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# *Khosa* – Still Searching for that Star

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DAVID ELLIOTT \*

## I. INTRODUCTION

Legislative intent, the Supreme Court has said, is the “polar star” of standard of review analysis.<sup>1</sup> After the Supreme Court’s spring 2009 decision in *Khosa*<sup>2</sup> though, the star still needs more focus. In this decision, a 7-1 majority of the Court upheld an immigration tribunal’s decision to reject an application for an exemption from a removal order. *Khosa* was the last chapter in a human drama that started with a fatal street race on Vancouver’s Marine Drive. It is an ongoing chapter in another story, the debate about the nature of judicial review of administrative action. The majority judges in *Khosa* disagreed as to whether section 18.1(4) of the *Federal Courts Act*<sup>3</sup> is sufficient to establish the relevant standard of review, or whether it must be supplemented by the common law standard of review principles in the 2008 decision in *Dunsmuir*.<sup>4</sup> This prompted a wide-ranging exchange about the relationship between judicial review and legislative intent. Neither of the majority approaches seems entirely satisfactory to me, but the debate in *Khosa* suggests some ideas for improvement. To show why, I will note briefly the facts and the immediate questions in this case, and then look in more depth at

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<sup>1</sup> *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 149.

<sup>2</sup> *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*], rev’g *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24, [2007] 4 F.C.R. 332, 276 D.L.R. (4th) 369 [*Khosa v. Canada* (F.C.A.) cited to F.C.R.], rev’g 2005 FC 1218, 266 F.T.R. 138, 142 A.C.W.S. (3d) 293, 48 Imm. L.R. (3d) 253 [*Khosa v. Canada* (F.C.) cited to F.T.R.], aff’g [2004] I.A.D. No. 1268 (Immigration Appeal Division) [*Khosa v. Canada* (I.A.D.)], aff’g *R. v. Khosa*, 2003 BCCA 644, 190 B.C.A.C. 23, 61 W.C.B. (2d) 155, 44 M.V.R. (4th) 13 [*R. v. Khosa* (B.C.C.A.) cited to B.C.A.C.].

<sup>3</sup> R.S.C. 1985, c. F-7, s. 18.1(4).

<sup>4</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]. Unless otherwise indicated, references to *Dunsmuir* are to the five-judge majority judgment in this decision, rendered by Bastarache and LeBel JJ. Binnie J. and Deschamps J. (for herself and Charron and Rothstein JJ.) delivered separate concurring judgments on the question of the standard of review.

the key underlying question of the relationship between common law review on one hand, and review codes and other legislative provisions, on the other. Then I will offer some suggestions for adding coherence to standard of review analysis.

The Vancouver street race ended when a car driven by Mr. Sukhvir Singh Khosa, an eighteen-year-old landed immigrant, struck and killed an innocent pedestrian. Mr. Khosa was convicted of criminal negligence and ordered deported back to India, his country of birth.<sup>5</sup> He applied to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada for a humanitarian and compassionate grounds exemption,<sup>6</sup> but the application failed. The IAD was divided on how much weight to give to Mr. Khosa's denial that he was racing, despite a criminal court finding to the contrary.<sup>7</sup> For the majority, this was significant; for the dissent, it was not. Mr. Khosa challenged the IAD decision, losing in the Federal Court, winning in the Federal Court of Appeal, and then losing again in the Supreme Court of Canada.<sup>8</sup> He was deported to India on April 28, 2008, two months after the Supreme Court's decision.<sup>9</sup>

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<sup>5</sup> *Ibid.* See also *R. v. Khosa* (B.C.C.A.), *supra* note 2 at paras. 28-36, and *Khosa v. Canada* (F.C.), *supra* note 2 at paras. 1-5.

<sup>6</sup> Pursuant to s. 67(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

<sup>7</sup> The IAD majority considered factors such as remorse, rehabilitation, and likelihood of reoffending. They concluded that overall, these factors weighed against a humanitarian and compassionate grounds exception. Although they found some of the evidence inconclusive, the majority were especially concerned at Mr. Khosa's denial that he had been street racing despite a criminal court finding to the contrary. They said that in view of Mr. Khosa's "failure...to acknowledge his conduct and accept responsibility for...street-racing...there is insufficient evidence upon which I can make a determination that [Mr. Khosa] does not represent a present risk to the public": member Kim Workun (member John Munro concurring), *Khosa v. Canada* (I.A.D.), *supra* note 2 at para. 23, quoted by Fish J. at para. 155 of *Khosa*, *supra* note 2. The dissenting member said that the majority placed too much weight on this denial: *Khosa v. Canada* (I.A.D.), *supra* note 2 at para. 53.

<sup>8</sup> For the three court decisions, see *supra* note 2.

<sup>9</sup> The Supreme Court's decision put an end to Mr. Khosa's stay in Canada, but not to the broader social questions raised by the case. Why, for example, do some young people take part in street racing? How can communities encourage safer, more legitimate activities? Should road designs be re-thought in residential areas? Should younger drivers' licence conditions be even more restrictive? When should sanctions for landed immigrants differ from those for permanent residents? For two recent legislative efforts to target street racing, see Bill C-19, *An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release Act*, 1st Sess., 39th Parl., 2006 (as passed by the House of Commons 14 December 2006), which created mandatory minimum driving prohibition periods for people convicted of street racing, and increased the maximum term of imprisonment for the most serious forms of the offence; and Bill 203, *An Act to amend the Highway Traffic Act and the Remedies for Organized Crime and Other Unlawful Activities Act, 2001 and to make consequential amendments to other Acts*, 2nd Sess., 38th Leg., Ontario, 2007 (assented to 4 June 2007), which imposed heavy penalties for offences such as street

## II. IMMEDIATE QUESTIONS

Because Mr. Khosa challenged the IAD decision by way of judicial review, the courts first had to determine how and how extensively they should supervise the tribunal's decision. As a federal tribunal, the IAD was subject to the codified grounds of judicial review in section 18.1(4) of the *Federal Courts Act* and to a privative clause in s. 162(1) of the *Immigration and Refugee Protection Act*.<sup>10</sup> Section 18.1(4) succeeded ss. 18 and 28 of the former *Federal Court Act*.<sup>11</sup> The statute was enacted in the early 1970s to create a court of review for all federal administrative decisions, and to provide it with codified and streamlined grounds of review and procedures.<sup>12</sup>

Section 18.1(4) of the *Federal Courts Act* permits judicial review where a federal tribunal's decision is marred by one or more of six categories of defect.<sup>13</sup> For example, s. 18.1(4)(d)—the subsection most relevant to the situation in *Khosa*—permits review where the tribunal “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.” Section 18.1(4)(c) permits review where the tribunal “erred in law”, whether or not the error is apparent on the face of the record. Both the scope and nature of this review are addressed by the statute. Section 18.1(4)(d) imposes specific—and rigorous-sounding—requirements before courts can review findings of fact, while s. 18.1(4)(c) makes a less demanding requirement (an error) a precondition to review of questions of law.

In contrast, current common law review principles have evolved through case law such as the Supreme Court's major 2008 restatement in *Dunsmuir*.<sup>14</sup> They require courts to weigh various contextual factors in order to determine the availability and intensity of review in a given situation. Among other things, *Dunsmuir* replaced the older patent unreasonableness—unreasonableness-correctness standards of substantive review with two: reasonableness and correctness.<sup>15</sup> The new reasonableness standard takes the

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racing and empowered police to immediately impound vehicles and impose one-week driving suspensions. As of early March, 2010, the street racing penalties had been declared constitutional: *R. v. Raham*, 2010 ONCA 206. Are these statutes likely to resolve the social questions?

<sup>10</sup> *Supra* note 6. See also s. 72(1).

<sup>11</sup> S.C. 1970-71-72, c. 1, enacted in 1971.

<sup>12</sup> For an early comment on this legislation, see David J. Mullan, “The Federal Court Act: A Misguided Attempt at Administrative Law Reform?” (1973) 23 U.T.L.J. 14.

<sup>13</sup> *Supra* note 3.

<sup>14</sup> *Supra* note 4.

<sup>15</sup> *Ibid.* at paras. 43-64. See also *infra* note 103. *Dunsmuir* also attempted to shorten and simplify contextual factor analysis: see text after note 103. In regard to procedural review, *Dunsmuir*

place of both the original reasonableness standard and the low-intensity, highly deferential standard of patent unreasonableness.

Although the current common law standards might appear to correspond roughly to sections 18.1(4)(d) and 18.1(4)(c) of the *Federal Courts Act*, they are by no means identical. Statutory wording is only one of several contextual factors considered at common law,<sup>16</sup> and the common law standards have criteria of their own. For example, in *Dunsmuir*, common law reasonableness is concerned with the “justification, transparency and intelligibility”<sup>17</sup> of the administrator’s decision-making process, and “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”<sup>18</sup> At first glance, this is less restrictive than s. 18.1(4)(d) review, with its limited targets of perversity, capriciousness, or lack of regard for the material.<sup>19</sup> The common law/statutory review gap seems even greater in the case of ss. 58 and 59 of the British Columbia *Administrative Tribunals Act*, which provide specifically for review under the standard of patent unreasonableness.<sup>20</sup> How courts approach these differences is important: the less intense the review, the more likely that an administrative decision will be upheld, and *vice versa*.

In *Khosa*, then, the immediate legal questions were: (1) did the grounds of review in s. 18.1(4) of the *Federal Courts Act*<sup>21</sup> include or exclude any consideration of the common law standard of review principles?; (2) what was the relevant standard of review?; and (3) should the IAD decision be upheld? In the Federal Court, Lufty J. applied the pre-*Dunsmuir* standard of patent unreasonableness, and concluded that the IAD decision was not patently unreasonable.<sup>22</sup> A majority of the Federal Court of Appeal said the standard should be reasonableness, and held that the IAD majority decision

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narrowed the scope of procedural fairness for most cases involving the dismissal of contractual public employees. For this situation, the Court largely reversed the presumption in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 in favour of public law procedural fairness principles, with a presumption in favour of contract principles. For a perceptive comment on the *Dunsmuir* efforts at reform, see David Mullan, “*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008) 21 Can. J. Admin. L. & Prac. 117.

<sup>16</sup> See also *infra* note 103.

<sup>17</sup> *Supra* note 4 at para. 47.

<sup>18</sup> *Ibid.* See also *ibid.* at para. 48, where the main majority said that reasonableness review requires “deference as respect,” and additional comments in paras. 45 and 49.

<sup>19</sup> *Supra* note 3, s. 18.1(4)(d).

<sup>20</sup> S.B.C. 2004, c. 45 [ATA].

<sup>21</sup> *Supra* note 3.

<sup>22</sup> *Khosa v. Canada* (F.C.), *supra* note 2.

was unreasonable.<sup>23</sup> Desjardins J.A., dissenting, took an approach similar to that of Lufy J. in the Federal Court.<sup>24</sup>

The five-judge main majority<sup>25</sup> in the Supreme Court applied the common law reasonableness standard articulated in *Dunsmuir*.<sup>26</sup> Speaking for the main majority, Binnie J. said that although the legislature can exclude common law standard of review analysis “by clear and explicit language,”<sup>27</sup> it did not do so here. He went further:

Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context...<sup>28</sup>

The main majority concluded that the IAD decision was reasonable. Rothstein J., with Deschamps J. concurring in part, said that the relevant standard was set by the deferential grounds in s. 18.1(4)(d) of the *Federal Courts Act*.<sup>29</sup> He agreed, though, that the IAD decision should be upheld.<sup>30</sup> Fish J., dissenting, agreed with the main majority that the standard was reasonableness, but he concluded that the IAD decision was unreasonable.<sup>31</sup> In the end, seven of the eight judges found the removal order to be valid. Moreover, as a result of the main majority decision, the *Dunsmuir* standard of review analysis is likely to be a major—if uncertain—gloss on s. 18.1(4) of the *Federal Courts Act*,<sup>32</sup> and on most other review codes, including the B.C. *ATA*.<sup>33</sup>

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<sup>23</sup> *Khosa v. Canada* (F.C.A.), supra note 2. See paras. 1-25 for the position of Décary and Malone J.J.A.

<sup>24</sup> *Ibid.* See especially paras. 45-55 and 58-61. She also considered an argument that had not been raised before the Federal Court judge: paras. 56-57.

<sup>25</sup> *Khosa*, supra note 2. Majority judgment by Binnie J., with McLachlin C.J., and LeBel, Abella and Charron JJ. concurring. Unless otherwise indicated, references to *Khosa* are to this judgment.

<sup>26</sup> *Supra* note 4.

<sup>27</sup> *Khosa*, supra note 2 at para. 50.

<sup>28</sup> *Ibid.* at para. 19.

<sup>29</sup> *Supra* note 3.

<sup>30</sup> Ironically, Binnie and Rothstein JJ. arrived at the same general conclusion after applying contrasting legal criteria, while Fish J. dissented after applying the same general criteria as the main majority. Binnie and Rothstein JJ. might have been less likely to reach the same result if there had been more controversy over the IAD's interpretation of the facts, or if its decision had turned on a question of law.

<sup>31</sup> *Khosa*, supra note 2 at para. 157. At paras. 149 and 156, Fish J. said that Mr. Khosa's denial that he had been engaged in street racing could not contradict or outweigh “all the evidence in his favour on the issues of remorse, rehabilitation, and likelihood of reoffence” and that the IAD majority's “inordinate” emphasis on this issue rendered their decision unreasonable.

<sup>32</sup> *Supra* note 3. See Parts 4 to 6 of the majority decision in *Khosa*, supra note 2 and the early post-*Khosa* cases in *infra* note 127.



### III. STANDARD OF REVIEW CONTROVERSY

Because of the general, residual nature of common law, the question of the reach of a statutory review code invites an examination of common law standard of review principles. *Khosa* is of special interest, as it contains the first extended discussion of these principles since *Dunsmuir* in 2008. Since they set many of the criteria that determine if an administrative decision should be upheld or set aside, these principles are often controversial, and the doctrine has evolved rapidly in the past four decades. Modern substantive contextual review,<sup>34</sup> first called the “pragmatic and functional” approach, and then simply “standard of review,” emerged in the 1970s. It was a reaction to the excessive intervention<sup>35</sup> and formalism<sup>36</sup> that was thought to characterize

<sup>33</sup> *Supra* note 20. Sections 58 and 59 of this Act contain a statutory patent unreasonableness ground. Referring to it, the main majority said in *Khosa*, *supra* note 2 at para. 19 that “[d]espite *Dunsmuir*, ‘patent unreasonableness’ will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention”. As seen below, it is not clear from *Khosa* how statutory grounds such as patent unreasonableness will live on, and how courts will “calibrate” their requirements. For the early impact of *Khosa* on the British Columbia Court of Appeal’s interpretation of ATA patent unreasonableness, see *infra* note 128. It remains to be seen whether and how procedural review codifications such as the Ontario *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and the Quebec *An Act respecting administrative justice*, R.S.Q. c. J-3 [*Administrative Justice Act*] will be affected by *Khosa*’s pro-common law orientation in regard to substantive judicial review.

<sup>34</sup> Courts generally distinguish between substantive review, which is concerned with non-procedural defects related to the reasoning and mental process of the administrator, and procedural review, which is concerned with fairness and process issues such as the right of a party to be heard, the impartiality and independence of the decision maker, and the general absence of abuse of process. The difference between the two kinds of review is sometimes just a question of degree. Both take a contextual factor-weighting approach to determining the intensity of review, although the factors are not identical: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], describing the substantive contextual factors at paras. 58-61 and the procedural contextual factors at paras. 22-27. As well, procedural review has a range of potential safeguards (e.g., the right to notice, an opportunity to respond to the contrary case, etc.) that are not found in substantive review. See also David W. Elliott, “Suresh and the Common Borders of Administrative Law: Time for the Tailor?” (2002) 65 Sask. L. Rev. 469 at 487-89. On procedural review generally, see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Carswell, 2004), c. 8; and *Dunsmuir*, *supra* note 4 at paras. 85-90.

<sup>35</sup> See e.g. the criticisms of interventionism made in Paul Weiler, *In the Last Resort: A Critical Study of The Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) c. 5.

<sup>36</sup> See generally *infra* note 37. The rejection of “classical” review in the 1970s and 1980s was driven heavily by the realist critique that law is indeterminate, and that statutory interpretation must take account of contexts as well as texts. For an influential example of

earlier classical<sup>37</sup> forms of review. Courts shifted from looking for jurisdictional and non-jurisdictional grounds of review, to identifying and weighing various contextual factors—both inside and outside the statutory text—in order to determine the relevant level of review.<sup>38</sup>

The new approach was broader based, more transparent, and more concerned about judicial restraint.<sup>39</sup> After several decades, though, commentators and judges began to complain that contextual review had become too unwieldy and unpredictable.<sup>40</sup> The Supreme Court responded to some of these concerns in *Dunsmuir*.<sup>41</sup> However, a year after *Dunsmuir*,<sup>42</sup>

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this critique, see H. Wade MacLauchlan, *Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?* (1986) 36 U.T.L.J. 343.

<sup>37</sup> Under what might be called the “classical review” approach in Canada until the 1970s, there were three general grounds of review: jurisdictional errors, a collection of nominate jurisdictional defects, and a non-jurisdictional ground of error of law on the face of the record that could be excluded by the presence of a privative clause. Other failings within jurisdictional boundaries could not be reviewed. They were considered part of the “merits” of the administrator’s decision, and were subject to judicial control only pursuant to a statutory appeal. See generally Ontario, Royal Commission Inquiry into Civil Rights: Report Number One, Vol. 1 (Toronto: Queen’s Printer, 1968). Classical review was highly text-based, with little explicit reference to non-textual sources. In the 1960s and at the beginning of the 1970s, it was becoming increasingly interventionist. This trend culminated in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425. There, in a very terse judgment, the Supreme Court set aside a decision of a labour relations board, despite the presence of strong privative clauses.

<sup>38</sup> For aspects of this development see *supra* note 15; Elliott, *supra* note 34; The Honourable Mr. Justice Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27 Queen’s L.J. 859; and Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2008), c. 8-10.

<sup>39</sup> See e.g., H. Wade MacLauchlan, “Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 280.

<sup>40</sup> See e.g., the concerns raised in *Toronto (City) v. Canadian Union of Public Employees Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 [*Toronto*] at paras. 61-134; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 at paras. 190-02; *Voice Construction v. Construction & General Workers’ Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609 at paras. 40-41; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 102, 279; *Dunsmuir*, *supra* note 4 at paras. 32-63, 120-155, 158-67. In *Toronto*, at para. 63, LeBel J. referred to “growing criticism with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied”. Further, at para. 64, he said that, “[t]his Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law”. In *Dunsmuir*, at para. 32, the main majority said that “[d]espite efforts to refine and clarify it, the present system has proven to be difficult to implement”. For academic criticisms, see the works referred to in the decisions above.

<sup>41</sup> *Supra* note 15. See also Part 4, below.

<sup>42</sup> *Supra* note 4. Two post-*Dunsmuir* decisions of interest before *Khosa* were *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 [*Lake*]; and *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195 [*Proprio*

standard of review controversy was as strong as ever, and, as will be seen, *Khosa* did not do much to clarify the relationship between judicial review and legislative intent.

#### IV. SHOULD THE COMMON LAW APPLY?

There were two main contexts for the debate between the majority judges in *Khosa*—the wording of the code itself, and the nature of common law standard of review analysis. Speaking for the main majority, Binnie J. said that the general and discretionary nature of the code makes common law supplementation both necessary and possible. He then tried to show how the code and common law standard of review principles interrelate. Binnie J. based his generality argument on the view that s. 18.1(4) of the *Federal Courts Act* must address a wide range of different federal tribunals. To apply it flexibly, courts must be able to draw on the common law.<sup>43</sup>

In contrast, Rothstein J. considered s. 18.1(4) to be an exhaustive statement of the standard of review.<sup>44</sup> He said that s. 18.1(4) *is* flexible, as it addresses several different types of questions,<sup>45</sup> and that there is consequently no need to apply the common law. Moreover, because this provision indicates clearly what grounds and standards are required, it “occupies the field” of

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*Direct*]. In *Lake*, the Supreme Court upheld a Minister’s assessment of the constitutional validity of his decision to surrender a fugitive. *Dunsmuir* had implied at para. 58 that constitutional questions should be subject to the correctness standard. In *Lake*, however, the Court applied a full contextual review and concluded that the appropriate standard of review was reasonableness. In *Proprio Direct*, the Court split 7-2 on the appropriate standard to be applied in a statutory appeal from the decision of a real estate association disciplinary committee that a real estate company had violated the association’s standards. The majority said that this was an expert committee interpreting its home statute, decided on the reasonableness standard, and concluded that the decision was not unreasonable. The dissenting judges said that this was a wide statutory appeal from a decision that involved issues of general concern: paras. 66-67. They said that no deference was needed, but that even if the reasonableness standard were applied, they would have found the decision to be unreasonable: paras. 70-71. See also *Société de l’assurance automobile du Québec v. Cyr*, 2008 SCC 13, [2008] 1 S.C.R. 338, where the majority applied procedural fairness under Quebec’s *Administrative Justice Act*, *supra* note 33, rather than contract principles, to the revocation of a mechanic’s accreditation.

<sup>43</sup> *Khosa*, *supra* note 2 at para. 28.

<sup>44</sup> *Ibid.* at paras. 128-29. Rothstein J. said that the issue was not whether s. 18.1(4) was a self-contained code, excluding reference to other statutory provisions and to relevant common law rules, but whether it was exhaustive of the common law standard of review. In his view it did oust *Dunsmuir*, *supra* note 4.

<sup>45</sup> *Ibid.* at paras. 108-10. Rothstein J. also said that *Dunsmuir*, *supra* note 4 itself has only two standards, and that *Dunsmuir* analysis is available under s. 18.1(4) where there is a privative clause.

standard of review analysis.<sup>46</sup> As seen,<sup>47</sup> s. 18.1(4)(d) refers to a decision or order of a tribunal that was based on “an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”<sup>48</sup> For Rothstein J., these words are “clear and unambiguous”.<sup>49</sup> They permit review for only the most “egregious cases”<sup>50</sup> of errors of fact. Thus, s. 18.1(4)(d) excludes further recourse to the common law.

The view that s. 18.1(4) is non-exhaustive seems preferable to the closed-door view of Rothstein J. Section 18.1(4)(d) itself is relatively detailed, and “perverse,” “capricious,” and “without regard” is strong language. It suggests a high threshold for review of erroneous questions of fact.<sup>51</sup> On the other hand, the *Federal Court Act* does not specifically immunize s. 18.1(4) from common law consideration.<sup>52</sup> Nor does the Act define the terms in s. 18.1(4)(d). Most grounds in s. 18.1(4) were originally identical or similar to traditional common law grounds, while s. 18.1(4)(d) was a little more distinct.<sup>53</sup> However, the inclusion of this subsection in s. 18.1(4) suggests that it too might permit some common law interpretation. The courts themselves had acted on this

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<sup>46</sup> *Ibid.* at para. 75.

<sup>47</sup> See Part 2, above.

<sup>48</sup> *Supra* note 3.

<sup>49</sup> *Khosa*, *supra* note 2 at para. 72.

<sup>50</sup> *Ibid.* at para. 118.

<sup>51</sup> See *Rohm & Haas Canada Ltd. v. Canada (Anti-Dumping Tribunal)*, (1978), 91 D.L.R. (3d) 212 (F.C.A.), describing “perversity” as “wilfully going contrary to the evidence” and “without regard for the material before it,” and “[ignoring or refusing to take notice of] that material or some significant part of it” at para. 6. See also *Crupi v. Canada (Employment and Immigration Commission)*, [1986] 3 F.C. 3 (F.C.A.), saying that the provision required a decision to be “manifestly wrong in relation to the entire file.” At para. 27 in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Supreme Court said that in reviewing a decision of the IAD on a question of fact under s. 18.1(4)(d), a court should accord “great deference,” and, at para. 38, referred, with apparent approval, to a Federal Court of Appeal decision saying that the patent unreasonableness standard should apply.

<sup>52</sup> *IRPA*, *supra* note 6. The privative clause in s. 162(1) of the *IRPA* protects the decision-making power of the IAD, not the statutory review power of the courts. To the extent that this provision restricts judicial review, it seems to be intended to restrict statutory as well as common law review.

<sup>53</sup> Section 18.1(4)(d) had no close analogue in Canadian judicial review, except perhaps for the evolving ground of “no evidence”. On the other hand the phrase “perverse and capricious” bore some resemblance to the “arbitrary, capricious, an abuse of discretion” criteria in s. 10(e) of the *American Administrative Procedure Act* (U.S.A., 1946), now 5 U.S.C. §§ 706, which was subject to interpretation by American courts. See e.g. the decisions referred to in *Citizens to Preserve Overton Park Inc. v. Volpe, Secretary of Transportation*, 401 U.S. 402; 91 S. Ct. 814; 28 L. Ed. 2d 136 (U.S.S.Ct.) at para. 24.

assumption in the years before *Khosa*. They had elaborated, to varying degrees, on the meaning of its grounds, including s. 18.1(4)(d).<sup>54</sup>

Binnie J. supported his generality argument with another argument based on discretion. He claimed that the power of reviewing courts to set the standard of review is similar to a judge's discretion to refuse judicial relief in cases of, for example, misconduct on the part of an applicant.<sup>55</sup> In this case, he said, the wording of s. 18.1(4) recognizes the discretion of reviewing courts not just to refuse relief, but to adjust the level of review. He said that this provision prescribes grounds, rather than standards, of review. The grounds permit, but do not require, the relevant standards.<sup>56</sup> Thus, although the ground of error of law in s. 18.1(4)(c) normally attracts correctness review, "the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute."<sup>57</sup>

As Rothstein J. suggested, this analogy to access and relief discretion conflates two distinct concepts. The first power is a broad equitable or public interest discretion, exercised by judges to uphold the integrity and fairness of the litigation process.<sup>58</sup> It applies to an otherwise unauthorized administrative decision. In contrast, both the grounds of review and standard of review analysis are concerned with the legal validity of an administrative decision. Further, courts assess legal validity by reference to the enabling legislation, and subject to review criteria contemplated by the legislature.<sup>59</sup> This is not just

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<sup>54</sup> *Supra* note 51. The decisions tend to follow one or both of two main patterns: (1) elaborating on the wording of s. 18.1(4)(d), and (2) equating s. 18.1(4)(d) with the patent unreasonableness standard (and, after *Dunsmuir*, the reasonableness standard: see e.g., *Obeid v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 503 (F.C.)). But see *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 (Fed. C.A.) [*Stelco*] (Evans J.A. for himself, Desjardins and Rothstein J.J.A.). At paras. 14-16, Evans J.A. said that although courts should not try to equate s. 18.1(4)(d) with either the reasonableness or patent unreasonableness standard, they can look at common law contextual factors to help determine if the decision was rationally supported by any material before it. This is close to the approach being recommended in this comment.

<sup>55</sup> *Khosa*, *supra* note 2 at paras. 36, 38, 49.

<sup>56</sup> *Ibid.* at para. 36.

<sup>57</sup> *Ibid.* at para. 44. Binnie J. said that in this situation, the decision would be upheld if it were found to be reasonable. *Quaere*, whether this general discretion to convert correctness review to reasonableness review in certain cases could ever include errors of law that involve "true" jurisdictional issues?

<sup>58</sup> E.g., to deny a remedy where there has been misconduct by the applicant or to refuse access to a court where a more appropriate forum is available. See the authorities referred to by Rothstein J. in *Khosa*, *supra* note 2 at para. 135.

<sup>59</sup> Of course, when a court weighs contextual factors in standard of review analysis, it might arrive at a lower or higher intensity of review than it would if it had applied the traditional common law review grounds on their own. However, this is simply the result of applying

an equitable or public interest matter, but a question of statutory interpretation. Why should *it* be subject to a discretionary judicial override?

## V. HOW SHOULD THE COMMON LAW APPLY?

Binnie J. did not need an argument about discretion to support the view that the code can be read in light of common law standards of review. However, he did need to show *how* the common law supplements statutory grounds such as those in s. 18.1(4). Although Binnie J. referred at one point to the *Dunsmuir* statement that common law standard of review analysis is concerned with determining legislative intent,<sup>60</sup> many of his comments were limited to whether there was a clear legislative intent to *oust* this analysis.<sup>61</sup>

If the legislature has *not* ousted the common law by means of “clear and explicit language,” how do legislation and common law relate in practice? Should s. 18.1(4) always be subject to a general common law override? What weight, if any, should attach to the fact that s. 18.1(4) is part of a statutory text? At one point, Binnie J. said that s. 18.1(4)(d) “intended a high degree of deference for administrative fact finding,” and can provide “legislative precision” to the reasonableness standard for findings of fact under the *Federal Court Act*.<sup>62</sup> However, when Binnie J. went on to determine the relevant level of review in this case, s. 18.1(4)(d) faded into the background. He made no reference at this stage to perversity, capriciousness, lack of regard for the evidence, or even a high degree of deference. Instead, he went directly to the *Dunsmuir* analysis, found that the standard should be reasonableness, and concluded that the IAD’s decision did not fall outside *Dunsmuir*’s “range of reasonable outcomes.”<sup>63</sup> Within this analysis, Binnie J. described the privative

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broader modern review criteria to the question of administrative validity and legislative intent, not a discretionary “staying” of judicial hands.

<sup>60</sup> *Khosa*, *supra* note 2 at para. 30.

<sup>61</sup> See e.g. *Khosa*, *ibid.* at paras. 19, 30, 40, and 51. Most of Binnie J.’s other references were to legislative intent on specific issues, such as, at para. 28, whether the general nature of s. 18.1(4) implied a need for common law supplementation, and, at para. 39, whether legislative intent should prevail over the common meaning of individual words. Binnie J. did draw a link between privative clauses and legislative intent at para. 55: see text accompanying note 64.

<sup>62</sup> *Khosa*, *supra* note 2 at para. 46. See also para. 3. This sounds like the statute supplementing the common law, rather than *vice versa*. For the latter approach, see Binnie J.’s suggestion at para. 19 that the common law can calibrate the content of a statutory review ground such as patent unreasonableness in the B.C. *ATA*, *supra* note 20: see text accompanying notes 22 and 25; and his suggestion at para. 48 that s. 18.1(4) the *Federal Court Act* is to be interpreted and applied against the “backdrop” of the common law.

<sup>63</sup> *Ibid.* at para. 67.

clause in s. 162(1) of the *IRPA* as “an important indicator of legislative intent.”<sup>64</sup> But all he required of s. 18.1(4)(d) of the *Federal Court Act* was that it not “conflict” with *Dunsmuir*’s reasonableness standard.<sup>65</sup> So much for legislative precision!<sup>66</sup>

Rothstein J. had a simple answer to the question about when to apply the *Dunsmuir* analysis: rarely. He based this view on a wide-ranging theory about legislative and judicial roles, and about the importance of privative clauses. This theory went beyond the generality and discretion issues discussed above. Rothstein J. suggested that in the absence of a strong privative clause, the *Dunsmuir* analysis should not apply to *any* administrative decision involving law or related matters.<sup>67</sup> In Rothstein J.’s view, supervision of questions of law—and of jurisdiction, constitutionality, and natural justice, etc.—is a special responsibility of courts, and should normally be subject to correctness review. Conversely, where it is clear at common law or in a statute where deference is required, *Dunsmuir*’s contextual analysis is unnecessary.<sup>68</sup> Rothstein J. said that tribunals are “better situated” than courts to decide questions of fact or policy, and should be deferred to in these areas. In the *Federal Courts Act*, he said, Parliament has indicated expressly where it wanted deference—in regard to the fact-related matters in s. 18.1(4)(d). Elsewhere, in the absence of a strong privative clause, the correctness standard should apply.

In Rothstein J.’s view, the deferential approach in modern contextual review started as a means of reconciling the rule of law with a legislative intent to protect some expert decision makers from review, but then it strayed from this path.<sup>69</sup> According to Rothstein J., *C.U.P.E.*,<sup>70</sup> the 1979 decision credited with starting modern substantive contextual review, was a response to a specific legislative signal.<sup>71</sup> Its policy of deference relaxed full correctness review on

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<sup>64</sup> *Ibid.* at para. 55.

<sup>65</sup> *Ibid.* at para. 58. *Cf. Baker, supra* note 34, where the Supreme Court applied a reasonableness standard to a humanitarian and compassionate grounds decision without even referring to the wording of s. 18.1(4) of the *Federal Court Act*.

<sup>66</sup> As seen, Binnie J.’s concept of broad common law discretion to alter the effect of grounds of review left some of the other grounds in s. 18.1(4) in a similar fluid state. See text accompanying notes 55-57.

<sup>67</sup> See e.g. *Khosa, supra* note 2 at para. 74.

<sup>68</sup> *Ibid.* at paras. 90-91, 95, 120.

<sup>69</sup> *Ibid.* at paras. 76-92.

<sup>70</sup> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [C.U.P.E.]. Although *C.U.P.E.* is generally regarded as being the foundation of modern contextual review, some of the ground had been laid in Dickson J.’s earlier decision in *Service Employees International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] S.C.R. 382.

<sup>71</sup> In Rothstein J.’s view, the main majority in *Dunsmuir* was wrong to see the deference policy under standard of review analysis as a response to the tension between the rule of law and

questions of law where the legislature expressly indicated its intent to restrict or exclude review.<sup>72</sup> In these areas, courts were to look only for patent unreasonableness or—at a later date—unreasonableness. This policy, said Rothstein J., *applied only where there was a strong privative clause*, in recognition of the legislature's prerogative to determine the relevant level of judicial review.<sup>73</sup>

Rothstein J. said the Supreme Court began to deviate from this policy in its 1994 *Pezim*<sup>74</sup> decision. There the Court assumed the power to substitute reasonableness for correctness review of errors of law: i) in the absence of a privative clause, ii) despite the presence of a legislative appeal provision, and iii) on the basis of the Court's own appraisal of administrative expertise.<sup>75</sup> Then, the Court downgraded the privative clause further by treating it as just one of a number of factors to consider in determining deference.<sup>76</sup> From its origins as a specific judicial response to privative clauses, deference policy came to be seen as a general judicial response to the legislature's initiatives in *creating* administrative bodies,<sup>77</sup> and judicially determined expertise—not

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the legislative desire to create administrative bodies. He said the creation of administrative bodies may bypass courts as primary decision makers, but does not interfere with their supervisory role: *Khosa supra* note 2 at paras. 77, 79. Rothstein J. said that it is privative clauses that create a tension between the rule of law and legislative supremacy, as they *do* purport to interfere with the courts' supervisory role: *Khosa supra* note 2 at paras. 75, 79-81.

<sup>72</sup> *Khosa, supra* note 2 at paras. 82-84.

<sup>73</sup> *Ibid.* at para. 81. Rothstein J. said that strong privative clauses typically purport "to preclude review not only of factual findings, but also legal and jurisdictional decisions". By implication, other privative clauses would *not* have triggered *C.U.P.E.* deference.

<sup>74</sup> *Ibid.* at paras. 87-88. Referring to *Pezim v. British Columbia (Superintendent of Brokers)* (*sub nom. Pezim v. British Columbia (Securities Commission)*), [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [*Pezim*].

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

<sup>76</sup> *Khosa, supra* note 2 at para. 92. Rothstein J. here referred to *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*]. See also *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 [*Bradco*], where the Court treated a legislative provision that purported to confer finality as being merely one of a number of factors to consider.

<sup>77</sup> *Khosa, ibid.* at para. 78, referring to the statement at para. 27 in *Dunsmuir, supra* note 4 that "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers." As Rothstein J. noted, the legislature does not contradict or oust the supervisory power of courts merely by creating special administrative bodies to decide matters at first instance. This process merely bypasses courts as primary adjudicators. Instead, in *Khosa, supra* note 2 at para 79, Rothstein J. said it is privative clauses that create this tension, by purporting to exclude judicial review. Rothstein J.'s critique is sound if the term "tension" is construed as meaning outright conflict, as where a statute seeks to exclude common law review. However, the *Dunsmuir* main majority may have had a softer meaning, such as "strain" or "potential divergence," in mind.



actual but imputed expertise—came to rival legislative intent as the polar star of standard of review analysis.<sup>78</sup>

In *Khosa*, Rothstein J. said there was no strong privative clause,<sup>79</sup> and the question was one of fact.<sup>80</sup> On this question, he said, s. 18.1(4)(d) of the *Federal Courts Act* occupied the field in regard to standard of review.<sup>81</sup> Accordingly, there should be no resort to the common law standard of review analysis in *Dunsmuir*.<sup>82</sup> Privative clauses, then, should move to the front page, and *Dunsmuir* should be demoted from landmark to footnote.

In contrast with modern mainstream review, Rothstein J.'s suggested alternative framework promises simplicity, clarity, and fidelity to legislative intent. What could be more explicit than a strong privative clause? And why resort to judicial inferences and deference policy where there is no need to reconcile legislative intent with the rule of law? As Rothstein J. suggests, the mere creation of an administrator to adjudicate at first instance does not target judicial review in the way that a privative clause does.

However, Rothstein J.'s theory makes these gains at a high price. One of the merits of modern contextual review is that it broadened the base for judicial review by recognizing openly that many factors are relevant to the standard of review, not simply privative clauses. Why give this up? Paradoxically, by limiting the legislature to a single mechanism for signalling judicial restraint on legal and related questions, Rothstein J.'s theory *restricts* the mechanisms of legislative intent. Indeed, his theory is not satisfied with a privative clause; only a "strong" one will do.

Rothstein J.'s theory also overstates the role of privative clauses in earlier contextual review. *C.U.P.E.* did link deference policy to a privative clause,<sup>83</sup> and the Supreme Court did downgrade the role of privative clauses in the 1990s.<sup>84</sup>

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<sup>78</sup> The court stated in *Khosa*, *supra* note 2 at para. 96 "[T]he majority's common law standard of review approach seeks two polar stars — express legislative intent and judicially determined expertise — that may or may not align."

<sup>79</sup> *Ibid.* at para. 112.

<sup>80</sup> *Ibid.* at para. 137. Rothstein J. said at para. 89 that tribunal decisions on matters of fact and of closely mixed law and fact merit deference because tribunals are "better situated" than courts to decide these matters. Hence, he might have found *Dunsmuir* factor analysis to be unnecessary in *Khosa*, even if s.18.1(4)(d) of the *Federal Courts Act* did *not* apply. Cf. his views in *Dunsmuir*, *supra* note 4 at para. 164.

<sup>81</sup> *Ibid.* at paras. 75, 117-135.

<sup>82</sup> *Ibid.* at para. 127.

<sup>83</sup> Dickson J., *supra* note 70 at 235, said that the privative clause constituted "a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board".

<sup>84</sup> For example, the Court said that deference may be required even in the absence of a privative clause: *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245 at 275; *Bell Canada v.*

However *C.U.P.E.* referred to other factors as well, and was vague as to which factors were essential.<sup>85</sup> In fact, both the pre-contextual and modern case law have always recognized deference factors other than privative clauses.<sup>86</sup>

Another paradox with the theory is its reliance on some of the criteria it criticizes. The idea that deference must be determined by a privative clause seems at odds with Rothstein J.'s own position on review of fact and policy. Rothstein J. criticized the use of expertise as a free-standing basis for judicial deference in law, jurisdiction, and related matters. Yet he supported intervention in these areas and deference to administrators in matters of fact and policy, on grounds that were based—at least partly—in assumptions about relative expertise.<sup>87</sup>

Binnie J.'s response to this theory was as follows:

*Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not

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*Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1746 [Bell], and, in *Bradco*, *supra* note 76 at para. 35, that if there is no special expertise, there may be no need for deference, even in the presence of a weak privative clause. Conversely, in *Bell* at 1744, where there was special expertise, the Court applied deference even in the face of statutory appeal provisions.

