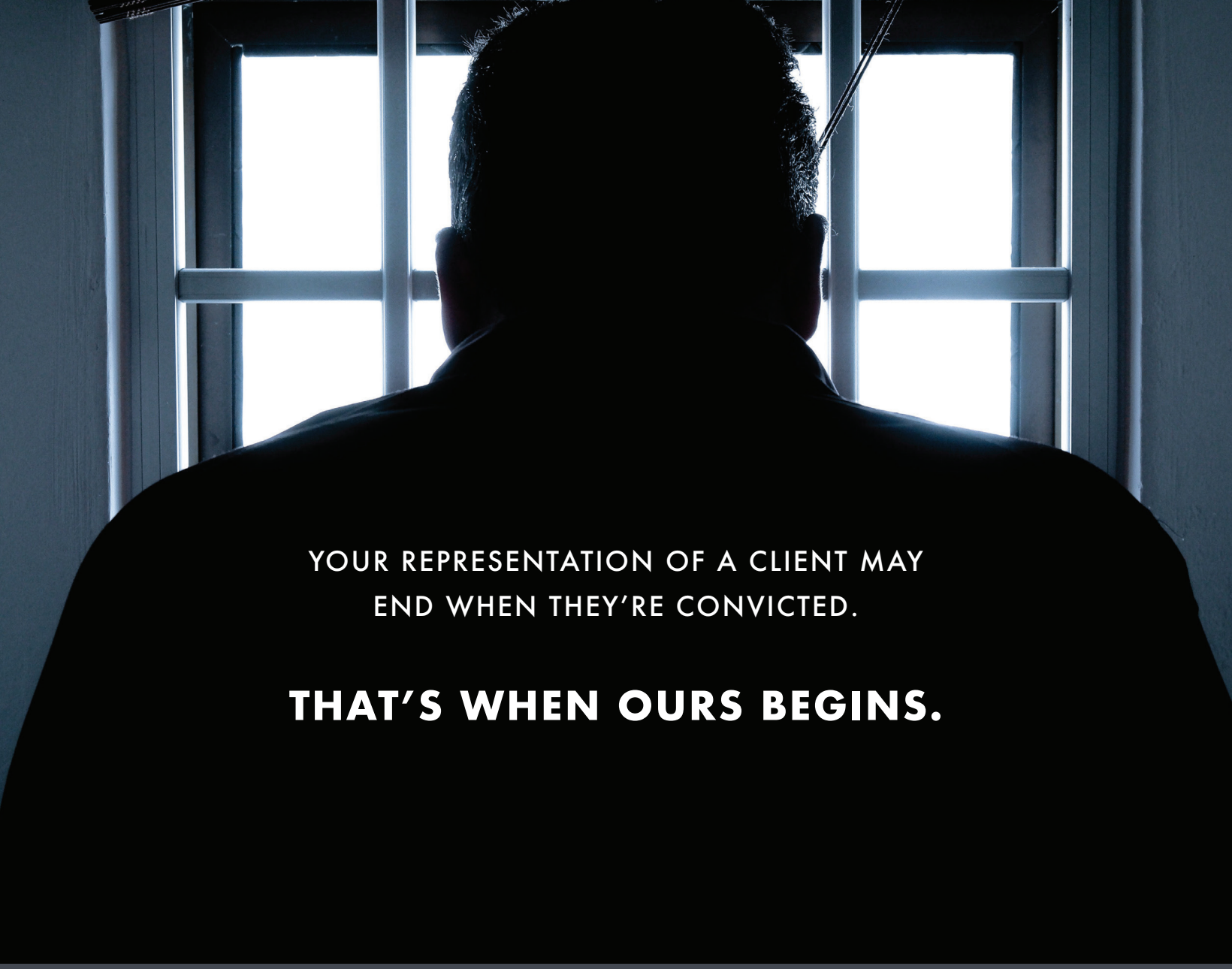
FOR THE DEFENCE

CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER VOL. 42, NO. 1 — MAY 2022

CRIMINAL LAWYERS' ASSOCIATION



YOUR REPRESENTATION OF A CLIENT MAY END WHEN THEY'RE CONVICTED.

THAT'S WHEN OURS BEGINS.

- Parole hearings
- Habeas corpus applications for involuntary transfers and segregation
- Inmate grievances
- Judicial review
- Advice for inmates and families about navigating incarceration
- Institutional charges
- Consultation with other lawyers about Correctional Law issues during sentencing

Borys Law is a forward-thinking law firm based in Kingston, ON, serving Eastern and Central Ontario in Criminal and Correctional Law.

Thoughtful · Strategic · Committed · Transparent

BORYS LAW

MORE THAN JUST REPRESENTATION

888-402-8282
(toll free/from any provincial jail)

613-777-6262
(local/from any federal prison)

www.boryslaw.ca

Once impossible research tasks
are now possible with **Westlaw Edge Canada**

Westlaw® Edge brings together a legacy of quality and accurate legal research and the latest advancements in technology.

FIrst-of-its-kind-features, like curated lists of key cases that meaningfully interpret statutes, exclusive warnings for questionable law, and an enhanced search experience expedite once complex and time-consuming research tasks. Research in ways never before possible with Westlaw Edge.

The standard for legal research.

Learn more at **tr.com/westlawedge-canada**

THOMSON REUTERS®

© 2021 Thomson Reuters TR1020985/10-21

The ProView smartphone app

Now your library fits in your pocket

Download the ProView app to conveniently reference eBooks on the Thomson Reuters® ProView platform with your smartphone anytime, anywhere. Experience our market leading eReader technology maximized for a smartphone screen, with all the ProView features and functionality that professionals rely on to do their work better and faster.

Visit store.thomsonreuters.ca/proview to get more information and download the ProView smartphone app.

Download on the App Store

GET IT ON Google Play

© 2021 Thomson Reuters TR1083480/03-21

THOMSON REUTERS®

FOR THE DEFENCE

President
John Struthers
Vice Presidents
Daniel Brown
John Hale
Cassandra DeMelo
Sid Freeman
Treasurer
Boris Bytensky
Secretary
Adam Weisberg
Assistant Secretary
Jessyca Greenwood
Executive Director *(Ex Officio)*
John Chagnon
Editors
Lindsay Daviau
Jill Makepeace
Photo Editor
Gabe Ramos
Past Editors
Gerald Chan
Breese Davies
Seth Weinstein
Gregory Lafontaine
Harold Levy
Michael Lomer
David Schembrucker

Criminal Lawyers' Association
189 Queen St. E., Suite 1
Toronto, Ontario M5A 1S2
Tel: 416-214-9875
Fax: 416-968-6818
E-mail: ed@criminallawyers.ca
www.criminallawyers.ca

For non-association members, subscription information can be obtained by contacting customer service at www.carswell.com/email or by phone at 416-609-3800 (in Toronto) or 1-800-387-5164 or by fax at 1-416-298-5082.
The Criminal Lawyers' Association Newsletter is published by Carswell. The opinions expressed in the CLA newsletter are those of the authors and do not represent the views of the CLA or its directors or its members. Submissions are welcome and should be directed to the Executive Director, John Chagnon, at 189 Queen St. E., Suite 1, Toronto, Ontario M5A 1S2. Tel: 416-214-9875 E-mail: ed@criminallawyers.ca.
For advertising inquiries, please call Michael Murton at 416-970-5123 or murton@murtonco.com.

42945724
Printed in United States by Thomson Reuters

THOMSON REUTERS

IN THIS ISSUE

COVER PHOTO Courtesy of Gabe Ramos.

PRESIDENT'S MESSAGE

by Shaunna Kelly

The retention of lawyers in criminal defence in intricately linked to a community that engages with them. The irony is that I'm writing this message to you on the cusp of leaving private practice to join the Indigenous Justice Division of MAG. My leaving is not for of the shortcomings of the community that I've come to know, but because of the personal path that I've chosen over the years and the purpose behind my practice. It is in fact the community, and in particular, the CLA community, that I was able to realize what fulfills me as a professional, as a woman and a person of both Indigenous and non-Indigenous descent.

As a young girl, raised in Sudbury Ontario, with it's low skyline and drab rocky expanse, I remember the awe that overwhelmed me each time that my family would drive along the 400 series into Toronto. I would beg my Dad to time our trip into the big city so that we'd be stuck in rush hour traffic. There was always something about the chaotic roads that intrigued me. As a child, sitting in the back of the car, I was able to watch people in their cars, wondering where they were coming from and where they were going.

Fast forward two decades later, and I found myself one of those same people, but this time, cursing the traffic, no longer wondering where those people were coming from, but asking *why* they were coming from there. Oddly, I never felt more at home than I did on those chaotic roads, that sense of disorder feels comforting to me despite the frustration. It's probably why I've loved being a criminal defence lawyer.

Our profession is a lot like those chaotic roads. Those not a part of our profession look in with wonder and often ask, how do we represent guilty people? Our families (or at least my family) constantly questioning whether the stress and heavy weight of the vicarious trauma that we experience is worth it. But it is within that chaos, and the massive misunderstanding of our profession, that many of us thrive. We are all outliers in the sense that we can see the good in our role when many others cannot. To a certain degree, we all enjoy the chaos and that is why it's important for us to stick together and navigate those chaotic roads together.

As many of us did pre-pandemic, our social lives were structured around the courts; the courthouses were very much our office halls. We used to easily grab lunch, or chat with while we waited in court. It was in this era of criminal defence that many of us got to know each other. Now that this aspect is gone, we need to make concerted efforts to create those same relationships outside of the courthouse hallways. Our community is still here, but as many things do, it has evolved and changed as the world around us has shifted.

Being a part of the CLA has helped me find the community that I so very much needed; but we still have a long way to go. When I first took on the role of *Gladue* court rep in 2015, I felt a deep void in our community as it relates to my fellow Indigenous lawyers. We've come miles since that day, but we still have a long way to go.

Did you know that up until 1951, Status "Indians" were barred from seeking legal advice, fundraising or meeting in groups. You can thank the *Indian Act* for that.

Did you know that Delia Opekokew was our first Indigenous member in the Ontario Bar – being called in 1979! The LSO released a "statistical snapshot" of lawyers in Ontario for 2018 which found that only 1.4% of lawyers identified as Indigenous. When we compare that the percentage of clients that identify as Indigenous, this means that most Indigenous clients are represented by non-Indigenous lawyers. In 2018, the LSO reported that there were only 551 Indigenous lawyers, in all areas of law across the province.

The recommendations of the Truth and Reconciliation Commission were delivered in 2015. It has been a slow progression to incorporate into the practice of law, but the CLA has made significant strides in the last two terms. If someone were to look up "retention of Indigenous lawyers" online, what comes up is a lot of information for non-Indigenous lawyers representing Indigenous Peoples, but very little in the way of initiatives to retain Indigenous lawyers in our profession. There is no secret formula to attract Indigenous lawyers to the practice of criminal defence, except that our organization needs to continue to make space, reach out to incoming law students, and ensure that steps are taken to maintain adequate representation on our Board.

In this respect, I think one of the best things that came out of the pandemic was the virtual world that was able to connect us across the province, to create a safe space for our Indigenous Lawyers of the CLA to meet and connect and support each other. So, over the last two years, our Indigenous committee increased our commitment to our members: creating meet and greet events for Indigenous lawyers, and putting a lot of time and energy into maintaining our Indigenous Committee. We even changed the name from the Aboriginal Committee to the Indigenous Committee to reflect a more inviting and inclusive

membership. Most importantly, we created the position of the Indigenous Director (currently held by Jessica Belisle). In line with the TRC recommendations, we now have an official voice for Indigenous lawyers on our CLA Board. I really hope this continues. This will take effort on the part of the CLA to ensure that these positions are filled over the years. And I would ask only that all these advancements in our community not be forgotten in our future boards.

We need to make space for Indigenous lawyers, not just on our board, but in the practice of criminal defence more broadly; we need to give space for their voices to be heard, their opinions to be considered. As our profession is literally overcome with non-Indigenous voices, please give our Indigenous lawyers space. Give us community so that we can thrive.

Do you know an Indigenous lawyer? Support them. Encourage them. Invite them to engage. We need community more than we ever have before. As an individual, the best thing you can do is make time for them. Reach out to see if they want to grab a coffee, take some time to ask questions about any cases they are working on, and most of all, create space for their voices and opinions.

I'm leaving, not because I fell out of love with criminal defence, or because I lost that drive and desire to be an advocate for our community, but because I've grown as a person and believe that the community that has accepted me is also supportive enough to let me take these next few steps, so that I can help make space for other Indigenous lawyers, other women and to better my own community.

I encourage you all to continue to support our initiatives to make space for Indigenous voices in our membership; it is through our community that we will be able to attract more Indigenous lawyers to the practice of criminal defence. Thank you to John Struthers, and to the many members of the CLA board, both past and present who helped me realize my voice, who gave me space to have my voice heard and the encouragement to push issues, that I feel passionately about, forward.

EDITOR'S NOTEBOOK

After nearly 17 years at the defence bar, I decided it was time for a change. The decision to leave was difficult, but was made with the full comfort that while I was leaving the defence bar, I would still get to see and interact with many of my colleagues and I would still be emersed in the practice I have always loved, just from a different perspective.

What I did not expect was how hard it would be to step down as co-editor of this magazine. It was only two and a half years ago that I accepted this position, and I still feel full of ideas and energy that can see me through many more issues. Being co-editor has allowed me the privilege to work with even more of my colleagues, to learn and grow through each publication and to help provide a platform for our collective voices to be heard. What a privilege it has been.

The only solace I take in my leaving is that I get to introduce two new co-editors, joining Jill Makepeace are Margaret Bojanowska, a criminal lawyer from the GTA and Neha Chugh of Chugh Law Professional Corporation, from Cornwall Ontario. Both are experienced in criminal law and are joining the team full of their own ideas and an energy that will benefit us all. I can't wait to see what they have in store.

My last issue of For The Defence is dedicated to our 49th annual Fall Conference. The conference, held over November 19 and 20, 2021 centered around advocacy and moving forward. The fantastic lineup addressed subjects that ranged from sentencing advocacy for racialized accused, charter advocacy, juror advocacy and included an advanced cross-examination seminar delivered by the one and only Roger J. Dodd, that both entertained and educated. One thing is for sure, we all came away from this year's conference better equipped to advocate on behalf of our clients.

