A Review of the Current Legal Landscape

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DARCY L. MACPHERSON
When we assumed editorship of the Manitoba Law Journal (MLJ) in 2010, our mission was to produce informed, diverse and timely discussions that would focus on events involving or highly relevant to our own community.¹

There are close to a million people living in Manitoba. The statutes and court cases of this province can and do affect their lives, sometimes in fundamental ways. That alone should be sufficient to justify having a venue for informed and independent commentary. A society needs critical commentary on how it is being governed, why, and what the future might or should look like.

A law journal focused on our own province need not be provincial. It can bring to bear insights from many personal and philosophical perspectives; it can draw on learning from many disciplines, including history, philosophy, sociology, economics, and psychology. Developments in other jurisdictions can be a powerful source of understanding.

Conversely, the study of legal events in Manitoba can contribute to many disciplines and their study in many places throughout the world. Our society is diverse and complex. Immigrants from all over the world have come here. It remains the home for many Indigenous communities. It has anglophone and francophone communities, and the legal system offers services in both official languages. A large part of the population lives in a modern urban centre, but Manitoba continues to have dynamic

agricultural and forestry sectors. There is an opportunity right here to study how the legal system impacts all kinds of individuals and groups involved in a vast range of endeavours. Our latest issue, we hope, illustrates our commitment to producing lively commentary from a group of authors with diverse perspectives, areas of expertise, and environments.

Our program has developed and evolved so that it now includes a commitment to producing each year the following four issues:

1. A general issue that encompasses review of developments that take place primarily in courts and tribunals;
2. “Underneath the Golden Boy” (UTGB) devoted to legislation and public policy; a project inaugurated by Bryan Schwartz in 2000;
3. An issue on criminal law, led by our team of specialists in the area, Richard Jochelson, David Milward, David Ireland, and Amar Khoday; volume 40(3) of the MLJ will be the first.2
4. A special issue on a topic involving the past, present or future of the legal profession, including law school education, professional practice, and the judiciary.

Volumes 39(1) and (2) were on the Great Transition in Legal Education.3 A companion volume, to be included in Volume 41, will focus on the history of Indigenous individuals at our law school and their subsequent careers.4 Previous special issues under our editorship concerned the judiciary: the memoirs of Chief Justice Sam Freedman,5 and Five Decades of Chief Justices of Manitoba.6 Our methodology with special issues often involves the use of oral history.7 We have found that

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7 These include Volume 39(1) of the Manitoba Law Journal, The Great Transition in Legal Education, which included twelve interviews with teachers from the University of Manitoba Law School; Transition, supra note 3; Volume 36 of the MLJ, (2013) 36: Special Issue Man LJ (5 Decades of the Chief Justice of the MBCA), which includes interviews with former Chief Justices Freedman, Scott and Monnin; Volume 37 of the
spoken dialogues, while edited and peer reviewed, provide a powerful means by which personalities and perspectives can be expressed and preserved.

This is our latest general issue. We hope it illustrates our commitment to gathering and publishing commentary that is engaging, relevant to our community, independent in its thinking, and diverse in the expertise and experience of our authors. They include full-time academics, practising lawyers, and judges; some are based here in Manitoba, some live and work in other jurisdictions. The methodologies used includes close examination of legal doctrine from Canadian courts and comparing pronouncements of courts in other jurisdictions. They also include empirical studies of current practice and the exploration of the early history of the common law.

In the first contribution, made by the Honourable Thomas A. Cromwell (former Justice of the Supreme Court of Canada), the author discusses one of the most important legal issues that confronts us as a society: access to justice. Like all jurisdictions, Manitoba finds itself under great stress trying to give those who have potentially been wronged an opportunity to make their case for redress, whether that be through the courts or otherwise. As chair of the Action Committee on Access to Justice in Civil and Family Matters, no one has had a better view of one of the more intractable problems that confronts our profession, our people, and our law today than has Justice Cromwell. Justice Cromwell speaks eloquently of the need for transition from older style methods (with litigation thought of as the primary source of justice) to forms of dispensing justice that are more tailored to the stakes at issue in each individual dispute. The concept of dispensing justice actually goes beyond what is typically thought of as the “justice system”. Justice Cromwell points out that many government agencies make decisions that fundamentally

MLJ, (2014) 37: Special Issue Man LJ (A Judge of Valour: Chief Justice Freedman – in His Own Words), largely based on interviews with former Chief Justice Samuel Freedman; the “famous legislative crises” of Underneath the Golden Boy (2003) 30:1 Man LJ, which includes nine interviews with senior Manitoba politicians. A forthcoming issue of the Manitoba law Journal will included a series of interviews with Indigenous persons who studied law at the University of Manitoba and explores their professional careers after graduation.

affect the lives of citizens every single day, and that what he refers to as the “justice gap” extends to these decisions as well. He discusses ideas of serious reform in a number of areas. The ideas of the Action Committee may lead to change. Will Manitoba lead in one or more of these areas? What can we learn from other jurisdictions? Contributions like that of Justice Cromwell will hopefully lead us into meaningful discussions about what changes we need here in Manitoba to make access to justice an even greater reality.

In this issue, we also continue our tradition of publishing the DeLloyd J. Guth Lecture in Legal History. The paper reproduced in this volume represented the sixth such lecture. Professor Charles Donahue, Jr. of Harvard Law School was the guest. He confronts the views of English historians about the beginnings of what would now be considered the building blocks of the laws of contract and tort. One of the most remarkable aspects of his speech is that he made 14th century legal precedents interesting and relevant to his 21st century audience. The Manitoba legal system retains in large part its common law origins, and reminds us that these influences are not always recent, and yet remain both debatable and important.

The contribution of Judge Anne Krahn, Sarah Inness, Stacey Cawley, and Bettina Schaible is evidence of Manitoba at its best. Each of the four authors represents a different sector of the criminal justice system. A judge, a criminal defence lawyer, prosecutor, and a police officer came together to assess whether, on a systemic basis, there were issues on

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11 Though it is generally our custom to use the honorific of “The Honourable” when referring to sitting and former judges, since the judge herself chose not to it in the text, we have decided to be consistent with that choice in this preface.
12 This is not the first time that the Manitoba Law Journal has published a group of significant contributions by members of different sectors of the criminal-justice system on a single topic. Under the rubric of “The Anatomy of a Public Inquiry”, in Volume 37, we were pleased to publish a series of contributions around the involvement of lawyers, police officers and judges with respect to public inquiries of various sorts. The contributions of Bruce MacFarlane, Q.C. (a lawyer and a former Deputy Attorney General of the Province of Manitoba), The Honourable Justice Jeffrey J. Oliphant (the former Associate Chief Justice of the Court of Queen’s Bench of Manitoba), Richard
the way in which judicial authorizations for police searches were granted in this province. While, undoubtedly, each of the authors comes to this task with different (one might even say conflicting) perspectives on the appropriateness of the authorizations granted (or not granted), they were able to find significant consensus. It also includes comments from individual authors, presumably where consensus was not possible. This article was motivated by an earlier study made in Ontario. It emerges that there are significant differences in the percentage that this panel found to be problematic when compared with the Ontario study. The decision by Manitoba criminal-justice participants to engage in this study, and publish the results, may encourage other jurisdictions (both provinces within Canada, and perhaps, international jurisdictions as well) to assess their own judicial authorizations schemes to determine compliance with both statutory and constitutional mandates.

G. Greg Brodsky, a well-known defence lawyer, argues in his piece that the provisions of the Criminal Code designed to keep mentally-ill defendants out of prison (and, presumably, get these defendants the mental health programming that will assist them) may actually be worse for the defendant than prison itself. Perhaps the most evocative part of the article is to be found in several descriptions of the real-life differences between prison on the one hand, and involuntary psychiatric care, on the other.

In Thomas Harrison’s case comment on Green v. Law Society of Manitoba, the author argues that that leave to appeal to the Supreme Court of Canada should never have been granted. He then turns his

Wolson Q.C. (a senior member of the criminal defence bar) and John Burchill (now a lawyer, but at the time of the events described, Mr. Burchill was an active-duty police officer) were yet another example of public service by those involved in the criminal-just system. See MacFarlane et al, “Anatomy of a Public Inquiry” (2003) 37:1 Man L J 103.


RSC 1985, c C-46.


attention to the judgment itself. After discussing the reasoning of both the majority and the dissent, Mr. Harrison points to the importance of the case for its discussion of the impact of law societies on the professions that they are charged with regulating. Mr. Harrison points out that this case may have a significant impact on at least three upcoming Supreme Court of Canada cases (one concerning lawyer civility,\(^ {18} \) and two more concerning the ability of law societies to deny admission to potential graduates of a planned law school due to perceived lack of tolerance\(^ {19} \)).

In “Gender-Exclusive Charitable Trusts: Re The Esther G. Castanera Scholarship Fund and Recent South African Judgments on Discriminatory Bursary Trusts”,\(^ {20} \) author François Du Toit draws some remarkable parallels (and some differences too) on the acceptability of gender-exclusive gifts between Manitoba and South Africa.

Finally, Darcy MacPherson has written a book review\(^ {21} \) of the biography Canadian Maverick: The Life and Times of Ivan C. Rand,\(^ {22} \) written by William Kaplan. This review continues a relatively recent tradition, here at the MLJ, of promoting judicial biography. For example, Volume 34, Issues 1 and 2, in collaboration with the UNB Law Journal in Rand’s native New Brunswick, contain a series of articles discussing the overall impact of the same Justice Rand who was the subject of Kaplan’s work.\(^ {23} \)

In the end, therefore, this issue of the MLJ embodies the commitments defined when we developed a new vision for the Journal in 2010: of producing high-quality relevant material for a Manitoba


\(^{22} \) (Toronto, Buffalo and London: University of Toronto Press, 2009).

\(^{23} \) (2010) 34:1 Man LJ; (2010) 34:2 Man LJ.
audience. We hope that it incorporates the insights from many other jurisdictions; that it can potentially contribute to legal understanding and reform far beyond our own borders; that is multidisciplinary; that it looks at law not only doctrinally, but empirically and philosophically; that it draws on authors from the academy, the practising profession and the judiciary; that places the current legal scene in the context ranging from the distant past to future possibilities.
What a pleasure it is to speak at this fine Law Faculty about access to civil and family justice. There is no more pressing or important challenge facing the legal system. And law students, as the future of our profession, and law faculty, with their important responsibilities in research and teaching, should be key players in our present and future efforts to improve access to justice. My work over the past several years as chair of the Action Committee on Access to Justice in Civil and Family Matters has had the effect of persuading me that we all must work together and do a great deal more to help address the access to justice challenge.

I will pose four questions and suggest some answers in the hope that this will stimulate your own thinking about what we can do to close the access to justice gap in our country.
I. WHAT IS ACCESS TO JUSTICE?

There is of course a large body of literature about what access to justice is or should be. I will not wrestle with all the fine distinctions or try to resolve the competing points of view here. But I will suggest that we need to think carefully about what we mean by access and what we mean by justice.

I start with a working definition of access to justice, the one that we used in our work on the Action Committee’s 2013 report, A Roadmap for Change. We said that people would have appropriate access to justice if they had the knowledge, resources, skills, and services needed to meaningfully address their civil and family legal problems.

Note that this short statement contains some potentially transformative ideas in relation to both access and justice. It does not limit or even focus on the ability of people to get the help of lawyers, let alone go to court. Let us turn first to the notion of “access.”

While of course courts and lawyers are indispensable aspects of our justice system, access to them ought not to be viewed as the beginning and the end of the sorts of access that are required. People may not need those services to address their issues; and even if they do, they will likely also require knowledge and skills and other types of resources. We must keep the full panoply of legal needs in mind when we are thinking about what access means.

Similarly, we should not equate justice with the outcome of a court proceeding. We have a strong – and laudable – tradition of fair process and of course fair process is a significant part of what we think of as justice. But we should also pay attention to just and practical outcomes. The fairest procedures in the world do not satisfy the need for access to justice if they cannot produce just and practical outcomes for the people who need them. There must be a balance between fair process and practical and just outcomes – as it was often expressed in an earlier time, procedure is the handmaiden of justice: it exists to ensure that justice is done. Fair process is not the end, but rather a means to an end.

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1 Action Committee on Access to Justice in Civil and Family Matters, Access to Civil & Family Justice: A Roadmap for Change (Ottawa: October 2013) [Roadmap].
Many think that our justice system is somewhat out of balance in this regard. We are, they say, process heavy and outcomes light. As we wrote in the Roadmap for Change, our civil and family justice system is “too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.” Access to justice cannot mean unlimited resort to formal processes but rather to a just and practical outcome achieved through a process that is fair and effective, one that keeps the demands of fair process and just outcomes in a sensible balance.

With that working definition of access to justice in mind, I turn to my second question.

II. WHY SHOULD WE BE CONCERNED ABOUT ACCESS TO JUSTICE?

I will not dwell on this question. All of you, I am sure, are aware that we have a large and growing gap between what our system of justice ought to provide and the ability of people to have meaningful access to it. As we said in the Roadmap, “The civil and family justice system is too complex, too slow and too expensive. ... [T]he system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.”

Everyone in the legal profession has a professional responsibility to work to improve the administration of justice. But the access to justice challenge has special significance for law students. During your legal careers, you are going to see a transformation of how legal services are offered to the public. This transformation will bring with it challenges and opportunities. Some of those opportunities relate to making legal services available to a wider segment of the public in a way that makes economic sense both to them and to the lawyers providing the services. We need more innovative approaches that will facilitate delivery of legal services at lower cost but with appropriate return to the legal professionals providing

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2 Ibid at 1.
3 Ibid at iii, 1.
them. You are on the cusp of that transformation and will be part of it whether you want to be or not.

But there are more fundamental reasons to be concerned about the access to justice gap. That gap has serious adverse effects on the people who fall into it, adverse effects that go far beyond the legal system, but engage health, social services, and other agencies. Research is helping us understand the costs of not having reasonable access to justice. In other words, if you think that providing access to justice is expensive, look at the costs of not providing it.

Beyond the toll of human suffering and public expense resulting from inadequate access to justice, there are broader societal implications. Too often we forget that an effective civil justice system underpins important aspects of our civil society such as the protection of human rights and security of economic activity. An effective civil justice system ought to be considered an essential public service. If there is no meaningful access to or vindication of our civil and economic rights, we have to ask if those rights exist in any meaningful sense.

To sum up, the gap in access to justice causes human suffering, drives up social costs, and even puts into the question the viability of our civil society. If that does not justify deep concern about this problem, it is hard to know what would.

This brief discussion of what access to justice is and why we should care about it brings me to my third question.

III. WHAT HAVE WE DONE TO CLOSE THE ACCESS TO JUSTICE GAP?

There is a lot of good news on this front – a lot more than I can cover here. But let me tell you something about the work of the Action Committee on Access to Justice in Civil and Family Matters which I have been chairing at the invitation of Chief Justice McLachlin since 2009.

The Committee was convened by the Chief Justice and it is the broadest coalition of organizations and individuals concerned about access to justice ever assembled in Canada. It consists of representatives of the judiciary, the bar, senior justice officials in federal and provincial governments, pro bono organizations, legal aid organizations, public legal information organizations, several law related NGO’s, and members of the public.
We quickly identified four priority areas – access to legal services, court process simplification, family law and prevention, and triage and referral – and struck working groups to study each area and advance proposals for change. Those reports led to our October 2013 report, the Roadmap for Change.

In that Report, we focused on what we called the “implementation gap” – the wide gap between the many and repeated calls for reform and achieving meaningful change. We identified factors that contribute to that gap and proposed some strategies to help to address them.

We thought that the leaders of the system were not yet persuaded that significant change was required. We addressed this by setting out in some detail the case for change. And this has helped to bring about greater awareness of and commitment to the issue at the leadership of the profession, the judiciary, and the ministries of justice.

We thought that responsibility for reform was too diffuse, with some of the key actors including the government, the judiciary, and the bar, operating in silos without sufficient cooperation and coordination. We proposed that each jurisdiction should have a multi-sectoral access to justice group that would promote cooperation and coordination across the sectors and provide effective leadership of reform efforts. These sorts of leadership groups have been set up in nearly every Canadian jurisdiction. We are starting to see real commitment by justice system actors to more collaborative approaches to change.

We thought that a lot more than tinkering was needed and that a new culture of reform was required. We tried to spell out what that change would look like by setting out six principles for reform. The first one was “put the public first.” These principles have got considerable traction, including this first one. Justice system professionals now nearly unanimously recognize the importance of involving the public in justice system reform efforts. The provincial/territorial access to justice committees have taken this to heart: most include representatives of the non-legal public.

We thought that we should conceive of our civil justice system as a continuum in which formal adjudication by a court was only a part. This idea is widely accepted at the conceptual level, but we have miles to go before the concept is transformed into concrete action.

We thought that there was an urgent need for more action-oriented research. We are now seeing a flourishing of academic interest. There are
access to justice centres at the University of Victoria and the University of Saskatchewan as well as the long-established Canadian Forum on Civil Justice at Osgoode Hall Law School, York University. A major research initiative on the Costs of Justice is just winding down while another, multi-pronged access to justice research project is gearing up. There are now several doctoral students in our law faculties doing research on access to justice.

Overall, there is much positive momentum to report. But significant change on the ground is hard to achieve and slow to come. Making the sort of change that is needed will required a sustained effort over a long period of time.

IV. WHAT CAN YOU DO?

There are many things that law students and the legal academy can do to further the cause of improved access to justice. Universities are built on the values of research, teaching, and service. Each of these values supports enhanced engagement with access to justice.

First, law students are not only the lawyers and judges of the future; they are also citizens, and often citizens in leadership roles in society. Your personal engagement with the issue of access to justice should lead you to be a better-informed citizen and leader. Lawyers ought to be knowledgeable about the problem and possible routes to improvement. Lawyers ought to be vocal advocates and strong leaders of change.

Second, law students and law professors are making and ought to continue to make important contributions to much-needed research about our civil and family justice system. Too often in the past our reform efforts were based on “anec-data” – anecdotal reports of what was going wrong in the system and what would fix it. Too often, the result was little real improvement and unintended adverse consequences. There is an enormous need for action-oriented, empirical research about the justice system and for quantitative and qualitative evaluation of our reform efforts. There is an enormous need for innovation in delivery of legal services. University-based research is already making important contributions in these areas, but much more could be done.

Third, in the area of service, law students are stepping up to the plate all across the country. They are participating in legal clinics, pro bono work, and social development initiatives in large numbers. But of course,
there is much more to be done. Clinical education, in particular, has the potential to provide much-needed professional training to law students as well as to help meet the mountain of unmet legal need in the community. Clinical programs are flourishing, but more opportunities for clinic placements are needed. Indeed, I think that a clinical placement should be part of every student’s legal education.

In all of these ways, law students and legal academics can make important contributions to improving access to justice. That issue, after all, is the most important issue facing our legal system, and its biggest challenge.
The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings?*

CHARLES DONAHUE, JR.**

DELLLOYD J. GUTH VISITING LECTURE IN LEGAL HISTORY:
SEPTEMBER 17, 2015

I. INTRODUCTION – THE ACTION ON THE CASE

The title of my talk has a question mark at the end of it, but I hope that when you read it you thought that I must be mad. After all, surely the modern laws of both tort and contract go back further than that. How about the Code of Hammurabi? Or Cain’s slaying of his brother Abel (Genesis 4)? Or Abraham’s purchase of the field in Machpelah from Ephron the Hittite (Genesis 23)? Even if we confine ourselves to England after the departure of the Romans, I can hear arguments that both tort and contract are to be found in Aethelbert’s Code in the early seventh century.¹ On the other side, I can hear someone say: “You are quite wrong, Donahue. The modern law of tort and contract

* This is a revised version of a talk given as the sixth annual DeLloyd J. Guth Visiting Lecture in Legal History on 17 September 2015. I would like to thank the Faculty of Law for inviting me, both faculty and students for the stimulating discussion afterwards, and everyone for a very pleasant couple of days.

** Paul A. Freund Professor of Law, Harvard Law School.

¹ See L Oliver, The Beginnings of English Law (Toronto: University of Toronto Press, 2002) at 60–81, for the text and translation, from which the relevance to ‘tort’ is obvious enough. For contract, see R L Henry, “Forms of Anglo-Saxon Contracts and Their Sanctions” (1917) 15:7 Michigan L R, (1917) 552–65, 639–56.
in the Anglo-American legal system goes back no further than the
nineteenth century in the case of tort, perhaps to the mid-eighteenth
century in the case of contract.’

I have to be careful. I have been working for some time on a large
book that will appear in the Oxford History of the Laws of England, and
my assignment is the years 1307 to 1399. Any historian who works on a
particular period for a long time has a tendency to see his period as
containing the origins of everything, both good and bad.

So what I want to do is tell you what happened in the fourteenth
century that is relevant to the modern law of tort and contract, and let you
make up your own minds.

Our knowledge of what happened in the fourteenth century has been
revolutionized in my lifetime. In 1949—I was eight years old at the time—
C. H. S. Fifoot, published a book called History and Sources of the Common
Law: Tort and Contract.\(^2\) It was largely a collection of reported cases, but it
was accompanied by a commentary that made it clear that Fifoot thought
that the origins of the modern law of tort and contract were to be found
in the rise of the action of trespass on the case. That action first appeared
in the central royal court shortly, as Fifoot saw it, before the last quarter of
the fourteenth century. My argument is going to be that Fifoot, at least in
some sense, was right about the general proposition: the origins of the
modern Anglo-American law of tort and contract are to be found in the
rise of the action of trespass on the case. However, he got many of the
details wrong, and much of the last sixty-five years has been spent trying to
get them right.

Fifoot’s first, and perhaps most fundamental mistake, was to focus on
what seems to be the first mention in the Year Book reports of the action
of trespass on the case, The Miller’s Case of 1367.\(^3\) We get the impression
that he thought that this was close to, or perhaps it was, the origin of that
action. In The Miller’s Case, the plaintiff attempted to bring an action on
the case against a miller who took some of the plaintiff’s grain as a fee for
grinding it. The plaintiff claimed that he was entitled to have his grain
ground for free. The court did not allow the action. One of the justices

\(^2\) (London: Steven & Sons, 1949).

\(^3\) For the text of the Year Book case, see Appendix, no 1. So far as I am aware, the
record in the case has not been found.
thought that a property-type of action was the appropriate one, another that the regular action of trespass was available.

The following year, 1368, sees the first Year Book report of an action on the case that is allowed to proceed. The plaintiff brought an action against an innkeeper. Money had been stolen from the plaintiff’s room in the inn while the plaintiff was away from the room. The innkeeper claimed that he had nothing to do with the loss of the money, but the court ruled for the plaintiff on a demur.

The proximity of these two cases allows us to imagine a process whereby lawyers were trying a new action, an action on the case, like trespass, but not quite the same thing. At first the court does not allow it, but finally it does, and a development that was to go on for centuries was started around this action on the case.

We might imagine such a process, but we would be wrong if we did so. Indeed, we should have known just on the basis of the report of The Miller’s Case that this was not the first time that someone had attempted to bring an action on the case, or even close to the first time. If it had been, we would expect that the defendant would have argued, and the justices probably would have agreed, that no such action of trespass on the case existed. But that is not the argument that is made in the case. Both of the arguments in favour of denying the action in this case assume that there is such an action; the question is whether it is appropriate in this situation. The answer that the court gives is ‘no’.

Research on the action on the case has proceeded in a number of directions. The first, and perhaps the most fundamental, was to ask what distinguished the action on the case from simple trespass. The answer to that question is complicated, and to some extent still controversial, but let me try to summarize what I think is the current understanding.

II. THE ORIGINS OF TRESPASS

To begin with the action of trespass: are the origins of this action to be found in Anglo-Saxon times or in the mid-thirteenth century or in the eighteenth century? It depends on what you are looking for. If it is the notion of a legal wrong or the notion of the king’s peace then look to

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4 Appendix no 2.
Anglo-Saxon times. If it is the notion that trespass is a direct forcible injury to the person, or property in the possession, of the plaintiff (like assault or trespass to land), then look to the eighteenth century.\(^5\) If it is a writ called ‘trespass’ that will be heard in the central royal courts, then look to the mid-thirteenth century.

The origins of the trespass writ in the central royal courts are obscure. At the beginning of the thirteenth century we find in the plea rolls actions like the following: ‘Walter de Grancurt brings a plea against Hugh de Polestead about why (ostensurus quare) he made his granddaughter a nun’.\(^6\)

What writ is this? It does not identify itself, and there was no writ in regular use in this period that contained the ostensurus quare formula. Obviously, however, someone had thought of the possibility of calling someone into the central royal courts to explain why he had done something.

The earliest examples of trespass writs in the registers of writs come from late in the reign of Henry III, between 1261 and 1272.\(^7\) The classic form of the writ is as follows:\(^8\)

The king to the sheriff, greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore (ostensurus quare) with force and arms (vi et armis) he made an assault upon the same A. at N. and beat wounded and ill-treated him so that his life was despaired of, and other outrages there did to him, to the grave damage of the same A. and against our peace (contra pacem).

Other examples make clear that this writ was also available for trespass to land and trespass for taking or damaging personal property.

Part of the problem with finding the origins of the writ of trespass is the word.\(^9\) The Latin *transgressio* becomes ‘transgression’ in English; the

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5. It is frequently said that this definition was not settled until *Scott v Shepherd*, 2 Wm Bl 892 (CP 1773), 96 Eng Rep 525 (KB 1773).
8. *Registrum brevium* (London 1687) fol 93 (the text dates from the 14th century).
9. For what follows, see C Donahue, ‘The Emergence of the Crime-Tort Distinction in
French *trespas*, which is derived from the Latin *transgressio*, becomes *tresspass* in English. These are generic words for ‘wrong’ or ‘sin’. None of them is confined to direct forcible injuries done with force and arms and against the peace of the king. ‘Forgive us our trespasses’ in the Lord’s Prayer, a translation that has been standard in English since the sixteenth century and which probably goes back to the fourteenth, is clearly referring to something broader than direct forcible injuries done with force and arms and against the peace of the king.

If we look to the mid-thirteenth century we see a bewildering variety of trespasses in the generic sense, but some more specific uses are reasonably clear:

A trespass may be felonious or non-felonious. (Non-felonious criminal trespasses will eventually be called misdemeanors.)

A trespass may be a plea of the crown or not. (If it is, it will usually be said to be with force and arms and against the peace of the king.)

A trespass may be prosecuted by public proceedings (indictment) or by private proceedings (appeal).

The *ostensurus quare* writ that emerged in the central royal courts in the mid-thirteenth century picked up characteristics of all three dichotomies. It was a private proceeding for a non-felonious plea of the crown. How this happened is anything but clear, but procedure may show the way, for we hear of yet a fourth distinction: A trespass in the generic sense may be either an appeal of felony or an appeal of trespass.

Appeals of felony were already on the decline, being forced out by the increasing use of indictment. Appeals of trespass proliferated. If they were for pleas of the crown, they had to be heard in the central royal courts because clause 24 of Magna Carta says that the sheriff cannot hear pleas of the crown. If they were not pleas of the crown, they might be heard by the sheriff in the county court, and we suspect that they normally were, unless they were heard in some even more local court.

This should make it clear that a great deal of legal history on this topic is wrong. What looks like a development of ideas in the mid-fourteenth century, when the requirement of force and arms was dropped in the action on the case, is in fact a jurisdictional shift, and the origins of the

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idea of wrongs by nonfeasance, negligence, or even just caused indirectly, must be found, if at all, in the local courts.\textsuperscript{10}

In the last years of Henry III contra pacem writs and bills usually alleging \textit{vi et armis} and, if successful, leading to damages begin to appear in large numbers in the central royal courts. As we just suggested, the decline of the appeal of felony may have something to do with it. The disturbances of the Barons’ Wars may also have something to do with it. The Statute of Gloucester of 1278 limits trespass in the central royal courts to matters where the damages were more than 40 shillings.\textsuperscript{11} There are also some trespass writs that get central royal court jurisdiction other ways. There are special writs for failing to repair of dikes (the rivers are the king’s highway) and for breach of market franchises (the king gave the franchise).\textsuperscript{12} In all of these writs there is a criminal element: the general issue is ‘not guilty’, the defendant was arrested (a process known as \textit{capias}): (1) to reply to the writ, (2) to hear the judgment, and (3) to pay the judgment. If he defaulted, he could be outlawed.

\textbf{III. TRESPASS IN THE FIRST HALF OF THE FOURTEENTH CENTURY}

Trespass in the first half of the fourteenth century presents a number of puzzles. Let us take a look at a couple of cases:

\textit{Ferrers v. Dodford} is a 1307 case on the plea rolls of King’s Bench.\textsuperscript{13} It tells us that John vicar of Dodford was attached to answer the following bill: ‘whereas lately the king had by his letters ordered his beloved and

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\textsuperscript{11} Statute of Gloucester, 6 Edw I, c 8 (1278).

\textsuperscript{12} See Palmer, \textit{supra}, note 10, at 283-93, 395-407.

\textsuperscript{13} Appendix no 3.
faithful John de Ferrers to come quickly to him with horses and arms on his Scottish expedition to assist him with his aforesaid expedition and the same John, getting ready to come to the aforesaid parts, had bought at Dodford a certain horse for a certain great sum of money from the aforesaid John, vicar of the church of Dodford, trusting in the same John’s words, for he put that horse up for sale under guarantee, affirming by corporal oath taken at Dodford before trustworthy men that the same horse was healthy in all its limbs and unmaimed’. The horse collapsed in the next town, and by the time that Ferrers got to Scotland the war was over.

In 1348, in the case of the Humber Ferryman: ‘John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B. upon Humber had undertaken to carry his mare in his boat across the River Humber safe and sound, and yet the said [Nicholas] overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage’.14

These cases illustrate the royal interest. It is obvious in the case of Ferrers v. Dodford. In the case of the Humber Ferryman, it lies in the fact that River Humber is part of the king’s highway. These cases also illustrate the fact that a contract action will eventually emerge out of the trespass action. Today, Ferrers v. Dodford, would probably be brought as a contract action, and the Humber Ferryman certainly could be.

Things are not always what they seem to be:

In Brainton v. Pinn in 1290, plea roll entries record the bill: ‘Why they burnt the houses of Walter at Howley and his goods and chattels to the value of 200 pounds’.15

Then they give us the plaintiff’s count: ‘By their foolishness and lack of care and through a badly guarded candle they burned the aforesaid houses, along with all his goods’.

Then they give us the defendants’ plea: ‘If any damage happened to the houses and other goods of that Walter through fire or other means, that was by accident and not by any lack of care or wickedness on their part’.

14 Appendix no 4.
15 Appendix no 5.
Finally, quite unusually, they give us a detailed jury verdict: The steward of the plaintiff did not let the defendants put out the candle before they went to bed, and when they woke up the bed was in flames.

What looks at first like a case of arson turns out to be a case about who was responsible for a candle that fell into hay with disastrous consequences.

In Rattlesdene v. Grunston in 1317, the plaintiff’s count alleges that: ‘The defendants drew out a great part of that wine from the aforesaid tun . . . with force and arms, to wit, swords and bows and arrows etc., and filled up that tun with salt water in place of that wine thus drawn out, whereby the whole of the aforesaid wine perished etc.’

Here a case of commercial fraud is being made to look like trespass *vi et armis*.

Both Brainton and Rattlesdene illustrate how allegations of force and arms can be a mask for quite different problems. But few cases give us this much detail. Most give us the common form of the writ and count followed by a plea of not guilty, with the jury coming up with an equally blank verdict of ‘guilty’ or ‘not guilty’, with an assessment of damages if the plaintiff is successful. Occasionally, as in Brainton and Rattlesdene, we can see what is really going on.

Here are some more such cases:

In 1348, in an action for battery and false imprisonment, defendants, who say they are plaintiff’s kin, admit that they shut him up and beat him: he was having a fit, and this was the treatment.

Beginning in the 1340s there are a large number of cases in which various people are accused of having murdered horses. That seems odd, until we look at the names of the defendants: They are Ferrer in French, or Faber in Latin, or Smith in English. The words all mean the same thing. These are blacksmiths who were shoeing horses and botched the job.

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16 Appendix no 6.
17 Appendix no 7.
IV. THE RISE OF THE ACTION ON THE CASE – TORT

By mid-century it seems that the jurisdictional distinction between actions done with force and arms and against the peace and those that are not is breaking down.

In the *Farrier’s Case* in 1372: ‘Trespass was brought against a farrier for that he had lamed his horse, and the writ contained the words ‘Why he fixed a nail in the foot of his horse in a certain place by which he lost the profit of his horse for a long time, etc.’

Counsel for the defendant argues: ‘He has brought a writ of trespass against us and it does not contain the words *vi et armis*: judgment of the writ’.

The Chief Justice replies: ‘He has brought his writ on his case (*en son case*) so his writ is good’.

Counsel for the defendant persists: ‘The writ should say *vi et armis* or “he wickedly fixed it,” and it has neither the one nor the other: judgment. Also he has not supposed in his count that he bailed us the horse to shoe; so otherwise it should be understood that if any trespass was done, it should be against the peace; wherefore judgment’.

‘And then’, the reporter tells us, ‘the writ was adjudged good, and issue was joined that he shod the horse, without this, that he lamed it, etc.’

Not all the features of the later action are here (which is probably why this case is reported), but it soon becomes clear that in the action on the case there will be no *capias* or outlawry. The action is an action on the special case with a ‘whereas’ (*cum*) clause, the essential purpose of which is to lay out some duty. We still have a way to go but the course is set.

In *Berden v. Burton* in 1382, a case that deals with the line between trespass and case, every possible standard of liability is mentioned: absolute liability, negligence, direct vs. indirect injury, intentional vs. accidental injury, proximate vs. remote cause. Someplace in here lie the lines between trespass and case and between case and no liability. No conclusion is reached in *Berden*, but these fourteenth-century justices and

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19 Appendix no 8.
20 Palmer’s explanation (*supra*, note 10, at 226) that this case involves a change in the form of writs for such cases is plausible.
21 Appendix no 9.
counsel clearly saw what the possibilities were. No conclusion was reached until the nineteenth century; some would argue that we have not reached one yet.

At least by 1390, a final step in the process so far as tort was concerned seems to have been reached. In an anonymous case, the plaintiff attempted to bring an action of trespass where he had bailed his horse to a man and his wife, and the horse died in their custody. Counsel for the defendant argues that only the action on the case is appropriate in such circumstances. Counsel for the plaintiff seems to have agreed; he asked for, and got, permission to settle the case.

What is going on here, or to put the question another way, why did this happen?

Once it became apparent, that we are not dealing with a sudden discovery in the middle of the fourteenth century that one could commit a wrong by some means other than punching someone in the nose, it seemed that procedural reasons were likely to provide a clue as to why the development occurred. One suggestion was that the forty-shilling minimum for damages in trespass became less and less significant as forty shillings came to be less and less valuable. The problem with this explanation is that it fits uneasily with the date of these developments. The mid-fourteenth century was, if anything, a deflationary time, not an inflationary one.

Certainly a contributing factor, if not the total cause, is that the county court declined over the course of the fourteenth century. Various reasons have been suggested for what seems to be a fact. It is possible that the county court became more and more political, and, hence, plaintiffs became dissatisfied with the quality of the justice that they were getting there. There may be something to this as an explanation for the rise of the action on the case. I rather doubt that there is much to it. The vast majority of trespass cases were decided by local juries, and the sheriff, who was the chief officer of the county court, was also responsible for empanelling juries. This was a political problem, but it was not a problem that one could avoid by bringing one’s case in the central royal courts.

The late S. F. C. Milsom was inclined to think that the emergence of the action on the case had something to do with the process of capias.23

22 Appendix no 10.
23 Milsom, Historical Foundations, supra, note 10, at 293–5.
Capias, as we have seen, was available in the common-law action of trespass *vi et armis*, probably from the beginning. It is generally thought to have been more effective than the other methods of getting a defendant before the court. There is nothing quite like putting a defendant in gaol until he posts bond that he will appear in court to ensure he is aware that he is being sued. That *capias* was regarded as a particularly effective process is shown by the fact that it was extended by the statute of Westminster II (1285) to account and by statute in 1352 to debt, detinue and replevin, but it was not available in the action on the case until 1504.24

Milsom’s argument is that *capias* was thought inappropriate for the less serious wrongs that were involved in the action on the case, and that the distinction between the two actions developed in order to make clear what was not appropriate for *capias*. There is almost certainly something to this argument, but its power depends on the assumption that a large number of cases that were later to be called ‘case’ were already being brought under the rubric of trespass in the first half of the fourteenth century. We have already seen that some were. The question is whether there were enough of them to cause the differentiation of the writs for procedural reasons. Otherwise, the decision not to allow *capias* in the action on the case was *post hoc*, taken after the action had been developed.

More recently Robert Palmer has constructed an elaborate argument that the Black Death explains the rise of the action on the case.25 As is well known, in the years 1348–49 between a third and a half of the English population died of the plague. As Palmer sees it the Black Death caused a crisis in traditional services. The blacksmith died in the plague, and someone who thought he knew what he was doing tried to do his job. The result was a number of dead or lamed horses. The decision, in Palmer’s view, was consciously taken by the chancery (I would incline to see, as well, the oversight of the king’s council here) to expand trespass to include professional incompetence. The evidence from the writ files, which Palmer examined in great detail, certainly suggests that different types of activities were brought in under the rubric of trespass on the case at different times. Palmer also suggests that there was a conceptual breakthrough in that

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24 Statute of Westminster II (1285), c 11; 25 Edw. III, stat 5 (1352), c 17; Statute, 19 Hen VII (1504), c 9.
there was a breach in the traditional notion that not doing is no trespass.\textsuperscript{26} Not everyone accepts all of this argument, but some of it is probably right. The absence of Year Book reports for the critical years (the years from 1357 to 1363 are all missing) is annoying. There were clearly many actions on the case in those years. Some of them were almost certainly discussed by court and counsel, but the first discussion that we have is in 1367, and by that time the action was already there.