<sup>85</sup> For example, Dickson J., at *supra* note 70 at 236, said that the board was a specialized tribunal that administered a comprehensive statute and had an accumulated experience in labour relations. Its members, he said, were required to exercise "[c]onsiderable sensitivity and unique expertise".

<sup>86</sup> In classical review, for example, a broad discretion made higher level review for error less likely: see e.g. *Re Ashby*, [1934] 3 D.L.R. 565 at 568 (O.C.A.). In the presence of a privative clause, review could depend on whether the defect was jurisdictional or non-jurisdictional. This, in turn, could be influenced by such considerations as whether the administrator was interpreting his or her enabling act or a general question of law: see e.g. *Parkhill Bedding & Furniture Ltd. v. International Moulders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board*, (1961), 26 D.L.R. (2d) 589 at 598. See also discussion in *supra* note 37.

<sup>87</sup> In *Khosa*, *supra* note 2 at para. 90, Rothstein J. said that courts have "greater law-making expertise" than administrators in questions of law, in addition to their capacity to ensure the uniformity of legal rules. Similarly, at *supra* note 80, although Rothstein J. opposed judicial deference on questions of law (except where there is a strong privative clause), he advocated judicial deference on questions of fact or policy, because tribunals are "better situated" in regard to these matters. Is this another way of saying that in regard to questions of fact, tribunals are likely to have greater expertise or access to better sources of expertise than courts? In effect, Rothstein J. was using a general assumption about relative expertise to suggest that questions of law should be subject to a correctness standard, except where a strong privative clause requires a *Dunsmuir* analysis to determine if reasonableness is more appropriate. For its part, the main majority said that some questions of law can be subject to a reasonableness standard on the basis of considerations such as relative expertise, apart from a privative clause. As well, on the basis of assumptions about relative expertise, both Rothstein J. and the main majority favoured a deferential standard for questions of fact. In these respects, at least, the two approaches do not seem very far apart!

only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments...[and may extend to situations] 'where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context'.<sup>88</sup>

Unlike Rothstein J., Binnie J. and the rest of the main majority affirmed the *Dunsmuir* view that deference can apply not only to decisions protected by privative clauses or to questions of fact or policy, but also to questions of law in regard to which a tribunal has special expertise. This is a broader approach, but it is not a very certain one. Is deference *always* appropriate where a tribunal interprets its constituent statute? Is deference *necessarily* appropriate for every tribunal assessment of facts or policy? Where should deference *not* extend to an expert tribunal's application of a general legal rule to a specific statutory context? And how should courts determine what constitutes special expertise? As in the main majority's discussion of the relationship between s. 18.1(4) of the *Federal Court Act* and common law standard of review analysis,<sup>89</sup> the answers are not clear.

## **VI. GUIDES AND GAPS IN *DUNSMUIR***

The weaknesses in Rothstein J.'s theory and in the main majority's approach appear to lead *Khosa* to an impasse. Overall, the more inclusive approach to the common law *Dunsmuir* analysis seems preferable. However, the main majority do not show clearly how this approach should work, or how the *Dunsmuir* common law analysis can supplement the statute without supplanting it. In this respect, Rothstein J.'s concern for legislative intent is worth further thought, and some of the problems and potential answers here may lie in *Dunsmuir* itself.

The main majority in *Dunsmuir* described judicial review as a balance between the rule of law and legislative supremacy. In their view, "...the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent."<sup>90</sup> They also saw judicial review as addressing "an underlying tension between the rule of law and democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow

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<sup>88</sup> *Khosa*, *supra* note 2 at para. 25 quoting in part from *Dunsmuir*, *supra* note 4 at para. 54.

<sup>89</sup> See text accompanying notes 60-65.

<sup>90</sup> *Supra* note 4 at para. 30. See also *Dunsmuir*, *supra* note 4 at para. 31, where they referred to the judiciary's power to review "for compliance with the constitutional capacities of government", and said that "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits."

them with broad powers.”<sup>91</sup> They described the rule of law itself as a general requirement that administrators comply with the law—the Constitution, statute law, or the common or civil law.<sup>92</sup> After articulating this general concept of balance or tension, the main majority moved on to discuss the guaranteed minimum core of review and to try to simplify and clarify the levels and categories of standard of review analysis.<sup>93</sup> Although this was a helpful start, it did not go far enough.

In the first place, the balance-tension concept would have benefitted from a more thorough discussion of both the rule of law guaranteed review and democracy-legislative intent sides of the equation, especially the latter.<sup>94</sup> In its discussion of theory, for example, the *Dunsmuir* majority could have gone on to show how legislative supremacy is tied to the democratic principle. There are at least two complementary ways this can be done. On one hand, the elected status of Canadian legislatures legitimates their authority to confer power on administrative bodies and to determine how this power should be enforced. On the other hand, it is important that government be kept accountable to the electorate. To help ensure this, legislatures are required to act through statutes, and virtually all administrative power must be authorized by statute.<sup>95</sup>

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<sup>91</sup> *Ibid.* at para. 27. See the comments of Rothstein J. on this passage, discussed at *supra* note 77.

<sup>92</sup> *Ibid.* at para. 28.

<sup>93</sup> *Ibid.* at paras. 34–64.

<sup>94</sup> *Ibid.* at para. 31. The Court should have clarified that Parliamentary supremacy is subject to the Constitution of Canada, which includes the rule of law, and it could have noted that Parliamentary legislation is itself one element of the “law” component of the rule of law. It should also have considered if the minimum core idea could be supported by the unwritten legal constitutional principle of the separation of powers. Conversely, the main majority did not need to support the core idea in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220. That was essentially a division of powers decision, despite its reinterpretation in decisions such as *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at para. 35. Finally, the content of the guaranteed minimum core of judicial review (referred to at *supra* note 90) needs clarification. What kind of jurisdictional questions does it include? To what extent does it include constitutional questions? Non-jurisdictional questions? See also *infra* note 123.

<sup>95</sup> The Court said that the Crown cannot legislate to bind its citizens without the support of a statute: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 433. This is a proposition with deep roots: see *The Case of the Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352. However, statutory authorization is normally also required for exercises of coercive power that fall short of executive legislation: see e.g., *Entick v. Carrington*, (1765) 19 Howell’s State Trials 1030; 2 Wils. 275, 95 E.R. 807. It is the capacity to exercise coercive power, and to do so legitimately, that distinguishes the state from ordinary individuals: Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther Roth & Claus Wittich, trans. by Ephraim Fischhoff *et al.* (New York: Bedminster Press, 1968) at vol. 1 at 54, 56. The reference in *Babcock v. Canada (A.G.)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 20 to “the well-established rule that official actions must flow from statutory authority clearly granted and properly exercised,” is a little too broad, though. In exceptional circumstances, and subject to possible legislative modification or revocation, official actions may be based on the royal prerogative

Despite ongoing electoral system flaws and the continued dominance of political executives, these are not simply theoretical ideals. Government must still ultimately answer to voters, and statutes remain its key legal link to the administrative process.<sup>96</sup>

This suggests that there may be good democratic reasons for taking legislative intent seriously. Realist critics may object that because statutes are always collectively authorized, often ambiguous, and never self-applying, there are gaps to be filled by reviewing courts.<sup>97</sup> As a result, standard of review

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power: see *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 at para. 54.

<sup>96</sup> Canada, of course, is a constitutional as well as Parliamentary democracy, with a vital democratic role for basic principles such as the rule of law, constitutionalism, federalism, and protection of basic and minority rights: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Arguably, though, at the very heart of the democratic notion of rule by the people are the Parliamentary and electoral processes. The state of this democracy is to some extent a question of perspective. On one hand, policy making power is concentrated in strong political executives as opposed to the houses of Parliament and the provincial legislative assemblies. Ethical debacles such as the federal sponsorship scandal put a strain on public confidence. The first-past-the-post electoral system distorts voter preferences. Only 64.7% of eligible voters took part in the 2006 federal election: Elections Canada, "Appendix 5: Statistics on voter turnout, 1867-2006" *The Electoral System of Canada* (23 April 2008), online: Elections Canada, <http://www.elections.ca/content.asp?section=gen&document=part4&dir=ces&lang=e&textonly=false>. On the other hand, Canadians still complain when they feel that Parliament is being bypassed altogether: see e.g. *Little support for proroguing Parliament: poll* CBC News (7 January 2010), online: CBC News <<http://www.cbc.ca/politics/story/2010/01/07/ekos-poll-prorogue.html>>. Canadians have secret ballots, universal adult suffrage, multiparty political systems, and relatively regular elections. As well, Canada rates high in international state surveys, according to criteria such as electoral process and political participation, pluralism, political culture, civil liberties, and accountability: see e.g. *The World in 2007: Economist Intelligence Unit Democracy Index 2006*, online: The Economist <[http://www.economist.com/media/pdf/DEMOCRACY\\_TABLE\\_2007\\_v3.pdf](http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf)>; Laza Kekic, *The Economist Intelligence Unit's index of democracy*, online: The Economist <[http://www.economist.com/media/pdf/Democracy\\_Index\\_2007\\_v3.pdf](http://www.economist.com/media/pdf/Democracy_Index_2007_v3.pdf)>; and Freedom in the World 2009: *Table of Independent Countries*, online: Freedom House <[http://www.freedomhouse.org/uploads/fiw09/FIW09\\_Tables&GraphsForWeb.pdf](http://www.freedomhouse.org/uploads/fiw09/FIW09_Tables&GraphsForWeb.pdf)>.

The significance of statutes, too, may be partly a matter of perspective. On one hand, the number of statutes in Canada is greatly exceeded by delegated legislation created by the administrative process. On the other hand, all but a handful of delegated legislation is based on statutes, and all delegated legislation is subject to change by statute. Although most statutes are formulated largely by senior public servants and Cabinet before they are processed in Parliament, the House of Commons and the Senate can expose them to one of the most powerful of all checks—publicity.

<sup>97</sup> For these and other realist criticisms, see *supra* note 36, and Hanoch Dagan, "The Realist Conception of Law" (2007) 57 U.T.L.J. 607. Realist critics in Canada tended to focus their fire on the influential and controversial nineteenth century English constitutional writer, Albert Venne Dicey, who popularized the concepts of the rule of law and Parliamentary sovereignty: see A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1965). These critics have tended to view Dicey as a strict positivist who

analysis can't generate scientifically verifiable findings from legislative intent. At best, it generates a judicial inference as to what was *likeliest* to have been intended. Thus, there is an approximate, even normative<sup>98</sup> dimension to standard of review analysis, but, it needn't be dismissed as anchorless,<sup>99</sup> or regarded as a stand-alone exercise of judicial power. It has a definite legislative target—the interpretation of a statute<sup>100</sup>—and this interpretation is

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overemphasized the role of legislatures and statutes, fail to adequately recognize the legitimacy of administrative discretion, and neglect non-Parliamentary and non-judicial influences on law: see e.g. H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1; Alan C. Hutchinson, "The Rise and the Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293; Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 U.T. Fac. L. Rev. 136; David Dyzenhaus, "Developments in Administrative Law: The 1992-93 Term" (1994) 5 Sup. Ct. L. Rev. (2d) 189; and Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58 U.T.L.J. 75. Even accepting these criticisms, though, it is arguable that statutes have significant communicative potential and importance: see *infra* note 100. If so, there is surely a core of insight in Dicey's view that judicial enforcement of administrative compliance with statutory mandates supports legislative supremacy (subject, in Canada, to the Constitution) and, in turn, electoral supremacy: see especially Dicey at 411-14. David Dyzenhaus argues—accurately, in my view—that Dicey's rule of law has both positivist and realist elements, but he finds in Dicey an "irresolvable tension" between "utter judicial deference to clearly expressed legislative intent" on one hand and a belief in "the constitutional morality of the common law", on the other: "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review", in Christopher Forsythe, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 141 at 151 ["Form and Substance"]. However, some tension is inevitable when one institution has legal supremacy and the other has power to interpret and apply it to specific situations. Dicey stressed the power of judicial interpretation at 413-414 for example, but he also affirmed at 60-61 that common law can be overridden by statutes. It was *because* Dicey's rule of law was based on interpretation that its precepts were not absolutes, but presumptions. The clearer the statute, then, the more a presumption must yield. Arguably, Dyzenhaus' own suggested approach to the rule of law is based on presumptions too: see *infra* note 102.

<sup>98</sup> A judicial inference as to what the legislature intended is likely, even bound, to be coloured by what a judge thinks the legislature *should* have intended. However, is this much different from what happens when a judge makes an inference as to meaning of an unwritten legal constitutional principle? Presumably, it too is bound to be influenced by what the judge feels *should* be the meaning of the principle.

<sup>99</sup> Cf. The well-known House of Lords decision about "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Reid L.J. at 71. Lord Reid was speaking of natural justice, which is presumably no easier to cut and dry than legislative intent!

<sup>100</sup> In the classic work, Samuel Hayakawa & Alan R. Hayakawa, *Language in Thought and Action*, 5<sup>th</sup> ed. (San Diego: Harcourt Brace Jovanovich, 1990), Hayakawa highlighted the many ways in which language can generate different understandings, depending on the words used and their contexts. However, Hayakawa considered that most meanings are "public" in the sense that they are likely to produce a high level of agreement among participants. Otherwise, communication would be impossible. Statutes, with their multiple authorship and general focus, present special communication challenges, but their deliberative background, non-colloquial style, written format, and public accessibility can facilitate communication, especially where their language is relatively precise and explicit. Can statutory texts be

itself subject to legislative change.<sup>101</sup> The challenge, then, is to provide a reasoned basis for combining the court's gap-filling role with its target of statutory interpretation.<sup>102</sup> *Dunsmuir* neglected this challenge. It failed to provide a systematic and coherent approach to determining legislative intent. Until that approach is found, Rothstein J. is right in saying that the polar star has become blurred.

*Dunsmuir's* specific standard of review reforms, like its theoretical foundations, were incomplete. *Dunsmuir* is well known for prescribing two standards of judicial review, a higher correctness standard and a more deferential reasonableness standard.<sup>103</sup> *Dunsmuir* also tried to fine-tune the

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automatically dismissed as indeterminate? And with their approval by elected representatives, can they be dismissed as unimportant?

<sup>101</sup> The legislature's ongoing power to correct a non-constitutional judicial interpretation is arguably a kind of negative mechanism of legislative intent: what isn't amended is presumably intended.

<sup>102</sup> The focus here is on the relevant standard or level of judicial review in a given situation. Arguably, *Dunsmuir*, *supra* note 4 also fell short in its prescriptions for reform of the content of judicial review once the relevant level of review was established: For example, in *Dunsmuir's* tests for reasonableness, *supra* notes 17 and 18, how much "justification, transparency and intelligibility" is needed? Must outcomes be "acceptable" as well as being "defensible in respect of the facts and law"? And how do the new reasonableness tests relate to old review grounds such as bad faith? The focus here is also different from that of David Dyzenhaus, whose concept of "deference as respect" was endorsed in *Dunsmuir* at para. 48. Dyzenhaus supports general presumptions in favour of principles such as fairness (David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process /Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193 at 241), participation and accountability ("Form and Substance", *supra* note 97 at 170), and equality and dignity (David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis" (2005) 55 U.T.L.J. 691 at 714), that can be displaced by explicit legislative wording or by adequate administrative justification (Dyzenhaus & Fox-Decent at 240). Dyzenhaus claims that this approach is inherently democratic, because it addresses process and participation, rather than a specific result or morality and because it permits (and requires) legislatures and administrators, respectively, to authorize or justify exceptions: "Form and Substance", *supra* note 97 at 170 and "The Rule of Law as the Rule of Liberal Principle" in Arthur Ripstein, ed., *Ronald Dworkin* (New York: Cambridge University Press, 2007) 56 at 74-76. This approach leaves open the question: what level of review—or "respect"—was intended by the legislature in a given situation, in the first place?

<sup>103</sup> See text accompanying note 15. The main majority dropped the standard of patent unreasonableness, mainly because of their view that the two criteria used to distinguish between unreasonableness and patent unreasonableness—the magnitude and the immediacy of the defect—were difficult to draw and illogical: *supra* note 4 at paras. 39-42. The criterion of immediacy was indeed difficult to draw, but the main majority's concern about magnitude was less convincing. In *Dunsmuir* at para. 41 they quoted from a commentator's statement that there cannot be shades of irrationality, a proposition that makes sense if reasonableness and rationality are equated with logical reasoning. However, patent unreasonableness also included defects such as bad faith that are unrelated to the reasoning process, and defects of this kind can vary in magnitude. At para. 42, they justified dropping patent unreasonableness rather than unreasonableness on the ground that it would be unpalatable and contrary to the rule of law to require parties to accept an unreasonable

factor weighing part of substantive contextual review. As described in the 1998 *Pushpanathan* decision,<sup>104</sup> this approach required courts to determine the relevant review standard in a particular case by reference to contextual factors such as: (1) the presence or absence of a privative clause, (2) the statutory purpose,<sup>105</sup> (3) the administrator's relative expertise, and (4) the nature of the question before the administrator.<sup>106</sup> No single factor was dispositive. Although courts tried to assess the cumulative weight of the *content* of the various factors, there was no clear set of priorities as between the factors themselves.<sup>107</sup> As one commentator said about a 2003 decision, "[w]e know the various considerations identified by the court with respect to each of the four factors, and the outcome, but we don't know the weight applied to each of the factors."<sup>108</sup>

The Court tried to guide and simplify this analysis in *Dunsmuir*. The main majority reaffirmed a "policy of deference" that required:

...respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.<sup>109</sup>

Then *Dunsmuir* encouraged reviewing courts to avoid a contextual factor analysis wherever the relevant standard had been established "in a satisfactory manner" by precedent.<sup>110</sup> For other situations, *Dunsmuir* kept the four *Pushpanathan* contextual factors,<sup>111</sup> but related them to a number of general propositions relating to the nature of the question before the

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decision. But doesn't the retention of the reasonableness ground require some parties to accept some *incorrect* decisions?

<sup>104</sup> *Supra* note 76, at paras. 29-38.

<sup>105</sup> For example, whether the statute conferred a broad discretion to balance policy considerations or prescribed a more confined power to determine rights between two parties.

<sup>106</sup> Usually, whether the question was one of fact, law, or mixed fact and law.

<sup>107</sup> Expertise was sometimes described as the most important factor, but the rationale and implications of this description were left unclear.

<sup>108</sup> David P. Jones, "Recent Developments in Administrative Law" in *Pushing the Boundaries: Standing, Privacy and Practical Issues: Proceedings of the National Administrative Law and Labour & Employment Law CLE Conference*, Ottawa, 2003 (Ottawa: Canadian Bar Association, 2003) at 7, cited in Deborah K. Lovett, "That Enigmatic Curial Deference and the Continuing and Most Curious Search for Legislative Intent – What to Do, What to Do?" (2004) 17 Can. J. Admin. L. & Prac. 207 at 218.

<sup>109</sup> *Supra* note 4 at para. 49; reaffirmed in *Khosa*, *supra* note 2 at para. 25 by Binnie J.

<sup>110</sup> *Ibid.* at paras. 57, 62.

<sup>111</sup> *Ibid.* at para. 64.



administrator.<sup>112</sup> Some questions, such as constitutional questions, “true” and boundary line jurisdictional questions<sup>113</sup> and “general questions of law,”<sup>114</sup> were removed from the full factor weighing process, and were apparently automatically subject to the correctness standard. The rationale for this appears to be the view that courts have a special role in regard to these questions.<sup>115</sup>

Thus, other questions of law give rise to a presumption in favour of correctness that can be rebutted if a tribunal is interpreting its own enabling statute or if it has special expertise in applying a common law or civil law rule to a specific statutory context.<sup>116</sup> Questions of fact, policy, or discretion create a strong but rebuttable presumption in favour of the more deferential reasonableness standard.<sup>117</sup> The rationale is presumably that administrators are assumed to have, or to have access to, special expertise in these areas.<sup>118</sup> As well, these subject matter presumptions can be confirmed or negated if they are outweighed by other contextual factors.<sup>119</sup>

*Dunsmuir’s* categorical approach may look relatively simple at first, but the package as a whole is uncertain. For one thing, it is unclear where the full package applies. *Dunsmuir* included legislative provisions such as privative clauses in its standard of review analysis. However, it failed to say when or

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<sup>112</sup> In *Khosa*, *supra* note 2 at para. 4, Binnie J. said that *Dunsmuir* contextual review is “particularly” concerned with the nature of the issue before the administrator.

<sup>113</sup> In *Dunsmuir*, *supra* note 4 at paras. 59 and 61, a “true” jurisdictional question was described as one that arises “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.” *Quaere*, where do these situations arise? More recently, in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 34, 309 D.L.R. (4th) 513 [*Nolan*], the Supreme Court described this kind of question as one that raises “a broad question of the tribunal’s authority”. *Quaere*, must all specific questions of authority be considered to fall within a tribunal’s jurisdiction?

<sup>114</sup> *Ibid.* at para. 60.

<sup>115</sup> See e.g. *ibid.* at paras. 58, 60-61 where the Court referred to the special status of s. 96 [of the *Constitution*] courts with regard to constitutional questions; to the requirements of consistency and uniformity in regard to general questions of law; and, perhaps implicitly, with regard to boundary jurisdictional questions between competing tribunals.

<sup>116</sup> *Dunsmuir*, *ibid.* at para. 55.

<sup>117</sup> *Ibid.* at para. 53.

<sup>118</sup> *Dunsmuir*, *ibid.* did not say this expressly, but in *Khosa*, *supra* note 2 at paras. 58, 89 respectively, Binnie J. and Rothstein J. noted that administrative tribunals are better situated than reviewing courts to make findings of fact. Rothstein J. compared these tribunals to courts of first instance, while Binnie J. referred to the IAD’s “advantage of conducting the hearings and assessing the evidence presented”. For Rothstein J., the situational advantage extends to questions of policy as well. This situational advantage of tribunals could also be seen as an aspect of the different roles of tribunals and courts.

<sup>119</sup> *Dunsmuir*, *ibid.* at para. 56, where the Court said that the question is whether the factors, “considered together, point to a standard of reasonableness” [emphasis added].

whether statutory review codifications could exclude common law standard of review analysis at the outset. *Dunsmuir* directed reviewing courts to dispense with its full contextual factor analysis where they find that the deference level has already been established “in a satisfactory manner” in earlier case law.<sup>120</sup> But how can they do this without comparing the contextual factors in earlier case law with those in the case before them?

As in *Pushpanathan*,<sup>121</sup> it is hard to find an overall ordering principle. Deference policy appears to have three potentially distinct foundations—legislative choices, expertise, and the special role of the judiciary—and it is not always clear how the three interrelate. Although *Dunsmuir* endorsed the four sets of *Pushpanathan* contextual factors,<sup>122</sup> it withdrew several categories of question from the full factor weighing process. Why should some questions of law always require correctness, while other categories or factors merely raise a rebuttable presumption in favour of one standard or another? Is context sometimes relevant and sometimes not?<sup>123</sup> Although some *Dunsmuir* presumptions can be rebutted, it is sometimes unclear how. What, for example, is meant by the statement that deference will “usually apply automatically” to discretion, fact, or policy?<sup>124</sup> Although *Dunsmuir* seemed to put considerable weight on the nature of the question before the administrator,<sup>125</sup> it also said

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<sup>120</sup> *Ibid.* at para. 62.

<sup>121</sup> See *supra* notes 76, 107.

<sup>122</sup> *Dunsmuir*, *supra* note 4 at para. 64.

<sup>123</sup> Why, for example, should “true” jurisdictional questions and division of powers and *Charter* questions be immune from contextual analysis as suggested in *Dunsmuir*, *ibid.* at paras. 58-59, 61? In *Pushpanathan*, *supra* note 76 at para. 28, the Court suggested that jurisdictional questions are simply those to which the correctness standard applies as a result of contextual factor analysis. In other words, they are a product of contextual analysis. In *Dunsmuir*, at paras. 59, 61, however, where the main majority discussed “true” and boundary line jurisdictional questions, they seemed to assume that these questions can be identified on an *a priori* basis. This attracted indirect criticism in *Canadian Federal Pilots Assn. v. Canada (Attorney General)*, 2009 FCA 223 at paras. 36-52 [*Canadian Pilots*]. There, Evans J.A. said jurisdictional issues, other than those that draw lines between competing administrative regimes, should not be designated abstractly and independently of contextual analysis as criteria for correctness. Assuming, though, that these jurisdictional questions can be identified *a priori* (by express statutory language, perhaps?), do they necessarily require correctness review? The main majority in *Dunsmuir* put jurisdictional and constitutional questions at the centre of the guaranteed core of judicial review, but must the constitutionally guaranteed core always entail correctness review? Similarly, why shouldn’t courts be able to look at the context of constitutional questions to see if a lower standard is appropriate in special situations? In one post-*Dunsmuir* decision, *Lake*, *supra* note 42, the Supreme Court seems to have pulled back from the blanket correctness approach. It subjected a constitutional question to contextual analysis, and concluded that the standard appropriate to that case was unreasonableness.

<sup>124</sup> *Supra* note 4 at para. 53.

<sup>125</sup> *Supra* note 112.

that a privative clause is a “strong indication” that reasonableness was intended.<sup>126</sup> If so, how should a privative clause be weighed against the nature of the question and against expertise? Which should prevail where, and why?

With all this uncertainty, it is not surprising that the main majority in *Khosa* had trouble relating the common law *Dunsmuir* analysis clearly to s. 18.1(4) of the *Federal Courts Act*. Until the uncertainty is reduced, lower courts are likely to have similar trouble—with s. 18.1(4),<sup>127</sup> with other statutory review codifications such the British Columbia *ATA*,<sup>128</sup> and with statutory texts in general.<sup>129</sup>

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<sup>126</sup> *Supra* note 4 at para. 52. See also *Khosa*, *supra* note 2 at para. 55 where Binnie J. said merely that a statutory appeal “may be at ease with [judicial intervention], depending on its terms.” He did not address the effect of a broad statutory appeal to the courts, which has been described as a factor that points to a “more searching standard of review”: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 27, referring to *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 46. In *Dunsmuir* at para. 130, Binnie, J. said that a full statutory appeal is an indication that the correctness standard was intended.

<sup>127</sup> Since *Khosa*, *supra* note 2, for example, the Federal Court has arrived at a wide variety of conclusions as to the standard now required by s. 18(4)(d), with little discussion as to how these results derive from the application of common law principles to the statutory text. For variations, see *Odetoyinbo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at para. 3 (the text’s capriciousness/lack of regard for evidence requirements plus *Dunsmuir*’s “range of outcomes” and justification tests); *Espinoza v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 806 at para. 31 (the text’s lack of regard for evidence requirement plus *Dunsmuir*’s “range of outcomes” test. After referring at the outset to the lack of regard textual test and to the range of outcomes common law test, and after considering the Board’s consideration of the evidence, Frenette D.J. concluded at para. 31 that “[a]n analysis of the Board’s decision leads to the conclusion that it considered adequately the issue of state protection and particularly the issue of an IFA and concluded the applicants had a viable, acceptable IFA by moving to the city of Guadalajara, Mexico. Finally the impugned decision falls well within the range of acceptable outcomes that flow from the facts and the law.”); *Canada (Minister of Public Safety and Emergency Preparedness) v. Iyile*, 2009 FC 700 at para. 33 (reasonableness with “a high degree of deference”); *Shaath v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 731 at para. 39 (*Dunsmuir*’s “range of outcomes” test). The Federal Court of Appeal (FCA) has addressed another provision of the federal code, s. 18(4)(c). In *Canadian Pilots*, *supra* note 123 at paras. 37–52, the FCA attempted to relate this provision directly and systematically to *Dunsmuir*’s contextual analysis. Its efforts were complicated by *Dunsmuir*’s concept of “true questions of jurisdiction or vires”: *supra* note 4 at para. 59. At para. 37, the FCA said this concept is “apt to cause confusion” if it is identified as a correctness criterion independently of contextual review analysis. At para. 51, it described jurisdiction in this sense as “legal authority to interpret and apply the disputed provision of ‘the tribunal’s enabling legislation’”. Does this beg the question as to the scope of the relevant provision, and as to whether legal authority means unreviewable legal authority?

<sup>128</sup> Before *Khosa*, *supra* note 2, the British Columbia Court of Appeal (BCCA) said that *Dunsmuir*, *supra* note 4 did not change the meaning of the *ATA*, *supra* note 20: *Manz v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2009 BCCA 92 at para. 36, 91 B.C.L.R. (4th) 219 [Manz]. A month after *Khosa*, the BCCA said that *Dunsmuir* “has not altered the express words of s. 59(3) of the [ATA]”: *Carter v. Travelex Canada Ltd.*, 2009 BCCA 180 at para. 27, 310 D.L.R.

## VII. FOCUSING THE SEARCH

How, then, should legislative intent be determined? First, reviewing courts need to keep the broad contextual base that has been a key strength of modern substantive review. Statutory texts are rarely unambiguous, and should not be interpreted in a vacuum. Without the most explicit authorization, codes should not be able to prevent a consideration of relevant common law review

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(4th) 39 [emphasis added]. A month later, the BCCA said that “*Khosa*...directs an interpretation of the [ATA]’s statutory criteria in the context of the principles of administrative law”: *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229 at para. 8, 310 D.L.R. (4th) 367 [Victoria]. Although the BCCA stressed that patent unreasonableness requires deference “at the high end of the *Dunsmuir-Khosa* range”, it seemed to move away from *Manz*’s “no evidence” or “openly, clearly, evidently unreasonable” requirement for fact toward *Dunsmuir* reasonableness criteria, including the “range of outcomes test”: *Victoria* at para. 10. The situation under the ATA is complicated by the fact that that for a discretionary decision, ss. 58-59 prescribe the patent unreasonableness standard and specify its content, but for a finding of fact or law protected by a privative provision, s. 58 prescribes the patent unreasonableness standard without specifying its content: see generally Robin Junger, “British Columbia’s Experience with the *Administrative Tribunals Act*”, (2008) 21 Can. J. Admin. L. & Prac. 51 at 60-65. Thus far, there has not been much direction as to the extent to which common law should affect the statutory patent unreasonableness ground, either where the ATA specifies and defines patent unreasonableness, or where the ATA merely specifies it.

<sup>129</sup> The Supreme Court did not provide much more direction in two post-*Khosa* decisions. *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 involved appeals on “any question of law or of jurisdiction” under s. 64(1) of the *Telecommunications Act*, S.C. 1993, c. 38. The issue was whether the Canadian Radio-television and Telecommunications Commission (CRTC) had authority to order the disbursement of funds from deferral accounts for particular purposes. Before addressing this, the Court decided on the reasonableness standard. At paras. 34-48, it said that the CRTC orders were 1) specific, rather than an exercise of general disbursement authority (*cf.* the description of jurisdiction in *Nolan*, *supra* note 113); 2) part of the CRTC’s rate-setting power; 3) within the CRTC’s specialized expertise; and 4) polycentric and discretionary. At para. 37, it noted that CRTC decisions on questions of fact are protected from appeal by a “strong privative clause”. However, if the issue was one of fact, why was it relevant to consider the appeal on law or jurisdiction? Conversely, if the appeal provision did apply here, why was it not cited as a factor to be weighed against the others? Also what weight should it merit? In *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54 at para. 34, the court addressed the standard of review issue in a single sentence: “The decision of the CRT [the Commission des relations du travail] on the proper interpretation of a provision of its constituent statute is entitled to a measure of deference and should be reviewed by the courts on a reasonableness standard.” The judgment did not indicate why this factor was decisive, or relate it to other relevant considerations, such as the general scope and nature of the CRT’s statutory mandate, the privative clause, and the question of the specificity or generality of the relevant question of law. See also *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 at paras. 30-36, where the court noted the presence of a statutory discretion, observed that it served the practical requirements of the statutory scheme, and treated these considerations as conclusive support for the reasonableness standard.

principles. Standard of review analysis should not be limited to situations involving strong privative clauses,<sup>130</sup> as this would narrow both the contextual base of review and legislators' options for influencing review intensity. Similarly, there should be no automatic exemptions from the common law's contextual factor weighing process,<sup>131</sup> except to preserve a guaranteed core of judicial review. Second, reviewing courts need a unified priority approach to common law standard of review analysis. It is not enough to weigh the content of various factors without regard to possible priority differences between the factors themselves. Nor is it enough to assign some priorities, as was done in *Dunsmuir*, if these are piecemeal and disconnected. Third, in standard of review analysis, there should be more recognition of the legislative role in the balance between the rule of law and the democratic principle. Standard of review should be linked more coherently to legislative intent.

Arguably, these needs could be addressed by two main measures. In the first place, courts should apply a strong presumption in favour of common law contextual review in the face of review codes and similar statutory review provisions. Only the most express statutory language should be able to exclude it.<sup>132</sup> Then, within contextual review, the *Dunsmuir* contextual factors themselves should be ordered in relation to their apparent proximity to legislative intent. In this way, the factor weighing process could take account of the structure of the contextual factors as well as their content. The first measure would help preserve the broad contextual base of modern common law review; the second would help sharpen its focus and deepen its reach. In this latter respect, legislative proximity criteria could help courts to take account of both the content *and* the relative status of contextual factors.

Assuming that common law contextual review has not been excluded by express statutory language, reviewing courts should be able to rely on a number of simple structural criteria to help them weigh contextual factors in terms of their proximity to legislative intent. The most important proximity criterion should be the legislation itself. Statutory texts have the approval, however nominal at times, of our elected representatives. The same cannot be said for contextual signals such as apparent relative expertise. On the other hand, because statutory texts are rarely unequivocal, they should virtually always be supplemented by a look at their context.

Another key proximity criterion should be the directness of the legislative provision. For standard of review purposes, legislative intent is a *relational* concept. Its concern is the relevant level of judicial review. A legislative

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<sup>130</sup> As suggested by Rothstein J. in *Khosa*, *supra* note 2.

<sup>131</sup> As suggested in *Dunsmuir*, *supra* note 4.

<sup>132</sup> Even this, of course, should be subject to the constitutional bar against excluding a minimal core of review referred to in *Dunsmuir*, *supra* note 4 at paras. 29-31.

provision that has the purpose of regulating the intensity of judicial review is a stronger indicator of intent than a legislative provision that merely has the effect of doing this. A legislative codification of grounds of review would fall in the first group. So, too, would a privative clause.<sup>133</sup> A grant of discretionary power to the administrator would fall into the second group. It would have the effect—but not necessarily the purpose—of restricting the intensity of review. Subject to these two main organizing concepts of legislative status and directness, more specific and more recent signals of intent should carry more weight than those that are more general, imprecise, or older.<sup>134</sup>

Applying these proximity criteria, it is possible to assign tentative priorities to the *Dunsmuir* and other relevant contextual factors for determining the intensity of judicial review. Included in the top priority level are direct legislative signals such as legislative codifications of grounds of review, appeal provisions, and privative clauses that are intended to enhance, restrict, or otherwise regulate the intensity of judicial review. In the middle priority level are indirect legislative signals such as grants of statutory discretion<sup>135</sup> and (rare) cases of jurisdiction-limiting language. By expanding or restricting administrative power, these provisions have the converse effect of restricting or expanding the potential intensity of judicial review. In the lower priority level are auxiliary signals—legislative provisions and non-textual

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<sup>133</sup> Privative clauses tend to be less direct than judicial review codifications and statutory appeal provisions. This is because most privative clauses purport to affect review intensity only in negative terms, by restricting its availability. Read literally, many privative clauses might be construed as unconstitutional attempts to block judicial review, including jurisdictional review: see *supra* notes 93, 94, and 123. Instead of doing this, courts tend to interpret all but the most extreme privative clauses as evidence of a legislative intent to lower, rather than exclude, judicial review. However, by according no special priority to privative clauses, especially those that fail to qualify as “strong,” courts encourage legislators to continue to frame privative clauses in broad exclusionary language. By giving a general presumptive priority to privative clauses and other textual provisions, courts could help encourage less sweeping privative language on the part of legislators.

<sup>134</sup> For example, a highly specialized tribunal interpreting its enabling statute should have priority over more general indicators, such as the assumption that courts have more expertise in deciding questions of law, the assumption that administrators are better placed than judges to decide questions of fact because they can hear evidence at first hand, and inferences that are derived from an examination of statutory purpose. Note that there may be more than one criterion of specificity or currency. For example, although a statutory review code normally affects more administrators than does a privative clause, its provisions may be more specific in indicating the level of review that should apply. Moreover, directness, specificity, and currency are questions of degree, so the assessment of proximity criteria must be a cumulative weighing process, not a simple list of either-or allocations.

<sup>135</sup> This factor and factors such as the presence of polycentric or bipolar issues are sometimes regarded as indicators of statutory purpose, which is treated as a separate factor. Arguably, though, the purpose of the statute is really an aspect rather than a determinant of legislative intent.

factors that support inferences in favour of lower or higher levels of judicial review intensity. These include administrative or judicial expertise, formal qualifications, capacity to address polycentric or bipolar issues, the need for legal consistency or uniformity, and other functional considerations, whether referred to in legislation or inferred from the context of a particular administrative decision.

Higher level signals such as privative clauses should normally give rise to a strong presumption in favour of lower intensity review, and *vice versa*. Such a presumption should be rebuttable by lower level signals, but only where their cumulative content weight is very significant. The stronger the presumption, the greater the contrary weight that would be needed to rebut it. In the case of the strongest presumptions, the statutory ground or standard would normally prevail, leaving common law signals with the secondary task of clarifying any ambiguities.<sup>136</sup> All these signals, of course, would be subject to the core of judicial review that is guaranteed by the rule of law and to other relevant constitutional constraints.

The framework suggested here is not an analytical shortcut or a guarantee of predictable results, but a means of structuring the search for legislative intent.<sup>137</sup> It is meant to refine, rather than replace, the Supreme Court's general "modern" approach to statutory interpretation on the specific question of determining the intensity of judicial review.<sup>138</sup> The suggested approach can draw on traditional presumptions of statutory interpretation where these

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<sup>136</sup> For example, s. 18.1(4)(d) of the *Federal Courts Act*, *supra* note 3, is the kind of direct legislative signal that would normally create a very strong presumption in favour of both a low level of review, and of its own specific deferential criteria. In the absence of strong contrary signals or of questions about the application of these criteria to a particular fact situation, the statutory wording would prevail: see text accompanying *infra* note 143.

<sup>137</sup> Because context is a comprehensive, but situation-specific concept, it is hard to shorten contextual analysis by referring courts to precedent, to simplify it by removing key questions or contextual factors, or to standardize its outcomes. As suggested here, though, there is another alternative available.

<sup>138</sup> The "modern" approach, which has been repeatedly endorsed (if not uniformly interpreted) by the Supreme Court, is based on the following passage from E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See *R. v. Middleton*, 2009 SCC 21 at para. 78, [2009] 1 S.C.R. 674; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at paras 55-56, [2007] 2 S.C.R. 610; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 95-96, [2005] 1 S.C.R. 533; *Marche v. Halifax Insurance Co.*, 2005 SCC 6 at para. 54, [2005] 1 S.C.R. 47; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para. 154, [2002] 4 S.C.R. 45. Driedger's formula is very general. It provides a broad starting point for a more specific approach directed at the question of standard of review by beginning with statutory wording and stressing context.

seem helpful. It is *not* a single-solution or text-limited approach. Privative clauses and legislative codifications must share the stage with other less direct indicators of statutory intent, unless they exclude them beyond doubt. Indirect and even direct legislative signals can be outweighed by auxiliary signals where the latter are especially strong. This is only a tentative framework that will need elaboration or modification as circumstances require.<sup>139</sup> On the other hand, by relating the standard of review to legislative intent on a non-exclusionary but prioritized and coherent basis, this approach may help to supply the link to legislative intent that was missing in *Pushpanathan*, *Dunsmuir*, and the two majority judgments in *Khosa*.