Given the theme of this year's conference, perhaps it is only fitting that our president, John Struthers, tasked our outgoing Indigenous and Legal Aid Chair, Shaunna Kelly, with this issues President's Message. Like me, Shaunna finds herself leaving the practice she too has come to love. Her important message is one of inclusivity and calls for the need to make space for Indigenous lawyers, not just on the board, but in the practice of criminal defence more broadly.

Chris Rudnicki and Theresa Donkor, take the lead in distilling Justice Ducharme's reasons in *R. v. Marfo,* a case that addresses how systemic discrimination can influence the impact of a given sentence on the offender, and advocates for the use of the *Marfo* analysis to ensure fit sentences for women who experience particularly harsh conditions when incarcerated.

Wes Dutcher-Walls takes a hard look at our current understanding of the rules of standing in s. 8 litigation. This must read will provide everyone with the tools necessary to resist any suggestion that a defendant must have a reasonable expectation of privacy in evidence to seek its exclusion under s. 24(2) of *the Charter*.

Liam O'Connor provides us a glimpse into jury addresses with a handy quick tip guide to Jury Closings, something we should all keep close when winding up any jury trial. (Of course, this is mandatory reading in addition to his "Loose Guide for Young Lawyers" - side note – not just for young lawyers - on conducting jury trials, found in the conference materials).

Our columnists, as always, did not disappoint. Highlights for me are

Lynda Morgan's informative piece on the admissibility and use of screenshot evidence and Hussein Aly's article that helps to demystify evidence of a third-party suspect. If you hadn't already read it, Eric Neubauer's review of Jill R. Presser, Jesse Beatson, and Gerald Chan's book, Litigating Artificial Intelligence, 2021/2022 Edition, Emond Publishing, will have you adding the book to your must have list. Earl Levy's Memoirs of a Criminal Defence Counsel will transport you to a different time, while Lauren Wilhelm's Docket and Craig Bottomley's member profile of Ashley Audet (let's face it, you probably read that first) like always, are must reads.

I have really enjoyed my time as an editor for this magazine. I can only hope that some of my joy and excitement came through the pages that made it onto your desks. As I sign off for the last time as editor, I hope to see you all again soon.

Lindsay Daviau

Work whenever and wherever you want
eBooks on Thomson Reuters® ProView

Experience the freedom and flexibility to work wherever and whenever you want — with or without an internet connection — with Thomson Reuters ProView, the premier eBook experience for professionals worldwide.

With ProView eBooks, you can:

Access ProView through your web browser or offline

Link to Thomson Reuters WestlawNext Canada and Taxnet Pro

Transfer your notes and highlights to new editions

Run searches within one eBook or across your library

Add colour-coded notes and highlights to your eBooks

Create PDFs to save, print, add notes to, and share

In addition to a familiar, print-like user experience with all the advantages that digital has to offer, ProView eBooks feature the most distinguished and respected authors from across Canada.

Learn more at **store.thomsonreuters.ca/proview**

© 2021 Thomson Reuters
TR1340000/09-21

THOMSON REUTERS®

The Feminist Potential of *R v Marfo*

by Chris Rudnicki and Theresa Donkor*

Reproduced with the permission of Chris Rudnicki and Theresa Donkor.

In recent years, much attention has justifiably been paid to the role systemic discrimination plays in an offender's moral culpability. This recognition could lead to new horizons in our law of sentencing. As Justice Ducharme's reasons in *R. v. Marfo* demonstrate, systemic discrimination can influence the impact of a given sentence on the offender.[1] Justice Ducharme justified an exceptionally low sentence in part based on the qualitatively harsher experience of imprisonment Mr. Marfo was likely to face as a Black man. This reasoning has the potential to transform sentencing not only for racially marginalized offenders, but also for women offenders. Defence counsel can apply the logic in *Marfo* to advocate for lower sentences for their women clients – to the extent women are likely to experience harsher conditions of imprisonment than men, individualized proportionality

demands that their sentences be reduced to account for this reality.

The judgment in *Marfo*: systemic racism and sentencing Black offenders

After executing a search warrant at McKingsford Marfo's residence, police located a loaded semi-automatic handgun, two prohibited overcapacity magazines, and approximately seven grams of crack cocaine.[2] Mr. Marfo was arrested and charged with a variety of firearm offences as well as poession of crack cocaine. Following an unsuccessful *Charter* application, Mr. Marfo admitted liability and was found guilty.[3] He was 30 years old at the time of his sentencing. The defence produced a detailed social history of Mr. Marfo at the sentencing hearing and centred their submissions on the impact of systemic anti-Black racism.[4]

The defence submitted that Black offenders are treated more harshly than other inmates in Canada's prisons, relying on the expert report prepared and filed in R. v. Morris and attached by Justice Nakatsuru as an appendix to his reasons for sentence.

Mr. Marfo is a Black man who was raised in a neighbourhood plagued by crime and violence. He witnessed his first shooting at seven years old.[5] He recalled seeing two other dead bodies in his neighbourhood while growing up. When he was 10, he was present when bullets hit the wall in his backyard. At 16, he was shot by an unknown assailant, and was fortunate that the bullet narrowly missed his heart.[6] When he was 24, his little brother and "closest friend" was shot and killed.[7] They had been living together at the time. While someone was convicted in the killing of his brother, Mr. Marfo believed that person was innocent and that the real shooter was still at large. A year later, a friend of his brother's was also murdered. Mr. Marfo told the social history author that he lived in constant fear of being shot again.[8]

This traumatic history played a direct, causal role in the offences for which Mr. Marfo was being sentenced. He obtained the firearm after his brother was shot because "he felt scared that the same thing was going to happen to him".[9] He became involved in the drug trade because it was an easy way for someone without a high school education to make money. He saw drug trafficking as a means of social elevation because that is what he had seen modelled for him by many men in his community.[10] Justice Ducharme was satisfied that his circumstances reflected the devastating material impact of systemic anti-Black discrimination.[11]

Systemic racism was also relevant to Mr. Marfo's likely experience of imprisonment. The defence submitted that Black offenders are treated more harshly than other inmates in Canada's prisons, relying on the expert report prepared and filed in *R. v. Morris* and attached by Justice Nakatsuru as an appendix to his reasons for sentence.[12] Under the heading "Incarceration", the report detailed how Black offenders are treated more harshly in custody. Citing reports of the Office of the Correctional Investigator, the *Morris* report found that: (a) the number of Black inmates facing disciplinary charges was increasing, while the overall number of disciplinary charges went down; (b) Black inmates were more likely to be placed in maximum security and were less likely than their counterparts to have their custody score lowered so that they could be transferred to medium or minimum security prisons; (c) Black inmates were over-represented in admissions to segregation and disproportionately involved in use of force incidents; (d) Black inmates reported being stereotyped and that judgments about their character and lifestyle were common; and (e) Black inmates were associated with gangs from their home neighbourhoods and that this association limited their access to jobs and vocational training.[13] Because Mr. Marfo is Black, his time in the penitentiary would likely be less safe and less free—in other words, more punitive.

If a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact.

Justice Ducharme found this evidence "very disturbing" and "highly relevant" to the balance of sentencing: "If a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact."[14] Ultimately, though he was not prepared to impose the conditional sentence requested by the defence, Justice Ducharme sentenced Mr. Marfo to 24 months in prison—well below the three and half years requested by the Crown, which itself was on the lower end of the range for "true crime" firearms offences like this one.[15]

The particularly harsh impact of imprisonment on Mr. Marfo was but one of several mitigating factors Justice Ducharme considered in the balance of sentencing. But it is a factor that has the potential to transform the sentencing calculus for marginalized offenders. If Justice Ducharme was right that the qualitative experience of imprisonment, rather than simply its duration, is a relevant factor in sentencing, then to the extent systemic discrimination renders imprisonment more concretely harsh, advocates should urge sentencing judges to consider reducing the reliance on imprisonment as a sanction.

If judges can justifiably reach behind the pure quantum of a sentence and ask what imprisonment will actually be like during a pandemic, then it stands to reason that they could broaden the scope of their inquiry and consider the differential experience of imprisonment across a host of other factors.

The road to *Marfo*: systemic discrimination and the experience of imprisonment

Traditionally, custodial sentencing in Canada is focused on the length, rather than the quality, of the sanction. A sentencing judge will identify the range of sentence for a given offence, identify the mitigating factors and aggravating factors, and then decide what point on the range strikes the appropriate balance.[16] Sentences are calibrated by identifying the appropriate number of units necessary to satisfy the principles of denunciation and deterrence, assuming that each of these units is equally punitive. Seldom does a sentencing judge consider what an *experience* of imprisonment will actually be like for the offender being sentenced.[17]

The global coronavirus pandemic introduced an exception to this rule. Prison inmates are confined in a congregate living facility and exposed to greater risk of infection; as of February 2021, 10% of Canada's prison population contracted COVID-19, compared to just 2% of the population at large.[18] In response to the pandemic, prison officials imposed significant restrictions on visitation, programming, and movement within their institutions, including unit-wide lockdowns confining inmates to their cells for 23 hours a day. While sympathetic with the need to reduce the risk of transmission, the Office of the Correctional Investigator warned that these restrictions "breached domestic and international human rights standards".[19]

Judges began considering these harsher conditions of confinement in the balance of sentencing. In *Hearns*, an influential trial-level decision from Ontario, Justice Pomerance held that an offender sentenced during the pandemic may be entitled to a sentence reduction because of the elevated risk of transmission and the restrictive lockdown measures aimed at preventing infection.[20] As authority for this proposition, she relied on the collateral consequences doctrine articulated by our Supreme Court in *Nasogaluak* and *Suter*.[21] This doctrine permits sentencing judges to consider the specific circumstances of the offender before them, including "any consequences arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender".[22] While the case law is not uniform in its approach, courts have generally tracked the *Hearns* analysis and considered the "pain of imprisonment in a pandemic" as a relevant factor in the balance of sentencing.[23]

This emerging line of authority creates new opportunities for advocates. If judges can justifiably reach behind the pure quantum of a sentence and ask what imprisonment will actually be like during a pandemic, then it stands to reason that they could broaden the scope of their inquiry and consider the differential experience of imprisonment across a host of other factors.

Marfo's feminist potential: applying individualized proportionality to women offenders

Justice Ducharme's ruling in *Marfo* is consistent with the law's evolving commitment to substantive, rather than formal, equality. In the s. 15 context, our Supreme Court has held that this "animating norm" of our constitutional order focuses the equality analysis on "the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present-day social, political, and legal disadvantage".[24] This includes a commitment to intersectionality: substantive equality recognizes "that intersecting group membership tends to amplify discriminatory effects".[25] The call in the s. 15 context echoes individualized proportionality's

Like Black offenders, a woman's experience of imprisonment is rendered significantly harsher through the operation of systemic discrimination.

demand that sentencing judges attend to the actual, material impact of a proposed sanction on the lived experience of the offender before them.

Like Black offenders, a woman's experience of imprisonment is rendered significantly harsher through the operation of systemic discrimination. Debra Parkes argues that "[w]omen have long been 'correctional afterthoughts' given their small numbers relative to men".[26] As early as the 1970s, government bodies have been raising concern about incarcerated women's inequitable access to recreation, programs, basic facilities, and space.[27] Women are more likely to be confined in higher security classifications, placed in an institution far from their home communities, deprived of access to rehabilitative programming, and denied community-based programming and involvement.[28] Women are also more likely than men to be the primary caregivers of children. Imprisonment increases the risk that the state will apprehend the offender's child and a resulting "permanent loss of parental rights".[29] This is among the most serious collateral consequences an offender can face.[30]

The conditions of imprisonment are even worse for women facing intersecting oppressions, such as Indigenous women. In F. (A.), Justice Stach recognized that "a sentence of imprisonment is for most aboriginal [sic] peoples far more difficult than a similar sentence for many other non-native Canadians".

The small number of women prisoners in Canada gives rise to a harsher experience of imprisonment at both ends of the security classification. There is no standalone minimum security prison for women in Canada.[31] While minimum security men have access to institutions with a much greater degree of freedom and access to community-based rehabilitative and vocational programs, minimum security women are placed in "multi-level" institutions—meaning "that women who are designated minimum security do not have the benefit of meaningful minimum security conditions".[32]

The conditions of imprisonment are even worse for women facing intersecting oppressions, such as Indigenous women. In *F. (A.)*, Justice Stach recognized that "a sentence of imprisonment is for most aboriginal [sic] peoples far more difficult than a similar sentence for many other non-native Canadians".[33] Indigenous women in particular are "over-represented in incidents of self-injury, segregation, use-of-force incidents, and maximum security".[34] In other words, when compared to non-Indigenous women in federal custody, Indigenous women's experience of imprisonment is more punitive, more dangerous, less rehabilatitve, and less free.

Beginning with the factual foundation laid by Parkes and others, Lisa Kerr argues that "Canadian sentencing courts are well positioned to respond, within the bounds of existing legal rules and principles, to the distinct experience and effects of women's imprisonment".[35] Individualized proportionality demands a capacious approach to the offender's experience of the penalty imposed, and in the case of women, the gendered experience of imprisonment. While Kerr argues that this proposition finds strong support in the collateral consequences doctrine ultimately endorsed by our Supreme Court in *Suter*, she notes that attentiveness to the unique impact of imprisonment on women offenders is not new. She points to *R. v. Collins*, a 2011 decision from the Court of Appeal for Ontario in which Justice Rosenberg held that the sentencing judge ought to have considered the "wrenching experience imprisonment would represent for a mother who has devoted the past eighteen years of her own life caring for her disabled child".[36] She concludes that "[f]or women who will do what Parkes calls 'particularly hard time', counsel should press judges to factor those issues into the analysis of a fit sentence".[37]

When read together with the jurisprudence developing the doctrine of individualized proportionality in Canadian law, *Marfo* can provide counsel robust authority for such an argument. Particularly in the wake of the pandemic jurisprudence, no longer can a prison sentence be calibrated only by reference to its duration. Sentencing judges must also look behind the months and years and into what the actual experience of imprisonment will look like for the particular offender before them. For women, this means that sentencing judges should consider that they are likely to have less access to rehabilitative programs, less interaction with the community, more distant from the homes and family, and to be less free than their male

If a sentence is more onerous for a woman because of systemic gender-based discrimination in the correctional system, then any sentence imposed must be shortened to recognize this fact.

counterparts. Put simply, a woman's experience of imprisonment is likely to be more punitive than that of a man found guilty of an identical offence. To adapt Justice Ducharme's holding in *Marfo*: If a sentence is more onerous for a woman because of systemic gender-based discrimination in the correctional system, then any sentence imposed must be shortened to recognize this fact.