\textbf{V. THE RISE OF THE ACTION ON THE CASE – CONTRACT}

Now let us turn to the contract side. In order to do this, we have to back up a little. Before there was a trespass action in the central royal courts there were four personal actions, debt, detinue, covenant and account, that have something to do with what we call contract, but which for procedural reasons (our term not theirs) were not to develop into the modern contract action. Two are particularly relevant here:\textsuperscript{27}

Debt is an action for a specific sum of money owed by the defendant to the plaintiff. The loan transaction is typical of one that gives rise to debt, also the sale transaction where the seller has delivered the goods but the buyer has not paid. The underlying idea seems to be that there is an imbalance in accounts between the plaintiff and the defendant. If the plaintiff does not have sealed evidence of the contract the defendant may wage his law — swear that he does not owe and get 11 oath-helpers to support him. The oath-helpers were available for hire in the central royal courts. This is contract in medieval parlance. We would call it a partially performed contract.

Covenant is an action for the enforcement of promises. The successful plaintiff gets the performance or its value, but not incidental damages. Proof is by jury. Early in the fourteenth century, perhaps earlier, the central royal courts, probably for procedural reasons, decided that one

\textsuperscript{26} The breach, however, was only partial. As we shall see, in most cases the defendant had to do something, just not enough to prevent the harm.

must have a sealed instrument to support the covenant. This is covenant in medieval parlance, but we would call it contract.

Our outline of the development of the action on the case from the action of trespass in the central royal courts emphasized jurisdictional and procedural developments, not conceptual ones, because our notion was that the concepts were already there. The question was which court would handle it and how. I do not want to retreat from that account. There is no question that people in the thirteenth century well knew that one could commit a wrong by ways other than punching someone in the nose and that one could breach a contract even if the promise was not under seal. But there was no law on these topics, at least not in the central royal courts, no law because those courts were nominally limited to injuries against the king’s peace normally with force and arms and to covenants under seal and partially executed contracts. No law, too, because of the general issue: ‘not guilty’, ‘he did not make the deed’, ‘he did not breach the covenant’, ‘he owes nothing’, put the case in the hands of oath-helpers or a jury which normally returned an inscrutable verdict. Complicated issues of responsibility, such as that raised by Brainton v. Pinn, were left to the jury. The rise of the action on the case did create substantive law, in the sense that it became possible by the use of the ‘whereas’ (cum) clause in the writ to allege the violation of a more specific duty than the general one not to commit breaches of the peace or to perform what one had agreed to perform under seal. The question then became where would these duties come from, and the earliest cases suggest that the first source of such duties was customary rules about how certain types of providers of services ought to behave: the miller, the innkeeper, the smith, the horse doctor. But how much further would this go? No one knew in the late fourteenth century, and a process of groping began. There are two stories to tell here, one about how the action on the case came to take over for covenant and the other about how it came to take over for debt. The first is eminently a problem of how far will we go; the second much less so. We can say a few words about the first; the second is a story of the sixteenth century.

Not doing is no trespass is a brooding omnipresence. It is breached in a few cases, but relatively few. A good example of where it is breached is the Innkeeper’s Case of 1368. Here the allegation of the custom of the

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28 Supra, note 4; Appendix no 2.
realm that innkeepers were absolutely liable for the loss of their guests’ goods survives a demur. Normally, however, ‘not doing is no trespass’ is the end of the story. As the Innkeeper’s Case shows, it is a problem in tort as well as in contract, but I cannot tell you the tort story in this paper. It is a story, once more, largely of the early modern period.

A number of the cases in which trespass on the case broke through had a contractual element in them:

In The Humber Ferry Case, the bill said: ‘that Nicholas atte Tounesende on a certain day and year at B. upon Humber had undertaken [there are various Latin words for this; the one that was ultimately to prevail was assumpsit] to carry his mare in his boat across the river Humber safe and sound, and yet the said Nicholas overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage’.

Defendant’s counsel argues: ‘We pray judgment of the bill, which suppose no wrong in us, but rather proves that he should have an action by way of covenant rather than by way of trespass’.

But the court says: ‘It seems that you did him a trespass when you overloaded your boat so that his mare perished. So answer.’

In Waldon v. Mareschal, in 1370: ‘William Waldon brought a writ against one [John] Marshall [the word means horse doctor], and alleged by his writ that the aforesaid John took in his hand the horse of the aforesaid William to cure it of its infirmity, and afterwards the aforesaid John so negligently did his cure that the horse died’.

And defendant’s counsel answers: ‘Because he has counted that he had undertaken to cure his horse of his malady, for which he should have had an action of covenant, judgment of the writ’.

And plaintiff’s counsel replies: ‘That we cannot have without a deed [that is, a sealed instrument]; and this action is brought because you did your cure so negligently that the horse died, wherefore it is right to maintain this special writ according to the case; for we can have no other writ’.

Which provokes the response: ‘You could have a writ of trespass, that he killed your horse generally’.

29 Supra, note 11; Appendix no. 4.
30 Appendix no 11.
To which plaintiff’s counsel replies: ‘A general writ we could not have had, because the horse was not killed by force, but died by default of his cure....’

‘And then’, the reporter tells us, ‘the writ was adjudged good....’

The Surgeon’s Case of 1375 was in an action against a surgeon for having botched the job of repairing the plaintiff’s hand so that the hand was permanently damaged. The defendant attempted to wage his law, an appropriate response in a writ of debt and perhaps in other contractual actions as well. Though the court seemed willing to accept his wager, the defendant, curiously, dropped his wager, but ultimately won because the writ did not allege where the undertaking took place.

In all of these cases, except in the case of the innkeeper, the defendant did something and did a bad job. Or at least one could argue that he did, because in Waldon v. Mareschall it is not clear that he did anything at all. But not doing is no trespass remains a principle, except in the case of innkeepers — why? Gradually, at least so far as the Year Book discussion is concerned, the requirement was dropped. This is a 15th century story. The cases are fascinating, but I am not going to be able to do justice to them here.

The story comes to final close in 1499. In Gray’s Inn, a reporter tells us: ‘Note, if a man makes a covenant to build me a house by a certain date, and does nothing about it, I shall have an action on my case for this nonfeasance as well as if he had built badly, because I am damaged by it: per FYNEUX [the Chief Justice of King’s Bench]. And [FYNEUX] said that it had been so adjudged, and he held it to be law. It is likewise if a man bargains with me that I shall have his land unto me and my heirs for £20, and that he will make an estate to me if I pay him the £20, and he does not make an estate to me according to the covenant, I shall have an action on my case and need not sue out a subpoena.’

Appendix no 12.

The relevant cases may be found in J H Baker & S F C Milsom, Sources of English Legal History: Private Law to 1750, Sir John Baker, 2d ed (Oxford: University Press, 2009) at 421-42.

Appendix no 13.

There are some things that do not change; perhaps in Canada the carpenter always comes when he says he will, but in the U.S. he does not.
The last remark is telling. *Subpoena* is the process used by the court in the Chancery, and Fyneux is clearly concerned about competition.

That is the end of the objection. In *Orwell v. Mortoft* (1505) Common Pleas under Frowyk, CJCP, accepted what King’s Bench had done: ‘If I covenant, in return for money, to make a house by a certain day, and do not do it, an action on the case lies for the nonfeasance’. But prepayment, as seems to be posited in this dictum, raises the issue of what will support the covenant if there is no prepayment, and will result in a huge snarl that has become known as the doctrine of consideration.

**VI. BY WAY OF A CONCLUSION**

Let me return to the claim with which we began, that the modern Anglo-American law of both contract and tort had their beginnings in the action on the case of the fourteenth century, and to those who would argue either that the beginnings of both laws are much older or that the beginnings of both are much later. Certainly the claim cannot be that the notion of an actionable legal wrong began in the fourteenth century, nor can it be that the fourteenth century sees the beginning of the notion that breach of certain kinds of agreements is actionable. For those ideas we should look to the Anglo-Saxons, the Romans, or even the Bible. Similarly, if we are looking for a substantive doctrinal construct that we can trace directly to what we have today, the fourteenth century is far too early. Substantive doctrine in the fourteenth century, to the extent that it existed, was intimately connected with the forms of action, and there was no single form of action in the fourteenth century that we can label ‘tort’ and no single form of action that we can label ‘contract’. In such a world, a robust theory of either tort or contract cannot develop.

What did happen in the fourteenth century was the development of a form of action that had the potential of being transformed into something that encompassed, on the one hand, all that we call contract, and, on the other, all that we call tort. It happened sooner in the case of contract than it did in the case of tort. We have already seen that by the end of the fifteenth century, the action on the case for assumpsit was allowed to substitute for the action of covenant, and by the end of the sixteenth

35 Appendix no 14.
century it was allowed to substitute for debt.\textsuperscript{36} There was thus a single action within which a unified theory of contract could develop, and more specific contractual doctrines could be hung around it.

And yet contract law as we know it today – offer and acceptance, covenants and conditions, general and special damages – is largely the creation of the late eighteenth and nineteenth centuries.\textsuperscript{37} Lord Mansfield had a great deal to do with it, though not all his proposals were accepted. Continental law also has a great deal to do with it. Comparativists, at least some of them, are fond of saying that the civil law of contracts and the common law are fundamentally the same.\textsuperscript{38} Little, if any, of this can be found in the fourteenth century or even in the sixteenth. What the fourteenth century gave us was an action that had the dynamic potential of developing into an action that allowed one to think about contract under one heading.

That many, perhaps most, people did not do so may be the result of the fact that the medieval idea of ‘contract’, an agreement that had been performed on one side but not on the other, persisted. Assumpsit broke into general and special assumpsit, the former of which, with accompanying ‘common counts’, reflected the medieval idea of contract, and only the latter focused on the formation of the agreement rather than on its partial performance. Far more cases seem to have been brought in general assumpsit than in special.

Tort is a somewhat different story. The distinction between trespass and case remained until the abolition of the forms of action beginning in the 1830s. Whatever sense can be made out of that distinction – and much effort was spent trying to make sense out of it – it clearly did not, in the minds of most lawyers, correspond to the distinction between intentional and negligent wrongs. Further, there was a variety of other actions, spin-offs of the action on the case, that acquired a life of their own, libel and slander, nuisance, trover, and, somewhat later, various

\textsuperscript{36} Slade v Morley, 4 Co Rep 92 (Exch Ch 1602); see Baker & Milsom, \textit{supra}, note 32, at 460–79.

\textsuperscript{37} For what follows about contract, see Baker, \textit{supra}, note 27, at 347–61; about tort, \textit{id.}, at 401–21.

\textsuperscript{38} It is, for example, the premise of J Gordley, \textit{The Philosophical Origins of Modern Contract Doctrine} (Oxford: Clarendon Press, 1991).
actions for tortious interference with economic relations. All of these prevented the development of a unified theory of the law of wrongs.

And yet most of the elements that the nineteenth century put together in its unified theory of torts were there from a quite early period. We hear of a distinction between intentional actions and accidents. The word ‘negligence’ is in quite frequent use. The idea of strict liability also seems to be there. The concept of foreseeability is certainly there by the end of the 17th century, perhaps earlier. We must be careful. Words do not always mean the same thing in the past as they do today. We are likely to get into a lot of trouble if we think that ‘negligence’ always means the breach of some objective standard of care. Nonetheless we must ask the question why a world that had quite sophisticated moral theories and was certainly capable of speculative reasoning never put together the elements that seem to us to be fundamental to a coherent law of wrongs in a package that looks anything like what the nineteenth century created and which we still, to some extent, have today.

If in contract the older notion of contract lasted for a long time, in tort the older notion that not doing is no trespass also lasted for a long time. The converse of this proposition is that if you did it, you are going to have to show a very good reason why you did it, or persuade the jury not to hold you liable. Relatively few direct inflictions of harm will escape going to the jury; relatively few intentional inflictions of harm will escape going to the jury, except some kinds of economic competition, and that only in a case where a royally protected activity was not involved.

For a long period, then, the system relied on ordinary people’s instincts, as reflected in the jury, to solve the problem of most civil wrongs. In a world in which technology did not change very rapidly and the potential of technology for doing harm was not so great as it is today, that system had its advantages, particularly when there were few judges. That may be an explanation of why the potential of the action on the case took so long to realize in the area of tort. The potential, however, was there in both tort and contract, and in both cases the potential was ultimately realized. That is my claim about the fourteenth century.
APPENDIX


1. The Miller's Case
Y.B. Mich. 41 Edw. 3, fol. 24, pl. 17 (CB 1367)
in Fifoot, History and Sources, 80

A writ of Trespass sur le case was brought against a Miller, and the plaintiff counted that, whereas he was wont to grind his corn at the mill of T. for himself and his ancestors for all time without toll and he had brought his corn there to be ground, the defendant came and took two bushels’ weight with force and arms, etc. And the writ ran: Quod cum praedicitus Johannes, etc. et antecessores sui a tempore cuius memoria non existit molere debuerunt sine multura, etc. praedictus defendens, etc. praedictum querentem sine multura molere vi et armis impeditiv, etc.¹

Cavendish. You see well how the writ runs, that he will not suffer him to grind without toll, and he has declared in his count that he took toll; and in this case he should have a general writ (general briefe) that he carried off the corn with force and arms, and not this writ: judgment of the writ.

Belknap. The writ is taken sur ma mater, and, if he has taken toll where he should not have taken it, I shall have a writ against him.

THORPE, C.J. You shall have Quod Permittat² against the tenant of the soil and thus it shall be tried, and not on a writ against the defendant.

¹ ['That whereas the aforesaid John, etc, and his ancestors from a time the memory of which runneth not to the contrary could grind without toll, etc., the aforesaid defendant, etc., impeded the aforesaid complainant from grinding without toll by force and arms, etc.]

² ['The king to the sheriff greeting. Command B. that justly etc. he permit A. to grind
Belknap. If a market be set up to the nuisance of my market, I shall have against him such a writ of *Quod Permittat*; but if a stranger disturbs folks (gents) so that they cannot come to my market, I shall have against him such a writ as this and shall make mention of the circumstances; and so here I shall have a writ of Trespass against him, because I cannot have *Quod Permittat*.

Wichingham, J. Suppose he had taken all your corn or the half of it, should you have such a writ as this, because he had taken more than he should take by way of toll? You should not have it, but a common writ of Trespass; and so you shall have here. Therefore take nothing by your writ.

his demesne wheat at the mill of the said B. quit of multure as he ought to do, as he says. And if he does not etc. Witness etc.’ G. D. G. Hall, ed., *Early Registers of Writs*, Selden Society 87 (London 1970) CC 120, at 96.

2. *The Innkeeper’s Case* [Navenby v. Lassels]

Y.B. Easter 42 Edw. III, fol. 11, pl. 13 (KB 1368)

in Fifoot, *History and Sources*, 80–1

Trespass was brought by one W. against one T., an innkeeper, and his servants; and he counted that, whereas throughout the whole kingdom of England it was the custom and use, where a common inn was kept, that the innkeeper and his servants should keep (garde) the goods and chattels which their guests had in their rooms within the inn while they were lodged there, the said W. came there on such a day, etc., into the town of Canterbury to the said T. and there lodged with him together with his horse and other goods and chattels, to wit, clothes, etc. and twenty marks of silver in a purse, and he took a room there and put these goods and chattels and the silver in the room, and then went into the town for other things; and while he was in the town, the said goods and chattels and silver were taken out of his room by evildoers through the default of the innkeeper and his servants in keeping them, *per tort et encounter le peace*, to his damage, etc. And he had a writ sur tout le materre accordé al cas.

And the innkeeper demanded judgment, because he had not alleged in his count, nor in his writ, that he had delivered to him the goods and silver, nor that the goods were taken by them, so that he had supposed no

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1 [Translation expanded and corrected by CD.]
2 [The record shows that this, in fact, happened in Huntingdon.]
manner of blame in them; and also he had delivered to him a key of his room to keep the goods therein; and he asked judgment if this action lay; and on this matter they demurred.

And it was adjudged by KNIVET, CJ, that the plaintiff should recover against them. . . .

3. FERRERS v. DODFORD
K.B. 42/189 (Trin. 1307)
in Sayles, Select Cases KB, vol. 3, no. 97, at 179–80

Northamptonshire. John, vicar of the church of Dodford, in mercy for several defaults.

The same John was attached to answer John de Ferrers on this plea: whereas lately the king had by his letters ordered his beloved and faithful John de Ferrers to come quickly to him with horses and arms on his Scottish expedition to assist him with his aforesaid expedition and the same John, getting ready to come to the aforesaid parts, had bought at Dodford a certain horse for a certain great sum of money from the aforesaid John, vicar of the church of Dodford, trusting in the same John’s words, for he put that horse up for sale under guarantee, affirming by corporal oath taken at Dodford before trustworthy men that the same horse was healthy in all its limbs and unmaimed, and the said John de Ferrers, having paid the aforesaid John, the vicar, for the aforesaid horse with the aforesaid sum of money, had caused the said horse to be brought to his manor of Bugbrooke, wherefore did he find the aforesaid horse maimed in the left shoulder. And because this horse was maimed and imperfect the aforesaid John de Ferrers came too late to the aforesaid parts of Scotland to assist the king’s said expedition, and he did not get any good out of the aforesaid horse, as the king has learned from the plaint of the same John de Ferrers, to that John’s serious loss and deceit and the manifest deceit of the king himself. And with respect to this he complains that on Thursday before the Feast of St. Barnabas the Apostle in the thirty-fourth year of the present king’s reign the aforesaid John, the vicar, did him the aforesaid trespass, wherefore he says that he is wronged and has suffered loss to the value of a hundred pounds. And he produces suit thereof etc.

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1 9 June 1306.
John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B. upon Humber had undertaken to carry his mare in his boat across the River Humber safe and sound, and yet the said [Nicholas] overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage.

Richemund. We pray judgment of the bill, which suppose no wrong in us, but rather proves that he should have an action by way of covenant rather than by way of trespass.

Bakewell. It seems that you did him a trespass when you overloaded your boat so that his mare perished. So answer.

Richemund. Not guilty.

[The plaintiff’s counsel.] Ready to aver our bill.

1 Corrected from LI MS. Hale 116.
2 According to the record, this should be Hessle; but BL MS. Harley 811, fo. 38 extends it as ‘Brokst’—perhaps Brough (which is where Ermine Street met the Humber).
3 Some MSS. say ‘and not’. The printed edition of 1679 says ‘or’, which gives quite the wrong sense.

5. Brainton v. Pinn,
K.B. 42/122 m. 22 (Hil. 1290)
in Sayles, Select Cases KB, vol. 1, no. 120, at 181-2

Devon. Herbert of Pinn and John his son in mercy for several defaults.

The same Herbert and John were attached to answer Walter de Brainton on the plea why they burnt the houses of that Walter at Holewey and his goods and chattels within them to the value of two hundred pounds, and other outrages etc., to the grievous loss of that Walter and against the peace etc. And with regard to this he complains that, whereas the aforesaid Herbert and John on Friday after the Assumption of the Blessed Mary in the sixteenth year of the present king’s reign were being entertained at the house of that Walter in his manor of Kenn, by their foolishness and lack of care and through a badly guarded candle they

1 20 August 1288.
burned the aforesaid houses, along with all his goods, that is to say, the corn in the barns and granaries, flesh-meat, fish, wool and linen cloths, silver spoons, gold rings, charters, deeds, household utensils and other goods, to the value of two hundred pounds, whereby he says that he is wronged and has suffered loss to the value of two hundred pounds, and thereof he produces suit etc.

And Herbert and John come by John Gerneis their attorney and say that they were being entertained in the houses of that Walter by his own good will, so that if any damage happened to the houses and other goods of that Walter through fire or other means, that was by accident and not by any lack of care or wickedness on their part. And concerning this they put themselves on the country etc. And Walter likewise. Therefore let a jury come three weeks after Easter wherever etc., unless the justices first etc.

Afterwards, three weeks after Easter in the twenty-first year of the present king’s reign, the parties came and likewise the jurors, who say on their oath that the aforesaid Herbert and John his son together with a certain Thomas de la Weye, parson of the church of Upton, steward of that Herbert, put up on the aforesaid day and year in the manor of the aforesaid Walter de Brainton and, whilst that Herbert was lying on his bed asleep in a certain grange of the aforesaid manor, the aforesaid Thomas did not allow the aforesaid John, son of that Herbert, to put out a certain candle which was fixed on a post of that grange, for which reason the aforesaid John went to bed whilst that candle was burning and immediately went off to sleep. And the aforesaid Thomas went away, and before he came back the aforesaid candle fell down and that grange was immediately set alight by it, and this at night, so that a certain part of the bed of the aforesaid Herbert was burned before he woke up, and also the whole manor aforesaid of that Walter, together with all his goods, was burnt by the aforesaid fire.

6. RATTLESDEENE v. GRUNESTON
Y.B. Pasch. 10 Edw. II (CB 1317)

Trespass against one who after he had sold a tun of wine drew out the wine and mixed it with salt water, as appears.

One [Simon] brought a writ of trespass against [Richard and Mary] and counted how he had bought a tun of wine for six pounds from this
same [Richard] on such a day etc.; he left it in his custody etc. There came [Richard] with force and arms and drew out a great part of the wine and refilled the tun with salt water, wherefore it became rotten and perished, against the peace etc.

Ingham. Judgment of the count, for you have said that we were used and that we came with force and arms, which is not to be understood and is worth nothing. Judgment again, for he has not said in which vill the trespass was done.

Scrope. We have said in [Orford].

Ingham. You have said that the buying took place in [Orford] and not the trespass etc.

And nevertheless because he let it be understood etc. Afterwards, not guilty etc.

7. ANON.

Y.B. 22 Lib. Ass., pl. 56 (Assizes 1348)
in Baker and Milsom, Sources, 353–4

In a bill of trespass for beating, wounding, maiming and imprisoning [the plaintiff]:

Fyncheden. As to the maiming and wounding, Not guilty. And as to the battery and the imprisonment, we tell you that at the time the plaintiff was in a mad fit and doing great harm; and for this reason the defendant and [the plaintiff’s] other relations took him and tied him up and put him in a house and chastised him and beat him with a rod, without this that we imprisoned or beat him in any other manner; and we do not think that for such imprisonment and battery he can assign wrong in our person.

Richemund. You did it of your own wrong, and without such cause; ready etc.

And the others said the opposite.
8. **The Farrier’s Case** [**Toundu v. Mareschall**]

Y.B. Trin. 46 Edw. III, fol. 19, pl. 19 (CB 1373)

in Fifoot, *History and Sources*, 81–2

Trespass was brought against a farrier for that he had lamed his horse, and the writ contained the words *quare clavem fixit in pede equi sui in certo loco per quod proficiendum equi sui per longum tempus amisset*, etc.

*Persay.* He has brought a writ of trespass against us and it does not contain the words *vi et armis*: judgment of the writ.

*Finchedon, C.J.* He has brought his writ *en son case* so his writ is good.

*Persay.* The writ should say *vi et armis* or *maliciose fixit*, and it has neither the one nor the other: judgment. Also he has not supposed in his count that he bailed us the horse to shoe; so otherwise it should be understood that if any trespass was done, it should be against the peace; wherefore judgment.

And then the writ was adjudged good, and issue was joined that he shod the horse, without this, that he lamed it, etc.

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1 [Professor Palmer has identified this case as William Toundu of York v. Peter Mareschall of Colliergate. Palmer, *English Law in the Age of the Black Death*, at 226, 368.]

2 ['*Why he fixed a nail in the foot of his horse in a certain place by which he lost the profit of his horse for a long time.*' ]

3 [*absque hoc* (a form of pleading later known as a ‘special traverse’).]

9. **Berden v. Burton et al.**

Y.B. Trin. 6 Ric. II, pl. 9, pp. 19–23 (1382)


A man brought a writ of trespass against Davy Houlgrave and Thomas de Burton and twelve others for his house burnt and broken, his servants beaten and maltreated, twelve oxen and a hundred sheep taken and driven off, and other goods and chattels taken and carried away, and other wrongs etc., to his damage etc.

*The defendants* appeared and denied etc. As to coming with force and arms, not guilty. As to the breaking of the houses, they say that they found the doors open. And because a rent-charge issuing from the same manor was granted to one A., ancestor of Davy, one of the defendants, by the ancestor of the person whose estate the plaintiff had in the same manor, they therefore entered and took the distress. And they asked judgment whether an action would lie for this entry etc., and they put forward a
deed of the grant of the rent etc., as if by compulsion of the court, for Belknap, C.J. said that the justification pleaded would have been worthless otherwise. And as to this matter the plaintiff offered to aver that the defendants broke his doors, without this, that they found them open, and a day was given in the octave of Michaelmas.

And as to the animals taken and driven off, the defendants showed how the plaintiff had an action of replevin pending for the same animals and the same taking (for he counted on the same day and the same place). And they asked judgment whether as to this action of trespass etc. concerning the animals. And, as to the animals, the writ of trespass was abated at once, and the writ of replevin was to remain in full force. And yet the replevin action was brought only against two of the defendants. But Belknap, C.J. said that all the others would be discharged by the bringing of replevin against the two men, and he also said that a writ of trespass shall abate in favor of a writ of replevin, but not the contrary, for replevin is in a form of a higher nature and is another kind of action etc.

And as to the battery of the servants, the defendants showed how after the taking they drove off the animals, as well they might, and some of the servants who were within [the manor] came after them, and they did not know whether this was in order to replevy the animals or to effect a rescue. And then by certain words which passed between them they clearly realized that their coming was for the purpose of effecting a rescue, and the defendants used force against them. And they asked judgment whether for such an interference an action would lie etc. And it was adjourned, as stated above.

And as to the arson of the houses, the defendants showed how after the distress, which was taken in the morning, some of the servants came after the defendants, and others remained inside the manor; thus the burning which was done was by reason of the negligence of the servants inside, who should have watched the fire. And they asked judgment whether etc. And he also showed the court that he came at the third hour with the constable of the town without any more people.

Holt (for the plaintiff). We say that they came with a great assembly and multitude of armed men and entered the manor and in the morning before sunrise, broke the doors and then entered the hall and threatened the servants, with the result that the servants were in fear of death and let the fire lie unattended and did not dare to return. Thus it was the fault of the defendants that the manor burned. And we ask judgment etc.
Burgh. Now we ask judgment on the writ, for you notice how they have alleged by their writ how we burned their house in fact, and now they have pleaded nothing on that point but show how we were the cause of the burning, in which event they ought to have had an action on their case and not this action. And we ask judgment etc., upon their admission etc.

Belknap, C.J. I also believe that the writ is improperly framed, for you ought to have brought your special writ upon your case, since it was not their intention to burn them, but the burning happened by accident. Even though it stemmed from their act, still it was done against their will. It is as if you broke my close and entered therein, and my animals went away through this opening and fled, so that I lost them forever; while you know nothing of this, I shall never have a writ of trespass against you alleging that you drove off my animals, but I really think that I shall have a general writ of trespass for breaking my close, with no mention of the driving away of the animals, and everything will be accounted for in the damages for the breaking of the close, for by the breaking of the close all the damage occurred and has been fully effected. And, furthermore, if you break my houses, and you go away, and then other strangers carry off my goods without your knowledge, I shall have a writ of trespass against you for the breaking into my houses etc. and recover everything in damages, as above. But, if you should be knowledgable or plotting or willingly present when the trespass is done, you shall be adjudged a principal feasor, for in trespass no one is an accessory etc.

And then Holt said that they came in the morning with certain assemblies of people, as above, and broke the doors and entered and took some straw and fired it in order to see around them, and the straw, while afire, threw sparks on the ground. Thus they burned etc.

Belknap, C.J. Now you are speaking to the point, for by the firing of the straw the houses were burned; thus they are as principal feasors. And then a day was given, as above.

And in this case it was also agreed that if your house be next to my house and my house is burned and your house as well by the accident of my house, you shall never have a writ against me alleging that I have burned your house, but rather a special writ upon your case. And, also, if I lie in your house and place a candle on the wall, and the candle falls on the straw, so that your house is burned, you shall have a special writ.

And later the parties reached an agreement etc.
In trespass brought against a man and wife, Woodrow counted of a horse killed at a certain place with force and arms.

Gascoigne. We protest that we do not admit coming with force and arms, for we say that the wife had the horse as a loan from the plaintiff to ride to a certain place, and we ask judgment whether he can maintain this action against us (and this was held a good plea).

So Woodrow (for the plaintiff): The truth of the matter is that the wife had the horse as a loan to ride to a certain town; and we say that she rode to another town, whereby the horse was enfeebled to the point of death; then she brought him back to the place named, and there the husband and wife killed him; and we demand judgment.

Gascoigne. And now we demand judgment of his writ, which says “with force and arms,” for upon his own showing he ought to have had a writ on the case (Note this).

So Woodrow said, we wish to imparl.¹

¹ [Fifoot’s note:] Imparlance or licentia loquendi: leave to ‘end the matter amicably without farther suit, by talking with’ the other party. See Bl. Comm. III, 298.
11. WALDON v. MARSHALL [DALTON v. BERETON]

Y.B. Mich. 43 Edw. III, fol. 33, pl. 38 (CB 1370)
in Fifoot, History and Sources, 81

William Waldon brought a writ against one J. Marshall, and alleged by
his writ quod praedictus Johannes manucepit equum praedicti Willelmi
de infirmitate [curare], et postea praedictus Johannes ita negligenter curam
suam fecit quod equus suus interiit.  

Kirton. We challenge the writ, because it makes mention of contra
pacem, and in his count he has counted of his cure ita negligenter so that
the horse died, so that he should not have said ‘against the peace.’

And the Judges were of opinion that the writ was ill framed. And then
the writ was read, and he had not said contra pacem in the writ, and the
writ was held to be good.

Kirton. Because he has counted that he had undertaken to cure his
horse of his malady, for which he should have had an action of covenant,
judgment of the writ.

Belknap. That we cannot have without a Deed; and this action is
brought because you did your cure ita negligenter that the horse died,
wherefore it is right to maintain this special writ according to the case; for
we can have no other writ.

Kirton. You could have a writ of Trespass, that he killed your horse,
generalement.

Belknap. A general writ we could not have had, because the horse was
not killed by force, but died by default of his cure. .

And then the writ was adjudged good. . .

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1 [Professor Palmer has identified this case as William de Dalton of York v. William de Bereton marshal. Palmer, English Law in the Age of the Black Death, at 191–3, 434–44.]

2 ['That the aforesaid John took in his hand the horse of the aforesaid William to cure it of its infirmity, and afterwards the aforesaid John so negligently did his cure that the horse died.']
12. THE SURGEON’S CASE [STRATTON v. SWALOND]¹

Y.B. Hil. 48 Edw. III., fol. 6, pl. 11 (KB 1374)
in Fifoot, History and Sources, 82–3

A man brought a writ of Trespass sur son case against one J. M., surgeon, and the writ ran thus, that, whereas the plaintiff’s right hand was wounded by one T. B., the defendant undertook (emprist)² to cure him of his malady in his hand, but that by the negligence of the said J. and his cure, the hand was so injured that he was maimed a tort et a ses damages. And note that in this writ there was no mention in what place he undertook, etc., but in his count he declared that he undertook in London in Tower Street in the parish of B. And the writ was not vi et armis nor contra pacem, etc.

Gascoigne. He did not undertake to cure him of the malady, as he has alleged: ready to wage our law.

Honnington. This is an action of Trespass and of a matter which lies within the cognisance of the country, in which case wager of law is not to be granted: wherefore, for default of answer, we demand judgment and pray our damages.

Cavendish, C.J. This writ does not allege ‘force and arms’ nor ‘against the peace,’ so that wager of law is to be allowed. . . . And this is the opinion of the whole court. . . .

[The case was then adjourned.]

Afterwards he waived the tender of law and said that he did not undertake to cure his hand: ready, etc.

Issue was joined on this.

Gascoigne. Now, Sir, you see well that the writ does not mention in what place he undertook to cure him, so that the writ is defective in this matter, for the court cannot know from what neighbourhood the jury shall come.

¹ For the tangled history of this case and a fuller report, see Baker and Milsom, Sources, at 402–4; cf. Palmer, English Law in the Age of the Black Death, at 193–6, 346–7. The names of the serjeants given here are probably wrong.
² Emprist is the reporter’s translation from the Latin of the writ. The writ is not given, so that the original word may possibly have been assumpsit, though more probably manucepit, as in Waldon v. Marshall [no. 11]. [Fifoot’s suspicion is confirmed by Palmer, English Law in the Age of the Black Death, at 346.]
Persay. He has not defined the place in his writ; wherefore we demand judgment of the writ.

Honnington. Because we have assigned in our count the place where he undertook our cure, therefore, though it is not mentioned in the writ, it is yet sufficient to bring together the jury from the place where we have affirmed the undertaking to have been made. Wherefore judgment if our writ be not good.

Cavendish, C.J. At this stage it is seasonable to challenge the writ for that he has not assigned the place of the undertaking, because it is necessary to summon the jury from that place; but if he had waged his law according to our first issue, then it would not have been necessary to have assigned a place in the writ. Moreover, this action of covenant of necessity is maintained without specialty, since for every little thing a man cannot always have a Clerk to make a specialty for him. . . .

And then, because the place was not named in the writ where the cure was said to have been undertaken, the action abated. And the plaintiff was in mercy.

13. A Dictum in Gray’s Inn (1499)
Trin. 14 Hen. VII, Fitz. Abr. Action sur le case, pl. 45
in Baker and Milsom, Sources, 442

In Gray’s Inn. Note, if a man makes a covenant to build me a house by a certain date, and does nothing about it, I shall have an action on my case for this nonfeasance as well as if he had built badly, because I am damaged by it: per Fyneux. And he said that it had been so adjudged, and he held it to be law. It is likewise if a man bargains with me that I shall have his land unto me and my heirs for £20, and that he will make an estate to me if I pay him the £20, and he does not make an estate to me according to the covenant, I shall have an action on my case and need not sue out a subpoena.
14. Orwell v. Mortoft
Y.B Mich. 20 Hen. VII, fol. 8, pl. 18 (CP 1505).\textsuperscript{1}

in Baker and Milsom, Sources, 450

Frowyk [CJCP]. . . . If I sell £10 worth of land, parcel of my manor, and covenant further to make an estate\textsuperscript{2} by a certain day, and before the day I sell the whole manor to someone else: in this case an action on the case lies against me. Likewise, if I sell ten acres in my wood, and then I sell the whole wood to someone else. O[r] if I covenant, in return for money, to make a house by a certain day, and do not do it, an action on the case lies for the nonfeasance. Here, then, he has sold 20 quarters of malt to the plaintiff to be delivered at a certain day, and has not done this, but has converted them to his own use; and so it is right that he should be punished by an action on the case. . . .

\textsuperscript{1} Also reported by Caryll in Keil. 69, 77 (correctly dated Mich. 21 Hen. VII).

\textsuperscript{2} I.e. execute a conveyance.
Reaching for Excellence: Evaluating Manitoba’s Process for Issuing Judicial Authorizations

Anne Krahn, Sarah Inness, Stacy Cawley, Bettina Schaible

I. INTRODUCTION

Fifteen years ago, Justice Casey Hill, Scott Hutchison, and Leslie Pringle conducted a study. They questioned whether prior judicial authorization for police searches protects privacy or is an illusion. They reviewed 100 warrants authorized in Ontario and the corresponding information to obtain those warrants. Ultimately, the authors determined that 69% of those warrants had some substantive defect and concluded that 61% would not have survived a Charter challenge.

As noted in the article, there are few opportunities for empirical, evidence-based evaluation of criminal justice processes. Anecdotally, the perception by many has been that applications for court authorizations have significantly improved. This panel decided to conduct a similar study in Manitoba to compare results, test the anecdotal perception and objectively determine if there had been improvement in the picture presented in 2000 in an effort to identify error patterns that might be corrected. A definitive statistical comparison cannot be made between these two review projects as they were conducted in different provinces by different evaluators. However, the results of this review may be used as a yard stick to identify changes in the future.

3 Ibid at 91.
The panel consisted of Sarah Inness, an experienced criminal defence lawyer, Bettina Schaible, an RCMP officer with 15 years of experience in drafting applications for court authorizations and instructor of the search warrant drafting course, Stacy Cawley, an experienced federal prosecutor, Anne Krahn,4 a provincial court judge, and Justice Sadie Bond5 who participated until her appointment to the Manitoba Court of Queen’s Bench at which time, Ms. Cawley took her place. The opinions expressed in this article are the individual views of the authors and do not represent the views of the court, law enforcement, government agency or law firm.

II. EVALUATION PROCESS

The panel reviewed search warrants related to 100 separate files maintained by the Provincial Court. Several files contained more than one application for the same place or item to be searched. For example if the first application was rejected, a second or third application might be filed under the same Provincial Court assigned file number. In total 125 separate applications and judicial decisions were reviewed. The review looked at all unsealed warrants or orders that were sought in Manitoba in September 2013.6 The month of September 2013 was selected arbitrarily because our warrant study started in December 2013 and the panel wanted to ensure that enough time was allowed for the reports to justice to be filed in the packages that we reviewed. We looked at unsealed packages filed chronologically in the month of September 2013.

Each package that was reviewed consisted of an affidavit or Information to Obtain a warrant (ITO), a warrant, and when filed, the Report to Justice about what was or was not seized under the warrant after it was executed. The first page of the affidavit was most often the form prescribed by the Code (often called the facesheet). This form does not

4 Now an Associate Chief Judge of the Provincial Court of Manitoba.
5 Justice Bond also provided valuable feedback on our final report.
6 Section 487.3 of the Criminal Code, RSC 1985, c C-46 [Criminal Code]; authorizes a judicial officer to “seal” or make an order which limits access to information filed as part of an application for judicial authorization when certain pre-conditions are met including where disclosure of information might compromise the identity of a confidential informant, compromise an ongoing investigation, endanger a person engaged in a particular intelligence-gathering technique or prejudice the interests of an innocent person.
allow enough space for the grounds on which the authorization is sought to be filled in, so the grounds are most often attached to the first page of the form or affidavit as an Appendix or Exhibit.

Each warrant was reviewed by the committee members individually. Then every warrant was discussed at meetings attended by all panel members and a consensus was sought as to the final evaluation of each package. While there were some reservations on some of the evaluations, generally a matter was discussed until there was agreement. Where there was agreement about a deficiency in an area, but where it was not invalid in law, the panel recognized it with “half” marks. In an effort to have comparable final results, the panel adopted and used a similar search warrant checklist or evaluation template as the one created for the Ontario study, with some small adaptations to reflect Manitoba practice and interest (attached as Appendix 1). The results of the study were compiled and are attached as Appendix 2.