It might be helpful to show how this approach could help to guide review analysis in a situation like the one in *Khosa*. Section 18.1(4) of the *Federal Courts Act* is a relatively comprehensive code, applicable to virtually all federal tribunals. However, if s. 18.1(4)(d) appears to occupy the standard of review field, it does not do so exclusively. It does not define its criteria, and nowhere does it expressly oust common law review principles. Hence s. 18.1(4)(d) should be capable of clarification, even modification, as a result of common law standard of review analysis. On the other hand, s. 18.1(4)(d) seeks to regulate the intensity of review in regard to matters of fact. It, then, is a direct legislative signal that deserves top priority. Arguably, so too is s. 162(1) of the *IRPA*. Whether or not it is a strong privative clause, its intent seems to be to restrict judicial review.<sup>140</sup>

Therefore, the starting point for judicial review should be whether the decision of the IAD was based “on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”<sup>141</sup> Although they are not legislatively defined, these terms are detailed and stringent. S. 162(1) of the *IRPA* suggests that they should be strictly construed. Hence, an opposite view would require strong contrary cumulative evidence

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<sup>139</sup> For example, as suggested in *supra* notes 94 and 123, considerable work is still needed to clarify the basis and the content of the guaranteed minimum content of judicial review. This will require a clearer exposition of the central, but often troublesome concept of jurisdiction. As well, the framework suggested here focuses on substantive review. Changes would be needed to accommodate some of the special features of procedural review, especially those that involve a claimed opportunity to be heard.

<sup>140</sup> Arguably, “sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction” (s. 162(1) of the *IRPA*, *supra* note 6) is strong language. It goes beyond what would be needed if the provision were intended only to allocate administrative responsibility as between the divisions of the Board. This allocation of interdivisional responsibility is addressed by other provisions of the *IRPA*. Hence s. 161(2) must have been intended to restrict judicial review. See also s. 72(1) of the *IRPA*. This provision requires leave of the Federal Court in order to commence review of decisions made under the *IRPA*.

<sup>141</sup> *Federal Courts Act*, *supra* note 3.



from the other *Dunsmuir* factors. However, as Binnie J. noted in *Khosa*, the other *Dunsmuir* factors also tend to point to deference.<sup>142</sup> For example, the broad humanitarian grounds discretion in s. 67(1)(c) and the IAD's expertise in regard to factual matters under this provision *reinforce* the deferential wording of s. 18.1(4)(d). Giving priority to s. 18.1(4)(d), and reading it in light of the privative clause and the other *Dunsmuir* factors, a judge would set aside an erroneous factual decision of the IAD only if it were clearly perverse, capricious, or made without regard for the material.<sup>143</sup>

If *Khosa* had involved a question of law, s. 18.1(4)(c) would have given rise to a presumption in favour of the correctness standard. As s. 18.1(4)(c) is less detailed than s. 18.1(4)(d), it should be even more open to common law supplementation. Section 18.1(4)(c) would be modified by the privative clause in s. 162(1) of the *IRPA* and by the discretionary and expertise factors from the *Dunsmuir* analysis. These, in turn, might be considered sufficient to rebut the correctness presumption and to lower the standard of review to reasonableness. Alternatively, if *Khosa* had involved a question of law, but no privative clause, factors such as discretion and expertise should still be relevant. However, in this situation, a judge would have to conclude that they were extremely important in order to justify outweighing the direct regulatory signal that favours correctness.

Finally, imagine that the facts in *Khosa* were subject to the British Columbia *ATA*<sup>144</sup> and not to s. 18.1(4) of the *Federal Courts Act*.<sup>145</sup> The *ATA* does not expressly exclude the common law, but it contains a very direct and specific legislative signal to apply the patent unreasonableness standard of review prescribed in its ss. 58(2)(a), 58(3), 59(3), and 59(4). Thus, although the common law has moved on since the creation of the *ATA*, it would require exceptional contextual evidence to the contrary to modify the meaning of these

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<sup>142</sup> *Supra* note 2 at paras. 54-58. The general objectives of the *IRPA*, *supra* note 6 seem mixed on this question. On one hand, they refer to a need to respect for the multicultural character of Canada and "to promote the successful integration of permanent residents into...Canadian society": ss. 3(1)(b), (e). As well, the fact that s. 174 makes the IAD a court of record may suggest a legislative recognition of the serious potential impact of its decisions on the rights and interests of the individuals before it. On the other hand, the general objectives also note that "integration...involves mutual obligations for new immigrants and Canadian society," and they refer to a need to protect the health and safety of Canadians: ss. 3(1)(e), (h).

<sup>143</sup> At this point, any further common law analysis would be limited to clarifying the application of these terms to particular circumstances. The approach proposed here reaches a destination similar to that of Rothstein J. in *Khosa*, *supra* note 2 at para. 137, but with the benefit of a broad yet directed contextual analysis. See also the approach in *Stelco*, *supra* note 54, which has some broad similarities to the one suggested here.

<sup>144</sup> *Supra* note 20.

<sup>145</sup> *Supra* note 3.

provisions. Otherwise, this explicit and specific legislative choice should be respected unless and until the legislature changes it.<sup>146</sup>

Clearly, judges could disagree on all these points in *Khosa* and in other standard of review decisions. The approach suggested here will not bring the polar star into full focus, but it should help to focus the search!

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<sup>146</sup> Thus, courts should normally assess discretionary decisions under ss. 58 and 59 of the *ATA*, *ibid.* according to the patent unreasonableness criteria that are provided expressly in ss. 58(3) and 59(4). In contrast, the *ATA* expressly stipulates that findings of fact or law under s.58 are to be assessed according to the patent unreasonableness standard, but it provides no criteria for this standard: see *supra* note 128. Accordingly, courts should normally assess these findings according to the common law patent unreasonableness standard that was in place prior to *Dunsmuir*, *supra* note 4.

# Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada

G R A H A M   R E Y N O L D S   \*

## INTRODUCTION

The creation and distribution of parodies promote the fundamental values underlying the constitutionally protected right to freedom of expression. Through parodies, individuals can progress in their “search for political, artistic and scientific truth”, protect their autonomy and self-development, and promote “public participation in the democratic process”.<sup>1</sup> Recognizing the importance of parody to political, social, and cultural life, governments in various jurisdictions have adopted or proposed parody defences to copyright infringement.<sup>2</sup> The Canadian *Copyright Act*,<sup>3</sup>

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<sup>1</sup> See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 72.

<sup>2</sup> In Australia, the *Copyright Act 1968* (Cth.) was amended in 2006 to include a provision for fair dealing for the purpose of parody or satire. Section 41A states that “[a] fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire”. Parodies are also permitted under Brazilian copyright law, though, as noted in Pedro Nicoletti Mizukami *et al.*, “Exceptions and Limitations to Copyright in Brazil: A Call for Reform” in Lea Shaver, ed., *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (New Haven: Information Society Project, 2008) 67 at 85, the law “severely restricts the range of legal parody.” In the EU, the EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] O.J. L 167/10 at 17, art. 5(3)(k) states that Member States may permit the use of copyright-protected works “for the purpose of caricature, parody or pastiche”. EU Member States that have adopted Article 5(3)(k) into their copyright legislation include Spain: see *Copyright, Law (Consolidation)*, 12/04/1996 (06/03/1998), No. 1 (No. 5); France: see *Loi No 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle*, J.O., 3 July 1992, 8801, art. L. 122-5(4); and the Netherlands: see *Copyright Act 1912*, art. 18b. Both the United

however, does not contain an explicit parody defence to copyright infringement. Furthermore, no Canadian court has accepted a defence of parody to a claim of copyright infringement.<sup>4</sup>

Some commentators have argued that the fair dealing defence, set out in sections 29-29.2 of the Canadian *Copyright Act*, can be interpreted in such a manner as to provide protection for parody.<sup>5</sup> The fair dealing defence states that works containing a substantial amount of copyright-protected material and created without the consent of the copyright owner will not infringe copyright if they have been created for the purpose of research, private study, criticism, review, or news reporting; if the copyright-protected work has been dealt with "fairly"; and if certain attribution criteria are satisfied.<sup>6</sup> Commentators who take the position that the fair dealing defence likely provides protection for parody maintain that the fair dealing category of criticism is broad enough to encompass parody.<sup>7</sup>

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Kingdom and New Zealand have proposed the adoption of a parody defence to copyright infringement. In Andrew Gowers, *Gowers Review of Intellectual Property* (London: HM Treasury, 2006) at 6, the author recommended the creation of an "exception to copyright infringement for the purpose of caricature, parody or pastiche" for the United Kingdom. In 2008, the New Zealand Government announced "the commencement of a review on whether there should be a copyright exception for the purpose of parody and satire": See "Parody and satire copyright exception to be considered", online: Copyright Council of New Zealand <<http://www.copyright.org.nz/viewNews.php?news=488>>. In the U.S., the Supreme Court in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994) [Campbell], suggests that parodies may be protected under the doctrine of fair use.

<sup>3</sup> *Copyright Act*, RSC 1985, c. C-42.

<sup>4</sup> See e.g. *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996), 71 C.P.R. (3d) 348 [Michelin]. The argument that the fair dealing category of criticism encompasses parody was rejected by Teitelbaum J.

<sup>5</sup> See Emir Aly Crowne Mohammed, "Parody as fair dealing in Canada: a guide for lawyers and judges", (2009) 4 *Journal of Intellectual Property Law & Practice* 468 at 468. The author argues that "the Supreme Court's decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* should signal an acceptance of parody as a statutorily valid form of criticism under the fair dealing provisions of the Act". See also Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K Fair Dealing and U.S. Fair Use" (2008) 53 *McGill L.J.* 309 at 338. The author suggests that *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH et al.*] "arguably has expanded the allowable purposes enough to render possible the future inclusion of a parody right".

<sup>6</sup> Attribution is only necessary with respect to works created for the purpose of criticism, review or news reporting. See *Copyright Act*, supra note 2, ss. 29-29.2.

<sup>7</sup> See D'Agostino, supra note 5 at 359; Mohammed, supra note 5 at 468; James Zegers, "Parody and Fair Use in Canada After *Campbell v. Acuff-Rose*" (1994) 11 *C.I.P.R.* 205 at 209. See also, *CCH et al.*, supra note 5 at para. 51 in which McLachlin C.J., held that the fair dealing categories must be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained"; See also, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 at para 48. Binnie J. stated for the court that "the law must accommodate

The argument that the fair dealing category of criticism encompasses parody, however, is based on the assumption that parodies are necessarily critical.<sup>8</sup> This article will challenge this assumption. Although parody is popularly conceived of as “a specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous”,<sup>9</sup> this conception is not definitive. Other conceptions of parody exist. Some have adopted the view that the object of criticism can be something other than the work being parodied. Others do not insist upon criticism at all.

This article takes the position that given the importance of parody to Canadian society, the Government of Canada should create a parody defence to copyright infringement. This defence, however, should not be embedded within the fair dealing category of criticism. Incorporating the parody defence within the fair dealing category of criticism would result in the protection of a restrictive, limited conception of parody. Under this approach, only critical parodies will be protected from a claim of copyright infringement. Non-critical parodies will be denied protection.

Rather than protecting parody within the fair dealing category of criticism, this article argues for the creation of a separate parody defence, capable of encompassing all of the various conceptions of parody. This defence could be incorporated within fair dealing as a new category.<sup>10</sup> Incorporating the parody defence within the fair dealing defence would help ensure that any encroachment on the rights of copyright owners due to the creation of this new user’s right will be limited to situations which are “fair”.

This article will proceed in three parts. First, it will introduce parody, describing its various conceptions and discussing its importance to Canadian society. Second, it will describe the historical treatment of parody in Canadian

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commentators such as the satirist or the cartoonist who...exercise a democratic right to poke fun at those who huff and puff in the public arena”.

<sup>8</sup> See Mohammed, *supra* note 5 at 468 where the author states that the “central feature of any parody is the use of humour or ridicule to point out some particular feature or ‘peculiarity’ of the original work. A parody, whether for humour or ridicule, is therefore inherently critical in nature. If so, it is clearly a form of ‘criticism’ under the Act if one accepts that there is no parody that does not (implicitly or explicitly) criticize the underlying work, or some feature(s) of it”. Also, Zegers, *supra* note 7 at 209 states that “parody is, by definition, a form of criticism”.

<sup>9</sup> Ellen Gredley & Spyros Maniatis, “Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright” (1997) 19 Eur. I.P. Rev. 339 at 341.

<sup>10</sup> See Howard Knopf, “The Copyright Clearance Culture and Canadian Documentaries”, online: Moffat & Co., Macera & Jarzyna LLP <[http://www.macerajarzyna.com/pages/publications/HPK\\_white\\_paper.pdf](http://www.macerajarzyna.com/pages/publications/HPK_white_paper.pdf)> at 3. Knopf suggests that “explicit provision should be made for fair dealing for the purpose of satire and parody”.

copyright jurisprudence and analyze whether contemporary Canadian courts are likely to find that parodies infringe copyright. Third, this article will discuss the creation of a parody defence to copyright infringement.

## PART I : INTRODUCTION TO PARODY

### A. Defining parody

Parody, a term derived from the Greek word "*parodia* (παρωδία)", has an ancient heritage.<sup>11</sup> The first reference to *parodia* is found in Aristotle's *Poetics*,<sup>12</sup> where the term was used to refer to a "narrative poem, of moderate length, in the metre and vocabulary of epic poems, but treating a light, satirical, or mock-heroic subject".<sup>13</sup> Over time, the meaning of parody changed. Later Greek and Roman writers used the term parody "to refer to a more widespread practice of quotation, not necessarily humorous, in which both writers and speakers introduce allusions to previous texts".<sup>14</sup>

The struggle to define parody was not resolved by the Greeks or the Romans. Even today, "the discussion of parody is bedevilled by disputes over definition".<sup>15</sup> As Simon Dentith states,

because of the antiquity of the word parody (it is one of the small but important group of literary-critical terms to have descended from the ancient Greeks), because of the range of different practices to which it alludes, and because of differing national usages, no classification can ever hope to be securely held in place.<sup>16</sup>

Margaret A. Rose, in her book *Parody: Ancient, Modern, and Post-Modern*, identifies thirty-seven conceptions of parody, crafted by authors such as Aristotle, Ben Jonson, Friedrich Nietzsche, Mikhail Bakhtin, Susan Sontag, Michel Foucault, Jacques Derrida, Martin Amis, and Umberto Eco.<sup>17</sup>

These conceptions of parody can be divided into various groups. The "popular perception of parody and the standard dictionary definition" conceives of parody as a "specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous".<sup>18</sup> This conception, which has been referred to as a

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<sup>11</sup> Margaret A. Rose, *Parody: Ancient, Modern, and Post-Modern* (New York: Cambridge University Press, 1993), at 5.

<sup>12</sup> Simon Dentith, *Parody* (New York: Routledge, 2000) at 10.

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

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

<sup>15</sup> *Ibid.*

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

<sup>17</sup> *Supra*, note 11 at 280-283.

<sup>18</sup> Gredley & Maniatis, *supra* note 9 at 341.

“target”<sup>19</sup> parody, has been frequently cited by courts in Canada and the United States as the definition of parody.<sup>20</sup>

Some conceptions of parody, however, do not insist upon the critique being performed at the “expense of the parodied text.”<sup>21</sup> Instead, the parodist can use the parodied text to critique something other than the work itself. Parodies that “involve the use of [a] text to comment upon something quite different,” such as “artistic traditions, styles...genres” or society, have been referred to as “weapon”<sup>22</sup> parodies.

Lastly, many definitions of parody do not insist upon criticism at all. Margaret A. Rose defines parody as the “comic refunctioning of performed linguistic or artistic material.”<sup>23</sup> Tracing the history of parody, Rose notes that the “comic” side of parody has been a characteristic of the form since its earliest introduction in ancient Greece:

The majority of works to which words for parody are attached by the ancients, and which are still known to us in whole or in part, suggest that parody was understood as being humorous in the sense of producing effects characteristic of the comic, and that if aspects of ridicule or mockery were present these were additional to its other functions and were co-existent with the parody’s ambivalent renewal of its target or targets.<sup>24</sup>

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<sup>19</sup> Michael Spence, “Intellectual Property and the Problem of Parody” (1998) 114 Law Q. Rev. 594 at 594.

<sup>20</sup> See *Michelin*, *supra* note 4. Teitelbaum J. adopts the definition of parody set out in *The Collins Dictionary of the English Language*, 2d ed., s.v. “parody” where parody is defined as “a musical, literary or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way”. In *Productions Avanti Ciné-Vidéo Inc. c. Favreau* (1999), 177 D.L.R. (4<sup>th</sup>) 129 leave to appeal to S.C.C. refused, 27527 (May 25, 2000) at para. 10 Rothman J. defines parody as “normally [involving] the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment”. In *Rogers v. Koons*, 960 F. 2d 301 (2d. Cir. 1992) the United States Court of Appeals, Second Circuit, defines parody as “when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original”. See also *Campbell*, *supra* note 2 at 580, where the US Supreme Court cites two dictionaries which adopt this conception of parody: *The American Heritage Dictionary*, 3d ed., s.v. “parody”, defines parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule”; and *The Oxford English Dictionary*, 2d. ed., s.v. “parody” which defines parody as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous”. The court then crafted its own definition: “[f]or the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”

<sup>21</sup> Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (London: Methuen, Inc., 1985) at 6.

<sup>22</sup> Spence, *supra* note 19 at 594.

<sup>23</sup> *Supra* note 11 at 52 [emphasis in original].

<sup>24</sup> *Ibid.* at 25.

Linda Hutcheon is another “of a number of theorists who believe that the continuing and unwarranted inclusion of ridicule in its definition has trivialised the form.”<sup>25</sup> Hutcheon defines parody as a “form of imitation...characterized by ironic inversion, not always at the expense of the parodied text”, suggesting that “what is remarkable about modern parody is its range of intent – from the ironic and playful to the scornful and ridiculing.”<sup>26</sup> Under this view of parody, neither critique nor comic intent is necessary. Instead, parodies may be characterized by “admiration and reverence ... as exemplified by the *Star Wars* films, which parody the much-loved film *The Wizard of Oz*.”<sup>27</sup>

## B. Importance of parody to Canadian society

Parody has been derided by some as parasitical;<sup>28</sup> critiqued by others as being “broadly conservative in the way that it constantly monitors and ridicules the formally innovative”;<sup>29</sup> and condemned by nineteenth century English novelist George Eliot for “[debas[ing]] the moral currency... and recklessly threaten[ing] the very fabric of civilisation by ridiculing the precious cultural safeguards which are its highest achievements in art and literature.”<sup>30</sup>

However, both critical and non-critical parodies can be seen as promoting the fundamental values underlying the constitutionally protected right to freedom of expression, “including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.”<sup>31</sup> As a result, both critical and non-critical parodies provide significant social benefits to Canadian society.

Critical parodies can be used to mock, among other political targets, politicians, policy positions, speeches, and political parties. Through ridicule, the faults in these targets can be exposed, giving individuals the opportunity to re-evaluate their political beliefs and assumptions. Non-critical parodies, however, can also serve in the search for political truth. A parody characterized by admiration of the specific policy ideas of a politician, for instance, can bring those ideas to the attention of a broader section of the population. This gives individuals the opportunity to evaluate and engage with

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<sup>25</sup> Gredley & Maniatis, *supra* note 9 at 339.

<sup>26</sup> Hutcheon, *supra* note 21 at 6.

<sup>27</sup> Gredley & Maniatis, *supra* note 9 at 340.

<sup>28</sup> Rose, *supra* note 11 at 281.

<sup>29</sup> Dentith, *supra* note 12 at 27.

<sup>30</sup> *Ibid.* at 188.

<sup>31</sup> *RJR Macdonald*, *supra* note 1 at para. 72.



these policy ideas, and potentially adopt them as part of their political ethos. As well, the presentation, through parody, of a political figure's laudable characteristics (for instance the ability to act in a bipartisan manner) conveys the impression that those characteristics are highly valued and should be adopted by other figures in the political world. A reverential parody can also convey the impression that a certain politician should be the model upon which other public figures should strive to mold themselves.

The search for artistic truth can also be advanced through non-critical parodies. Critical parodies can aid in this search by ridiculing or tearing down certain commonly accepted artistic conventions, figures, or works, thereby creating opportunities for new artists to produce their works unencumbered by the weight of the past. Non-critical parodies, on the other hand, can aid in the search for artistic truth by emphasizing a work's admirable and praiseworthy characteristics, an artist's unique style, or the appeal of a certain movement, helping create a beacon to which other artists can direct their efforts.

Sociolinguist Mary Louise Pratt identifies parody as one of the "arts of the contact zone," a social space "where cultures meet, clash, and grapple with each other, often in contexts of highly asymmetrical relations of power, such as colonialism, slavery, or their aftermaths as they are lived out in many parts of the world today."<sup>32</sup> Through parodies, marginalised groups appropriate and adapt "pieces of the representational repertoire of the invaders."<sup>33</sup> In so doing, parody acts as a tool of self-development, helping marginalised or oppressed groups achieve autonomy from more empowered cultures. This imitation or ironic inversion need not be couched in the form of criticism.

Critical parodies can promote public participation in the democratic process. For instance, a parody which ridicules a work or an individual could spur the public, through anger or dismay, to engage in the democratic process in order to create opposition to that work or individual. However, non-critical parodies can also promote this value. Parodies of individuals, works, or social movements characterized by admiration and reverence could inspire the population to engage in the democratic process in order to provide support to those individuals, works, or social movements.

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<sup>32</sup> Mary Louise Pratt, "Arts of the Contact Zone" (1991) 91 *Profession* 33 at 33.

<sup>33</sup> *Ibid.* at 34.

## PART II : PARODY AND COPYRIGHT IN CANADA

### A. Do parodies infringe copyright in Canada?

In Canada, one infringes copyright by doing, without the consent of the copyright owner, anything that only the copyright owner has the exclusive right to do.<sup>34</sup> The exclusive rights of the copyright owner with respect to works are set out in section 3 of the *Copyright Act*. Various rights of the copyright owner are likely infringed through the creation and distribution of parodies. First, in many cases, the creation of parodies likely infringes the copyright owner's right to reproduce their work. This right is infringed either where a person reproduces an entire work or a substantial part of a work. The question of whether the portion of the work that has been taken is substantial "must be assessed from both a quantitative and qualitative perspective."<sup>35</sup> That is to say, even taking a small portion of a work can infringe copyright if that portion is deemed to be a substantial part, in a qualitative sense, of the original work.

Effective parodies immediately evoke, in the mind of the viewer/reader, the original cultural work or practice upon which they are commenting. In order to do so, parodies usually reproduce elements drawn from the core of the original work or practice. As noted by the United States Supreme Court in *Campbell v. Acuff-Rose*, the leading American decision on parody and fair use:

Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable...What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.<sup>36</sup>

As parodies quote from the work's "most distinctive or memorable features,"<sup>37</sup> it is likely that they would be considered to reproduce, in a qualitative sense, a substantial part of the original, copyright-protected work, thus infringing the copyright owner's right to reproduce the work.

The distribution of a parody may also infringe the rights of the copyright owner. For instance, if a parody which reproduces a substantial portion of the copyright-protected work is posted online and subsequently downloaded by one or more users, the copyright owner's rights to communicate the work to

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<sup>34</sup> *Copyright Act*, *supra* note 3, s. 27.

<sup>35</sup> *Hager v. ECW Press Ltd.*, [1999] 2 F.C. 287.

<sup>36</sup> *Supra* note 2 at 588.

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

the public by telecommunication, to reproduce the work, and to authorize the reproduction of the work may be infringed.<sup>38</sup>

## B. Canadian courts' treatment of parody and copyright

Few Canadian cases have dealt with the intersection of parody and copyright infringement. Of those few, only one has entertained the thought that parody could serve as a defence to copyright infringement. The first Canadian case dealing with parody and copyright infringement is *Ludlow Music Inc. v. Canint Music Corp.*,<sup>39</sup> a case in which a parody of the famous Woody Guthrie song "This Land is Your Land" was alleged to infringe copyright in the original work. The defendants, writing at the time of Canada's centennial, a period when "Canada went 'nation-crazy',"<sup>40</sup> replaced Guthrie's lyrics with lyrics "which gently chid[ed] the Canadian Government and the Canadian people for their alleged feelings of inferiority."<sup>41</sup> Jackett P., of the Exchequer Court of Canada, granted an injunction restraining the defendants from selling their parody, deeming it a "proper exercise of judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy."<sup>42</sup>

Nine years later, in *MCA Canada Ltd. v. Gilberry & Hawke Advertising Agency Ltd.*,<sup>43</sup> the question of whether a parody constitutes copyright infringement was again canvassed. In this case, the defendant advertising agency had created a parody of the song "Downtown" (composed by Tony Hatch and made famous by Petula Clark) in the attempt to draw Ottawa-area patrons to Lewis Mercury, a car dealership. As noted by Dubé J. of the Federal Court of Canada, Trial Division, "[t]he final stanza brings it all together in one irresistible invitation: Lewis Mercury is Downtown. They have a car for you

<sup>38</sup> The leading Canadian case to interpret the right to communicate the work to the public by telecommunication is *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427.. The leading Canadian case to interpret the authorization right is *CCH et al.*, *supra* note 5.

<sup>39</sup> [1967] 2 Ex. C.R. 109, 51 C.P.R. 278 [*Ludlow* cited to Ex. C.R.].

<sup>40</sup> Douglas Coupland, *Souvenir of Canada* (Vancouver: Douglas & McIntyre, 2002) at 75.

<sup>41</sup> *Ludlow*, *supra* note 39 at 118. Zegers, *supra* note 7 at 208, notes that "[i]n 1958 Ludlow Music published the song 'This Land is Your Land' in Canada and the United States and soon thereafter a Canadian version by 'The Travellers' was authorized. The Canadian version became well-known throughout Canada, due in no small part to a decision by the 1967 Centennial Commission to publish the song in *Young Canada Sings*. The song book was distributed throughout Canada and soon patriotic youngsters from Bonavista to Vancouver Island were singing along, happily unaware of who owned copyright. No doubt all this centennial activity inspired Canint Music to record a parody of 'This Land' wherein the idea that Canada belongs to 'you' or 'me' is thoroughly mocked".

<sup>42</sup> *Ludlow*, *supra* note 39 at 51.

<sup>43</sup> (1976), 28 C.P.R. (2d) 52 (F.C.T.D.) [*MCA*].

Downtown. They are just waiting to help you Downtown.”<sup>44</sup> Dubé J. granted an injunction restraining the defendants from further infringement of “Downtown”, and awarded infringement, punitive and exemplary damages.<sup>45</sup> The fact that the work was a parody was not considered to be a defence to copyright infringement.

The next case involving parody and copyright, *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd. et al.*, was decided in 1982.<sup>46</sup> The defendants had written the song “Constitution”, a parody of “Revolution”, a Beatles song composed by John Lennon and Paul McCartney, as a “commentary on the events preceding the proclamation of the *Constitution Act*”.<sup>47</sup> Van Camp J., of the Ontario High Court of Justice, granted a motion for an interlocutory injunction preventing Rogers Radio Broadcasting Ltd. *et al.* from infringing ATV Music Publishing of Canada Ltd.’s copyright.

The first Canadian case to address the issue of whether the fair dealing defence protects parody was *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)*.<sup>48</sup> The CAW, in the context of a union organizing campaign at CGEM Michelin Canada’s Nova Scotia plants, had distributed leaflets depicting CGEM Michelin’s corporate logo, “a beaming marshmallow-like rotund figure composed of tires” called the Michelin Tire Man (or Bibendum):

broadly smiling... arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker. In the same leaflet, another worker safely out of the reach of “Bibendum’s” looming foot has raised a finger of warning and informs his blithe colleague, “Bob, you better move before he squashes you”. Bob, the worker in imminent danger of “Bibendum’s” boot has apparently resisted the blandishments of the union since a caption coming from his mouth reads, “Naw, I’m going to wait and see what happens”. Below the roughly drawn figures of the workers is the following plea in bold

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<sup>44</sup> *Ibid.* at para. 4.

<sup>45</sup> *Ibid.* at para. 22.

<sup>46</sup> (1982), 35 O.R. (2d) 417, 65 C.P.R. (2d) 109 (H.C.J.) [*ATV Music*].

<sup>47</sup> Zegers, *supra* note 7 at 208. Zegers notes, at 211, that the lyrics of “Constitution” were as follows: “You say you want a constitution/ Well Trudeau/ Will it really change the world/ Provinces you know aren’t certain Alberta’s not the third world/ And when stickin’ the dogs on Clarke/ Better make sure they bite not bark/ Then Trudeau you’re going to be alright”.

<sup>48</sup> The fair dealing defence was not argued as a defence in *Ludlow*, *MCA*, or *ATV*. In *Ludlow* and *ATV*, the compulsory license defence was argued. Zegers, *supra* note 7 at 208 notes that “[u]nder subs. 19(1) of the Act it was not a breach of copyright in a musical recording to make a record of that work provided that records had previously made with the copyright owner’s consent and provided that proper notice was given to the owner. Section 19(2) limited 19(1) by prohibiting alteration to copyrighted works recorded pursuant to 19(1) unless the alteration was authorized by the owner. Essentially, s. 19 granted, under certain conditions, a license to make recordings of copyrighted work without the copyright owner’s permission.”

letters, "Don't wait until it's too late! Because the job you save may be your own. Sign today for a better tomorrow."<sup>49</sup>

After becoming aware of the leaflets, CGEM Michelin sued CAW for copyright infringement and trademark infringement.<sup>50</sup> CAW argued that their version of Bibendum was a parody, and, as a result, did not infringe copyright. While acknowledging that the Canadian *Copyright Act* does not contain an explicit parody defence to copyright infringement, the CAW argued that parody is protected under the fair dealing defence. Specifically, it argued that the category of criticism should be interpreted in such a manner that would encompass parody.

Describing the union's position as a "radical interpretation"<sup>51</sup> of the *Copyright Act*, Teitelbaum J., of the Federal Court (Trial Division), rejected the argument that he should "give the word 'criticism' such a large meaning that it includes parody."<sup>52</sup> Teitelbaum J. stated that in interpreting criticism in such a manner that encompasses parody, he would be "creating a new exception to...copyright infringement, a step that only Parliament [has] the jurisdiction to do."<sup>53</sup> As a result, Teitelbaum J. rejected the contention that parody is a defence to copyright infringement in Canada.

Two years after *Michelin* was decided, the Quebec Court of Appeal, in *Productions Avanti Ciné-Vidéo Inc. c. Favreau*<sup>54</sup>, dealt with an allegation of copyright infringement in which parody was argued as a defence. Favreau allegedly infringed copyright by creating a pornographic film entitled "La Petite Vite" that "substantially copied the most original and important elements of 'La Petite Vie' ...[a] highly original and very well known situation comedy...[which is] probably the most popular series in the history of Quebec television".<sup>55</sup> In a concurring judgment, Rothman J. addressed Favreau's claim that parody is a defence to copyright infringement. Rather than rejecting the claim outright, as Teitelbaum J. did in *Michelin*, Rothman J. appeared to accept the proposition that a parody could act as a defence to copyright infringement in Canada in certain circumstances:

Respondent's only serious defence of his use of the characters, costumes and decor created in "La Petite Vie" is a defence of fair use of these elements for purposes of parody. With respect, I see nothing in "La Petite Vite" that could possibly be

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<sup>49</sup> *Michelin*, *supra* note 4 at 353.

<sup>50</sup> This article will not address the allegation of trademark infringement; the issue of parody and trademark infringement in Canada is the topic for another article.

<sup>51</sup> *Michelin*, *supra* note 4 at 377.

<sup>52</sup> *Ibid.* at 381.

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

<sup>54</sup> *Supra* note 20.

<sup>55</sup> *Ibid.* at 574.

characterized as parody. Clearly, its purpose was not to parody “La Petite Vie” but simply to exploit the popularity of that television series by appropriating its characters, costumes and decor as a *mise-en-scene* for respondent’s video film...Parody normally involves the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment. Appropriation of the work of another writer to exploit its popular success for commercial purposes is quite a different thing. It is no more than commercial opportunism. The line may sometimes be difficult to trace, but courts have a duty to make the proper distinctions in each case having regard to copyright protection as well as freedom of expression. In this case, Respondent was on the wrong side of that line.<sup>56</sup>

Even though Rothman J. hinted at the potential applicability of a defence of parody to a claim of copyright infringement, *Michelin* is currently the only Canadian case to have addressed the particular issue of whether the fair dealing defence (and, particularly, the fair dealing category of criticism) provides protection for parody. The statement, in *Michelin*, that “under the *Copyright Act*, ‘criticism’ is not synonymous with parody”, appears to soundly reject the possibility that parody could act as a defence to copyright infringement.<sup>57</sup>

In 2004, however, in *CCH et al.*, the Supreme Court of Canada (SCC) signaled a dramatic shift in the way that copyright defences should be interpreted. Prior to *CCH et al.*, defences to copyright infringement, such as fair dealing, were seen as limitations on the copyright holder’s exclusive rights, and were generally interpreted restrictively.<sup>58</sup> In *CCH et al.*, it was accepted that defences to copyright infringement should instead be seen as users’ rights. As noted by McLachlin C.J.:

In order to maintain the proper balance between the rights of a copyright owner and users’ interests, [the fair dealing defence] must not be interpreted restrictively. As Professor Vaver...has explained...“User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation”.<sup>59</sup>

As a result of the SCC’s decision in *CCH et al.*, some commentators have suggested that Canadian courts may now find that parody is protected under the fair dealing defence. For instance, Professor Giuseppina D’Agostino notes that “[p]ost CCH’s liberal interpretation of the enumerated grounds, it could be argued that ‘criticism’ could now encompass parody.”<sup>60</sup> As well, in an article

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<sup>56</sup> *Ibid.* at 574-575.

<sup>57</sup> *Supra* note 4 at 378.

<sup>58</sup> See e.g. *Robertson v. Thomson Corp.* (2004), 72 O.R. (3d) 481 (C.A.) at para. 36; *Michelin*, *supra* note 4; *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324 (Ont. Ct. J. (Gen. Div.)) at para. 48 [Boudreau]. Cf. *Allen v. Toronto Star Newspapers Ltd.* (1997), 36 O.R. (3d) 201 (Ct. J. (Gen. Div.) Div. Ct.), a case, pre-*CCH et al.*, which took a liberal approach to the fair dealing defence.

<sup>59</sup> *Boudreau*, *ibid.* at para. 48.

<sup>60</sup> D’Agostino, *supra* note 5 at 359.

entitled "Parody as fair dealing in Canada: a guide for lawyers and judges", Professor Emir A.C. Mohammed states that "[s]imply put, copyright law in Canada now recognizes a defence of parody."<sup>61</sup>

It is not certain, however, that courts will move in this direction. A recent case heard in British Columbia illustrates the risk in relying on litigation as the means through which a parody defence to copyright infringement can be created.<sup>62</sup> In the 2008 case of *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*,<sup>63</sup> Canwest Mediaworks Publications Inc. brought an action against Gordon Murray, Carel Moiseiwitsch, and four unnamed individuals for passing off, trademark infringement, and copyright infringement after the defendants created a parody edition of the Canwest-owned Vancouver Sun. The parody edition reproduced the masthead of the Vancouver Sun and contained articles criticizing, "amongst other things, Israel's policy with respect to the Palestinians...[and] the plaintiff's reporting of Middle East issues".<sup>64</sup> The articles were dropped off in Vancouver Sun vending machines.<sup>65</sup>

A motion was brought by the plaintiff to strike various elements from the defendant's statement of defence, including those paragraphs which argued that parody is a defence to copyright infringement under the fair dealing defence. Master Donaldson allowed the motion and struck the paragraphs from the statement of claim, noting that:

In the statement of defence, the defendant seems to assert that the fake *Sun* is a parody, and therefore it does not infringe the *Copyright Act* due to the "fair use" exception for criticism in s. 29.1. However, Teitelbaum J held clearly in *Michelin* at Para. 63 that parody is not an exception to copyright infringement under the *Copyright Act*, and therefore does not constitute a defence. As parody is not a defence to a copyright claim, the defendant's allegations cannot be necessary to prove it.<sup>66</sup>

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<sup>61</sup> Mohammed, *supra* note 5 at 469.

<sup>62</sup> In "Why Canada Needs Parody Parity and Comedy Comity" (2008) 20 C.P.I. 717, Howard Knopf argues that legislative intervention is necessary to provide protection for parody in Canada. Noting that "[i]t is primarily the responsibility of Parliament, and not individual litigants, to take the necessary steps to provide clear and predictable laws in Canada", Knopf sets out various reasons why relying on litigation to provide protection for parody is flawed at 741. Like the author of this article, Knopf argues that the answer is to amend s. 29 of the *Copyright Act* to include parody (and satire).

<sup>63</sup> 2008 BCSC 1609 [*Canwest* - decision by Master Donaldson], aff'd 2009 BCSC 391 [*Canwest* - decision by Myers, J.]

<sup>64</sup> *Canwest* - decision by Myers, J., *supra* note 63 at para. 2

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

<sup>66</sup> *Canwest* - decision by Master Donaldson, *supra* note 63 at paras. 14-15. On appeal, in *Canwest* - decision by Myers, J., *supra* note 63, the motion for an order striking various paragraphs from the statement of claim was allowed. The issue of whether parody is a defence to copyright infringement was not addressed by E.M. Myers J. in any depth.

This motion, argued eleven years after *Michelin* was decided and four years after the SCC's decision in *CCH et al.*, is an indication that relying on litigation to ensure the protection of parody is a risky proposition. Notwithstanding the SCC's decision in *CCH et al.*, the spectre of *Michelin* still looms large over the parodist in Canada.

### PART III: TOWARDS THE CREATION OF A PARODY DEFENCE TO COPYRIGHT INFRINGEMENT

It has been suggested that as a result of the SCC's decision in *CCH et al.*, parody will likely receive protection under the fair dealing category of criticism.<sup>67</sup> The argument that the category of criticism encompasses parody, however, is based on the assumption that parodies are necessarily critical.<sup>68</sup> As demonstrated in Part I, this assumption can be challenged. Though many conceptions of parody do insist upon criticism, either of the imitated work or of something else, other conceptions of parody do not.

Given the manner in which parody has evolved since its introduction in ancient Greece,<sup>69</sup> and the recognition that today, "[n]o stable understanding of the term 'parody' exists",<sup>70</sup> it is inadvisable to limit the notion of parody within the *Copyright Act* to any one conception. Protecting parody under the fair dealing category of criticism, a move arguably made possible by the SCC in *CCH et al.*, would do just that. This article takes the position that if parody is to be protected as a defence to copyright infringement, it should receive protection as a separate defence, rather than under the fair dealing category of criticism. Protecting parody as a separate defence would allow for the protection of both critical and non-critical parodies.

One objection to the adoption of a separate parody defence to copyright infringement is that it has the potential to encompass too many dealings with copyright-protected works, encroaching on the exclusive rights of copyright owners to an unacceptable degree. This objection is not without merit. Any new defence must maintain the "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".<sup>71</sup>

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<sup>67</sup> See D'Agostino, *supra* note 5 at 324; Mohammed, *supra* note 5 at 468.