Advocates will, of course, need to lay an evidentiary foundation before asking their sentencing judge to reduce their client's sentence to account for systemic, gender-based discrimination. Fortunately, as Kerr notes, women's experience of imprisonment in Canada has been the subject of decades of research. In light of this evidence, the fact that women's experience of imprisonment is generally worse than men's—and exponentially so where compounded by intersecting oppressions—is difficult to dispute.[38] Competent advocates should highlight this research for their sentencing judge. Sentencing judges finding themselves without this evidence should insist that it be provided. To sentence an offender in the absence of this information would be to risk imposing a sentence that is disproportionately punitive.

A feminist orientation cannot only be concerned with the conditions of women's imprisonment. The goal should not be to sanitize and rationalize the carceral project, but to address the root causes of inequity and criminalization that bring increasing numbers of women into contact with the criminal justice system.[39] Much of this work necessarily must take place outside of the law. But to the extent that the law can recognize and remedy systemic disadvantage, *Marfo* provides a model of how that goal might be achieved. The doctrine of individualized proportionality supplies all the tools we need to bring the conditions of women's imprisonment out of the shadows and into the courtroom. The challenge now is for feminist advocates to organize and put these tools to work on behalf of our clients.

Chris Rudnicki is the founder of Rudnicki & Company, Criminal Lawyers. Theresa Donkor is an associate at Rudnicki & Company.

NOTES:

[*] Lead counsel and associate, respectively, at Rudnicki & Company Criminal Lawyers.

[1] *R. v. Marfo*, 2020 ONSC 5663, 2020 CarswellOnt 14037 (Ont. S.C.J.) [*Marfo*].

[2] *Ibid* at para. 2.

[3] Mr. Marfo entered into an agreed statement of facts and invited a finding of guilt, rather than pleading guilty, to preserve his rights on appeal: *ibid* at para. 1. See generally *R. v. Faulkner*, 2018 ONCA 174, 2018 CarswellOnt 2902 (Ont. C.A.) at para. 104. Justice Ducharme accepted that resolving the charges this way was a "genuine indication of Mr. Marfo's remorse": para. 47.

[4] This practice is becoming more common for Black offenders, as judges find a dedicated report assists them to assess moral culpability and determine a fit sentence. See further Maria C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal Law J 103.

[5] *Marfo, supra*, note 1, at para. 11.

[6] *Ibid* at para. 11.

[7] *Ibid* at para. 12.

[8] *Ibid*.

[9] *Ibid* at para. 18.

[10] *Ibid* at paras. 17-18.

[11] *Ibid* at paras. 48-51.

[12] *R. v. Morris*, 2018 ONSC 5186, 2018 CarswellOnt 14990 (Ont. S.C.J.) at Appendix A.

[13] *Marfo*, *supra*, note 1, at para. 52, citing *Morris*, *ibid*.

[14] *Ibid*.

[15] In *R. v. Graham*, 2018 ONSC 6817, 2018 CarswellOnt 19201 (Ont. S.C.J.), Justice Michael Code held that "three to five years is the appropriate range for a first s. 95 offence where the possession of the gun is associated with criminal activity, such as drug trafficking", even for young first offenders. See paras. 36-38.

[16] *R. v. Lacasse*, 2015 SCC 64, 2015 CarswellQue 11715 (S.C.C.) at para. 57. See also Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 73-75.

[17] Benjamin L Berger, "Proportionality and the Experience of Punishment" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Police, and Practice* (Toronto: Irwin Law, 2020) 368 at 370.

[18] Office of the Correctional Investigator, "COVID-19 Status Update-Third COVID-19 Status Update" (23 February, 2021), online (pdf): < https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20210223-eng.pdf> at 13 at 2.

[19] *Ibid* at 13.

[20] *R. v. Hearns*, 2020 ONSC 2365, 2020 CarswellOnt 5089 (Ont. S.C.J.) at para. 16.

[21] *R. v. Nasogaluak*, 2010 SCC 6, 2010 CarswellAlta 269 (S.C.C.); *R. v. Suter*, 2018 SCC 34, 2018 CarswellAlta 1266 (S.C.C.).

[22] *Suter*, *ibid* at para. 47, cited in *Hearns*, *supra*, note 20, at para. 19.

[23] Lisa Kerr and Kristy-Anne Dubé, "The Pains of Imprisonment in a Pandemic" (2021) 46:2 Queen's LJ 327 at 339-341.

[24] *Ontario (Attorney General) v. G*, 2020 CSC 38, 2020 SCC 38, 2020 CarswellOnt 17020 (S.C.C.) at paras. 43.

[25] *Ibid* at para. 47.

[26] Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 JL & Equal 127 at 129. Though women continue to be incarcerated at much lower rates than men, the rate of women's incarceration has been increasing at a much faster pace in the last ten years. As Parkes reports, "[b]etween 2003 and 2013, the number of women prisoners increased 16.5 percent overall" from 2003 to

2013, "while the federal population increased 16.5 percent overall during the same period": see 138.

[27] *Ibid*.

[28] *Ibid*.

[29] Lisa Kerr, "How Sentencing Reform Movements Affect Women" in David Cole and Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 250 at 254, citing *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, 2013 CarswellBC 3813 (B.C. S.C.) at 485.

[30] Parkes 2016, *supra*, note 26, at 142, citing *Inglis*, *ibid*.

[31] *Ibid* at 141.

[32] *Ibid*.

[33] *R. v. F. (A.),* 1994 CarswellOnt 116, 35 C.R. (4th) 62, [1995] 2 C.N.L.R. 151 (Ont. Gen. Div.) at para. 22.

[34] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report*, vol 1a (Ottawa: NIMMIWG, 2019) at 635.

[35] Kerr 2020, *supra*, note 29, at 251.

[36] *Ibid* at 269, citing *R. v. Collins*, 2011 ONCA 182, 2011 CarswellOnt 1327 (Ont. C.A.) at para. 41.

[37] *Ibid* at 270.

[38] *Ibid* at 250-51.

[39] For a thoughtful exploration of the tension between reform and abolition as legitimate feminist goals, see Parkes 2016, *supra*, note 26, at 145-152.

QUICK TIPS
Closing to a Jury: Effective Advocacy that Stays Within Bounds

by Liam O'Connor and Justice Laura Bird
Edited by: Lindsay Daviau

Photo courtesy of Barry Tjen.

1. Goals of a Closing Address:

Crown	Defence
Relate the evidence to the issues the jury has to decide –do not simply recite the testimony of each witness	Be as concise, compelling and enjoyable as possible
Address problematic areas of the Crown's case –inconsistent statements, unsavoury witnesses, gaps in the evidence	Give the jury clear reasons to acquit
Address defense arguments	Make the conclusion seem obvious
Explain why they should not have a reasonable doubt	Play to the jurors who you think are on your side so they will fight for you

2. What Makes a Good Closing

- Must be focused –jurors have a limited attention span so the closing should be as concise as possible
- Be scrupulous about your recount of the evidence–make sure you get it right
- You must engage with the jury–make as much eye contact as possible
- Speak at a volume that is louder than a normal speaking voice and more slowly
- Display confidence
- Appropriate use of technology–Powerpoint, photographs, portions of statements

3. How to Prepare

- Watch experienced, respected lawyers do closings
- Take what works from others but develop your own style–you must be true to your personality
- Start thinking about your closing early in the case–well before the trial starts
- Preparation is critical–at a minimum your key ideas must be written down–it is dangerous to wing it
- Develop templates

4. Things to Include

- Thank the jurors–acknowledge the sacrifice they have made
- A list of reasons your client is not guilty–numbering them can be effective
- Concessions–admit the obvious
- Acknowledgement of difficult facts–don't hide from them

5. Do NOT

- Use phrases such as "I think" or "I believe"–no one cares about your personal opinion
- Use sarcasm or personally demean counsel, a witness or the accused
- Use language designed to inflame the emotions of the jury
- Refer to specific examples of wrongful convictions (ie. Morin or Milgaard) or wrongful acquittals
- Invite the jury to speculate
- Misuse evidence (ie. hearsay if it was not admitted for its truth, evidence of prior discreditable conduct)
- The Crown cannot tell the jury an acquittal will create future victims
- The Crown cannot comment on the failure of the accused to testify
- The Crown cannot suggest the accused used disclosure to craft a defence

6. Client Management

- Do not let your client bring children to court
- Instruct your client not to react to your closing or the Crown's–no nodding, head shaking or faces
- Tell your client to sit still, look interested and innocent

7. The Law

- As a general rule–stay in your lane and leave the law to the judge

Exceptions:

- Reasonable doubt
- Why a murder is first degree murder
- Why an accused is guilty as a party
- Vetrovec witnesses

8. Consequences of Overstepping

A Soft Correction	A Strong Correction	A Mistrial
• Minor misstatements of evidence	• Significant misstatement of the evidence or the law	• Remedy of last resort
	• Inviting the jury to speculate	• Should only be granted when corrective instructions cannot cure any prejudice
	• Personal opinions or inappropriate comments about counsel or a witness	
	• Inflammatory comments	

Section 8 Standing and Section 24(2) Applicability:

We Know the Difference

by Wes Dutcher-Walls

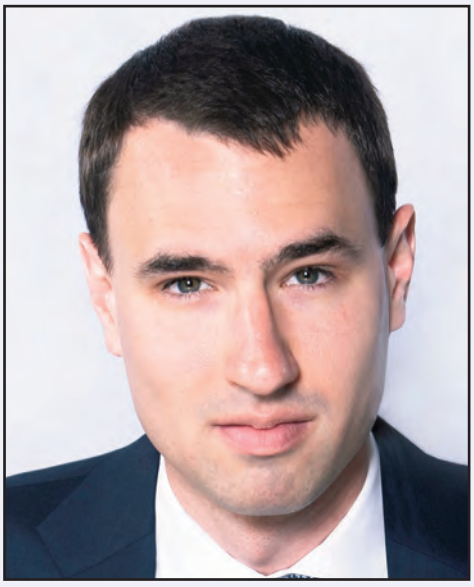


Photo courtesy of John Narvali.

Two years ago, I was surprised to read in a Crown factum that a defendant must have a reasonable expectation of privacy in evidence to seek its exclusion under s. 24(2) of the *Charter*.[1] I was confused at seeing this position in a court filing in 2020 but a review of the case law suggests that Crowns still make the argument now and then. The case has since resolved so we did not get to litigate the issue. I hope this article provides a toolkit for how to respond if your Crown makes this argument.

If your Crown makes the same argument mine did, you may be unsure whether the prosecution sees a reasonable expectation of privacy as part of the "obtained in a manner" test or a new, free-standing threshold requirement to access s. 24(2). Either way is inaccurate. Assessing a defendant's expectation of privacy in an item is, at best, a roundabout way of asking whether discovery of the item violated that defendant's *Charter* rights.

We know the difference between section 8 standing and the applicability of s. 24(2). Each has its own threshold test. Section 8 requires an applicant to establish a reasonable expectation of privacy in the subject matter of the search. Section 24(2) requires the applicant establish the evidence at issue was "obtained in a manner" that infringed their own *Charter* rights. While a privacy analysis may be relevant to whether a defendant meets the "obtained in a manner" requirement, it is not necessary or dispositive.[2]

If a Crown makes this argument, how should you respond? I suggest using semantics, precedent, and policy.

First, control the labelling of the issue. I don't like using the word "standing" in relation to s. 24(2). Standing is a person's legal entitlement to invoke the jurisdiction of a court.[3]

The word implies something that inheres in a person. The word "standing" makes sense in the context of s. 8: can *this particular person* establish their *own* expectation of privacy in this place or thing? In contrast, the "obtained in a manner" requirement in s. 24(2) rightfully places the focus on the state's misconduct: does the wrongdoing of the police poison their discovery of evidence useful to the Crown's case? Focusing on the state's actions is appropriate for s. 24(2) because it is designed to maintain confidence in the administration of justice and deter future *Charter*-infringing conduct.

I don't like using the word "standing" in relation to s. 24(2).

A pet peeve of mine is when lawyers throw the term "standing" around when it's not accurate. I frequently rant to my colleagues about this. For example, I don't think the word "standing" applies when *Charter* claimants argue they can rely on breaches of another person's rights in the *Grant* analysis to show a pattern of misconduct by police. (They can.[4]) I also don't think "standing" captures when claimants ask to excise information arising from a breach of another person's rights from an ITO or grounds for arrest. (They can.[5]) Using the term "standing" in these situations might make the court look more skeptically on the *Charter* applicant's argument. "Standing" feels restrictive. It's a mechanism designed to shut the door to certain classes of litigants. It suggests the need to prove one's *worthiness* to ask for certain relief. But the real question in these situations is whether the legal framework – whether it's the excision test, the *Grant* factors, or the "obtained in a manner" requirement – recognizes a particular fact as an appropriate part of the analysis. "Standing" can seem like a helpful shorthand, but I suggest that defence lawyers should stop saying it in relation to s. 24(2). Once your client establishes a breach of his or her own *Charter* rights, the issue is no longer about standing.[6]

Second, use precedent. There is supportive case law to help you counter the argument that s. 24(2) requires the claimants to establish a reasonable expectation of privacy. The difference between section 8 standing and s. 24(2) applicability often comes up cases where a vehicle stop results in the arrest of multiple defendants. For example, in *Lindo and Horn*, police arrested both occupants of a car for possession of crack cocaine. Police found drugs on the passenger. Greenberg J. of the Manitoba Court of Queen's Bench found a s. 9 breach for both defendants and held that the driver could seek exclusion of the drugs under s. 24(2) despite having no reasonable expectation of privacy over the passenger's body and clothing. There was a sufficient temporal and causal connection to satisfy the "obtained in a manner" requirement: but for the detention of *both* defendants, there would have been no search of the passenger.[7]

For similar factual scenarios, consider the following cases:

- In *Cartwright and Patrick*, the driver admitted ownership of a backpack containing drugs but police charged both occupants of the car with possession. McArthur J. excluded the drugs from the case against the passenger on the basis of breaches of her own *Charter* rights.[8]
- In *Sivarasah and Baregzay*, the passenger conceded he had no expectation of privacy in a car but Coroza J. (as he then was) found he had "*standing*" (ahem) to seek a s. 24(2) remedy to a exclude a gun found after a traffic stop.[9]
- *Fortune* is a variation on the usual "two occupant" fact pattern. Fortune was alone and driving another person's car at the time police discovered drugs in the car's console. Brown J. held that the defendant could have applied to exclude the evidence even *without* a reasonable expectation of privacy: "If evidence was obtained because of violations of his own individual rights that do not stem solely from his mere lawful presence and possessory rights within the vehicle, he could still establish standing for a s. 24(2) application."[10]

"Standing" feels restrictive. It's a mechanism designed to shut the door to certain classes of litigants. It suggests the need to prove one's worthiness to ask for certain relief.