It must be conceded that there is a healthy dose of subjectivity in a determination of whether a certain set of facts amounts to reasonable grounds or meets the standard of reasonable suspicion. Even the Supreme Court of Canada has had difficulty on occasion agreeing on whether the standard of reasonable grounds has been met. For example, in *R. v. Morelli* the court divided on whether the grounds relied on by a police officer provided sufficient grounds in a search for child pornography on computers in a residence. A similar experience was encountered during this study. Healthy debates occurred on whether certain facts amounted to reasonable grounds. Generally the panel was able to come to a consensus on the final evaluation. So while recognizing the intrinsic difficulty that the type of evaluation undertaken in this study requires, the hope is that by bringing different perspectives to the table, the conclusions can offer the benefit of combined wisdom.

A few comments about the sample size are also necessary. In the month of September 2013, there were a total of 189 applications (this includes re-applications) filed with the court. 43, or 23% of the applications were sealed. The sealing orders were made in applications for search warrants (both *Criminal Code* and *Controlled Drugs and Substances Act*), tracking warrants, general warrants, production orders, and Number 2010 SCC 8, [2010] 1 SCR 253.
Recorder Warrants. This is fairly consistent with the applications filed for all of 2013 where 27% of the applications were sealed. The types of warrants reviewed in this study consisted of the following:

- Controlled Drugs and Substances Act search warrants 28%\(^9\)
- Criminal Code and other regulatory acts search warrants 43%\(^10\)
- Production Orders 19%\(^11\)
- DNA warrants <1%\(^12\)
- Entry warrants 9%\(^13\)

When one looks at the types of applications filed in the entire year of 2013, it is fair to say that these authorizations are a good representation of the main types of judicial applications considered by the Provincial Court.

All applications for judicial authorizations in 2013:

- Controlled Drugs and Substances Act search warrants 15%
- Criminal Code and other regulatory acts search warrants 34%
- Production Orders 25%
- DNA warrants 9%
- Entry warrants 7%
- General warrant (s. 487.01) 5%

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\(^8\) Out of 2028 applications filed, 544 were sealed - based on statistics provided by the Manitoba Court Office.

\(^9\) 35 out of 125.

\(^10\) 43 out of 125.

\(^11\) 24 out of 125.

\(^12\) 1 out of 125.

\(^13\) 11 out of 125.
Omnibus (multiple types of warrants sought in one application) 4%

Tracking warrants <1%

Public Safety Gun/weapons warrants (s. 117.04 of the Criminal Code) <1%

Interception of private communications with consent and Assistance orders <1%

Impressions warrants .01%

While the study provides a snapshot of specific applications filed in a discrete period of time – September 2013, it is the panel’s view that certain themes and consistent errors emerged. We have expanded on these in this report. We also predict that the same themes or errors would be identified even if a larger sample of applications had been studied. Another study looking at a different period of time would provide more information about the validity and persistence of the themes and errors we have identified.

III. OVERVIEW

Judicial Justices of the Peace (JJP) considered 113 of the applications reviewed. Twelve were considered by Provincial Court Judges. The vast majority of the applications were made by the RCMP or the Winnipeg Police Service.

It is impossible to comment individually on each of the 125 warrants in this report but several themes were repeatedly identified by the committee during this review and these will be discussed further in our analysis.

In all, the Panel felt that 23%\textsuperscript{14} of the reviewed Warrants that were authorized should not have been authorized. We concluded 20%\textsuperscript{15} would

\textsuperscript{14} 25 out of 109. 109 is the number of warrants that were authorized and reviewed in this study. There were a further 16 warrants that were rejected, that is, not authorized.
not have survived a Charter challenge. However, when one accounts for triplicate errors made in a series of applications in the same investigation by the same investigator, it is more accurate to say 14% of the warrants should not have been authorized.\textsuperscript{16} By comparison, in the Ontario study they concluded that 69% of the warrants should not have been issued due to a material defect in the warrant or the application for the warrant. A further assessment in the Ontario study of whether the defective portion could be severed from the remainder of the application concluded that 61% of the warrants would not have survived a Charter challenge.\textsuperscript{17}

IV. ANALYSIS

A. Legal Description of the “Offence”

The offence must be set out with sufficient particularity so that the person whose premises or property is to be searched can identify the particular criminal transaction that is being investigated.\textsuperscript{18} It is not enough to merely specify, “robbery contrary to section 344 of the Criminal Code”. “The search warrant must identify the transaction and offence in such a way that the issuing judicial officer can assess the “nexus” between the evidence being sought and the grounds demonstrated in the Information to Obtain.”\textsuperscript{19}

The panel found that in less than 2% (three) of the warrants reviewed the legal description of the offence was inadequate. In two cases it was an error in the date of the offence – one application was rejected for that reason. In the third case, the offence described did not include the jurisdiction or date of the offence. These appeared to be anomalies. By comparison, the Ontario study found 20% of the sample contained a description of the offence which was substantially inadequate.\textsuperscript{20}

\vspace{1cm}
\begin{footnotesize}
\begin{enumerate}
\item 18 out of 109.
\item See Section E, \textit{below}; “Applications authorized that ought not to have been” for further explanation.
\item \textit{Supra} note 1 at 91.
\item \textit{Ibid} at 113.
\item \textit{Supra} note 1 at 94.
\end{enumerate}
\end{footnotesize}
In another 2% of the authorization packages, there was some deficiency but not enough to invalidate the warrant. For example, one offence used the wrong section number of the Criminal Code. In another case, the grounds in the affidavit described a theft of $2.5 million dollars’ worth of materials and the offence specified was theft under $5000. This warrant was not executed due to police resource constraints. The offence was properly described in a second application.

B. Reasonable Grounds for the “Offence”

Most of the authorizations reviewed require the judicial officer to be satisfied that there are “reasonable grounds” to believe the offence under investigation has occurred and that evidence or items to be seized will be found at the search location. The Supreme Court of Canada has defined “reasonable grounds” to mean there is a “reasonable probability” rather than proof beyond a reasonable doubt or a prima facie case. The Supreme Court has also described the standard as one “where credibly-based probability replaces suspicion”. The Information to Obtain must therefore contain sufficient evidence capable of being assessed and measured independently by the judicial officer to come to the conclusion that the pre-conditions for the warrant’s issuance have been provided.

In some of the applications reviewed, such as some of the production orders, the Criminal Code requires that the justice be satisfied that “there are reasonable grounds to suspect”. The Supreme Court of Canada described this standard in this way:

Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and ground in common sense and practical everyday experience. A police officer’s grounds for reasonable suspicion cannot be assessed in isolation.

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21 R v Debot, [1989] 2 SCR 1140 at para 54, 102 NR 161 [Debot].
22 Canada v Southam, [1984] 2 SCR 145 at para 43, 33 Alta LR (2d) 193 [Southam].
23 See also, Hutchinson’s Search Warrant Manual, supra note 18 at 114-115.
24 Criminal Code, supra note 6, sections 487.012(2), 487.015(2), 487.016(2), 487.018(3), for example.
25 R v Chehil 2013 SCC 49 at para 29 (see also paras 30 & 33). See also R v MacKenzie, 2013 SCC 50 at para 38, 71-74, [2013] 3 SCR 220 – another example where the
The standard of reasonable suspicion is a modest threshold that is lower than the standard of reasonable grounds. The panel concluded that 12% of the packages reviewed did not disclose reasonable grounds to support the listed offence. There were a number of applications which were made at the conclusion of a single, lengthy drug investigation where there were multiple suspects, multiple locations searched and multiple controlled substances seized. A series of applications were then filed to search cell phones for evidence related to drug trafficking or possession of the proceeds of crime. On a number of the applications related to this investigation, the offence alleged, for example trafficking marihuana, was not the offence supported by the grounds, which referred to the seizure of methamphetamine. In a number of these applications, the offence that was alleged was possession of the proceeds of crime and the grounds to believe that the items were in fact proceeds of crime were missing. For example, an affidavit referred to both drugs and cash being seized. There was no information in the grounds to provide a basis to believe that the cash seized was the proceeds of drug trafficking. The police appeared to have reasonable grounds for the search but had failed to accurately synthesize a lengthy investigation to justify a search of electronic devices for the appropriate offence at the end of the investigation.

C. Legal Description of the “Location”

The location to be searched must be set out correctly; to fail to do so will be fatal to the warrant.\textsuperscript{26}

The majority of the locations for which authorizations were sought were the dwelling house of the suspect – 38%. The second most frequent place to be searched was an electronic device related to the suspect – 27%, while the third were independent businesses such as a financial institution, public utility, or medical facility – 21%. The remainder included searches of a vehicle related to the suspect, a dwelling house that was not the home of the suspect or search of items seized from the suspect.

\textsuperscript{26} Supreme Court of Canada is divided on whether the facts amount to reasonable suspicion.; and Hutchinson’s Search Warrant Manual, \textit{ibid} at 60-62

\textsuperscript{26} \textit{R v Parent}, [1989] 47 CCC (3d) 385 (YTCA), 41 CRR 323.
The vast majority of applications and warrants properly described the location of the place to be searched. We found a legally insufficient description of the place in 3% of the applications compared to the Ontario study where they found 5%.\textsuperscript{27} For example, in one instance police had seized an electronic exhibit but did not properly note the address of the detachment where the exhibit was being held. In a second example, there were numerous failures (all relating to the same investigation) to properly describe an IPhone or Blackberry. The information to obtain disclosed a list of phones which had been seized. Unfortunately, the list did not differentiate in its description of each item sufficiently so the panel could tell which “black Samsung” police wanted to search, when more than one “black Samsung” phone was seized.

There was some deficiency but not enough to invalidate the warrant in 6% of the applications. An example of such a deficiency was where the information to obtain described the search for unmarked tobacco (contrary to a Manitoba tax statute). The warrant authorized a search of two cardboard boxes (one with a suspect’s address on it) located in the investigative unit. However the description of the boxes with the suspect’s address did not appear in the grounds of the information to obtain the search warrant. The panel felt that the cardboard boxes that were to be searched for tobacco should be described with more particularity in the grounds of the information to obtain the warrant.

The description of the place to be searched on the warrant should always mirror the description in the affidavit in support of the warrant.

\textbf{1. Ms. Cawley’s Comments:}\n
In the course of this review, there was debate about the best practice in completing the warrant face sheet when police are applying to search a cell phone already in their possession. Should the affiant list the cell phone as the “place” to be searched or the “thing” they are searching for?

It was common for the police to list their exhibit locker as the “place” to be searched and the cell phone (previously seized and held in the locker) as the “thing”. It did seem odd that the police were applying to search their own locker. Nevertheless, this is an acceptable practice provided the information is clear that the police have the device in their custody and are applying to search the device for evidence of the offence.

\textsuperscript{27} Supra note 1 at 95.
For greater clarity, another option would be to state “cell phone (description) currently located in police exhibit locker.....” as the place to be searched.

Given current technology, cell phone searches implicate the same privacy interests as computers. In R v. Vu, Justice Cromwell stated, on behalf of the Court, that, “...the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place”. While these comments appear to support listing a device as the “place” to be searched, context is important. In Vu, while the computer was discussed as a place, it was treated as a thing.

Until we have further guidance from the courts, the police must make every effort to clearly articulate they are seeking judicial authorization to search a cell phone, previously seized incident to arrest and in their possession, for evidence of the offence under investigation. Perhaps one day we may have specialized forms tailored to the unique considerations - involved in computer or mobile device searches. Until that time, police should strive to be clear in the information to obtain.

It is beyond the scope of this paper to address best practices concerning narrowing the scope of a cell phone search, recommended wording for categories of evidence sought from the device or addressing time requirements for computer/device analysis. Investigators should be aware of the potential issues that may arise in these areas and consult with the Crown for assistance.

D. Reasonable Grounds for the “Location”

The panel found that in 13% of the cases, reasonable grounds did not exist to believe that a search of the location would produce evidence of the offence. In an additional 4% there was some deficiency but not sufficient to invalidate the entire warrant. The types of issues noted were a failure to provide grounds to support a search for firearms at a suspect’s residence when the suspect had been involved in a firearm offence at a different location, away from the residence. In a few cases, the search warrant authorized searches of outbuildings, but there were no specific grounds articulated as to why evidentiary items would be located in outbuildings.

29 2013 SCC 60 at para 51, [2013] 3 SCR 657 [Vu].
In a few cases, the grounds relied on to justify the search of the location were two or more months old and the belief that the items would still be at the location was not logical based on the dated nature of the information.

E. Legal Description of the “Things”

The warrant should contain a sufficiently detailed description of the items to be searched for so that a searching officer can identify the items. This test has been described as “the fellow officer” test:

Would another police officer unfamiliar with the rest of the investigation be able to execute the warrant without reference to the Information to Obtain or other material? Would such an officer know from the warrant (and nothing else) what to seize, and what to leave behind?30

We found that in 6% of the applications there was a material deficiency in the description of the items police wanted to search for. Another 6% of applications contained some deficiency but not sufficient to invalidate the warrant. In one case, law enforcement officers appeared to have seized a cell phone incident to an arrest on an offence of luring a child and invitation to sexual touching. It was alleged that the adult suspect sent sexually explicit messages to a child under the age of 16. The first application was denied for a number of reasons, including an incomplete description of the cell phone – no make, colour, model number, and phone number. It was clear to the panel in reviewing the supporting affidavit that police wanted to search the cell phone for text messages and photos that may have been sent to the child. The second application (which was authorized) provided a more detailed description of the phone as the “thing” to be seized and noted the location to be an exhibit locker in the police station. Arguably, greater clarity about what the search authorized could have been achieved by identifying the phone as the “place” to be searched and describing the type of data (“the things”) that police were looking for – text messages and photos. As noted in Ms. Cawley’s comments above, this is an area of uncertainty in the law at this time.

Another example was where the warrant authorized the search of a cell phone for all text messages and cell phone records. The offence

30 Supra note 18 at 94.
alleged sexually explicit material being sent to a child on one specific date. The panel felt that the search should have been limited to look for material sent during the time period alleged in the offence. If police are unable to restrict a search due to limitations in the software used to conduct the electronic search, this should be explained in the information to obtain.

Some examples of those matters which we concluded had some deficiency, but the overbroad portions could be severed from the descriptions were:

- where medical records were sought, but these were not restricted to the time period alleged in the offence;
- in a sexual assault investigation, the description of the offence included “offence related clothing”;
- a description of the items to be searched for on an IPOD included the phrase “for any evidence [related to the offences] including but not limited to… text messages, emails, chat logs…” The phrase, “including but not limited to” or “any evidence related to the offence” as a catchall for items to be searched for is to be avoided as it creates an overbroad and imprecise description of the things to be searched for;
- “any other cellular phone data”; and
- “any other forensic evidence”.

1. Ms. Cawley’s Comments:

Concerning cell phone searches, the affiant should specify the category of evidence they are searching for on the device. In the example above, the search of the cell phone was limited to text messages and photos. The affiant would have to address why he is of the belief text messages and photos (evidence of the offence) would be found on the cell phone. Overly broad statements such as “computers and the data contained therein” should be avoided.

Additionally, investigators should consult the Crown in their jurisdiction for advice on how to articulate categories of evidence as there is regional disparity on how to best approach this issue.

F. Reasonable Grounds for the “Things”

In 13% of the packages reviewed, there were not sufficient grounds to explain why the things to be searched for would afford evidence. There
was some deficiency in a further 6%. It appeared that in many of these instances the affiant believed it was self-evident why the listed things were related to the offence and the location.

In a number of instances, police sought to search cell phones for text messages or emails, but the affidavit failed to set out any grounds on which to believe that the text messages or emails would provide evidence of the offence. In a few instances the items to be searched for as listed on the warrant itself were not referred to in the affidavit at all.

1. Cpl. Schaible’s Comments:

   A number of reviewed authorizations failed to properly provide an adequate legal description or reasonable grounds relating to the “offence”, “place” or “things to be searched for” (15 Warrants had an issue with one or more of these areas with another 17 Warrants obtaining only a ½ mark in this category). Law enforcement cannot expect the reviewing Justice to authorize a Warrant if the listed “offence”, “things to be searched for”, or “place” that will be searched does not match what they have outlined in the reasonable grounds detailed in the affidavit.

   The “nexus” is a term often used in warrant writing to describe the triangular connection between the “offence” that is being investigated, how it is linked to the “things” that police would like to search for and the reasons why those items can be found in the “place” for which the warrant is written.

   Ultimately, these three points are in one form or another on the facesheet of every Information to Obtain, regardless of the type of warrant. It is the affiant’s job to clearly explain the investigation and to “connect the nexus dots” for the reviewing Justice, outlining very clearly the reasonable grounds for the triangular connection of “offence”, “things”,

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**FIGURE 1: THE “NEXUS”**

![Diagram of the Nexus](image)

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Offences

\[\text{\[\begin{array}{c}
\text{Things}
\end{array}\]}\]

\[\text{\[\begin{array}{c}
\text{Places}
\end{array}\]}\]

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ultimately
and “places”. In all, the committee felt that in 13% of the applications, the affiant failed to properly provide reasonable grounds detailing one or more of the “nexus” points. Failing to explain even one of those connections should always get the warrant denied as the affiant has not established the required reasonable grounds. This point cannot be highlighted enough as our review has shown that it is the main reason a warrant is denied.

A similar issue was an “overbroad” request in the “Items to be searched for” category. I would caution an affiant against including in their description a term like “...including but not limited to the following items”. In every application affiants should be correlating each of the “items” they are searching for on their facesheets to the specific items they have reasonable grounds for and have detailed in their affidavit. It is important to remember that officers executing a warrant that come across offence-related items they did not anticipate would be there and are not listed in the “Items to be searched for” have the authority to seize those items under section 489 of the Criminal Code.31 In my opinion, it is better to use the authority of section 489 C.C. to seize those items then to include an overly broad list in the “Items to be searched for” portion of the warrant that is not supported in the grounds.

2. Ms. Inness Comments:

i. Grounds Not Explained Sufficiently

Recognizing the expediency with which some applications are brought, perfection cannot be expected. That said, a fair number of the warrants were poorly organized and disjointed. It took a few readings to “get” the grounds. These applications left the impression there was sufficient evidence (perhaps even more than that contained in the application), but it was poorly explained and inadequately linked with the reasonable grounds test.

A large number of warrants left much guess work to the judicial officer in determining if the grounds existed. This mainly was due to the affiant’s failure to connect the dots for the justice. Although the reviewing judge should take into account reasonable inferences that can be drawn.

31 Criminal Code, supra note 6, s 489. This is a codified plain view doctrine.
from the information in the ITO,\textsuperscript{32} it is important to distinguish between speculation and reasonable inference. Furthermore, while some inferences may lend themselves to their conclusions based on common sense, others may require a bit of specialized knowledge or additional information.

Frequently this was observed in the \textit{Controlled Drug and Substances Act} (CDSA)\textsuperscript{33} investigations where the affiant failed to explain the connection between the nature of the investigation and the items they wanted to locate and seize. While some of the items may seem obvious to those who have experience with CDSA matters, it is necessary to explain to the justice why the items sought will afford evidence of the offence. For example, “documents”: such a broad term would theoretically allow for the seizure of any and all documents in the home. While items such as score sheets, bills (to establish residency) may relate to the offence, other documents may not.

\textbf{ii. Feeney Warrants}

Some of the Feeney warrant (a warrant that authorizes the entry of a residence to conduct an arrest)\textsuperscript{34} applications were extremely well-written. The grounds were well-sourced and properly explained. Many, however, were very lax. Oftentimes the affiant did not adequately explain the grounds to arrest (easily done if an arrest warrant has already been granted) or the basis to believe the suspect is still present in the place they are seeking to enter. For example, in one case, reference was made to a confidential informer who reported that the suspect was living with his girlfriend at a particular address, but the informant information was not sourced or corroborated.

\textsuperscript{32} Vu, \textit{supra} note 29 at para 16.
\textsuperscript{33} SC 1996, c 19.
\textsuperscript{34} Named after \textit{R v Feeney}, [1997] 2 SCR 13, 212 NR 83.
V. RESULTS AND COMPARISON

<table>
<thead>
<tr>
<th></th>
<th>Ontario 1999</th>
<th>Manitoba 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal description of offence was inadequate</td>
<td>18%  + 2% some deficiency</td>
<td>2%  + 2% some deficiency</td>
</tr>
<tr>
<td>Reasonable grounds for offence was inadequate</td>
<td>10%  + 2% some deficiency</td>
<td>12%</td>
</tr>
<tr>
<td>Legal description of location was insufficient</td>
<td>4%  + 1% some deficiency</td>
<td>3%  + 6% some deficiency</td>
</tr>
<tr>
<td>Reasonable grounds for the location was lacking</td>
<td>20%</td>
<td>13%  + 4% some deficiency</td>
</tr>
<tr>
<td>Legal Description of Things was insufficient</td>
<td>13%  + 22% some deficiency</td>
<td>6%  + 6% some deficiency</td>
</tr>
<tr>
<td>Reasonable Grounds for Things was inadequate</td>
<td>10%  + 16% some deficiency</td>
<td>13%  + 6% some deficiency</td>
</tr>
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“Some deficiency” not enough to necessarily invalidate the warrant

VI. CERTAIN ISSUES IN THE WARRANT APPLICATIONS

A. Sourcing of Information

In order to disclose reasonable grounds, it is important that an affiant properly describe the source of the information. The panel found that in 74% of the warrants, the information was properly sourced. In 22% there was some sourcing of the information. In 4% of the applications, the affidavit was filled with unsourced information. In the Ontario study, 59% of the warrants contained proper sourcing, 36% had some sourcing and 5% contained unsourced narrative. On this measure, clear

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35 Supra note 1 at 119-23 (Table 1).
improvement on the requirement for foundation or basis for conclusions can be seen.

B. Informants

When the information comes from a confidential informant, it is important that the information be corroborated or the reliability of the informant be substantiated. In 90% (19 out of 21) of the applications where information from a confidential informant was referenced, the information was properly corroborated with other independent information. In 86% of the applications, the reliability of the informant was properly explained. Although the panel concluded that most applications established sufficient information to support the minimum levels necessary to support reliability and corroboration, in 43% (9 out of 21) we would have liked to see more information to establish either the informant’s reliability or corroboration of the informant’s information.

1. Ms. Cawley’s Comments

Special concerns arise when a search warrant application is based on informant information. The court, Crown, and police are obligated to protect informant privilege. The law has made clear the privilege is not qualified by R. v. Stinchcombe disclosure obligations and is subject only to the “innocence at stake” exception. In two warrants, accounting for 10% of the warrants containing informant information, there was detail included that could have identified the informer. This is problematic. There is simply no margin for error when protecting the identity of a confidential informant. It is a worthwhile reminder to all investigators that the duty to protect informant privilege arises whether the informant is anonymous or known to police. Courts have recognized that “the smallest or most innocuous detail may unwittingly reveal the identity of the informer”. Police should exercise heightened caution when using information from anonymous sources as it is extremely difficult to ascertain whether the detail will reveal the informer’s identity.

Affiants are faced with a challenging task when they use informant information to justify a search warrant. There is a natural tension between including enough detail to allow the Justice to assess the content and reliability of the informer tip and the legal obligation of the police to protect informer privilege. While informer privilege prevents disclosure of certain details, it does not dilute the “totality of the circumstances” test outlined in Debot.\(^{39}\) How does an affiant navigate between his legal obligation to protect the informer’s identity and simultaneously meet the reasonable grounds threshold in the information to obtain? In the sample of warrants reviewed, the compromise was to summarize the informer information. The summary was written in a manner that protected the informer’s identity yet permitted disclosure to the accused. This is an acceptable practice provided the affiant does not mislead the authorizing justice and is full, fair and frank in the summary.

When faced with uncertainty, investigators should consult with the Crown’s office and consider obtaining a sealing order.\(^{40}\)

2. Cpl. Schaible’s Comments

In all, 10% of the reviewed Warrants (2 out of 21) that included confidential informant information did not properly reference or corroborate the informant. I will re-iterate Ms. Cawley’s comments in that it is the affiant’s job to detail as clearly as possible, depending on each individual circumstance, that the informant’s information is compelling, credible and wherever possible, corroborated.\(^{41}\) Affiants who are including an informant in their grounds need to be very conscious of the difficult balance between providing the Justice enough detail to help them assess the credibility of the informant and the confidential informant’s right to have their identity protected by not revealing identifying details.

In those instances where an affiant does not have experience in handling informants and/or drafting authorizations that include confidential source information, I would strongly urge them to request the assistance of a Crown attorney to review the material before submitting it to the court for consideration.

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\(^{39}\) *Debot*, supra note 21.

\(^{40}\) Pursuant to s 487. 3 of the *Criminal Code*, supra note 6.

\(^{41}\) *Debot*, supra note 21.
C. Night Time Executions

Section 488 of the Criminal Code requires a warrant issued under 487 or 487.1 to be executed by day (defined in s. 2 as between 6 am and 9 pm) unless reasonable grounds exist and the warrant is authorized for night execution.

The panel found that all search warrants (three) which sought to execute a Criminal Code search warrant during night hours contained grounds for that request. There were an additional eight CDSA search warrants which sought night execution. Of these eight drug warrants, seven contained specific grounds to justify executing the CDSA search warrant at night. Arguably, a CDSA search warrant does not require explicit grounds to justify a night execution (see Ms. Cawley’s comments below). The panel did not consider it an error when grounds were omitted to execute a CDSA search warrant at night.

There were five files all relating to the same lengthy drug investigation. Each of these five court files consisted of three applications to search a cell phone. They appeared to be Criminal Code search warrants but the standard Criminal Code form was not used. In each case, the police were seeking to search a cell phone to further a drug investigation. The phone had already been seized and was in the police exhibit locker. The Information to Obtain had been filled in seeking to execute by “day or night”. The information to obtain did not contain explicit grounds to search by night. In some cases, the warrant was granted for an extended period of time so that the police Tech Crime unit would have time to search for data on the phone. There was information in the third application (which was filed requesting an extended expiry date) that a police backlog would require at least one year for the phones to be analysed. In the second and third applications of these series of warrants, the warrants were noted as authorizing a search “by day”. These series of applications are problematic for a number of reasons:

- They related to a drug investigation and no additional grounds to justify a night execution if it was a CDSA warrant would be required.
- These warrants were for devices already in police custody so the usual justification for the requirement for reasonable

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42 Criminal Code, supra note 6, s 488.
grounds to execute at night are absent. The phone is already in police custody and there is no greater invasion of privacy if the phone is searched at night as opposed to during the day.

Given that these series of applications did not involve the search of premises like a residence or commercial business, the panel concluded that these applications should not be counted as errors in neglecting to include reasonable grounds to justify night execution. This provides an example of where traditional search principles do not fit comfortably with searches of modern, digital devices.

1. Ms. Cawley’s Comments

i. Section 11 CDSA warrants

The prohibition on night warrants in section 488 does not apply to warrants issued under section 11 of the CDSA. CDSA search warrants may be executed “at any time” without justification for doing so in the information to obtain.43 There has been some judicial debate about this point.44 Indeed, even the original search warrant review article stated that, “s.8 of the Charter, at least in respect of dwellings, requires the inclusion of reasonable grounds in the information to justify the extraordinary step of a night search”45 (in the context of a CDSA search). Subsequent case law has not imposed that high a standard.46 In R. v. Saunders, the majority of the Newfoundland and Labrador Court of Appeal,47 concluded that:

...the determination by the trial judge that, in the case of a search warrant issued pursuant to the authority of section 11 of the CDSA, ‘there must at the very least be something in the information to obtain from which the justice can draw an inference that the request to search at night has a reasonable basis is, on the law as it presently stands, in error.’48


Supra note 1 at 95.


Later affirmed by the Supreme Court of Canada in R v Saunders, 2004 SCC 70, [2004] 3 SCR 505.

There is also confusion surrounding whether authorization for night execution should be sought when a CDSA warrant is obtained by telewarrant pursuant to section 487.1 of the Criminal Code. In my view, if a warrant is obtained pursuant to s.11 of the CDSA it does not require night execution justification regardless of whether it is sought in person or by telewarrant.

Section 11(2) of the CDSA states:

Application of section 487.1 of the Criminal Code
(2) For the purposes of subsection (1), an information may be submitted by telephone or other means of telecommunication in accordance with section 487.1 of the Criminal Code, with such modifications as the circumstances require. (emphasis added)

The meaning of “with such modifications as the circumstances require” in ss. 11(2) of the CDSA was considered in R. v. Dueck. Police had executed a CDSA warrant at night that was authorized under the telewarrant provision in ss.11 (2). Dueck alleged that the trial judge erred in finding the CDSA warrant authorized the police to search the residence at night. Counsel for the accused conceded that a warrant executed under the CDSA may be executed “at any time”. He argued, however, that this did not apply to the telewarrant section in ss.11 (2) of the CDSA. The British Columbia Court of Appeal rejected this argument. The Court adopted a common sense approach pointing out that:

...no sensible reason comes to mind that would require the provisions of a warrant obtained over the telephone or by fax under the Controlled Drugs and Substances Act to be different in substance from one obtained in person where the substantive requirements to obtain them are the same.

Accordingly, Saunders and Dueck support the position that investigators need not justify the night execution of a CDSA search

49 Criminal Code, supra note 6 at s 487.1.
50 CDSA, supra note 33 at s. 11.
51 Ibid, s 11.2.
53 Ibid at para 2.
54 Ibid at para 22.
warrant whether the warrant is obtained in person or using the telewarrant provision.

D. Technological Issues

Thirty one years ago the Supreme Court of Canada decided that judicial pre-authorization for a search, where feasible is the constitutional standard required by section 8 of the Charter in the vast majority of cases.\(^{55}\) In *R. v. Evans*,\(^ {56}\) the Supreme Court said that a warrantless search is presumed unreasonable, unless the party seeking to justify it can rebut the presumption. These principles have been affirmed and applied recently as the same Court grapples with the advance of technology and vast amounts of information that can be carried around on small devices or stored in computers in the home. The Supreme Court continues to rely on front line judicial officers to screen and balance the citizen’s reasonable expectation of privacy against law enforcement’s request for searches to further criminal investigations. For example in *Vu*\(^ {57}\) the Court noted that requiring specific authorization to search a computer listed in the warrant alerts the judicial officer to the need to weigh the distinctive privacy concerns raised by computer searches and whether in the circumstances it should give rise to law enforcement’s goals. In *Spencer*,\(^ {58}\) the Supreme Court found that the linking of anonymous internet activity to a certain subscriber engaged a reasonable expectation of privacy and therefore the police should have sought judicial pre-authorization for subscriber information.

1. Cpl. Schaible’s Comments

The committee identified some issues surrounding warrant applications dealing with technological items. Unfortunately, legislation cannot be drafted and updated to reflect the rapidly changing world of technological devices that police must seek to search in their investigations. This creates a grey area that is usually addressed through litigation and affiants are then guided by new and emerging case law. This, however, poses great difficulties for an affiant who is attempting to work

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\(^{55}\) *Southam*, *supra* note 22.


\(^{57}\) *Vu*, *supra* note 29 at para 47.

within the confines of the law where there is no clarity on the subject. Defense counsel would like police to include restrictions on what can be searched and, where possible, I would also encourage this practice.

Having said that, it is not always possible to be specific as the technology used by police to conduct the search of a computer or cellular device may not be able to narrow in on specific texts or specific photos (as an example). Tech Crime investigators advise that the software used for retrieving information from different devices and various models of devices (even models from the same company) may not always allow the retrieval of the same information. In order to address this challenge, I would strongly recommend that affiants consider including a paragraph from a Tech Crime member (expert) stating the limitations of the search technology they will need to use in an effort to educate the reviewing Justice as to what their software is, or is not, capable of retrieving. This suggestion is comparable to a drug investigator including a paragraph in their grounds from a qualified drug expert on why certain items are usually present in a drug search (i.e. score sheets, residency documents, scales, etc) to justify the inclusion of those items in their “Items to be searched for” section.

E. Rejected Applications

In all, 13% (16 out of 125 applications) of the Manitoba warrants were rejected by the reviewing judicial authority. By comparison, in the Ontario study 7% of the applications were rejected. In this study, for each denial, written reasons for rejection were included in the returned court information. Some applications were rejected for more than one reason. The reasons for denials included the following:

- Wrong date on the Information to Obtain (ITO) for the offence – 3 out of 16 (19%)
- Wrong name of suspect – 1 out of 16 (6%)
- Wrong address – 2 out of 16 (13%)
- No offence date – 1 out of 16 (6%)
- No jurisdiction – 1 out of 16 (6%)
- Inadequate description of phone/place – 1 out of 16 (6%)
- Lack of jurisdiction for offence – 1 out of 16 (6%)
- Lack of grounds for place – 5 out of 16 (31%)
- Lack of grounds for items – 4 out of 16 (25%)
• No reference to attached Appendix (grounds attached to affidavit) – 1 out of 16 (6%)
• Did not identify that there was a prior application made – 2 out of 16 (13%)
• Technical issue – no place for the JJP to sign in Telewarrant – 1 out of 16 (6%)

The panel largely agreed with the reasons for rejection with the exception of two cases. In one the matter was rejected for lack of reasonable grounds, in the other it was rejected because the judicial officer felt the police applied under the wrong Criminal Code section number. The panel felt that there were sufficient grounds in the first case. In the second, the panel disagreed that the applicant was required to apply for a production order under another section number. Ultimately in that investigation, the production order that was sought by police was authorized by a Provincial Court Judge on a third application.

It is helpful to note the statistics kept by Manitoba Courts in the last years as to the rates of rejection of warrants and orders:
• 2010 – 1970 Applications, 402 of those applications were rejected – 20%  
• 2011 – 2092 Applications, 402 of those applications were rejected – 19%  
• 2012 – 2280 Applications, 410 of those applications were rejected 18%  
• 2013 – JJP: 1769 applications, 293 of those applications were rejected – 16.5%  
  o Judges: 535 applications, 57 of those applications were rejected – 11%  
• 2014 – JJP: 1837 applications – 371 of those applications were rejected – 20%  
  o Judges: 565 applications, 52 of those applications were rejected – 9%59

It does appear that a healthy level of scrutiny is being brought to bear on judicial applications.

59 Based on statistics provided by the Manitoba Court Office search registry via e-mail on June 23, 2015. These types of statistics will be published in future Provincial Court Annual Reports.
1. Judge Krahn’s Comments:

In all of the cases where a warrant was not granted, the judicial officer provided written reasons for the rejection. This is an improvement from what was noted in the Ontario study where written reasons for rejection were not consistently provided.

In one case the warrant was rejected because the judicial officer erroneously believed that the application should have been made under section 487.013 not section 487.012. This highlights a more recent difficulty with a legislative approach which is to continue to add to the Criminal Code different types of court authorizations. This creates difficulty because it increases the technical difficulty of choosing the right tool to further an investigation. Academics have long been advocating for the simplification of the Criminal Code rather than the continued additions of more sections which, arguably, cause the law to become more and more inaccessible to both front line judicial officers and police officers who most often do not possess law degrees.

The number of rejections support that judicial officers are fairly and accurately scrutinizing the applications. The providing of reasons for rejection promotes transparency and education of the police officer to the identified deficiency. From an even broader perspective, it promotes Charter compliance and the truth-seeking function of the legal process.

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60 Supra note 1 at 111-12.
61 Criminal Code, supra note 6, s 487.012 - .013
62 See R v Telus Communications, 2013 SCC 16, [2013] 2 SCR 3. Where Telus successfully argued that the police chose the wrong type of authorization in seeking to obtain text messages on a go-forward basis. A similar debate is currently unfolding based on a gap in the types of production orders available because the legislation does not allow you to capture subscriber information on a “go forward” basis to accompany tracking warrants and trace communications recorders, see Re Transmission Data Recorder Warrant, 2015 ONSC 3072, [2015] OJ No 2471.
64 Charter, supra note 2.
The reasons fulfill an important role in educating the police officer, allows for correction of the deficiency and furthers transparency in the decision making process.

Anecdotally, one sometimes hears the concern that the judicial officer is merely a rubber stamp for law enforcement. Based on our examination, the Panel concluded this was not the case. While there was an error rate that we have described for warrants authorized that ought not to have been authorized, this can largely be attributed to misunderstandings of the legal definitions in a few cases and applying a lower standard of what amounts to reasonable grounds.

There was also good evidence of judicial officers approaching their task with scrutiny and good faith. The panel noted that in numerous instances, the judicial officer would delete items identified on the search warrant for which there were no grounds in the information to obtain the warrant. In numerous instances, the judicial officer would include date limitations for records being sought, in order to properly limit the scope of records being produced to those which were related to the grounds in the affidavit. In another instance, the judicial officer deleted an overbroad phrase “and any other cell phone number....” when the investigation related to explicit sexual messages being received from one cell phone.

In one instance, the judicial officer endorsed the night execution of an entry warrant when grounds had been substantiated for this in the affidavit. It is not immediately clear that the Criminal Code requires an officer to seek permission to execute an entry warrant as section 488 requires that all search warrants be executed by day unless there are grounds to search at night. There is no reference to section 529 in section 488. Section 529.2 permits a judicial officer to include any conditions on the execution of the entry warrant that would make it “reasonable in the circumstances.” While there have not been appellate

66 See Criminal Code, supra note 6 at s 529.
67 Ibid, s 488.
68 Ibid, s 487.
69 Ibid, s 529.
70 Ibid, s 488.
71 Ibid, s 529.2.
decisions that have specifically ruled on this issue, in *R. v. N.M.*,\(^\text{72}\) Justice Hill, in *obiter* comments, concluded that a combined reading of sections 487, 488, 487.1 and 529.5\(^\text{73}\) would require judicial pre-authorization of a night time execution of an entry warrant. This is an example of a police officer seeking authorization for a night time search as a best practice and the judicial officer giving consideration to that request and authorizing it.

**F. Applications Authorized that ought not to have been**

The panel felt that 23%\(^\text{74}\) of applications were authorized but ought not to have been. Nine of these were authorized by a Provincial Court Judge and 16 by a Judicial Justice of the Peace (JJP). In most of these cases the panel did not agree that the information contained in the application was sufficient to meet the reasonable grounds test, in relation to the items likely to be found at the location or insufficient grounds to establish the delineated offence. In a number of occasions the warrant package was deficient in more than one area.