<sup>68</sup> See Mohammed, *supra* note 5 at 469; Zegers, *supra* note 7 at 209.

<sup>69</sup> In Rose, *supra* note 11 at 280-283, the author sets out 37 conceptions and definitions of parody.

<sup>70</sup> Spence, *supra* note 19 at 594.

<sup>71</sup> *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para. 30.



A response to this objection, however, would be to embed the proposed parody defence within the fair dealing defence. Parody would then constitute the sixth acceptable fair dealing category, joining research, private study, criticism, review, and news reporting. Under this approach, individuals would have the right to use a substantial amount of copyright-protected material without the consent of the copyright owner for the purpose of parody, as long as their dealing is “fair” and certain criteria with respect to attribution are satisfied. The fairness analysis would limit the extent to which parodies are protected, helping ensure that a balance is maintained between the copyright owner’s rights and the rights of the parodist.

The term “fair” is not defined in the *Copyright Act*. Rather, it is a question of fact which must be determined in each case.<sup>72</sup> In *CCH et al.*, the SCC set out a series of factors<sup>73</sup> in the attempt to provide a “useful analytical framework to govern determinations of fairness in future cases.”<sup>74</sup> These factors include the purpose of the dealing, the character of the *dealing*, the amount of the dealing, alternatives to the dealing, the nature of the original work, and the effect of the dealing on the original work.<sup>75</sup> The two factors which are particularly relevant in seeking to ensure that the fair dealing category of parody does not upset the balance between owners’ rights and the public interest are the factor which addresses alternatives to the dealing and the factor which addresses the effect of the dealing on the work.

The factor which addresses alternatives to the dealing could be used to deny protection to parodies that could, with the same degree of success, use a non-infringing work, such as a work which has passed into the public domain or an original work. In discussing this factor, the SCC, in *CCH et al.*, noted that:

[I]t will...be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.<sup>76</sup>

Parodies which imitate a work in order to critique it will likely tend to fairness under this factor. Though it may not be “necessary” to reproduce a work in order to achieve the ultimate purpose of critiquing it, it may be argued that it is “reasonably necessary” to do so. In many cases, such a critique, if it did not reproduce the original work, would not be equally effective. As

<sup>72</sup> *CCH et al.*, *supra* note 5 at para. 52.

<sup>73</sup> These factors were crafted by Linden J.A. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 drawing from the decision of Lord Denning in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) and the U.S. doctrine of fair use.

<sup>74</sup> *CCH et al.*, *supra* note 5 at para. 53.

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

<sup>76</sup> *Ibid.* at para. 57.

Professor Mohammed notes, “‘plain’ criticism, couched in the tempered language familiar to academics and editors, will not be as effective as a well-executed parody (especially in relation to political affairs, social commentary, or labour disputes).”<sup>77</sup>

Some weapon parodies, those that use the parodied work to criticize something other than the work itself, would also tend to fairness under this factor. Certain works have secondary significations – they are intimately associated in the mind of the public with something other than the work itself. For instance, a song may be associated with a specific era, figure, or political movement. In these situations, it could be argued that a critique of that era, figure, or political movement would not be equally effective if it did not use the work associated with that subject as a vehicle for such criticism. Therefore, the use of the copyright-protected work in the service of such a critique would likely be seen as “reasonably necessary”. However, in some cases, equally effective alternatives to the use of the copyright-protected work could be found in seeking to critique something other than the work itself. In those cases, this factor would tend to unfairness.

Many non-critical parodies would also tend to fairness under this factor. For example, if the ultimate purpose of the dealing is to construct a respectful or admiring parody of a certain work, it is difficult to argue that such a parody would be equally effective if it did not reproduce a sufficient amount of the work to evoke that work in the minds of the reader/listener/viewer. In this situation, as well, the use of the copyright-protected work would be “reasonably necessary to achieve the ultimate purpose”.<sup>78</sup>

Some parodies, however, could tend to unfairness under this factor. For instance, in situations such as *MCA*, which involved the creation of a parody of the hit song “Downtown” in order to draw consumers to a car dealership in downtown Ottawa, there is a strong possibility that the dealing would not be found to be “reasonably necessary” to achieve the ultimate purpose, which was to bring people to Lewis Mercury. Equally effective alternatives could have been utilized which would not have involved the use of a copyright-protected work.

The second factor which is particularly relevant in seeking to ensure that the fair dealing category of parody does not upset the balance between owners’ rights and the public interest is the factor which addresses the effect of the dealing on the work. The SCC, in *CCH et al.*, stated that “[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.”<sup>79</sup> In most cases, parodies do not

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<sup>77</sup> Mohammed, *supra* note 5 at 471.

<sup>78</sup> *CCH et al.*, *supra* note 5 at para. 57.

<sup>79</sup> *CCH et al.*, *supra* note 5 at para. 59.

compete with the market for the original work. For instance, 2 Live Crew's parody of "Pretty Woman", which "juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility", cannot be seen as competing with the market for Roy Orbison's classic song "Pretty Woman".<sup>80</sup> An individual seeking to purchase Orbison's song will not intentionally purchase 2 Live Crew's parody instead. Certain parodies created out of respect or admiration for the original work could, perhaps, compete with the market of the original work. In those cases, this factor will tend to unfairness. In many cases, however, this factor will tend to fairness.

In seeking to incorporate a parody defence within fair dealing, another question which must be addressed is whether works created for the purpose of parody must satisfy the attribution requirements set out in the *Copyright Act*. Works created for the purposes of criticism, review, and news reporting must satisfy various attribution requirements if they are to be protected by the fair dealing defence.<sup>81</sup> These works must mention the source of the work and, if given in the source, the name of the author, performer, maker, or broadcaster.<sup>82</sup> These attribution requirements are not required for works created for the purpose of research or private study.<sup>83</sup>

In the case of parodies, it can be argued that it is unnecessary to require parodists to explicitly mention the source of the work and the name of the author, on the basis that in many cases the source and author are evident from the parody itself. For instance, though the CAW's parodic version of Bibendum was different from Michelin's beloved corporate icon, individuals who saw the CAW leaflet and were familiar with Bibendum would recognize it within the parody. As noted by the United States Supreme Court in *Campbell v. Acuff-Rose*, "there is no reason to require parody to state the obvious, (or even the reasonably perceived)."<sup>84</sup> However, what of those parodies that fail to evoke the original work in the mind of the viewer? If there is no attribution requirement associated with parody as a category of fair dealing, then the creation and distribution of these parodies could result in public confusion and potential damage to the original creator or the current copyright-owner.

This article proposes incorporating parody within section 29.1 of the *Copyright Act*, the section which protects criticism and review. After this amendment, section 29.1 would state that fair dealing for the purpose of

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<sup>80</sup> *Campbell*, *supra* note 2, at 583.

<sup>81</sup> *Copyright Act*, *supra* note 3, ss. 29.1-29.2.

<sup>82</sup> *Ibid.*, s. 29.1.

<sup>83</sup> *Ibid.*, ss. 29-29.2.

<sup>84</sup> *Campbell*, *supra* note 2 at 583.

parody, criticism, or review does not infringe copyright if the attribution requirements are satisfied. However, a point of clarification could be added stating that in the case of parody, the attribution requirements will be satisfied if the source and author of the work are evident from the parody itself. This point of clarification would ensure that parodies do not have to state the obvious, an act which could have the effect of detracting from the overall impact created by the parody without providing any benefit to the original author or the owner of copyright in the parodied work.

## CONCLUSION

This article has taken the position that, given the benefits to Canadian society which result from the creation and distribution of parodies, the Government of Canada should create a parody defence to copyright infringement. This defence, however, should not be embedded within the fair dealing category of criticism. Statements by commentators that the fair dealing category of criticism is capable of encompassing parody are based on the assumption that parodies are necessarily critical. This article has challenged this assumption. Though many conceptions of parody insist upon some element of criticism, other conceptions of parody do not.

Rather than protecting parody within the fair dealing category of criticism, this article has advocated for the creation of a separate parody defence. In order to ensure that this new user's right does not encroach to an unacceptable degree on the rights of copyright owners, this article has suggested incorporating the parody defence within fair dealing as a new fair dealing category. Individuals would then have the right to use a substantial amount of copyright-protected expression without the consent of the copyright owner for the purpose of creating a parody, provided that the original work is dealt with "fairly" and various attribution requirements are satisfied.

The creation of such a defence will ensure that all parodies are capable of being protected under the *Copyright Act*, and not simply those parodies which can be seen as critical. Both critical and non-critical parodies advance the values underlying the *Charter*<sup>85</sup> right to freedom of expression, namely the "search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process."<sup>86</sup> If the impetus behind the development of a parody defence to copyright infringement is the desire to recognize and preserve the

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<sup>85</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

<sup>86</sup> *RJR Macdonald*, *supra* note 1 at para. 72.

social benefits which arise from the creation and distribution of parodies, then any parody defence should be flexible enough to encompass both critical and non-critical parodies. This article advocates for the creation of such a defence.

# STRIPPING MATTERS TO THE [CENTRAL] CORE: Searching Electronic Devices Incident to Arrest

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J O H N   B U R C H I L L \*

*Mr. Kipper, 27, joined a growing group of camera-phone owners who can't seem to resist capturing themselves breaking the law. "As a criminal defense attorney, it's very difficult when a client proclaims his innocence but incriminates himself by taking photos of the stolen items," says William Korman, the Boston attorney who represented Mr. Kipper.*<sup>1</sup>

## I. INTRODUCTION

Cell phones and other similar devices can be the subject of a crime, the dispassionate recorder of a crime and the instrumentality of a crime all in one. Police blotters and news headlines are replete with cases of suspects using their cell phones to record themselves at crime scenes or while committing criminal acts,<sup>2</sup> while possessing stolen or contraband property,<sup>3</sup> to display the proceeds of crime,<sup>4</sup> to communicate with others about

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<sup>1</sup> See e.g. William Bulkeley, "Cheese! Uh-Oh ... Cellphone photos prove perps' guilt" *The Wall Street Journal* (8 December 2007) A1.

<sup>2</sup> See e.g. "Parolee Accused of Sexually Abusing Teens" *KOLOTV* (15 January 2010), online: KOLOTV <<http://www.kolotv.com/news/headlines/81792132.html>>. The accused, Michael Cockrell, videotaped himself with his cell phone having sex with two teenage girls he had plied with alcohol.

<sup>3</sup> See e.g. "Camera phone pictures give suspect up" *Press of Atlantic City* (26 February 2005), online: Press of Atlantic City <[http://www.pressofatlanticcity.com/news/atlantic/022605ring\\_f26.cfm](http://www.pressofatlanticcity.com/news/atlantic/022605ring_f26.cfm)>. A cell phone picture of the suspect holding an AK-47 was used to show knowledge and possession relative to shooting using the same weapon a few months earlier.

their crimes<sup>5</sup> or as the instrumentality of crime itself.<sup>6</sup> In one recent case the accused and his girlfriend used their cell phone to photograph themselves with the mutilated body of their victim, whom they stabbed more than 80 times, and then later to record themselves washing their bloody clothing in the bath.<sup>7</sup>

Cell phones are not the only devices used for these purposes. MP3 players, iPods, Palms and other digital devices are also valued by criminals for their large storage capacities and innocuous appearance as a means to conceal and transport information without detection. A 2002 *New York Times* article described this phenomenon in detail:

Drug dealers use contact lists to track buyers and suppliers, investigators say, while drug makers, like those who run clandestine methamphetamine laboratories, use memos to keep recipes and ingredient lists. Pimps use the devices to keep track of clients, revenues and expenses. Smugglers and money launderers track their transactions on spreadsheets. Stalkers have been known to store their fantasies and victims' schedules on [them].

Even spies have used them. Corporate spies have downloaded sensitive documents to their hand-helds and quietly walked off with them. Robert P. Hanssen, the F.B.I. agent who was sentenced to life in prison in May for selling secrets to Moscow, used his Palm III to keep track of his schedule to pass information to his Russian contacts.<sup>8</sup>

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<sup>4</sup> See e.g. "Baby photo helps jail fraudster" *BBC News* (22 July 2008), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/england/humber/7518937.stm](http://news.bbc.co.uk/2/hi/uk_news/england/humber/7518937.stm)>. The accused, Abu Bunu, was convicted of bank fraud and jailed for five years after a photo of his baby surrounded by piles of money found on his mobile phone was used as evidence against him at trial.

<sup>5</sup> See e.g. Noah Shachtman, "Fighting Crime With Cellphones' Clues" *The New York Times* (3 May 2006), online: The New York Times <<http://www.nytimes.com/2006/05/03/technology/techspecial3/03cops.html>>. The accused, Dan Kincaid, sent text messages using his Blackberry to his girlfriend while fleeing from a home burglary detailing his escape route.

<sup>6</sup> See e.g. "Mobile phone calls failed to trigger London blast" *Forbes* (2 July 2007), online: Forbes <<http://www.forbes.com/feeds/afx/2007/07/02/afx3877290.html>>. Call logs retrieved from mobile phones meant to detonate bombs in London's entertainment district led to the arrests of seven suspects.

<sup>7</sup> "Murderer nailed by 'deleted' camera phone pictures of him with victim's body" *The Daily Record* (26 March 2008), online: Daily Record <<http://www.dailyrecord.co.uk/news/scottish-news/2008/03/26/murderer-nailed-by-deleted-camera-phone-pictures-of-him-with-victim-s-body-86908-20362883>>.

<sup>8</sup> Jennifer 8. Lee "A Palmtop for the Prosecution" *The New York Times* (24 October 2002), online: The New York Times <<http://www.nytimes.com/ref/open/reviews/24palm-OPEN.html>>. See also Darren Murph, "iPod deemed a 'criminal tool' in high school security breach" *Engadget* (15 February 2007), online: Engadget <<http://www.engadget.com/2007/02/15/ipod-deemed-a-criminal-tool-in-high-school>>.

The amount of information that is collected and stored on these devices has grown exponentially with advances in technology, functionality and storage capability. As such, the discovery of a cell phone or other storage device on a suspect may produce a treasure trove of material useful in the investigation and prosecution of crimes as direct, circumstantial or collateral evidence and/or as a means to identify witnesses, associates or co-conspirators. Even innocuous details contained in a device can provide useful evidence.<sup>9</sup>

However, because electronic devices are capable of storing vast amounts of private information—from letters, journals, voice and text messages, e-mail, video, pictures, a record of incoming and outgoing calls, to address books, calendars and web browsing histories—today's digital devices may contain private information that is quantitatively and qualitatively different than has previously been the case. Nevertheless, issues of privacy are generally much more fluid in today's web-based digital world than they used to be.<sup>10</sup> In fact, when a device is seized incident to arrest, issues of privacy are subordinated to the lawful restraint of the suspect's liberty and neither a warrant nor independent reasonable grounds are required to search the device.

While warrantless searches are presumptively unreasonable, searches conducted incident to arrest are an exception to that rule. The question is: to what extent can the police probe a device seized incident to arrest for evidence? Can they scroll through the phone directory as they might flip through an address book or wallet looking for their identification? Can they

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security-breach>; "iPod car theft ringleader jailed" BBC News (28 July 2004), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/england/london/3932847.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/3932847.stm)>.

<sup>9</sup> See e.g. "Scott Peterson pleads not guilty to killing wife, unborn child" CNN (22 April 2003), online: CNN <<http://www.cnn.com/2003/LAW/04/21/laci.peterson/index.html>> where tidal charts and data relative to the bay in which his wife's body was discovered were discovered by police. See also Declan McCullagh, "Police Blotter: Google Searches Lead to Murder Conviction" CNET News (27 January 2009), online: CNET News <[http://news.cnet.com/8301-13578\\_3-10150669-38.html?tag=mncol](http://news.cnet.com/8301-13578_3-10150669-38.html?tag=mncol)> in which a number of cases are chronicled where a suspect's web browsing history provided circumstantial evidence. As most Smartphones today have web browsing capabilities and access to such programs as Google Maps or Google Earth, locating such searches on a handheld device today would not be unforeseeable. Also consider the amount of information people post about themselves on Social Networking sites, especially [www.mocospace.com](http://www.mocospace.com), which was specifically designed for use by cell phones to find friends, send instant messages, chat and send photos/videos, etc.

<sup>10</sup> Mathew Ingram, "On social sites, your privacy has to be flexible" *The Globe and Mail* (16 July 2009). See also Office of the Privacy Commissioner of Canada, *Focus Testing Privacy Issues and Potential Risks of Social Networking Sites*, (Research Report) (Toronto: Decima Research, 2009). While these papers deal with social networking sites, they are endemic of this generation's willingness to treat privacy as a secondary concern to the free flow and exchange of information. In fact, in some cases criminals have posted details of their offences, including videos of themselves committing criminal acts, on these sites and personal blogs.



look at pictures, videos and cached Internet searches as they might look at family pictures and credit card receipts found in a wallet? Can they read incoming and outgoing e-mails as they might read a folded letter found tucked into the back of an address book or wallet? Can they seize the phone and send it for forensic analysis as they might send a suspect's shirt, seized after a murder, for DNA analysis or the sole of a suspect's shoe for its imprint to compare to a recent break and enter? Furthermore, is a search warrant even necessary where the accused has used the device to facilitate a crime in the first place and it is therefore subject to forfeiture as offence related property?

The goal of this paper is to increase awareness of this type of digital evidence and to canvass the rapidly developing area of the law regarding the search of such devices incident to arrest. As there is little jurisprudence on the subject in Canada, this paper will review the law surrounding searches incident to arrest generally, as well as surveying the growing body of case law from the United States that suggests the examination of such items may be analogous to searches of other information repositories such as wallets, backpacks, purses and cameras. Although the analogy between digital devices and other information repositories may be imperfect, the powerful capabilities of these devices to record and store information means that the power to search them incident to arrest is becoming more important for the investigation, detection and prevention of crime.

## II. SEARCH INCIDENT TO ARREST

### A. Setting the Stage

The power of search incident to arrest is well entrenched in the common law. As noted by Justice L'Heureux-Dubé for a unanimous Supreme Court of Canada in *Cloutier v. Langlois*, the historical roots of the power to search incident to arrest date back nearly 200 years to *R. v. Barnett*, where it was implied that police officers may seize property from an arrested person if it is connected with the charge against him.<sup>11</sup>

Justice L'Heureux-Dubé went on to reference L. H. Leigh on this point.<sup>12</sup> According to Leigh, a constable can search a person on arrest and take into custody articles in his possession which the constable believes may:

1. be connected with the offence charged,
2. be used in evidence against him,
3. give a clue to the commission of the crime,

<sup>11</sup> [1990] 1 S.C.R. 158 at para. 23 (QL) [*Cloutier*].

<sup>12</sup> *Ibid.* at para. 28.

4. aid in the identification of the criminal, or
5. locate any weapon or implement which could enable the prisoner to commit an act of violence or effect his escape.<sup>13</sup>

It is clear from the decision in *Cloutier* that the existence of reasonable grounds was not a prerequisite to searching a lawfully arrested person at common law in England. As noted by Justice L'Heureux-Dubé:

the existence of reasonable grounds is not a prerequisite to the existence of a police power to search . . . [while] the British courts did not impose reasonable grounds as a prerequisite to the power to search a personal lawfully arrested, neither have they gone so far as to recognize a power to search as a simple corollary of arrest. The Canadian courts on the other hand do not seem to have hesitated in adopting this latter approach.<sup>14</sup>

While section 8 of the *Charter of Rights*<sup>15</sup> regarding unreasonable searches was not invoked by either party in *Cloutier*, subsequent Supreme Court of Canada jurisprudence involving section 8 has continued to maintain, subject only to strip searches, that reasonable grounds are not required to search a suspect incident to arrest. For example, in *R. v. Caslake* Chief Justice Lamer stated for the majority:

To be clear, this is not a standard of reasonable and probable grounds . . . Here, the only requirement is that there be some reasonable basis for doing what the police officer did. . . . The police have considerable leeway in the circumstances of an arrest which they do not have in other situations.<sup>16</sup>

Even Justice Bastarache for the minority stated that “the existence of reasonable grounds is precisely not a prerequisite to the existence of a police power to search incidentally to an arrest.”<sup>17</sup>

The power to search incident to arrest in the United States is also well rooted in legal tradition dating back more than 150 years. In fact, when the United States Supreme Court first considered the search incident to arrest power in *U.S. v. Weeks*, it also cited *R. v. Barnett* with approval.<sup>18</sup>

In tracing the history of the doctrine in *U.S. v. Robinson*, the United States Supreme Court stated:

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<sup>13</sup> L.H. Leigh, *Police Powers in England and Wales* (London: Buttersworth, 1975) at 50 [emphasis added]. Other cases have discussed Leigh's work and the application of an ancillary powers doctrine that would enable the police to perform such reasonable acts as are necessary for the due execution of their duties.

<sup>14</sup> *Supra* note 11 at para. 49 [emphasis added].

<sup>15</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 8.

<sup>16</sup> [1998] 1 S.C.R. 51 at para. 20 [*Caslake*].

<sup>17</sup> *Ibid.* at para. 49 [emphasis added].

<sup>18</sup> 232 U.S. 383 (1914).

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement under the Fourth Amendment, but is also a "reasonable" search under that Amendment.<sup>19</sup>

Shortly after *Robinson*, the Court had to consider whether clothing seized from an accused after being secured in custody could later be examined and subjected to forensic analysis without warrant. The Court affirmed that property taken into custody upon arrest may be later subjected to laboratory analysis and the test results admitted at trial.<sup>20</sup>

The principles set out in *Robinson* were later expanded to include objects no longer accessible by a defendant, but in the exclusive control of the arresting officers. For example, in *New York v. Belton* the court held that a container in the exclusive control of the police—but previously seized from the accused's car—could be searched incident to arrest:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.<sup>21</sup>

Similarly, in *R. v. Copan*<sup>22</sup> the B.C. Court of Appeal also held that the police may open and examine the contents of a container seized from an accused incident to arrest. In admitting the evidence found in a sealed envelope (money from a robbery) the Court said:

The issue is one of control and whether it can be said the appellant had a reasonable expectation of privacy. The trial judge concluded the appellant had no control over these articles and that leads to the conclusion that he could not have had a reasonable expectation of privacy. I agree with the conclusion of the trial judge on this issue. With respect, I do not see how it could be said on these facts that the appellant had a reasonable expectation of privacy, the envelope and its contents being properly (search and seizure on arrest) in control of the police.

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<sup>19</sup> 414 U.S. 218 at 235 (1973).

<sup>20</sup> *U.S. v. Edwards*, 415 U.S. 800 (1974) [Edwards]. See also *State v. Oles*, 993 S.W.2d 103 (Tex. Ct. Crim. App. 1999) regarding shoes and clothing taken from the accused and tested by the police against the victim's blood without a warrant. See also *State v. Steen*, 536 S.E.2d 1 (N.C. S.C. 2000), cert. denied, 531 U.S. 1167 (2001) in which the defendant's clothing was seized pursuant to a lawful arrest and examined six days for evidence of an unrelated matter. At 241 the court stated, "It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination."

<sup>21</sup> *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 at 2864 (1980).

<sup>22</sup> (1994), 39 B.C.A.C. 307, 22 W.C.B. (2d) 320.

It is a significant fact here that it was open to the police to look closely at the property seized on arrest and had they done so they would have seen the marked five dollar bill, the ten dollar bill and the bag of coins.<sup>23</sup>

Subsequent U.S. cases have held that an officer may search the contents of a container found on or near the arrestee as a search incident to arrest. However, where the closed container (e.g. a 200-pound foot locker) is “not immediately associated with the person of the arrestee to their exclusive control”, it has been held that it could not be searched incident to arrest.<sup>24</sup>

More recently, in *Arizona v. Gant*, the United States Supreme Court summed up the authorities regarding the power to search the contents of a vehicle incident to arrest, holding that:

1. The passenger compartment of a vehicle may be searched incident to arrest where the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or,
2. Where the arrestee can no longer access the vehicle’s passenger compartment, a search incident to arrest will be permitted “when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”<sup>25</sup>

Although no computer cases have yet applied *Arizona v. Gant*, its reasoning suggests that once an accused is secured and no longer able to access the device, it can only be searched where the officer believes that evidence of the crime may be found in it. However, earlier cases have held that the search of cell phones found inside vehicles of a lawfully arrested occupant could be justified incident to arrest just like the search of any other closed container found in a vehicle.<sup>26</sup>

Nevertheless, in Canada the law is not so restrictive. For example, the “reach and grab” rule articulated in the first part of *Arizona v. Gant* has been dismissed in Canada. As noted by Justice Doherty (as he then was) in *R. v. Lim* (No. 2):

With the greatest of respect, I do not find the American view an attractive one. It has spawned a number of exceptions or qualifications (e.g., the “plain view” doctrine and the “protective sweep” rule), all of which have led to Byzantine complexity and

<sup>23</sup> *Ibid.* at paras. 7-8. See also *R. v. Abdo*, 2009 ABCA 340, 464 A.R. 147 in which the Alberta Court of Appeal upheld the search of a Skittles container found on an accused arrested for impaired driving.

<sup>24</sup> *U.S. v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476 at 2485 (1977) [emphasis added].

<sup>25</sup> 129 S.Ct. 1710 at 1714 (2009).

<sup>26</sup> See *State v. Novicky*, 2008 WL 1747805 (Minn. Ct. App. 2008), rev. denied (Minn. Ct. App. 2008); *U.S. v. Fierros-Alvarez*, 547 F. Supp. 2d 1206 (D. Kan. 2008); *U.S. v. James*, 2008 WL 1925032 (E.D. Mo. 2008); and *U.S. v. Rocha*, 2008 WL 4498950 (D. Kan. 2008).

apparently innumerable factual distinctions. More important, the American case law, in my opinion, operates under an unduly restrictive view of the legitimate police purposes attendant upon the arrest of a person . . . In my view, in Canada, the justification for a warrantless search as an incident of arrest goes beyond the preservation of evidence from destruction at the hands of the arrested person to include the prompt and effective discovery and preservation of evidence relevant to the guilt or innocence of the arrested person. The American position also fails to give sufficient weight to the reduced legitimate expectation of privacy which must accompany any arrest.<sup>27</sup>

More recently, in *R. v. Tontarelli*,<sup>28</sup> a unanimous New Brunswick Court of Appeal upheld the warrantless search of an accused's vehicle incident to arrest, including the contents of a duffle bag found in the trunk, even after the accused had been taken into custody. Quoting from *Caslake* the court held that "the existence of reasonable and probable grounds is precisely not a prerequisite to the existence of a police power to search incidentally to an arrest."<sup>29</sup> Moreover, "the only requirement is that there be some reasonable basis for doing what the officer did."<sup>30</sup>

Furthermore, in *Caslake* the Supreme Court noted that the authority for the search does not necessarily arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy. Even delay and distance do not automatically preclude a search from being incidental to arrest, so long as there is a proper explanation. The Court further held that there are four bases upon which a valid search incidental to arrest may occur:

1. to protect the police;
2. to protect the evidence;
3. to discover the evidence; or
4. some other valid purpose.<sup>31</sup>

Although "some other valid purpose" is not defined, it could include such things as "clues to the commission of the crime" or to "aid in the identification

<sup>27</sup> *R. v. Lim* (No. 2), [1990] 1 C.R.R. (2d) 136, O.J. No. 3261, (Ct. J. (Gen. Div.)) (QL) at paras. 39, 43-44 [emphasis added].

<sup>28</sup> *R. v. Tontarelli*, 2009 NBCA 52, 348 N.B.R. (2d) 41.

<sup>29</sup> *Ibid.* at para. 44.

<sup>30</sup> *Ibid.* at para. 48. Also see *R. v. Drapeau* (1993), 38 B.C.A.C. 237, 19 C.R.R. (2d) 361, upholding the search of a duffle bag in a vehicle incident to arrest; *R. v. Smellie* (1994), 53 B.C.A.C. 202, 95 C.C.C. (3d) 9, leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 64, upholding the search of a vehicle incident to arrest, including removal of the door panels; and, more recently *R. v. Alkins*, 2007 ONCA 264, 85 O.R. (3d) 161, regarding the search of a vehicle's trunk incident to arrest for weapons.

<sup>31</sup> *Caslake*, *supra* note 16 at para. 25.

of the criminal” as noted by L.H. Leigh.<sup>32</sup> For this reason it is a much broader exception than is found in U.S. authorities. However, as noted by Doherty J.A. in *R. v. Belnavis*, the power to search incident to arrest does not extend to searches undertaken for purposes which have no connection to the reason for the arrest.<sup>33</sup>

While the foundations for Canadian and American jurisprudence on search incident to arrest are based on English common law, those rules have since been codified in England. As noted by the majority in *R. v. Golden*, such statutory regimes can also offer some guidance to Canadian courts.<sup>34</sup>

For example, in *Golden* the Supreme Court considered section 32(2) of the *Police and Criminal Evidence Act 1984* (U.K.), which codified the common law with respect to police searches in England. Pursuant to this section an officer may search an individual who has been arrested for anything:

- a) which he might use to assist him to escape from lawful custody; or which might be evidence relating to an offence; and
- b) if the offence for which he has been arrested is an indictable, to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence.<sup>35</sup>

Section 32(9) further authorizes that a constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing:

- a) that he might use it to assist him to escape from lawful custody; or
- b) that it is evidence of an offence or has been obtained in consequence of the commission of an offence.<sup>36</sup>

Furthermore, sections 53 and 55 of the *Police and Criminal Evidence Act 1984* abolished the common law right to conduct intimate searches (i.e. strip searches) unless they are approved by an officer of at least the rank of

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<sup>32</sup> Leigh, *supra* note 13.

<sup>33</sup> *R. v. Belnavis* (1996), 29 O.R. (3d) 321 (Ont. C.A.), *aff'd* on other grounds [1997] 3 S.C.R. 341 [Belnavis]. Also see Caslake, *supra* note 16 at para. 17 where Chief Justice Lamer subsequently emphasized that “the search is only justifiable if the purpose of the search is related to the purpose of the arrest”.

<sup>34</sup> 2001 SCC 83, 3 S.C.R. 679 at para. 101. However, the minority stated at para. 8, that “[a]lthough foreign legislation can be useful as a source of criteria to determine the reasonableness of a search, I think it is clearly excessive to adopt foreign legislation to reinvent the common law rule [of search incident to arrest] in Canada” [Golden].

<sup>35</sup> *Police and Criminal Evidence Act 1984* (U.K.) 1984, c. 60, s. 32(2).

<sup>36</sup> *Ibid.*, s. 32(9).

Inspector. Even an electronic device seized incident to arrest cannot be “interrogated” (i.e. subjected to forensic analysis in order to download stored communications, pictures, videos, etc.) without warrant unless the offence is serious and such interference has been authorized by a ranking officer pursuant to section 93 of the *Police Act*, 1997.<sup>37</sup>

Recently, however, the Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO) issued practice guidelines regarding the recovery of digital based evidence. In those guidelines ACPO recommended that mobile phones should not be searched by untrained personnel due to the potential loss or destruction of data. For all digital based evidence ACPO recommended the following principles be adhered to:

Principle 1: The data held on an exhibit must not be changed.

Principle 2: Any person accessing the exhibit must be competent to do so and explain the relevance and implications of their actions.

Principle 3: A record of all processes applied to an exhibit should be kept. This record must be repeatable by an independent third party.

Principle 4: The person in charge of the investigation has the responsibility for ensuring that the law and these principles are adhered to.<sup>38</sup>

While ACPO did not mandate getting search warrants for such devices, they did stress the importance of a properly conducted forensic analysis by trained personnel. Furthermore, searches of electronic devices in the field were to be discouraged unless exigent circumstances dictated otherwise. This is consistent with sending other types of evidence, such as DNA, trace evidence, tool marks and ballistics, away for forensic analysis by expert technicians and to avoid contamination issues.

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<sup>37</sup> 1997, c. 50. A serious offence is one punishable by three or more years in prison, involves violence or substantial financial gain, or which involves a criminal organization or terrorist threat.

<sup>38</sup> Association of Chief Police Officers of England, Wales and N. Ireland “Good Practice Guide for Computer Based Evidence” (2009), at 4. Online: <[http://www.7safe.com/electronic\\_evidence/ACPO\\_guidelines\\_computer\\_evidence.pdf](http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf)>. See also “Electronic Crime Scene Investigation: An On-the-Scene Reference for First Responders” (2009), National Institute of Justice. Online: <<http://www.ojp.usdoj.gov/nij/pubs-sum/227050.htm>>.

## B. Forensic Examination

The foregoing authorities serve as a solid foundation for the power of police to search an electronic device incident to arrest and without warrant. For example, an experienced investigator may know that such devices can often be the recorder or instrumentality of certain types of crimes and will contain direct or circumstantial evidence of that or other offences.

To date there have only been a handful of cases reported in Canada where the lawfulness of data extracted from a cell phone seized incident to arrest has been at issue. In one of those cases, *R. v. Giles*,<sup>39</sup> the B.C. Supreme Court found that the memory and contents of a BlackBerry seized incident to arrest may be searched without warrant and without concern for the time lapse between the seizure of the device and the access to its contents.

Like the clothing in *U.S. v. Edwards*,<sup>40</sup> in this case, the court held:

[O]nce an item is seized for use in a criminal investigation, the police are entitled to subject it to technical analysis to determine its evidentiary significance. This often requires sending the item "off-site" to qualified experts. Neither the time nor the distance between the arrest and the analysis meant that the search of the BlackBerry fell outside the scope of the common law power to search incidental to this lawful arrest.<sup>41</sup>

The court further analogized that such searches are akin to looking inside a logbook, diary, notebook or purse found in the same circumstances,<sup>42</sup> and that the BlackBerry device was meaningless without its contents.<sup>43</sup> Moreover, the court emphasized that the search of the BlackBerry was not unreasonably invasive, stating:

I do not find persuasive the argument that the use of technology, when searching for particular e-mails and other data [e.g. "score sheets", telephone numbers, e-mail addresses, memos, calendar information, saved digital communications, PIN numbers, bank account numbers and passwords], was such a dramatic and unreasonable invasion of privacy that the search here fell outside the scope of a search incidental to the arrest. This search was not an "affront to human dignity" because it was not invasive as is the taking of bodily samples. Nor was it a search of the home, a place which is highly protected. It was a search of a hand-held computer by use of BlackBerry software.<sup>44</sup>

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<sup>39</sup> 2007 BCSC 1147, 77 W.C.B. (2d) 469 [*Giles*].

<sup>40</sup> *Supra* note 20.

<sup>41</sup> *Giles*, *supra* note 39 at para. 57. See also *R. v. Backhouse* (2005), 195 O.A.C. 80, 194 C.C.C. (3d) 1; *R. v. McIntyre* (1993), 135 N.B.R. (2d) 266, 21 W.C.B. (2d) 376, *aff'd* on other grounds [1994] 2 S.C.R. 480 in which a majority of the New Brunswick Court of Appeal held that the seizure of a jacket for blood and gunshot residue testing could have been justified incident to arrest.

<sup>42</sup> *Ibid.* at para. 56.

<sup>43</sup> *Ibid.* at para. 55.

<sup>44</sup> *Ibid.* at para. 68.



In reaching its decision, the court relied in part<sup>45</sup> on the ruling of Justice Dunn in *R. v. Lefave*,<sup>46</sup> where the police searched the accused's apartment and arrested him after he threatened, on an Internet chat site, to rape his seven-year-old daughter and then kill himself. Incident to his arrest the police seized his laptop computer and sent it for forensic analysis to a Technical Crimes Unit. In a subsequent trial for possession of child pornography found on the computer, Justice Dunn found that the laptop was seized incidental to a lawful arrest and that the "[t]he examination of the data in the computer was a reasonable procedure to determine if there was any evidence on it to connect the accused with the crime in question."<sup>47</sup> Accordingly, there was no violation of section 8 of the *Charter*.<sup>48</sup>

The decisions in *Giles* and *Lefave* were recently considered by Justice Trafford (albeit without comment or analysis) in *R. v. Polius*.<sup>49</sup> In that case it was held that the inspection of a cell phone on arrest breached the accused's section 8 rights. While Justice Trafford conceded that the primary investigator (Detective Sergeant Burks) did have, objectively, a reasonable basis for his belief that the accused's cell phone may have contained evidence of a murder, and that he had met the threshold required to seize the phone incident to arrest and subsequently have it examined, Detective Sergeant Burks did not arrest the accused. The arrest was carried out by Detective Correia (albeit at Burks' direction).<sup>50</sup>

Although Burks instructed Correia to arrest the accused on a charge of counseling to commit an indictable offence, he did not instruct him to seize any cell phones he may have had in his possession incident to arrest and he did not summarize the information he had collected about the alleged murder to facilitate a lawful seizure of the device. Consequently, Justice Trafford held that Detective Correia did not have a reasonable basis for his belief that the cell phone may have been evidence of the murder when he arrested the accused. Justice Trafford further declined to impute Detective Correia with the knowledge of Detective Sergeant Burks.<sup>51</sup>

As Justice Trafford found that the evidence from the phone was nevertheless admissible under section 24(2) of the *Charter*, the ruling is

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<sup>45</sup> *Ibid.* at para. 61.

<sup>46</sup> [2003] O.T.C. 872, 59 W.C.B. (2d) 217 (Ont. Sup.Ct.).

<sup>47</sup> *Ibid.* at para 30

<sup>48</sup> *Ibid.* at para. 31.

<sup>49</sup> *R. v. Polius*, [2009] O.J. No. 3074 (Ont. Sup. Ct.) (QL).

<sup>50</sup> *Ibid.* at para. 37. See also *R. v. Savory*, (15 October 2009), unreported ruling of Justice Lederer (Ont. Sup. Ct.).

<sup>51</sup> *Ibid.* at paras. 38-39.

unlikely to be appealed by the Crown. However, it is worth noting that Justice Trafford would have likely found that the search of the phone incident to arrest did not invoke section 8 of the *Charter* if it had been carried out by Detective Sergeant Burks himself or if he had summarized for Detective Correia the details of the case, and the initial search of the phone was cursory in nature to determine if there was a reasonable basis to believe it may be evidence of the offence. Nevertheless, subject to exigent circumstances, Justice Trafford felt a full forensic analysis could not be conducted incident to arrest without a warrant.<sup>52</sup>

Considering reasonable grounds are the prerequisite for a valid arrest, it will be rare that the arresting officer does not have some basic understanding of the case or the reasons for the arrest. Furthermore, a full forensic analysis is already conducted on other items lawfully seized incident to arrest and without warrant (such as DNA analysis, GSR testing and footwear impressions); therefore, it is unlikely the courts will carve out a special niche just for handheld devices. While a number of privacy concerns are raised, those concerns are secondary to the lawful restraint of the suspect's liberty interests as noted in the cases below.

As Justice Trafford did not cite any foreign jurisprudence in his analysis it is possible that he may have come to a different conclusion had he canvassed the growing case law on the subject in the United States. However, as there appears to be a split between the B.C. Supreme Court and the Ontario Superior Court of Justice on this issue, further review of the jurisprudence in the United States may be helpful as a guide for Canadian courts.

## II. EXAMINATION OF PERSONAL PROPERTY ON ARREST

### A. Wallets, Notebooks and Diaries

In *Giles* the court analogized that searches of handheld devices such as a Blackberry were no different than looking inside a logbook, diary, notebook or purse. While the court in *Giles* did not cite any cases to support this proposition, it is clear that such "information repositories" are analogous to handheld devices and may be searched incident to arrest.<sup>53</sup>

In fact, *U.S. v. Cote*<sup>54</sup> recently came to the same conclusion, holding that the contents of a cellular phone, including its call logs, phone book, and wireless web inbox were properly searched incident to a valid arrest. The court held

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<sup>52</sup> *Ibid.* at para. 34.