It makes sense that all of these examples are s. 9 cases in the context of vehicle stops. Courts might be more willing to find a "causal" connection between an arbitrary stop and the discovery of contraband incident to arrest in a *Charter* application by *any* occupant of the vehicle. For a completely different factual scenario, consider *Flores*.[11] Bystanders saw the defendant flee from the scene of a car accident and run into one of two houses: 65 Ringley or 67 Ringley. Police first went to 67 Ringley and searched it thoroughly without a warrant. Then they went next door to 65 Ringley where

they found the defendant hiding in a garden shed and displaying indicia of impairment. The trial judge found that the defendant had a reasonable expectation of privacy *only* in her own home (67 Ringley). However, the police's unlawful search of 67 was sufficiently connected to their discovery of the defendant in the backyard of 65 that the subsequent breath samples were "obtained in a manner" that violated the defendant's section 8 rights. In other words, the defendant was lucky the police illegally searched her own house before finding her elsewhere. *Flores* provides an example of the nuanced approach necessary to apply the "obtained in a manner" requirement separately from the "reasonable expectation of privacy" analysis.

Blurring the lines between s. 8 standing and s. 24(2) applicability leads to poor reasoning and a bad result.

Blurring the lines between s. 8 standing and s. 24(2) applicability leads to poor reasoning and a bad result. In *Wilkinson*, police were patrolling a "high crime" area in an unmarked car and saw the defendant running away from them. Wilkinson dropped a backpack containing drugs in a vacant lot *before* the detention crystallized when police caught up to him.[12] The court found there was a s. 9 breach but that the backpack was not "obtained in a manner" that violated Wilkinson's s. 9 rights. Citing *Edwards* and *Patrick* – both s. 8 standing cases – the court found that the defendant's abandonment of his bag was dispositive: because the defendant abandoned his *privacy* interest in the bag, he had no "standing" under s. 24(2) despite the breach of his s. 9 rights.[13]

In *Wilkinson*, the unjustified addition of a privacy analysis at s. 24(2) determined the outcome and denied the defendant *Charter* relief. A "generous" causal analysis under s. 24(2) would likely have led to the conclusion that police would not have discovered the defendant's drugs if they hadn't arbitrarily detained him for the crime of running in public. On the other hand, it might be possible to rationalize the result within the "obtained in a manner" analysis. *Wilkinson* is distinguishable from a case like *Le*, where the detention *preceded* and arguably caused the defendant's flight and the subsequent discovery of the contraband.[14] Regardless of the outcome in *Wilkinson*, it makes more sense to distinguish these cases using *the Pino* framework than through a reasonable expectation of privacy analysis.[15]

Finally, if reliance on the case law fails, make a policy argument. I see at least three problems with adding a privacy threshold to s. 24(2). First, our courts' understanding of privacy emphasizes *ownership*.[16] A "proprietary" analysis of privacy creates major inequities.[17] All of them would be imported into s. 24(2) if a reasonable expectation of privacy becomes a free-standing threshold for s. 24(2) remedies. Considering a *Charter* claimant's possession or ownership of an item or place at the "obtained in a manner" threshold in every case – regardless of which substantive right is breached – would turn the *Charter* into property rights code instead of a check on state overreach.

Secondly, relatedly, the incriminating nature of evidence does not always depend on a defendant's ownership or possession of it. No doubt, there are cases where a defendant's lack of privacy interest in contraband suggests a weak Crown case on the merits.[18] But our constitutional order would be unrecognizable if the protection of s. 24(2) was limited to cases where the relevance of the evidence to the question of guilt or innocence depended on the defendant's expectation of privacy in it. Even for possession cases, the principles in *Jones*[19] suggest that the Crown should not be able to take inconsistent positions by arguing that a defendant has no expectation of privacy in evidence at the "obtained in a manner" stage but then spend the merits portion of the trial establishing the defendant's possession of it.

Finally, a threshold requirement for a reasonable expectation of privacy is inconsistent with a flexible justificatory mechanism like s. 24(2). A strict, proprietary approach to privacy rights *might* be justifiable in the United States where constitutional violations result in automatic exclusion.[20] But in Canada it makes little sense to set a high bar at the s. 8 stage when s. 24(2) gives the court another chance to consider society's interest in seeing the prosecution proceed. Justice La Forest recognized this in his concurrence in *Edwards*.[21] It makes even less sense to make a restrictive privacy analysis a precondition to *all Charter* relief, asking each successful claimant to jump through an additional hoop of showing an expectation of privacy before accessing a remedy for the breach of his or her substantive rights *other* than privacy (for example, in ss. 9 or 10 cases).

Put simply, adding an expectation of privacy threshold is inconsistent with the remedial purpose of s. 24(2). Helpfully, at least one court found the phrase "all the circumstances" in s. 24(2) applies equally at the threshold stage. On this view, courts must consider *all* of the circumstances even when deciding if evidence was "obtained in a manner" that breached a defendant's rights.[22] I like this approach. Defence counsel should continue resisting any attempts to create a new bright line rule that would limit our clients' access to one of the few tools they have to hold the state accountable and vindicate their *Charter*-protected rights.

Wes Dutcher-Walls is an associate at Addario Law Group LLP.

NOTES:

[1] The full paragraph: "It would be incongruous and illogical for items in which an applicant has no reasonable expectation of privacy to be subject to exclusion as a result of a s. 10(b) breach, when they would not be subject to exclusion under s. 8. This would be an impermissible expansion of the reach of s. 24(2) in the s. 10(b) context. Section 24(2) is designed as a personal remedy to address infringements of personal Charter rights. If a person has no reasonable expectation of privacy in an item, then it should not be subject to a s. 24(2) analysis."

[2] *R. v. Barton*, 2016 ONSC 8003, 2016 CarswellOnt 20908 (Ont. S.C.J.) at para. 117.

[3] *Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)*, [1983] B.C.J. No 873 (B.C. C.A.).

[4] See e.g. *R. v. Lauriente*, 2010 BCCA 72, 2010 CarswellBC 313 (B.C. C.A.).

[5] See e.g. *R. v. Mediati*, 2018 ONCJ 164, 2018 CarswellOnt 366 (Ont. C.J.); *R. v. Croft*, 2013 ABQB 716, 2013 CarswellAlta 2485 (Alta. Q.B.); *R. v. Dhillon*, 2014 ONSC 6287, 2014 CarswellOnt 15003 (Ont. S.C.J.), reversed 2016 ONCA 308, 2016 CarswellOnt 6488 (Ont. C.A.). Moldaver J. gives this argument a bump in *R. v. Marakah*, 2017 SCC 59, 2017 CarswellOnt 19341 (S.C.C.) at paras. 192-193 (dissenting).

[6] *R. v. Lambert*, 2020 NSPC 37, 2020 CarswellNS 621 (N.S. Prov. Ct.) at para. 270. See also *R. v. Do*, 2012 BCSC 411, 2012 CarswellBC 763 (B.C. S.C.) at para. 12: the threshold question at s. 24(2) is "not properly characterized as one going to the standing of the accused to seek a constitutional remedy".

[7] *R. v. Lindo*, 2006 MBQB 101, 2006 CarswellMan 177 (Man. Q.B.) at paras. 28-33.

[8] *R. v. Cartwright and Patrick*, 2017 ONSC 6858, 2017 CarswellOnt 18002 (Ont. S.C.J.) at paras. 56-70.

[9] *R. v Sivarasah and Baregzay*, 2017 ONSC 3597, 2017 CarswellOnt 9048 (Ont. S.C.J.) at paras. 171-172.

[10] *R. v. Fortune*, 2012 BCSC 2031, 2012 CarswellBC 4208 (B.C. S.C.).

[11] *R. v. Flores*, 2020 ONSC 7283, 2020 CarswellOnt 18276 (Ont. S.C.J.).

[12] *R. v. Wilkinson*, 2020 BCSC 2230, 2020 CarswellBC 3658 (B.C. S.C.) at para. 21.

[13] *R. v. Wilkinson*, 2020 BCSC 2231, 2020 CarswellBC 3659 (B.C. S.C.) at para. 15.

[14] *R. v. Le*, 2019 SCC 34, 2019 CarswellOnt 8589 (S.C.C.).

[15] *R. v. Pino*, 2016 ONCA 389, 2016 CarswellOnt 8004 (Ont. C.A.).

[16] In *Edwards*, the Supreme Court relied on a federal case from Arkansas called *Gomez* when including ownership or possession as factors to consider when determining whether a defendant has a reasonable expectation of privacy in a place or thing: *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CarswellOnt 1916 (S.C.C.) at para. 45, citing *United States v. Gomez*, 16 F.3d 254 at 256 (8th Cir 1994).

[17] See e.g. *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, 1984 CarswellAlta 415, [1984] 2 S.C.R. 145 (S.C.C.) at 159; Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's L.J. 65 at 70-71; David J. Schwartz, "*Edwards* and *Belnavis*: Front and Rear Door Exceptions to the Right to be Secure from Unreasonable Search and Seizure" (1998) 10 C.R. (5th) 100; Lisa Austin, "Person, Place, or Thing? Property and the Structuring of Social Relations" (2010) 60 U. Toronto L.J. 445 at 454.

[18] See e.g. *R. v. Cartwright and Patrick*, *supra*, note 8, at para. 70; *R. v. Lindo*, *supra*, note 7, at paras. 28, 33.

[19] *R. v. Jones*, 2017 SCC 60 at para. 26.

[20] Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's L.J. 65 at 70-71.

[21] *R. v. Edwards*, [1996] 1 SCR 128 at paras 65-69.

[22] *R. v Sivarasah and Baregzay*, 2017 ONSC 3597 at para 177 (per Coroza J.).

In Memoriam

Edward Sapiano

by William Jaksa

Photo of Ed Sapiano courtesy of William Jaksa.

Edward J. Sapiano was passionate, professional, irreverent and, of course, entertaining. But not everyone saw the best of him, and he absolutely loved that.

He loved the criminal law. He loved courtroom battles. He loved pushing boundaries.

There are many audacious stories that I have heard about Edward since his passing about the way he liked to push boundaries. Some include new exaggerated twists. All came from second-hand sources. All were amusing. Some were true.

It's a testament to his character that a small percentage of the defence bar still believes '*that it's possible*' his death is an elaborate hoax. That he is actually living comfortably in Thailand and spending his free time day trading gold options. The idea that he's still alive, that he hasn't passed, is the only way to reconcile the reality of his death. That his enormous personality was just too youthful and remarkable to die. The hoax allows us to momentarily forget the unfairness of the illness he faced.

Edward became very ill towards the end of a lengthy murder trial and was forced to take a few years off from his practice. He eventually returned and picked up where he left off, conducting several murder trials back-to-back. Just before another murder trial began, a kidney became available, and he turned it down. He didn't want to inconvenience the client, the court, the co-accused and he really didn't want to antagonize Legal Aid Ontario.

He passed with dignity and pride in the manner in which he lived his life. He didn't want anyone to feel sorry for him.

Edward made a lasting difference in the criminal bar. He was a titan, a skilled advocate, and your favourite

lawyer's favourite lawyer. He fought for his clients with flair, mastery of the law and compassion. You certainly knew when he was in the courtroom. Judges, Crowns and, by the end of a trial, even juries would see Edward stand up and think to themselves "what is he going to do now". If Sapiano was on his feet, the gallery, whether filled with colleagues or members of the public, were watching him push narratives and boundaries.

He loved teaching and mentoring new lawyers, passing along knowledge and advice, in some circumstances, advice that would test the boundaries of the law. He was always inspiring seasoned attorneys to think more creatively. We can all recount instances of being offered advice or counsel from Edward on a particular file.

And as relentless as he was in the pursuit of justice for his clients, he also wanted to positively impact the community he lived in. Through his Piece Options Gun Surrender Program, he made our streets and communities safer. In the past 10 years, over 400 firearms and counting have been surrendered to police.

Continue to tell stories about Edward. Continue to talk about his unwavering courage to stand up for his clients. Continue debating the outrageous advice he gave you. Through these stories we keep his memory alive and the defence bar is better for it.

We will all miss him, especially how he regularly harangued Liam O'Connor and a handful of Crown Attorneys in Brampton.

In true Edward Sapiano fashion, I am obligated to say that this whole Memoriam is entirely accurate, except for all the totally made-up parts.

harrington & mahoney
ATTORNEYS AT LAW

Criminal defense lawyers in the United States since the 1970's, **Mark J. Mahoney** and **James P. Harrington** are Past Presidents of the New York State Association of Criminal Defense Lawyers. Both are also members of the National Association of Criminal Defense Lawyers; Mark is a member of the Criminal Lawyers Association.

harrington & mahoney concentrates on criminal defense, in state and federal trial and appellate courts within New York State. We have experience in many cases with Canadian and U.S. elements. We are also happy to assist with referrals to counsel in other parts of the United States.

We can consult on the possible U.S. immigration consequences of proposed resolution of criminal charges for purposes of advising the client, or advocating with the Crown or the Court regarding the choice of charges or sentence to be imposed. For your clients with actual convictions, we have successfully advocated for the admissibility to the U.S. of many whose convictions we find, possibly contrary to expectations, do not warrant exclusion, or we have obtained waivers of inadmissibility where needed. Due to our association with local immigration attorneys we can also assist in obtaining a full range of U.S. immigration legal services.

70 Niagara Street, Third Floor
Buffalo, New York
14202-3407
mjm@harringtonmahoney.com

Area code : 716
Phone: 853-3700
Fax: 853-3710
jph@harringtonmahoney.com

www.harringtonmahoney.com

PHOTOS

from the CLA Fall Conference, November 19-20, 2021

PHOTOS


Liam O'Connor

PHOTOS

A New Broadway Musical: Memoirs of a Criminal Defence Counsel

The Juror I Married

by Earl J. Levy Q.C.