1. **Judge Krahn's Comments:**

Of the 25 warrants granted that we found should not have been, 15 were applications by the same police officer from a smaller urban center and related to the same, lengthy drug investigation into multiple accuseds and multiple offences. These 15 applications related to only five devices that had been seized when many search warrants were executed at different locations. In each of these five files, there were three applications made as the police officer tried to correct errors he had noticed, even after being granted the first authorization. The applications themselves were difficult to read and understand. The panel ended up re-reading and returning to them more than once in order to evaluate them. The Informations to Obtain were obviously “cut and pasted” from earlier applications in order to seek search warrants for various devices that had been seized from residential properties at the conclusion of a lengthy police investigation. These applications exemplified the difficulty that an affiant may have in synthesizing a large amount of information and including only relevant information related to the search of one device.

\(^{72}\) *R v M (N.N.)*, [2007] 159 CRR (2d) at para 236, 223 CCC (3d) 417.

\(^{73}\) *Criminal Code*, supra note 6, ss 487, 488, 487.1, & 529.5.

\(^{74}\) 25 of 109 of the applications.
into one document. These series of warrants contained a great deal of irrelevant information which would have made it more difficult for the judicial officer to sift out those pieces that actually bore on the requirements necessary to validly issue the warrant. The panel concluded that sufficient grounds likely existed but the affiant’s ability to articulate was wanting.

So while the panel has concluded that 23% of the warrants were authorized that ought not to have been, the numbers do not tell the complete story. Since 15 of the 25 were warrants granted by the same two judicial officers and written by the same police officer in relation to the same lengthy investigation, the same type of mistake is being made and double or triple counted in our review. If this is taken into account, it is more accurate to conclude the “error rate” in our study is 14%.

G. Reports to Justice

The Report to Justice sections in the Criminal Code (sections 489.1 and 490)\textsuperscript{75} are designed to be a check-and-balance so the court has some type of documentation explaining the results of the execution of a duly authorized warrant and the items that were seized under that warrant or any other appropriate authority.

Upon review, the panel determined that in 87 out of 100 authorizations a Report to Justice ought to have been filed. The panel reviewed each of the corresponding Reports to a Justice that were filed with the court in relation to the 100 reviewed authorizations and discovered that of the reports that needed to be filed, only 60% were actually submitted to the court. Of those that were actually filed, several of them had errors in the paperwork including quoting the wrong section number of the warrant and incomplete reports.

There are special requirements for Reports to a Justice where a telewarrant is sought (s. 487.1 (9) C.C.)\textsuperscript{76} that require the filing of a report “as soon as practicable but within a period not exceeding seven days after the warrant has been executed”. Upon review, the committee found that of the 17 authorizations that were obtained via telecommunication and required the filing of a report, only 12 such reports were submitted and

\textsuperscript{75} Criminal Code, supra note 6, ss 489.1 & 490

\textsuperscript{76} Ibid, s 487.1(9)
that less than half (only 42%) were actually filed within the specified 7 days.

Finally, the committee determined that 40% of the reports that should have been submitted were not filed at all. Sections 489.1 and 490\(^\text{77}\) of the Criminal Code clearly outline law enforcement’s responsibilities post-search with respect to reporting the results of a search and identifying the items seized to the court. Recently, the Court of Appeal in Ontario highlighted in R. v. Garcia-Machado,\(^\text{78}\) that a failure to file a Report to Justice “as soon as practicable” (or at all) is a Section 8 breach of the Charter in that “Everyone has the right to be secure against unreasonable search or seizure”.\(^\text{79}\) In that decision, the Ontario Court of Appeal quoted Canada v. Southam Inc., stating “The matter seized thus remains under the protective mantle of s. 8 so long as the seizure continues.”\(^\text{80}\)

1. Cpl. Schaible’s Comments

More and more cases across the country are being challenged by defence counsel relating to the failure of police to properly file the required Report to a Justice and the courts are starting to view this failure as “symptomatic of an institutional and systemic problem”.\(^\text{81}\) I would strongly encourage all law enforcement agencies to re-visit those sections of the Criminal Code and ensure all their members understand their obligations for the post-search reports to justice as we clearly have room for improvement in this area.

VII. CONCLUSION

A. Ms. Cawley’s Comments

The overall results of the Manitoba search warrant review project were positive. However, a potential systemic issue was identified concerning the search warrant training available to smaller municipal and specialized police agencies within the province of Manitoba. The smaller agencies had

\(^\text{77}\) Ibid, ss 489.1 & 490
\(^\text{79}\) Charter, supra note 2, s 8.
\(^\text{80}\) Southam, supra note 22 at para 41.
\(^\text{81}\) Garcia-Machado, supra note 78 at para 29.
the highest percentage of warrants assessed as “substandard”. The smaller agencies also had the majority of applications containing sourcing issues, erroneous applications for night execution, and inadequate grounds to support the issuance of the warrant.

Rural municipal police agencies and specialized units are encouraged to proactively seek out search warrant training opportunities. There is much to be gained by developing good working relationships with experienced members of the larger agencies. If possible, members should participate in the courses offered by the RCMP or WPS. Additionally, the role of the Crown cannot be overstated. It is important that the Federal and Provincial Crown offices continue to support these units by assisting with formal search warrant training and offering to review search warrant materials before they are submitted.

Police officers are participants in a justice system that demands a balance between law enforcement goals and individual privacy rights. The Manitoba search warrant sample demonstrated that the majority of investigators understand and respect the need to maintain that balance. For example, the warrants reviewed for this project were submitted in 2013, a time when there was uncertainty concerning police powers to search cell phones incident to arrest. The Supreme Court had not yet released its decision in *R. v. Fearon*. In the course of review, the committee noted several search warrant applications for cell phones that were likely unnecessary as the search would have been authorized by the common law doctrine of search incident to arrest. The fact that an investigator, in circumstances where there was legal uncertainty, pursued judicial authorization as opposed to relying on a pre-existing common law doctrine demonstrates a desire to be Charter compliant. These efforts should be commended.

Investigators and prosecutors alike must appreciate that systemic weaknesses, including a failure to adequately train police officers, will have negative consequences including the exclusion of evidence. For this reason it is imperative that training for all police agencies in the province is prioritized to ensure standards are maintained and that investigators are apprised of changes in the law.

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B. Cpl. Schaible’s Comments

The Committee evaluated each package and assigned an A to an application that demonstrated a sophisticated police understanding of warrant drafting requirements, a C+ when the application demonstrated a passable, decent understanding of warrant drafting requirements and an F when the application demonstrated a substandard understanding of warrant drafting requirements.

A large number of warrants the committee reviewed were very professionally written and met all the legal requirements for judicial authorization. The bulk of the reviewed warrants were drafted by the two largest police agencies in Manitoba, namely the Winnipeg Police Service and the Royal Canadian Mounted Police, who wrote 84% of the original warrants reviewed. It is also clear that the large majority of those applications were well written and received either an “A” or “C+” rating – WPS (84%) and RCMP (87%). I highlight these statistics to point out that the continued efforts of both agencies to focus on education through various warrant drafting courses has had a positive overall effect on their final product and should be encouraged into the future.

Our review also indicated that in some instances, the smaller police agencies in the province have struggled with their judicial applications and a greater focus should be emphasized on the continued education and development of their members. Efforts have already been made to reach out to these agencies to offer them some positions on upcoming warrant drafting courses.

On occasion, I am approached by affiants expressing frustration at the reviewing Judicial Justices of the Peace (JJPs) for denying their warrant application. In some instances, I concur with their frustration at the inconsistencies between different JJP’s. However I would also like to point out that not all police officers submit applications to the highest standard and an individual's understanding and interpretation of the law will always play a role in our system. I would like to highlight, however, that our review of these 100 warrants, including the 25 different re-applications for previously denied warrants and the corresponding rejection letters from the court, showed the JJP’s do a very good job providing consistent reasons for their rejection, which is supported in law.

While law enforcement appreciates as much consistency as possible from the court when it comes to judicial authorizations, it is impossible to eliminate the occasional human error. Certainly a continued focus on
training and education for JJP's and Judges is to be encouraged as it is for law enforcement personnel and their affiants.

Judicial authorizations are a powerful tool at the disposal of the police and great care should be taken to ensure that each application meets the necessary legal requirements. As technology changes, there are many hurdles to overcome as affiants navigate their way through the challenges of submitting a warrant in an environment where the statutes do not provide specific guidance on how to search these ever-changing technologies. Keeping an eye on the case law coming out of the Supreme Court and Manitoba Courts will be important as we move forward in dealing with these challenges. Ultimately, police officers want to do things right and it is up to the various police agencies to ensure they have the tools to do the job properly.

C. Ms. Inness Comments:

Without access to the full file it is impossible to know how many of the applications reviewed may have contained false or misleading information, or omitted information that should have been included. To that extent, the review is limited to an analysis of the face of the ITO and warrant.

The review uncovered some systemic deficiencies in the warrant-granting process in Manitoba, many of which could be rectified with education and training. While the findings/observations of this working group may lead to improvements in the system, this “deconstruction process” lent itself to some fruitful areas for defence counsel to consider in defending clients in warrant cases.

Defence counsel should scrutinize applications where inferences are required to support the grounds. Although the reviewing judge should take into account reasonable inferences that can be drawn from the information in the ITO\textsuperscript{83} there must be a sufficient evidentiary basis to do so. Furthermore, while some inferences are readily available based on common sense reasoning, others may require a bit of specialized knowledge or additional information.

Given the fact that very private and personal information is frequently stored on cell phones, there should be some restriction on the time-frame

\textsuperscript{83} \textit{Vu, supra} note 29 at para 16.
of the data to be searched, as well as the areas within the phone (e.g. texts, emails, phone logs), the same could be said for requests to search other electronic equipment, i.e. computers. The Supreme Court of Canada’s ruling in *R. v. Fearon*\(^84\) sends a strong message to law enforcement to limit the searches of cell phones incident to arrest to a valid purpose for the search. The recognition of highly personal information stored on personal electronic devices underscores the importance of clearly defined searches. This case, along with *Vu*\(^85\), speaks to the importance of ensuring that searches go no further than reasonably necessary. Defence counsel have strong ammunition in these decisions to attack search warrants for electronic devices where no limits are put in place in order to protect privacy interests.

It was a general consensus among the group that many of the warrants that contained deficiencies likely would have withstood a *Charter* challenge, either by way of correction of the technical defects or the evidence being admitted under section 24(2)\(^86\). From the writer’s perspective, this prediction was based upon the observation that very few warrants are quashed in Manitoba. One is hard pressed to find cases in any database search in Manitoba where a warrant was found to have issued in breach of section 8 and the evidence excluded under section 24(2). Is that a result of the warrants in Manitoba meeting the statutory and constitutional requirements for prior judicial authorization? Or is that as a result of a very restrictive application of the test by reviewing judges? The recent decision of *R. v. Evans (E.D)*\(^87\) may answer that question for those who are more defence-minded. Notwithstanding materially misleading and false information being presented by the affiant, the warrant was upheld in what was described by the trial judge to be a “close call”. If the warrant in that case was upheld, one is left to wonder what would be required in order to have one quashed.

Reading a number of warrants in succession was helpful in identifying flaws or inadequacies. Sometimes it was necessary to read an ITO multiple times in order to “see” the issues. A similar approach in practice can lead

\(^{84}\) *Fearon, supra* note 28.

\(^{85}\) *Vu, supra* note 29.

\(^{86}\) *Charter, supra* note 2, s 24 (2).

\(^{87}\) 2014 MBCA 44, 306 Man R (2d) 9.
to the discovery of a possible attack on a warrant that was not apparent at first blush.

Often times defence counsel focus our analysis on the ITO and gloss over the actual warrant. This exercise emphasized the importance of closely examining the issuing document itself. Errors on that document may serve as a valuable tool in the attack on its issuance.

D. Judge Krahn’s Comments:

In the Ontario study, Hutchison noted justices of the peace “are largely without formal training.”88 There has been significant improvement and change since that study was conducted in 1999. Judicial Justices of the Peace in Manitoba now have at least two days set aside for education and training twice a year, as well as ongoing on the job training.

The fundamental requirements of judicial authorizations and identified needs for training based on informal feedback from the Superior Court, the bar or law enforcement are addressed in those training sessions. The Provincial Court judges also have annual education sessions and the opportunity to attend more educational programs across the country and abroad. The National Judicial Institute offers a great variety of high calibre judicial training in Canada. In 2000, the Ontario study concluded that 61% of the authorizations would not survive a section 8 Charter challenge and 69% should not have been authorized. In our review, we concluded that 20% might not survive a Charter challenge and 23% were authorized that should not have been. When one takes into account the repetition of 15 applications in relation to the same investigation, it is more accurate to say that we found an error rate of 14% of authorizations granted that ought not to have been. While there is still scope for improvement, there is significant reason for optimism that judicial officers are largely getting it right and education programs have begun to address the shortcomings noticed in 2000.

88 Supra note 1 at 110.
## Appendix A

<table>
<thead>
<tr>
<th>Warrant Review Exercise</th>
<th>Reviewer</th>
<th>Warrant No. (from tab)</th>
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</tbody>
</table>

### Documents in File

- □ Information to Obtain □ Warrant/Order □ Report to Justice □ Detention Order
- Charges laid □ yes □ no
- □ Other
- ________________________________________________________________
- ____________________________

Total pages of ITO - Total pages overall -

### Warrant Application Data

1. Warrant/Order prepared by □ WPS □ RCMP □ Other – Specify ____________

1A. Affiants - □ General Duty □ Specialty Section – Specify ____________

1B. Affiants - years of service – Specify _________________

2. The type of Warrant or Order
   - □ Search Warrant □ C.C. □ CDSA □ Other (HTA, etc...) Specify ____________
   - □ Production Order
| □ DNA Warrant                                      |
| □ Other (General, Impression, Tracking etc...) – Specify ____________________________ |

2A. The Warrant was issued by Telewarrant □ yes □ no

2B. The reason for the Telewarrant requirement was provided □ yes □ no

3. The Warrant was issued by a □ Judicial Justice of the Peace (JJP) □ Provincial Court Judge (PCJ)

3A. Court Location: □ Winnipeg □ Portage □ Brandon □ Thompson □ Steinbach □ Dauphin □ The Pas

3B. Does the material in the file indicate any earlier application, whether granted or not?

□ Yes (an earlier application was made) or □ no indication of an earlier application

3C. Written reasons for rejection provided?

□ yes □ no

3D. Reason for rejection supported in law?

□ yes □ no

Reasons for rejection (add into “Other Notes” at the end):

□ Lack of reasonable grounds

□ Inaccuracies or inadequacies on the place to be searched

□ Adequate description of the offence
□ Reasons for Telewarrant requirement not specified
□ Other

4. The location to be searched is a

□ dwelling house where the suspect resides (DWH)

□ dwelling house, other (DWHO)

□ financial institution (FI)

□ other investigator (□ regulatory agency or □ other police officer) (OI)

□ institutional repository of evidence (e.g. TSE, prison, etc.) (IR)

□ utility (hydro, phone) (UT)

□ commercial (COM)

□ computer (CMPT)

□ iPhone

□ iPod

□ cell phone

□ other (OTH)
5. Does the Information to Obtain set out reasonable grounds with respect to:

   - yes
   - no

   - [ ] the commission of the offence
   - [ ] the things to be seized will afford evidence
   - [ ] the things are at the location to be searched

6. How are the Grounds in the Information to Obtain sourced (pick one):

   - [ ] in general properly identify and reference all necessary investigative sources
   - [ ] reference some investigative sources, but portions of the information are without any identified investigative source (e.g., “my investigation has revealed ...”)
   - [ ] is essentially an unsourced narrative of the offence the officer believes has been committed.

7. Does the Warrant contain a legally adequate description of:

   - yes
   - no

   - [ ] offence under investigation
   - [ ] the place to be searched
8. Does the Warrant provide for s. 488 night execution? □ yes □ no

8A. If yes, is the endorsement property justified in the Information? □ yes □ no

### Informers

9. Does the Information make reference to Informers (unidentified persons claiming informer privilege)?
   □ yes □ no (If no, skip to next section)

9A. Did the Information depend on the informer’s credibility for its issuance? □ yes □ no

9B. Was the informer’s evidence properly referenced and corroborated? □ yes □ no

9C. Is the informer reliability properly explained, not simply identified as “known to me and proven reliable in the past” without more? □ yes □ no

### Specialized Warrants and Endorsements

10. Did the Warrant involve any of the following special provisions, and if so, was their use justified in the information?

   □ s. 487(1)(c.1) (offence related property)

   □ s. 487(2.1) (search of computer for data)
<table>
<thead>
<tr>
<th>□ s. 487.02 (assistance orders)</th>
</tr>
</thead>
<tbody>
<tr>
<td>If an assistance order was granted, at whom was it directed?</td>
</tr>
<tr>
<td>Specify: ____________________</td>
</tr>
<tr>
<td>Was the assistance order justified in the information? □ yes □ no</td>
</tr>
<tr>
<td>□ s. 487.03 (sealing order)</td>
</tr>
</tbody>
</table>

**Regulatory Relationship**

11. Does the Warrant application raise Colarusso issues (i.e., does it refer, or seek to seize, evidence gathered using a regulator/administrative statutory power)?

□ yes □ no

**Special Locations**

12. Did the Warrant authorize a search of a “special location” (i.e. law office, receptacle of medical, mental health, counselling or media outlet records)? (If no, skip to next section)

□ yes □ no If yes, specify: _________________________

12A. If so, did the Warrant address the issues associated with the special location?

(endorsements or other accommodation of the nature of the place)

□ yes □ no

**Inadmissible Evidence (Charter breach or otherwise)**
13. Does the Warrant include reference to evidence likely not admissible or properly available for the Warrant application? □ yes □ no

13A. If yes, does the Warrant application properly identify the evidence as such?
□ yes □ no

13B. The nature of any such evidence is earlier
□ s. 8 breach □ s. 10(b)/statement breach □ other Charter breach

**General Observations**

14. Does the Warrant application demonstrate a:

□ sophisticated police understanding of warrant drafting requirements (A)
□ passable, decent understanding of warrant drafting requirements (C+)
□ sub-standard understanding of warrant drafting requirements (F)

15. Overall, **should** the warrant have been issued (as distinct from “could it have issued”)?
□ yes, it should have issued □ no, it should not have been issued

16. Would the warrant likely have been confirmed in any subsequent Charter or other challenge?
□ yes, would have survived challenge □ no, would likely have been struck down
16A. Could some part of the warrant have survived scrutiny if severed from the defective/deficient portions of the document? (Y, ᴴ, N)

☐ yes ☐ no

17. On the basis of the material, was it legally necessary for the investigator to have obtained a warrant?

☐ yes ☐ no

18. Comments/ Other Notes

___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
## APPENDIX B

<table>
<thead>
<tr>
<th>Agency/ Affiant</th>
<th>Type</th>
<th>Application Information</th>
<th>Grounds</th>
<th>Sourcing</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 8127 WPS</td>
<td>S- Drugs</td>
<td>SW-CDSA JJP WPG Y Y  DWH Y Y Y ✓</td>
<td>N Y Y</td>
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<td></td>
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<tr>
<td>2 8127 WPS</td>
<td>&quot;</td>
<td>SW-CDSA JJP WPG Y</td>
<td>DWH Y Y Y ✓</td>
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<tr>
<td>3 8141 TAX</td>
<td>SW</td>
<td>JJP WPG e-iPhr Y % Y ✓</td>
<td>Y Y Y</td>
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<td></td>
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<tr>
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Note: Y = Yes, N = No, C+ = Committee's Overall Assessment of 4/5, A = Acceptable, F = Unacceptable, Rej = Rejected, Incons = Inconsistent, Off = Offence, Thgs = Things.
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I. INTRODUCTION

Defence lawyers should not be so quick to move to find their clients not criminally responsible (NCR). People do not ‘get off’ when they are found not criminally responsible. Clients are remanded into custody and their liberty can be affected far more effectually than by a prison sentence. Recent changes to the Criminal Code suggest defence counsel should be all the more vigilant about the potential for NCR findings.

It is difficult for counsel to predict the corollary effects of an NCR finding, and such a finding can lead to unintended consequences for any client. A client who is not facing a lengthy term of imprisonment may find themselves in a forensic hospital and subject to a Review Board for many years for a trivial offence all the while with their liberty extremely restricted. For the purposes of this article, my comments consider primarily those who are charged with violent offences who may be facing a penitentiary sentence. Furthermore, a distinction must be drawn between Mental Health Court and NCR proceedings. Counsel who contemplate seeking (or, in some cases, not opposing) an NCR finding should consult with an expert to determine the disposition that is likely to be imposed by the Review Board. A client who will be viewed as a significant risk or who is unlikely to respond to treatment may spend the rest of his or her life under mental health supervision.

* WITH ZACH KINAHAN, B.B.A., J.D.
While the current regime under Part XX.1 of the Criminal Code is modernized and Charter-compliant (see Winko v. Forensic Psychiatric Institute\(^1\)), there is still great scope for significant deprivations of liberty for those found NCR. In some cases, these deprivations may seem disproportionate, especially when the gravity of the accused person’s conduct is minor to moderate in nature. This was recognized by Joan Barrett and Rium Shandler in Mental Disorder in Criminal Law:

> Also, in cases where the offence charged is minor in nature, the accused may prefer to be convicted and sentenced rather than be found NCR and subject to the Review Board’s jurisdiction for an indeterminable length of time. Indeed, in some cases, it may be viewed as irresponsible to raise the defence where the offence charged is minor or only moderately serious.\(^2\)

An apt sentiment is found in the R. v. Kankis\(^3\) case involving an appeal from an NCR finding where the accused was charged with six counts of breaching his probation order and his recognizance. In allowing the appeal, Trotter, J. made the following observations about the implications of an NCR verdict:

> At times, the criminal law proves itself a rather blunt instrument by means of which to deal with those who suffer from mental illness and are alleged to have committed non-violent crimes...A special verdict of not criminally responsible on account of mental disorder has significant consequences for a mentally disordered offender, Part XX.1 of the Criminal Code notwithstanding. It is especially so in the case of persons who prove intractable when offered treatment and whose "crime" is non-violent and would not attract substantial punishment upon conviction.\(^4\)

There is no doubt that substantial consequences are attached to a finding of NCR. This paper will examine issues associated with the impact

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\(^1\) [1999] 2 SCR 625, 135 CCC (3d) 129 (SCC).
\(^2\) Joan Barrett & Rium Shandler, Mental Disorder in Canadian Criminal Law (Scarborough, Ont: Carswell, 2006) (loose-leaf 2016 release 4) at 4:38.22. See also Hy Bloom & Hon. Richard D. Schneider, Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals (Toronto: Irwin Law, 2006), at 131-132. At p 132, the learned authors observe that: "There is no predictable correlation between the seriousness of the offence and the final disposition." See also the discussion of this issue by Martin J.A. in R v Simpson 1977 CarswellOnt 1048, 35 CCC (2d) 337 (Ont CA) at pp 359-360.
\(^3\) 2012 ONSC 378, 2012 CarswellOnt 586.
\(^4\) Ibid at para 20, citing R v Lambie (1996), 28 OR (3d) 360 (Ont Gen Div) at pp 379-80.
of NCR verdicts and the public perception attached to NCR decisions through a number of interesting case studies which I am familiar with. We will also consider the appropriateness of the burden placed on accused person when insanity is raised by the Crown or the Court. Finally, we will examine the new amendments to the law and their impact on individuals who may be considering the NCR defence.

II. PART I: DEFENCE COUNSEL SHOULD NOT SO READILY PUT FORWARD NCR

A. Consequences to Individuals Under the Law

Disposition-making under Canada’s current NCR laws focuses on the present mental condition of the NCR accused rather than the seriousness of the index offence. In providing for an examination of the accused’s present mental condition, Canada’s existing NCR laws specifically engage with the danger an accused might pose to others without regard to the index offence charged. This is in turn connected to the level of restrictions that must be placed on their liberty. More stringent measures are ordered where an accused, in the condition in which he comes before the Board, is believed to pose greater risk than he did at the time he committed the offence that brought him into the system. The regime is under Part XX.1 of the Criminal Code which conjunctively engaged with the provincial mental health legislation. Since 1992, Part XX.1 of the Criminal Code has governed the assessment, detention, and release of persons who have been found either unfit to stand trial or not criminally responsible on account of mental disorder. Once an individual is found not criminally responsible or unfit to stand trial due to a mental disorder, or has been found not guilty by reason of insanity, the individual is then ordered to be detained in a mental health facility under the Criminal Code and must receive care and treatment.

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5 Bloom & Schneider, supra note 2 at 132.
6 The Mental Health Act, CCSM c M110. See s 24(1): “A person admitted to a hospital under Part XX.1 (Mental Disorder) of the Criminal Code (Canada) is deemed to be an involuntary patient, and while detained under that Part is subject to the provisions of this Act that concern involuntary patients, except that, notwithstanding any other provision of this Act, (a) the provisions respecting the status of a patient do not apply to the person; and (b) the person may leave or be discharged from the
Irrespective of the actual offence committed, an accused may be subject to indefinite detention. Once detention in a mental health facility is ordered, it is the Review Board’s determination as to whether it is appropriate for the individual to be returned to the community. Instances of poor behaviour, adverse reactions to treatment, outbursts, and unwillingness to comply with the treatment would be compiled into a report on which the Review Board would base their decision for further treatment or release. When a negative report is made, upon review an individual may be denied release on this basis. In subsequent Review Board hearings, the decision would be made with a view to progress since the last report. Past behaviour and current compliance with treatment often create a vicious cycle for the offender. Progress in treatment is the objective, therefore an individual who maintains they are not in need of treatment are often deemed unsuitable for release. In Manitoba the provisions under ss. 24(2) of The Mental Health Act permit involuntary admission once the Criminal Code detention expires:

When detention expires under the Criminal Code

24(2) Shortly before a person’s detention under Part XX.1 of the Criminal Code (Canada) expires, a psychiatrist on the staff of a facility may examine the person and assess his or her mental condition and may, if the requirements for involuntary admission under subsection 17(1) are met, admit the person to the facility as an involuntary patient in accordance with that subsection.\(^7\)

The recommendation by the facility can result in involuntary detention of the basis of s. 15 of The Mental Health Act. Subsection 17(1) reads:

Requirements for involuntary admission

17(1) After examining a person for whom an application has been made under subsection 8(1) and assessing his or her mental condition, the psychiatrist may admit the person to the facility as an involuntary patient if he or she is of the opinion that the person

(a) is suffering from a mental disorder;
(b) because of the mental disorder,

(i) is likely to cause serious harm to himself or herself or to another person, or to suffer substantial mental or physical deterioration if not detained in a facility, and

\(^7\) Ibid, s 24(2).
(ii) needs continuing treatment that can reasonably be provided only in a facility; and
(c) cannot be admitted as a voluntary patient because he or she refuses or is not mentally competent to consent to a voluntary admission.\(^8\)

It is this process of admitting a person in a psychiatric facility that creates the possibility of a period of indefinite detention. The Review Board in Manitoba is governed by The Mental Health Act under s. 49. Under ss. 49(3), the panel is comprised of three members: a lawyer, a psychiatrist, and a member who is neither a lawyer nor a psychiatrist.\(^9\) According to ss. 49(4) the minister, or a person designated by the minister for the purpose, shall assign members to sit on the various panels of the review board from the roster appointed by the Lieutenant Governor in Council.\(^10\) In Manitoba’s Mental Health Act, “Minister” means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act.\(^11\) It is important to note that in accordance with ss. 49(8), the Review Board panel may not be comprised of a psychiatrist or physician who is treating or has treated the person, nor can a member of the panel be an officer, employee, or staff member of the facility in which the person is being treated.\(^12\) Therefore, the Review Board is made up of individuals who have no history or connection to the individual being assessed. Decisions are based on information provided by the mental health facility and the courts in order to determine the risk the individual may or may not pose.

A few cases come to mind when considering the unintended consequences of the NCR defence. Two case studies are considered below.

1. Rights and Privileges – The O’Brien Case

John Francis O’Brien suffered from paranoid schizophrenia and was charged with second degree murder for the death of his roommate.\(^13\) In 2002, John Francis O’Brien testified as to all of the reasons why he wanted to overturn the verdict of being unfit to stand trial. Mr. O’Brien described the differences between Stony Mountain Federal Penitentiary and the

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\(^{8}\) Ibid, s 17(1).
\(^{9}\) Ibid, s 49(3).
\(^{10}\) Ibid, s 49(4).
\(^{11}\) Ibid, s 1 (definitions).
\(^{12}\) Ibid, s 49(8).
\(^{13}\) R v O’Brien, 2002 MBQB 184, 2002 CarswellMan 290.
Selkirk Mental Hospital in Manitoba. Mr. O’Brien was adamant that he would much rather spend his time in the penitentiary. He described the differences between rights in a penitentiary and privileges in a hospital. He explained that smoking—at that time when the offender could smoke—was a privilege, having your own money was a privilege, going for a walk was a privilege, all of which could be taken away from a patient.

He compared this to the rights given to prisoners at Stony Mountain. He described being able to work to make money at a paying job, and having the opportunity to develop skills in trades. He described having a job in the penitentiary, while at Selkirk, patients only get the $83 a month provided by welfare. Mr. O’Brien was adamant that a sentence in prison would allow him to have access to a good library, a canteen, a gymnasium, a yard with baseball, soccer, curling, and tennis. He also included that he would be able to interact with more people at the penitentiary and not only mentally ill patients. Mr. O’Brien described that at Stony Mountain, a prisoner can roam the grounds when their cell opens up in the morning; there is a woodworking shop, a psychiatrist, and inmates can go for a walk outside. Mr. O’Brien told the court that at Selkirk Mental Hospital, something as simple as going for a walk outside for 15 minutes is a privilege that many patients might never receive. Mr. O’Brien described:

In Selkirk everything’s a privilege and you have doctors and nurses and the treatment team, I think they call them, deciding if you can go out on the grounds for 15 minutes. That’s a big, big thing. If you can get [outside] for 15 minutes. And when I say big, I mean big. There’s all kinds of people waiting years to get out there for 15 minutes.

When asked how long Mr. O’Brien had to wait to receive that privilege, he answered, “I, I still don’t have it. I’ve been there ten years”. He then went on to explain that he did have escorted privileges, adding, “I need to be escorted everywhere I go”.

Mr. O’Brien explained to Oliphant, A.C.J., as he then was, that at Stony Mountain inmates could work to buy televisions for their own cells.

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15 Ibid at p 55.
16 Ibid at p 56.
17 Ibid at p 57.
18 Ibid.
In Stony Mountain, he explained, inmates have televisions in their cells complete with remote controls, and they watch whatever they want to. Mr. O’Brien described a preference for baseball. However, at Selkirk, there is one television, in one room, and everyone has to watch the same channel. His application to be transferred to the penitentiary was not allowed.

2. Exhibiting Bad Behaviour – The Case of Earl Joel Wiebe

Another interesting case to consider is that of Earl Joel Wiebe. In circumstances such as this one, it appeared that individuals have committed offences to get out of solitary confinement. If a patient is found to be acting out, behaving stubbornly, defying or resisting authority, or deemed untreatable in a forensic institution, the patient may be subject to a form of solitary confinement. As in the Earl Joel Wiebe case, it may not be long before they find their meals being slid under the door. In this case, the NCR verdict amounted to near solitary confinement that was so apparent to this individual that he would commit various criminal acts in order to attempt to be transferred to a prison. These attempts were sometimes successful, and sometimes not.

Some offenders who are medicated in the hospital and do not like the effects of the medication consider that, in and of itself, to be a form of solitary confinement. In the penitentiary, a person is not forced to take medication. However at the hospital, if a patient does not want to take their medication, then it is physically forced upon them. The individual must escape the effects of the medication by going to the penitentiary to (in their view) interact with the community in a meaningful way. Despite his best efforts, Earl Joel Wiebe’s recurring challenge was that at the conclusion of each criminal sentence, he was returned to a forensic hospital.

This is not what the average member of the public envisions when they think of an NCR verdict.

19 Ibid.
21 O’Brien Transcript, supra note 14 at p 61.
B. Public Perception: The Stigma of Mental Illness and Criminal Behavior

1. A Lifelong Stigma & Challenge for Cause

In the eyes of the law, the stigma of mental illness lasts a lifetime. The public perception of mental illness carries with it social and legal realities, especially in the scope of criminal offenders. Louis Riel\(^{22}\) during his trial said:

I cannot abandon my dignity. Here I have to defend myself against accusations of high treason, or I have to consent to the animal life of an asylum. I don’t care much about animal life, if I am not allowed to carry with it moral existence of an intellectual being.\(^{23}\)

An important issue in this discussion is whether or not the issue of mental illness should be raised at challenge for cause during jury selection. In jury selection, the Crown and the defence each have a limited number of peremptory challenges, for which no reason needs to be given to dismiss a juror, and an unlimited number of challenges for cause, which must be proven on specific grounds such as partiality.\(^{24}\) Each juror comes into their role with previous life experiences, knowledge, heuristics, and biases which have the potential to interfere in decision-making and can lead jurors to form positive or negative stereotypes about a person or group, thereby influencing their verdicts.

It seems logical that if stigma towards mental illness is found to be detrimental to the impartiality of the verdict, then this problem may be abetted through a challenge for cause procedure to ensure the defendant’s right to a fair trial. However, defence counsel must be aware of the risk in raising the issue during the challenge for cause, especially if it remains to be determined if this is the appropriate avenue to be taken by defence.

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\(^{22}\) Louis David Riel (22 October 1844 – 16 November 1885) was a Canadian politician, a founder of the province of Manitoba, and a political leader of the Métis people of the Canadian prairies. He led two resistance movements against the Canadian government and its first post-Confederation prime minister, Sir John A. Macdonald. Riel sought to preserve Métis rights and culture as their homelands in the Northwest came progressively under the Canadian sphere of influence. Riel has been made a folk hero by the Francophones, the Catholic nationalists, the aboriginal rights movement.


\(^{24}\) See *Criminal Code*, RSC 1985, c C-46, ss 634, 638 [Criminal Code].
Proceed with Extreme Caution

The peril lies in that by addressing these issues so early in the proceedings, the defence counsel may be in effect raising the issue before they intend to. If the defence counsel does not raise the issue, then they will not have the opportunity to address the potential for bias before the commencement of the trial.

2. Vince Li – Four Thousand Psychiatrists

The intersection between mental illness and criminal law has been used as an object of political pandering. A recent and topical Manitoban case on this point is that of Vince Li.

In 2009, Vince Li was declared by a court to be not criminally responsible for his actions in the killing of Tim McLean because he suffered from schizophrenia and dementia at the time of the killing. In June 2010, Manitoban Justice Minister Andrew Swan suspended a decision by the Criminal Code Review Board to allow Li to take escorted walks on the grounds of the Selkirk Mental Health Centre. A group representing more than 4,000 Canadian psychiatrists condemned the province’s decision to prevent Vince Li from taking short supervised outdoor strolls calling it, “the worst kind of political pandering and fear-mongering”. The suggestion that Mr. Swan is pandering is demonstrative that issues related to crime and NCR are those that evoke public attention and reaction.

Essentially, the Criminal Code Review Board ruled Mr. Li could receive outdoor passes twice daily from the locked forensic unit at the Selkirk Mental Health Centre as long as he was accompanied by two staff members. However, the Justice Minister immediately vetoed the outings calling them, “contrary to the interests of public safety” until the centre “beefs up” security measures. For the year prior, Mr. Li had been kept in a locked ward and was not allowed outside. The Minister of Justice demanded increased security before Manitoba would honour the Review


27 Ibid.
Board decision regarding a crime that the Minister claimed “shocked the conscience of all Manitobans and indeed all Canadians.”

In a letter to the Winnipeg Free Press, the Canadian Psychiatric Association said the Justice Minister's reaction to a Review Board's “carefully considered” decision to grant a “slight increase” in Mr. Li's liberty demonstrates “a shocking lack of knowledge and understanding of mental illness”.

However, in this case, a significant portion of the public tended to side with the Justice Minister.

The letter to the Justice Minister was written by the association's president Dr. Stanley Yaren, who has treated Mr. Li and also serves as the director of the Winnipeg Regional Health Authority's adult forensic psychiatry program. Dr. Yaren made clear in an interview that his comments were made in his role as head of the national association. He commented on public perception noting that, there are still “members of the public who would return to the days when the mentally ill were cast out of society to be incarcerated in prisons and asylums, never to see the light of day”.

The Criminal Code Review Board, with the benefit of the advice of experts in the field, decided Mr. Li should be able to walk outside on the grounds of the hospital and the physicians responsible for Mr. Li's treatment believed that he posed no threat. Unless the public is misinformed about the circumstances of Mr. Li's escorted walks on the grounds, the message from the Minister, and his supporters amongst the public, was that this fellow should not be afforded the privilege which any other prison inmate would have on day one at the penitentiary.

3. David Michael Krueger – Change of Venue

There is no doubt that the issues of NCR create uneasiness amongst the public. A change of venue was granted to David Michael Krueger because of the community reaction to his offence and the ability to ensure

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29 Supra note 26.
30 Ibid.
31 Ibid.
an unbiased jury when the psychiatric background of Mr. Krueger was made public. Mr. Krueger brutally murdered three young children in 1956 and 1957 and then subsequently was found not guilty by reason of insanity and placed in Oak Ridge, an Ontario Psychiatric Facility located in Penetanguishene.\(^\text{32}\) His story is worth the read.

David Krueger completed a program at Oak Ridge, he was deemed greatly improved and sent to a medium-security hospital in Brockville, Ontario in 1991. In Brockville, Krueger claims he fell in love with a psychiatric patient named Dennis Kerr who rejected his sexual advances.\(^\text{33}\) During the first hour of his very first weekend pass in over thirty years, Krueger stabbed Kerr to death. Then Mr. Krueger, in his blood-drenched clothes, calmly walked to a police station and turned himself in.\(^\text{34}\)

Mr. Krueger was being supervised on a day pass at the time—but his supervisor was a fellow named Bruce Hamill, a former patient who killed an elderly woman.\(^\text{35}\) They were supposed to get ice cream at a nearby Dairy Queen; instead, with a selection of knives provided by Hamill, Krueger mutilated Kerr.\(^\text{36}\) Hamill was an accomplice in the Brockville murder and both men were subsequently returned to Oak Ridge.\(^\text{37}\)

This story had members of the public scratching their heads regarding the administration of the current hospitalization and treatment regime. When the psychiatric history was published, the story was deemed so outrageous that a motion to change the venue was granted due to the community reaction to his offence and the instability to ensure an unbiased jury.