<sup>53</sup> *Giles*, *supra* note 39 at para. 56.

<sup>54</sup> 2005 WL 1323343 (N.D.Ill., 2005), *aff'd* on other grounds 504 F.3d 682 (7th Cir. 2007), cert. denied, 128 S. Ct. 2519 (2008) [*Cote*].

that searches of items such as wallets and address books, which it considered analogous to a cellular phone, have long been held valid when made incident to an arrest.<sup>55</sup>

Two of the cases cited by the court in *Cote* were *U.S. v. Molinaro*<sup>56</sup> and *U.S. v. Rodriguez*.<sup>57</sup> In *Molinaro* a DEA agent seized the accused's wallet incident to arrest, spread its contents out on the trunk of a car, and discovered slips of paper containing the name and phone numbers of the accused's co-conspirators. The court rejected the accused's contention that this was not a valid search incident to arrest, noting that the Supreme Court had upheld warrantless searches of an arrestee's person, including personal property contained in his pockets, as a search incident to arrest, and that numerous courts had upheld the search of a defendant's wallet under the search incident to arrest exception to the warrant requirement.<sup>58</sup>

In *Rodriguez*, officers seized the accused's wallet and personal address book following his arrest and photocopied each of its pages, in the process learning that the book contained the phone number of a co-conspirator. The court upheld the search as valid incident to arrest, and upheld the photocopying of the contents of the book as a permissible attempt to preserve evidence.<sup>59</sup> The accused tried to argue that the photocopying of the contents of the address book did not occur at the scene of the arrest; however, quoting *Edwards*,<sup>60</sup> the court refused to invalidate the search because:

[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention . . . The courts of appeals have followed this same rule, holding that both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted into evidence.<sup>61</sup>

More recently, in *U.S. v. Vaneenwyk*,<sup>62</sup> the New York District Court held that the search and photocopying of a day planner was justified incident to arrest. Citing *Rodriguez*, the court held that the accused had no more reasonable expectation of privacy in the day planner at the police station following his

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<sup>55</sup> *Ibid.* at 6.

<sup>56</sup> *U.S. v. Molinaro*, 877 F.2d 1341 (7th Cir. 1989) [*Molinaro*].

<sup>57</sup> *U.S. v. Rodriguez*, 995 F.2d 776 (7th Cir. 1993), cert. denied, 510 U.S. 1029 at 778 [*Rodriguez*].

<sup>58</sup> *Supra*, note 56 at 1346-47.

<sup>59</sup> *Supra*, note 57 at 778.

<sup>60</sup> *Supra* note 20.

<sup>61</sup> *Rodriguez*, *supra* note 57 at 778.

<sup>62</sup> 206 F. Supp. 2d 423 (N.Y.D.C. 2002).

arrest than he did at the time of its initial seizure by the officers when they searched the inside of his truck. The court stated:

The fact that the officers later photocopied the day planner is of no moment. Having already legitimately looked through the contents of the book, the officers' copying of it simply preserved what they had already lawfully seen.<sup>63</sup>

Furthermore, in *U.S. v. Simpson*,<sup>64</sup> the Tenth Circuit Court of Appeals held that evidence obtained from a wallet searched incident to arrest, did not have to be in relation to the crime being searched for. The court held that, as a general rule, a search incident to a lawful arrest may be made of all portable personal effects in the immediate possession of the person arrested. The discovery during a search of totally unrelated objects which provide grounds for prosecution of a crime different than that which the accused was arrested for does not render the search invalid. One of the justifications advanced by the court for searching the wallet's contents was that cards and addresses may disclose names of those who may have conspired with the person searched in the commission of the crime charged.<sup>65</sup>

Mr. Justice Ritter of the Alberta Court of Appeal recently took a similar position in *R. v. Chubak*, where he stated:

When police search a person as part of a search incident to arrest, they are not precluded from looking at, and taking into their control and custody, anything they find on the arrested person, so long as the search is for a reason related to the arrest. For example, police may find a piece of paper on the arrested person. That piece of paper may be totally innocuous, or it may disclose that the arrested person just purchased a knife or firearm which has not yet surfaced in the search. It may also disclose that the arrested person was involved in a crime unrelated to the search. If it does, and even if the police were beginning to suspect that the arrested person was involved in such a crime, the piece of paper is admissible in evidence as a fruit of a search incident to arrest.<sup>66</sup>

More than 15 years earlier, in *U.S. v. Andrews*, the Fifth Circuit also took a similar position.<sup>67</sup> In that case agents from the Drug Enforcement Agency (DEA) tracked a tugboat until it docked in Pascagoula, Mississippi. Andrews was observed waiting for the boat when it docked and surveillance was

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<sup>63</sup> *Ibid.* at para. 17.

<sup>64</sup> 453 F.2d 1028 (10th Cir.), cert. denied, 408 U.S. 925 (1972).

<sup>65</sup> *Ibid.* at 1031. See also *U.S. v. Abel*, 707 F.2d 1013 (9th Cir. 1983); *U.S. v. Holzma*, 871 F.2d 1496 (9th Cir. 1983) rev'd on other grounds; *Horton v. California*, 496 US 12 (1990); *U.S. v. Richardson*, 764 F.2d 1514 (11th Cir.), cert. denied; *U.S. v. Crespo-Diaz*, 474 US 952 (1985); *U.S. v. McEachern*, 675 F.2d 618 (4th Cir. 1982); *U.S. v. Passaro*, 624 F.2d 938 (9th Cir. 1980), cert. denied (1981), 449 US 1113; *U.S. v. Gay*, 623 F.2d 673 (10th Cir. 1980), cert. denied, 449 U.S. 957; *U.S. v. Castro*, 596 F.2d 674 (5th Cir. 1979), cert. denied, 444 US 963; and *U.S. v. Ziller*, 623 F.2d 562 (9th Cir. 1980).

<sup>66</sup> *R. v. Chubak*, 2009 ABCA 8, 100 Alta. L.R. (4th) 199 at para. 19 [emphasis added].

<sup>67</sup> *U.S. v. Andrews*, 22 F.3d 1328 (5th Cir. 1994), cert. denied (1994), 115 S.Ct. 346.

subsequently conducted on him. Three days later Andrews was observed driving erratically and he was arrested for impaired driving by the local police. A search incident to arrest located a red spiral notebook that contained diagrams inside.

The officer subsequently turned the notebook over to the DEA, who determined that one of the diagrams included the names and abbreviations of the countries Colombia, Peru, Argentina, Venezuela, and Panama. These names and abbreviations were connected to each other, and to the names of locations in Georgia and Florida, by a series of lines and arrows. At trial the government argued that the diagram depicted a marijuana distribution and importation network.<sup>68</sup>

Furthermore, one day after Andrews' arrest for impaired driving, a search conducted inside the fuel tanks of the tugboat found a hidden airtight compartment containing over four thousand pounds of marijuana, with an estimated street value of \$3.6 million. One of the other diagrams in Andrews' spiral notebook depicted the fuel tanks in the tugboat and the location of the marijuana in the hidden compartment.

The issue at trial was the search of the notebook and its delivery to and subsequent use by the DEA. The seizing officer did not contend that the notebook was either contraband or the instrumentality of crime; rather, he turned it over to the DEA because he believed that the diagrams might be relevant. The defence argued that when the officer turned the notebook over to federal officials, "what began as an inventory search . . . became an excuse for 'investigatory rummaging' on behalf of Customs and DEA."<sup>69</sup> However, the court found the argument to be without merit, holding that:

Once property has been seized with proper justification and is in plain view of governmental officials, the owner no longer has a reasonable expectation of privacy with respect to that property, and it may be seized without a warrant. When Adams turned the notebook over to federal officials and they reviewed it, it had already been seized with proper justification, pursuant to a valid inventory search.<sup>70</sup>

In *R. v. Brady*,<sup>71</sup> the Ontario Superior Court also considered whether a detailed search of an address book seized from the accused incident to arrest was justified. In this case the accused was arrested after an extensive investigation into child pornography and child sexual abuse. The address book was photocopied and over the next few months an officer called most of the names and phone numbers which appeared in the book to unearth evidence of other crimes that may have been committed by the accused. He eventually

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<sup>68</sup> *Ibid.* at 1333.

<sup>69</sup> *Ibid.* at 1336-37.

<sup>70</sup> *Ibid.* at 1338-1338.

<sup>71</sup> (1996), 6 O.T.C. 307, 31 W.C.B. (2d) 382.

located a youth who had been sexually abused among the list. This youth was the subject of the current charges against the accused.

The court concluded that the search and seizure fell within the justificatory exception of a valid search incident to arrest, holding that the doctrine had to be given sufficiently flexible scope to allow the police to use seized materials to investigate both the charged crime and other possible crimes. The court stated:

[T]he police aim was largely to use the evidence to ascertain if the accused might have committed other crimes on young people falling within the framework of the Project Guardian investigation. I remain convinced that the incident-to-arrest doctrine must be given sufficiently flexible scope to allow the police to use the seized materials to investigate both the charged crime and other possible crimes that might have been committed by the accused. Absent evidence that the police have acted in bad faith by, for example, laying the charge itself as a ruse or stratagem to conduct what otherwise would be a clearly unreasonable search.<sup>72</sup>

In *Hill v. California*,<sup>73</sup> the United States Supreme Court affirmed the use of a diary seized incident to arrest that contained two pages outlining the accused's participation in a robbery in detail. As the accused could not be identified by the witnesses, the diary was the only substantial evidence against him.<sup>74</sup>

While the scope of the search incident to arrest, in that case an entire apartment, has since been narrowed by *Chimel v. California*,<sup>75</sup> it is still valid law in terms of searching the contents of a diary for evidence— notwithstanding that it is inherently private and contains an individual's private thoughts.

In *Reimer v. Ontario*,<sup>76</sup> a civil case alleging false arrest and imprisonment, members of the Ontario Provincial Police (OPP) seized a scrapbook Mr. Reimer

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<sup>72</sup> *Ibid.* at para. 15-16.

<sup>73</sup> 401 U.S. 797 (1971).

<sup>74</sup> *Ibid.* at 801. See also *People v. Hill*, 69 Cal.2d 550, 446 P.2d 521 at 522, note 3 (Cal. Sup. Ct. 1968). The diary narrated: "Friday I went out with Gina. Then Saturday night we went out to hold up a market, but when we got there it was closed, so we had to go to a house. We knocked on the door, and when they answered the door we ran in and I had to hit the man on the head with my gun, because he didn't get down on the floor fast enough. We only got about \$60 from them. We left from there and went to TJ and scored seven keys. On the way back we pulled over at the roadblock, but they only checked the trunk of the car. We got back home about 6:00 in the morning. I went to bed. Then Dick and one of the guys that made this run with us left my apartment with Dick to go and get something to eat. This turned out to be a mistake, because they got busted for possession of grass".

<sup>75</sup> *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 at 2043 (1969). While the court found that an entire house or even a room was too broad an area to search incident to arrest, the English courts still allow such searches incident to arrest for extradition offences. See *R. (on the application of Rottman) v. Commissioner of Police of the Metropolis*, [2002] UKHL 20, [2002] 2 A.C. 692.

<sup>76</sup> (2007), 159 A.C.W.S. (3d) 461, O.J. No. 2683 (Ont. Sup.Ct.) (QL).

carried with him and looked through it. Mr. Reimer was upset with the seizure and did not believe the OPP should have had access to it. However, Justice McKinnon stated that, while “no doubt Mr. Reimer had a reasonable expectation of privacy in his book, . . . the book was seized appropriately as an incident to arrest”.<sup>77</sup>

As authority for this proposition Mr. Justice McKinnon cited *R. v. Mohamad*<sup>78</sup> in which the Ontario Court of Appeal upheld the search of a briefcase in a vehicle subsequent to the accused’s arrest. Although the vehicle was stolen, the accused maintained that he had a privacy interest in the contents of his briefcase that was inside the vehicle. The court disagreed, stating:

On each occasion that Dyett opened the briefcase, he undertook his search of its contents for the purpose of discovering evidence relating to the crimes for which Jebo had been arrested. The searches were grounded in Jebo’s arrest and were carried out in a vehicle known to have been stolen.

In these circumstances, I conclude that the requirements for a valid search of the appellant’s briefcase under the search incident to arrest power were met. The search of the contents of the briefcase was not unlawful or unreasonable and, hence, the evidence obtained from that search was admissible.<sup>79</sup>

However, where such material is seized in plain view (as opposed to incident to arrest), it must be ‘immediately apparent’ that what is being viewed is evidence of a crime or is otherwise subject to seizure.

### ***Plain View Doctrine***

In *R. v. Doyle*,<sup>80</sup> the court excluded a diary located during a search warrant of the suspect’s house where the police were looking for a hunting knife and clothing. While the diary was found to contain incriminating statements, unlike

<sup>77</sup> *Ibid.* at para. 64. See also *R. v. Lamirande*, 2002 MBCA 41, [2002] 9 W.W.R. 17 leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 203 (January 23, 2003), where notes and poetry seized from an accused when she was admitted into custody were used to provide essential background and context within which she and the others came together to commit the robbery.

<sup>78</sup> *R. v. Mohamad* (2004), 69 O.R. (3d) 481, 181 O.A.C. 201 (C.A.) (QL).

<sup>79</sup> *Ibid.* at paras. 47-48. See also *U.S. v. Johnson*, 846 F.2d 279 (5th Cir. 1998); *U.S. v. Stephenson*, 785 F.2d 214 (8th Cir. 1986); *U.S. v. Chiu*, 522 F.2d 330 (2nd Cir. 1975) for other cases where briefcases were searched incident to arrest. But also see *R. v. Adekoya* (2001), Winnipeg 99-01-21184 (Man. Q.B.), where Krindle J. found the search of a briefcase was not rationally connected to the underlying arrest (although admitted the evidence under s. 24(2) of the Charter.

<sup>80</sup> (1992), 128 N.B.R. (2d) 91 [Doyle].

the situation in *Hill*, it was not seized incident to arrest, but was only seized in “plain view” after the officer found it in a bedside table and looked through it.<sup>81</sup>

The court in *Doyle* relied on three American decisions that were particularly on point.<sup>82</sup> In one of those decisions, *U.S. v. Wright*,<sup>83</sup> a tax evasion case, the Ninth Circuit Court of Appeals excluded evidence found in a 5 x 8 inch ledger book that was located during a police search warrant for a fake driver’s license. The court held that the government’s “plain view” justification must fail because the scope of the authorized search of the ledger was restricted to checking whether it contained the fake license, which “did not require the perusal of the ledger’s written contents.” Moreover, “[t]he incriminating nature of the ledger was not ‘immediately apparent’ . . . but was revealed only after [the officer] carefully examined its contents.”<sup>84</sup> The court went on to express its discomfort with this type of search, stating:

If it were permissible to inspect the contents of the ledger, officers acting under a search warrant for any specific item would be empowered to inspect minutely diaries, letters, films and all matter of private materials unrelated to the authorized scope of the search. To permit this type of conduct under the cloak of the plain view exception would be tantamount to enlarging the scope of any search to that of the “general warrant” abhorred by the colonists.” The Constitution protects against such intrusions. We hold that the trial court erred in failing to suppress the evidence of the black ledger.<sup>85</sup>

The Ninth Circuit came to a similar conclusion in *U.S. v. Whitten*,<sup>86</sup> where it held that the seizure of a closed notebook under the plain view rule was not permitted. Nevertheless, a yellow notepad opened to a page containing information, the nature of which was readily apparent to the agents as incriminating, was held to be admissible. As noted by the court:

[T]he ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. To assure that warranted searches do not result in ‘exploratory rummaging’ the plain view doctrine limits the right of seizure to items, the incriminating nature of which is immediately apparent to the searching officer.<sup>87</sup>

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<sup>81</sup> *Ibid.* at para. 50. See also *R. v. Little*, 2009 CanLII 41212 (Ont. Sup. Ct.); *R. v. Little*, 2009 CanLII 42594 (Ont. Sup. Ct.) in which circumstantial evidence (text messages and photographs) linking the accused to the victims of a double homicide were found on his phone (a Palm Treo). The phone was not seized incident to arrest, but was located during a search warrant of the accused’s home. As the phone was not listed on the warrant, it was seized under s. 489 as evidence in plain view. Although she admitted the evidence under s. 24(2), Justice Fuerst found that searching it without warrant was a breach of s. 8.

<sup>82</sup> *Ibid.* at paras. 45-49.

<sup>83</sup> *U.S. v. Wright*, 667 F.2d 793 (9th Cir. 1982).

<sup>84</sup> *Ibid.* at 797.

<sup>85</sup> *Ibid.* at 799.

<sup>86</sup> *U.S. v. Whitten*, 706 F.2d 1000 (9th Cir. 1983).

<sup>87</sup> *Ibid.* at 1013 [emphasis added].



By contrast, in *State v. Franklin* the Missouri Court of Appeals held that the police were justified in viewing a videotape that was found to contain child pornography, where the videotape was found in plain view.<sup>88</sup> The officer observed the videotape in plain view while seizing other drug paraphernalia and believed it might contain instructions on how to cook or manufacture methamphetamine as he had found other such videotapes when investigating other methamphetamine labs. As such he viewed the videotape to determine whether it contained such instructions. When he saw the images of a small child having oral and anal intercourse with an adult male it was immediately apparent that it was child pornography and was seized.<sup>89</sup>

The plain view doctrine is similar in Canada.<sup>90</sup> In fact, most Canadian cases on the doctrine can trace their lineage to any number of U.S. cases, in particular *Texas v. Brown*,<sup>91</sup> *Horton v. California*<sup>92</sup> and *Coolidge v. New Hampshire*.<sup>93</sup>

For example, in *R. v. Belliveau*<sup>94</sup> the New Brunswick Court of Appeal, summarizing *Texas v. Brown*, stated that before the plain view doctrine will permit the warrantless seizure by police of private possessions, three requirements must be satisfied:

First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Secondly, the officer must discover incriminating evidence "inadvertently", which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it", relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when the police officers lawfully engaged in an activity in a particular area perceive a suspicious object, they must seize it immediately.<sup>95</sup>

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<sup>88</sup> *State v. Franklin*, 144 S.W.3d 355 at 359 (Mo.App. S.D. 2004).

<sup>89</sup> *Ibid.* at 360. See also *State v. Ridgway*, 718 So. 2d 318 (Fla. App. 1998), for a similar decision where a photo album, found in a cooler was opened by officers looking for drug paraphernalia (i.e. written instructions on how to cook meth), and found to contain pictures of the accused having sex with minors.

<sup>90</sup> See *R. v. Belliveau* (1986), 75 N.B.R. (2d) 18, 30 C.C.C. (3d) 163 (C.A.); *R. v. Fitt* (1995), 139 N.S.R. (2d) 186, 96 C.C.C. (3d) 341 (C.A.), aff'd [1996] 1 S.C.R. 70; *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (C.A.), 26 C.R.R. (2d) 354, aff'd [1996] 1 S.C.R. 70; and *R. v. Spindloe*, 2001 SKCA 58, [2002] 5 W.W.R. 239. See also *R. v. Tse*, 2008 BCSC 906, 79 W.C.B. (2d) 720 at paras. 196-204, where Davies J. found a computer seized in plain view during a search warrant could be examined as well.

<sup>91</sup> 460 U.S. 730 (1983).

<sup>92</sup> 496 U.S. 128 (1990).

<sup>93</sup> 403 U.S. 443 (1971).

<sup>94</sup> *Supra* note 90.

<sup>95</sup> *Ibid.* at para. 25.

In *R. v. Law*,<sup>96</sup> while affirming the plain view doctrine, the Supreme Court of Canada held that it could not be used to justify examining, translating and photocopying documents found in a stolen safe for use by Revenue Canada officials. The documents were not found inadvertently and their incriminating nature was not immediately obvious to the officer. In fact the officer testified that there was nothing facially wrong with the documents and that he lacked both accounting expertise and proficiency in Chinese (the language of the documents) to have even determined there was.<sup>97</sup>

The important question for the purpose of this paper is whether or not digital evidence residing on a handheld device or computer is properly characterized as “in plain view.” That is, if the device is lawfully seized incident to arrest, will the police always be in a lawful position to view everything on the device? Or is it more limited, so that such searches do not result in “exploratory rummaging” until something incriminating is found?

Few courts have considered the question of how the plain view doctrine applies to digital evidence. However, in *U.S. v. Wong*,<sup>98</sup> the Ninth Circuit examined the admissibility of child pornography located on the accused’s computer during a search, by the police, for evidence of the accused’s involvement in the murder of his girlfriend.

Specifically, the police were looking for documents, maps and diagrams relating to the site where the victim’s body was found, and for material related to the white supremacist movement which the police suspected the suspect had manufactured as a ruse to disguise the true motive for the murder. At his trial for possession of child pornography, the accused argued that the evidence was not related to the justification of the original search and was therefore inadmissible. However, the court found that the police were lawfully searching for evidence of murder in the graphics files when they accessed the child pornography. As such, the evidence was properly admitted under the plain view doctrine:

The child pornography seized must have been in plain view during the search for evidence of [the victim’s] murder. To satisfy the plain view doctrine: (1) the officer must be lawfully in the place where the seized item was in plain view; (2) the item’s incriminating nature was ‘immediately apparent;’ and (3) the officer had ‘a lawful right of access to the object itself.’ ... While searching the graphics files for evidence of murder ... [Officer] Van Alst discovered pictures of children as young as age three engaged in sexual acts. The incriminating nature of the files was immediately apparent to Van Alst. Since the police were lawfully searching for evidence of murder in the graphics files,

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<sup>96</sup> 2002 SCC 10, 1 S.C.R. 227.

<sup>97</sup> *Ibid.* at para. 27.

<sup>98</sup> 334 F. 3d 831 (9th Cir. 2003).

that they had legitimately accessed and where the incriminating child pornography was located, the evidence was properly admitted under the plain view doctrine.<sup>99</sup>

Furthermore, in *U.S. v. Williams*,<sup>100</sup> the Fourth Circuit Court of Appeals held that a search of a computer is analogous to a file cabinet containing a large number of documents and when conducting a search officers may view each file, at least cursorily, to determine its contents. To be effective, such searches should not be restricted by file name or label because such name or labels on a computer can be easily manipulated to hide their real substance. The court stated:

Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality . . . Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.<sup>101</sup>

However, where there are no legitimate facts that a computer may be a repository for evidence sought in a search, conducting such a search without warrant will be unconstitutional. In *U.S. v. Payton*<sup>102</sup> the police obtained and executed a search warrant on the accused's residence looking for, among other things, sales ledgers and financial records of his involvement in the drug trade. While the warrant did not explicitly authorize the search of the accused's computer, it was searched and child pornography was located. At a subsequent trial for possession of child pornography, the evidence was excluded.<sup>103</sup>

<sup>99</sup> *Ibid.* at 838. See also *State v. Frasier*, 794 N.E. 2d 449 (Ind. Ct. App. 2003) in which the court concluded that child pornography was observed in plain view where the police were examining the computer for notes and records of drug trafficking. But see *U.S. v. Carey*, 172 F.3d 1268 (10th Cir. 1999), reh'g denied, (Apr. 30, 1999), where the court held that a warrantless police search of image files on the defendant's computer was not justified under the "plain view" doctrine, and was therefore in violation of the Fourth Amendment, where a police officer was searching the computer for evidence of drug trafficking and, after noting several files with a sexually suggestive name and with a ".jpg" file name extension, suggesting an image file, the officer began looking through the ".jpg" files.

<sup>100</sup> 592 F.3d 511 (4th Cir. 2010).

<sup>101</sup> *Ibid.* at 522. See also *U.S. v. Mann*, 592 F.3d 779 at 782 (7th Cir. 2010); *U.S. v. Hill*, 459 F.3d 966 at 978 (9th Cir. 2006) where the court stated, "[c]riminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer"; *U.S. v. Gray*, 78 F. Supp. 2d 524 527 n.5 (E.D. Va. 1999), where the court stated, "computer files can be misleadingly labeled, particularly if the owner of those files is trying to conceal illegal materials."; *U.S. v. Riley*, 906 F.2d 841 at 845 (2d Cir. 1990) where the court stated, "few people keep documents of their criminal transactions in a folder marked 'drug records.'"

<sup>102</sup> 573 F.3d 859 (9th Cir. 2009).

<sup>103</sup> *Ibid.* See also *U.S. v. Kim*, WL 5185389 (S.D. Texas 2009). While the officers in *Kim* had obtained a warrant to search his computer for evidence of computer hacking, they opened files that were suggestive of child pornography (not hacking) such as "ForbiddenFruit" and "Illegal\_Loli#". The evidence was suppressed at a subsequent trial for possession of child

As such, while it is possible to seize and examine a handheld device incident to arrest and justify the observation and recovery of evidence related to other crimes under the plain view doctrine, there must be some reasonable connection between examining the device and the evidence observed. For example, in *People v. Bullock* the court found that the police lawfully searched a pager incident to the accused's arrest for drug trafficking where it was held that pagers are an "instrument commonly used in selling drugs".<sup>104</sup>

However, where there is no claim that such devices are known to be instruments or recorders of criminal activity, or where there is no rational connection between the arrest and the search, relying on the plain view doctrine might be a risky proposition for investigators and it should likely be avoided. For example, in *State v. Smith* the Indiana Court of Appeals held that a warrantless search and seizure of the electronic contents of the cellular phone that had been seized from the defendant's car was not justified under the plain view doctrine.<sup>105</sup>

Despite these cases, in *R. v. LeFave*,<sup>106</sup> there was no discussion whatsoever about the plain view doctrine when officers discovered child pornography while looking at the accused's computer incident to arrest for threats to his daughter. Instead, the court was quite content to hold that the images were observed incident to a lawful examination of the computer seized incident to arrest. The court explained its conclusion in clear, simple terms:

It is trite law that, if the police uncover evidence of other crimes during the course of a lawful investigation or search, they can use such evidence for further charges.

In the case before me, if there had been no computer aspect to the crime being investigated, a seizure and search of the contents of the computer would probably be illegal absent a warrant.

Here, the seizure of the laptop computer was incidental to the investigation of the alleged crime of threatening or communicating. The examination of the data in the computer was a reasonable procedure to determine if there was any evidence on it to connect the accused with the crime in question. Unlike the case of *R. v. Caslake*, *supra*, in the evidence before me, both the subjective and objective elements of the officers' belief in searching the data of the computer were reasonable in these peculiar circumstances.

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pornography as the officers did in fact believe they contained child pornography (not evidence of hacking). As such it could not be said they were discovered inadvertently.

<sup>104</sup> *People v. Bullock*, 277 Cal. Rptr. 63 at 66 (1991). Also see *State v. Franklin*, *supra* note 88, regarding the examination of videotapes where, in the officer's experience, such tapes may contain evidence of the crime.

<sup>105</sup> *Smith v. State*, 713 N.E.2d 338 (Ind. Ct. App. 1999), transfer denied, 726 N.E.2d 303 (Table) (Ind. 1999). Notwithstanding the recent ruling in *Arizona v. Gant*, *supra* note 25, searching the device incident to arrest may have been a more reasonable explanation.

<sup>106</sup> *Supra*, note 46.

The discovery of what appeared to the officers to be examples of child pornography from the different places on the accused's computer was incident to the examination of that data that the police were then seeking. That incident, or as it might be termed accidental discovery, of other evidence is, however, evidence that, in my view, was legally obtained by the actions of the police in the circumstances. Consequently, I find that there has been no breach of the accused's rights under s. 8 of the Charter.<sup>107</sup>

## B. Cameras and other Recording Equipment

Many of today's digital cameras have memory cards that far exceed those of computers in years past. They can be used to record private memories and, in recent years, they have also been added as a feature to many digital phones. As such, they also make a good analogy for the storage and retrieval of personal information contained in today's cell phones.

In *U.S. v. Ayalew*,<sup>108</sup> the New York District Court held that the police were entitled to search the accused's camera, incident to his arrest along the border, for any photographic evidence that he had in fact crossed the border. In its original decision, the court held that the camera had been lawfully taken from him and as such he could no longer expect any right of privacy with respect to its contents.<sup>109</sup> At the motion for reconsideration, the accused argued that the examination of the camera was not truly incident to arrest, as it had been taken back to the police station; however, the court held that a camera may more properly be considered a personal effect than a container. The court stated:

'Personal effects' include items that are found on a suspect's person, including outer clothing, and the contents of his pockets, purse, or wallet. Generally, and in this case, Ayalew's camera was carried on his person. Additionally, courts have considered photographs within the purview of personal effects. Thus, cameras are not akin to luggage, as Ayalew suggests, and are not containers that may only be opened pursuant to a warrant.<sup>110</sup>

In *State v. Pancake*,<sup>111</sup> the Ohio Court of Appeals held that the police were lawfully entitled to view a videotape found inside a camcorder seized from an accused that had been surreptitiously videotaping women through their windows. The court held that the police were not required to obtain a warrant to view the videotape, nor were they required to obtain a warrant before asking the complainant to view the tape. While the accused contended that listening to the tape without a warrant was, in effect, an investigatory search

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<sup>107</sup> *Ibid.* at 28-31.

<sup>108</sup> *U.S. v. Ayalew*, 563 F. Supp. 2d 409 (N.D.N.Y. 2008). Reconsideration denied 2008 WL 4104699 (N.D.N.Y. 2008).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* at 2 [Internal citations omitted].

<sup>111</sup> 2003 WL 1596975 (Ohio App. 2 Dist. 2003).

which violated his expectation of privacy, the court held that once the tape had been seized and was within the control of the police that they had a right to play it and were not required to get a separate search warrant.<sup>112</sup>

More recently, in *State v. Gribble*,<sup>113</sup> the Rhode Island Supreme Court held that a camera seized from a suspect believed to be photographing young girls was validly searched incident to arrest. In this case the police responded to a report of a man photographing young girls with a concealed camera, as the officers approached to investigate, the accused pushed an officer away, fled, and knocked down a bystander. When the police caught and arrested the accused they searched a backpack he was carrying and found two digital cameras. They viewed photos on the cameras, which were of young girls taken from below waist level.

The court held that the fact that defendant had shut the cameras off and put them into a closed backpack indicated he intended to keep the photos private; thus, he had a reasonable expectation of privacy in the cameras and memory cards. But the search of the cameras was a valid search incident to arrest. The bag had been in defendant's control; officers looked inside it shortly after his arrest and determined that the cameras and their contents contained apparent evidence of criminal activity. The fact that the officers had to remove the cameras from the backpack, turn them on, and manipulate the cameras' controls in order to view the images, did not render the search unlawful.<sup>114</sup> Relying on the decision *U.S. v. Robinson*, the court held:

Cell phones, pagers, and laptops are similar to a digital camera in that they all hold personal data and process digital information. Courts across the country have found that an individual does have a reasonable expectation of privacy when it comes to these personal electronic devices.<sup>115</sup>

While the accused further indicated that the search of the camera was not contemporaneous with his arrest, the court held that the Fourth Amendment does not prohibit searches after a reasonable delay. The court concluded:

The search of the cameras seized from defendant was a valid search incident to his arrest because the officers believed the cameras and memory cards were evidence of defendant's alleged crime. The officers were aware of a report that defendant may have been taking unlawful pictures. When they found cameras in the bag defendant was carrying at the time of his arrest, it was reasonable that they would believe these were the cameras he allegedly had been using, and that they would contain potential evidence of the alleged crime. Since defendant was carrying the bags when he was arrested, they were clearly within his immediate control.<sup>116</sup>

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<sup>112</sup> *Ibid.* at paras. 31, 33.

<sup>113</sup> *State v. Gribble*, R.I. Super. LEXIS 149 (R.I. Super Ct. 2007).

<sup>114</sup> *Ibid.* at 17.

<sup>115</sup> *Ibid.* at 7.

<sup>116</sup> *Ibid.* at 17.

In *R. v. Manley*,<sup>117</sup> the Ontario Superior Court considered an application to exclude photographs of the accused holding a sawed-off shotgun found in the memory of a cell phone seized incident to his arrest. The accused was the prime suspect in several armed robberies and after his arrest the police opened a cell phone he was carrying with the intention of finding something in it that might identify the owner.

In the process of doing this the officer pushed various scroll and other buttons in order to observe the saved data in the phone, and observed pictures of the accused taking pictures of himself holding a sawed-off shotgun. These pictures were time-dated to indicate that they had been taken within twelve hours following one of the robberies he was suspected of. As the cell phone was losing power it was given to another officer who downloaded the images to a computer out of concern that the images may have been lost if the phone lost power.<sup>118</sup>

The accused claimed the search violated his sections 7 and 8 *Charter* rights to be secure against unreasonable search and seizure. However the court dismissed the application as the search and seizure were justified incident to arrest in accordance with the Supreme Court of Canada's rulings in *Cloutier* and *Caslake* for (a) safety reasons; (b) to check the ownership of any items in the accused's possession; (c) to check for evidence and to protect it from destruction.<sup>119</sup>

### C. Pagers, Cell Phones and Electronic Organizers

In *State v. Gribble*, the Court cited *U.S. v. Chan*, which held that "expectation of privacy in an electronic repository for personal data is therefore analogous to that in a personal address book or other repository for such information."<sup>120</sup> *Chan* was one of the first cases to address the issue of accessing the memory of an electronic pager incident to arrest.

In *U.S. v. Chan*, the police seized an electronic pager and searched it incident to the arrest. The court denied the accused's motion to suppress the evidence, holding the search was legally conducted incident to arrest, analogizing that the information stored in the pager was similar to that of a closed container. Citing to the Supreme Court's decision in *Belton*, the court held that the general requirement for a warrant prior to the search of a container (or an address book) does not apply when the container is seized incident to arrest:

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<sup>117</sup> [2008] O.J. No. 801 (Sup.Ct.) (QL).

<sup>118</sup> *Ibid.* at para. 25.

<sup>119</sup> *Ibid.* at paras. 25, 37.

<sup>120</sup> *U.S. v. Chan*, 830 F. Supp. 531 at 534 (N.D. Cal. 1993).

Although Chan had a protected privacy interest in the contents of the pager's memory, it is irrelevant in this case because the pager was searched incident to Chan's arrest. When making a lawful arrest, police may conduct a warrantless search of the area within the arrestee's immediate control ... an officer may also search the contents of a container found on or near the arrestee in a search incident to arrest.<sup>121</sup>

While Chan did not dispute the lawfulness of the seizure incident to his arrest, he argued that a separate warrant was required to search or examine the contents of the pager because of the high expectation of privacy in its contents. However, the court disagreed. While admitting that the device was not likely to produce a weapon and there was probably no threat that evidence would be destroyed, the court stated that the arrest itself destroyed the defendant's expectation of privacy in the subsequent search.<sup>122</sup> In reaching this conclusion the court relied on *U.S. v. Holzman*, a previous decision of the court, in which an address book was seized during a lawful arrest and immediately examined by the police:

As in *Holzman*, defendant Chan's expectation of privacy was destroyed as a result of a valid search incident to arrest ... [T]he general requirement for a warrant prior to the search of a container does not apply where the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid.<sup>123</sup>

The decision in *U.S. v. Chan* was subsequently endorsed by the Seventh Circuit Court of Appeals in *U.S. v. Ortiz*,<sup>124</sup> which held that the activation and retrieval of information from a pager searched incident to arrest was permissible under the Fourth Amendment. In affirming the trial court's decision, the court held:

An officer's need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed by merely turning off the power or touching a button. Thus, it is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.<sup>125</sup>

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<sup>121</sup> *Ibid.* at 535. See also *U.S. v. Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996); *State v. Deluca*, 325 N.J. Super. 376 (1999); *U.S. v. Hunter*, 166 F.3d 1211 (9th Cir. 1996), cert. denied, 525 US 1185 (1999); *U.S. v. Thomas*, 114 F.3d 403 (3rd Cir. 1997); and *U.S. v. Yu*, WL 423070 (S.D.N.Y. 1997).

<sup>122</sup> *Ibid.* at 536.

<sup>123</sup> *Ibid.*

<sup>124</sup> 84 F.3d 977 (7th Cir. 1996).

<sup>125</sup> *Ibid.* at 984. See also *People v. Bullock*, *supra* note 104; *U.S. v. Romero-Garcia*, 991 F. Supp. 1223 (D. Or. 1997), holding that a search of pager information without warrant was valid due to exigency of gathering the information before it was lost or corrupted.



With reference to a pager's finite memory, a similar argument was made in *U.S. v. Lynch*,<sup>126</sup> where it was argued that the activation and retrieval of stored information in the pager was valid due to the existence of exigent circumstances. However, like the court in *Chan*, the court declined to address this issue, finding that the search was valid incident to arrest. Following the Supreme Court's decisions in *U.S. v. Robinson* and *U.S. v. Edwards* the court held that warrantless searches of any effects found upon the accused's person was justified incident to arrest similar to the contents of wallets and address books. The court held:

The justification for allowing such searches is not that a person does not have an expectation of privacy in such personal effects such as a wallet or address book, but that once an arrest has been made, the privacy interests of the arrestee no longer take precedence over police interest in finding a weapon or obtaining evidence. While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape and evidence.<sup>127</sup>

While the accused argued that a closed, locked container could not be searched incident to arrest, citing *U.S. v. Chadwick* as authority, the court distinguished the 200-pound foot locker in that case from an item actually found on the accused's person. The difference, noted the court, between a pager and the footlocker at issue in *Chadwick*, is that one is clearly separate from the person of the arrestee. The pager here was found on the accused's hip and thus could be characterized as part of his person for purposes of a search incident to an arrest. It was an element of his clothing which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest.<sup>128</sup>

A similar ruling was made by the Sixth Circuit in *U.S. v. Goree (and Carter)*<sup>129</sup> respecting an electronic organizer. In that case, both accuseds were identified as possible drug traffickers upon their arrival at an airport, based on their travel profiles, which included last minute, cash-purchased tickets. They were subsequently arrested and searched after one of them was surveilled to a motel and the other one showed up. A search of Goree incident to arrest located four large baggies of cocaine wrapped with plastic to his upper torso. Goree subsequently provided a statement, which he refused to sign, saying he was carrying the drugs for Carter.

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<sup>126</sup> 908 F. Supp. 284 (D.V.I. 1995).

<sup>127</sup> *Ibid.* at 288.

<sup>128</sup> *Ibid.* at 289. See also *U.S. v. Johnson*, 846 F.2d 279 (5th Cir. 1988), holding that the search of a briefcase was valid as incident to a lawful arrest.

<sup>129</sup> 47 Fed. Appx. 706 at 713 (6th Cir. 2002).

When Carter was arrested he was searched and an electronic organizer was recovered from the pocket of the jacket he had been wearing at the time of his arrest. Without requesting Carter's consent and without first obtaining a search warrant, the police opened the organizer, turned it on, and pressed the "scroll" button. An examination of the contents revealed a listing for Goree, Goree's mother and Goree's pager. Several days later, the officers created a video recording that documented the contents of the electronic address book.

Both Goree and Carter were subsequently charged and convicted of conspiring to possess with the intent to distribute two kilograms of cocaine and with aiding and abetting each other in the possession of two kilograms of cocaine.