When defence counsel are preparing for trial, one would think that the most they could hope for as a result would be a not guilty verdict for their client. It would be difficult to envisage that our involvement in the trial would result in a most significant impact on our personal life. I certainly did not, but it did for me in a surprising way.

I no longer have my file on that trial. It was some 45 years ago. I recall that it was not a high-profile trial. I do not remember the name of my client or his three co-accused. I do recall the charges were fraud and conspiracy to commit fraud involving the sale of automobiles. The accused were all convicted.

During the time period of this trial there were very few women on juries, generally, and only one was called to the book to be sworn in as a juror in this trial. This potential juror appeared to be in her mid-twenties, about 5'10" tall, stylishly dressed, blonde and very attractive. Rather surprisingly, she was challenged by one of the defence counsel when the other defence counsel, including myself and Crown, accepted her as a juror. Oh well.

The trial began. The Crown was calling certain witnesses who were the victims of the alleged fraud and in a position to identify one or more of the accused who were all sitting in the prisoner's dock. The Crown asked one of the witnesses if he could identify in the courtroom the individual whom he alleged had defrauded him. At this moment, the back door of the courtroom opened and the witness pointed to the man who had just entered the courtroom as the individual who had defrauded him. He obviously was not one of the accused.

It shortly became known that the

individual who had entered the courtroom and was identified as one of the culprits was, in fact, the husband of one of the jurors and had entered the courtroom to pick up his wife when the Court day was over. The Crown argued that this misidentification was prejudicial to the Crown's case and a mistrial should be declared. The trial judge disagreed with the defence that it fell within the case law that speaks to the dangers of identification evidence and was very relevant evidence. A mistrial however was surprisingly declared by the trial judge and a new trial was ordered to start that day. The same jury panel was still in the courthouse and a new jury was to be chosen from that panel.

Guess whose name was picked by the court clerk from the remaining names of possible jurors for the new trial. Unbelievably, it was again the 5'10 blonde, attractive, and stylishly dressed. All counsel, including the one who previously challenged her accepted her as a juror. She sat in the front row of the jury box at the far-left side, being the furthest from where I was seated at my counsel table.

The trial proceeded as expected, somewhat laboriously. I had cast a look over at the jury box and the blonde juror on more than one occasion, trying to be cool about it. I thought she had looked back. The turning point for me came when at the morning break a female court officer carefully approached me, when there were only a few persons still in the courtroom. The officer mentioned this attractive juror had asked her if I was married. I decided then and there that I would try to meet her after the jury verdicts, which were guilty for all four accused.

When I addressed the jury I stood almost directly in front of my new favourite juror, at a normal distance. After the verdicts, I quickly said my goodbyes to my co-counsel, the Crown and the officer-in-charge. I did not go to the Barrister's change room to change out of my robes and moved quickly to the ground floor of the courthouse and stood in a space between the elevators and escalator so as not to miss her coming down from the jurors' room after saying her goodbyes to her fellow jurors and picking up her belongings in the jurors' room. We met at the bottom of the escalator and engaged in a short conversation. I asked her to dinner at the popular Hy's Steakhouse, which was back then on Richmond St. and she accepted. After asking her to wait, I went to the Barrister's lounge to change into my street clothes. When we arrived at Hy's we met a defence lawyer friend of mine and his date at the bar. We agreed to have dinner together. As the night went on, we all appeared to be enjoying ourselves at our dinner table. My friend was bordering on having too much to drink. Later in the evening, all the male waiters in their tuxedos surrounded one of our neighbour's tables with a cake and then all sang happy birthday to a lady at that table. Those sitting at tables nearby decided they would sing something that caused laughter, and they did. Two other tables were involved before ours was reached.

When they finished, my friend walked out into the middle of the room after saying to the three of us, "I will look after this". When he found his spot he raised his voice for all in the room to hear: "I shot an arrow into the air", he then looked up and pointed up, "It fell to the ground. I know not where", he then looked down and pointed down and looked around the room and finished in a louder, more emphatic voice, "I lose more fucking arrows that way". There was much laughter that followed, and the two following tables chipped in with their diddys. Before you know it, everyone in that room was up on their feet doing the rumba about the room and all the male waiters in their tuxedos were standing around the room looking dumbfounded.

I did not have a car that day as it was getting repaired. My friend offered to drive us afterwards and we foolishly agreed, even given his drinking. When he stopped driving, which had been much faster than we had liked, he pulled over suddenly and made a quick exit, saying as he left he would be back soon. Needless to say we were surprised and perplexed. We waited about one-half hour but my friend was not in sight. I had watched him walk down the street we were on and saw him turn a corner. I followed his route and when I turned the same corner, I walked a short distance looking into windows that were without coverings and saw my friend with others, drinks in hand, and realized I was looking into a booze can.

I returned to his car, and advised the ladies of what I saw and the poor chances of seeing my friend again soon that night. I called for cabs, one for me and my date and one for my friend's date. The night for the three of us had seemingly come to an end, but not the relationship between myself and the blonde juror. Avril and I were married before the year's end.

The Use and Admissibility of Screenshot Evidence

Lynda Morgan & Ava Armand[1]

Over the past decade, Crown disclosure increasingly contains screenshots of social media or electronic communications relevant to the alleged offence. Our clients' defence may also rest on screenshot evidence. Sometimes a screenshot is the best or only source of evidence, particularly where individuals have communicated using applications that retain content for a limited time. It is important to familiarize yourself with admissibility requirements to ensure you can identify potential issues.

Screenshots Are Photographs of Electronic Evidence

Screenshots are photographs of electronic evidence. A properly authenticated photograph is presumptively admissible where it "accurately and fairly depicts what is shown in the picture." Photographs may be excluded where the prejudicial effect exceeds probative value.[2]

The threshold for authentication is low. At common law, "authentication requires the introduction of some evidence that the item is what it purports to be".[3] Section s. 31.1 of the *Canada Evidence Act* requires that the party who seeks to admit the electronic evidence adduce evidence capable of supporting a finding that the electronic document is what it purports to be, using either direct or circumstantial evidence.[4]

In addition to meeting the test for authentication, the party tendering the evidence must also satisfy any relevant evidentiary rules.[5] In each case, consider how you will satisfy the applicable evidentiary test, and consider whether there is a basis to challenge admissibility. For instance, where the prosecution tenders screenshots of text messages between a complainant and accused discussing an alleged sexual assault, the complainant's texts com-

plaining of the assault are prior consistent statements. The Crown must be able to articulate the basis upon which those presumptively inadmissible statements are admissible.

When confronted with or seeking to tender evidence in the form of screenshots of electronic messages, consider the following issues:

1. Can be the screenshots be authenticated? Through whom?
2. Do the screenshots accurately and fairly depict the messages that were exchanged? How can this be proved?
3. How can authorship be established?[6]
4. Are there are any other evidentiary rules that might make the evidence inadmissible?
5. Should the messages be admitted in an edited form?

Screenshot Evidence Can be Manipulated or Incomplete

Unlike evidence obtained through forensic extraction, screenshots rely entirely on the creator. The screenshotter can choose which messages to capture, he can delete certain messages before taking screenshots (depending on the app), and contemporaneous metadata is unlikely to be preserved. On the face of a screenshot, it is often impossible to determine whether any messages are missing, or whether the contents have been manipulated.

In *R. v. Mootoo*,[7] Justice Davies rejected *amicus'* argument that it was unfair to rely on screenshots where the captured message exchange was incomplete. It was obvious from the content that messages were missing. For instance, it was clear that some messages were not responsive to earlier messages. The complainant agreed that the screenshots did not capture the entire conversation with the recipient. The complainant was also unable to explain why she had not captured all of the messages, could not remember how many messages were missing, and could not remember the content of the missing messages. *Amicus* argued that because the Crown cannot lead only a portion of a defendant's statement, by analogy, the Crown could not adduce only a portion of the defendant's text message conversation. The Court rejected this logical submission, holding that,

> . . .text messages are different than oral statements. A text message is an accurate record of what was said. If the meaning of a text message is clear on its own, the message can be admissible even if it was part of a longer conversation that was not all captured.[8]

In *Mootoo*, the text messages were of a sexual nature and their meaning was quite explicit. Justice Davies found no evidence that the screenshotter had deliberately selected messages to alter or manipulate the meaning. In any event, "there is nothing unfair about relying on screenshots if the meaning of the messages is clear even if some messages are missing".[9] *Mootoo* should not be read as giving the Crown or defence *carte blanche* to lead incomplete screenshot conversations. Where there is evidence that screenshots were taken with a view to manipulating the meaning, or where the conversation is unclear because of the missing messages, counsel may be able to successfully argue that their introduction is unfair.

In addition to concerns about the completeness of a screenshotted conversation, there are ways to manipulate messages so that they can appear to be from someone else or to alter the timing of messages to suit a particular purpose.[10] For example, I can send myself a text message through an online texting site and label those incoming text messages on my phone as coming from "Mr. Criminal". Once I screenshot that text, there is no additional forensic evidence available to the viewer that shows who actually sent the message.

In *R. v. Aslami,* the trial Crown led electronic evidence which included screenshots of TextNow and Facebook messages. To collect the TextNow evidence, the police watched the appellant's ex-wife take screenshots on her phone of the messages she had exchanged with a person she named "Sumal Jan". At trial, she testified that she believed that person was the appellant. The Crown did not lead any evidence to establish when the TextNow messages were sent. The screenshot only showed when the screenshot - not the message - had been created. Police also obtained screenshots of Facebook messages from a third party, who said those messages were between him and the Appellant. The Crown called no expert evidence.

The Court of Appeal criticized the trial judge's reliance on the screenshot evidence, noting that:

> . . . trial judges need to be very careful in how they deal with electronic evidence of this type. There are entirely too many ways for an individual, who is of a mind to do so, to make electronic evidence appear to be something other than what it is. Trial judges need to be rigorous in their evaluation of such evidence, when it is presented, both in terms of its reliability and its probative value. . .[11]

Screenshots Can Preserve Vanishing Messages

Despite their shortcomings, screenshots may be the only way to preserve contemporaneous electronic communications. Unsaved Snapchat messages disappear from both the sender's and recipient's phone after twenty-four hours. Certain Instagram communications disappear if they are not captured. Generally, the decision as to whether to screenshot disappearing messages is made before police become involved and before counsel is retained. If you are involved, first determine how or whether the other person is notified when a screenshot is made. If the other party will be notified, figure out an alternative such as taking a photograph of the conver-

sation using a second device rather than a screenshot (or better yet, retain an expert to create the image). If you are retained after the screenshot is made, an expert may be able to locate artefacts on a phone that provide objective evidence respecting timing of an incoming or outgoing message or the time a screenshot was made.

NOTES:

[1] Ava Armand is an articling student at Addario Law Group.

[2] *R. v. Mootoo*, 2021 ONSC 5984, 2021 CarswellOnt 12959 (Ont. S.C.J.) at para. 57; *R. v. Tello,* 2018 ONSC 356, 2018 CarswellOnt 361 (Ont. S.C.J.) at para. 9.

[3] *R. v. C.B.*, 2019 ONCA 380, 2019 CarswellOnt 7222 (Ont. C.A.) at para. 66.

[4] *R. v. C.B.*, *supra,* at paras. 68, 77, 78.

[5] *R. v. Rashid*, 2021 ONSC 3443, 2021 CarswellOnt 6869 (Ont. S.C.J.) at para. 48.

[6] Authorship is a question for ultimate determination; authentication is required for admissibility: *R. v. Martin,* 2021 NLCA 1, 2021 CarswellNfld 2 (N.L. C.A.) at para. 53.

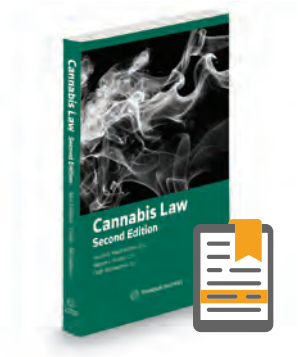
[7] *R. v. Mootoo, supra,* note 2.

[8] *Ibid* at para. 79.

[9] *Ibid,* at para. 82.

[10] *R. v. Aslami,* 2021 ONCA 249, 2021 CarswellOnt 5561 (Ont. C.A.) at para. 11.

[11] *Ibid* at para. 30.



Now also available as an eBook on Thomson Reuters® ProView

New Edition

Cannabis Law, Second Edition

Bruce A. MacFarlane, Q.C., Robert J. Frater, Q.C., and Croft Michaelson, Q.C.

Cannabis Law, Second Edition is an essential read not only for lawyers and educators, but for anyone who wants to participate in the cannabis industry. **Cannabis Law, Second Edition** covers a wide variety of legal issues, including criminal law, commercial law, and workplace and human rights-related issues.

Topics discussed include federal and provincial/territorial regulatory schemes; municipal and Indigenous regulation; offences and punishment, including cannabis-impaired driving; medical cannabis; and the business of cannabis.

New in this edition

All chapters are updated to include recent changes to federal, provincial, territorial, and municipal legislation and case law developments from across Canada.

The second edition focuses on providing analysis and guidance on the business side of cannabis, including two brand new chapters:

- Edibles
- Industrial hemp

$196

Softcover + ProView eBook
July 2021 approx. 340 pages

eBook only $163

Print only $163

978-0-7798-9885-5

Pricing includes shipping and handling. Price(s) subject to change without notice and subject to applicable taxes.

Available risk-free for 45 days

Online: store.thomsonreuters.ca
Call Toll-Free: 800-387-5164
In Toronto: 416-609-3800

For more information, please visit the product page on store.thomsonreuters.ca

© 2021 Thomson Reuters TR1825463/08-21

THOMSON REUTERS®

Notice to the Profession
Product Factsheet
MAY 7, 2022 v19.5

eXoneratePro™

Miscarriages of Justice Case Management System

Software designed to track the case review process

eXoneratePro™ is a customizable, multi-user, cross-platform, multi-lingual database platform designed to track the criminal case review process, from initial application(s) to the determination of whether there may have been a wrongful conviction.

eXoneratePro™ is based on software originally developed for the UBC Innocence Project, Allard School of Law by **Douglas F Brown Software Services Inc.**

We are in final stages of development and need candid usability reviewers, etc.