33 Bovsun, ibid.
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
4. **R. v. Molodowic at the Supreme Court of Canada – Even Jurors are not Immune**

Mr. Molodowic suffers from paranoid schizophrenia. After shooting and killing his grandfather, he drove to a friend’s house and told her father to call the police, as he had just shot his grandfather. After being arrested and properly informed of his rights, he gave a statement to the police and was tried before a judge and jury on a charge of second degree murder. Prior to trial, he had undergone two psychiatric assessments and both doctors testified that the accused’s act of shooting his grandfather was consistent with his mental disorder having caused him to believe that only in so doing could he save himself from further torment.

Further, the doctors agreed that Mr. Molodowic did not have the capacity to appreciate that his actions were morally wrong at the time of the offence. No rebuttal expert was called to contradict the testimony from the doctors but on cross-examination the Crown challenged the expert evidence and was successful in drawing a number of admissions and concessions. Mr. Molodowic was convicted of second degree murder. The majority of the Manitoba Court of Appeal dismissed his appeal. The issue on appeal was whether the verdict was unreasonable with respect to the effects of the accused’s illness on his criminal responsibility.

The dissenting opinion of Huband, J.A. became the basis of the Supreme Court’s decision to set aside the verdict. The judgment was delivered by Arbour, J.:

> The trial judge correctly instructed the jury that they were not required to accept that evidence, but that they had to assess it in light of the totality of the evidence tendered, and that they were entitled to reach their own conclusion even if it conflicted with that of the experts. A majority of the Court of Appeal concluded that it was not unreasonable for the jury to convict in that “it was within the right of the jury to reach the verdict it did” (1998),126 Man R (2d) 241, at p. 244), whether one agreed with that verdict or not. Huband J.A., dissenting, reviewed all the evidence bearing on the central question of whether the appellant knew that killing his grandfather was morally wrong. He approved of the trial judge’s instructions to the jury that they were not bound to accept the unchallenged opinion of the experts but said (at p. 252):

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39. Ibid.
40. Ibid at para 17.
41. Ibid at para 18.
The trial judge[s]’ instruction needs to be considered in the context of the case presented to the jury. The expert opinions of Dr. Yaren and Dr. Shane need not be accepted if there is some reason to reject them, because of some discernible flaw in their reasoning or because the opinion was formulated on too fragile a factual basis or because the opinion conflicts with inferences one might logically draw from other evidence.

One might have legitimate reservations about the opinion of Dr. Shane, standing alone. But I do not see any rational basis for rejecting the opinion of Dr. Yaren. Dr. Yaren starts with the credibility of a truly independent witness. He has substantial experience in this field. He has the benefit of a staff of skilled associates to assist him in reaching his diagnosis and formulating his opinion as to the culpability of the accused. His opinion is entirely consistent with the evidence as to the accused’s conduct in the months and weeks leading up to the shooting. It also accords with the conduct of the accused on the night of the killing, as described by others and through the accused’s own statement to the police.

To reject all of this evidence was, in my view, unreasonable and invites appellate intervention. I would set aside the verdict on the ground that it is unreasonable and cannot be supported by the evidence, and I would substitute a verdict that the accused is not criminally responsible by reason of mental disorder.

I agree with the foregoing conclusions and need expand only briefly on the reasons of Huband J.A.42

In paragraph 17 of the Supreme Court decision, the Court reiterated that Dr. Yaren was of the opinion that it was “highly probable that the appellant did not have the capacity to appreciate that his actions were wrong.”43 While Dr. Shane and Dr. Yaren differed in their precise diagnoses, the mental illness shared key symptoms, including visual and auditory hallucinations, and persecutory delusions which together severely impair the sufferer’s grasp of reality. Further, as mentioned above, both doctors were of the opinion that the appellant’s act of shooting his

42 *Ibid* at para 12.
43 *Ibid* at para 17: [Dr. Yaren was] Relying on his interviews with the appellant, the results of formal psychological testing conducted at the Health Sciences Centre, records from the appellant’s three-day stay at the Brandon Mental Health Centre in August 1995, interviews with the appellant’s family and the appellant’s statement to the police, he diagnosed the appellant as having developed full-blown paranoid schizophrenia, a severe mental disorder, roughly two months prior to the shooting.
grandfather was consistent with his mental disorder having caused him to believe that only in so doing could he save himself from further torment. 44 The Supreme Court reiterated:

I agree with Huband J.A. that the evidence, particularly the testimony of Dr. Yaren, does not reasonably support the conclusion that the appellant was lucid to the point of knowing that his acts were morally wrong at the time of the shooting. In my view, the totality of the psychiatric evidence did not give rise to the reasonable possibility that the appellant, who laboured under the effects of a severe mental disorder at the time he committed a homicide, and whose moral judgment was impaired as a result, would have had a momentary reprieve from the effects of his disorder, at the critical time, sufficient to provide him with the moral insight necessary to engage his criminal responsibility. 45

This was an example of a circumstance where despite the fact that experts formulated an opinion on the culpability of the accused, public perception of crime and mental illness served to outweigh the expert testimony in the eyes of the jury. The jury was willing to overlook the professional opinion of both Dr. Yaren and Dr. Shane. Ultimately, the appeal was allowed, the judgment of the Manitoba Court of Appeal was set aside and a verdict of NCR was entered. 46

III. PART II: REASONABLE DOUBT VERSUS BALANCE OF PROBABILITIES

A. The Presumption of Innocence

In the R. v. Godfrey decision, Mr. Justice O’Sullivan was of the opinion that the argument against the presumption of sanity was potentially threatening to liberty given that insanity may be raised by the Crown or by the Judge. 47 If there was no presumption of sanity, it would be open to a jury to condemn a prisoner to incarceration as an insane person—potentially for life—if they had a reasonable doubt as to his sanity.

In R v. Swain, the court considered the constitutionality of the Crown being able to raise insanity over the accused’s objections, and ultimately established that the Crown is generally only able to raise NCR post-guilty

44 Ibid at paras 16-17.
46 Ibid at para 24.
verdict.\textsuperscript{48} It is my opinion that one of the problems is that post-guilt insanity may be raised by the Crown or by the Court, which leaves the accused in the invidious position of being obliged to disprove it. There is the further problem that the jury may reach a compromised verdict where the jury is not convinced of guilty beyond a reasonable doubt, but is satisfied that the accused is mentally ill and perhaps injurious.

If the accused is to be subjected to a life sentence, his defences should be open to him to choose—even if, as in \textit{R v. Chaulk},\textsuperscript{49} the accused feels they are not subject to the ‘paper laws’ and the accused is incapable of knowing that their act is condemned by people generally.\textsuperscript{50}

If the accused is unfit to instruct counsel, we have another problem—that is, the accused’s ability to choose his defence must be subsumed to the compassion that the accused is incapable of understanding that the act charged is wrong in light of the ordinary moral standards of reasonable members of society.

In her opinion in \textit{Chaulk}, Madame Justice Wilson finds that some American states in the English Law Revision Committee have come to the conclusion that the defence of insanity should be an evidential rule and not a persuasive burden:

In short, the lower burden on the accused who pleads insanity is seen as being both more consonant with fundamental principles of criminal law, and has a sufficiently high threshold to prevent insanity pleas in cases where there is only tenuous support for such a plea.\textsuperscript{51}

As Madame Justice Wilson stated in \textit{Swain}, “the unfairness of imposing on an accused who does not wish to raise the defence of insanity, the burden of proving, among other things, that he is not presently dangerous” is a problem.\textsuperscript{52}

In \textit{Swain}, Madame Justice Wilson, who was in agreement with the Chief Justice that the common law rule infringed the accused's s. 7 \textit{Charter} right to liberty, categorized some of the dangers inherent in the rule:

I accept the appellant's submission that to permit the Crown to tender evidence of insanity against the wishes of the accused is to countenance too great an

\textsuperscript{48} [1991] 1 SCR 933, 1991 CanLII 104 (SCC) [\textit{Swain}].
\textsuperscript{49} [1990] 3 SCR 1303, [1990] SCJ No 139 [\textit{Chaulk}].
\textsuperscript{50} \textit{Ibid}.
\textsuperscript{51} \textit{Ibid} at p 70.
\textsuperscript{52} \textit{Swain}, supra note 48 at pp 1025-1026.
interference with the fundamental right of an accused to advance whichever
defences he considers to be in his best interests and to waive those which he
considers are not. I agree with the appellant that to allow the prosecution to raise
the issue of insanity can completely distort the trial process because of the impact
it can have on other defences raised by the accused, on the jury's assessment of
his credibility, and on the traditional role played by defence counsel in an
adversary system.

Madame Justice Wilson observed, and I am compelled to agree, that
allowing the prosecution to raise the issue of insanity serves to discredit
the accused's credibility so that a potential defence such as alibi or
accident are prejudiced. She also found that the conditions at Oak Ridge,
a division at Penetanguishene, were highly corrosive and emphasized rules
and regulations in lieu of personal rights. She wrote in Swain at p. 1027:

Under s. 16(4) of the Criminal Code the accused is presumed to have been sane at
the time he or she committed the offence. The accused who elects not to defend
on the basis of insanity relies on this statutory presumption. If I am correct in
what I have said about the impact of the common law rule, allowing the
prosecution to raise the issue of insanity may substantially reduce the chances of
an accused's outright acquittal. It may totally defeat the strategy adopted by the
defence and deprive the accused, particularly an accused who turns out to be
sane, of the fair trial the adversarial process was designed to ensure. This is a
high price to pay to protect the relatively small number of persons going through
the criminal justice system who are truly insane and do not wish to raise it in
their defence. In cases where the Crown is permitted to introduce evidence of
insanity over the accused's objection and does not succeed in proving it, the
defence's case may have been destroyed to no avail. His election is simply proved
to have been sound but this is cold comfort to him and to his counsel.

Directly following, Madame Justice Wilson harkened back to this
paper's main argument—

I think it should be borne in mind also that another consequence of allowing the
prosecution to adduce evidence of insanity is that the accused may well face
consequences more harmful to him than a conviction. An insane acquittee is
detained at the pleasure of the Lieutenant Governor, often for a period
exceeding that which would have been possible upon conviction. He must also
live with the stigma of being held to be both a criminal and insane and may face
conditions worse than those obtaining in prison. The intervener, the Canadian
Disability Rights Council, described the Penetanguishene Mental Health Centre
in which the appellant initially spent some time and in which 130 of Canada's
inmates on Lieutenant Governor's warrants are detained as:

53 Ibid.
54 Ibid at p 1027.
... a highly coercive environment emphasizing rules and regulations rather than personal rights. At Oak Ridge, there are steel gates which are double locked. The gates are deadlocked from the end of the corridor, from 10:30 at night to 6:30 or 7:00 in the morning. The windows in the inmates' rooms have bars. One-third of the patients sleep on concrete slabs. The rooms want for cleanliness. There is no cleaning staff. There are metal detectors, a closed circuit television, and an x-ray machine. At night all inmates are locked in individual rooms. Inmates are also locked in their rooms during the day if the staff is short, which is often the case. Inmates who are in the assessment unit are subjected to intense lighting which is left on twenty-four hours a day. In some parts of the facility, there are no temperature controls. There is one psychiatrist for all the inmates at Oak Ridge and he spends one-fifth of his time away from the facility. Consequently the facility uses inmates on LGW's to act as therapists for one another. In the name of treatment, inmates of one of the units are forbidden to speak to each other during the course of an ordinary day.

It is my view that society's interest in ensuring (that persons [who are not criminally responsible] are not convicted) cannot override the right of an accused to control his own defences and to forego the defence of insanity if this is in his interests. As I stated in R. v. Turpin, 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, at pp. 1313 and 1316:

To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit would appear, in Frankfurter J.'s words, "to imprison a man in his privileges and call it the Constitution". 55

With this knowledge, one has to wonder about the proposition that Chief Justice Lamer, as he then was, concludes in Chaulk—that the alternative of an evidentiary burden requiring the accused to merely raise a reasonable doubt would not be effective, because it would be very easy for an accused person to fake such a defence, and thereby raise a reasonable doubt. 56

55 Ibid at pp 1027-1029.
56 See Chaulk, supra note 49 at p 1342: The Attorneys General of Quebec and Ontario both argue that an evidentiary burden would be ineffective because it is very easy for an accused to "fake" insanity and to raise a reasonable doubt. Thus, lowering the burden on the accused to a mere evidentiary burden would defeat the very purpose of the presumption of sanity. The appellants answer that only an accused who is willing to be incarcerated under the "L.G.W. system" will be inclined to raise insanity. Given the severe loss of liberty which corresponds to a successful insanity plea, it is unlikely that accused people will raise s. 16 on a routine basis.
We are after all arguing about the place of detention, or whether there should be detention. If the argument is to deter and to detect flimsy cases of insanity from gullible juries, that objective is largely achieved by the compulsory and indefinite detention upon the special verdict of acquittal. As we know, if the accused is dangerous and mentally ill, he does not go to the street. He is remitted under a provincial Mental Health Act to determine place of treatment and commence what appears at the outset to be indefinite detention.

B. Who Can Raise NCR: Should the Crown be Obligated to Prove on Beyond Reasonable Doubt Standard?

The defence of mental disorder is set out in s. 16 of the Criminal Code. In s. 16(2) of the Criminal Code, the accused is required to prove on a balance of probabilities that they are NCR once they raise the defence. In my view, akin to self-defence, the onus should rest on the Crown to prove beyond a reasonable doubt that s. 16 NCR is not available to the accused. In my opinion, this would be an effective safeguard to individual’s liberty particularly in circumstances where the accused does not want to raise the defence and it has been raised by the Crown or the Court.

I take the position that it is for my client to instruct me on defences he wants to raise. This is, of course, subject to his not being found unable to instruct counsel. Once a client is found fit to stand trial, however, professional ethics demand that the client alone must decide whether to advance an NCR defence, and rules of professional conduct require counsel to respect the client's ability to exercise his or her freedom of choice in this regard.

57 Criminal Code, supra note 24, s 16.
58 Ibid, s 16(2).
59 Swain, supra note 48. See also R v Szostak, 2012 ONCA 503, 2012 CarswellOnt 9100. Rosenberg, J. provides a noteworthy discussion on this point. The essence is captured at para 77: “I should begin by saying that I am satisfied that where, as here, the accused is fit, counsel is not entitled to advance the NCRMD defence against the wishes of the accused. I would go further and hold that counsel must have instructions before advancing the NCRMD defence. This control over the defence is a necessary consequence of the values of dignity and autonomy that underlie our adversarial system.”
The major tactical decision faced by the defence is whether to raise NCR at the outset of the trial. If the accused is obviously NCR or has no defence, it is best to build an evidentiary record supporting a finding of NCR throughout the trial. On the other hand, if there is a viable defence to the underlying conduct—for example, alibi—NCR should not be pleaded until a finding of guilt is made. The reason for this is not hard to understand: a defence of “I didn't do it, but if I did I was NCR” tends to lack credibility. If the accused wants to raise the defence of accident or defence of alibi, he should be able to raise it without the connotation that goes with the NCR evidence.

C. The Claude Lanthier Case – Choose Your Defences Carefully

On this point, I reflect on the Claude Lanthier case.\(^6\) Claude Lanthier was out on a day pass from Selkirk Mental Hospital. Mr. Lanthier’s father was seen walking down the street carrying a rifle. When the police saw Mr. Lanthier, Sr. they asked him what he was doing with the gun. Mr. Lanthier, Sr. told the police that he thought his son was coming to kill him. The police told him to put away the gun and to call 911 Emergency if anything happened. Mr. Lanthier, Sr. was concerned, and he used various items of household furniture to barricade the door. When Claude Lanthier approached his father’s house he could see his father holding the gun through the window. While Mr. Lanthier, Sr. was on the phone with the police holding his rifle, the sound of Mr. Lanthier, Jr. pushing against the barricaded door could be heard through the phone. During the transfer of the 911 call, the sound of the barricade toppling over could be heard through the phone—and then you could hear footsteps. The words, “Father, I tell you I’ll kill you, I tell you I’ll kill you,” was heard on the 911 call, and then two gun shots ‘Bang Bang’. The door is opened and ultimately Mr. Lanthier, Sr. ends up getting shot with his own rifle. As the corded phone receiver hangs from the wall mount, you could hear the sound of it hitting the wall—slower and slower.

Initially, no one was exactly sure what transpired in those few seconds between the door being opened and the gun going off. My client, however

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\(^6\) *R v Lanthier* (1973), Winnipeg 5/4904 (MBQB). This section is commentary to the case in which Greg Brodsky, Q.C. was lead counsel.
was adamant that he did not shoot his father and that the gun ‘just went off’ by accident. When I asked my client what happened he told me he was afraid his father was going to kill someone so he ran over to him and took the gun away. I asked him how he did that. He told me that his father was hunched down, and appeared to be on the phone with someone while clutching the rifle. Claude Lanthier did not know his father was on the phone with police. He tried to remove the gun from his father’s hands. His father, in turn, tightened his grip on the gun. Then the gun discharged.

As for the words, “Father, I tell you I'll kill you, I tell you I’ll kill you,” I was able to establish this was from two different voices. The word “Father” was said by Claude, “I tell you I’ll kill you, I tell you I’ll kill you,” was said by the father. The next issue was how two shots were fired in succession. This was an unusual situation, so I took it upon myself to research and test this model of rifle. I acquired a replica of this rifle and inspected it—I learned how it works. I spent hours at the shooting range. This particular rifle has a half-moon trigger. The Crown argued that you cannot pull the trigger if your arm is extended, in the way that Mr. Lanthier, Sr.’s would have been. When Mr. Lanthier, Sr. squeezed the stock to keep hold of the gun, the half-moon trigger was engaged thereby discharging the rifle.

I was able to show that this gun, under these circumstances, could be discharged accidentally from the precise circumstances my client described—and once the bullet is in the chamber, two shots could be fired in quick succession. I stood before the jury, re-enacted the circumstances and showed how the gun could be discharged twice.

Due to the fact Claude Lanthier was on a day pass from Selkirk Mental Hospital, I had my doubts the jury would accept his explanation. This is another insidious consequence of an accused who has a history of mental illness. Claude Lanthier was in a predicament because if he were to testify to the circumstances, the Crown could cross examine him on his mental health history, thereby severely affecting his credibility. I could have moved to find Claude Lanthier found NCR, but instead we argued accident—and were successful. Mr. Lanthier was acquitted. If we went the NCR route, Mr. Lanthier would still be in custody.

Now although that was a tangent, it is demonstrative of the notion that an accused person should be able to determine if he wants to raise
NCR or not. This is, whether he should be getting a life sentence when he could have a term definite, or whether it is possible that other defences outside the scope of NCR are available. The Claude Lanthier case is also an archetypal circumstance where defence counsel has to be vigilant when an accused faces real credibility challenges on the basis of the mental health history.

The consequences of an NCR verdict must be fully and carefully explained to the client. The client who may have the s.16 verdict available to him or her must be made to understand that, if successful, the verdict will not result in acquittal. Instead, the NCR verdict will bring the individual within the jurisdiction of the Review Board until they no longer represent a significant risk to the safety of the public (there is a caveat in the new law I intend to address in the next section).

The client must understand that while under the Review Board's jurisdiction he or she may be subject to detention in a psychiatric hospital not only initially, but also may be returned to the hospital for lengthy periods at a time even after an initial or subsequent discharge to the community. Counsel must advise the client that detention in a psychiatric facility will be for an unknown and unknowable period of time, potentially longer than any sentence they might face upon conviction in criminal court and “counsel must advise that detention in psychiatric hospital may be in very secure conditions with few or no privileges and severe restrictions on liberty.”61 Furthermore, the client may be transferred to various hospitals around the province based on the Board's determination of their security classification.

1. Court Ordered Assessments

Section 672.11(b) of the Criminal Code provides that a court may order an assessment with respect to criminal responsibility where it has reasonable grounds to believe that such evidence is necessary to determine whether the accused would be exempt from criminal responsibility by virtue of s. 16.62 The court may make an assessment order of its own


62 Criminal Code, supra note 24, s 672.11(b).
motion, or on the application of the accused at any time.\textsuperscript{63} The Crown, however, may only seek an assessment order where: (1) The accused puts his or her mental capacity for criminal intent into issue or (2) The prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.\textsuperscript{64} It is subsection (2) which provides the Crown the authority to make the motion.

The case law on s. 16 places further restrictions on the Crown. As outlined above, the Supreme Court in\textit{Swain} held that giving the Crown an unrestricted right to raise the NCR issue against the wishes of the accused violates the accused's s. 7 Charter right to control his or her own defence. The Court held that the Crown is only permitted to raise the NCR defence in two situations: (1) where the accused puts his or her mental capacity into question and (2) after the trier of fact has concluded that the accused is otherwise guilty of the offence charged.\textsuperscript{65}

In the recent decision of\textit{R. v. Vassell}, Justice Dean held that s. 672.12(3), read in conjunction with the prohibition on raising the NCR defence as set out in\textit{Swain}, means that the Crown cannot seek an assessment of criminal responsibility until the accused raises the issue or the trier has made a finding of guilt.\textsuperscript{66}

It is appropriate to examine the\textit{Her Majesty the Queen and Richard Dowdell}\textsuperscript{67} decision from February 2015 as not only a breach of solicitor-client privilege, but also an unwarranted intrusion on the accused’s ability to choose their defence. I have already mentioned that it is my position that an individual has the right to choose what defences he or she puts forward. If a copy of the psychiatrist report goes to the Crown, who then raises NCR or the issue of fitness, the client is deprived of his or her right to choose. It is the accused whose liberty is in jeopardy—he should decide whether he wants a term definite or an indeterminate sentence.

There are several ways that the potential for an NCR verdict may arise during a trial. First, the accused can raise the issue of NCR at the outset of the proceeding and seek to leave the issue with the jury. If evidence

\textsuperscript{63} Ibid, s 672.12.
\textsuperscript{64} Ibid, s 672.12(3).
\textsuperscript{65} Swain, supra note 48.
\textsuperscript{66} R v Vassell, 2013 CarswellOnt 8344, 2013 ONCJ 333 (Ont CJ) at paras 27-28.
\textsuperscript{67} [2015] OJ No 748.
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capable of supporting the defence exists, the jury will be required to assess first whether it has been proved beyond reasonable doubt that the accused committed the criminal act. If the jury is so satisfied, it will then have to consider whether an NCR defence has been proved on a balance of probabilities. If the jurors are not satisfied, they must then go on to consider whether the mens rea for the offence is proved beyond a reasonable doubt. The second option is to conduct the trial without raising a s. 16 defence until after the jury returns its verdict. If the accused is found guilty, meaning that the Crown has proved both the actus reus and mens rea of the offence, the defence can raise the issue of NCR and have it adjudicated before a conviction is entered.

IV. PART III: NEW AMENDMENTS: REVIEW BOARD HEARINGS & HIGH-RISK ACCUSED

Sadly, many of the Federal Government initiatives on crime do not appear to be informed by reality. Under the new amendments to the Criminal Code, an NCR accused deemed “high-risk” would no longer be entitled to an annual review of his detention. Rather, he would only be entitled to a review every three years. The new amendments prohibit a “high-risk” accused from entering the community for any reason other than urgent medical matters. What a high-risk offender would be facing is the prospect of detention in a forensic hospital without any hope of release (or even an increase in privileges) for three years. This hardly seems like an environment conducive to treatment and recovery.

The clinical tools that are used to assess risk were not designed explicitly to answer the specific legal questions the NCR laws demand. For example, there is no specific clinical tool that assesses whether someone poses a “significant threat to the safety of the public”. In practice, “significant threat” has been interpreted as a real risk of serious physical or psychological harm. A miniscule risk of grave harm will not meet this

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68 R v David, 2002 CarswellOnt 2920, 7 CR (6th) 179 (Ont CA).
69 Swain, supra note 48.
70 Criminal Code, supra note 24, ss 672.81 – (1.31) – (1.32).
71 Ibid, s 672.64(3).
72 Bloom & Schneider, supra note 2 at 224.
threshold, nor will a high risk of trivial harm.\textsuperscript{73} Given that the risk assessment tools were not explicitly designed with the legal question in mind, “it is critical that medical or psychiatric evaluations in this context be anchored in an understanding of the legal standard involved”.\textsuperscript{74} In \textit{Orlowski v. British Columbia} for example, the BC Court of Appeal found that the Review Board “had not come to grips with the legal question of significant threat” because it had been distracted by the question of how the accused “would cope in the outside world”.\textsuperscript{75}

The new NCR amendments suggest fixing the problem by classifying certain offenders as ‘high-risk’ NCR persons and detaining them for lengthier periods, thereby eschewing the importance of aligning clinical and legal approaches. Although the amendments were brought to force in the name of public safety, the pressing question remains as to how to ensure the successful reintegration of NCR accused into society upon their eventual release. For instance, proposed amendments designated high-risk offenders as unsuitable for therapeutically important privileges associated with eventual community reintegration without any evidence.\textsuperscript{76}

Given fears about high-risk designation,\textsuperscript{77} informed mentally ill persons accused of criminal offences and their counsel will likely try to avoid the NCR route. Defence counsel will more often encourage their client to avoid NCR verdicts by accepting a plea, following which they will serve their time and exit the system. Having avoided the NCR route, mentally ill offenders will instead emerge from prison with no treatment and no supervision. A similar situation was occurring prior to Bill C-30, which was introduced in 1992.\textsuperscript{78} Before Bill C-30, counsel for mentally ill accused sidestepped NCR or ‘unfit to stand trial’ options because of the

\textsuperscript{73} Ibid.
\textsuperscript{74} Rebecca Sutton, “Canada’s Not Criminally Responsible Reform Act: Mental Disorder and the Danger of Public Safety” (2013) 60 Criminal L Q 41 at 58.
\textsuperscript{75} 1992 CarswellBC 1103 at paras 41-42, 94 DLR (4th) 541.
\textsuperscript{76} Canadian Bar Association, National Criminal Justice Section, “Bill C-54 – Not Criminally Responsible Reform Act”, (Ottawa: March 2013), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=a205a9cc-d37f-4331-8572-e0852123c591> at 10.
\textsuperscript{77} Ibid at 8-9.
\textsuperscript{78} Bill C-30, An Act to amend the Criminal Code and to amend the National Defence Act and the Young Offenders Act in consequence thereof (assented to 1991, c 43, s 4, proclaimed in force February 4, 1992).
likelihood their client would spend more time in custody than if they had gone to prison, and the severe and lasting consequences to an NCR verdict on the individual.\textsuperscript{79} The new amendments enacted in the Criminal Code will likely increase the risk that mentally ill individuals will be left untreated and unsupervised, and in turn increase the potential to harm others.

V. PART IV: CHOOSE YOUR COMMUNITY

When advising a client on whether to seek an NCR verdict, the choice should not be presented to an accused as simply one of going to jail or going to a hospital. In light of the current regime, ethical obligations require defence counsel to consider carefully and advise the client as to the potential consequences of an NCR verdict. Those accused of relatively minor property offences, and even mid-level offences involving some violence, should be specifically informed that if found NCR, they could spend much more time detained in a psychiatric facility than they would spend incarcerated if convicted. Clients should also be advised that they are unlikely to be absolutely discharged by the Review Board until they demonstrate “insight” into their mental illness and compliance with psychiatric treatment. Clients who do not believe they are mentally ill should be told that they may progress very slowly through the Review Board system. Only once the client is fully informed can counsel obtain meaningful instructions on how to proceed.

Commentators should tread carefully when making generalizations across jurisdictions in regards to NCR findings because each provincial body handles Review Board processes differently. Furthermore, the rules governing NCR individuals can and have been changed with incoming new legislation. As well, the actual implementation of Review Board processes may vary greatly province to province, but the blemish of an NCR verdict remains with the accused for the rest of their life.

The Criminal Code may be altered decade to decade, as might the implementation of Review Boards, but the NCR verdict does not go away. The individual will remain shrouded in the NCR finding and will be forced to weather political ebbs and flows. Mobility rights, as considered

\textsuperscript{79} Sutton, \textit{supra} note 74 at 59.
by the Charter, may be impacted by different provinces taking different approaches to Review Board implementation.

In advising mentally disordered clients as to the benefits and disadvantages of the NCR route, counsel should be aware that the public protection/treatment model enshrined in Part XX.1 of the Criminal Code is invasive. The model, by nature, patronizes accused persons and turns them into objects of other people's wisdom and knowledge about what is best for them. The individual then becomes a subject of institutional rules and deprivations. Mentally disordered clients who are opposed to treatment with psychiatric medications or resolved to be self-determining are poor candidates for the NCR verdict.

Clients with a history of treatment non-compliance are likely to continue to have periods of non-compliance and relapse. This will result in initial detention in hospital for lengthy periods because the non-compliant and deteriorating NCR individual will have significant difficulty convincing the Review Board they can be safely released into the community. These are clients for whom the NCR verdict should not be pursued or should be pursued with extreme caution. The client who is amenable to treatment and willing to comply is a better candidate for oversight by the Review Board.

VI. CONCLUSION

The special verdict of not criminally responsible by reason of mental disorder raises a host of vexing legal, factual, and tactical issues for defence counsel. An accused found NCR faces the prospect of being under restrictions imposed by the Review Board for the rest of his or her life, even if the offence was relatively minor. On the other hand, an accused found NCR whose dangerousness has the prospect of being controlled may be discharged far earlier than he would have been had he been convicted of the offence.

Counsel should be wary of advising pursuit of the NCR verdict for clients who have lengthy criminal records (even if for minor offences) or a long history of diagnosis with major mental disorder and an equally long history of non-compliance with treatment. Clients who have repeatedly come into contact with the criminal justice system will often have difficulty convincing the Review Board that they do not pose a significant risk to the safety of the public.
Knowing how and when to advance an NCR defence is a crucial skill set of properly informed defence counsel. The importance of being familiar with this branch of the law will only increase as provincial governments continue to underfund mental health services.
A Sign of Things to Come? Legal and Public Policy Issues Raised by the Supreme Court of Canada Decision in *Green v. Law Society of Manitoba*

**THOMAS S. HARRISON**

I. INTRODUCTION

This article examines legal and policy issues arising out of the Supreme Court of Canada's decision in *Green v. Law Society of Manitoba*.\(^1\) Despite some preliminary questions related to the merits of why leave to appeal was granted, the policy and legal issues addressed in *Green* mark it as a significant case.

The Court’s examination of standard of review and the public interest authority of law societies are potentially important precedents for upcoming cases.\(^2\) More broadly, this litigation touches on several policy issues, including mandatory education for judges and rules governing how

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\(^1\) 2017 SCC 20, 407 DLR (4th) 573 [*Green*].

\(^2\) As a capitalized term, ‘Law Society’ refers to the legal regulator in Manitoba, whereas, ‘law societies’ is used to refer to legal regulators in Canada in general, some of which, like the Nova Scotia Barristers Society, do not use the more generic term.
judges can return to practice.\(^3\) Generally, the Green decision also highlights a concern about the variable nature of access to justice in Canada.

Ultimately, this case may prove an important step in the Court’s approach to the regulation of the legal profession in several upcoming cases. Together, the legal and policy issues raised in Green make it an important marker in the development of the law and, perhaps, a sign of things to come.

A. Background

Sydney Green was a Manitoba lawyer and a prominent former politician.\(^4\) Green graduated from the University of Manitoba Law School and was called to the Bar in 1955.\(^5\) He had a long and varied career as a labour lawyer, politician and provincial Cabinet Minister throughout the 1970’s and 1980’s.\(^6\) After politics, Mr. Green returned to the practice of law where he also served as a Manitoba Law Society bencher.\(^7\)

Starting January 1, 2012, the Manitoba Law Society approved a twelve hour mandatory CPD rule for practicing lawyers.\(^8\) Mr. Green did not report his CPD activities for 2012 and 2013. The Law Society contacted Mr. Green in 2014 to advise that he had sixty days to comply with the mandatory CPD requirement, failing which he would be suspended. Mr. Green did not reply to this 2014 communication from the Law Society, or

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6 See, for example, “Manitoba’s Progressive Party ready to contest its first election”, The Leader-Post (13 November 1981), B11, online: <https://news.google.com/newspapers?id=t49VAAAAIBAJ&sjid=0z8NAAAAIBAJ&pg=1356,3555910>.

7 Green, supra note 1 at para 6.

report any CPD activities. Consequently, in July of 2014, Green was suspended from the practice of law.\footnote{Green, \textit{supra} note 1 at para 11. Though the regulator subsequently agreed not to enforce the suspension until litigation was resolved.}

Before the lower courts, Green challenged his suspension using two arguments.\footnote{Mr. Green also initially made an argument under the \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982}, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter], which appears to have been abandoned on subsequent appeal, Manitoba Court of the Queen’s Bench, 2014 MBQB 249 at para 36, (2014) 313 Man R (2d) 19.} He first asserted that the Manitoba Law Society lacked jurisdictional authority to make a CPD program mandatory or to suspend a lawyer who failed to comply. He also challenged the legitimacy of the rules created by the provincial Law Society to implement the CPD program as a matter of procedural fairness and natural justice. Both the Queen’s Bench and the Court of Appeal rejected these arguments.\footnote{Ibid at paras 18, 25 & 36.} Prior to the hearing at the Supreme Court, Mr. Green abandoned the first jurisdictional grounds of appeal.\footnote{Justice Wagner noted that Green had conceded the legal authority of the Law Society to make these rules at the Court of Appeal (Green, \textit{supra} note 1 at para 15), though this argument does not appear in the Court of Appeal judgment itself 2015 MBCA 67, 319 Man R (2d) 189.} Mr. Green appealed to the Supreme Court of Canada, which granted leave on December 10, 2015.\footnote{Decision granting leave to appeal available online: \textit{Sidney Green v Law Society of Manitoba}, 2015 MBCA 67, leave to appeal to SCC granted, online: <https://scc-csc.lexum.com/scc-csc/scc1-csc-a/en/item/15673/index.do>. The Court also granted a motion by the Federation of Law Societies to intervene in the matter on May 13, 2016.}

B. The Supreme Court of Canada Decision

1. \textit{The Majority}

In a decision written by Justice Wagner, the majority of the Supreme Court rejected Mr. Green’s appeal.\footnote{Green, \textit{supra} note 1. The majority in this case included McLachlin C.J., along with Moldaver, Karakatsanis, Wagner, and Gascon JJ.} The Supreme Court determined the
standard of review applicable to the validity of rules made by a law society was ‘reasonableness’.\textsuperscript{15}

The Court also found the language of the enabling legislation conferred a “broad discretion”, \textsuperscript{16} for benchers to act reasonably as elected officials, responsible to the legal profession to whom the rules exclusively apply.\textsuperscript{17} Here, the Court analogized law society rule-making to the legislative function of municipal councils.\textsuperscript{18}

In applying standard of review principles, the majority determined that since the Manitoba Law Society was acting “pursuant to its home statute in making the impugned rules,” ‘reasonableness’ was the appropriate approach.\textsuperscript{19} The Court also noted the regulator’s institutional expertise to decide on policy and procedures to govern the legal profession.\textsuperscript{20}

Justice Wagner considered the reasonableness of the mandatory CPD requirement in light of the general public interest mandate of the Law Society, the specific statutory obligation of the regulator to act in the public interest, and past cases that have construed law society rule-making authority broadly.\textsuperscript{21} The majority gave “considerable latitude” for the Law Society to make rules on its interpretation of the statutory public interest mandate.\textsuperscript{22}

The majority found both the rules creating the mandatory CPD program in Manitoba, and a penalty of suspension for failure to comply, to be reasonable. Justice Wagner also determined that the right to practice

\textsuperscript{15} Ibid.

\textsuperscript{16} Rules of the Law Society of Manitoba, \textit{supra} note 8; Green, \textit{ibid} at para 22.

\textsuperscript{17} Green, \textit{ibid} at para 23; see also: \textit{Catalyst Paper Corp v North Cowichan (District)}, 2012 SCC 2, [2012] 1 SCR 5.

\textsuperscript{18} Green, \textit{ibid} at para 21.

\textsuperscript{19} \textit{Ibid} at para 24.

\textsuperscript{20} \textit{Ibid} at para 25.


\textsuperscript{22} Green, \textit{supra} note 1, at para 24, citing \textit{Agaira v Canada (Public Safety and Emergency Preparedness)}, 2013 SCC 36, [2013] 2 SCR 559; and further analyzed through paras 32–42.
law was statutory, rejecting a claim by Mr. Green that a suspension deprived him of some ‘common law right’ as a legal professional.\textsuperscript{23}

Justice Wagner also noted that a suspension for failure to comply with the mandatory CPD rule was not, or not only a disciplinary action, but was instead “administrative in nature” and that “reasonable members of the public would understand that a temporary suspension...is not akin to a more serious disciplinary suspension”.\textsuperscript{24} In this respect the Court also noted that a suspension for failing to comply with the CPD requirement does not result in public notice, or appear in a lawyer’s disciplinary record.\textsuperscript{25} A similar kind of suspension, for not filing fees, also does not provide for a hearing and can be remedied through compliance.\textsuperscript{26}

The majority concluded that suspension under the rules was not mandatory in Manitoba. In this case, Justice Wagner noted some practical discretion resided with the Chief Executive Officer of the Law Society,\textsuperscript{27} since a year had passed before Mr. Green was contacted and asked to comply with the rules. In observing different procedures in place in other jurisdictions for CPD, the majority also noted that “there is no magic formula” to making rules to implement a mandatory education program,\textsuperscript{28} and found the Manitoba Law Society rules reasonable.\textsuperscript{29}

2. The Dissent

Justice Rosalie Abella wrote the dissent, joined by Justice Suzanne Coté. The dissent judgment accepted the authority of the Law Society to create a program of mandatory CPD and to suspend lawyers for non-compliance. However, the dissent turned on the issue of the right to automatically suspend a lawyer for non-compliance within the mandatory CPD rule in Manitoba. Justice Abella concluded that an automatic

\textsuperscript{23} Green, \textit{ibid} at para 49.

\textsuperscript{24} \textit{Ibid}. The court states it is not ‘disciplinary’ at para 59, but then proceeds in the next para to say CPD does not relate “solely to the competence of lawyers”, implying it does relate in part to ‘competence’, which generally may be subject to discipline. See also para 60, which then restates proposition that non-compliance is not “on its own” grounds for incompetence.