Carter subsequently appealed his conviction on the ground that the search of his organizer was unlawful. The Court of Appeal disagreed, affirming the admissibility of the evidence:

One of the delineated exceptions to the warrant requirement is for searches incident to a lawful arrest. A search incident to arrest may extend to the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. While based upon the need to disarm and to discover evidence . . . the fact of the lawful arrest . . . establishes the authority to search. Accordingly, an officer need not provide proof of an additional exigency to justify a search that is incident to a lawful arrest, and the item need not still be in the defendant's immediate control at the time of the search. Nevertheless, a search incident to arrest is valid only if the underlying arrest is itself valid. Carter therefore alleges that at the time of his arrest the police officers lacked probable cause to arrest him. This claim is meritless. The officers, having observed both Carter's behavior at the airport as well as his arrival at the Motel Six where Goree was staying, possessed knowledge of a "probability or substantial chance of criminal activity" on Carter's part (probable cause decision should be evaluated from the reasoned position of a law enforcement officer with their knowledge and expertise). Hence, whether Carter's arrest occurred at the moment he was asked to stay in the hotel lobby or after the police searched Goree, it was supported by probable cause and was therefore a lawful arrest justifying the subsequent warrantless search.<sup>130</sup>

In *R. v. Edwards*,<sup>131</sup> the police had information that the accused was trafficking narcotics and placed him under surveillance. They subsequently arrested him for driving while prohibited and just prior to his arrest they observed him talking on a cell phone. When they approached his vehicle he swallowed a cellophane wrapped object the size of a golf ball. His vehicle was towed to an impound lot and two and a half hours later (after locating cocaine in his girlfriend's apartment) it was searched and a cell phone and pager were seized. After the seizure the police monitored the telephone and pager and on ten occasions either answered the telephone or called people in response to a

<sup>130</sup> *Ibid.* at 713 [Internal citations omitted].

<sup>131</sup> (1994), 91 C.C.C. (3d) 123 (Ont. C.A.), *aff'd* [1996] 1 S.C.R. 128.

pager message. Several of the individuals spoken to asked for the accused and requested crack cocaine.

The Ontario Court of Appeal found that the search of the vehicle and the subsequent search and seizure of the phone and pager were lawful incident to the arrest. In addition, since the vehicle belonged to the accused's girlfriend, and had already been legally impounded, it was the girlfriend and not the accused that had standing to challenge the seizure.<sup>132</sup>

Similarly, in *U.S. v. Caymen*,<sup>133</sup> the Ninth Circuit held that the accused had no legitimate expectation of privacy in the contents of a hard drive from a computer that he obtained by fraud, and thus, lacked standing under the Fourth Amendment to challenge a search of the hard drive conducted by police. Therefore, by analogy, a suspect would have no standing to challenge the search and examination of a handheld device seized incident to arrest that had been fraudulently or otherwise illegally obtained.<sup>134</sup>

Recently, in *U.S. v. Park*,<sup>135</sup> the District Court of Northern California held that unlike the pagers of old, the capacity of cell phones to store vast amounts of information reduced the risk that data would be destroyed or overwritten by incoming calls, and that the government made no showing that the search was necessary to prevent the destruction of evidence.<sup>136</sup> Furthermore, while the court did not disagree with the previous pager decisions, it felt that the current cell phone technology attracted a higher level of privacy:

This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.<sup>137</sup>

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<sup>132</sup> *Ibid.* at para. 19.

<sup>133</sup> 404 F.3d 1196 (9th Cir. 2005).

<sup>134</sup> *Ibid.* at 1200-01. Also see *R. v. Millar*, 2005 ONCJ 61, in which the police were found to have lawfully entered a hotel room without warrant and arrested the accused where the room had been rented with a stolen credit card. A subsequent search of the room located the stolen credit card and receipts in the garbage. The court found that the accused had no reasonable expectation of privacy where he obtained the room through fraud.

<sup>135</sup> 2007 WL 1521573 (N.D. Cal. 2007).

<sup>136</sup> *Ibid.* at 27.

<sup>137</sup> *Ibid.* at 21. See also *U.S. v. Wall*, 2008 WL 5381412 (S. Fla. D. 2008), *aff'd* 343 Fed. Appx. 564 (11th Cir. (Fla.) 2009) and *Ohio v. Smith*, Ohio 6426 (Super. Ct. 2009). The court was split 4:3 with the majority following *U.S. v. Park* and the minority and Court of Appeal following *U.S. v. Finley* (op cit).

Ironically, notwithstanding the court's concern that the large storage capacity of current cell phones minimized the risk that evidence would be destroyed or overwritten, on May 23, 2007 (the same day the judgment was issued) U.S. Cellular announced it had launched a new cell phone application that allows users to delete cell phone memory from a remote location. The service, called "My Contacts Backup," was created to assist cell phone users in protecting their personal data, should their cell phones be lost, stolen, or destroyed. The memory can be backed up and transferred to a new handset, but it can also be destroyed. As such, any time a cell phone is seized, the owner (or an associate) can remotely delete all personal data from the phone to prevent the police from examining it.<sup>138</sup>

In *People v. Diaz*,<sup>139</sup> decided after *Park* and without any reference thereto, the California Court of Appeals concluded that searching a cell phone's memory was a valid search incident to arrest. The court held: "The fact that electronic devices are capable of storing vast amounts of private information does not give rise to a legitimate heightened expectation of privacy where a defendant is subject to a lawful arrest while carrying the device on his person."<sup>140</sup>

Ultimately, the court concluded: "Because the warrantless search of defendant's cell phone was a valid search incident to arrest, his motion to suppress the fruits of the search was properly denied."<sup>141</sup> While the Supreme Court of Canada restricted the power to search incident to arrest in two cases where there was a significant invasion of privacy, *R. v. Stillman*<sup>142</sup> and *R. v. Golden*,<sup>143</sup> both cases involved security of the person and bodily intrusion – not the search of physical objects carried on the person.

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<sup>138</sup> See "My Contacts Backup", online: U.S. Cellular <[www.uscellular.com/mycontactsbackup](http://www.uscellular.com/mycontactsbackup)>. See also Privacy Rights Clearinghouse, "Your Cell Phone Can Continue Talking Even After You Get Rid of It", online: Privacy Rights Clearinghouse <[www.privacyrights.org/ar/CellDelete.htm](http://www.privacyrights.org/ar/CellDelete.htm)>.

<sup>139</sup> 165 Cal. App. 4th 732, 82 Cal. Rptr. 3d 215 [cited to Cal. Rptr.3d] (C.A. 2008).

<sup>140</sup> *Ibid.* at 218.

<sup>141</sup> *Ibid.* at 219.

<sup>142</sup> [1997] 1 S.C.R. 607. This case involved the taking of hair samples, buccal swabs and teeth impressions by the police of a youth without his consent.

<sup>143</sup> *Supra* note 34. This case involved the strip search of a suspected drug dealer. The court affirmed that strip searches may be conducted incident to arrest. However, because strip searches are inherently humiliating and degrading they should only be carried out where there are reasonable grounds to believe weapons or evidence of the offence will be discovered and the search is conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible.

Furthermore, in *U.S. v. Arnold*, the Ninth Circuit held that a border search of a computer was not analogous to a strip search or body cavity search.<sup>144</sup> Moreover, while the trial judge reasoned that “opening and viewing confidential computer files implicates dignity and privacy interests,”<sup>145</sup> the Ninth Circuit reversed that decision.<sup>146</sup>

Moreover, in *U.S. v. Endacott*, the court also specifically countered the trial decision in *U.S. v. Arnold*.<sup>147</sup> The court stated further:

Indeed, the human species has not yet, at least, become so robotic that opening a computer is similar to a strip search or body cavity search. Of course viewing confidential computer files implicates dignity and privacy interests. But no more so than opening a locked briefcase, which may contain writings describing the owner's intimate thoughts or photographs depicting child pornography. A computer is entitled to no more protection than any other container.<sup>148</sup>

The decision in *U.S. v. Arnold* rested primarily on the Fifth Circuit's decision in *U.S. v. Finley*, a case where the police searched the call records and text messages on the accused's cell phone incident to arrest. The court found that the accused did have a reasonable expectation of privacy in the call records and text messages on the phone; however, it also found that the search was lawful, without any additional justification, to look for evidence of the arrestee's crime on his person (including in closed containers such as a cell phone) in order to preserve it for use at trial. The court held:

Although *Finley* has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that “in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person.<sup>149</sup>

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<sup>144</sup> 533 F.3d 1003 (9th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009). Also see *People v. Endacott*, 164 Cal. App. 4th 1346 (C.A. 2008), and *U.S. v. Romm*, 455 F.3d 990 (9th Cir 2006), cert. denied, 549 U.S. 1150 (2007). Although these are Customs cases, they are analogous to searches incident to arrest - the authority to search flows from crossing the border, much like a search incident to arrest flows from the arrest. Reasonable grounds are not a prerequisite for either search.

<sup>145</sup> *U.S. v. Arnold*, 454 F. Supp.2d 999 at 1003 (Cal. D. 2006).

<sup>146</sup> *Supra* note 144 at 1008.

<sup>147</sup> *People v. Endacott*, 164 Cal. App. 4th 1346 at 1349 (C.A. 2008) petition for rev. denied 2008 Cal. LEXIS 13005 (Cal. Sup. Ct. 2008).

<sup>148</sup> *Ibid.* at 1350.

<sup>149</sup> *U.S. v. Finley*, 477 F.3d 250 at 259-60 (5th Cir. 2007), cert. denied, 549 U.S. 1353 (2007). Internal citations omitted. See also *U.S. v. Curry*, 2008 WL 219966 (D. Me. 2008), where the court attempted to reconcile the holdings in *Finley* and *Park* based on the fact that the search

Effective July 16, 2009, based primarily on the reasoning in *Arnold*, the U.S. Customs and Border Patrol (CBP) instituted a policy that officers can “review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through or reside in the United States.” The officers may examine, in addition to documents, books and other printed material, “computers, disks, hard drives and other electronic or digital storage devices” without reasonable suspicion. They may detain documents and electronic devices, or copies thereof, “for a reasonable period of time” to perform a thorough search either “on-site or at an off-site location” and may involve third parties assisting CPB officials.<sup>150</sup>

More recently, in *U.S. v. Murphy*,<sup>151</sup> the Fourth Circuit also relied on *Arnold* and *Finley* holding that officers may retrieve text messages and other information from cell phones and pagers seized incident to arrest. One of the arguments made by the accused was that officers should determine the storage capacity of the phone before accessing the contents. Presumably phones with a small storage capacity may be searched without a warrant due to the volatile nature of the information stored (similar to the old pager cases), but that a search of a cell phone with a larger storage capacity would implicate a heightened expectation of privacy and thus, would require a warrant to be issued before a search could be conducted.<sup>152</sup>

While a similar argument was dismissed in *U.S. v. Arnold*, the court in *U.S. v. Murphy* found the argument problematic for several reasons, primarily because requiring police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule. As noted by the court, “it is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone.”<sup>153</sup> Outside of the decisions in *U.S. v.*

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of the cell phone in Park was not “substantially contemporaneous” with his arrest whereas in *Finley* it was.

<sup>150</sup> U.S. Customs and Border Protection, “Policy Regarding Border Search of Information, (16 July 2008), [http://www.customs.gov/linkhandler/cgov/travel/admissibility/search\\_authority.ctt/search\\_authority.pdf](http://www.customs.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf) online: <[http://www.customs.gov/linkhandler/cgov/travel/admissibility/search\\_authority.ctt/search\\_authority.pdf](http://www.customs.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf)>.

<sup>151</sup> 552 F.3d 405 (4th Cir. 2009), cert. denied, 2009 U.S. LEXIS 2858 (2009).

<sup>152</sup> In addition most new Smartphones such as the BlackBerry Pearl or BlackBerry Curve can be set to automatically delete text/ e-mail messages after only a few days using the “keep messages” option to avoid using excessive memory on the device. As such, notwithstanding the larger storage capacity of today’s cell phones, important messages can still be lost if this feature has been activated and the phone is not examined immediately.

<sup>153</sup> *U.S. v. Murphy*, *supra* note 151 at 411.

*Park*<sup>154</sup> and *U.S. v. Wall*,<sup>155</sup> almost all decisions to date have upheld the search of cell phones incident to arrest.<sup>156</sup>

Nevertheless, even in *U.S. v. Park*, the court did not dispute the lawfulness of searches incident to arrest. However, a fine reading of the case shows that the court was troubled with the officers' "vague" reasons for the search. For example, it did not appear that the phones were actually seized at the time of arrest (only at "booking" some 90 minutes after their arrest). Furthermore, one officer said the phones were searched for booking and inventory purposes to document and safeguard the arrestees property; another said it was for evidence because cell phones can contain evidence of drug trafficking and cultivation activities; and another (who filed an affidavit in support of a subsequent wiretap application) said the phones "were seized and surreptitiously searched ... then returned to the owners".<sup>157</sup>

#### IV. CONCLUSION

In *Hunter v. Southam*,<sup>158</sup> Justice Dickson, speaking for a unanimous Court, stated that warrantless searches were presumptively unreasonable. However, he also stated that what is "unreasonable" must be determined according to "whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."<sup>159</sup>

Considering reasonable grounds are not a prerequisite to a search incident to arrest and that it is the arrest itself that is the significant intrusion of state power into the privacy of one's person, if the arrest is lawful, then the individual's privacy interest is subordinated to legitimate law enforcement concerns. Those concerns include the need to:

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<sup>154</sup> *Supra* note 135.

<sup>155</sup> *Supra* note 137.

<sup>156</sup> See also *U.S. v. Wurie*, 612 F. Supp.2d 104 (D. Mass 2009); *U.S. v. Young*, 278 Fed. Appx. 242 (4th Cir. 2008), cert. denied 129 S.Ct. 514 (2008); *U.S. v. Fierros-Alvarez*, 547 F. Supp. 2d 1206 (D. Kan. 2008); *U.S. v. James*, *supra* note 26; *State v. Novicky*, *supra* note 26; *U.S. v. Valdez*, 2008 WL 360548 (E.D. Wis.); *U.S. v. Mercado-Nava*, 486 F. Supp. 2d 1271 (D. Kan 2007); *U.S. v. Brookes*, 2005 WL 1940124 (D. V.I. 2005); *U.S. v. Cote*, *supra* note 35; *U.S. v. Dennis*, 2007 WL 3400500 (E.D. Ky. 2007); *U.S. v. Lottie*, 2007 WL 4722439 (N.D. Ind. 2007); *U.S. v. Young*, 2006 WL 1302667 (N.D. W. Va. 2006); and *U.S. v. Diaz*, 2006 WL 3193770 (N.D. Cal. 2006).

<sup>157</sup> *Supra*, note 133 at 14 [emphasis added].

<sup>158</sup> *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 [*Hunter v. Southam*].

<sup>159</sup> *Ibid.* at 159-60.

1. protect the police;
2. protect the evidence;
3. discover the evidence; or
4. some other valid purpose.<sup>160</sup>

Although electronic devices today are capable of storing vast amounts of private information such as voice and text messages, e-mail, video, pictures, records of incoming and outgoing calls, address books and calendars, courts have generally held that such devices do not give rise to a heightened expectation of privacy (like strip searches) where an accused is lawfully arrested while carrying the device on his person.

While the opening and viewing of confidential computer files implicates dignity and privacy interests, it does not implicate them more than opening a wallet, purse, diary or briefcase that may contain family photographs, bank statements, personal letters or writings describing the owner's intimate thoughts. Furthermore the right to seize also affords the right to subject the evidence to a physical or forensic examination. Once an item is seized for use in a criminal investigation, the police are entitled to subject it to technical or forensic analysis to determine its evidentiary significance. Neither the time nor the distance between the arrest and the analysis affect the scope of the common law power to search incidental to this lawful arrest.

Although the nature of the offence being investigated may determine the reasonableness of the search, the doctrine has to be given sufficiently flexible scope to allow the police to use seized materials to investigate both the charged crime and other related offences. For example there may be no reasonable basis to believe a cell phone contains any relevant evidence where the accused is arrested for a traffic violation (unless it can be clearly articulated), however the cell phone of a known gang member arrested for a serious offence could be analyzed for the purpose of locating pictures or messages about the offence, supporting criminal organization charges, identifying witnesses or co-conspirators.

While the decision in *R. v. Giles*<sup>161</sup> did not consider any U.S. authorities, it is clear that if it had done so, there is sufficient case law to support the conclusion it reached. Similarly, the current statutory regime in England would also support this position, where a serious offence is involved and if the search is done by qualified forensic examiners.

Furthermore, considering the often overlooked fourth criteria in *Caslake*, allowing searches of property incident to arrest for "some other valid

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<sup>160</sup> *Caslake*, *supra* note 16 at para. 25.

<sup>161</sup> *Supra* note 39.



purpose,” the law in Canada is arguably more expansive than in the United States, so long as the seizing officer can articulate his course of action. In fact, this was the problem in *U.S. v. Park*, where the court stated “the government has not articulated any reason why it is necessary to search the contents of a cell phone in order to fulfill any of [its] legitimate governmental interests.”<sup>162</sup>

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<sup>162</sup> *Supra*, note 135 at 33.

# La Proclamation du 6 décembre 1869

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F R A N Ç O I S L A R O C Q U E \*

## INTRODUCTION

Le 6 décembre 1869, le gouverneur général du Canada John Young (Lord Lisgar) signe une proclamation royale adressée aux habitants de la terre de Rupert et du Nord-Ouest dans l'objectif avoué d'apaiser le mécontentement populaire face à l'annexion imminente de ce vaste territoire au Canada<sup>1</sup>. En plus d'offrir une amnistie aux individus qui dans les semaines précédentes avaient monté une résistance armée dans la colonie de la rivière Rouge à l'annexion du territoire par le Canada, la proclamation du 6 décembre 1869 contient un certain nombre de garanties. Plus spécifiquement, à la demande du cabinet impérial et au nom de Sa Majesté la Reine Victoria, le gouverneur général du Canada promet aux habitants de la terre de Rupert et du Nord-Ouest que leurs « droits civils et religieux » seront rigoureusement respectés après l'accession de ce territoire au Canada.

La nature précise de la proclamation royale et de sa portée juridique font présentement l'objet d'un débat vigoureux dans l'affaire *R. c. Caron*<sup>2</sup>, un procès relatif à une infraction au paragraphe 34(2) des *Use of Highways and Rules of the Road*<sup>3</sup>. Dans cette affaire, l'accusé conteste la validité du règlement en vertu duquel il est accusé, alléguant que le règlement viole ses droits linguistiques constitutionnels puisqu'il a été édicté et imprimé exclusivement en anglais. La défense de l'accusé se fonde sur deux prétentions centrales. D'une part, l'accusé soutient que la garantie du respect des droits « civils » dans la proclamation du 6 décembre 1869 inclut le respect des droits

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\* B.A., LL.B., Ph.D. Professeur adjoint à la Section de common law de la Faculté de droit de l'Université d'Ottawa. Puisque cet article a été rédigé et édité avant que la décision de la Cour du banc de la Reine dans l'affaire *R. c. Caron*, 2009 ABQB 745 (CanLII) ne soit rendue le 17 décembre 2009, il ne tient pas compte des conclusions de la Cour du banc de la Reine à l'égard de la proclamation du 6 décembre. Cette décision fera l'objet d'une analyse distincte dans un avenir rapproché.

<sup>1</sup> *Proclamation du 6 décembre 1869*. Version anglaise : (1870) 5 *Sessional Papers*, No. 12, aux pp. 43-44. Version française : (1870) 5 *Documents de la session*, No. 12 aux pp. 45-46.

<sup>2</sup> *R. c. Caron*, 2008 ABPC 232, [2008] A.J. 855, [2008] 12 W.W.R. 675, 95 Alta. L. R. (4e) 307 [Caron].

<sup>3</sup> *Use of Highways and Rules of the Road*, Alta. Reg. 304/2002 [le règlement].

linguistiques qui existaient en 1869 dans la terre de Rupert et le Nord-Ouest. D'autre part, l'accusé estime que la proclamation du 6 décembre 1869 fait aujourd'hui partie de la constitution du Canada au sens du paragraphe 52(2) de la *Loi constitutionnelle de 1982*<sup>4</sup>. Selon l'accusé, les dispositions du règlement, adoptées et imprimées uniquement en anglais, contreviennent à un engagement constitutionnel qui avait été pris en vertu de la procédure établie à l'article 146 de la *Loi constitutionnelle de 1867*<sup>5</sup> visant l'annexion de la terre de Rupert et du Nord-Ouest, et entériné par la proclamation du 6 décembre 1869. Par conséquent, prétend l'accusé, les lois albertaines qui violent cet engagement constitutionnel doivent être déclarées inopérantes.

Le 2 juillet 2008, la Cour provinciale de l'Alberta accepte la thèse de l'accusé en ce qui a trait à l'interprétation textuelle et au statut constitutionnel de la proclamation du 6 décembre 1869 et déclare inopérantes les dispositions du règlement et l'article 3 de la *Loi linguistique*, R.S.A. 2000 c. L-6<sup>6</sup>. À l'appui de ses conclusions, la Cour provinciale s'en remet aux témoignages experts d'historiens, de sociologues, de politologues et de sociolinguistes afin de reconstituer une partie du contexte socio-historique de l'époque et des événements menant à l'émission de la proclamation du 6 décembre 1869.

La proclamation du 6 décembre 1869 comme telle n'a jamais fait l'objet d'une analyse judiciaire détaillée avant l'affaire *R. c. Caron*<sup>7</sup>. Par ailleurs, mis à part les études historiques générales sur la résistance des Métis à la rivière Rouge et sur l'offre d'amnistie qu'elle contient<sup>8</sup>, la proclamation du 6 décembre 1869 semble avoir été largement ignorée des historiens. Dans ses motifs, le juge Wenden affirme ce qui suit :

Exception faite de la question de l'amnistie, la proclamation du 6 décembre 1869 n'a jamais fait l'objet de recherche de la part des historiens.

<sup>4</sup> *Loi constitutionnelle de 1982* (R.-U.), constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.U.), 1982, c. 11, entrée en vigueur le 17 avril 1982.

<sup>5</sup> *Loi constitutionnelle de 1867* (R.-U.), 30 & 31 Vict, c. 3. Les deux versions de la proclamation du 6 décembre 1869 sont reproduites intégralement à la Section B du présent article.

<sup>6</sup> *Caron*, supra note 2. La conclusion de l'affaire *R. c. Caron* est reprise la même journée dans une affaire analogue : *R. c. Boutet* (2 juillet 2008), Edmonton A42887-025S, A47718-075S, A65382-133S (Cour prov. Alb.). Le 28 juillet 2008, la province de l'Alberta interjette appel des décisions de la Cour provinciale dans les affaires *R. c. Caron* et *R. c. Boutet*. L'appel des affaires *R. c. Caron* et *R. c. Boutet* a été entendu à la Cour du Banc de la Reine de l'Alberta du 19 au 27 janvier 2009.

<sup>7</sup> La proclamation a cependant été mentionnée récemment en *obiter* dans l'affaire *Manitoba Metis Federation Inc. et al. v. Canada (A.G.) et al.*, 2007 MBQB 293, [2007] C.C.S. 22740, [2007] M.J. 448 aux para. 262 et 670 [*Metis Federation*].

<sup>8</sup> Voir par ex. Jonas A Jonasson, « The Red River Amnesty Question » (1937) 6:1 The Pacific Historical Review 58.; Arthur S. Morton, *A History of the Canadian West to 1870-1871*, London, Thomas Nelson & Sons Ltd., 1939.

Par conséquent, il n'existe pas de résultats écrits de recherches, et même si les écrits des grands historiens nous donnent le contexte et quelques détails concernant les événements, ils ne nous procurent pas de réponses complètes aux problèmes soulevés par ce procès<sup>9</sup>.

De plus, il ne semble exister aucun article de périodique juridique ou monographie de droit constitutionnel qui traite de la proclamation du 6 décembre 1869. Elle semble avoir été complètement ignorée des chercheurs en droit.

Le présent article a donc pour objet de combler cette lacune importante dans la littérature juridique canadienne en élucidant la nature et la portée normative de la proclamation du 6 décembre 1869 ainsi que les principes qui en régissent l'interprétation. Le présent article est divisé de la manière suivante :

1. Le contexte historique menant à l'émission de la proclamation du 6 décembre 1869
2. Le texte de la proclamation du 6 décembre 1869
3. L'effet juridique des proclamations : principes généraux
4. L'effet juridique de la proclamation du 6 décembre 1869

Dans la mesure où il s'avère pertinent de le faire, la présentation et l'analyse de ces thèmes s'effectueront en faisant référence à l'abondante correspondance officielle des hauts fonctionnaires de la Compagnie de la baie d'Hudson, du cabinet impérial et du gouvernement canadien. Ce choix méthodologique se justifie par la nécessité de comprendre la raison d'être de la proclamation du 6 décembre de 1869. Or, la correspondance officielle représente en fait les témoignages directs des protagonistes et des témoins privilégiés de cette période décisive de l'histoire constitutionnelle du Canada. Elle nous permet, 140 ans plus tard, de tenter de reconstituer le climat politique qui régnait au moment de la résistance de la rivière Rouge et de saisir le bienfondé des solutions envisagées pour résoudre l'impasse constitutionnelle.

À la lumière de mon analyse de la documentation historique et des principes juridiques applicables, je conclus que la proclamation du 6 décembre 1869 a joué un rôle essentiel dans le devenir constitutionnel de l'ouest canadien. À mon avis, en 2010, elle demeure pertinente, sinon déterminante, dans l'appréciation des droits civils et religieux des canadiens et canadiennes qui habitent le territoire qui constituait autrefois la terre de Rupert et le Nord-Ouest.

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<sup>9</sup> Caron, *supra* note 2 aux para. 40-41.

## I. CONTEXTE HISTORIQUE MENANT A L'EMISSION DE LA PROCLAMATION DU 6 DECEMBRE 1869

Ce sont les événements de la résistance des habitants de la rivière Rouge qui ont mené à l'émission de la proclamation du 6 décembre 1869. Ces événements sont bien connus des historiens et bien documentés ; il n'est pas nécessaire ici d'en faire le bilan détaillé<sup>10</sup>. Un simple croquis historique suffira pour rappeler le contexte de ces événements.

Si les tensions entre les Métis et la Compagnie de la baie d'Hudson remontent au moins aux années 1840 et à l'affaire *Sayer*<sup>11</sup>, elles atteignent leur paroxysme durant les mois qui précèdent le transfert de la terre de Rupert et du Nord-Ouest au Dominion du Canada. Bien que l'annexion de ces territoires est prévue depuis bien avant la confédération<sup>12</sup>, les négociations tripartites entre la Compagnie de la baie d'Hudson, le Royaume-Uni et le Canada des termes et des conditions du transfert s'effectuent sans consulter la population locale. Dans son témoignage devant le Comité spécial sur les causes des troubles du Territoire du Nord-Ouest, Mgr Alexandre Taché affirme ce qui suit :

Lorsqu'on apprit que des négociations avaient eu lieu entre le gouvernement canadien et celui de l'Angleterre, au sujet de l'acquisition du territoire, sans même avoir tenté de consulter la population de la province qui se croyait civilisée et qui l'était, il s'en suivit beaucoup de mécontentement non-seulement parce qu'elle n'avait pas été consultée, mais parce qu'elle n'avait pas même été mentionnée dans les négociations<sup>13</sup>.

<sup>10</sup> Parlement, Comité spécial, « Rapport du Comité spécial sur les causes des troubles du Territoire du Nord-Ouest de 1869-1870 », dans *Journaux de la Chambre des communes du Canada*, vol. 8, (22 mai, 1874) à l'Appendice No. 6 (« Rapport du Comité spécial ») ; W.L. Morton, dir., *Alexander Begg's Red River Journal and other Papers Relative to the Red River Resistance of 1869-1870*, Toronto, Champlain Society, 1956 ; Gilles Boileau, dir., *Louis Riel et les troubles du Nord-Ouest : de la Rivière-Rouge à Batoche*, Montréal, Éditions du Méridien, 2000 ; Jennifer Reid, *Louis Riel and the Creation of Modern Canada: Mythic Discourse and the Postcolonial State*, Albuquerque, University of New Mexico Press, 2008.

<sup>11</sup> Pierre Guillaume Sayer, un Métis francophone, avait été accusé en 1849 de faire la traite de fourrure sans permis, et ce en contravention du monopole de la Compagnie de la baie d'Hudson. Bien qu'il s'agit à prime abord d'un litige commercial, l'affaire *Sayer* a mené à la reconnaissance par la Compagnie de la baie d'Hudson du droit des Métis francophones d'avoir un procès en français et un juge qui comprend le français. Pour un bon résumé de l'affaire *Sayer* et de ses répercussions juridiques, voir Roy St. George Stubbs, *Four Recorders of Rupert's Land*, Winnipeg, Peguis Publishers, 1967 aux pp. 27-31. Voir aussi Caron, *supra* note 2 aux para. 120-143.

<sup>12</sup> *Loi constitutionnelle* de 1867, *supra* note 5, art. 146.

<sup>13</sup> *Rapport du Comité spécial*, *supra* note 10 à la p. 9. Voir aussi le témoignage de John McTavish, *Rapport du Comité spécial*, *supra* note 10 aux pp. 1-2 qui corrobore le témoignage de l'Archevêque de Saint-Boniface ; Caron, *supra* note 2 au para. 559.

En plus du mécontentement de ne pas avoir été consultés, les habitants de la terre de Rupert et du Nord-Ouest éprouvent de sérieuses inquiétudes quant à la sécurité de leurs droits et privilèges suite à l'annexion au Canada. En 1868 les Métis prennent connaissance du fait que certains arpenteurs canadiens sont entrés dans le pays pour conclure des traités avec certaines tribus autochtones à l'égard de terres sur lesquelles les Métis revendiquent également des intérêts propriétaires<sup>14</sup>. Comme l'a reconnu le juge de procès dans l'affaire *Metis Federation*, en plus de craindre pour leurs intérêts fonciers, les Métis francophones ont également des inquiétudes à l'égard de la survie de leur culture face aux inévitables vagues d'immigration qu'entraînerait l'accession au Canada :

One of the causes of the resistance was the concern, particularly of the French Métis, that the Settlement upon becoming part of Canada would experience immigration, particularly from Ontario, *which would result not only in a loss of their religion and culture but, as well, of their land*. This concern was evident from the actions of the French Métis in the summer and fall of 1869 and was recognized by Canada as is evident from the writings or statements of representatives of the Crown [nos italiques]<sup>15</sup>.

En automne 1869, l'anxiété populaire face au transfert de la terre de Rupert et du Nord-Ouest atteint un point culminant, menant ainsi aux événements saillants de la résistance, notamment, l'interception de McDougall aux frontières de la colonie, la prise armée de Fort Garry et la formation du gouvernement provisoire. C'est dans la foulée de ces événements que la proclamation du 6 décembre 1869 est émise.

L'objectif avoué de la proclamation était d'apaiser le mécontentement populaire face à l'annexion canadienne de la terre de Rupert et du Nord-Ouest et de mettre fin aux tensions qui ont marqué les semaines précédentes. Mais plus spécifiquement encore, la proclamation avait pour but de clarifier toutes méprises concernant l'annexion des terres exploitées par la Compagnie de la baie d'Hudson. En effet, dans la perspective du gouvernement canadien, si les habitants de la terre de Rupert et du Nord-Ouest avaient des inquiétudes à l'égard de l'annexion, c'est parce qu'ils n'étaient pas bien informés quant aux bonnes intentions du gouvernement canadien. Dans son discours du trône inaugurant la 3<sup>e</sup> session du 1<sup>er</sup> Parlement, prononcé le 15 février 1870, le gouverneur général fait référence aux « malentendus » qui ont occasionné la crise de la rivière Rouge et de la nécessité de fournir des « explications ».

J'ai suivi avec beaucoup d'anxiété le cours des événements, dans les Territoires du Nord-Ouest. De malheureux malentendus quant aux intentions dans lesquelles le *Canada* cherchait à acquérir le pays, ont conduit à des complications de nature grave. En vue de les faire disparaître j'ai cru qu'il était désirable d'épuiser tous les moyens de

<sup>14</sup> *Rapport du Comité spécial*, ibid. aux pp. 8-9.

<sup>15</sup> *Metis Federation*, supra note 7 au para. 261.

conciliation avant de recourir à d'autres mesures, et les dernières nouvelles m'induisent à espérer que les alarmes non fondées, qu'entretenait une partie des habitants, ont fait place au désir de prêter l'oreille aux explications que je leur ai fait donner<sup>16</sup>.

La correspondance officielle de l'époque rend compte abondamment de la perception du gouvernement canadien à l'égard des causes de la crise la rivière Rouge et de la politique de sensibilisation qu'il convenait d'adopter pour apaiser les craintes des habitants de ces territoires. Deux exemples suffiront pour illustrer la position du gouvernement fédéral à cet égard. Dans une lettre du 3 novembre 1869, J.A.N. Provencher raconte au lieutenant gouverneur McDougall le récit d'une conversation qu'il eut avec des membres de la résistance :

I talked with several men whom I had reason to believe were leaders of the Insurgents or in some way connected with them. I was surprised to hear that they did know anything about what had been done either in the Canadian or Imperial Parliaments relating to the North-West Territory. They only knew that Canada had paid to the Hudson's Bay Company £300,000 for their rights in that country.

I explained to them that the Imperial Parliament had authorized the transfer of the North-West Territories to Canada, and that the Canadian Parliament and the Hudson's Bay Company had agreed upon the terms of transfer. I insisted that the new Government, when established by the issuing of the Proclamation to that effect, would represent the Crown of England and the Government of Canada; but that Canada only being substituted to the rights of the Crown and the Company, could not and would not interfere with the religious or private rights of citizens<sup>17</sup> [nos italiques].

Dans la même veine, le secrétaire d'état aux provinces Joseph Howe affirme dans une lettre à McDougall datée du 19 novembre 1869 : « The Government entertains the hope that the opposition presented will be withdrawn when the prejudices aroused have been allayed by frank explanations »<sup>18</sup>. Il sera démontré dans la prochaine section que le gouvernement impérial était aussi d'avis que la crise de la rivière Rouge était causée par des inquiétudes mal fondées des habitants du territoire à l'égard des véritables intentions du gouvernement fédéral<sup>19</sup>.

<sup>16</sup> « Discours du trône » dans *Journaux du Sénat*, vol. 3 (15 février 1870), aux pp. 11-14 (John Young).

<sup>17</sup> R.-U., H.C., « Correspondence relative to the recent disturbances in the Red River Settlement », c. 207 dans *Command Papers*, vol. L (1870) 293 à la p. 20 [Correspondence]. La même correspondance est publiée au Canada dans les deux langues officielles au (Parlement, « Correspondence and Papers Connected with Recent Occurrences in the North-West Territories » dans *Sessional Papers*, n° 12 (1870) [Correspondence and Papers]. À moins d'indication contraire, les renvois à la correspondance officielle sont au recueil publié par HMSO.

<sup>18</sup> *Correspondence*, *ibid.* à la p. 10.

<sup>19</sup> *Infra* note 30 et texte correspondant.

Le 10 décembre 1869, soit quatre jours après l'émission de la proclamation, le gouvernement fédéral met en œuvre un deuxième volet de sa campagne d'information en nommant Donald Smith comme commissaire chargé, entre autre, « to explain to the inhabitants the principles on which the Government of Canada intends to govern the country, and to remove any misapprehensions which may exist on the subject »<sup>20</sup>. Dans sa lettre d'instruction à Donald Smith, le gouverneur général John Young fait référence à la proclamation du 6 décembre, en soulignant qu'elle invite

all who have complaints to make, or wishes to express, to address themselves to me as Her Majesty's Representative, and you may state with the utmost confidence that the Imperial Government has no intention of acting otherwise, or permitting others to act otherwise, than in perfect good faith towards the inhabitants of the Red River district and of the North-West<sup>21</sup>.

Enfin, le gouverneur général mandate Smith de faire comprendre aux habitants qu'ils peuvent faire confiance au gouvernement canadien,

that respect and attention will be extended to the different religious persuasions, that title to every description of property will be carefully guarded, and that all the franchises which have subsisted, or which the people may prove themselves qualified to exercise, shall be duly continued or liberally conferred<sup>22</sup>.

Dans son rapport à John Young en date du 16 décembre 1869, John A. MacDonald demande au gouverneur général du Canada de rassurer le cabinet impérial que « the Government here have taken, and are taking active measures to bring about a happier state of affairs »<sup>23</sup>. Il mentionne spécifiquement la mission de Donald Smith ainsi que celle du père Thibault et du colonel Salaberry, à qui 500 copies de la proclamation du 6 décembre 1869 avaient été remises<sup>24</sup>.

Ainsi, la proclamation du 6 décembre 1869 s'inscrit dans une démarche générale et calculée des gouvernements impérial et canadien dont le but était d'informer, de garantir et de rassurer les habitants de la terre de Rupert et du Nord-Ouest à l'égard du déroulement de l'annexion de leur terre ancestrale et de la continuité de leurs droits au sein du Canada.

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<sup>20</sup> Lettre de Joseph Howe à Donald Smith, 10 décembre 1869, dans *Correspondence*, *supra* note 17 à la p. 51.

<sup>21</sup> Lettre de John Yong à Donald Smith, 12 décembre 1869, dans *Correspondence*, *ibid.* à la p. 58.

<sup>22</sup> *Ibid.*

<sup>23</sup> Parlement, « Report of a Committee of the Honourable Privy Council » dans *Correspondence and Papers*, *supra* note 17 à la p. 143.

<sup>24</sup> Lettre de Joseph Howe, (6 décembre 1869), Ottawa, Archives nationales du Canada, (RG 6 C.1, vol. 90, file 1045, 6-7) (R176-3-6-E). Voir aussi lettre de Joseph Howe à William McDougall, 7 décembre 1869, dans *Correspondence and Papers*, *ibid.* aux pp. 42-43.



## II. LE CONTENU DE LA PROCLAMATION DU 6 DECEMBRE 1869

Il appert de la preuve historique que la proclamation fut imprimée en anglais, en français et en cri<sup>25</sup>, bien qu'il ne fait aucun doute que seules les versions française et anglaise font autorité. Par ailleurs, en faisant la recherche du cet article, j'ai pu consulter l'ébauche manuscrite de la version française, laquelle est bien conservée aux Archives nationales<sup>26</sup>.

Bien que la proclamation du 6 décembre 1869 est mentionnée et citée à maintes reprises dans les publications officielles du gouvernement canadien<sup>27</sup>, elle est reproduite intégralement dans la « Correspondence relative to the Recent Disturbances in the Red River Settlement »<sup>28</sup> en tant qu'annexe à la lettre de Joseph Howe à William McDougall, en date du 7 décembre 1869. La petite missive de Howe se lit intégralement comme suit : « Sir – Enclosed you will find the original Proclamation referred to in my letter of yesterday's date, in English and French. It may be as well that you should have the original Proclamation in your hands »<sup>29</sup>.

Voici en colonnes parallèles les versions française et anglaise de la proclamation du 6 décembre 1869 :

*Proclamation de Sir John, Gouverneur  
Général du Canada, 6 Déc. 1869*

Par Son Excellence le Très Honorable Sir John Young, Baronnet, un des Membres du Très Honorable Conseil Privé de Sa Majesté, Chevalier Grand' Croix du Très Honorable Ordre du Bain, Chevalier Grand' Croix de l'Ordre Très Distingué de Saint Michel et Saint George, Gouverneur Général du Canada.

*Proclamation of Sir John Young,  
Governor General of Canada, Dec. 6,  
1869.*

By His Excellency the Right Honorable Sir John Young, Baronet, a Member of Her Majesty's Most Honorable Privy Council, Knight Grand Cross of the Most Honorable Order of the Bath, Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George, Governor General of Canada.