Key features of eXoneratePro™

- Ease of use design and 'no manual required' approach
- Powerful search commands across all layouts, records, and fields
- Detailed applicant profiles, including fields for ethnicity, gender identification, etc
- Follows application process, from start to finish
- Options for long-term document storage, including scans of original applications
- Customizable reports of file status and typical reasons for eligibility or otherwise
- Automatic calculation of days of an applicant's incarceration
- Docketing of staff time and lawyers' hours used per case, using time-as-tenths, or start-time/finish-time
- Automatic identification of docketing conflicts when using start-stop
- Robust database security, EAR capable, layered user accounts, extensible data API
- Mac / Windows / Linux server environments, mobile devices (in development)

For further information on how you might assist with this important software, please call 888.410.2077 or email info@exoneratepro.com

©2022 Douglas F Brown Software Services Inc.

WRENCHES FOR THE TRENCHES

Pointing the Accusatory Finger in Court: The Requirements of Third Party Suspect Evidence

by Hussein Aly

Photo courtesy of Albussein Abdelazim.

If you didn't do it, then who did?

The quality of advocacy often depends on the details. A defence where an accused denies committing the crime might work, but one that answers the question of who actually did it is far more persuasive. Persuasive advocacy creates reasonable doubt, something all defence counsel strive towards.

For defence lawyers, answering the question of who really did it is done through evidence of other suspects/third party suspects. A third party suspect evidence is adduced "to suggest some other person (either known or unknown) committed the offence".[1] The claim is "not a defence in the usual sense, but rather, an argument that the Crown has not met its burden of proof".[2]

Given the role it plays in victory, the temptation to answer the obvious question that flows from an accused's denial of guilt is strong. That said, defence counsel are not free to advance any possible theory/argument about who did the crime. Before answering the question of "who did it?", there are a series of hurdles the defence must first clear. Properly understanding the requirements will help counsel convince the gatekeepers to open the door to advancing evidence of third party suspects.

The Nature of the Evidence: All other Evidentiary Rules Apply

Third party suspect evidence "must comply with the basic rules of admissibility, meaning it must be relevant, material, and not barred by any exclusionary rule".[3] Therefore, "the proponent does not get a free ride through the admissibility thicket upon mere announcement of "third party suspect".[4] The evidence being tendered to demonstrate that the third party

committed the offence(s) must therefore be admissible evidence, as opposed to inadmissible evidence such as hearsay or opinion evidence.

There Must be an Air of Reality

As with all defences, the accused must demonstrate that there is an "air of reality" to the argument that a third party committed the offence with which the accused is charged. Absent an air of reality, the evidence is inadmissible based on it having no relevance. The defence must clear this hurdle "to ensure that "fanciful or farfetched" defences are not put before the trier of fact". The onus placed on the defence "is not intended to be a high threshold".[5] To demonstrate an air of reality, counsel will be required to point to admissible evidence – either on the record, in disclosure, or anticipated – that persuades the trial judge that the proposed evidence is "reasonably capable of supporting the inferences required for the defence to succeed".[6] In other words, "the defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence".[7] When determining if this test is met, "the trial judge must take the evidence to be true and must not assess credibility or make other findings of fact"[8] and "it is both permissible and necessary to look at the full evidentiary record when evaluating an alternative suspect issue".[9] This being the case, the trial judge does not make "determinations about the credibility of witnesses, weigh evidence, make findings of fact, or draw determinate factual inferences" or "assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day".[10] The focus should be on relevance, with a recognition that "there is a fundamental difference between relevance and the question of whether the evidence in a particular case will be effective in leading to a verdict of not guilty".[11] When deciding whether to admit third party suspect evidence, "the court must exercise its discretion to admit evidence implicating third party suspects in a way that supports the presumption of innocence and gives practical effect to the right to make full answer and defence".[12]

The Third Party Suspect Rule Applies at all Stages of the Trial

Ordinarily, defence counsel only needs a good-faith basis to pose a question to a witness. However, regarding alternate suspects "asking questions of Crown witnesses in cross-examination invokes the same gatekeeper function that a defence proffer of evidence would and that the third party suspect case law ought to apply". Accordingly, in this circumstance, "there must be both a good faith basis for the question and the implication of a third party suspect must have an air of reality to it".[13]

The Test for Admissibility

The onus is on the defence to establish that the alternative suspect has a "sufficient connection" to the offence. The use of the terms "sufficiently connected" and "sufficient connection" "suggest that the degree of connection between the third party suspect and the offence must be something more than just any connection".[14] To meet this burden, "evidence of opportunity is generally essential, coupled with direct or circumstantial evidence implicating the alternate suspect in the crime, such as identification evidence, motive, or disposition".[15] Overall, "the nature of the connection or link must be one that suggests that the third party suspect committed the offence, not merely that the person was present at the time that the offence happened".[16]

In support of the application, the defence can point to the alternative suspect's propensity or disposition to commit the act through evidence "from expert opinion, from a record of criminal convictions, or from evidence of general reputation"[17] but "the mere fact of an outstanding charge cannot be used to establish an alternate suspect's disposition to commit a crime".[18] Motive is also an important element to establish, but "evidence of the alternate suspect's violent disposition or animus towards the deceased is not sufficient to establish the necessary connection, without more"[19] since it "is motive and opportunity that give probative value to propensity evidence".[20] Similarly, impecuniosity as a motive "is of such a general and amorphous nature as to be almost valueless on the third party suspect issue".[21] Defence counsel should marshal all forms of connective evidence since "evidence of a third party's means, motive, or opportunity is usually sufficient to discharge the accused's onus".[22]

In some cases, counsel will only be able to argue that a similar crime was committed by some unknown person, so *that* individual must have also done the crime with which the accused is charged. For unknown third party suspect situations, "there is no principled reason to require that the connection be established by evidence relating directly to the third party where that individual is unknown".[23] When the suspect is unknown, the probative force of the evidence "generally arises from similarities between the crime charged and another crime that the accused could not possibly have committed".[24] Defence counsel will still have to point to similarities because "unless the circumstances and similarities to the other offence are sufficient to suggest that the same individual committed both crimes, unknown third party suspect evidence will not be logically relevant".[25]

Probative Value vs Prejudice Test

Third party suspect evidence will often lead to a longer and more complex trial – both undesirable consequences. Despite this, "in giving constitutional protection to the accused's rights to make full answer and defence and to be presumed innocent until proven guilty, we must accept a certain amount of complexity, length, and distraction from the Crown's case as a

necessary concession to the actualization of those rights." As a result, "The exclusion of relevant, material, and otherwise admissible defence evidence may only be justified on the ground that the potential prejudice to the trial process of admitting the evidence *substantially outweighs* its probative value".[26]

Notice Requirements

In advancing a third party suspect, defence counsel will wrestle with the rules of notice. In Ontario, courts have ruled that the thirty-day notice requirement under rule 30.01 of the *Criminal Proceedings Rules* regarding presumptively inadmissible evidence does not apply to third party suspect evidence because "it is presumptively admissible, provided that it is logically relevant, unless its prejudicial effect substantially outweighs its probative value".[27] Courts have ruled that "the timing and sufficiency of the notice for an alternate suspect defence is not subject to a fixed rule".[28] For example, "where the defence proposes to call direct evidence from another person taking responsibility for the crimes charged, that proposed evidence itself constitutes a sufficient nexus or connection. Nothing more need be shown and no formal application is necessary".[29] Moreover, "if the case itself clearly gives rise to a third party suspect defence, the defence need not bring an application to advance it".[30] Further, "the accused need not bring an application where the accused or another witness provides evidence of other individuals known to have been present at the scene of a crime who had the opportunity to commit the crime".[31] Other courts have questioned this since the result would be that "the defence could always proceed without bringing a formal application, which has implications for the manner in which the trial is conducted by both Crown and defence".[32] All of these situations where notice has been dispensed with involve direct evidence resulting in a simplified analysis where "there is no need to evaluate whether the inference advocated by the defence is reasonable and can be drawn".[33]

Where notice should be given, "a failure to give notice should never preclude the defence from relying on relevant and admissible evidence".[34] That said, pre-trial forms specifically ask if there will be evidence of other suspects, and advanced notice "assists in the orderly conduct of the trial".[35] The Supreme Court has made it clear that "the integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case"[36] and that "this risk is especially heightened where the defence seeks to introduce other alleged suspects or crimes into the trial".[37] Practically, defence counsel need to know if their defence will be placed before the jury, so providing notice and having a pretrial motion provides clarity. Compliance with the rule in *Browne and Dunn* also impacts the timing of application and when to provide notice. Proper notice also prevents upsetting the trial judge and possible responsive/remedial rulings such as "an adjournment or giv[ing] the Crown a broader right of reply".[38] The most prudent course of action is to provide notice and have the alternative suspect application adjudicated as a pre-trial motion.

The Content of the Notice

The content of the notice is informed by its purpose: to inform the court with sufficient information to allow them "to ensure that only logically probative evidence whose prejudicial effect does not substantially outweigh its prejudicial effect is admitted".[39] The rational is "*not* to give the Crown advance notice of the defence case".[40] Nor is the content of the notice "directed at forcing the accused to disclose the specifics of his/her defence".[41] Rather, "as long as the notice provides a sufficient basis to understand the general nature of the evidence and its relevance, the requirements of notice will be served".[42] Hence, the assertion that an affidavit from a client is required has been rejected.[43]

Final Thoughts

Third party suspect evidence introduces new challenges and considerable work for defence counsel. If the suspect is unknown, counsel need to find a strikingly similar offence that their client could not have committed. If the suspect is identified, additional evidence of opportunity and motive to commit the crime must be found and highlighted. If there is also propensity/disposition evidence, counsel need to consider the reality that fairness dictates the Crown can call reply evidence to show that the accused harbours the same disposition/propensity. After all that, counsel must decide when to show their hand and provide notice. It will take considerable effort to point the finger in court, but it is required for persuasive advocacy. The reward of reasonable doubt is well worth the effort.

NOTES:

[1] *R. v. Malley*, 2017 ABCA 186, 2017 CarswellAlta 1026 (Alta. C.A.) at para. 54, leave to appeal refused 2018 CarswellAlta 1111 (S.C.C.).

[2] *Ibid* at para. 54.

[3] *R. v. JMW,* 2020 ABCA 294, 2020 CarswellAlta 1445 (Alta.C.A.) at para. 27 [*JMW*].

[4] *R. v. Tomlinson*, 2014 ONCA 158, 2014 CarswellOnt 2371 (Ont. C.A.) at para. 72 [*Tomlinson*].

[5] *R. v. Ismail*, 2020 ONSC 7972, 2020 CarswellOnt 18822 (Ont. S.C.J.) at para. 9.

[6] *R. c. Cinous*, 2002 SCC 29, 2002 CarswellQue 261 (S.C.C.) at para. 83.

[7] *R. v. Grandinetti*, 2005 SCC 5, 2005 CarswellAlta 81 (S.C.C.) at para. 48.

[8] *R. v. Grant*, 2015 SCC 9, 2015 CarswellMan 89 (S.C.C.) at para. 20 [*Grant*].

[9] *R. v. Kawal*, 2018 ONSC 4560, 2018 CarswellOnt 12527 (Ont. S.C.J.) at para. 72.

[10] *R. v. Feeney*, 2014 ONSC 7268, 2014 CarswellOnt 18892 (Ont. S.C.J.) at para. 84.
[11] *R. v. Myers*, 2021 ONSC 792, 2021 CarswellOnt 1305 (Ont. S.C.J.) at para. 17 [*Myers*].
[12] *R. v. Scotland*, 2007 CarswellOnt 8874, [2007] O.J. No. 5302 (Ont. S.C.J.) at para. 14.
[13] *Myers*, *supra*, note 11, at para. 15.
[14] *R. v. Brown*, 2010 ONSC 6057, 2010 CarswellOnt 8717 (Ont. S.C.J.) at para. 23 [*Brown*].
[15] *R. v. Pan*, 2014 ONSC 3800, 2014 CarswellOnt 17374 (Ont. S.C.J.) at para. 38.
[16] *Brown*, *supra*, note 14, at para. 19.
[17] *R. v. Berard*, 2018 ONSC 5218, 2018 CarswellOnt 15290 (Ont. S.C.J.) at para. 51.
[18] *Ibid* at para. 51.
[19] *Ibid* at para. 49.
[20] *Ibid*.
[21] *Tomlinson, supra*, note 4, at para. 83.
[22] *JMW*, *supra*, note 3, at para. 28.
[23] *Grant*, *supra*, note 8, at para. 26.
[24] *Ibid* at para. 27.
[25] *Ibid* at para. 28
[26] *R. v. Hudson*, 2021 ONCA 772, 2021 CarswellOnt 15303 (Ont. C.A.) at para. 193.
[27] *R. v. Fenton*, 2017 ONSC 4572, 2017 CarswellOnt 11838 (Ont. S.C.J.) at para. 30 [*Fenton*].
[28] *R. v. Bermudez*, 2017 ONSC 7370, 2017 CarswellOnt 19518 (Ont. S.C.J.) at para. 42 [*Bermudez*].
[29] *R. v. Murphy*, 2012 ONCA 573, 2012 CarswellOnt 10836 (Ont. C.A.) at para. 28.
[30] *Bermudez*, *supra*, note 28, at para. 44.
[31] *Ibid* at para. 43.
[32] *R. v. Kenyon*, 2014 ONSC 7567, 2014 CarswellOnt 19383 (Ont. S.C.J.) at para. 11.
[33] *Myers*, *supra*, note 11, at para. 14.
[34] *Bermudez*, *supra*, note 28, at para. 49.
[35] *Ibid* at para. 47.
[36] *Grant*, *supra*, note 8, at para. 4.
[37] *Ibid*.
[38] *Bermudez*, *supra*, note 28, at para. 49.
[39] *Fenton*, *supra*, note 27, at para. 27.
[40] *Ibid* at para. 28.
[41] *Bermudez*, *supra*, note 28, at para. 48.
[42] *Ibid*.
[43] *Bermudez*, *supra*, note 28, at paras. 38-48.

$193
Hardcover + ProView ebook
August 2021
approx. 1,280 pages
ProView eBook only $161
Print only $161
978-1-7319-0901-5

Pricing includes shipping and handling. Price(s) subject to change without notice and subject to applicable taxes.

Available risk-free for 45 days
Online: store.thomsonreuters.ca
Call Toll-Free: 800-387-5164
In Toronto: 416-609-3800

Also available as an eBook on Thomson Reuters® ProView

New Edition
Martin's Ontario Criminal Practice, 2022 Edition
Edward L. Greenspan, Q.C., The Honourable Mr. Justice Marc Rosenberg, and Marie Henein, LL.B., LL.M.