\textsuperscript{25} \textit{Ibid} at para 61.

\textsuperscript{26} \textit{Ibid} at para 63.

\textsuperscript{27} \textit{Ibid} at para 64.

\textsuperscript{28} \textit{Ibid} at para 66.

\textsuperscript{29} \textit{Ibid} at para 67.
suspension in this case impaired the public’s confidence in a particular lawyer,30 and also unreasonably undermined confidence in the profession.31

Justice Abella characterized breaches of the mandatory CPD rule as “failing to attend classes”, and observed that suspension for minor rule breaches touched on the law society’s “duty to protect the public from the erosion of trust in the professionalism of lawyers.”32 In such cases, the “perception” of professionalism is also important, and “professional delivery [of services] must not only be done, it must be seen to be done.”33

The dissent differed with the majority as to whether the Law Society had any discretion in responding to a lawyer who was non-compliant with the CPD program.34 It characterized suspension for non-compliance as a more substantive “competence” issue rather than purely as an administrative proceeding.35 Justice Abella also noted there was no opportunity for written response, no capacity for the Law Society to informally resolve the complaint,36 and no chance for representation by counsel. She also pointed out that the Law Society of Manitoba did not provide for exemptions or waivers of the requirement,37 and that because the process and sanctions were non-discretionary, no resort to judicial review was available.

Citing both Lord Denning and Justice Dickson,38 Justice Abella highlighted the disciplinary nature of the Manitoba Law Society’s process by emphasizing the possible harm to a suspended lawyer’s reputation, and to the profession, as well as personal economic costs. She noted “the reason for suspension does not magically transform a punitive consequence into an administrative one”,39 and concluded by stating that

30 Ibid at para 72.
31 Ibid at paras 81 – 82.
32 Ibid at para 74.
33 Ibid at para 79.
34 Ibid at paras 84 – 87.
35 Ibid at para 90.
36 Ibid at paras 87 – 88.
37 Ibid at paras 91 – 93.
38 Ibid at para 94.
39 Ibid at para 95, also noting the rules require the Law Society to notify the Chief Judges of Manitoba’s courts and all members of the Law Society.
the procedures to enforce the mandatory CPD program in Manitoba were “unreasonable”, and potentially sanctioned lawyers “arbitrarily.”

II. DISCUSSION OF LEGAL ISSUES

The Green case raises a preliminary question of why leave to appeal was granted, which brings into focus the longstanding policy of the Court not to provide reasons for its leave to appeal decisions. A second legal issue considered below is the determination of standard of review, and a third is the Court's treatment of the 'public interest’ function of legal regulators in Canada.

A. Policy and Legal Dimensions for Granting Leave

In considering the significance of the Green case, Alice Woolley has noted “Rarely have so many judicial resources been spent on a case worthy of so little.” This observation raises a real question about how leaves are granted and why an appeal was allowed in these circumstances. The reasons why the Supreme Court of Canada chooses to hear certain matters is the subject of some scholarship, and leave to appeal is rare, with only between ten and fifteen percent of all applications granted leave.

Leaves are granted on the basis of several factors, set out generally in the Rules of the Court, though articulated in more detail in case law. In

40 Ibid at paras 96 – 98.
41 See Alice Woolley, “Justice For Some” (13 April 2017), ABlawg (blog), online: <http://ablawg.ca/2017/04/13/justice-for-some/> [Woolley, "Justice for Some"].
43 Governing, ibid at 78-79. The Supreme Court’s average acceptance rate is 10 - 15 percent, based on 500 – 600 applications received annually and “the tradition has been for the panels of three to retain the final word on whether a case will be heard”.
44 See Rules of the Supreme Court of Canada, SOR/2002-156 at r 25(1) (c) (ii) which requires applicants to identify the “public importance” of issues raised, and (iii)
this case, there was little if any ‘conflicting jurisprudence’, which is one factor that would have justified granting leave. The provincial regulation of lawyers has some ‘national scope’, another factor, but courts have recognized a longstanding and wide authority for law societies to regulate the Canadian legal profession. Moreover, the existence of mandatory CPD for lawyers has been widely accepted across Canada.

At first glance then, the facts of the case seem straightforward, the law uncomplicated and, but for this case, largely uncontested. Also, the Court does not usually provide reasons for granting or denying applications, which has been justified in the past as a way to ensure the Court’s “flexibility” in “allocating its scarce judicial resources.” Given recent improvements in the Court’s efficiency, declining caseloads and the provision of additional resources available to Supreme Court judges, the historical justification for not providing reasons on leave applications may be less convincing now than in the past. In the end, the lack of clarity requires identification of the potential constitutional validity or inoperability of a law.

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45 See R v Hinse [1995] 4 SCR 597, 130 DLR (4th) 54 [Hinse].
46 Including to sanction lawyers for matters that may not be explicitly set out in law, see AG Can v Law Society of BC [1982] 2 SCR 307, 37 BCLR 145, also known as the “Jabour” decision. See also Thomas Harrison, “Independence and CPD in the Camp Inquiry & the Green Appeal” (30 September 2016), Politics, Law and Life (blog), online: <http://politicslawlife.blogspot.ca/2016/09/independence-cpd-in-camp-inquiry-green.html> [Harrison, “Independence and CPD”].
47 As noted in Factum of the Intervener, Federation of Law Societies of Canada in Green, supra note 1 at para 18, which sets out the various statutory regimes, online: <http://www.scc-csc.ca/WebDocumentsDocumentsWeb/36583/FM030_Intervener_Federation-Law-Societies-Canada.pdf>.
48 Governing, supra note 42 at 81.
49 Hinse, supra note 45 at para 8.
50 Current statistics, from 2006 to 2016 available at the Supreme Court website (see: “Statistics 2006-2016” (28 February 2017), Supreme Court of Canada (website), online: <http://www.scc-csc.ca/case-dossier/stat/index-eng.aspx>) support the characterization that the Court has had its “fastest productivity level in a decade”, Governing, supra note 42 at 77. At the time of Hinse, ibid, the court usually heard over a hundred matters a year, but in recent times has averaged well below. In 2016 it heard only 63 matters. The Court is increasing clerk resources available to each judge by 25%. See Mallory Hendry, “Changes coming to SCC law clerks program” (19 April 2010), Canadian Lawyer & Law Times (blog), online: <http://canadianlawyermag.com/legalfeeds/3781/changes-coming-to-scc-law-clerks-program.html>.
about why leave was granted in Green may be a case in point for why it might be advisable for the Supreme Court to re-consider its general practice not to provide reasons in leave to appeal matters.51

One possible explanation for why leave was granted is the issue of the constitutional role of the Bar raised by this case.52 For example, the Supreme Court has recently identified a common law constitutional basis for the Bar in relation to the obligations to clients.53 In both written and oral submissions though,54 the argument about a connection between legal practice and the common law was not substantially further developed. Consequently, it is unsurprising that the Court later gave short shrift to Mr. Green’s argument and found instead that, in this instance, a right to practice law is wholly statutory.55

However, questions about the nature of Bar independence continue to be considered and refined by Canadian courts.56 Other cases have

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51 Summaries prepared by staff lawyers were apparently available by written request up until recently, Governing, supra note 42 at 79. The author requested these summaries, but was advised by the Supreme Court that the practice to make them available on request was no longer in place, email dated 2 May 2017, on file with the author.

52 The Green case, supra note 1, also did not touch on any question involving Aboriginal rights, another possible consideration in granting leave, Governing, ibid at 79, citing text of a speech delivered by John Sopinka, “The Supreme Court of Canada (Toronto, 10 April 1997) in Brian A Crane and Henry S Brown, The Supreme Court of Canada Practice (Toronto: Thomson Canada, 2008) at 482.

53 Canada (AG) v Federation of Law Societies, 2015 SCC 7, [2015] 1 SCR 401. The Court identified part of the duty of loyalty, the duty of commitment to a client’s cause as a new principle of fundamental justice. The recognition of the common law principle further reinforces an emerging viewpoint that independence of the Bar is an important unwritten constitutional principle. See Professor Patrick Monahan, now a Superior Court judge in Ontario, in Patrick Monahan, “The Independence of the Bar as a Constitutional Principle in Canada” in Law Society of Upper Canada, ed, In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada and the Independence of the Bar (Toronto: Irwin Law, 2007) [LSUC, Public Interest], at 117 [Monahan, Independence].


55 Green, supra note 1 at para 49. Though in the British tradition the Bar of the Inns of the Court never enjoyed statutory recognition, see Philip Girard, “The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities” in [LSUC, Public Interest], supra note 53, 45 at 50 - 51.

56 See Thomas Harrison, “The Emerging Principle of Independence of the Bar in
raised similar issues about how legal professional regulation functions in Canada. In light of this litigation, some of it pending, the Supreme Court may have granted leave in the Green case as a potential “strategic” opportunity to further develop the law in this area. Several of these cases are considered in the next section in the context of two significant legal developments in the Green decision.

B. Standard of Review

1. ‘Reasonableness’ as the Standard for Law Society Rule-Making

The Green case determined that the rules of a law society should be reviewed on a standard of reasonableness. It is surprising that the Green case is the first to establish the standard of review by the Supreme Court for a rule created by a Canadian law society. Given the distinctive nature of Canadian legal regulators and their important role in legal professional governance, it seems remarkable that such a matter has never been


58 Though such “strategic” approaches by Canadian Supreme Court judges may be less pervasive or less apparent, Tournament, supra note 42 at 95.

59 Green, supra, note 1 at para 19.

60 North America is arguably the “last bastion of traditional notions of self-regulation of the legal profession”, see Alice Woolley, Understanding Lawyers’ Ethics in Canada, (Markham: LexisNexis, 2011) at 4. In Canada, self-regulatory independence of the Bar also has distinct features, such as lawyer elections and a system of statutorily authorized regulatory bodies, run largely by lawyers; see also Noel Semple, Legal Services Regulation at the Crossroads: Justitia’s Legions, (Cheltenham, Edward Elger
considered directly by the highest Court. It may be that it is first time the Court has considered the standard because more focus has been on reviewing the disciplinary decisions of law societies, rather than on the validity of the rules themselves.

Notwithstanding this possible lack of previous attention, the majority decision undertook an “analytically robust reasonableness review” in justifying the use of a ‘reasonableness’ standard in this case.\(^\text{61}\) The identification of a reasonableness standard in this context is not unexpected given a similar standard is used to review law societies’ disciplinary decisions.\(^\text{62}\) However, the Green case may also represent a shift in direction, away from a recent emphasis on a categorical approach in determining the standard of review, towards a more flexible consideration of context.\(^\text{63}\)

The possible shift in this case illustrates an ongoing debate in Canadian administrative law about the extent to which the Supreme Court may apply a variable standard in its deference to administrative decision-makers. On the one hand, the Court has previously rejected the idea that its application of the ‘reasonableness’ standard changes.\(^\text{64}\) On the other hand, the contextual consideration of factors in Green may have the result that the Court may be “more reluctant to interfere in some administrative decisions than in others”.\(^\text{65}\) In other words, if the

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Daly, supra note 61, citing Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd, 2016 SCC 47, [2016] 2 SCR 293.

Recently, for example, in Wilson v Atomic Energy of Canada, 2016 SCC 29, [2016] 1 SCR 770. The Court’s position on this issue has not been consistent, as noted by Woolley, “Justice for Some”, supra note 41.

contextual factors highlighted by Justice Wagner in Green were to change in future cases, the Court may apply a different standard.66

2. Applying the Reasonableness Standard in Upcoming Litigation

The question of law society reasonableness in relation to its rule-making authority will likely be important in the pending case involving Ontario lawyer Joseph Groia.67 In that instance, the Court will be considering law society disciplinary sanctions, arising out of claims that Mr. Groia inappropriately breached his professional civility obligations. The term “civility” appears throughout the 2016 Ontario Court of Appeal judgment in Groia and both the dissent and majority decisions in Groia found that “civility” was “enshrined” in the province’s professional rules.68 However, the term “civility” does not appear in the professional rules, nor is the concept defined in either statute or regulation in Ontario.69

In Green, the majority also considered that the Law Society was acting within its statutory authority to make “rules” to establish a “presumption

66 Which could lead to a substantially different outcome depending on the circumstances. See Daly, supra note 61 for the Court’s possible recent shift to a contextual approach.

67 Groia, supra note 57.

68 Ibid at paras 119 and 128 and adopted by the dissent at 254.

69 An older version of the professional rules from the Law Society of Upper Canada, pre 2014, is under consideration in the Groia litigation. However, there is arguably no substantive difference between the old rules and the new rules in respect of the “civility” question. See Law Society of Upper Canada, Rules of Professional Conduct, Toronto: Law Society of Upper Canada, 2014. There is reference in two sub-rules in Ontario obliging lawyers to be ‘civil’, currently at 3.2-1 and 5.1-2. These sub-rules are identified respectively as the “Courtesy” rule and the “Quality of Service” rule. The term ‘civil’ is undefined and the term “civility” does not appear in either the rules or the Commentary. The overall concept of “civility” remains unidentified and undefined in either statute or in the professional regulations governing lawyer behaviour in Ontario, see Thomas Harrison, “Civility, Public Interest, Courts, Zealousness & Discretion in Groia v LSUC 2016”, (22 June 2016), Politics, Law and Life (blog), online: <http://politicslawlife.blogspot.ca/2016/06/civility-public-interest-courts.html> . The definitional ambiguity, and the relative rarity of “incivility” both remain significant issues in the scholarship examining lawyer self-regulation in Canada, see Alice Woolley, “Does Civility Matter?” (2008) 46 Osgoode Hall LJ 175; and Alice Woolley, “Uncivil by Too Much Civility?: Critiquing Five More Years of Civility Regulation in Canada” (2013) 36 Dal LJ 239, which are also cited by the dissent in Groia, supra note 57 at para 302.
of reasonableness”. By contrast, when the Supreme Court of Canada considers the applicable standard in Groia, a contextual approach may take into account the absence of any specific “civility” rules created by the Law Society of Upper Canada. Consequently, the shift to a contextual approach may be an important factor in determining the standard the Court will use to review this upcoming case.

In determining the standard of review, the Court in Green also determined that a presumption of reasonableness applies in instances where a law society acts pursuant to its home statute. This determination, and its connection to the ‘public interest’, is also an important jurisprudential development and is considered in the next section.

C. The ‘Public Interest’ Obligations of Law Societies

Changes in the way the Court approaches standard of review could impact on the way it considers the statutory public interest authority of legal regulators. In reviewing past administrative decisions, courts commonly considered whether the decision-maker acted pursuant to the “interpretation” of its home statute, in which case courts begin their consideration with a presumption of reasonableness. However, in the Green case, the Supreme Court appears to have altered this wording to remove the word “interpretation”, so that a regulator need only act pursuant to its home statute. This wording change could have a significant impact in the way the Court approaches reviews, especially in

70 Green, supra note 1 at para 23.
71 Ibid at para 24.
73 Woolley, “Justice for Some”, supra note 41; where she notes this distinction in paragraph 24 of the decision; Green, supra note 1. It ‘appears’ to have been eliminated because later in the same paragraph, the Supreme Court re-inserts the term ‘interpretation’ to say that a law society’s ‘interpretation’ of its public interest mandate must be reasonable. However, as set out infra, this apparent change may be significant in a court’s initial determination of whether or not a regulatory body has acted within the purview of its statutory public interest mandate in the first place, which may be considered more strictly than on a standard of simple reasonableness, under either a contextual approach or as a matter of correctness.
relation to judicial review of administrative action in professional legal regulation.

1. **Interpretation of the Statutory ‘Public Interest’ Obligation of Law Societies**

   In the past, questions of statutory interpretation by administrative tribunals were generally accorded less deference by the courts. Following the Supreme Court’s 2008 decision in *Dunsmuir*, judges generally adopted a more deferential approach where an administrative body was interpreting its ‘home’ or enabling statute, though the “competing approaches” and numerous exceptions continued to “vex” the Court.

   If this wording change in *Green* is read narrowly, it could suggest that the Court will focus on the scope of enabling legislation, rather than the reasonableness of an administrative decision-maker’s interpretation. Eliminating the word “interpretation” may thus be important because it could mean that a presumption of reasonableness would not automatically apply where the scope of underlying statutory authority was an issue. Without an initial presumption of reasonableness, a contextual approach by the Court could result in a different applicable standard, and a return to a less deferential approach in construing whether an administrative decision-maker has acted in accordance with authority conveyed by their enabling legislation.

2. **The ‘Public Interest’ in Litigation Involving Law Societies**

   The scope of statutory authority, and the standard of review of law societies purporting to act in the public interest, will be important issues in future cases. For example, the Ontario Court of Appeal decision in *Groia* also emphasizes the public role and function of law societies.

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75 *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 94-95, [2008] 1 SCR 190.
76 Blake, *supra* note 74 at 215.
77 But see Woolley, “Justice For Some”, *supra* note 41; which suggests instead that this wording change in *Green* may actually widen the presumption of reasonableness to apply to all administrative actions, including the question of whether a tribunal has acted within its statutory mandate.
78 *Supra* notes 68-70 and associated text.
79 *Groia*, *supra* note 57; where the historical public interest/purpose is the focus of para
Unlike the situation in the Green case though, there was no direct statutory authority for the Law Society of Upper Canada to act in the ‘public interest’ at the time of the events that gave rise to the proceedings against Mr. Groia. The absence of statutory public interest authority, in addition to ambiguities with respect to ‘civility’, may be important contextual considerations for the Court’s review of law society authority to regulate lawyers for in-court misconduct on this basis.

Similarly, the question of law society ‘public interest’ authority is also likely to be addressed in the upcoming Supreme Court of Canada case involving Trinity Western University (TWU). Under Canada’s federal structure, each province and territory has individual responsibility for the legal profession, and each has a separate legal regulator. The law society in each jurisdiction must therefore determine whether potential applicants meet the requirements for Bar membership. At issue in this case is a community covenant that TWU requires students to sign, prohibiting sexual activity except as between a husband and wife. The accreditation of the law school at TWU has consequently spawned litigation in several provinces from those opposed to accreditation because, it is argued, the community covenant is discriminatory on the grounds of sexual orientation.

1 of the majority judgment.

Legal Profession Act, supra note 8, s 3(1); the purpose of the Manitoba Law Society is to “uphold and protect the public interest in the delivery of legal services with competence, integrity and independence”.


Canada v LSBC, ibid, which suggests absence of a statutory public interest power may be less significant since Courts have long recognized a common law ‘public interest’ authority in professional legal regulation.

LSBC, Trinity Western, supra note 57.

Prohibited under s 15 of Canada’s Charter, supra note 10. Most jurisdictions in Canada have accredited the TWU law school, with the notable exception of Ontario. The decision of Ontario’s Law Society not to accredit was upheld by the Ontario
Public interest issues that will be before the court in that case include the protection of individual rights under the Charter, the distinct role of law societies in Canadian legal regulation, and the constitutional role of the Bar.\(^8\) On a wide view of the ‘public interest’, the issues in TWU may also be construed as reasonably within the statutory authority of a Canadian legal regulator. However, if the wording change in Green suggests that the Court is returning to a less deferential approach, then the power of law societies to regulate in this area may be more circumscribed.

Leave to appeal to the Supreme Court in the TWU matter was granted in February 2017,\(^8\) and it is currently scheduled to follow the appeal in the Groia matter, a few weeks later in November 2017.\(^8\)

In Green, the Court compared law societies to municipal authorities, which also suggests a narrow interpretation of regulators’ public interest obligations.\(^8\) Here, the majority analogized benchers to elected city officials to suggest that they were similarly democratically accountable to the lawyers who elected them.\(^8\) The Court’s description narrows the traditional characterizations of law societies and lawyers, which are more typically described as playing a broad public and democratic role. At a minimum though, the public purpose of law society regulation obliges

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\(^8\) Monahan, Independence, supra note 53; Charter, supra note 10.
\(^8\) LSUC, Trinity Western, supra note 84.

\(^8\) Green, supra note 1 at para 21.
\(^8\) Ibid at para 23; known as the “law and liberalism” thesis, see Terence C Halliday & Lucien Karpik, Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries (Oxford: Clarendon Press, 1997); for a more limited version of this argument in the Canadian context see, e.g., W Wesley Pue, “Death Squads and ‘Directions over Lunch’”, in LSUC, Public Interest, supra note 53 at 83. This traditional narrative involving the ‘public interest’ is a central theme and starting point of the majority in Groia, supra note 57 at para 1.
benchers not just to be accountable to their electors, but to a much wider body, including everyone who depends on the provision of legal services.\textsuperscript{90}

Subsequent to its decision in the \textit{Green} case, the Supreme Court revisited the question of the public interest function of law societies. In its June 2017 decision in \textit{Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin}, the Supreme Court also considered issues involving a lawyer facing sanctions for his professional behaviour, though in a criminal context involving the imposition of costs on defence counsel.\textsuperscript{91} Though the primary issue in the case involved the judicial authority to sanction lawyer behaviour, the Supreme Court also considered the complementary public role of law societies.\textsuperscript{92}

Here, without reference to its earlier comparison of law societies to municipal councils, the majority of the Supreme Court provided a similarly narrow definition of the primary role of law societies as one of ‘public protection’.\textsuperscript{93} The Court’s identification of ‘protection’ as the primary function of law societies seems to be another characterization of the legal regulators’ public role. In addition to being different from the description in \textit{Green}, this purpose also potentially varies from the traditional view, which sounds comparable, not to the traditional role of law societies, or to the role of municipal councils, but rather to a modern consumer protection tribunal.

These descriptions of the role and function of law societies in relation to the ‘public interest’ appear inconsistent. The Court has provided only limited explanation of these points in both decisions, so the ultimate determination remains unclear. However, the jurisprudential inclination in both decisions appears to also presage some future possible limits on the public role and function of law societies.

\textsuperscript{90} Also note in Woolley, “Justice For Some”, supra note 41; though it does not explore the implications of the comparison in relation to how it might affect future determinations of the regulator’s public interest authority.

\textsuperscript{91} 2017 SCC 26, [2017] 408 DLR (4th) 581 [\textit{Jodoin}]. In comparison to the decision in \textit{Green}, the dissent in \textit{Jodoin} was also written by Justice Abella, who was again joined by Justice Coté.

\textsuperscript{92} \textit{Ibid} at paras 22 – 23.

\textsuperscript{93} \textit{Ibid}.
III. Public Policy Issues Raised in the Green Appeal

From a policy perspective, the Green litigation touches on two public policy issues. These issues have received national attention and are now the subject of initiatives that may lead to some important changes in the public administration of the judicial branch of government. These public policy issues are briefly examined in the next two subsections.

A. Mandatory CPD for judges?

The issue of mandatory CPD for lawyers has also become an important concern being considered in the context of judges. At the same time that Mr. Green was before the Court in 2016, similar questions about the need for a mandatory legal education, but in the judicial context, arose in a recent Canadian Judicial Inquiry involving Justice Robin Camp.94 In that matter, Justice Camp faced scrutiny about his conduct and language in a sexual assault hearing over which he presided. Justice Camp’s behaviour showed that his knowledge and understanding of criminal law was inadequate.95 The Inquiry also provoked a more general consideration of whether judges should also be subject to mandatory education to address gaps in legal knowledge. Those opposed claimed mandatory education for judges would breach judicial independence and set a potentially “dangerous precedent”.96

94 See Cristin Schmitz “Cromwell worries judicial gaffes won’t be cured through education”, (30 September 2016), Lawyers Weekly (blog), online <http://www.lawyersweekly.ca/articles/3023>. Justice Camp’s language in a case where he was presiding over a criminal sexual assault trial at the provincial court, and his lack of understanding about the law in this area ultimately led to a Canadian Judicial Council recommendation that he be removed from the bench, see Canadian Judicial Council, “Canadian Judicial Council recommends that Justice Robin Camp be removed from office”, (March 2017), online: <https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2017_0309_en.asp>; Harrison, “Independence and CPD”, supra note 46.

95 Justice Camp eventually resigned from the bench, after it was recommended by the Canadian Judicial Council that he be removed from judicial office, see Sean Fine, “Judge in ‘knees together’ trial resigns after the council recommends he be fired”, Globe and Mail (9 March 2017), online: <http://www.theglobeandmail.com/news/national/judicial-council-recommends-justice-robin-camp-be-fired/article34249312/>.

96 See CBC News, “Mandatory training for judges in sexual assault sets dangerous
By comparison, the Court considered and rejected a claim that mandatory CPD for lawyers in some way breached professional rights in Green. Similarly, the risks that mandatory legal education for judges might breach judicial independence also seem overstated. The question of whether ‘judges should return to school’ has been the subject of discussion in Canada for many years. In the legal system, the mandatory imposition of such a requirement must legitimately respect the independent role of lawyers and judges. However, by contrast to Canada, an annual educational requirement has been included within the requirements of judicial office in Britain for the last several years.

In this respect, the use of mandatory education to enhance legal competency, or perhaps to address things like the quality of judicial writing, appear as valid objectives reasonably within the public purpose of judicial independence. Currently, mandatory legal education for precedent, expert says”, CBC News (10 April 2017), online: <http://www.cbc.ca/news/canada/edmonton/mandatory-judicial-sexual-assault-law-dangerous-precedent-1.4063574>; quoting University of Alberta’s Professor Lise Gotell.


98 In England judges who hear sexual assault matters must take a mandatory course. See Philip NS Rumney and Rachel Anne Fenton, “Judicial Training and Rape” (2011) 75 JCL 473.

99 Generally judges and lawyers, but in the judicial context specifically in the case of Justice Camp.


101 Which is also not an absolute principle and is subject to limits in the Canadian context, such as on tenure and the requirement that Canadian judges must retire at age 75.
judges continues to be the subject of public discussion and is now the focus of possible federal legislation.\textsuperscript{102}

B. Judges Returning to Practice?

A second policy concern raised by the Green case is whether and how judges should be permitted within lawyer’s professional rules to return to practice once they leave the bench. It has been noted that more and more Canadian judges are now returning to legal practice.\textsuperscript{103} In this case, Mr. Green’s counsel was Mr. Charles Huband, a former judge who returned to practice in 2010 following his retirement from the Manitoba Court of Appeal several years earlier.

Mr. Huband’s role as counsel for the appellant in this case illustrates a host of legal regulatory challenges that have continued to “stir debate” in this area.\textsuperscript{104} These include the possibly untoward perceptions of retired judges appearing before former colleagues, unfairness in lawyer advertising, and the need for more explicit post-judicial service confidentiality guidelines.\textsuperscript{105} Like the issue of mandatory CPD, this issue is also the subject of a current public consultation, here by the Federation of Law Societies, which is considering changes to make the rule more restrictive.\textsuperscript{106} Whatever the final outcome, given the increasing prevalence

\textsuperscript{102} In February 2017, the interim leader of the Opposition tabled Bill C-337, An Act to amend the Judges Act and the Criminal Code (sexual assault), 1st Sess, 42nd Parl, 2017, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8792144>; which would require education in “sexual assault law that includes instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants”.

\textsuperscript{103} Stephen GA Pitel & Will Barolin, “Revising Canada’s Ethical Rules for Judges Returning to Practice” (2011) 34:2 Dal L J 483 [Pitel & Bartolin].

\textsuperscript{104} Cristin Schmitz, “Proposed Ethics Rules for Former Judges Stir Debate”, (27 February 2017), The Lawyer’s Daily (blog), online: <https://www.thelawyersdaily.ca/articles/2612/proposed-ethics-rules-for-former-judges-stir-debate>.

\textsuperscript{105} Ibid. See also, Adam Dodek, “Judicial Confidentiality”, (13 June 2016), Slaw (blog), online: <http://www.slaw.ca/2016/06/13/judicial-confidentiality/>; Pitel & Bartolin, supra note 103.

\textsuperscript{106} See notice of consultation posted at the Federation of Law Societies website, Federation of Law Societies of Canada, News Release, “Consultation Begins on
of judges returning to practice, changes to professional rules to clarify regulation in this area are a welcome improvement to legal governance in this area.

IV. CONCLUSION

There is some legitimate question about why the Supreme Court would choose to grant leave in the Green case. However, this recent Supreme Court decision is important for several reasons. The Court’s identification of a novel standard of review and its consideration of law society’s ‘public interest’ obligations are substantial additions to the law. These additions take on further significance in light of the prospect that these issues may continue to be refined by the Court. The Court’s consideration of legal issues in Green may foreshadow its approach to similar issues and provides an interesting glimpse into judicial perspectives on several aspects of professional lawyer regulation in Canada.

From an additional policy perspective, the case also intersects with a couple of concurrent issues in judicial administration. This includes a proposal for mandatory education for judges, which has become the focus of potential federal legislation. Whether for lawyers or judges, the prospect of mandatory CPD appears in the public interest to address gaps in knowledge and to keep abreast of new developments in the law.

Given Mr. Green’s representation by a retired judge of Manitoba’s Court of Appeal, the case also addresses ongoing concerns about Canadian professional lawyer rules governing how judges can return to legal practice. With mandatory retirement dates and extended lifespans, more and more former judges are maintaining an active presence in Canada’s legal community. Yet to date, the rules have provided only a

Model Code Amendments” (2 February 2017), online: <https://flsc.ca/consultations-begin-on-model-code-amendments/>; where it is noted that “the proposed rule on Former Judges Returning to Practice would bar former provincial, territorial or federally appointed judges, from communicating with or appearing as a lawyer before any Canadian court or tribunal, without the permission of the law society in the relevant jurisdiction. The proposed rule would permit former judges to mentor, support, coach and teach others how to better advocate before, or correspond with, a court”.

Such as are currently set out in National Code of Professional Conduct, supra note 3 at r 7.7.
minimal level of guidance with respect to this issue. In this respect, further clarification and direction from legal regulators will address a considerable lacuna in professional lawyer rules.

Mr. Huband’s participation as appellant’s counsel in this matter also relates to a policy question about access to justice, which touches on why leave to appeal in this matter to the Supreme Court was granted in the first place. Within the Canadian legal system, one “litigant-centred” hypothesis suggests that “upper dogs” or those with higher status, may receive more favourable treatment. Based on empirical research, some have concluded that the “upper dogs” hypothesis has previously not applied at the Supreme Court level.

It may be coincidental, but the high profile of a former Court of Appeal judge, acting as counsel to a prominent lawyer and former politician appellant, in combination with the debatable merit of the Green case, could be an example of how the Canadian justice system prefers high status litigants. Given the public attention paid to challenges of access to justice, and the difficulties faced by so many in accessing the courts, it would be unfortunate if the Supreme Court was reinforcing, by hearing this matter, a systemic trend towards favouring litigants with greater status or social capital.

Whatever else the decision may portend for the future of Canadian law and policy, the case marks the end of a lengthy and distinguished career for Mr. Green. Having lost his challenge before the Supreme Court, he has now resigned from the Manitoba Bar. However, he remains unrepentant in his critical views of the value of lawyer CPD, stating “most lawyers agree” that compulsory legal education is “a sham.”

Ultimately, the Supreme Court’s consideration of the legal issues in this case are important steps in its approach to questions of professional legal regulation in Canada. Together, the legal and public policy issues

108 Macfarlane, Governing, supra note 42 at 80, and Tournament, supra note 42.
raised in Green make it an important marker in the development of both the law and policy, and perhaps, a sign of things to come.
Re The Esther G. Castanera Scholarship Fund and Recent South African Judgments on Discriminatory Bursary Trusts

FRANÇOIS DU TOIT *

I. INTRODUCTION

In Re The Esther G. Castanera Scholarship Fund¹ the Manitoba Court of Queen’s Bench recently upheld a gender-exclusive testamentary bursary trust. Dewar J found that the trust bequest’s gender exclusivity violated neither Manitoba’s Human Rights Code² nor public policy.³ South African courts have, during the post-constitutional era,⁴ also been confronted with the question whether gender-exclusive testamentary bursary trusts occasion unfair discrimination against those excluded from eligibility and, if so, whether these trusts’ provisions can be varied through the excision of the impugned gender restrictions from the wills concerned.

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¹ Re the Esther G. Castanera Scholarship Fund, 2015 MBQB 28, [2015] 7 WWR 191 [Castanera].
² CCSM c H175 [Manitoba Human Rights Code].
³ Castanera, supra note 1 at para 46.
⁴ The first fully-democratic South African elections took place on 27 April 1994, which was also the date upon which South Africa’s interim Constitution came into effect. The Constitution of the Republic of South Africa, No 108 of 1996 [Constitution]; became South Africa’s supreme law in 1996.
In each of the South African cases, the gender restrictions were imposed in conjunction with other exclusions from eligibility, chief among which were race and religion. Current South African jurisprudence on discriminatory testamentary bursary trusts therefore features no judgment factually comparable to Castanera in which a court had to determine the tenability of only gender as a criterion for bursary eligibility in the light of policy imperatives on equality and non-discrimination.

This difference raises the question whether a South African court would also have upheld the gender-exclusive Castanera Trust. This commentary suggests an affirmative answer to this question, and investigates some of the convergences that exist in South African and Canadian courts’ treatment of bursary trusts under which testators have imposed discriminatory eligibility restrictions. The commentary shows that contemporary policy issues in regard to wills, gifts, and trusts are by and large universal in nature and that, consequently, legal-comparative engagement with these issues yields valuable perspectives on challenges common to diverse jurisdictions.

II. THE CASTANERA JUDGMENT

In Castanera, the testatrix, who passed away in 1997, executed a will in 1991 in terms of which she left 50% of her residuary estate “for scholarships at the University of Manitoba for needy and qualified women graduates of the Steinbach Collegiate Institute who will study for a Bachelor of Science degree with a major in one of the basic sciences...” The University of Manitoba was concerned from the outset that the gender exclusivity of the Esther G. Castanera Scholarship Fund,
established pursuant to this bequest,\(^8\) contravened the University’s policies on the non-acceptance of discriminatory scholarships, bursaries, and fellowships. However, the issue remained unresolved internally for more than a decade, and the University approached the court in 2013 with a request for the variation of the Scholarship Fund, inter alia to include also male graduates within its eligibility criteria.\(^9\) Dewar J adjourned this matter to allow the University time for further deliberation, which elicited an amended application from the University calling upon Dewar J to determine, inter alia, whether the “qualification in the Will that the Fund be used for ‘women graduates’ offend or violate The Human Rights Code ... or public policy.”\(^10\) The University’s concerns regarding the tenability of the gender-exclusive bequest stemmed from the fact that, although female students were traditionally underrepresented in the sciences, their numbers in the University’s relevant undergraduate programs had risen in recent times.\(^11\)

Dewar J commenced his judgment on the aforementioned question posed in the University’s amended application by distinguishing the leading judgment in Canada Trust Co v. Ontario (Human Rights Commission)\(^{12}\) – also known as the “Leonard Trust case” – from the one before him in Castanera. Canada Trust involved an inter vivos trust for educational scholarships. The trust’s indenture restricted eligibility to, inter alia, Protestant Christians of the White race. The trust deed’s recitals expressed the settlor’s belief that the White race is best equipped to ensure global advancement; moreover, that the world’s progress is dependent on the maintenance of Christianity.\(^13\) The trust’s indenture also contained a proviso that limited the annual expenditure on any female recipient of a scholarship to no more than one quarter of the total allocation made for scholarships to male and female recipients in any given year.\(^14\) The Ontario Court of Appeal ruled that all restrictions with respect to race, colour, creed or religion, ethnic origin, and gender had to be deleted from

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8 Note that Dewar J used “the Esther G. Castanera Scholarship Fund” and “the Castanera Trust” synonymously in his judgment.
9 Castanera, supra note 1 at paras 8–13.
10 Ibid at para 14.
11 Ibid at para 24.
12 [1990] 69 DLR (4th) 321, 74 OR (2d) 481 [Canada Trust].
13 Ibid at para 14.
14 Ibid at para 18.
the trust indenture on the ground that those conditions contravened public policy. The Court condemned explicitly the settlor’s beliefs on racial and religious superiority, and found these beliefs patently at odds with contemporary public policy.\footnote{Ibid at para 39. See also the recent judgment of the Ontario Superior Court of Justice in Royal Trust Corporation of Canada v The University of Western Ontario et al., 2016 ONSC 1143, [2006] 129 OR (3d) 772. Where Mitchell J declared qualifications relating to, inter alia, race, marital status, and sexual orientation contained in a testamentary bursary bequest void as being contrary to public policy. The Judge ruled that, although the will did not expressly state that the testator propounded racial supremacy and homophobia, inter alia, as was the case with the indenture under consideration in Canada Trust, the impugned qualifications nevertheless left no doubt as to the testator’s views and his intention to discriminate on the aforementioned grounds: ibid at para 14.}

Dewar J noted in Castanera that the majority judges in Canada Trust were “clearly offended” by the settlor’s views on race and religion, but that their reasoning in this regard did not comment on the condition in the trust’s indenture that restricted female scholarship-recipients to one quarter of the distributable annual fund. Dewar J consequently declined to interpret the majority’s ruling in Canada Trust, namely to excise the gender restriction along with the other aforementioned restrictions from the trust’s indenture, “as a conclusion that every gift that discriminates between the sexes will necessarily be contrary to public policy.”\footnote{Castanera, supra note 1 at para 35.} In so finding, Dewar J aligned himself expressly with the view espoused in University of Victoria v. British Columbia (Attorney General)\footnote{2000 BCSC 445, [2000] 185 DLR (4th) 182 [University of Victoria].} that there is nothing offensive in a testator who belongs to a particular faith wishing to promote others of the same faith (in University of Victoria through bursaries reserved for Roman-Catholic students) if the gift was not motivated by notions of supremacy.\footnote{Castanera, supra note 1 at paras 34, 37. See also Re Ramsden Estate, (1996) 139 DLR (4th) 746, [1996] 145 Nfld & PEIR 156.} This very aspect served, according to Dewar J, to distinguish the Esther G. Castanera Scholarship Fund from the Leonard Scholarships:

\textit{Put very simply, the restrictions which drove the decision in the Leonard Trust case were motivated by a belief that white Anglo Protestant people were superior to all other people of different races and different creeds. It is this notion that a select group of people are superior to others simply because of who they are that...}
makes the restrictions in the Leonard Scholarships so offensive. The restrictions contained in the Castanera Scholarship Fund are not motivated by superiority. If anything, they are motivated by a desire to promote women in a field which historically was a male-dominated field. There is no suggestion that women will make better scientists than men. There is only a suggestion that women should be encouraged to enter a discipline which Dr. Castanera appeared to have enjoyed, and which historically was not populated by women. The notion that these conditions can be construed as unreasonably discriminatory is simply not sustainable.\(^\text{19}\)

Dewar J bolstered this view with reliance on a number of considerations:

- the testatrix’s desire to promote women in her field of specialisation – one in which women were historically underrepresented – was a bona fide and reasonable cause to benefit only female students;\(^\text{20}\)
- the testatrix’s freedom of testation had to be weighed against (potential) discrimination, but, absent an offensive motive on the testatrix’s part, the Esther G. Castanera Scholarship Fund did not evince blatant discrimination;\(^\text{21}\)
- male students excluded from the testatrix’s beneficence might feel deprived, but that was not determinative – no male student was precluded from pursuing studies in the sciences simply by reason of his ineligibility for the particular scholarship; if a male student was truly dedicated to the sciences, he would find other opportunities to enter the field;\(^\text{22}\)
- even though the underrepresentation of women in the sciences between the time of the will’s execution and the time the gift became effective had changed, a narrow focus on numbers to conclude discrimination, to the exclusion of other considerations such as the testatrix’s background as well as the origin of the gift, would undermine the testatrix’s last wishes;\(^\text{23}\)

\(^{19}\) Castanera, supra note 1 at para 37.