<sup>25</sup> Caron, *supra* note 2 au para. 422.

<sup>26</sup> *Proclamation to people of Red River* (1869), Ottawa, Archives nationales du Canada, (RG 6 C.1, vol. 90, file 1045, 6-7) (R176-3-6-E).

<sup>27</sup> L'analyse des nombreuses références officielles à la proclamation du 6 décembre 1869 excède la visée du présent article; elle fera l'objet d'un autre article à paraître prochainement.

<sup>28</sup> *Correspondence and Papers*, *supra* note 17 à la p. 43 (version anglaise), à la p. 44 (version française).

<sup>29</sup> *Ibid.* à la p. 43 (version anglaise).

À tous et chacun les fidèles Sujets de Sa Majesté la Reine dans ses Territoires du Nord-Ouest, et, à tous ceux qui ces présentes verront,

SALUT :

La Reine m'a chargé, comme son représentant, de vous informer qu'elle a appris avec surprise et regret que certaines personnes mal conseillées, dans ses établissements de la Rivière Rouge, se sont liguées pour s'opposer, par la force, à l'entrée dans ses Territoires du Nord-Ouest de l'Officier choisi pour administrer, en son nom, le gouvernement, lorsque les Territoires seront unis à la Puissance du Canada, sous l'autorité du récent Acte du Parlement du Royaume-Uni; et que ces personnes, par force et violence, ont aussi empêché d'autres de ses loyaux sujets d'entrer dans le pays.

Sa Majesté a l'assurance qu'elle peut compter sur la loyauté de ses sujets dans le Nord-Ouest, et croit que ceux qui se sont ainsi illégalement ligüés l'ont fait par suite de quelque malentendu ou fausse représentation.

La Reine est convaincue qu'en sanctionnant l'union des Territoires du Nord-Ouest avec le Canada, elle consulte les meilleurs intérêts de ceux qui y résident, renforçant et consolidant en même temps ses possessions dans l'Amérique du Nord comme partie de l'Empire Britannique. Vous pouvez donc juger du chagrin et du déplaisir avec lesquels la Reine regard les actes déraisonnables et illégaux qui ont eu lieu. Sa Majesté me commande de vous dire qu'elle sera toujours prête, par ma voie comme son représentant, à redresser tous griefs bien fondés; et qu'elle m'a donné instruction d'écouter et considérer toutes plaintes qui pourront être faites, ou tous désirs qui pourront m'être exprimés en ma qualité de Gouverneur Général. En même temps,

To all and every the Loyal Subjects of Her Majesty the Queen, and all to whom these Presents shall come,

GREETING:

The Queen has charged me, as Her representative, to inform you that certain misguided persons in Her Settlements on the Red River, have banded themselves together to oppose by force the entry into Her North-Western Territories of the officer selected to administer, in Her Name, the Government, when the Territories are united to the Dominion of Canada, under the authority of the late Act of the Parliament of the United Kingdom; and that those parties have also forcibly, and with violence, prevented others of Her loyal subjects from ingress into the country.

Her Majesty feels assured that she may rely upon the loyalty of Her subjects in the North-West, and believes those men, who have thus illegally joined together, have done so from some misrepresentation.

The Queen is convinced that in sanctioning the Union of the North-West Territories with Canada, she is promoting the best interest of the residents, and at the same time strengthening and consolidating her North American possessions as part of the British Empire. You may judge then of the sorrow and displeasure with which the Queen views the unreasonable and lawless proceedings which have occurred.

Her Majesty commands me to state to you, that she will always be ready through me as her representative, to redress all well-founded grievances, and that she has instructed me to hear and consider any complaints that may be made, or desires that may be expressed to me as Governor General. At the same time she has

elle m'a chargé d'exercer tout le pouvoir et l'autorité dont elle m'a revêtu pour le maintien de l'ordre et la répression des troubles illégaux.

Par l'autorité de Sa Majesté, je vous assure donc que sous l'union avec le Canada, tous vos droits et privilèges civils et religieux seront respectés, vos propriétés vous seront garanties, et que votre pays sera gouverné, comme par le passé, d'après les lois anglaises et dans l'esprit de la justice britannique.

En outre, et par son autorité, je conjure et commande ceux d'entre vous qui sont encore assemblés et ligués, au défi de la loi, de se disperser paisiblement et de regagner leurs foyers, sous les peines de la loi en cas de désobéissance.

Et je vous informe en dernier lieu, que dans le cas de votre obéissance et dispersion immédiate et paisible, je donnerai ordre qu'il ne soit pris aucunes mesures légales contre aucun de ceux qui se trouvent impliqués dans ces malheureuses violations de la loi.

Donné son mon Seing et le Sceau de mes armes, à Ottawa, ce sixième jour de décembre dans l'année de Notre Seigneur mil huit cent soixante-neuf, et dans la trente troisième année du Règne de Sa Majesté.

Par Ordre.  
John Young

charged me to exercise all the powers and authority with which she has entrusted me in the support of order, and the suppression of unlawful disturbances.

By Her Majesty's authority I do therefore assure you, that on the union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws, and in the spirit of British justice.

I do, further, under her authority, entreat and command those of you who are still assembled and banded together in defiance of law, peaceably to disperse and return to your homes, under the penalties of the law in case of disobedience.

And I do lastly inform you, that in case of your immediate and peaceable obedience and dispersion, I shall order that no legal proceeding be taken against any parties implicated in these unfortunate breaches of the law.

Given under my hand and Seal at Arms at Ottawa, this Sixth day of December, in the year of our Lord, One Thousand Eight Hundred and Sixty-nine, and in the Thirty-third year of Her Majesty's Reign.

By Command.  
John Young

La proclamation du 6 décembre 1869 contient huit (8) paragraphes. Le contenu de chaque paragraphe peut être schématisé de la manière suivante :

**Para. 1** (« The Queen has charged me... ») : Un bref récit des événements saillants de la résistance, dont le détournement de McDougall du territoire de la rivière Rouge.

**Para. 2** (« Her Majesty feels assured... ») : Sa Majesté estime toujours avoir la confiance de ses sujets et croit que la résistance est motivée par l'erreur et le malentendu.

**Para. 3** (« The Queen is convinced... ») Sa Majesté est convaincue que l'annexion du Nord-Ouest au Canada est dans le meilleur intérêt des résidents de ce territoire et du Canada.

**Para. 4** (« Her Majesty commands me... ») Le gouverneur général du Canada, en tant que représentant de la Reine, sera toujours disposé à entendre et remédier aux griefs légitimes des résidents. Le gouverneur général entend cependant exercer l'autorité de la couronne pour rétablir l'ordre et supprimer l'illégalité.

**Para. 5** (« By Her Majesty's authority... ») Le gouverneur général assure les résidents de la terre du Rupert et du Nord-Ouest que suite à l'union au Canada, tous leurs droits et privilèges civils et religieux seront respectés et que tous leurs biens seront garantis. Le gouverneur général assure finalement que le territoire sera gouverné, comme auparavant, conformément aux lois anglaises et dans l'esprit de la justice britannique.

**Para. 6** (« I do, further, under her authority... ») Le Gouverneur général exhorte et commande aux membres de la résistance de se disperser et à regagner leurs foyers chez eux, sous peine de sanctions légales en cas de désobéissance.

**Para. 7** (« And I do lastly inform you... ») Si la résistance se disperse immédiatement, le gouverneur général ordonnera qu'aucune procédure pénale ne sera initiée contre ceux qui y ont participé.

**Para. 8** (« Given under my hand ...») Signée et datée du 6 décembre 1869.

Il est pertinent de souligner que le texte de la proclamation du 6 décembre 1869 est basé en grande partie sur un télégramme du comte Granville, secrétaire aux colonies du gouvernement impérial, envoyé au gouverneur général du Canada John Young le 25 novembre 1869, communiquant les conseils du cabinet impérial et de la reine Victoria :

Do you what you like with the following: --

The Queen has learnt with regret and surprise that certain misguided men have joined together to resist the entry of the Lieutenant Governor into Her Majesty's possessions on the Red River.

The Queen does not distrust Her subjects' loyalty in those Settlements, and must ascribe their opposition to a change plainly for their advantage to misrepresentation or misunderstanding.

She relies upon your Government for taking every care to explain where there is a misunderstanding, and to ascertain the wants and conciliate the good will of the Settlers of the Red River. But at the same time she authorises you to tell them that she views with displeasure and sorrow their lawless and unreasonable proceedings, and that she expects that if they have any wish to express, or complaints to make, they will address themselves to the Governor of the Dominion of Canada, of which in a few days they will form part.

The Queen relies upon Her Representative being always ready on the one hand to give redress to well founded grievances and on the other hand to repress, with the authority which she has entrusted him, any unlawful disturbance<sup>30</sup>.

Comme le télégramme l'indique, la crise dans le Nord-Ouest était perçue à Londres comme étant le résultat de « misrepresentation or misunderstanding » et, selon le comte Granville, il incombait au gouverneur général canadien, dans sa capacité de représentant de Sa Majesté, d'expliquer la position des gouvernements impérial et fédéral et de concilier les attentes et vœux des habitants de ce vaste territoire.

Dans une lettre au gouverneur William McTavish datée du 6 décembre 1869, le gouverneur général John Young confirme s'être inspiré du télégramme du comte Granville dans la rédaction de sa proclamation émise le même jour. Il écrit :

Sir,

I have the honour to address you in my capacity of Representative of the Queen and Governor-General of Her Majesty's British North-American Possessions, and to enclose, for your information a, Copy of the Message which I received from Earl Granville, in reply to the accounts which I had sent officially of the events which have taken place at the Red River.

*This Message conveys the matured opinion of the Imperial Cabinet. The Proclamation I have issued is based upon it; and you will observe it refers all who "have desires to express or complaints to make" to me as invested with authority to act on behalf of the British Government. Every claim or complaint which may be put forward will be attentively considered, and the inhabitants of Rupert's Land, of all classes and persuasions, may rest assured that Her Majesty's Government has no intention of interfering with, or setting aside, or allowing others to interfere with or set aside, their religious rights and the franchises which they have hitherto enjoyed or to which they may hereafter prove themselves equal [nos italiques]*<sup>31</sup>.

<sup>30</sup> Télégramme du comte Granville à John Young, 25 novembre 1869, reproduit dans *Correspondence, ibid.* à la p. 170.

<sup>31</sup> Lettre du Gouverneur général John Young à William McTavish, 6 décembre 1869, reproduite dans *Correspondence, ibid.* à la p. 34. La lettre inclut en pièce jointe une copie du télégramme de Granville.

Il appert donc que la proclamation se veut l'expression de la volonté conjointe du cabinet impérial et du gouvernement fédéral de garantir les droits des habitants de la terre de Rupert et du Nord-Ouest.

### III. PRINCIPES GÉNÉRAUX RÉGISSANT L'EFFET JURIDIQUE DES PROCLAMATIONS

#### *Qu'est-ce qu'une proclamation?*

En common law, une proclamation est une annonce officielle faite sous le grand sceau de la couronne. Au Royaume-Uni, les proclamations annoncent la volonté exécutive de la Couronne en conseil. Au Canada, les proclamations expriment la volonté exécutive du Gouverneur général en conseil. Comme l'a affirmé le juge Cannon : « A formal announcement, under the great seal, of what the Governor General in Council wishes to make known to the subjects is a proclamation »<sup>32</sup>.

#### *Quel est l'effet juridique d'une proclamation?*

L'effet juridique d'une proclamation dépend, entre autres, du libellé et de la portée territoriale de celle-ci. Or, il sied de distinguer les proclamations relatives au territoire du Royaume-Uni et les proclamations relatives aux possessions étrangères de la couronne acquises par cession ou par conquête.

#### *Au Royaume-Uni*

Au Royaume-Uni, il est depuis longtemps reconnu que la couronne ne peut pas légiférer ou modifier la common law par voie de proclamation<sup>33</sup>. Dans la *Case of Proclamations* (1610), Sir Edward Coke affirme ce qui suit :

[T]he King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm, 11 Hen. 4. 37. Fortescue De Laudibus Angliæ Legum, cap. 9. 18 Edw. 5. 35, 36, &c. 31 Hen. 8. cap. 8. *hic infra*: also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not; for *ubi non est lex, ibi non est transgression: ergo*, that which cannot be punished without proclamation, cannot be punished with it<sup>34</sup>.

Autrement dit, au Royaume-Uni, la couronne peut par proclamation annoncer sa volonté de faire appliquer une règle de droit quelconque, mais ne peut jamais modifier une législation, une règle de common law ou une coutume. Ces fonctions relèvent uniquement du parlement et des cours

<sup>32</sup> *Reference Re: Canada Temperance Act Part II*, [1935] S.C.R. 494 à la p. 509, [1935] S.C.J. No. 20, [1935] 3 D.L.R. 641, 64 C.C.C. 159.

<sup>33</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, éd. par Roger E. Michener, Indianapolis, Liberty Fund, 1982 à la p. 13.

<sup>34</sup> *Case of Proclamations* (1610), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.).

judiciaires. Au Royaume-Uni, les proclamations royales sont donc exécutoires que dans l'unique mesure où elles se font le reflet de l'état du droit existant.

Blackstone précise que le pouvoir de faire des proclamations au Royaume-Uni découle de la prérogative royale. Par l'entremise de proclamations, la couronne communique sa volonté exécutive de faire appliquer le droit existant.

From ... the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. *These proclamations have then a binding force, when (as sir Edward Coke observes) they are grounded upon and enforce the laws of the realm.* For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. *And therefore his constitutions or edicts, concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary* [nos italiques]<sup>35</sup>.

### À l'égard des colonies (en général)

À l'égard des colonies conquises ou cédées, l'effet juridique des proclamations est fort différent. Il est établi depuis la fin du 18<sup>e</sup> siècle que la couronne jouit de la prérogative de légiférer par proclamation relativement aux affaires des colonies. De telles proclamations ont force de droit et sont exécutoires, comme s'il s'agissait d'une loi du parlement impérial. Ce pouvoir législatif de la couronne à l'égard des colonies est cependant sujet à une limite importante : la prérogative royale de légiférer par proclamation pour une colonie cesse d'exister dès que la colonie en question se constitue une assemblée législative<sup>36</sup>.

Ces principes ont été énoncés par Lord Mansfield dans l'affaire *Campbell v. Hall* (1774)<sup>37</sup> dans laquelle la cour devait déterminer l'effet juridique de la Proclamation royale du 7 octobre 1763 relativement à l'île de Grenade dans les Antilles. En l'espèce, les parties contestaient la légalité d'une taxe sur le sucre que la couronne avait introduite par décret en 1764. La cour a conclu que dans la mesure où la Proclamation de 1763 commande aux habitants de l'île de Grenade de constituer une assemblée législative, la couronne ne jouissait plus de la compétence de décréter l'imposition d'une nouvelle taxe sans l'assentiment du parlement impérial.

<sup>35</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 1, Chicago. University of Chicago Press, 1979 aux pp. 260-261.

<sup>36</sup> Peter Hogg, *The Constitutional Law of Canada*, feuilles mobiles, Toronto, Carswell, 2007 aux pp. 1-18, 2-7.

<sup>37</sup> *Campbell v. Hall* (1774), 1 Cowp. 204 à la p. 213, 98 E.R. 1045 (K.B.).

### À l'égard du Canada

La règle de l'affaire *Campbell v. Hall* s'applique également au Canada. La prérogative royale de légiférer à l'égard des colonies canadiennes est tombée en caducité avec l'émission de la Proclamation royale de 1763 dans la mesure où celle-ci ordonnait la constitution d'assemblées législatives. En effet, au 7<sup>e</sup> paragraphe du texte, Sa Majesté le Roi George III proclame :

Et attendu qu'il est à propos de faire connaître à Nos sujets Notre sollicitude paternelle à l'égard des libertés et des propriétés de ceux qui habitent comme de ceux qui habiteront ces nouveaux gouvernements, afin que des établissements s'y forment rapidement, Nous avons cru opportun de publier et de déclarer par Notre présente proclamation, que nous avons par les lettres patentes revêtues de notre grand sceau de la Grande-Bretagne, en vertu desquelles lesdits gouvernements sont constitués, donné le pouvoir et l'autorité aux gouverneurs de nos colonies respectives, d'ordonner et de convoquer, de l'avis et du consentement de notre Conseil dans leurs gouvernements respectifs, dès que l'état et les conditions des colonies le permettront, des assemblées générales de la manière prescrite et suivie dans les colonies et les provinces d'Amérique placées sous notre gouvernement immédiat; que nous avons aussi accordé auxdits gouverneurs le pouvoir de faire, avec le consentement de nosdits conseils et des représentants du peuple qui devront être convoqués tel que susmentionné, de décréter et de sanctionner des lois [nos italiques]<sup>38</sup>.

En ordonnant la constitution d'une assemblée législative au Québec, le Roi George III s'est dépouillé de son pouvoir législatif à l'égard de cette colonie. Il sied de noter cependant que même si elle a mis fin au pouvoir législatif de la couronne à l'égard des colonies, la Proclamation royale de 1763 a toujours force de droit<sup>39</sup>; celle-ci figure aujourd'hui parmi les Lois refondues du Canada<sup>40</sup>. De plus, la force juridique de la Proclamation royale de 1763 semble avoir été confirmée par l'article 25 de la *Charte canadienne des droits et libertés*.

Les éditeurs du *Canadian Encyclopedic Digest* affirment : « Her Majesty has prerogative powers to legislate personally for conquered or ceded colonies but these were exhausted with respect to Canada after the Proclamation of 1763 »<sup>41</sup>. Cette affirmation mérite d'être nuancée. Si la Proclamation de 1763 a mis fin à la prérogative législative de la couronne à l'égard des colonies qui y sont décrites – c'est-à-dire pour le territoire qui composait autrefois le Québec – celle-ci n'a pas eu pour effet d'éteindre la prérogative législative de la

<sup>38</sup> *Proclamation royale de 1763* (R.-U.), reproduite dans L.R.C. 1985, app. II, n° 1.

<sup>39</sup> Voir *St. Catharines Milling and Lumber Co. v. Ontario (A.G.)*, (1887), 13 S.C.R. 577 (La Cour suprême du Canada reconnaît que la Proclamation royale de 1763 avait « the force of a statute and was in the strictest sense a legislative act, and which had never, ... been repealed, but remained, ... in force at the date of confederation », à la p. 623).

<sup>40</sup> *Proclamation royale*, *supra* note 38.

<sup>41</sup> *Canadian Encyclopedic Digest (Ontario)*, 3<sup>e</sup> éd., vol. 8, Toronto, Carswell, 1979 au titre « Crown », § 10. Voir aussi *La Couronne en droit canadien*, Cowansville (Qc), Ministère de la Justice/ Yvon Blais, § 4.2 à la p. 21.



couronne à l'égard des territoires nord-américains que la Proclamation ne mentionne pas, dont la terre de Rupert et le Nord-Ouest. En effet, ces territoires ne faisaient pas partie du Canada en 1763.

Il est important de bien saisir la portée territoriale de la Proclamation de 1763. En ce qui a trait aux territoires qui font aujourd'hui partie du Canada, la Proclamation s'appliquait explicitement au Québec, lequel est décrit comme suit au premier paragraphe de la Proclamation :

Le gouvernement de Québec, sera borné sur la côte du Labrador par la rivière Saint-Jean et de là par une ligne s'étendant de la source de cette rivière à travers le lac Saint-Jean jusqu'à l'extrémité sud du lac Nipissing, traversant de ce dernier endroit, le fleuve Saint-Laurent et le lac Champlain par 45 degrés de latitude nord, pour longer les terres hautes qui séparent les rivières qui se déversent dans ledit fleuve Saint-Laurent de celles qui se jettent dans la mer, s'étendre ensuite le long de la côte nord de la baie de Chaleurs et de la côte du golfe Saint-Laurent jusqu'au cap Rozière, puis traverser de la l'embouchure du fleuve Saint-Laurent en passant par l'extrémité ouest de l'île d'Anticosti et se terminer ensuite à ladite rivière Saint-Jean<sup>42</sup>.

La terre de Rupert et le Nord-Ouest n'étaient pas directement visés par la Proclamation de 1763; ils étaient toujours administrés par la Compagnie de la Baie d'Hudson, laquelle détenait sa charte directement de la couronne au bon plaisir de Sa Majesté depuis 1640. La terre de Rupert et le Nord-Ouest sont demeurés entièrement assujetties aux décrets et proclamations de la couronne et aux lois du parlement impérial jusqu'à leur accession au Canada en 1870<sup>43</sup>. Slaterry est d'avis que la couronne britannique jouissait toujours de sa pleine prérogative législative à l'égard ce territoire jusqu'au moment de son annexion au Canada. Il affirme : « Although the Hudson's Bay Company had been granted certain limited rights of legislation respecting the territory in its Charter of 1670, no representative legislature had been established in the colony. It would appear on this basis that the Crown's original legislative competence remained unimpaired »<sup>44</sup>. Autrement dit, « [t]he Crown, in conferring a legislative power upon an unrepresentative institution such as the Company, would not lose its own legislative authority »<sup>45</sup> à l'égard du territoire administré par la Compagnie de la baie d'Hudson.

Il serait possible de contester cette dernière affirmation en s'appuyant sur la règle de common law selon laquelle la couronne ne dispose d'aucun pouvoir législatif à l'égard de colonie de peuplement (« settled colonies »). Conformément à cette règle, les colons britanniques sont réputés de transporter la common law avec eux là où ils s'installent, et continuent à jouir

<sup>42</sup> *Supra* note 38.

<sup>43</sup> Hogg, *supra* note 36 aux pp. 2-12 à 2-13.

<sup>44</sup> Brian Slaterry, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories*, Oxford, University of Oxford, 1979 à la p. 295.

<sup>45</sup> *Ibid.* aux pp. 299-300.

des protections de celle-ci contre les proclamations de la couronne comme s'ils habitaient toujours en Angleterre. Cependant, dans la mesure, d'une part, où la common law en vigueur dans la terre de Rupert était figée à celle de 1670<sup>46</sup>, et d'autre part, que la règle à l'égard des colonies de peuplement ne fut pas reconnue avant 1693<sup>47</sup>, il y a lieu de douter que la common law aurait eu pour effet d'empêcher la couronne de légiférer par proclamation dans la terre de Rupert. Quoi qu'il en soit, le statut juridique précis de la terre de Rupert demeure ambigu. Selon Slattery, « Rupert's Land was initially deemed to be a conquered colony [et non pas une colonie de peuplement], in which the laws and property rights of the inhabitants remained in force until modified. The Charter of 1670 effected a partial introduction of English law, but only as regards Company employees and others living under their rule »<sup>48</sup>.

À la lumière de ces principes et des interrogations qui subsistent à l'égard du statut juridique de la terre de Rupert et du Nord-Ouest, il existe de bonnes raisons de croire que la proclamation du 6 décembre 1869 avait force de droit et s'appliquait *ex proprio vigore* à l'égard de la terre de Rupert et du Nord-Ouest au moment de son émission. Cette conclusion semble étayée par les textes constitutionnels effectuant la cession de la terre de Rupert et du Nord-Ouest et, surtout, par la correspondance officielle de l'époque. Celle-ci appuie largement la thèse selon laquelle la proclamation du 6 décembre 1869 était conçue pour engendrer des effets spécifiques et exécutoires.

#### IV. L'EFFET JURIDIQUE DE LA PROCLAMATION DU 6 DÉCEMBRE DE 1869

Pour bien saisir l'effet juridique de la proclamation du 6 décembre 1869, il est nécessaire de tenir compte de la procédure constitutionnelle qui avait été établie pour effectuer le transfert de la terre de Rupert et du Nord-Ouest. Or, la procédure du transfert de la terre de Rupert et du Nord-Ouest était établie à l'article 146 de la *Loi constitutionnelle de 1867*. Cette disposition prévoyait que la cession de la terre de Rupert et du Nord-Ouest se ferait par décret en conseil de Sa Majesté, suite à la présentation d'adresses de la part du parlement du Canada exprimant les « termes et conditions ... que la Reine jugera convenable d'approuver »<sup>49</sup>. L'article 146 précise par ailleurs que « les dispositions de tous

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<sup>46</sup> Voir *Sinclair v. Mulligan* (1888), 5 Man. L.R. 17 (C.A.), juge en chef Taylor (« until 1870, the law of England of the date of the Hudson's Bay Company charter 1670 was the law in force here » à la p. 23).

<sup>47</sup> Slattery, *supra* note 44 à la p. 156.

<sup>48</sup> *Ibid.* à la p. 164.

<sup>49</sup> *Supra* note 5.

ordres en conseil rendus à cet égard, auront le même effet que si elles avaient été décrétées par le parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande. » Autrement dit, le décret en conseil effectuant l'annexion de la terre de Rupert et du Nord-Ouest et les conditions qu'il énumère seraient assimilés à une loi du parlement impérial, à même titre que la *Loi constitutionnelle de 1867*, et ferait partie *ipso facto* de la Constitution du Canada<sup>50</sup>.

C'est ainsi que les 16 et 17 décembre 1867, conformément à la procédure décrite à l'article 146, le Sénat et la Chambre des communes du Canada présentent une adresse à Sa Majesté, lui demandant « de bien vouloir, sur l'avis de Son très honorable Conseil privé, unir la terre de Rupert et le Territoire du Nord-Ouest au dominion et octroyer au Parlement du Canada le pouvoir de légiférer pour leur prospérité et leur bon gouvernement futurs »<sup>51</sup>. Dans cette adresse, le gouvernement et le parlement du Canada affirment solennellement être « disposés à assumer les fonctions gouvernementales et législatives pour ces territoires » et « à *faire respecter les droits des personnes physiques* ou morales qui y sont installées et placer ces droits sous la protection des tribunaux compétents. »<sup>52</sup> [nos italiques].

Quelques mois plus tard, soit, le 31 juillet 1868, le parlement impérial sanctionne la *Loi de 1868 sur la terre de Rupert*, laquelle, comme son titre officiel l'indique, habilite formellement Sa Majesté la Reine « à accepter, sous condition, la cession des terres, droits et privilèges de la Compagnie de la baie d'Hudson et prévoyant l'adhésion du territoire correspondant au dominion du Canada »<sup>53</sup>. En vertu de cette loi impériale, la couronne était maintenant disposée à recevoir par acte de cession l'ensemble du territoire qui était exploité par la Compagnie de la baie d'Hudson afin de l'annexer au territoire du Canada par décret en conseil, conformément à la procédure décrite à l'article 146 de la *Loi constitutionnelle de 1867*.

Les négociations commencent en automne 1868. Le 1<sup>er</sup> octobre 1868, George Étienne Cartier et William McDougall sont « délégués en Angleterre pour régler les conditions de l'acquisition par le Canada de la terre de Rupert

<sup>50</sup> L'Arrêté en conseil de Sa Majesté admettant la Terre de Rupert et le Territoire du Nord-Ouest, en date du 23 juin 1870, aujourd'hui appelé le Décret en conseil sur la terre de Rupert et le territoire du Nord-Ouest est le texte No. 3 énuméré à l'annexe *Loi constitutionnelle de 1982*, supra note 4.

<sup>51</sup> Adresse du Sénat et de la Chambre des communes du dominion du Canada à Sa Majesté la Reine des 16 et 17 décembre 1867, constituant l'Annexe A du Décret et en conseil sur la terre de Rupert et le territoire du Nord-Ouest, constituant le texte No. 3 énuméré à l'annexe de la *Loi constitutionnelle de 1982*, supra note 4. Par conséquent, en vertu de l'al. 52(2)b) de la *Loi constitutionnelle de 1982*, l'Adresse du 17 décembre 1867 fait partie de la Constitution du Canada.

<sup>52</sup> Ibid.

<sup>53</sup> *Loi de 1868 sur la terre de Rupert*, (R.-U.), 31-32 Vict., ch. 105.

et ... du Territoire du Nord-Ouest »<sup>54</sup>. Les négociations se déroulent sans qu'aucune consultation soit menée auprès des habitants du territoire.

Les 29 et 31 mai 1869, une seconde Adresse est présentée à Sa Majesté par la Chambre des communes et le Sénat du Canada, lui demandant d'unir la terre de Rupert et le Nord-Ouest au Canada, conformément aux termes et conditions indiqués<sup>55</sup>. Celle-ci inclut notamment le versement d'une somme de 300 000 livres sterling à la Compagnie de la baie d'Hudson et la confirmation des titres de propriétés de la compagnie. Aucune mention n'est faite des droits des habitants Métis de la terre de Rupert et du Nord-Ouest.

Le 19 novembre 1869, la Compagnie de la Baie d'Hudson cède la terre de Rupert et le Nord-Ouest à la couronne<sup>56</sup>, complétant ainsi la première étape de la transaction tripartite entre la Compagnie de la baie d'Hudson, la couronne et le Canada. C'est vers la fin de l'automne 1869 que le mécontentement populaire face à l'annexion imminente de la terre de Rupert et du Nord-Ouest atteint son paroxysme, et se manifeste par la résistance armée dans la colonie de la rivière Rouge.<sup>57</sup>

Bien que c'était la Compagnie de la baie d'Hudson qui devait assumer les fonctions gouvernementales durant cette période de transition constitutionnelle jusqu'au moment de l'annexion, la correspondance officielle de l'époque démontre que celle-ci se trouvait dans l'incapacité d'assurer la tranquillité publique. Dans une lettre datée du 23 novembre 1869, John Young écrit au comte Granville : « Authorities of Hudson's Bay Company, with whom the Government still rests, are apparently inactive and powerless »<sup>58</sup>. À cette missive, le comte Granville répond le 30 novembre, « Hudson's Bay Company's Government no longer possible, and the only alternative is Government by Canada, which ought to be established

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<sup>54</sup> *Résolution de la Chambre des communes et du Sénat du Canada du 28 mai 1869* al. 3 constituant l'annexe B du *Décret et en conseil sur la terre de Rupert et le territoire du Nord-Ouest*, constituant le texte No. 3 énuméré à l'annexe de la *Loi constitutionnelle* de 1982, *supra* note 4.

<sup>55</sup> *Adresse de la Chambre des communes et du Sénat du Canada du 29 et 31 mai 1869, constituant l'annexe B du Décret en conseil sur la terre de Rupert et le territoire du Nord-Ouest*, constituant le texte No. 3 énuméré à l'annexe de la *Loi constitutionnelle* de 1982, *supra* note 4.

<sup>56</sup> Caron, *supra* note 2 au para. 459 ; Renvoi : *Droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, para. 5. L'acte de cession constitue l'annexe C du *Décret en conseil sur la terre de Rupert et le territoire du Nord-Ouest*, constituant le texte No. 3 énuméré à l'annexe de la *Loi constitutionnelle* de 1982, *supra* note 4.

<sup>57</sup> *Supra* notes 9 à 14 et texte correspondant.

<sup>58</sup> Télégramme de John Young au comte Granville, 23 novembre 1869, reproduit dans *Correspondence*, *supra* note 17 à la p. 3.

promptly. Her Majesty's Government are, however, desirous to co-operate, and believe Hudson's Bay Company to be equally anxious to do so »<sup>59</sup>.

La situation se complexifie davantage lorsque le lieutenant-gouverneur général William McDougall fait publier une proclamation le 2 décembre 1869 annonçant prématurément l'annexion du territoire alors que, *de jure et de facto*, celle-ci ne s'était pas encore produite<sup>60</sup>. McDougall avait été nommé le 28 septembre 1869 en vertu de la *Loi concernant le gouvernement provisoire de la terre de Rupert et du Territoire du Nord-Ouest après leur adhésion à l'Union*<sup>61</sup>. En date du 2 décembre, ce dernier n'avait apparemment pas encore été informé de la décision du cabinet impérial de proroger l'acceptation du transfert de la terre de Rupert, laquelle avait initialement été prévue pour le 1<sup>er</sup> décembre 1869<sup>62</sup>.

C'est donc dans le chahut politique que la proclamation du 6 décembre 1869 est émise, durant les semaines où la Compagnie de la baie d'Hudson n'était plus en position d'exercer son autorité<sup>63</sup>. Pour sa part, le Canada refusait d'assumer le contrôle d'un territoire aux prises d'une insurrection. John Young écrit au comte Granville le 27 novembre 1869 : « On surrender by Company to Queen, the Government of Company ceases. The responsibility of Administration of affairs will then rest on Imperial Government. Canada cannot accept transfer unless quiet possession can be given »<sup>64</sup>. Dans de telles circonstances, il incombait à la couronne d'affirmer son autorité morale et politique afin régler l'impasse et assurer le succès de la transaction.

Bref, la proclamation du 6 décembre 1869 est émise durant une période de grande confusion quant au gouvernement de la terre de Rupert et du Nord-Ouest. Quoiqu'il en soit du contexte de son émission, *le fait* de son émission est en soi significatif, d'autant plus qu'elle fut émise sous la main et le sceau du gouverneur général du Canada, dans sa capacité de représentant et porte-parole de la couronne impériale et chef du gouvernement canadien.

<sup>59</sup> Télégramme du comte Granville à John Young, 30 novembre 1869, reproduit dans *Correspondence, Ibid.* à la p. 170.

<sup>60</sup> Parlement, « Proclamation de William McDougall, 2 décembre 1869 » dans *Sessional Papers*, n° 12 (1870) aux pp. 71-72.

<sup>61</sup> 1869, 32-33 Vict., ch. 3 (Canada), sanctionnée le 22 juin 1869. Voir aussi Parlement, « Commission appointing the Honourable William McDougall, C.B., Lieutenant Governor of the North West Territories » dans *Sessional Papers*, n° 12 (1870) aux pp. 4-5.

<sup>62</sup> Parlement, « Lettre de William McDougall à Joseph Howe, 2 décembre 1869 » dans *Sessional Papers* n° 12 (1870) aux pp. 69-71.

<sup>63</sup> Caron, *supra* note 2, juge Wenden ( « [l]a procédure légale nécessaire pour effectuer le transfert de la Terre de Rupert et du Nord-Ouest était interrompue par les événements qui avaient eu lieu dans la colonie de la rivière Rouge en octobre et en novembre 1869 » au para. 527).

<sup>64</sup> Télégramme de John Young au comte Granville, 27 novembre 1869 reproduit dans *Correspondence, supra* note 17 à la p. 12.

Dans sa capacité de représentant de la Sa Majesté, la Reine Victoria, John Young avait manifestement l'autorité d'émettre des proclamations au nom de Sa Majesté. Dans une lettre datée du 7 décembre 1869, Joseph Howe affirme que la proclamation était « issued by the Governor General by the direct command of Her Majesty »<sup>65</sup>. De plus, dans son télégramme du 25 novembre 1869, le comte Granville informait John Young que Sa Majesté « authorises you to tell them that she views with displeasure and sorrow their lawless and unreasonable proceedings »<sup>66</sup>. Conformément à cette autorisation directe, la proclamation du 6 décembre 1869 exprime le mécontentement de Sa Majesté face aux événements à la rivière Rouge, sa sollicitude face aux préoccupations de ses sujets qui habitaient la terre de Rupert et du Nord-Ouest et sa garantie que leurs droits seront respectés une fois unis au Canada. Par ailleurs, la décision d'émettre la proclamation au nom de Sa Majesté, plutôt qu'au nom du gouvernement canadien, comportait probablement un avantage stratégique important : les membres de la résistance ne s'opposaient pas à la couronne impériale, mais uniquement à la fédération canadienne. Effectivement, dans une lettre à Joseph Howe, William McDougall affirme que « [t]he leaders of this movement have studiously represented that they were only resisting the aggressions of Canada and not the authority of the Crown »<sup>67</sup>.

À la lumière de la procédure établie par l'article 146 de la *Loi constitutionnelle de 1867* et du contexte social et politique dans lequel elle fut émise, une question se pose quant au poids juridique qu'il convient d'accorder la proclamation du 6 décembre 1869 et aux promesses qu'elle contient. Dans l'affaire *R. c. Caron*, la Cour provinciale de l'Alberta a dû se pencher sur la portée juridique de la promesse de respecter les « droits et privilèges civils et religieux ». En définitive, la cour a conclu (1) que la garantie du respect des droits « civils » faite par le gouverneur général du Canada dans la proclamation incluait le respect des droits linguistiques qui existaient en 1869 dans la terre de Rupert et le Nord-Ouest et (2) que la proclamation du 6 décembre 1869 fait aujourd'hui une partie de la constitution du Canada au sens de l'al. 52(2) de la *Loi constitutionnelle de 1869*<sup>68</sup>.

Il ne convient pas dans cet article d'évaluer le bienfondé de la première conclusion de droit de la Cour provinciale de l'Alberta dans l'affaire *R. c. Caron*, à savoir si la mention de « droits civils » dans la proclamation du 6 décembre

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<sup>65</sup> Parlement, «Lettre de Joseph Howe à William McDougall, 7 décembre 1869» dans *Sessional Papers*, n° 12 (1870) à la p. 42.

<sup>66</sup> Télégramme du comte Granville à John Young, 25 novembre 1869 reproduit dans *Correspondence*, *supra* note 17 à la p. 170.

<sup>67</sup> Parlement, «Lettre de William McDougall à Joseph Howe, 2 décembre 1869» dans *Sessional Papers*, n° 12 (1870) à la p. 71.

<sup>68</sup> *Caron*, *supra* note 2 aux para. 454 et 561.

1869 inclut les droits linguistiques. Non plus ne convient-il de traiter du bilinguisme judiciaire et législatif institué par la Compagnie de la baie d'Hudson dans l'administration des affaires publiques de la terre de Rupert et du Nord-Ouest. Ces questions excèdent largement la visée modeste de cet article et méritent de faire l'objet d'une recherche approfondie. En revanche, il est possible de faire quelques commentaires sur le caractère constitutionnel de la proclamation du 6 décembre 1869.

### ***La proclamation du 6 décembre 1869 fait-elle partie de la Constitution du Canada?***

Tout d'abord, il sied de rappeler la notion élémentaire que la constitution du Canada ne se limite pas aux seules lois constitutionnelles de 1867 et 1982. Plutôt, la constitution du Canada est un amalgame organique de textes écrits, de principes non écrits et de conventions<sup>69</sup>. La définition de la 'Constitution du Canada' au par. 52(2) de la *Loi constitutionnelle de 1982* exprime le caractère ouvert de celle-ci en indiquant que la Constitution « comprend » la *Loi de 1982 sur le Canada*, y compris la *Loi constitutionnelle de 1982*, les textes législatifs et les décrets figurant à la l'annexe, ainsi que leurs modifications subséquentes.<sup>70</sup> Or, en droit canadien, le terme « comprend » indique généralement une définition non exhaustive. Nonobstant l'opinion contraire du professeur Hogg à cet égard<sup>71</sup>, la Cour suprême a explicitement reconnu la possibilité de reconnaître d'autres textes constitutionnels qui ne sont pas énumérés à l'annexe de la *Loi constitutionnelle de 1982*. Dans le *Renvoi relatif à la sécession du Québec*, la Cour affirme que « [l]a 'Constitution du Canada' comprend certainement les textes énumérés au par. 52(2) de la *Loi constitutionnelle de 1982*. Même si ces textes jouent un rôle de premier ordre dans la détermination des règles constitutionnelles, ils ne sont pas exhaustifs »<sup>72</sup>. Dans la même veine, dans l'affaire *Colombie-Britannique (P.G.) c. Canada (P.G.)*, le juge Iacobucci reconnaît « la possibilité que *des documents non énumérés au par. 52(2) de la Loi constitutionnelle de 1982 puissent quand*

<sup>69</sup> Hogg, *supra* note 36 aux pp. 1-1 – 1-22.