Martin's Ontario Criminal Practice, 2022 Edition offers the current and authoritative explanation of the rules of practice in Ontario's criminal justice system, with a comprehensive review of:

- Criminal Appeal Rules
- Criminal Proceedings Rules of the Superior Court of Justice (annotated)
- Rules of the Ontario Court of Justice in Criminal Proceedings (annotated)
- *Provincial Offences Act* (relevant sections and regulations, annotated)
- Regulations governing appeals under the *Provincial Offences Act*

For more information on this publication, including "What's new in this edition", please visit store.thomsonreuters.ca

Choose your format: eBook, print, or both options
Experience the freedom and flexibility to work wherever and whenever you want, with or without an Internet connection, with Thomson Reuters® ProView: the premier eBook experience for professionals worldwide.

© 2021 Thomson Reuters TR1842413/09-21

THOMSON REUTERS®

THE DOCKET

by Lauren Wilhelm

Sentencing — starting points — ranges — role in appellate review of sentences

The appellants plead guilty to wholesale fentanyl trafficking offences – The Crown appealed the sentences to the Alberta Court of Appeal who set a nine-year "starting point" for offences of this nature – The main issue at the Supreme Court was the propriety of the starting-point method of sentencing – the court ultimately held that, like ranges, starting points when properly understood and applied are a form of non-binding appellate guidance.

Ranges and starting points are forms of quantitative appellate guidance aimed at ensuring sentences reflect the principles in the Criminal Code – They do not relieve judges from conducting an individualized analysis – Ranges represent a summary of case law reflecting past minimum and maximum sentences - Starting points are an alternative, involving the selection of a starting point and the individualization up or down – They are different paths to the same destination of a proportionate sentence

Deviation from a range or starting point alone, does not justify appellate intervention – Only where a sentence is demonstrably unfit or a judge has made an error in principle impacting the sentence can an appellate court intervene – There is no longer space to treat ranges or starting points as binding in any sense – Departing from a range or starting point will be appropriate where necessary to achieve proportionality, exceptional circumstances are not required.

R. v. Parranto, 2021 SCC 46; **Brown & Martin JJ.**, Wagner C.J. & Kasirer J.; **Moldaver** & Côté JJ. (concurring in result); **Rowe J.** (concurring in result and concurring with Moldaver on guidance); **Karakatsanis** & Abella JJ. (dissenting)

Self-defence — reasonableness of action — factors in s. 34(2) — person's role in the incident — s. 34(2)(c) —–jury instructions

The new self-defence provision under s. 34 is a simplification and unification of its predecessor – there are three requirements of the defence: 34(1)(a) "the catalyst": the accused must reasonably believe that force or threat thereof is being used against them or another – 34(1)(b) "the motive": the subjective purpose of responding to the threat must be to protect oneself or another – 34(1)(c) "the response": the act must be reasonable in the circumstances.

This appeal focused on the third requirement, the response, and the factors under s. 34(2) used to evaluate that requirement – Unlike the first two requirements, which are concerned with the accused's subjective belief and purpose, this inquiry focuses on the reasonableness of the actions not the mental state of the accused – The reasonableness of the act is assessed by reference to the non-exhaustive list of factors in s. 34(2) – The assessment of the factors is global and holistic, no single factor is determinative of the outcome – The trier of fact must assess and weigh all factors to determine whether the act was reasonable.

Amongst the enumerated factors is "the person's role in the incident" – The question on appeal was whether this factor had to be considered in all cases, or only in cases of unlawful conduct, morally blameworthy behaviour or provocation (as under the previous legislation) – The court held that the application of the factor was not limited, rather it captures all actions, omissions and exercises of judgment from beginning to end of the incident, which may be relevant to whether the act underlying the charge is reasonable – Conduct captured by this factor must relate to the incident and be relevant to whether the ultimate act was reasonable in the circumstances – It must be both temporally and behaviorally relevant.

The Crown must prove beyond a reasonable doubt that an accused's act in response to a threat was unreasonable with reference to all applicable factors under s. 34(2) – Juries must be instructed that a self-defence claim will only fail if they conclude the accused's ultimate act was unreasonable – They must be instructed to consider all relevant factors under s. 34(2).

R. v. Khill, 2021 SCC 37; **Martin J.,** Wagner C.J. & Abella, Karakatsanis & Kasirer JJ.; **Moldaver J.,** Brown & Rowe JJ. (concurring); **Rowe J.** (dissenting)

Accused's evidence — credibility — adverse inference - tailoring — error of law

The trial judge began his reasons convicting the accused with a finding that he had tailored his evidence to fit the Crown's case – He relied heavily on that finding in his overall assessment of credibility and the evidence – Drawing an inference that advance notice of the Crown case has allowed for tailoring and/or discounting an accused's evidence on that basis is an error of law – To do so turns the right to be present at

trial and the constitutional rights to make full answer and defence under ss. 7 & 11(d) of the Charter into weapons against the accused – Yhe curative proviso cannot be applied to save this type of error.

R. v. C.T., 2022 ONCA 163; Miller, Trottter & Zarnett JJ.

Unreasonable verdict — identification — depositing of forensic evidence during offence

Appellant was convicted of robbing a donut shop – There was no direct evidence of identification – Identification of the perpetrator turned on the circumstantial evidence of a fingerprint and DNA – The appellant's print was one of five on a plastic bag that was placed on the counter by the perpetrator – His DNA matched spit found two hours later on the sidewalk in front of a Chinese restaurant about 60 metres from the donut shop – It did not match DNA from vomit on a balaclava found in a school yard 260 metres away.

Guilt must be the only reasonable inference to found a conviction on circumstantial evidence – The reasonableness of verdicts in cases where fingerprint/DNA evidence forms the basis of an identification the court must first examine the reasonableness of the inference that the evidence was deposited at the relevant time and place and then examine whether the reasonable inferences on the totality of the evidence were sufficient to prove guilt beyond a reasonable doubt.

The presence of the appellant's print on the bag proved only that he touched it – There was no evidence to demonstrate that he touched it in connection with the robbery, such evidence would be required to draw an inference of guilt – Indeed there was evidence to the contrary: the presence of four other prints on the bag and some evidence that the perpetrator was wearing gloves.

Additional evidence can sometimes overcome an absence of connection of a piece of forensic evidence to the crime, but this was not such a case – The saliva containing the appellant's DNA was not taken from the crime scene, or a known flight path or an object or vehicle connected to the crime scene – Just like the print on the bag, the DNA from the saliva was not linked to the crime – The inference that the forensic evidence was deposited at the relevant time and place was unavailable.

There were also problems with the overall reasonableness of the trial judge's decision – The description of the perpetrator couldn't meaningfully link the appellant to the crime – The trial judge rejected submissions regarding the innocent deposition of the saliva, and drew speculative inferences based on misapprehensions of the evidence – The Crown argued the unlikelihood of coincidence between the location of appellant's DNA in the saliva and his print on the bag could overcome the absence of connection between the two items and the crime – This reasoning was significantly flawed – There was no connection to either item to the crime and to use one to infer a connection to the other was circular reasoning – It was unreasonable to be satisfied that guilt was the only reasonable inference on this evidence.

R. v. Janeiro, 2022 ONCA 118; Paciocco J.A. (Nordheimer & Sosin JJ. concurring)

Racial or cultural stereotypes — impermissible reasoning — cross-examination and closing address - need for jury instruction

Appellant convicted of historical sexual offences on his daughter – He testified and denied the allegations and called seven family members to whom the complainant said she'd previously disclosed as witnesses – Each of those witnesses denied that the complainant had made any disclosure – The family was Indian – Cultural norms as practiced by the family and other witnesses were put in issue by both Crown and defence – The issue on appeal was whether the Crown invited reliance on impermissible racial or cultural stereotypes through her cross of the defence witnesses and closing address and, if so, whether the absence of a jury instruction cautioning against impermissible reasoning resulted in an unfair trial – The Court of Appeal answered both of these questions affirmatively.

It is permissible to consider cultural beliefs or practices as evidence of what an individual believes or to explain their apparent behaviour, but it is impermissible to invite a trier to adopt a stereotype about cultural practices unsupported by the evidence to do so – The Crown advanced three propositions related to the culture of the defence witnesses, only one of which had any foundation in the evidence and in a limited context at that – she put questions to the witness based on highly perjorative assumptions about their culture and framed them through that lens – The suggestions were rejected by the witnesses and were not founded in the evidence, yet the Crown went to the jury and attempted to use the cultural background of the defence witnesses to argue that they had a powerful motive to lie.

While the Crown was entitled to pursue its theory, where questioning is so heavily freighted with negative cultural stereotyping that it may subconsciously resonate with the jurors even though it's not established by the evidence, it creates a risk that without some instruction from the trial judge, a jury will seize on the stereotypes – In these circumstances juries should be expressly instructed not to engage in impermissible reasoning based on such stereotypes.

R. v. B.G., 2022 ONCA 92; Miller J.A. (MacPherson & Roberts JJ. concurring)

BOOK REVIEW

Litigating Artificial Intelligence

By Jill R. Presser, Jesse Beatson, and Gerald Chan

Review by Eric S. Neubauer, Counsel, Neubauer Law

Photo courtesy of Eric S. Neubauer

Dave: Open the pod bay doors, HAL.

HAL: I'm sorry, Dave. I'm afraid I can't do that.

Dave: What's the problem?

HAL: I think you know what the problem is just as well as I do.

Stanley Kubrick's 1968 film—*2001: A Space Odyssey*

The notion of "artificial intelligence" or "AI" evokes in most vague feelings of wonderment and unease. The sentient computer has been a common trope of science fiction, and its use in film and television has entertained for decades. But somehow, notwithstanding an increasing public discourse on *smart* algorithms, *smart* phones, and *smart* cars, the notion of "artificial intelligence" remains relegated to science fiction. To the extent it gives rise to concern, it is a concern that we safely place at a future distance. The problems and benefits of AI, we tell ourselves, are not for our generations, but for future generations to solve and enjoy.

Emond Publishing's *Litigating Artificial Intelligence* deftly disrupts this conception of AI. It illustrates that AI is not our future, but rather our present. In response, it arms litigators with the tools they need to confront this new reality. Far from science fiction futurism, this book is, at bottom, a practical guide. Its target audience are those forward-facing members of our profession who recognize that AI is no longer a novelty gag, winning jeopardy episodes and chess tournaments; but rather, AI underpins the technology driving our daily lives, and increasingly, our legal systems.

Litigating Artificial Intelligence is part of Emond's Professional Series. Members of the criminal bar will undoubtedly be familiar with Emond. Its publications in the Criminal Law Series have quickly established a reputation of offering clear and practical guidance on difficult substantive and procedural issues in criminal law. This publication is no exception. While not exclusively focused on criminal law, *Litigating Artificial Intelligence* concentrates on the presence and impact of AI in a litigation context. The result is a book with broad appeal, and much to offer criminal law practitioners.

The successful execution of this book is surely attributable to the stellar cast of authors and contributors, which include venerated judges, counsel, students, and academics. The authors include the recently appointed Superior Court Justice Jill

R. Presser, along with the highly respected lawyers Jesse Beatson and Gerald Chan. Together, the authors possess a wealth of knowledge and experience considering the intersection of technology and legal systems. They are joined by an impressive and equally knowledgeable group of contributors including: the Honourable Justice Lorne Sossin, Chris Bentley, Ren Bucholz, Gordon V. Cormack, Ryan Fritsch, Maura R. Grossman, Mabel Lai, Petra Molnar, Major Christopher Nam, Anthony Niblett, Kate Robertson, Colin Stevenson, Carla Swansburg, Leah West and Andy Yu.

The book begins its education with a practical and clear definition of what "artificial intelligence" means: "algorithmic software that accomplishes cognitive tasks such as learning, reasoning, and self-correction." The book proceeds from this point organized into four sections or points where litigators are likely to encounter AI in their practices. These four sections are: (1) AI as Decision-Maker; (2) AI and Evidence Law; (3) AI as the Subject Matter of a Lawsuit; and (4) AI-Enabled Litigation Tools.

Section 1 identifies the kind of decisions currently being rendered or informed by AI in our legal system, and what is required for a litigator to challenge these decisions. Over four chapters, the authors examine the issues faced by litigators encountering AI in the contexts of criminal law (Chapter 3), administrative law (Chapter 4), and immigration law (Chapter 5). The section ends with an examination of the tactical challenges that can arise in litigating AI in these contexts (Chapter 6).

Criminal practitioners will find Chapter 3's exploration of the use of algorithmic technology in Canadian criminal law particularly fascinating. The chapter reveals what may be a surprise for some: many AI tools are already utilized widely in the UK and US, and they are at the doorstep in Canada, if not already in use. The chapter examines AI in risk prediction tools (such as for bail and sentencing), DNA analysis ("probabilistic genotyping"), as well as in law enforcement. The part dealing with probabilistic genotyping DNA tools is worth highlighting and is critical reading for practitioners given it is already regularly relied upon in Canadian criminal courts. The section helpfully unpacks the complicated science underlying this kind of DNA testing and guides the reader through the limitations on its reliability. Chapter 6 nicely bookends Section 1 by helpfully identifying tactical and procedural considerations for litigators seeking to challenge the use of AI tools in court.

Section 2 examines and unpacks the myriad evidentiary issues arising from the AI context. Chapter 7 offers a frank and practical assessment of issues engaged by the admission of algorithmically generated evidence, as well as the admission of human expert evidence about AI. The section also includes a fascinating chapter on litigating the use of AI in the national security proceedings context in Chapter 8. Chapter 7 is particularly artful in its application of current evidentiary principles to this newly emerging area of law and is striking in the volume of authorities and succinct summaries it offers. It very much feels like a guide through the trickiest parts of litigation involving AI tools, beginning with obtaining relevant disclosure/discovery and continuing through difficult issues determining admissibility.

In Section 3: "AI as the Subject Matter of a Lawsuit", the authors question the feasibility and process of establishing tort or criminal liability when *smart* devices do something *dumb*, or worse. The section features three discrete examinations of how liability can be apportioned in the civil (Chapter 9), criminal (Chapter 10), and military (Chapter 11) contexts. A highlight for me in this section was the playful and exquisitely titled Chapter 10: "Do Androids Dream of the Electric Chair? Questions About Criminal Liability for AI Agents". This chapter examines the twin questions of whether we could and should hold various forms of AI criminally liable for the real and predictable harms they cause. More than a theoretical thought experiment, the chapter is useful in what it reveals about the contours and limits of our current legal systems, and how these may need to change in response to increasingly sophisticated machines.