\(^{20}\) Ibid at para 38.

\(^{21}\) Ibid at paras 39 - 40.

\(^{22}\) Ibid at para 40.

\(^{23}\) Ibid at para 41.
if a university’s policies on the non-acceptance of discriminatory scholarships, bursaries and fellowships conflict with a testamentary bursary bequest, it should decline to accept the gift in the first place, or apply forthwith for its variation with service to all parties who might benefit if the variation was not allowed.24

In light of the foregoing, Dewar J answered the question posed in the University’s amended application in the negative: the bursary trust’s gender exclusivity violated neither the Human Rights Code25 nor public policy.26

III. SOUTH AFRICAN JUDGMENTS

A. Racial Restrictions

During the post-constitutional era South African courts have been steadfast in their condemnation of race-based eligibility restrictions imposed under testamentary bursary trusts. This approach is mandated by the Constitution because the Constitution’s Bill of Rights27 is binding on all natural and juristic persons;28 moreover, the Constitution demands that South African courts, in their application of a provision of the Bill of Rights to a natural or juristic person, apply or develop the common law to give effect to such a constitutional right.29 Contemporary South African courts have therefore addressed policy issues in private law with reliance on the normative value system established by the Constitution in general and the Bill of Rights in particular. In Minister of Education v. Syfrets Trust Ltd NO,30 for example, the Court struck a restriction from a testamentary bursary trust that limited eligibility to students “of European descent only” at the University of Cape Town. Griesel J ruled, having applied the constitutional unfair-discrimination test espoused in Harksen v. Lane NO31

24 Ibid at para 42.
26 Castanera, supra note 1 at para 46.
27 Constitution, supra note 4 at ch 2.
28 Ibid, s 8(2).
29 Ibid, s 8(3).
30 [2006] ZAWCHC 65, [2006] 10 B Const LR 1214, 4 All SA 205 [Syfrets Trust].
to the impugned testamentary provision, that the racial restriction occasioned unfair discrimination against non-White students and that it was, as such, contrary to public policy “as reflected in the foundational constitutional values of non-racialism [and] ... equality.”32 It is evident that Griesel J directly correlated the constitutional imperatives of racial equality and non-discrimination on the one hand, with the limiting effect of public policy on freedom of testation on the other hand.

Similarly, in Curators, Emma Smith Educational Fund v. University of KwaZulu-Natal33 the Supreme Court of Appeal dismissed an appeal against an order of the Durban and Coast Local Division of the High Court34 to strike a Whites-only restriction from a testamentary bursary trust. Bertelsmann AJA remarked in the course of his judgment on behalf of the Supreme Court of Appeal:

The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need ... must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past.35

It is important to note that, notwithstanding the abovementioned judgments in which South African courts have ordered the excision of racial restrictions from charitable testamentary bursary trusts under the rubric of constitutionally-infused public policy as an established limitation on testamentary freedom, the courts have, in their engagement with these trusts, consistently acknowledged testators’ freedom of testation.36 South African courts’ continued adherence to freedom of testation is significant when the judgments in the BOE Trust37 case are evaluated. In casu the Western Cape High Court dismissed an application for the removal of a racial restriction in favour of White students from a testamentary bursary trust. Mitchell AJ opined38 that the racially-restrictive bequest was not “as

32 Syfrets Trust, supra note 30 at para 47.
33 [2011] 1 B Const LR 40, [2010] 6 All SA 518 (S Afr SC) [Emma Smith].
35 Emma Smith, supra note 33 at para 42.
36 See also Part IV. B, below.
38 Albeit in an obiter dictum because the matter was ultimately decided on the
clearly contrary to public policy as the trustees [the applicants in casu] believe.  

39 Mitchell AJ argued that the Constitution proscribes unfair discrimination, but that discrimination designed to achieve a legitimate purpose is not unfair.  

40 He next remarked on anecdotal evidence regarding the high emigration rate among White South African graduates, and opined that a condition attached by the testatrix to the bursary bequest that demanded the return of bursary-recipients to South Africa could serve to ameliorate the skills loss consequent upon this emigration phenomenon. Therefore, according to Mitchell AJ, the racially-exclusive nature of the bursary trust in this case served a legitimate purpose and any discrimination occasioned by it could not be labelled as unfair.  

41 Erasmus AJA, writing for a full bench of the Supreme Court of Appeal, dismissed the appeal against Mitchell AJ’s judgment, and did so with particular emphasis on the testatrix’s freedom of testation. He acknowledged that freedom of testation is not only implicitly guaranteed in the Constitution’s property clause, but that any subversion of testamentary freedom also offends the constitutionally-guaranteed right to human dignity because “[t]he right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.” Erasmus AJA ordered, therefore, that a residuary provision in favour of a number of charitable organisations, stipulated by the testatrix in the alternative should implementation of the bursary bequest be rendered impossible, had to take effect. He ruled that, since the four universities charged with the selection of bursary-recipients refused to participate in such selection (because they regarded the racial limitation as unconstitutional), an impossibility of the bursary bequest ensued which, in turn, necessitated  

(in)applicability of section 13 of the Trust Property Control Act, (S Afr), No 57 of 1988 [Trust Property Control Act] regarding the court’s statutory power of trust variation.  

39 BOE 1, supra note 37 at para 14.  

40 Ibid.  

41 Ibid at para 15.  

42 BOE 2, supra note 37.  

43 Constitution, supra note 4, s 25.  

44 Ibid, s 10.  

45 BOE 2, supra note 37 at paras 26-7.
that “effect has to be given to the wishes of the testatrix so that the bequest to the named charitable organisations is enforced.”

The foregoing synopsis of South African courts’ approach to racially-restrictive bursary trusts reveals a judicial willingness to invoke constitutionally-infused policy considerations to curb testators’ freedom to prescribe racial exclusivity when making such bequests. Courts effected this limiting influence of public policy through the striking-out of racial restrictions on bursary eligibility, in particular in instances where the wills in issue were made decades prior to the advent of South Africa’s current constitutional dispensation, and these racial restrictions violate the newly-emergent constitutional approach to policy matters in South African private law. Have South African courts followed a similar approach to gender restrictions on bursary eligibility imposed in conjunction with racial restrictions? This question is addressed hereafter in greater detail.

B. Gender Restrictions

In Syfrets Trust the testator not only imposed a race-based eligibility restriction – he executed a later codicil in which he also excluded female students of all nationalities from eligibility. Griesel J ruled that this restriction occasioned unfair discrimination against female students; consequently, that the codicil’s gender restriction, like its racial restriction, contravened public policy and, therefore, that the codicil had to be excised from the testator’s will on the common-law ground that a court does not give effect to testamentary provisions that offend public policy. Griesel J based this ruling on the direct horizontality of the Constitution’s equality clause and the presumption created in terms of section 9(5) of the

Ibid at para 31.

For example, the will in Syfrets Trust, supra note 30, was executed in 1920, whereas the testator executed the will that established the Emma Smith Educational Fund in 1938.

Ibid.

The codicil further excluded all Jewish students from receiving bursaries.

Syfrets Trust, supra note 30 at para 47.

Constitution, supra note 4 at s 9. The equality clause determines, inter alia, that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in the clause, including race and gender. The equality clause operates not only vertically between the state and the individual, but it also protects individuals from the abuse of their equality rights by other individuals: Syfrets Trust,
Constitution that discrimination on any of the grounds listed in the equality clause – including gender – is unfair unless it is established that the discrimination is indeed fair.52

An analysis of the aspects relating to gender discrimination in Griesel J’s judgment reveals that he found it untenable for a charitable trust with the laudable objective of benefitting “deserving students with limited or no means” to exclude over half of the particular university’s student population by reason of the restrictions that the testator imposed.53 The unacceptability occasioned by the trust’s restrictive nature was exacerbated, according to Griesel J, by the fact that those ineligible for the bursaries are members of the very groups that suffered from disadvantage in South Africa’s past, namely Blacks and women.54 Griesel J opined in this light that the trust did not advance marginalised groups but rather discriminated against them which, in turn, entrenched and perpetuated previously-existing patterns of advantage and privilege among White males.55 Griesel J bolstered his view on this point with reliance on legislation adopted by the South African Parliament such as the National Education Policy Act56 and the Promotion of Equality and Prevention of Unfair Discrimination Act.57 The Judge also referenced international instruments ratified by the South African Parliament such as the Convention on the Elimination of All Forms of Discrimination against Women58 as well as the International Covenant on Civil and Political Rights.59 These national statutes and international instruments proscribe, inter alia, gender discrimination and demand the achievement of equitable education opportunities as well as the redress of past inequalities in education provision, including the

52 Syfrets Trust, supra note 30 at paras 27–28, 33.
53 Ibid at para 34(b).
54 Ibid at para 34(a).
55 Ibid at para 34(b).
56 National Education Policy Act (S Afr), No 27 of 1996.
promotion of gender equality and the advancement of the status of women.\textsuperscript{60} The prospect of a future South African court vitiating a bursary trust’s eligibility restriction that excludes women appears strong in the aftermath of \textit{Syfrets Trust}.\textsuperscript{61} However, the Supreme Court of Appeal’s subsequent judgment in \textit{Emma Smith}\textsuperscript{62} supports the contention that a bursary trust that restricts eligibility to women only may not suffer a similar fate. It was shown above that this case involved the removal of a Whites-only eligibility restriction from a testator’s testamentary bursary trust.\textsuperscript{63} However, this racial restriction was in favour of “poor girls who but for such assistance would be unable to pursue their studies.”\textsuperscript{64} This gender restriction was not challenged before the court of first instance or before the Supreme Court of Appeal. A possible explanation for this is that women of all races have generally been regarded as persons subjected to previous disadvantage in South Africa.\textsuperscript{65} Indeed, Bertelsmann AJA, who delivered the Supreme Court of Appeal’s judgment in the matter, appeared quite comfortable with the notion of an educational fund for women only when he dismissed the argument of the Emma Smith Educational Fund’s curators that, should the Fund be shorn of the racial restriction imposed by the testator, the Fund might be void for vagueness. Bertelsmann AJA said that such an argument would fall by the wayside if “it is clear that the Fund’s proceeds may be applied to assist all South African women in need of financial support of a tertiary education.”\textsuperscript{66} It is arguable, therefore, that the \textit{Emma Smith} judgment established, albeit indirectly, a precedent in favour of gender-exclusive bursary trusts under which only women benefit. Would the same hold true in respect of bursary trusts under which only men stood to benefit? This question was subsequently addressed in \textit{In re Heydenrych Testamentary Trust}.\textsuperscript{67}

\begin{thebibliography}{99}
\bibitem{60} \textit{Syfrets Trust}, \textit{supra} note 30 at para 34(c)-(f).
\bibitem{61} \textit{Ibid}.
\bibitem{62} \textit{Emma Smith}, \textit{supra} note 33.
\bibitem{63} See Part III. A, above.
\bibitem{64} \textit{Emma Smith}, \textit{supra} note 33 at para 8.
\bibitem{65} See, eg, the submission to this effect made by the Fund’s curators in the court of first instance: \textit{Makgoba}, \textit{supra} note 34 at para 11.
\bibitem{66} \textit{Emma Smith}, \textit{supra} note 33 at para 44.
\bibitem{67} \textit{Heydenrych}, \textit{supra} note 6.
\end{thebibliography}
The applicant in *Heydenrych* was the administrator of three charitable testamentary trusts. The applicant sought the deletion of what it regarded as discriminatory provisions from the three wills in issue. The will that established the Heydenrych Trust determined that the testator’s residuary estate had to be held in trust “for the education of European boys of good character of the Protestant faith to enable them to qualify for the civil service of the Union [of South Africa] or as a Pharmaceutical Chemist.”

The Cyril Houghton Bursary Trust was established for the education of South African boys at Oundle School in Peterborough, Northamptonshire. The will provided that the bursaries were available to members of the white population group only. The object of the George King Trust was to provide financial assistance to promising music students of good character in needy circumstances at the University of Cape Town. The testator’s will limited eligibility to “members of the white group of Protestant Faith.”

The applicant prayed only the excision from the three wills of the references to race and colour – it asked the court to delete the word “European” from the Heydenrych will; the reference to “the white population group” from the Houghton will; and the qualifier “members of the White Group” from the George King will. The applicant sought no order regarding the Heydenrych and Houghton trusts’ gender restrictions because it opined that such “discrimination” should be treated “more circumspectly” than direct discrimination on the grounds of race and colour, and that the freedom of testators to impose gender-based conditions should remain unfettered.

The Women’s Legal Centre, a non-profit law centre for the advancement of equality for women, intervened as *amicus curiae* on this point, and took issue with, inter alia, the gender-exclusivity of the Heydenrych and Houghton trusts insofar as these excluded girls and women from eligibility. The *amicus curiae* prayed,
inter alia, that the word “boys” be deleted from the Heydenrych will, and that the word “boy” in the Houghton will be replaced with “boy/s and girl/s.”

Goliath J ruled, with reliance on earlier judgments such as Syfrets Trust and Emma Smith, that the racial restrictions imposed under the wills in issue disqualified Black South Africans from benefitting from the scholarships; that such exclusion occasioned unfair discrimination in accordance with the Constitution’s equality clause; and, consequently, that these restrictions offended public policy. She, therefore, ordered the excision of the racial restrictions from the various wills. The applicant contended with regard to the gender restriction contained in the Heydenrych will that the testator’s motivation for favouring boys was not altogether clear, but conceded that, when he executed his will in 1943, positions in the civil service as well as in the profession of pharmaceutical chemistry were almost exclusively occupied by men and that, therefore, the testator might not have considered including girls under his bursary bequest. The applicant argued with regard to the Houghton will’s gender restriction that the testatrix was not motivated by sexism when she restricted the bursaries to boys; moreover, that many scholarships are limited to single-sex schools and that the public would not generally regard such scholarships as unreasonable or offensive. The applicant contended, therefore, that the testator’s and testatrix’s decisions were of a personal nature and that their gender preferences should, accordingly, be treated circumspectly.

Goliath J rejected the applicant’s foregoing arguments. She pointed out regarding the Houghton will that the Oundle School was a boys’ school at the time when the testatrix executed her will, but that it converted to a co-educational school a mere six months later. She held that the testatrix did not foresee the transformation of the Oundle

75 Ibid.
76 Syfrets Trust, supra note 30.
77 Emma Smith, supra note 33.
78 Heydenrych, supra note 6 at para 14.
79 Ibid at para 23.
80 Ibid at paras 15, 19.
81 Ibid at paras 15, 18.
82 Ibid at para 15.
School’s ethos and values into a gender-inclusive school when she executed her will.\textsuperscript{83} Goliath J opined regarding the Heydenrych will that the testator’s preference to support only boys to qualify for the civil service or as pharmaceutical chemists was motivated by his belief that women were incapable or unable to qualify in the civil service or as chemists. She reasoned that the testator contemplated neither the subsequent changes in the gender composition of the civil service, nor the recent advancement of women in the field of chemistry.\textsuperscript{84}

Goliath J decided the matter in terms of section 13 of the \textit{Trust Property Control Act}\textsuperscript{85} which permits the High Court to vary trust provisions that conflict with the public interest. Section 13 requires additionally that the trust provisions in question must have brought about consequences which the trust founder (the testator or settlor) did not contemplate or foresee. She held, in light of her abovementioned findings, that the impugned restrictions in the Heydenrych and Houghton wills occasioned unfair discrimination on the ground of gender; consequently, that they violated the Constitution’s equality clause as well as the public interest.\textsuperscript{86} She held further that these unfairly discriminatory trust provisions brought about consequences that the respective testators did not contemplate or foresee, particularly insofar as the wills in question were executed before the advent of South Africa’s constitutional democracy – the testators did not foresee that discriminatory bursary trusts would be unconstitutional and unlawful under the new legal order, nor did they foresee that the charitable purposes of their trusts would be hampered by the imposition of discriminatory conditions.\textsuperscript{87} Goliath J consequently ordered the striking-out of the word “boys” in the Heydenrych will and its replacement with “persons”; moreover, that all references to the male gender in the Houghton will be read and interpreted to incorporate the female gender.\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
\item Ibid at para 18.
\item Ibid at para 19.
\item Supra note 38, s 13.
\item Hendrenrych, supra note 6 at para 20.
\item Ibid at para 21.
\item Ibid at para 23.
\end{enumerate}
\end{footnotesize}
IV. EVALUATION

The Syfrets Trust and Heydenrych judgments condemn, in the South African context, testamentary bursary trusts that either expressly exclude women, or that explicitly benefit men only. On the other hand, the Emma Smith judgment provides some support for the contention that a South African court will likely uphold a gender-exclusive trust such as the one in Castanera which restricts bursary eligibility to women only. It is submitted that two lines of reasoning taken in the Castanera case commend themselves in particular to the possibility of a South African court’s concurrence with Dewar J’s judgment.

A. The Redress of Historical Disadvantage

Dewar J emphasised throughout his judgment in Castanera that the testatrix’s gender-exclusive trust bequest was motivated by her desire to promote women in her specialist discipline – one in which women were historically underrepresented.89 He correlated this consideration explicitly with the exception contained in section 13 of the Human Rights Code,90 namely that discrimination by any person with respect to, inter alia, any service, right, benefit or privilege available to the general public is prohibited unless bona fide and reasonable cause exists for the discrimination. Dewar J opined that a woman’s promotion of other women in a discipline in which women were historically underrepresented “is a bona fide and reasonable cause to direct her money to women only.”91 He remarked, however, on a recent improvement in the enrolment numbers of female students at the University of Manitoba in the disciplines stipulated in the testatrix’s will and he conceded that the enrolment of female students in these disciplines might in future even exceed that of male students.92 Dewar J opined, nevertheless, that numbers

89 Castanera, supra note 1 at paras 37-40, 44.
90 Manitoba Human Rights Code, supra note 25, s 13.
91 Castanera, supra note 1 at para 38. Tarnopolsky JA expressed similar sentiments in Canada Trust when he said that “[t]hose charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the Human Rights Code ... would not likely be found void because they promote rather than impede the public policy of equality”: Canada Trust, supra note 12 at para 104.
92 Castanera, supra note 1 at para 45.
alone is not the determinative consideration; rather, societal values regarding the redress of past inequalities should determine whether a testamentary bursary trust that benefits only women remains inoffensive to public policy notwithstanding the advancement of women in the disciplines in issue.  

The aforementioned part of Dewar J’s judgment stands firmly in the tradition of achieving substantive equality (as opposed to mere formal equality). The pursuit of substantive equality is vital when addressing the question whether discrimination has any place in charity law and, therefore, whether some forms of discrimination by charitable disponors should be insulated from judicial interference. This question does not, however, yield an easy or obvious answer. Some scholars argue that all discriminatory bequests, gifts, and trusts, regardless of any equality-promoting objectives they might have, fall to be invalidated on policy grounds. Eason, for example, reasons that disabusing charitable disponors of discriminatory notions “articulates a more balanced donor-charity bargain” and that this bargain leaves ample room for other disponent directives (in other words, dispositions devoid of any discrimination) that “contribute positively to a diverse and pluralistic charitable environment.” Harding argues in similar vein that the societal collective good, in pluralistic societies in particular, demands that others shall not be treated unfavourably with explicit reference to elements of their identity. Harding reasons, furthermore, that denying charitable disponors the possibility to discriminate will invariably limit the range of options available to them to pursue valuable goals, but he contends that, if a disponent’s goals may be achieved in a variety of other ways, the disallowance of dispositive options that expressly involve discrimination – even equality-promoting discrimination – will have a negligible impact on personal autonomy. Other scholars favour the role of substantive-equality-promoting discrimination in charity law. Lamek, for example, argues that “discrimination which is aimed at advancing the legitimate

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93 Ibid.
96 Ibid at 324–325.
interests of a particular group should not attract the wrath of the moralist, the indignation of the civil libertarian or the surgical attention of the court.”

97 Morris similarly points out that discrimination may bring with it public benefit – an essential element of charitable status – when such discrimination is essential to overcome some disadvantage or social exclusion. 98 Du Toit regards South African courts’ application of public policy to discriminatory testamentary bursary bequests in the post-constitutional era as “steadfastly normative” but he approves of the fact that these courts, in adjudicating on these matters, have distinguished permissible fair (or equality-promoting) discrimination from untenable unfair discrimination, thereby tempering the rigidity that could result from an objective, normative, strictly policy-based approach to discriminatory testamentary dispositions.

99 The South African Constitution certainly mandates the pursuit and achievement of substantive equality. The Constitutional Court affirmed this truism in, inter alia, Minister of Finance v. Van Heerden 100 when Moseneke J reasoned that the ambit of the equality right in the South African context is determined by the country’s history and the underlying values of its Constitution:

From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact … This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation sensitive” approach is indispensable because of shifting

100 [2004] 11 B Const LR 1125, 6 All SA 121 (CC).
patterns of hurtful discrimination and stereotypical response in our evolving democratic society.\textsuperscript{101}

It was shown earlier in the analysis of Syfrets Trust that Griesel J identified women collectively as suffering from past patterns of disadvantage in South Africa.\textsuperscript{102} Indeed, the South African Constitutional Court has repeatedly acknowledged the historical vulnerability of women in various spheres of South African society\textsuperscript{103} and has asserted the constitutional imperative for affirmative measures to achieve substantive gender equality in South Africa.\textsuperscript{104} It is in this light that Dewar J's positioning of the gender restriction under the Esther G. Castanera Scholarship Fund as exactly such an equality-promoting measure to redress historical gender imbalances assumes particular importance in the South African context. Gibson shows, for example, that parity has been achieved latterly in the enrolment of girls and boys at South African primary schools; moreover, that the number of female students actually exceeds the number of male students in South African secondary and tertiary education.\textsuperscript{105} Gibson maintains, nevertheless, that the South African education system as a whole is still plagued by “a deeply engrained problem of gender inequality.”\textsuperscript{106} She advocates that cultural attitudes towards gender roles lie at the heart of this problem which is, in turn, manifested by the absence of women’s “public voice” in various sectors of

\begin{footnotesize}
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\item\textsuperscript{101} Ibid at paras 26-27.
\item\textsuperscript{102} See Part III. B, above.
\item\textsuperscript{103} See, eg, S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) (2002), [2002] 6 All SA 642 at paras 64-65, 11 B Const LR 1117 (CC); Bhe v Magistrate Khayelitsha (Commission for Gender Equality as Amicus Curiae) (2004), [2005] 1 B Const LR 1, 1 All SA 580 (CC); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa (2005), [2005] 1 B Const LR 1 at para 91, 1 All SA 580 (CC).
\item\textsuperscript{104} See, eg, Daniels v Campbell NO (2004), [2004] 7 B Const LR 735 at para 22, 5 All SA 331 (CC); Hassan v Jacobs NO (2009), [2009] 11 B Const LR 1148 at para 37, [2009] 5 All SA 572 (CC).
\item\textsuperscript{106} Ibid at 14.
\item\textsuperscript{107} Ibid at 20.
\end{enumerate}
\end{footnotesize}
South African society.\textsuperscript{108} She lists the dearth of female students in disciplines such as mathematics, science, engineering, law, and commerce as indicative of these phenomena.\textsuperscript{109} Gibson notes, furthermore, a study by the South African National Commission of Higher Education conducted in the 1990s which found that women occupied only 32% of research and teaching positions at South African higher education institutions; moreover, that 89% of women academics were junior lecturers and that less than 3% of professors were female.\textsuperscript{110} While these statistics have certainly improved over the past two decades, Wolhuter et al shows in a more recent study on the trends at a South African university that the proportion of female academics remains comparatively high among young and emerging scholars; moreover, that the per capita research output of female academics lags behind that of their male counterparts.\textsuperscript{111} The authors argue that gender equality in South African higher education must be achieved not only through the employment of more female academic staff, but also the employment of highly-qualified female scholars.\textsuperscript{112} These arguments relate directly to Dewar J’s view in Castanera that the enrolment numbers of female students might leave a false impression of equality within a given discipline, more so if there is an exodus of women from the discipline after graduation or an underrepresentation of women in leadership positions within the discipline.\textsuperscript{113} The foregoing scholarship indeed suggests that, despite numerical parity between the genders in South Africa’s higher education sector, the “voices” of women to which Gibson refers is by and large still in the minority in the South African academic hierarchy.

It is submitted, therefore, that the advancement of women on all levels of South Africa’s tertiary education sector remains of critical importance more than two decades after constitutional democratisation, and that the transformative changes in South Africa’s post-constitutional legal-political landscape have to date not yielded substantive parity in the

\begin{itemize}
  \item \textsuperscript{108} Ibid at 22.
  \item \textsuperscript{109} Ibid.
  \item \textsuperscript{110} Ibid at 22–23.
  \item \textsuperscript{111} CC Wolhuter et al, “The Research Output of Female Academics at a South African University: Progress with Gender Equity?” (2013) 10 Africa Education Rev 148 at 160.
  \item \textsuperscript{112} Ibid at 161.
  \item \textsuperscript{113} Castanera, supra note 1 at para 39.
\end{itemize}
position of women in relation to men in the academic sphere. It is important to note in this regard that Canada Trust supports the contention that charitable trusts that contain *prima facie* discriminatory provisions, but that pursue legitimate purposes, do not fall foul of policy prescripts on equality and non-discrimination. Tarnopolsky JA remarked that “[i]t would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women ... or other historically disadvantaged groups would be void as against public policy.”

Dewar J situated the Castanera Trust squarely within this paradigm when he said that “[w]here the gift can be articulated as promoting a cause or a belief with specific reference to a past inequality, there is nothing discriminatory about such a gift.” It is certainly arguable that contemporary societal values as well as constitutionally-infused public policy in South Africa, as indeed in Canada according to Dewar J in *Castanera*, will not be offended by a gender-exclusive bursary trust that encourages women to enter a discipline in which women have historically been underrepresented; nor indeed will it be unreasonable for a university to administer such a gender-exclusive trust. Although the manner in which such a trust is assessed in terms of public policy might change in the future, it is submitted that a contemporaneous application of the public policy yardstick in the South African context, with due cognisance of, first, the constitutional substantive-equality imperative and, secondly, the failure to achieve such equality gleaned from the abovementioned scholarship on the current status of women in South African higher education, lends considerable weight to the contention that a South African court would have concurred with the reasoning and ultimate ruling of Dewar J in *Castanera*.

B. Freedom of Testation

Dewar J’s approach in *Castanera* to the testatrix’s freedom of testation is another ground upon which a South African court would have arrived at a corresponding finding. He emphasised that the testatrix exercised a personal choice to encourage women to enter a discipline which she

114 Canada Trust, *supra* note 12 at para 105.
115 *Castanera, supra* note 1 at para 44.
herself enjoyed and which historically was not populated by women; moreover, that this personal choice had to be respected. He also said that a context-sensitive adherence to freedom of testation provides “the necessary comfort to a testator that his/her gift will be treated in the manner anticipated by them.” This acknowledgment of the testatrix’s freedom to dispose of her residuary estate as she saw fit corresponds with both courts in the BOE Trust case’s firm adherence to freedom of testation and its constitutional underpinnings, particularly with Erasmus AJA’s correlation in the Supreme Court of Appeal of freedom of testation with the constitutionally-guaranteed right to human dignity. It must be borne in mind, however, that Dewar J’s defence of testamentary freedom in Castanera effectuated substantive-equality-promoting discrimination. Erasmus AJA’s pro-freedom-of-testation stance in BOE Trust, on the other hand, activated the alternative devolution of trust income through the will’s residuary clause and, in so doing, obviated the need to engage the potential unfairness of the discrimination wrought by the bursary bequest’s racial exclusivity. Nevertheless, both judges set their respective sights firmly on testamentary freedom, albeit to different effect.

Dewar J is not alone in his defence of testamentary freedom in recent Canadian jurisprudence. Such reiteration of testators’ ius disponendi (and Canadian courts’ engagement with the question regarding policy-based limitation of testamentary freedom) arose also in judgments on discriminatory provisions in wills that were not concerned with charitable bursary trusts. In Spence v. BMO Trust Company, for example, the Ontario Court of Appeal referred to freedom of testation as “a deeply entrenched common law principle.” Cronk JA said:

Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator’s right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of

117 Ibid at para 37.
118 Ibid at para 41.
119 Ibid at para 42.
120 See Part III. A, above.
121 2016 ONCA 196, [2016] 129 OR (3d) 561 [Spence].
122 Ibid at para 30.
testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.\textsuperscript{123}

In Spence the testator explicitly excluded his one daughter from benefitting under his deceased estate. Cronk JA, in deciding that this unambiguous and unconditional testamentary wish was not open to scrutiny on policy grounds, distinguished \textit{Canada Trust} from the matter before her \textit{in casu}. She reasoned, inter alia, that the Leonard Trust's indenture required the administrators of a public charitable trust to engage in discriminatory conduct in the selection of scholarship candidates as well as eligible academic institutions – it was this requirement for discriminatory action on the part of the trust administrators in the operation of a public charitable trust that, according to Cronk JA, activated the court’s policy-based intervention in \textit{Canada Trust}.\textsuperscript{124} In Spence, on the other hand, the testator’s will did not require any discriminatory conduct by the estate trustee; nor, in contrast to \textit{Canada Trust}, did it involve the creation or operation of a public charitable trust so as to require conformity to the public policy against discrimination.\textsuperscript{125} Cronk JA concluded that there was no basis for the earlier policy-driven review of the deceased’s will undertaken by the application judge and that that judge had erred in ordering a departure from the testator’s clearly expressed wish regarding the disinheritance of his one daughter.\textsuperscript{126}

Cronk JA’s view in \textit{Spence} that the non-discrimination norm applies to charitable trusts because they operate in the public – and not in the private – sphere is aligned to a similar opinion expressed by Tarnopolsky JA in \textit{Canada Trust}.\textsuperscript{127} In \textit{Emma Smith}, Bertelsmann AJA reasoned correspondingly that South African courts are under a constitutional imperative to remove racially restrictive testamentary clauses that conflict with public policy where these clauses relate to educational trusts

\textsuperscript{123} \textit{Ibid} at para 75.
\textsuperscript{124} \textit{Ibid} at para 68.
\textsuperscript{125} \textit{Ibid} at para 71.
\textsuperscript{126} \textit{Ibid} at para 86.
\textsuperscript{127} \textit{Canada Trust}, supra note 12 at para 107; where the Judge of Appeal said: “This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts.”
Gender Exclusive Trusts

administered by publicly-funded institutions such as universities. The Acting Judge of Appeal opined, moreover, that “[i]n the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster.” This view that it is the public nature of charitable educational trusts that subjects such trusts to the non-discrimination norm is not, however, uncontroverted. Harding points out, for example, that Robins JA, writing for the majority in Canada Trust, spoke, at least at times, in terms that were patently not directed exclusively at charitable trusts. The Judge of Appeal opined, for example, that “a trust” – therefore, not only a charitable one – premised on racism and religious superiority contravenes public policy. Harding argues, moreover, that, even if such a broad reading of Canada Trust is not followed, public policy is an integral component of the law of gifts and trusts and, therefore, that it functions as an “entirely unremarkable method for importing into the private law considerations of a public nature.” Grattan and Conway reason in similar vein that the doctrine of public policy channels constitutional protections into private law and, consequently, that no “more exclusive personal sphere” exists within the private law domain that is immune from the influence of public policy. They argue, therefore, that the doctrine of public policy can override purely private dispositions without the need to invoke some public “anchor” to achieve such an effect.

The aforementioned scholarly debate regarding the public/private divide and its implications for discriminatory trusts remains contentious but does not negate the truism that freedom of testation is not unfettered – public policy limits, in Canada as in South Africa, testators’ freedom to dispose absolutely capriciously of their property upon death. It is abundantly clear that human-rights-infused policy considerations underpinned the Ontario Court of Appeal’s judgment in Canada Trust as

128 Emma Smith, supra note 33 at para 42.
129 Ibid at para 38.
130 Harding, supra note 95 at 307.
131 Canada Trust, supra note 12 at para 39.
132 Harding, supra note 95 at 312.
134 Ibid.
well as the South African judgments in *Syfrets Trust, Emma Smith, and Heydenrych* where trust instruments were varied through the removal of discriminatory restrictions from the instruments in question. Moreover, Bertelsmann AJA was explicit in *Emma Smith* that freedom of testation must yield to the constitutional equality imperative when a restrictive testamentary bequest has discriminatory effect.\(^{135}\) In Canada, authority even exists that public policy can be invoked to strike down unconditional testamentary bequests based on the discriminatory uses to which the beneficiary might put such bequests.\(^{136}\) Why, then, would the public policy regarding non-discrimination not trump a South African testator’s freedom to stipulate the setting-up of a gender-exclusive testamentary bursary trust such as the one in *Castanera*?

It is submitted that the answer to this question lies in the appreciation of the majority and minority judges in *Canada Trust* as well as Dewar J in *Castanera* for the need to consider carefully the factual peculiarities of each case in which reliance is placed upon public policy to interfere with the terms of a will. Robins JA said in *Canada Trust* that the Ontario Court of Appeal’s policy-based intervention in that case was “mandated by the ... unique provisions in the trust document establishing the Leonard Foundation.”\(^{137}\) Tarnopolsky JA concurred when he opined with regard to charitable trusts that prescribe eligibility restrictions that “these trusts will have to be evaluated on a case by case basis.”\(^{138}\) He said, furthermore, that the *Canada Trust* case “should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.”\(^{139}\) Dewar J expressed similar sentiments in *Castanera* when he reasoned that every gift requires a contextual assessment because a “one-size-fits-all policy” would be subversive of freedom of testation.\(^{140}\) Some Canadian scholars concur – Parachin, for example, argues that courts invariably engage in a balancing

\(^{135}\) *Emma Smith*, supra note 33 at para 42. Robins JA expressed similar sentiments in *Canada Trust*, supra note 12 at paras 37-40.


\(^{137}\) *Canada Trust*, supra note 12 at para 42.

\(^{138}\) Ibid at para 103.

\(^{139}\) Ibid.

\(^{140}\) *Castanera*, supra note 1 at para 42.
exercise when they weigh the harm inflicted by a discriminatory charitable trust against its anticipated benefit; moreover, that this balancing exercise is “highly discretionary” and “context-sensitive.”

The South African judgments under discussion contain statements to similar effect. For example, Griesel J, having made his policy finding on the impugned testamentary provisions in *Syfrets Trust*, said:

>This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored … It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions – which discriminate unfairly on the grounds of race, gender and religion – are invalid.

It is submitted that, to establish the unfairness of discrimination, a context-sensitive examination of the facts of the particular case is a necessary and unavoidable part of the judicial inquiry. After all, the law of charitable trusts does not preclude testators or settlors from targeting their beneficence at discrete populations or distinctive groups in society. It is, therefore, significant to note Mitchell AJ’s stance in the court *a quo* in the *BOE Trust* case that the right to benefit a particular class of persons and, thus, to exclude others from benefit is inherent to freedom of testation.

The facts of the case at hand must, therefore, be decisive to any judgment on the application of the public policy yardstick to determine the (un)fairness of the discrimination occasioned by restrictive and exclusionary charitable trust provisions. What, then, are the facts in *Castanera* that would prompt a South African court not to interfere with the provisions of the Castanera Trust on policy grounds? The South African judgments under discussion reveal at least three instructive considerations in answer to this question.

The courts considered, first, a shift in public policy between the time that a trust was founded and the time a court is called upon to consider the tenability of its provisions. Where no such shift occurred, the courts

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142 *Syfrets Trust*, *supra* note 30 at para 48.
143 Parachin, *supra* note 141 at 183 - 184.
144 *BOE 1*, *supra* note 37 at para 16.
acknowledged testators’ knowledge and understanding of contemporary societal views and policy imperatives in devising their testamentary trust bequests. In the BOE Trust judgments, for example, the testatrix executed the will containing the racial restriction on bursary eligibility in 2002 – eight years into South Africa’s current constitutional dispensation – and Mitchell AJ opined in the court a quo that, consequently, the testatrix must have made her will with full appreciation of the prevailing demands of constitutionally-infused public policy. She likely provided for the charitable organisations as substitute beneficiaries because she realised that the implementation of a racially-exclusive charitable trust bequest might be impossible for a variety of reasons. Similarly, in Castanera the testatrix executed her will in 1991, four years after Manitoba’s Human Rights Code was assented to in 1987. It is certainly likely that, at the time when she contemplated the gift to the University of Manitoba as well as the time when she made her will, the testatrix was aware of judicial views such as that expressed by Tarnopolsky JA in Canada Trust in favour of the advancement of women through gender-exclusive trusts, and she probably knew of the Human Rights Code’s express allowance for affirmative measures to redress historical gender imbalances. The University’s receptiveness to the testatrix’s proposed testamentary gift for female students – evident during discussions between the testatrix and the University prior to the act of testation and culminating in the advertisement of the gift even before the testatrix’s passing – might have reinforced her belief that societal values had not changed to such an extent that a charitable testamentary gift to women only had become generally offensive to Canadian society. In fact, this inoffensiveness characterised Dewar J’s own assessment of contemporary Canadian society’s views on gender-exclusive charitable trusts under which only women benefit. It is in this regard that Bertelsmann AJA’s ostensible acceptance in Emma Smith of the tenability of an educational trust for women only in the South African context assumes particular

146 Ibid at para 22.
147 BOE 2, supra note 37 at para 30.
148 Manitoba Human Rights Code, supra note 2, s 9 (2) (g).
149 Castanera, supra note 1 at para 5.
150 Ibid at paras 41, 45.
151 See Part III. B, above.
Gender Exclusive Trusts

significance because it compliments Dewar J’s assessment of how Canadian society regards such a trust. The aforementioned judgments support the contention that contemporary societal views in Canada and South Africa do not condemn bursary trusts for women only and, therefore, that a South African court, when called upon to adjudicate on a women-only testamentary bursary trust created during the post-constitutional era will likely concur with those aspects of Dewar J’s judgment in which he adhered to the testatrix’s testamentary freedom.

South African courts focused, secondly, on the question whether the impugned restrictions occasioned the frustration of a testator’s charitable objective. In both Emma Smith and Heydenrych the respective courts ruled that the racial limitations – and in Heydenrych the gender limitations under the Heydenrych and Houghton wills – prevented the full realisation of the various testators’ charitable objectives. Bertelsmann AJA noted in Emma Smith that the Emma Smith Educational Fund had grown exponentially since its establishment, but that the Fund had consistently paid out bursary amounts well below what it could afford. Bertelsmann AJA attributed this directly to the Fund’s racial exclusivity and said that “the racially restrictive nature of the Fund prevents the realisation of the testator’s intentions.” Goliath J opined in similar vein in Heydenrych that the testators of the three wills in issue “did not foresee that the charitable purpose of the trusts would be hampered by the discriminatory conditions imposed.” The Esther G. Castanera Scholarship Fund was also under-utilised – the initial capital bequest of around $270,000 amounted to over $550,000 in 2015. Dewar J did not, however, attribute this under-utilisation to the Fund’s gender exclusivity; instead, it was, in all likelihood, attributable to the various delays caused by the University of Manitoba’s attempts to address internally the concerns regarding the Fund’s gender exclusivity as well as uncertainty regarding the identity of the institution from which bursary-recipients had to be drawn. In fact,

152 Emma Smith, supra note 33 at para 12.
153 Ibid.
154 Ibid at para 40.
155 Heydenrych, supra note 6 at para 21.
156 Castanera, supra note 1 at para 7.
157 Ibid at paras 9–12.
158 The testatrix stipulated that recipients had to be women graduates of the Steinbach
Dewar J was favourably disposed to allowing the gender-exclusive Castanera Trust every opportunity to realise the testatrix’s charitable objective in the format that she originally devised. He even dismissed concerns that the catchment area provided by the institution whose graduates the testatrix wished to benefit was too small to make reasonable use of the testatrix’s gift. He opined that the gift “should be given a chance to operate” before any change to the catchment area is considered. It is evident that the Esther G. Castanera Scholarship Fund’s gender exclusivity did not, in Dewar J’s estimation, frustrate the testatrix’s charitable objective. The facts of the Castanera judgment are, therefore, not entirely on par with those of South African cases such as Emma Smith and Heydenrych, and a South African court could rely on similar factual differences to distinguish a Castanera-like case from these South African judgments in order to abide by a testator’s freedom of testation.

A third and final consideration evident from South African courts’ engagement with restrictive charitable bursary trusts is their willingness to consider statistics or numbers on underrepresentation and exclusion in cases where claims were made that such trusts occasioned unfair discrimination. Whilst Dewar J argued in Castanera that enrolment numbers are not necessarily decisive, it is, understandably, difficult for courts to ignore statistics and numbers altogether when adjudicating on averments of unfair discrimination. Griesel J lamented in Syfrets Trust that the restrictions imposed by the testator on bursary eligibility excluded over half of the students at the University of Cape Town. Goliath J noted in Heydenrych that women remained underrepresented among South African

Collegiate Institute; however, this institution ceased to exist in 1972 and was effectively succeeded by the Steinbach Regional Secondary School: ibid at para 16. Dewar J held that it was the testatrix’s intention to benefit graduates of the public school in Steinbach, including the Steinbach Regional Secondary School: ibid at para 46.

159 Ibid at para 48.
160 The Supreme Court of Appeal in BOE 2, supra note 42 at paras 21–25; distinguished expressly the Emma Smith case from the one before it and, in so doing, escaped the strictures of the doctrine of precedent which would otherwise have bound it to the latter judgment. This paved the way for the Supreme Court of Appeal’s pro-freedom-of-testation stance in BOE 2.
161 Castanera, supra note 1 at para 39.
162 Syfrets Trust, supra note 30 at para 34(b).
chemistry graduates; moreover, while women were overrepresented at the lower levels of the South African civil service, almost 68% of senior civil-service positions were held by men in 2008.\textsuperscript{163} These figures informed both courts’ assessment of the unfairness of the discrimination occasioned by the restrictive trusts in those two cases. In this light, a South African court would likely pay particular attention to the statistics, provided by the University of Manitoba, on the enrolment of female students in the disciplines that the testatrix in \textit{Castanera} identified in her will. These statistics are:\textsuperscript{164}

<table>
<thead>
<tr>
<th>Year</th>
<th>Chemistry</th>
<th>Physics</th>
<th>Mathematics</th>
<th>Biochemistry</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>30%</td>
<td>17%</td>
<td>29%</td>
<td>44%</td>
</tr>
<tr>
<td>2012</td>
<td>26%</td>
<td>10%</td>
<td>27%</td>
<td>42%</td>
</tr>
<tr>
<td>2011</td>
<td>35%</td>
<td>11%</td>
<td>31%</td>
<td>44%</td>
</tr>
<tr>
<td>2010</td>
<td>38%</td>
<td>9%</td>
<td>18%</td>
<td>44%</td>
</tr>
<tr>
<td>2009</td>
<td>38%</td>
<td>15%</td>
<td>21%</td>
<td>42%</td>
</tr>
</tbody>
</table>

Even by the University of Manitoba’s own standard, namely that an enrolment number of below 40% represents underrepresentation,\textsuperscript{165} the foregoing statistics suggest underrepresentation – in some instances severe underrepresentation – of female students in the majority of the relevant disciplines. It is submitted that a South African court would, with little hesitancy, conclude that these numbers underscore the historical disadvantage of women in these disciplines, which conclusion would bolster such a court’s judgment that a gender-exclusive charitable trust which benefits only women in the relevant disciplines is indeed an affirmative measure, and that it is, consequently, incumbent upon the court to, in the words of Dewar J in \textit{Castanera}, “treat the testator or testatrix with the respect and gratitude to which he or she is entitled.”\textsuperscript{166}

\textsuperscript{163} Heydenrych, \textit{supra} note 6 at para 6.
\textsuperscript{164} \textit{Castanera}, \textit{supra} note 1 at para 21.
\textsuperscript{165} \textit{Ibid} at para 11.
\textsuperscript{166} \textit{Ibid} at para 41.
V. CONCLUDING REMARKS

Public policy is “an unruly horse” and its application as a normative yardstick invariably elicits differences in opinion.\(^{167}\) South African courts have, in recent years, increasingly invoked constitutionally-founded public policy to limit testators’ freedom to impose eligibility restrictions under charitable bursary trusts. These courts have been particularly severe on racial restrictions, but have also invalidated co-existing gender restrictions. These judgments have elicited the approval of some South African scholars. Wood-Bodley, for example, concurs with the outcome of Syfrets Trust insofar as the testator’s purpose in including the impugned provisions in his will amounted to “gratuitous discrimination ... of a particularly egregious kind” which, according to Wood-Bodley, could not survive judicial policy-based scrutiny informed by the values promoted by the South African Constitution’s Bill of Rights.\(^{168}\) Other South African scholars have, however, been critical of some of these judgments. Van der Westhuizen and Slabbert, for example, do not regard the eligibility restrictions imposed by the will in Syfrets Trust as occasioning any egregious infringement on fundamental rights; they argue, moreover, that, even if these restrictions are regarded as discriminatory, freedom of testation dictates that the restrictions should have been left untouched.\(^{169}\) This pro-freedom-of-testation stance appears to be supported by the judgments in the BOE Trust case. However, some South African scholars have been critical of particularly the Supreme Court of Appeal’s judgment in BOE Trust. Modiri, for example, asserts that the court’s adherence to testamentary freedom occasioned a regrettable judicial disregard of the unlawfulness of the racial restriction imposed under the bursary trust in casu; moreover, it permitted the court to conveniently circumvent engagement with the issues of race and racism explicit in the bursary bequest.\(^{170}\)

\(^{167}\) BOE 1, supra note 37 per Mitchell AJ at para 13.
\(^{170}\) JM Modiri, “Race as/and the Trace of the Ghost: Jurisprudential Escapism,
The aforementioned divergent scholarly views suggest that this commentary’s thesis, namely that a South African court would have decided the Castanera case in a manner akin to Dewar J’s judgment, is by no means certain. Nevertheless, the commentary highlighted various convergences between Canadian and South African courts’ approaches to discriminatory bursary trusts. The redress of historical disadvantage as well as adherence to freedom of testation are the most significant of these convergences. The limiting effect of public policy on testamentary freedom is tempered by Canadian and South African courts’ acknowledgment that each judgment on the tenability of an exclusionary eligibility restriction under a testamentary bursary trust must be considered on its own merits and with reference to its peculiar facts and circumstances. This acknowledgement occasions, in turn, an appreciation of shifts in public policy over time as well as a recognition of testators’ knowledge and understanding of contemporary societal views and policy imperatives in devising their testamentary trust bequests; a considered evaluation of whether the impugned restrictions occasion the frustration of a testator’s charitable objective; and due cognisance of statistics or numbers on underrepresentation and exclusion in cases where unfair discrimination under restrictive bursary trusts is averred. These points of contact between Canadian and South African courts’ approaches to discriminatory bursary trusts certainly renders this commentary’s thesis on a South African court’s concurrence with Dewar J’s judgment in Castanera highly probable.
A Walking Contradiction: 
A Review of Canadian Maverick: The Life And Times Of Ivan C. Rand

D A R C Y L . M A C P H E R S O N *

I. INTRODUCTION

I, like many law students of my generation of the early-to mid-1990s, knew relatively little of The Honourable Mr. Justice Ivan Cleveland Rand. Of course, I was aware of his service on the Supreme Court of Canada—Justice Rand served on the Court from 1943 to 1959—even though it ended more than 15 years before I was born, and long before judges had the explicit guarantees of the Canadian Charter of Rights and Freedoms1 and the judgments penned to expound upon them by which to earn national attention. I also knew that he had developed the “Rand formula”, wherein no one is required to join a union even where the workforce is unionized, but the non-members are required to pay the equivalent of union dues; because the non-member benefits by the activities of the union, especially through its collective bargaining activities.

II. BOOKEND SURPRISES?

Until recently, this short summary constituted the entirety of my knowledge of the man and his accomplishments. Then, I picked up

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* Professor, Faculty of Law, University of Manitoba. Thanks are owed to both Ms. Melanie Wire, who offered wonderful research assistance and read drafts, and to the student editors at the Manitoba Law Journal for their editorial assistance.

1 Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (UK), c 11 [the “Charter”].
Canadian Maverick: The Life and Times of Ivan C. Rand by William Kaplan.¹

For me, two of the most surprising things about this book are found at either end of it. In the preface, after discussing the biographies of other members of the Supreme Court of Canada, Kaplan writes:

To date, except around the edges, Canadian judicial biography has been, with a few exceptions, mostly uncritical and largely celebratory, written by unabashed admirers. To my great surprise, this book turned out to be different.³

In one sense, the first sentence in this excerpt is hardly surprising. Historical biographies should be written by people who have an interest in their subject. After all, how else can a person commit to a long-term project like a comprehensive book-length biography of a public figure?⁴

With a few exceptions, most people have to find a way to identify with their subject. That usually means admiration and/or commonality with the subject. However, historians, though they will likely have views on the facts that they are learning, should be ready to report what they learn, whether good, bad, or ugly. For producing an honest look at an important Canadian judicial figure, Kaplan deserves thanks. Rand might otherwise be forgotten in a generation or two, or at the very least, relegated to the annals of his short biography on the Supreme Court of Canada’s website.⁵

But, the second sentence was certainly a surprise. To take an active dislike to a subject to which one has devoted a 20-year project would be rather unusual. Not only that, but as will be discussed in more detail below, Kaplan’s changing view of (and one might even say his emotional response to) his subject affected the overall tone of the book.

The other end of the book was its final chapter. The concluding chapter is, for me at least, a very nice summary of that which preceded it. As will be discussed further below, where it falls down somewhat is that the conclusion is not terribly convincing at drawing together the disparate

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¹ Canadian Maverick: The Life and Times of Ivan C. Rand (Toronto, Buffalo and London: University of Toronto Press, 2009) [“Canadian Maverick”].
² Ibid at xv.
³ Interestingly, this particular project, according to the author himself, took approximately 20 years. See Canadian Maverick, ibid at xi.
parts of a man described as “contradictory”, nor does it satisfactorily explain the massive changes in tone throughout the book.

III. CHAPTER SUMMARIES

In the first chapter, entitled “The Right Start”, Kaplan begins by covering essentially the first third of Rand’s life: from childhood to his student days at Mount Allison University in his native New Brunswick; to Harvard Law School; to a brief stop in Saskatchewan; through courtship of and marriage to Iredell (Dell) Baxter; to becoming a lawyer in Medicine Hat, Alberta; and ultimately, to the decision to return to his native Moncton. The account is detailed, but not dense, and thus an easy read. In fact, the entire volume is eminently readable, with prose that is lucid, but without unnecessary affectation or technicality.

The second chapter, “The Young Lawyer Tries Politics”, shows that Rand was not good at everything he attempted. He was a capable lawyer, who received much work from the Province of New Brunswick to appear between both administrative tribunals and courts with respect to freight rates. He was one of the lead counsel on the legal questions that would vex the creation of the United Church of Canada. But as a prosecutor, he lost one of the most notorious murder cases in New Brunswick at the time. While Rand was a successful advocate before tribunals and courts

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6 Canadian Maverick, supra note 2 at 424.
7 Ibid at 3-28.
8 Ibid at 3-6.
9 Ibid at 6-13.
10 Ibid at 13-16.
11 Ibid at 16.
12 Ibid at 16-18.
13 Ibid at 18-27.
15 Ibid at 29-63.
16 Ibid at 30-40.
17 Ibid at 41-44.
18 Ibid at 40-41.
in Canada, he had a losing record at the Judicial Committee of the Privy Council in London.19

Despite his ability in debate (detailed in the account of Rand’s days at Mount Allison), Kaplan makes the point that Rand was not at his core a warm person, even with his own family.20 Politics, particularly in Atlantic Canada, tend to be very personality-driven.21 The voters often cast their ballot based on the personality of the candidate or that of the party leader. Without this warmth, Rand lost a by-election in his home riding,22 and the Liberal Party of New Brunswick used one of its safest seats in a second by-election to get Rand elected, though by a smaller margin compared to previous elections.23 As the pre-ordained attorney-general (the premier had named Rand to the Cabinet prior to the first by-election),24 Kaplan points out that Rand was a reformer, but no radical.25 Rand’s political career was brief, as he and his party were both removed from office in the next provincial general election.26

Rand returned to his legal practice, but soon found himself offered a position with the Canadian National Railway. It is this period of Rand’s life that is the subject of Chapter 3, “The Railway Counsel at Work and at Home.”27 What is interesting here is that it appears Rand had no problem burying whatever liberal tendencies might otherwise be in evidence, as Rand was in the upper echelon of a department that developed strategies to deny recoveries to complainants.28 Representative cases were discussed through much of the chapter as the railway tried to navigate its public mandate of providing transportation services,29 while still managing an

19 Ibid at 72.
20 Ibid at 82-83.
21 The author of the review grew up in the politics of Prince Edward Island where family members, friends, and acquaintances were all involved in or attached to political campaigns.
22 Canadian Maverick, supra note 2 at 49.
23 Ibid at 50-52.
24 Ibid at 47.
25 Ibid at 52-53.
26 Ibid at 61-63.
27 Ibid at 64-92.
28 Ibid at 89-90.
29 Transportation services, even when operated in the private sector, are an acknowledged public good. See the Canada Transportation Act, SC 1996, c 10, in
ever-mounting debt.\textsuperscript{30} Perhaps the most interesting part of the chapter was the discussion of Rand’s home life.\textsuperscript{31} Rand’s wife, Dell, was described as totally devoted to her family, particularly her husband.\textsuperscript{32} Rand himself was a “stern, judgmental taskmaster”,\textsuperscript{33} who demanded that his two sons show the same work ethic that characterized his own personality. He placed a high value on loyalty and earning what one received, both with his sons and his siblings.\textsuperscript{34} Rand had little time for his three sisters,\textsuperscript{35} even charging rent to his youngest sister for living in their parents’ home\textsuperscript{36}—which had been bequeathed to Justice Rand—after their mother’s death.\textsuperscript{37}

In Chapter 4, “The Framework of Freedom”,\textsuperscript{38} Kaplan details in a very laudatory fashion Rand’s significant contribution to the Supreme Court of Canada. Interestingly, while Rand is credited with writing some of the most memorable judgments in the history of the institution, it is as Kaplan claims, largely an impression.\textsuperscript{39} But, there are members of the Court, both today and in the recent past, who were bellwethers on particular issues.\textsuperscript{40}

It appears that, in Kaplan’s view, Rand’s judgments made him a bellwether on issues of freedom against unwarranted government intrusion on the activities of minority groups.

Then, Kaplan points out that this judicial attitude did not seem to translate to his personal life. Justice Rand was known to counsel family

\textsuperscript{30}Canadian Maverick, supra note 2 at 75-80.
\textsuperscript{31}Ibid at 82-89.
\textsuperscript{32}Ibid at 82.
\textsuperscript{33}Ibid at 82-83.
\textsuperscript{34}Ibid at 83-84.
\textsuperscript{35}Ibid at 84.
\textsuperscript{36}Rand’s father had predeceased his mother. Ibid at 85.
\textsuperscript{37}Ibid.
\textsuperscript{38}Ibid at 93-164.
\textsuperscript{39}Ibid at 143.
\textsuperscript{40}For example, there can be no doubt that Justice Rosalie Silberman Abella (a current member of the Supreme Court of Canada) is one of this country’s – and the world’s – foremost authorities on the law of equality and human rights. When Justice Abella finds no credibility in an equality claim, there is a certain additional influence to this decision simply because of her background and specialized knowledge. One could make the same claim with respect to transportation law when discussing the career of the recently-retired Justice Marshall Rothstein, or the law of standing to maintain a lawsuit with respect to recently-retired Justice Thomas Cromwell.
members to avoid the Acadians in New Brunswick. This is surprising, considering that the premier of New Brunswick during Rand’s brief foray into politics was Acadian. Kaplan explains this by saying that Rand’s prejudices were subject to individualized exceptions.

With respect to the next chapter, “Rand’s Formula”, my major complaint is that the first thirty pages of the chapter had little to do with Rand. Rather, it focused on the struggle that precipitated the dispute that Rand was asked to resolve by the award that contained the famous formula that has become one of the mainstays of Canadian labour law. The most interesting thing about Kaplan’s account is that it portrays Rand as the conciliator, the negotiator who brought parties who had been fighting over many issues for a long time to a workable consensus on many of these. Justice Rand then proceeded to write an arbitration award that would implement a resolution in which neither side could declare an absolute victory over the other, but where nonetheless, each side could find that their respective legitimate concerns had been addressed in a meaningful way. It seems as though there were three basic tenets or beliefs that motivated Justice Rand’s approach to his task.

First, he believed that the idea that management and labour would be consistently, fundamentally, and diametrically opposed to one another was simply bad business. Second, he saw that the relatively extreme positions of the parties on union security (management wanted no security for the union, financial or otherwise, while the union wanted all employees to have to be members of the union and pay dues, that is, the classic “union shop”) as fairly unhelpful. Third, he thus saw a need for a different approach, and his questions to the parties in the arbitration were directed at figuring out the potential of this different approach to avoid problems.

41 Canadian Maverick, supra note 2 at 84.
42 Ibid at 47.
43 Ibid at 322.
44 Ibid at 165-220.
45 Ibid at 165-212.
46 Ibid at 206.
47 Ibid at 206-207.
48 Ibid at 196.
49 Ibid at 197.
By all accounts, including Kaplan’s, Justice Rand did his job very well. But he did not do this alone. Horace Pettigrove would advise Justice Rand throughout the process. What is interesting about this is not only that the two men did not get along from their initial meeting, but that Pettigrove quickly became one of Justice Rand’s few true lifelong friends to be dealt with at length in Kaplan’s account. The award written by Justice Rand changed the labour law landscape in a way that would be a made-in-Canada solution to the issue of union financial security. This soon developed into a part of the legislative and policy choices that led to a long and sustained period of Canadian economic prosperity following World War II.

In “Rand Tackles the Palestine Problem”, Kaplan does an admirable job in teaching the reader about the history of a problem (the division of what was then referred to simply as Palestine and creation of the modern state of Israel) that was simply not part of my intellectual database—as a white, Anglo-Saxon, Catholic male born in 1975—up to that point. But, for me, there was an edge to some of Kaplan’s writing that may not have been entirely fair to Rand. Though Kaplan describes some of Rand’s ideas as “naïve” and “half-baked,” interestingly, Kaplan also admits that the ideas proposed by Justice Rand largely found favour with the majority of the United Nations Special Committee on Palestine. The report of the Special Committee on Palestine ultimately led to the creation of the modern state of Israel, and its international recognition. From my point of view, perhaps something else was at play for Justice Rand. Is it not possible that some of the details of Rand’s proposal (which might have

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50 **Ibid** at 194-195.
51 **Ibid** at 195.
52 The possible exception to this statement is the Right Honourable Chief Justice Sir Lyman Poore Duff. Though the two (Duff and Rand) would serve on the Supreme Court of Canada for less than a year, Duff would remain a friend to Rand until Duff’s death in 1955. **Ibid** at 97, 106.
53 **Ibid** at 216.
54 **Ibid** at 217-220.
55 **Ibid** at 221-251.
56 **Ibid** at 223-224.
57 **Ibid** at 249.
58 **Ibid** at 246.
59 **Ibid** at 250.
seemed unfair to the proposed Jewish state) were actually designed to show the Arab community that the Committee was not giving the Jewish representatives everything they were asking for? The Arab community was unlikely to accept any report of the Special Committee—many Arab leaders refused to meet with the Committee in the first place;\textsuperscript{60} therefore, by making certain elements less than acceptable to Jewish representatives, he might have been trying to save the majority report from the criticism of being entirely one-sided.\textsuperscript{61}

In Chapter 7, entitled simply “King Coal”,\textsuperscript{62} Kaplan describes how Rand was asked to examine the diminishing coal industry in the early 1960s, as oil and natural gas rose to prominence as fuel sources. I must admit to a bit of bias on this subject. As the grandson\textsuperscript{63} and son\textsuperscript{64} of coal miners from Cape Breton, I have seen and heard about both the plight of miners on the one hand, and from outsiders, the complaints about Atlantic Canada in general, and how Cape Breton specifically is too dependent on government assistance. At points in the chapter, Kaplan seems to fall into this trap as well. He seems to point out the economic costs to the rest of the country of government support for Cape Breton miners.

Yet, he does not seem to recognize that, as much as the economic support was designed for the miners themselves, it was, in my view at least, equally designed to maintain a portion of the country, particularly where Cape Breton was the most economically depressed part of a largely non-economically-diversified province. Put another way, this was not about one person, one family, or even one industry. It was not about a way of life. Rather, this support was perhaps more accurately captured by the reality that massive displacement of individuals from Cape Breton due to a lack

\textsuperscript{60} Ibid at 230. The recognition of Israel was one of the few examples— if not the only one— of international co-operation between the United States and the Union of Soviet Socialist Republics during the period of the Cold War. On this point, see Future Government of Palestine, GA Res 181 (II), UNGAOR, 2nd Sess, Supp No 1, UN Doc A/RES/181 (1947) 131.

\textsuperscript{61} Canadian Maverick, supra note 2 at 250.

\textsuperscript{62} Ibid at 252-292.

\textsuperscript{63} My paternal grandfather worked in the coal mines of Cape Breton from the age of 9 to the age of 64.

\textsuperscript{64} My father spent a year in the mines at the age of 19 working alongside my grandfather.
of economic diversity (and, admittedly a dying industry) would not have been good for Canada. One sees this playing out again, with the current economic situation in Alberta. As oil prices began to wane, a single industry was no longer able to provide the bedrock of the economy in a much larger area of Canada. Some may point out that the oil and gas industry has not sought any government assistance. But, the question is, if oil and gas were no longer economically viable without assistance, would the province be given help? I suspect that it would, simply because the displacement of a very large number of people will negatively affect not only those directly displaced, but also those who remain in the locale from which their neighbours have been displaced. As well, the new locales to which these large groups of displaced people are relocated may have trouble adapting to the influx of new people.

In “A Founding Dean of Law”, Justice Rand’s time immediately following his retirement from the Supreme Court of Canada is detailed. His time at the University of Western Ontario (between 1959 and 1964) was as the initial Dean of the Faculty of Law. Kaplan’s account in some ways portrays Justice Rand at his best. His experience made him a very knowledgeable lecturer, and Kaplan argues that he really cared about the students. He also taught a new course himself when no member of the teaching staff would agree to take it on.

But, in some ways, this chapter also shows Rand at his worst. Kaplan describes a man who would use out-of-date teaching materials, resort to autocratic behaviour (acting as if the opinions of other faculty members were irrelevant), would not fight for raises and other benefits for his staff because it would be undignified to do so, would interfere with—or at

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65 Interestingly, the people of Cape Breton and Newfoundland are front and centre in another economic downturn, as many workers in Alberta’s oil and gas industry have been brought in, on a temporary basis, from both of these Atlantic Canadian locales.

66 Canadian Maverick, supra note 2 at 293-330.

67 The University of Western Ontario is now corporately branded as Western University.

68 Ibid at 313.

69 Ibid.

70 Ibid at 323.

71 Ibid.

72 Ibid at 315.

73 Ibid.
least attempt to interfere with—the career plans of faculty members when they wanted to leave their respective posts, and would openly discuss with other faculty members the possibility of dismissal of a professor for reasons that would be unlikely, by today’s standards at least, to justify this action, among others. In some cases, such as the mistreatment of a professorial candidate because of his name, Kaplan would blame it on prejudice. Matters were routinely left for the Dean to deal with.

While much of what Kaplan writes is completely fair, there is one point where his criticism may have been unjustified. He questioned whether Justice Rand was the correct choice as Dean, questioning whether there was “sizzle” without the “steak”.

In Chapter 9, “Canadian Gothic Meets the Mambo King”, Kaplan’s approach is openly aggressive and even hostile to Rand. As Kaplan points out, in retirement, Justice Rand was asked to investigate the propriety of the activities of Justice Leo Landreville of the Supreme Court of Ontario. The alleged misconduct was said to have arisen out of a stock deal conceived while Landreville was mayor of Sudbury. At the time, there was no statutory mechanism to deal with the misconduct of judges. Direct legislative intervention would be necessary to remove a judge from office.

To be clear, I agree with Kaplan that Justice Rand made mistakes. He reviewed on an ex parte basis a report of the Law Society of Upper Canada that found Justice Landreville guilty of misconduct and calling for his removal. Justice Rand would also fail to follow the statutory requirements under the federal Inquiries Act. For me, all of this is certainly sufficient to justify criticism of Justice Rand. At the same time, I

74 Ibid at 321.
75 Ibid at 318.
76 Ibid at 321-322.
77 Ibid at 315.
78 Ibid at 305.
79 Ibid at 331-376.
80 Ibid at 351. This court is now known as the Ontario Superior Court of Justice.
81 Ibid at 340, 346-347.
82 Ibid at 351.
83 Ibid at 354-355.
84 RSC 1985, c I-11.
am uncertain that Kaplan was not at least somewhat guilty of the same “offence” for which he holds Justice Rand accountable. Put another way, in my view, Kaplan argues that Justice Rand was overly aggressive in pursuing what Justice Rand perceived as an irremediable flaw in Justice Landreville’s character. Yet, Kaplan himself was not only descriptive. He seems to implicitly attribute Justice Rand’s excesses to prejudices against French speakers, and Roman Catholics, of which Justice Landreville was both. But, one could question whether this was necessarily the case. Was Justice Rand allowing prejudice to pre-determine his outcome? Or was he simply applying his own view that judges are to be held to the highest possible moral and ethical standards? At the very least, Justice Rand had strong views about how judges ought to be expected to carry themselves, as was evident from the previous chapter, where Kaplan argued that asking for more money from the university was beneath the dignity of any judge. Kaplan makes the case for prejudice. But, is it not also possible that Justice Rand knew that this was one of the first attempts to remove a section 96 judge, at least in the modern era, and therefore was trying to set the ethical bar for judges at a very high level? Perhaps Justice Rand recognized that it is very difficult to raise a moral standard that was much lower, as compared to lowering a standard that proves to be too high for modern usage. Of course, reading the mind of a man who died almost half a century ago is impossible.

The chapter also discusses the creation of the Canadian Judicial Council in response to the Landreville inquiry conducted by Justice Rand. Its creation was clearly designed to curb some of the procedural excesses of the Landreville inquiry, and to depoliticize the oversight of judges. However, given recent events, we may not have moved as far away

85 Canadian Maverick, supra note 2 at 427-428.
86 Ibid at 315.
87 Section 96 of the Constitution Act, 1867 (UK), 30 & 31 Vict, c 3 provides that all superior court judges, among others, shall be appointed by the federal government.
88 It would be difficult to prove that this was in fact the first case of attempted removal of a judge. But, given that it appears that there were no established procedures to deal with cases of this type, it would seem relatively obvious that these cases were not commonplace.
90 Canadian Maverick, Ibid at 375.
91 Ibid.
from character assassination as one might have hoped in disciplining judges who may have violated ethical standards.\textsuperscript{92}

The final substantive chapter, called “Rand’s Disastrous Investigation into Labour Disputes”,\textsuperscript{93} gives away much of Kaplan’s views of Rand’s work. In 1966, Justice Rand accepted a request from Ontario’s premier to serve as a one-person royal commission into labour unrest in the province. Justice Rand viewed picketing as something that needed to be stopped or severely curtailed.\textsuperscript{94} He spent time going around the world looking at the approaches used in other jurisdictions.\textsuperscript{95} Many people disagreed with this rather extreme approach,\textsuperscript{96} and the recommendations found in the report produced by Justice Rand were not implemented.\textsuperscript{97}

While it is undoubtedly correct on the facts, this chapter sees the use of hyperbole that, for me at least, was simply unnecessary. Even the use of the term “disastrous” in the title of the chapter seems unduly harsh. From my point of view, for a report to qualify as a “disaster”, more is required than a simple disagreement with the majority of people. In my view, one of the goals of any report like this should be to stimulate public debate. If this is true, then to that extent at least, the report was successful. If an extreme report causes people to see the virtues of the current system, this is positive. Calling it a “disaster” simply because it was not accepted by the government of the day seems unfairly harsh.

Some of the recommendations are also better understood in their historical context. As Justice Rand was writing in the mid-1960s, both Canada and the United States were experiencing an expansion of the modern welfare state. In the U.S., the “Great Society” programs under President Lyndon B. Johnson were some of the largest expansions of the welfare state since the New Deal era under President Franklin D.

\begin{thebibliography}{1}
\bibitem{92} The treatment of the Honourable Associate Chief Justice A. Lori Douglas (now retired) of the Manitoba Court of Queen’s Bench, Family Division, focused on “salacious” and “intimate” photographs of the judge before her appointment to the Bench posted on the Internet, and she claimed, without her knowledge, shows that perhaps we are still not above the vilification of judges when the judge does something that members of the public consider to be less than upstanding.\textit{Canadian Maverick, supra} note 2 at 377-421.
\bibitem{93} \textit{Ibid} at 408.
\bibitem{94} \textit{Ibid} at 400-402.
\bibitem{95} \textit{Ibid} at 403, 410.
\bibitem{96} \textit{Ibid} at 420.
\end{thebibliography}
Roosevelt. Is it really all that surprising that Justice Rand believed that a new government tribunal could resolve labour disputes? Given Justice Rand’s experiences in the Ford dispute—where picketers prevented non-striking workers from attending work. Is it really surprising that Justice Rand would want to limit these problems? Justice Rand, when he was at the Supreme Court of Canada, authored the lead judgment in a case called Aristocratic Restaurants. While it was intended to acknowledge workers’ rights to picket, the case, according to Kaplan, caused the courts to be more hostile to picketing. Is it not possible that by creating a tribunal outside the court system to deal with these disputes, Justice Rand was trying to implicitly acknowledge that the courts had not been terribly successful in dealing with these issues? During the Ford dispute, there was significant illegality that occurred, much of it between strikers on the picket line and others. To my way of thinking, there may be at least two reasons why Justice Rand may have been more opposed to picketing in 1966 than he was twenty years earlier during the Ford strike. First, at Ford, the goal was to end a particular dispute. As Justice Rand acknowledged in his report, this criminality was for authorities other than Rand to deal with. Also, by the time that Rand was writing his report, it was in the past. In Ford, the past was irrelevant. The goal was to allow the parties to work together productively in the future. In his labour disputes investigation, on the other hand, the past needed to inform Rand’s recommendations. If Justice Rand wanted to prevent future civil unrest, is it surprising that curbing the use of picketing would (in Rand’s

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100 Canadian Maverick, supra note 2 at 186.
102 Canadian Maverick, supra note 2 at 149.
103 Ibid at 207.
104 Ibid.
105 Ibid.
experience at least) probably be one of the most effective and efficient ways to do so?

Again, we will never have definitive answers to any of these questions. But, I am not entirely convinced that all of the harshness heaped on Justice Rand in Kaplan’s account was fully justified.

IV. COMMENTARY

This review has already mentioned some of the virtues of this book. It is well-written, without technicality or jargon. The largely laudatory chapter on Justice Rand’s service on the Supreme Court of Canada provided insights about cases that I thought I knew quite well. The Palestine chapter was very proficient at laying out the problem in a way that was accessible to those unfamiliar with either its ancient roots, or its 20th century solution. The information in the chapter allowed me to have a better understanding of its impacts on conflict in the region in the 21st century.

But, in other ways, Kaplan’s account is inconsistent, both in its overall tone and in the expectations it has of its subject. Perhaps a simple example would assist here. In Chapter 4, “The Framework of Freedom”, there was a positive feel to the fact that Rand was the driving force behind the progressive approach of the Supreme Court of Canada to civil rights in the 1950s. By Chapter 6, “Rand Tackles the Palestine Problem”, occurring in the late 1940s, however, his ideas were “naïve and half-baked”, even though they largely found favour with both the majority of the Committee and the international community generally.\footnote{Ibid at 248-249.} The Rand Formula was, according to Horace Pettigrove, “original thinking”.\footnote{Ibid at 205.} It is difficult for the reader—or, perhaps more accurately, it is difficult for me—to reconcile why and how both accounts could be true, virtually simultaneously. Was Justice Rand an “original thinker”, sometimes leading the Supreme Court of Canada into an era of civil rights that would ultimately lead to the adoption of the Charter?\footnote{Supra note 1.} Or was he “ naïve”?

Of course, it is possible that he was in fact each of these at different times, depending on the circumstances. Nonetheless, if this were the case,
it would have been interesting—again, to me, at least—for Kaplan to have provided his thoughts on what circumstances made the difference. In the Ford dispute, both parties knew that the dispute had to end at some point. In Palestine, on the other hand, the dispute had raged on, in some form, for decades, if not centuries. In other words, in Ford, Justice Rand was dealing with parties willing to settle their dispute, whereas, in the Middle East, it is at least questionable whether any final settlement was possible through this process, no matter how objectively “fair” or “reasonable” the resolution might appear to an outsider. In Ford, the parties were divvying up an economic pie. In the Middle East, the question was a right to remain in a place that at least for some, was the only place that they would consider to be “home”. Kaplan’s account of the Japanese Deportation case seems to focus on the unfairness of such a forced relocation. Could the fact that Rand had spoken against such action at home have affected his view of the similar situation in Palestine? Might the fact that Justice Rand was frugal have meant that he was more willing to bend in the Ford dispute, because it was clear that economically, both sides would get more than enough to survive, whereas in Palestine, there was less “middle ground” to work with, and a far greater non-economic impact on those affected? Therefore, possibly in Rand’s view, there had to be a “winner” in these circumstances. Simply asking these questions does not prove that Kaplan’s account is flawed. Rather, it simply suggests a line of argument that may resolve some of the contradictions that Kaplan appears to see in his subject. Would Kaplan agree with this? I am not sure, because Kaplan did not explicitly consider this in Canadian Maverick.

Justice Rand himself may not have been entirely internally consistent, and the pages of a biography should be prepared to show this inconsistency. Nonetheless, the best biographies that I have read explain this type of duality in a single individual in a way that tends to humanize both the duality and the individual. In short, few people are entirely internally consistent. At its best, the internal inconsistency makes interesting reading, because the author provides an explanation to which others can relate. Kaplan does not do this in a humanizing way, but rather,

109 Canadian Maverick, supra note 2 at 106-110.
111 Supra note 2.
at least some of his conclusions seem harsh and unforgiving of a man who appears to have brought all of himself—good, bad, and somewhere in the middle, at various times—to public service. Paradoxically, Kaplan is highly critical of his subject particularly in his later public service, that is to say, Rand’s efforts following his departure from the Supreme Court of Canada. I am always quite reticent to criticize those who have conscientiously applied the majority of their working lives to public service. Justice Rand, as counsel to government, a politician, a judge, and a public inquiry commissioner, spent a significant part of his life in public service.

In the end, some of Kaplan’s criticism may be over the top. Nonetheless, overall, Kaplan produced a detailed, well-researched, engagingly-written volume about a man who, without Kaplan’s contribution, would likely have quickly been forgotten. William Kaplan deserves congratulations for his 20-year resolve to finish this project, and for giving the life of an important public servant a fulsome discussion.