The book concludes with a useful review of AI-embedded tools built for use in legal practices. This section helpfully pivots away from the dangers of AI and focuses instead on how litigators can use AI to their advantage. The section includes a helpful overview in Chapter 12, followed by a closer examination of AI tools in the contexts of electronic discovery (Chapter 13); legal research and brief-writing (Chapter 14); online dispute resolution or ODR (Chapter 15); and "predictive analytics", the process by which automated data analysis can predict the outcome of cases (Chapter 16). The final chapter of the book offers the interesting, if unsettling, conclusion that AI predictions of case outcomes are not doing anything different from what lawyers do every day for their clients—they just do it better.

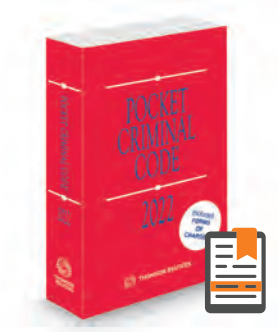
A few things struck me in reviewing this book as a criminal practitioner. The first is that this book was, dare I say, a bit of an unexpected pleasure to read. While criminal practitioners will be naturally drawn to those sections of the book which directly impact their practices—of which there are many—the rest of the chapters offer entertainment and education by analogy in equal measure.

The second is the realization that the current technological "revolution" unfolding in the criminal jus-

tice system—prompted entirely by the COVID-19 pandemic—is not our justice system "arriving", it is just the beginning of much bigger changes. While it may be the case that criminal practitioners are quickly trying to get used to doing things differently—electronic disclosure, electronic filing, electronic evidence, and electronic hearings—this is not preparing for the future. In many ways, this is catching up to the past. Anyone wringing their hands about getting rid of an old fax or binding machine (as I am) knows exactly what I am talking about. The AI tools being described in this book are the future, and they seem like science fiction, but they are at the doorstep. The question is not whether they will enter our criminal justice system, but when, and what we will do about it.

And this brings me to the most striking lesson this book imparts, which is its warning to practitioners. Changes in technology will bring with it profound and rapid changes in the law; and the pace of technological change only hastens. The book's introduction brings this unsettling thought into sharp focus with a well-placed quote from journalist Graeme Wood: "Change has never happened this fast before, and it will never be this slow again." A mantra of *Litigating Artificial Intelligence* is that lawyers need to get their act together when it comes to understanding and confronting this and other fast-moving technologies. Lawyers who fail to educate themselves about the perils and promise of AI in our world and legal systems risk, like Dave in Kubrick's film, getting left out in the cold.

Undoubtedly, that education will be difficult. Buying this book is an excellent start.



$88
Softcover + ProView eBook
August 2021
approx. 1,970 pages
ProView eBook only $74
Print only $74
978-1-7319-0913-8
Pricing includes shipping and handling. Subject to change without notice and to applicable taxes.

Also available as an eBook on Thomson Reuters® ProView

New Edition
Pocket Criminal Code, 2022 Edition

How do you keep up with the latest amendments to the *Criminal Code*? Gain quick and comprehensive access to criminal laws as they currently apply in Canada with **Pocket Criminal Code 2022**. **Pocket Criminal Code 2022** includes a table of concordance, table of contents, index, and forms of charges for major offences.

New in this edition
Legislative amendments featured with this edition include those introduced by the following:

- *An Act to amend the Criminal Code (medical assistance in dying)*, S.C. 2021, c. 2 (former Bill C-7), which received Royal Assent and came into force on March 17, 2021 [save for s. 1(2.1), which will come into force on March 17, 2023].
- *An Act to amend the Judges Act and the Criminal Code*, S.C. 2021, c. 8 (former Bill C-3), s. 4, which received Royal Assent and came into force on May 6, 2021.
- Regulation 2021-44, which aims to amend the schedules to the *Controlled Drugs and Substances Act*, to come into force on March 31, 2022.

Available risk-free for 45 days

Online:
store.thomsonreuters.ca

Call Toll-Free:
800-387-5164

In Toronto:
416-609-3800

© 2021 Thomson Reuters TR1852054/09-21

THOMSON REUTERS®

Prepare for and present your criminal case with confidence

Thomson Reuters criminal law titles

Prepare for and present your case with confidence with Thomson Reuters® criminal law titles. Featuring the highest quality content of legislation, caselaw, and commentary from some of the most respected authors and practitioners, Thomson Reuters criminal law titles have been proudly serving the needs of generations of Canadian criminal lawyers, crown, judiciary, and law enforcement professionals. Many of these titles are also available as eBooks, allowing you to work anywhere, anytime.

Rely on the insightful, comprehensive, and authoritative coverage of the latest developments of criminal law. You'll be sure to find the resource you're looking for to build your case and your library.

Discover the complete selection of titles at store.thomsonreuters.ca

© 2021 Thomson Reuters TR1923846/10-21

THOMSON REUTERS®

MEMBER PROFILE

Photo courtesy of Peter Grande and reproduced with the permission of Ashley Audet.

Ashley Audet

by Craig Bottomley

City/Town: Toronto

Year of Call: 2012

As I cornered Ms. Audet in counsel lounge and had security block the exits. . .

ME: Hey Ashley, want to be the next lawyer profiled in For The Defence?

ASHLEY: It's my literal nightmare.

ME: So . . . you'll do it?

ASHLEY: Can I say no?

ME: No.

ASHLEY: Can I drink a lot of wine while I do it?

ME: Yes.

ASHLEY: I'm in.

And that, ladies and gentlemen, is a criminal lawyer.

QUESTIONS

Finish the Sentence

1. If I never went to law school, I would have become . . . **a phys ed teacher.** *Yeah, a lot of phys ed teachers smoke at recess. You're ready.*

2. If I could change careers tomorrow, I would become . . . **a photographer for National Geographic.** *This may be the best answer we've ever had for this question.*

3. If I win 10 million dollars, I will . . . **buy a plane ticket around the world**.

4. If I could appoint the next Chief Justice of Canada it would be . . . **(not a lawyer or judge) Eugene Levy**. *Those are the eyebrows we need in uncertain times.*

5. **Kristen Wiig** . . . will play me in the movie based on my life. *Correct.*

6. **Jason Momoa** . . . will play my love interest in the movie. *Duncan Idaho rescues a smoking gym teacher from herself!*

7. Prime Minister Trudeau is . . . **an accomplished drama teacher**. *This is as diplomatic as Ashley gets!*

8. Canada's next Prime Minister is . . . **hopefully someone with more credentials than a famous last name.** *I spoke too soon!*

9. If I could pick one injustice to undo it would be . . . **Canada's historic and continued treatment of Indigenous and First Nations communities.**

10. If I could solve one issue it would be . . . **our justice system's dependence on incarceration.**

11. If I could represent/defend a historical figure it would be . . . **Rosa Parks**.

12. If I was to be executed, my last meal would be . . . **a very large bottle of wine, fried chicken, mac and cheese, and collard greens.** *She made me buy her this while she answered these questions.*

13. My greatest regret in life is . . . **not taking better advantage of nap time when I was a kid.** *I have dreams about taking naps.*

14. Boy I really screwed up when . . . **I started smoking almost 25 years ago.**

15. My hero is . . . **my Dad.**

16. My favourite section of the Criminal Code is . . . **any section that is not ss. 276/278**. *Can we include 686 for the nerdy appellate lawyers?*

17. If I could legalize an activity it would be . . . **drug possession**. *Just don't get rid of trafficking offences. I have bills to pay.*

18. If I could criminalize an activity it would be . . . **slow walking.** *Or decriminalize the kicking of slow walkers!*

19. Most people don't know that I . . . **spent my 1L and 2L summers working on juvenile justice in Uganda and Sierra Leone and that I had never set foot in a law firm until articling interviews.** *We're basically leading parallel lives. . . if you replace Uganda with Brampton and Justice with Canadian Tire.*

20. The strangest thing I have eaten is . . . **crocodile**. *It was a fight to the death. That bloody croc never stood a chance.*

21. I really embarrassed myself when I . . . **fell flat on my face doing box jumps at the gym. I wish I could say this was an isolated incident. It was not.** *Just out of curiosity. . . do they have cameras at this gym?*

22. My pet peeve is . . . **having to file paper copies of materials that have been filed electronically.** *I know which trial and which judge you are talking about. I share this pain.*

23. The toughest challenge in my life has been . . . **battling anxiety and depression**. *You're a rock star. Love this answer.*

24. If I could be reincarnated, I would come back as . . . **a giraffe**.

25. I am afraid of . . . **car washes**. *Once you're a giraffe, you won't have to worry.*

26. I believe in . . . **karma**.

27. In high school I was . . . **an athlete**.

28. In undergrad I was a . . . **connoisseur of Montreal's nightlife**. *I have a series of follow up questions!*

29. In law school I was . . . **counting down the days until I was no longer a student**.

30. If my dog could speak s/he would say . . . **I could have sworn I was a cat named Bruce.** *I'm not a dog, Your Honour.*

31. Legal Aid Ontario . . . **No comment**.

Choices:

1. Guiness or Molson Canadian? **Tequila.** *One pint of Tequila please.*

2. Grilled Rib Eye or Grilled Tofu? **Rib eye.**

3. Alfa Romeo or Mercedes Benz? **Mercedes AMG G Wagon in matte black. Not that I've spent too much time thinking about it.**

4. Romantic or Hunter/Provider? **Hunter/provider.**

5. Out late and sleep in or in bed by 10 and up at 6? **Out late and up at 6.**

6. Armani or Old Navy? **Armani.**

7. James Bond or Lara Croft? **James Bond.**

8. Hockey or Soccer? **Basketball.**

9. Classical music or classic rock? **Classic rock.**

10. Superman or Wonder Woman? **Wonder Woman.**

11. Blended or Single Malt? **Slightly ashamed to say I don't know the difference.** *Slightly??? Just lie and say single malt. Och, ma poor Scottish heart.*

12. Manolo or Crocs? **Option (c) - Converse Chuck Taylors.**

13. Mac or PC? **Mac**.

14. Globe and Mail or The National Post? **Globe**.

15. Starbucks or Tim Horton's? **Tim's.**

16. Yoga or Treadmill? **Yoga.**

17. 30 days jail or two year conditional sentence? **30 days jail.** *If you want to reconsider, we'll count pandemic time as dead time.*

18. Dog or Cat? **Cat. Reluctantly.** *Take that, Bruce.*

19. Canoe or Speedboat? **Canoe.**

20. Muskoka cottage or condo in Florida? **Muskoka cottage.**

21. Star Wars or Star Trek? **Neither.** *My poor nerd heart.*

22. Prime Minister Doug Ford or 5 years of recession? **5 years of recession.**

23. Cash paying drunk driving case or legal aid murder? **Legal aid murder.**

24. Flowers or chocolate? **Flowers.**

25. Pinot Noir or Chardonnay? **Pinot noir.**

26. Android or iPhone? **iPhone.**

27. Drunk or stoned? **Drunk.**

28. Naughty or nice? **Depends who you talk to.**

Favourites:

1. Guitarist – **Neil Young.** *Yes.*

2. Poet – **Bob Dylan**.

3. Author (Fiction) – **Antoine de Saint-Exupery**.

4. Author (Non-Fiction) – **Jon Krakauer**.

5. Prime Minister – **The original Trudeau**.

6. City – **Cape Town**.

7. Lawyer – **The late Austin Cooper.** *The consummate gentleman.*

8. Judge – **Beverley McLachlin**.

9. Journalist – **Jayme Poisson**.

10. Chef/Restaurant – **Anywhere that serves all day breakfast.**

11. Hotel – **Any hotel with huts over the water.**

12. Theme park – **Wonderland**.

13. Park – **Algonquin**.

14. Canadian – **Tom Thomson**.

15. Sports team – **Raptors**.

16. Travel destination – **Zanzibar. . . the island.** *Not the one on Yonge Street??*

17. Thrill seeking activity – **White water kayaking.**

18. Police force – **This must be a trick question to see if I'm paying attention.**

19. Movie – **The Basketball Diaries**.

20. Actor – **Morgan Freeman.**

21. Band – **The National.**

22. Song – **Into the Mystic.**

23. Intoxicant – **Tequila**.

24. Supreme Court of Canada decision – **R. v. Mann.**

25. Hobby – **Eating.**

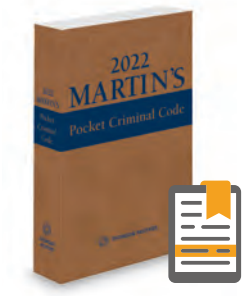
26. Political party – **Depends on the day.**

27. Ontario Premier – **Not our current one.**

28. Historical figure – **Mandela**.

29. Attorney General – **TBD . . . waiting (hopefully not in complete vain) for an AG who increases LAO's budget the same way they increase the Crown's budget**.

30. Crown Attorney – **Daniel Brandes.** *Hear hear!!*



$86
Softcover + ProView eBook
August 2021
approx. 1,690 pages
ProView eBook only $72
Print only $72
978-1-7319-0902-2

Pricing includes shipping and handling. Price(s) subject to change without notice and subject to applicable taxes.

Also available as an eBook on Thomson Reuters® ProView

New Edition
Martin's Pocket Criminal Code, 2022 Edition
Edward Greenspan, The Honourable Mr. Justice Marc Rosenberg, and Marie Henein, LL.B., LL.M.

With complete text of the *Criminal Code*, this pocket reference includes regularly used Forms of Charges for the *Criminal Code* and the *Controlled Drugs and Substances Act*.

New in this edition
Martin's Pocket Criminal Code, 2022 Edition features all of the latest legislative amendments including:

Criminal Code of Canada and other legislation amended by:

- *An Act to amend the Criminal Code (medical assistance in dying)*, S.C. 2021, c. 2 (former Bill C-7) (subs. 1(2.1) to come into force March 17, 2023)
- *An Act to amend the Judge's Act and the Criminal Code*, S.C. 2021, c. 8 (former Bill C-3)
- Canada Regulation 2021-44 (to come into force March 31, 2022), which aims to amend the *Controlled Drugs and Substances Act*.

Available risk-free for 45 days
Online: store.thomsonreuters.ca
Call Toll-Free: 800-387-5164
In Toronto: 416-609-3800

© 2021 Thomson Reuters TR1852082/09-21

THOMSON REUTERS®