<sup>70</sup> *Loi constitutionnelle de 1982*, *supra* note 4 au para. 52(2).

<sup>71</sup> Dans une vieille édition de son ouvrage, le professeur Hogg a écrit ce qui suit au sujet du caractère non exhaustif de la définition du Canada. « The definition of the "Constitution of Canada" in s. 52(2) is introduced by the word "includes". In general, in Canadian statutes, the word "includes" indicates that the definition is not exhaustive. ... But, considering the specificity of the list of Acts and orders, and the grave consequences (namely, supremacy and entrenchment ...) of the inclusion of other instruments, surely no court would be so bold as to make additions to the 30 instruments in the schedule. » Voir *Constitutional Law of Canada*, 3<sup>e</sup> éd., Toronto, Thomson Canada Limited, 1992 à la p. 9. Le professeur Hogg a atténué ces propos dans les versions plus récentes de son ouvrage à la lumière de la jurisprudence de la Cour suprême du Canada sur cette question.

<sup>72</sup> Renvoi relatif à la sécession du Québec, [1998] 2 R.C.S. 217 au para. 32.

*même être considérés comme constitutionnels dans certains contextes* » [nos italiques].<sup>73</sup>

Ainsi, dans la mesure où l'annexe de la *Loi constitutionnelle de 1982* n'est pas exhaustive, il est donc possible en principe que la proclamation du 6 décembre 1869 puisse être considérée comme faisant partie de la Constitution du Canada. En définitive, la question à savoir si la proclamation du 6 décembre 1869 est à juste titre un texte constitutionnel dépend de la possibilité d'identifier le mécanisme ou le procédé par lequel elle aurait été enchâssée dans la Constitution du Canada. À cet égard, trois possibilités me semblent plausibles.

Premièrement, si, tel qu'exposé dans la section précédente, la proclamation a été émise par le gouverneur général du Canada au nom de Sa Majesté la Reine Victoria en vertu de la prérogative royale de légiférer pour les colonies, celle-ci pourrait revêtir par conséquent le même statut qu'une loi du parlement impérial<sup>74</sup>. Or, en 1869, les lois impériales étaient hiérarchiquement supérieures aux lois du parlement canadien. Donc, dans la mesure où le parlement impérial n'a jamais aboli, modifié ou désavoué la proclamation du 6 décembre 1869, celle-ci demeurerait toujours en vigueur et s'appliquerait *ex proprio vigore* dans l'ordre constitutionnel canadien<sup>75</sup>.

Selon la deuxième hypothèse, il serait possible de fonder le caractère constitutionnel de la proclamation du 6 décembre 1869 sur l'Adresse du Parlement du Canada à Sa Majesté des 16 et 17 décembre 1867<sup>76</sup>. Dans cette Adresse, le gouvernement et le parlement du Canada affirment solennellement être disposés « à faire respecter les droits des personnes physiques ou morales qui y sont installées et placer ces droits sous la protection des tribunaux compétents »<sup>77</sup>. Ainsi, il serait possible de caractériser la proclamation de 1869 comme une réitération de l'engagement constitutionnel qu'avait pris le Canada dès 1867 de respecter les droits des habitants de la terre de Rupert et du Nord-Ouest. Rappelons que l'Adresse du Parlement du Canada était présentée conformément à la procédure établie à l'article 146 de la *Loi constitutionnelle de 1867* et reproduite intégralement dans le Décret en conseil du 23 juin 1870. Or, tel que le prévoit l'article 146, les dispositions du Décret en conseil effectuant l'annexion de la terre de Rupert et du Nord-Ouest possèdent « le même effet que si elles avaient été décrétées par le parlement du Royaume-Uni

<sup>73</sup> *Colombie-Britannique (P.G.) c. Canada (P.G.)* ; Acte concernant le chemin de fer de l'Île de Vancouver (Re), [1994] 2 R.C.S. 41 au para. 82.

<sup>74</sup> *Supra*, notes 43-48 et au texte correspondant.

<sup>75</sup> *Statut de Westminster, 1931*, 22 Geo. V, ch. 4 (R.U.), art. 7.

<sup>76</sup> *Supra* note 51.

<sup>77</sup> *Ibid.*



de la Grande-Bretagne et d'Irlande »<sup>78</sup>. Le juge Wenden dans l'affaire *R. c. Caron*, a abordé le rapport entre l'Adresse du Parlement de 1867 et la proclamation du 6 décembre 1869, mais ne semble pas en tirer de conclusions définitives.<sup>79</sup>

C'est la troisième hypothèse qui a été retenue par le Cour provinciale de l'Alberta dans l'affaire *R. c. Caron*. Dans cette affaire, le juge Wenden fonde son analyse du caractère constitutionnel de la proclamation du 6 décembre 1869 sur une disposition spécifique du Décret en conseil du 23 juin 1870<sup>80</sup>. Voici les grandes lignes de son raisonnement. D'abord, le Décret en conseil prévoit, *inter alia*, ce qui suit :

Sa Majesté, sur l'avis du Conseil privé et au titre des pouvoirs dont elle est investie par les lois en cause, décrète réalisée le 15 juillet 1870 l'adhésion au dominion du Canada, d'une part, du Territoire du Nord-Ouest, ... d'autre part,... de la terre de Rupert, aux conditions ci-après qui, ... ont été approuvées par Sa Majesté<sup>81</sup>.

Le Décret en conseil énumère ensuite les 15 conditions négociées par les représentants du Canada, de la Compagnie de la baie d'Hudson et du Royaume-Uni et qui « ont été approuvées par Sa Majesté ». Ces conditions prévoient notamment la contrepartie financière à verser à la Compagnie de la baie d'Hudson, les droits et les obligations, respectivement, du Canada et de la Compagnie de la baie d'Hudson à l'égard du territoire et des tribus indiennes qui y habitent.

C'est la quinzième condition qui, selon le juge Wenden, a pour effet d'enchâsser la proclamation du 6 décembre 1869 dans la Constitution du Canada. Elle se lit intégralement comme suit :

15. Le gouverneur en conseil est habilité à prendre toute mesure nécessaire à l'exécution des conditions énoncées ci-dessus. Le très honorable comte Granville, un des premiers secrétaires d'État de Sa Majesté, est chargé de donner les instructions qui s'imposent en l'occurrence.

Selon le juge Wenden, la condition quinze réitère et reflète le mandat spécial qui avait été accordé au gouverneur général en conseil dans la seconde Adresse du parlement du Canada à sa Majesté des 29 et 31 mai 1869. Cette Adresse autorisait le gouverneur en conseil « à prendre toute mesure nécessaire à l'exécution de l'accord »<sup>82</sup>.

Or, selon le juge Wenden, il convient de caractériser la proclamation du 6 décembre 1869 comme une « mesure nécessaire à l'exécution » de l'annexion

<sup>78</sup> *Supra* note 5.

<sup>79</sup> *Caron*, *supra* note 2 aux para. 492-509.

<sup>80</sup> *Ibid.* aux para. 512-561.

<sup>81</sup> *Supra* note 50.

<sup>82</sup> *Ibid.* Voir aussi *Caron*, *supra* note 3 au para. 525.

de la terre de Rupert et du Nord-Ouest. Il explique son raisonnement dans les termes suivants :

[527] La procédure légale nécessaire pour effectuer le transfert de la Terre de Rupert et du Nord-Ouest était interrompue par les événements qui avaient eu lieu dans la colonie de la rivière Rouge en octobre et en novembre 1869.

[528] Vers la fin du mois de novembre 1869, le gouverneur-général John Young avait envoyé un télégramme au comte Granville. Le télégramme annonçait que le Canada n'accepterait pas le transfert s'il ne pouvait pas garantir une possession paisible. Le Canada voulait que le transfert soit remis à plus tard.

[529] Le comte Granville a envoyé une dépêche dans laquelle il a indiqué que le Royaume-Uni ne voulait pas attendre jusqu'à ce que la possession paisible puisse être garantie. Il a aussi envoyé le télégramme sur lequel est fondée la proclamation.

[530] En déclarant que le Canada n'accepterait pas le transfert de la Terre de Rupert et du Nord-Ouest sans possession paisible, on a créé une situation où il n'était pas possible de réaliser l'exécution des conditions. Si rien n'était fait pour apaiser les Métis, les troubles continueraient. Le Royaume-Uni avait seulement un mois selon les termes de la *Loi sur la Terre de Rupert* pour transférer les terres au Canada. La proclamation fut la réponse qui traitait les problèmes étant la cause des troubles<sup>83</sup>.

Ainsi, selon le juge Wenden, la proclamation du 6 décembre 1869 apportait une solution juridique à l'impasse politique de la résistance à la rivière Rouge. Les promesses royales énoncées dans la proclamation du 6 décembre 1869 ont mené aux négociations constitutionnelles avec le gouvernement provisoire de Louis Riel et à l'adoption de la Liste des droits<sup>84</sup>. Par conséquent, le juge Wenden conclut : « Avec la conciliation des Métis, la possession paisible exigée par le Canada devenait possible. Tous les dispositifs visaient à assurer le succès du processus de transfert. Selon moi, étant donné le contexte historique, la proclamation est un document constitutionnel »<sup>85</sup>.

L'analyse du caractère constitutionnel de la proclamation du 6 décembre 1869 du juge Wenden a le mérite de placer la proclamation dans son contexte historique et de rattacher sa raison d'être à une disposition positive de la Constitution du Canada, soit, le Décret en conseil du 23 juin 1870. En revanche, à première vue, le raisonnement de la cour semble présenter une faille sur le plan chronologique. Tel qu'exposé plus haut, le juge Wenden fonde le caractère constitutionnel de la proclamation du 6 décembre 1869 dans la quinzième condition énumérée au Décret en conseil du 23 juin 1870. Or, il est difficile de concevoir qu'une disposition positive du Décret en conseil puisse avoir pour effet de constitutionnaliser la proclamation émise six mois auparavant, sans indication précise à cet effet dans le libellé dudit Décret en conseil. Cette

<sup>83</sup> Caron, *supra* note 2 aux para. 527-530.

<sup>84</sup> *Ibid.* au para. 559.

<sup>85</sup> *Ibid.* au para. 561.

objection s'estompe cependant si on tient compte du fait que la quinzième condition du Décret en conseil de 1870 reprend et réitère le contenu de la seconde Adresse du Parlement du Canada des 29 et 31 mai, 1869<sup>86</sup>, laquelle fut présentée à Sa Majesté plus de six mois avant l'émission de la proclamation du 6 décembre 1869.

### ***L'interprétation du libellé de la proclamation du 6 décembre 1869***

En définitive, le statut constitutionnel de la proclamation du 6 décembre 1869 est une question distincte de celle de ses effets précis. À la simple lecture du libellé de la proclamation, il semble évident que la couronne ne tente pas de légiférer dans le sens ordinaire de ce terme – c'est-à-dire qu'elle ne tente pas de modifier l'ordre juridique ou de créer du droit nouveau pour la terre de Rupert et le Nord-Ouest. Il ne s'agit pas, comme la proclamation royale de 1763, d'un appel aux colons de constituer une assemblée législative ou d'une réglementation de leurs transactions avec les autochtones. Ni ne s'agit-il d'un instrument semblable au décret dans l'affaire *Campbell v. Hall* modifiant les tarifs et taxes en vigueur dans le territoire. La proclamation du 6 décembre 1869 se veut plutôt une déclaration de Sa Majesté destinée aux habitants de la terre de Rupert faite et du Nord-Ouest dans le but de les rassurer quant à la sécurité de leurs droits suite à l'accession de ces territoires au Canada. Au lieu de créer du droit, la proclamation du 6 décembre 1869 annonce la continuation de droits préexistants et cherche à désamorcer la résistance en clarifiant les intentions et la bonne foi du gouvernement canadien d'en assurer le respect.

Cette caractérisation de la proclamation du 6 décembre 1869 n'est pas vide de sens : elle détermine le choix des principes dont il faut tenir compte en interprétant son libellé. Évidemment, si la proclamation du 6 décembre 1869 fait partie de la Constitution du Canada au sens du para. 52(2), elle doit recevoir une interprétation progressiste et évolutive<sup>87</sup>. Par exemple, les termes « tous vos droits et privilèges civils et religieux » devraient normalement être interprétés en fonction de leur portée actuelle, et non pas selon le sens plus restreint qu'ils possédaient potentiellement en 1869.

Même si la proclamation n'est pas caractérisée comme faisant partie de la Constitution du Canada, elle doit néanmoins recevoir l'interprétation « la plus équitable et la plus large qui soit compatible avec la réalisation de son objet »

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<sup>86</sup> *Ibid.* au para. 525.

<sup>87</sup> *Renvoi relatif au mariage entre personnes du même sexe*, [2004] 3 R.C.S. 698 au para. 22 ; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145 au para. 17.

en vertu de la Loi d'interprétation fédérale<sup>88</sup>. Or, l'objet de la proclamation du 6 décembre 1869 était d'apaiser les craintes des habitants de la terre de Rupert et du Nord-Ouest à l'égard de leurs droits civils et religieux suite à l'annexion de leur territoire au Canada<sup>89</sup>. Cette conclusion de fait du juge Wenden est bien appuyée par la correspondance officielle<sup>90</sup>. Il convient donc d'accorder au libellé de la proclamation du 6 décembre 1869 une interprétation large et équitable, qui s'harmonise avec la réalisation de l'objectif d'assurer le succès de la transaction effectuant l'annexion de la terre de Rupert et du Nord-Ouest.

Une autre considération qui me semble pertinente est le fait que la proclamation du 6 décembre 1869 a ostensiblement été émise au nom personnel de Sa Majesté à l'intention des Métis de la terre de Rupert et du Nord-Ouest, un peuple autochtone au sens de l'article 35 de la Loi constitutionnelle de 1982. Or, comme l'a reconnu à maintes reprises la Cour suprême du Canada, « l'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones »<sup>91</sup>. Quoique la jurisprudence traite généralement de l'honneur de la couronne dans le contexte des traités autochtones, aucune considération de principe ne semble écarter son application à l'égard d'une proclamation destinée au Métis. Par ailleurs, plusieurs cours canadiennes ont reconnus la pertinence du principe de l'honneur de la couronne dans des litiges impliquant les Métis<sup>92</sup>.

Dans l'affaire *R. c. Caron*, le juge Wenden a rejeté la pertinence du principe de l'honneur de la couronne à l'égard de Métis de la terre de Rupert et du Nord-Ouest au motif qu'ils « n'étaient pas considérés comme un peuple souverain avec une souveraineté préexistante »<sup>93</sup>. Respectueusement, j'estime que le juge Wenden limite indûment le principe de l'honneur de la couronne,

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<sup>88</sup> *Loi d'interprétation*, L.R.C. 1985 c. I-21, art. 12. La *Loi d'interprétation* s'applique aux proclamations de la couronne. En vertu de son article 3, la *Loi d'interprétation*, « s'applique à tous les textes, indépendamment de leur date d'édiction ». Le mot « texte » est défini à l'article 2 comme désignant « Tout ou [une] partie d'une loi ou d'un règlement ». Le mot « règlement » pour sa part est défini au même article comme incluant une « proclamation ». Enfin, le mot « proclamation » est défini au par. 35(1) de la *Loi d'interprétation* comme désignant une « Proclamation [faite] sous le grand sceau ». La proclamation du 6 décembre 1869 est donc une proclamation au sens de *Loi d'interprétation*.

<sup>89</sup> *Caron*, *supra* note 2 au para. 454.

<sup>90</sup> Voir la discussion *supra* aux notes 10 à 24 et au texte correspondant.

<sup>91</sup> *Nation Haida c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511 au para. 16 [*Nation Haida*]. La Cour renvoi également aux affaires *R. c. Badger*, [1996] 1 R.C.S. 771, par. 41 [*Badger*]; *R. c. Marshall*, [1999] 3 R.C.S. 456 [*Marshall*].

<sup>92</sup> Voir notamment *Newfoundland and Labrador (Minister of Environment and Conservation) v. Labrador Métis Nation* (2007), 288 D.L.R. (4th) 641 (C.A. N.L.) ; *R. v. Powley* (2001), 53 O.R. (3d) 35 (C.A.) ; *R. v. Willison*, [2005] B.C.J. No. 92 (C.P.). Contra *Metis Federation*, *supra* note 7.

<sup>93</sup> *Caron*, *supra* note 2 au para. 491.

lequel est un « précepte fondamental » qui s'applique dans divers contextes et qui engendre de différentes obligations selon les circonstances<sup>94</sup>. Par exemple, lorsque le gouvernement exerce des pouvoirs discrétionnaires touchant aux intérêts particuliers des peuples autochtones, le principe de l'honneur de la Couronne donne naissance à une obligation fiduciaire<sup>95</sup>. Lorsqu'il s'agit d'interpréter un traité, l'honneur de la couronne exige que celui-ci soit interprété de la manière la plus favorable aux intérêts des autochtones, de sorte à éviter « la moindre apparence de manœuvres malhonnêtes »<sup>96</sup>. Même en absence de traité, le principe de l'honneur de la couronne « exige la tenue de négociations menant à un règlement équitable des revendications autochtones »<sup>97</sup>. Finalement, lorsqu'il s'agit de définir les droits qui sont promis à l'article 35 de la Loi constitutionnelle de 1982 et de les concilier avec d'autres droits et intérêts, l'honneur de la couronne oblige le ministère public à « consulter et, s'il y a lieu, d'accommoder »<sup>98</sup>.

À mon avis, le principe de l'honneur de la couronne intervient dans le cas de la proclamation du 6 décembre 1869 dans la mesure où celle-ci constitue une promesse royale faite à l'égard des peuples Métis quant à la sécurité de leurs « droits et privilèges civils et religieux » au sein du Canada. Dans le cadre des négociations qui ont mené à l'annexion, sur la foi de la proclamation du 6 décembre 1869, les peuples Métis pouvaient s'attendre à ce que la couronne agisse honorablement dans la conciliation des droits préexistants des habitants de la terre de Rupert et du Nord-Ouest avec ceux du Canada. Par conséquent, l'honneur de la couronne commande à mon avis que toute ambiguïté dans le libellé de la proclamation du 6 décembre 1869 soit résolue en faveur des intérêts et des droits des communautés Métis auxquelles elle était destinée. La question à savoir quels « droits et privilèges civils et religieux » seraient aujourd'hui protégés par la proclamation du 6 décembre 1869 sera examinée dans un article subséquent.

## CONCLUSION

À la lumière du contexte historique de son émission et de son libellé, il ne fait aucun doute que la proclamation du 6 décembre 1869 a joué un rôle important dans le développement constitutionnel de l'ouest canadien. Elle a été émise par le gouverneur général du Canada au nom de Sa Majesté la Reine Victoria pour assurer le succès de la plus grande transaction immobilière de

<sup>94</sup> *Nation Haïda*, *supra* note 91 au para. 16.

<sup>95</sup> *Ibid.* au para 18; *R. c. Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245 au para. 79.

<sup>96</sup> *Nation Haïda*, *ibid.* au para. 19 ; *Badger*, *Ibid.* au para. 41 ; *Marshall*, *Ibid.* au para. 4.

<sup>97</sup> *Nation Haïda*, *ibid.* au para. 20; *R. c. Sparrow*, [1990] 1 R.C.S. 1075 aux pp.1105–1106.

<sup>98</sup> *Nation Haïda*, *ibid.*

l'histoire du Canada. Alors que la Compagnie de la baie d'Hudson avait cédé la terre de Rupert et le Nord-Ouest à la couronne, conformément à la procédure établie par l'article 146 de la *Loi constitutionnelle de 1867*, le Canada, pour sa part refusait d'en prendre possession tant et aussi longtemps que ces territoires demeuraient aux prises de la résistance armée des Métis. Ceux-ci étaient furieux d'avoir été ignorés durant les négociations préalables entre la Compagnie de la baie d'Hudson, le Royaume-Uni et le Canada et s'inquiétaient (à juste de titre) de la sécurité de leurs droits acquis une fois unis au Canada et revendiquaient désormais certaines garanties juridiques. La proclamation du 6 décembre 1869 incarne la promesse de la couronne impériale que les « droits et privilèges civils et religieux » des habitants de la terre de Rupert et du Nord Ouest seraient respectés suite à l'annexion au Canada. Une telle promesse ne saurait être ignorée.

Il n'a pas été question dans cet article d'identifier ou de discuter des droits spécifiques visés par la proclamation du 6 décembre 1869. Ceux-ci feront l'objet d'une recherche subséquente. Quoiqu'il en soit, il est néanmoins possible d'avancer que le libellé de la proclamation du 6 décembre 1869 doit recevoir une interprétation large et libérale, fondée sur son objet constitutionnel pacifique et conciliateur. Une telle approche semble être commandée tant par les canons d'interprétations ordinaires que par le principe de l'honneur de la couronne. Or, dans la mesure où ni le cabinet impérial, ni le parlement canadien n'ont ni désavoué, ni aboli, ni modifié la proclamation de 6 décembre 1869, il existe de bons motifs pour affirmer que celle-ci demeure pertinente, sinon déterminante, dans l'appréciation des droits civils et religieux des canadiens et canadiennes qui habitent le territoire qui constituait autrefois la terre de Rupert et le Nord-Ouest.

# Criminal Liability of Partnerships: Constitutional and Practical Impediments

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

## I. INTRODUCTION

Recent changes<sup>1</sup> to the *Criminal Code*<sup>2</sup> have altered the liability of corporations for crimes requiring proof of mental fault<sup>3</sup> in Canada. The author and others have discussed the effect of these changes.<sup>4</sup> Since arguments regarding the strengths and weaknesses of Bill C-45 with respect to corporations have already been made elsewhere, they need not be repeated here.<sup>5</sup>

However, Bill C-45 goes beyond corporate criminal liability. The new rules also purport to hold other “organizations” liable in the same manner as corporations. “Organizations” include many associations of persons, which (unlike corporations) do not have separate legal personality from the individuals that comprise them.

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<sup>1</sup> Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, 2nd Sess., 37<sup>th</sup> Parl., 2003, (as passed by the House of Commons 31 March 2004) [Bill C-45].

<sup>2</sup> R.S.C. 1985, c. C-46, as am. by S.C. 2003, c.21.

<sup>3</sup> “Mental fault” includes both subjective (that is, *mens rea*) and objective (criminal negligence) fault elements. There are offences that do not require the prosecution to prove mental fault of the accused. These are referred as “strict liability” and “absolute liability” offences. See *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1313-1326, [*Sault Ste. Marie*]. Bill C-45 does not deal with these.

<sup>4</sup> See e.g., Bruce Welling, *Corporate Law in Canada – The Governing Principles*, 3<sup>rd</sup> ed. (London, Ontario: Scribblers Publishing, 2006) at 159-178; Todd Archibald, Kenneth Jull & Kent Roach, “The Changed Face of Corporate Criminal Liability” (2005) 48 *Crim. L.Q.* 367; Darcy L. MacPherson, “Extending Corporate Criminal Liability? Some Thoughts on Bill C-45” (2004) 30 *Man. L.J.* 253 [MacPherson, “Extending Corporate Criminal Liability?”].

<sup>5</sup> The authors listed do not necessarily agree with one another on all of the relative strengths and weaknesses of Bill C-45. There are significant points of divergence. However, an assessment of these is not the task for this paper.

How does the legislation purport to do this? There are three possible approaches. The first would hold members of the “organization” liable for wrongdoing committed as part of the organization’s activities. The second approach would imbue the “organization” with the separate legal personality currently reserved for incorporated associations, for all purposes. The third approach would imbue the “organization” with separate legal personality, but for limited purposes only. Bill C-45 is not explicit as to which approach is to be adopted in interpreting its provisions. Therefore each approach will be considered in turn.

I begin by setting out some of the provisions of Bill C-45 and other statutes with respect to organizational liability. Secondly, I argue that, unless an organization has a separate legal personality, the idea of imposing criminal penalties on an “organization” is actually imposing the penalties on its members. Bill C-45 may be attempting to impose the economic component of the criminal sanction on the partners directly, whether or not they were involved in the wrongdoing that led to the imposition of the fine. If this is its intention, the state is punishing people, not for what they personally have done, but rather for their membership in an allegedly criminal association. This violates the presumption of innocence enshrined in s. 11(d) of the Canadian Charter of Rights and Freedoms.<sup>6</sup> Furthermore, this violates the right to freedom of association guaranteed by s. 2(d) of the Charter.<sup>7</sup>

Third, there are division-of-powers issues raised by attempting to imbue provincially-regulated organizations with separate legal personality through federal legislation. Partnerships, (which are designated specifically as “organizations” under Bill C-45), are clearly governed by the law of the province(s) in which the partnership carries on business.<sup>8</sup>

Fourth, these constitutional problems may become less acute if an “organization” is only imbued with separate legal personality for the limited purposes of ascribing criminal wrongdoing to it. However, this leaves certain practical concerns; the division of property between the “organization” and its members may become unclear. This may make it very difficult to punish the

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<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule “B” to the *Canada Act, 1982*, 1982, c. 11 (U.K.) [*Charter*].

<sup>7</sup> In *Corporate Law in Canada*, *supra* note 4 at 177, n. 57, Welling questions whether Bill C-45 may raise issues around s. 7 of the *Charter*. Given that: (i) the issue raises concerns in terms of both corporate and non-corporate organizational offenders; (ii) the issue was raised by Welling in the corporate context; (iii) the issue has not been addressed in the corporate context, issues around s. 7 will be left to another day.

<sup>8</sup> Alison R. Manzer, *A Practical Guide to Canadian Partnership Law*, looseleaf (Aurora, Ontario: Canada Law Book, 1994) at para. 1.10 [Manzer]; J. Anthony VanDuzer, *The Essentials of Canadian Law: The Law of Partnerships and Corporations*, 3<sup>rd</sup> ed. (Toronto: Irwin Law, 2009) at 29 [VanDuzer].



“organization” without directly punishing its members. I conclude that the attribution of “organizational” criminal liability for offences requiring proof of mental fault is fraught with difficulty, irrespective of such attribution’s analytical basis.

To be clear, one question is left aside – I am not asking whether the government should introduce organizational criminal liability. This normative issue is a much larger question whose resolution is better left to another day.<sup>9</sup> As Immanuel Kant once theorized, ‘ought’ implies ‘can’.<sup>10</sup> Herein, we set aside the question of whether the federal government ought to have passed this statute. The remaining analytical question is of sufficient importance and complexity to warrant our full attention here. Therefore, it is this analytical question on which we shall focus.

## II. STATUTORY AND CONSTITUTIONAL PROVISIONS

Before turning to the substantive question, it is necessary to set the stage by reviewing the statutory provisions which inform much of the analysis. Let us begin with Bill C-45 itself.

### A. Bill C-45

Bill C-45 provides that an organization is liable for an offence if, among other things, a “senior officer” of the “organization” is a party to the offence.<sup>11</sup> The definitions of “organization” and “senior officer”, respectively, read as follows:

“organization” means  
a public body, body corporate, society, company, firm, *partnership*, trade union or municipality, or  
an association of persons that  
is created for a common purpose,  
has an operational structure, and  
holds itself out to the public as an association of persons;  
“senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;<sup>12</sup>

<sup>9</sup> In “Extending Corporate Criminal Liability”, *supra* note 4 at 256-258, two potential rationales for corporate criminal responsibility are identified. Neither of these rationales is subjected to normative analysis in the earlier article. This will again have to wait for another day.

<sup>10</sup> Immanuel Kant, *Critique of Pure Reason*, ed. and trans. by Paul Guyer & Allen W. Wood (Cambridge: Cambridge University Press, 1998) at 540.

<sup>11</sup> Bill C-45, *supra* note 1, s. 2 [now *Criminal Code*, *supra* note 2, para. 22.2(a)].

<sup>12</sup> Bill C-45, *ibid.*, s. 1(2) [now *Criminal Code*, *ibid.*, s. 2] [emphasis added].

The definition of “senior officer” includes a reference to the term “representative”, which is itself defined in Bill C-45 as follows:

“representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;<sup>13</sup>

For this paper, the major substantive section of Bill C-45 is the section that is now s. 22.2 of the *Criminal Code*:

In respect of an offence that requires the prosecution to prove fault - other than negligence - an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers acting within the scope of their authority, is a party to the offence; having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.<sup>14</sup>

## B. The Charter

Certain constitutional provisions are also relevant. Sections 2 and 11 of the *Charter* read in part as follows:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

11. Any person charged with an offence has the right:

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

## C. Partnership

In assessing the impact of Bill C-45 on a non-corporate organizational structure, it seems appropriate to focus on one type of structure for consistency and continuity throughout the analysis. Partnership<sup>15</sup> is the logical choice, for four reasons. First, partnerships are specifically named as “organizations” under Bill C-45.<sup>16</sup> Second, the law of partnership is well developed and reasonably uniform across the country with a clear statutory overlay, thereby providing the most source material for this analysis. Third,

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

<sup>14</sup> *Supra* note 11.

<sup>15</sup> This paper will be restricted to the law of general partnership. It will leave aside issues around the limited partnership and the limited-liability partnership.

<sup>16</sup> Bill C-45, *supra* note 1, s. 1(2).

partnership is one of the most easily recognized forms of non-corporate organization. Fourth, many partnerships are large in size (professional partnerships that cannot be incorporated due to statutory or other restrictions come to mind).

The definition of partnership is:<sup>17</sup>

Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit; but the relationship between members of an incorporated company or association is not a partnership within the meaning of this Act.

Bill C-45 itself contains no definition of “partnership”. Consequently, the courts are likely to adopt the definition offered by the provincial *Partnership Acts*.<sup>18</sup>

Therefore, a partnership is not a separate person from its partners.<sup>19</sup> Instead it is a relationship that exists between persons. How is it that the federal government intends to hold a *relationship* liable for a criminal offence?

### III. A HYPOTHETICAL EXAMPLE

A simple hypothetical will assist. For continuity purposes, reference will be made to this example throughout the paper. One gentleman (“Adam”) works with another gentleman (“Brian”). Each is involved in managing their shared enterprise. Thus, assuming that the business is an “organization”, Adam and Brian are each a “senior officer” of the organization.

Both believe that their relationship is *not* one of partnership. In fact, the contract between the two gentlemen indicates specifically that partnership is

<sup>17</sup> *Partnership Act*, C.C.S.M., c. P30, s. 3 [*Partnership Act* (Manitoba)]. While this is drawn from Manitoba, the other common-law provinces and territories have legislation to a similar effect. Quebec has a partnership regime, which in some ways mirrors that of its common-law sister-provinces. However, there are important differences, which are unique to Quebec. For a discussion of the Quebec partnership regime, see VanDuzer, *supra* note 8 at 29-30. The discussion will be limited to the common-law provinces.

<sup>18</sup> See *Continental Bank Leasing Corp. v. Canada*, [1988] 2 S.C.R. 298 at para. 22, Bastarache J., (dissenting on different grounds); *Spire Freezers Ltd. v. Canada*, [2001] 1 S.C.R. 391 at para. 17; *Backman v. Canada*, [2001] 1 S.C.R. 367. In these cases the Supreme Court of Canada held that in the absence of a statutory definition of “partnership” in the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1, the ingredients of a partnership for tax purposes are those provided under partnership law as codified in the provincial legislation.

<sup>19</sup> See *Re: Thorne and New Brunswick Workmen's Compensation Board* (1962), 33 D.L.R. (2d) 167 (N.B.C.A.). The position is the same in English law: The Law Commission and The Scottish Law Commission, *Partnership Law – A Report on a Reference under Section 3(1)(e) of the Law Commissions Act, 1965*, Cm 6015 (London and Edinburgh: The Law Commission and The Scottish Law Commission, 2003) at paras. 2.5-2.6 [“The English and Scottish Law Commissions Report”].

not intended. However, notwithstanding the intentions of the parties, the statutory definition of partnership is satisfied, and thus, a partnership exists.<sup>20</sup> Adam has been misbehaving. He has been using the business to defraud customers. Adam intended some benefit to the business from his activities, and there was, in fact, some benefit to the enterprise. Notwithstanding this, Brian knew nothing of the scheme to defraud customers. Had Brian known of the scheme, he would have done everything possible to stop it.

Adam is guilty of fraud. Can the same be said of the business? Bill C-45 explicitly intends that there could be criminal liability.<sup>21</sup> What happens to Brian? He has done nothing criminal. Can the government access Brian's personal assets to pay the fine against the organization?

#### IV. CONCLUSIONS

Given what follows, the conclusions to be drawn from the analysis are set out below:

##### ***Without Imbuing the "Organization" with Separate Legal Personality***

Imposing liability on a partnership without providing a separate legal personality presents several difficulties. Partnership property is owned by the partners collectively. While one partner may have legal title to the asset, the partner is subject to a fiduciary obligation in favour of the other partners to only use "partnership property" for the partnership's business purposes. Therefore, payment of the fine levied must come from someone who owns property.

##### **Interpretative Difficulties**

Perhaps, the property should only come from the guilty partner. However, this interpretation renders Bill C-45 redundant. Furthermore, such an interpretation does not accord with the purpose of the Act, the scheme of the Act, or the intention of Parliament. Therefore, such an interpretation is to be rejected. The codified rules of criminal sentencing promote, among other things, the responsibility of offenders. Asking a person not associated with the organization to contribute to the payment of the fine would not be in accordance with this principle. This leaves only the property used in the business of the partnership. Therefore, property of both the guilty and the innocent partners may be used to pay the fine levied against the organization;

<sup>20</sup> For an example where the courts have held that there is in fact a partnership even where all the parties thereto claim that no such relationship was intended to exist, see *Redfern Farm Services Ltd. v. Wright*, 2006 MBQB 4, 200 Man.R. (2d) 129.

<sup>21</sup> See Bill C-45, *supra* note 1, ss. 1(2) and 2 [now *Criminal Code*, *supra* note 2, s. 2 "organization" and s. 22.2(c)].

### Section 11(d) of the *Charter*

Section 11 of the *Charter* – including the presumption of innocence contained in s. 11(d) – applies to any case where the prosecution is “criminal by nature” or causes “true penal consequences”. Since the prosecution will occur under the *Criminal Code*, the prosecution is “criminal by nature”. Even if this does not render the prosecution is “criminal by nature”, each of the unlimited power to fine, and the fine’s purpose in protecting public order to sufficient to attract s. 11 protections. Parliament cannot avoid the application of s. 11 by “charging” one entity (the partnership) when a person who has not been charged (the innocent partner) will be required to make good on the fine levied. In addition, the innocent partner will suffer “true penal consequences” if the innocent partner’s property can be used to pay the fine against the organization. A criminal fine is fundamentally different than other civil liabilities that can (according to the law of partnership) be placed upon one partner by another without the consent of the first partner. A criminal fine for an offence of mental fault carries with it an assignment of moral blame, unlike other civil liabilities. Therefore, constitutional protections should apply to the payment of a criminal fine;

### Section 2(d) of the *Charter*

Freedom of association protects a person’s right to perform in association with others activities which the person has the legal right to perform individually. A person has the legal right to do nothing about the criminal behaviour of any other person, and not be liable for it. Bill C-45 does not change this outcome for the innocent partner; however, once the guilty partner commits a crime which is intended to benefit the partnership, the innocent partner can be forced to pay part of the partnership’s resulting fine. Therefore, the right of the innocent partner to do nothing in the face of the knowledge of his or her co-partner’s criminal behaviour is removed, simply because the innocent partner is associated as a partner of the guilty individual. As such, Bill C-45 violates s. 2(d).

In the alternative, Bill C-45 drives at the “qualitative distinctions” between the individual partner and the partnership. According to recent Supreme Court of Canada jurisprudence, this is sufficient to attract s. 2(d) protection. Bill C-45 draws such a “qualitative distinction” in at least five ways. First, the definition of “organization” focuses on “associations of persons” rather than the individuals that comprise them. Second, not all partners are designated as “senior officers” of the partnership, drawing a distinction between the partnership and the individual partners. Third, the fact that there can be “organizational” liability without any senior officer (who is the conduit to “organizational” liability) being liable for any crime, including the one for which the organization is charged, further accentuates this distinction. Fourth, one section in Bill C-45 imposes a duty to ensure occupational health and

safety for workers on “every one”. This applies equally to individuals as well as organizations. Parliament specifically equates the two for the purpose of this section, and does not do so for “organizational” liability sections of Bill C-45. Parliament is clearly drawing a distinction between the group (the partnership) and its individual counterpart (the partner). Finally, the Supreme Court of Canada has given specific examples of the “qualitative distinctions” meant to be caught by the test enunciated by the Court. There are significant similarities between one of those examples and the distinctions drawn by Bill C-45.

Under s. 2(d) jurisprudence, the section will be engaged if: (i) the state seeks to either prevent or provide a specific disincentive to the pursuit of the common goals, or the actions of the state have the effect of substantially interfering with the pursuit of the common goals, and (ii) but for the prohibition or disincentive at issue, the common goals are legally allowed; and (iii) the disincentive at issue is driven at the associational nature of the goals sought to be pursued. Bill C-45 creates a specific disincentive against the pursuit of collective goals, even though the collective goals may be legal in and of themselves. The common goals of the partnership are legally allowed, because the criminal goals of one senior officer are *not* necessarily *common* goals of the partners. The disincentive is driven at the fact that the goals being carried out in the associational context of partnership. This is precisely the type of state action with which s. 2(d) is concerned. Also, values which underlie *Charter*, including the rule of law, could be enhanced by s. 2(d) protection in these circumstances. This militates in favour of s. 2(d) protection for the innocent partner.

### Section 1

Through a comparison of the impact of Bill C-45 to the s. 1 analysis undertaken by the Supreme Court of Canada on the facts of *R. v. Oakes*,<sup>22</sup> it is contended that there is, at the very least, a strong argument to suggest that Bill C-45 may not pass constitutional muster if the organization is not imbued with separate legal personality.

### ***Imbuing the “Organization” with Separate Legal Personality for All Purposes***

Imbuing the partnership with a separate legal personality for all purposes – similar to that for corporations – will alleviate concerns around both ss. 11(d) and 2(d) of the *Charter*. However, division of powers issues arise when the federal government applies separate legal personality to the partnership for all purposes. Provincial legislatures have jurisdiction over “Property and

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<sup>22</sup> *Infra* note 125.

Civil Rights in the Province”, including general regulatory jurisdiction over businesses. If an otherwise valid federal law could change the ownership of property by a provincially-regulated business, this effectively strips the provincial legislatures of the power to regulate businesses. To give effect to both the federal power over criminal law and the provincial regulation of business, the federal power only applies when the criminal law applies to the business.

The position of the partnership is then analogous to the constitutional position of the corporation. Provincial law cannot interfere with the status of a federally-incorporated corporation. Although there is no case-law on this point, the province should be able to determine the status of provincially-incorporated corporation. The case-law on the status of federal corporations includes the ability to carry on business as part of that status. The separate legal personality of a corporation is as important as its ability to carry on business. If the federal government does not have the power to remove the separate legal personality of a provincially-incorporated corporation, the federal government should also not have the ability to impose a separate legal personality on a provincially-regulated partnership.

The purpose of separate legal personality in this context is to ensure that a partnership has the ability to possess property. Yet, it is clear that the provinces have the legislative competence to determine who may own property in the province in the civil context. Furthermore, it is clear that the provinces have spoken on this issue in the civil context.

However, once the criminal law applies (because a crime has been committed), the doctrine of federal paramountcy applies because: (i) a fine is the predominate way to sentence organizations under the provisions of Bill C-45; (ii) if the partnership could not own property, a valid federal purpose would be frustrated, because the partnership would have no ability to pay any fine so levied; and (iii) since a valid federal purpose would be frustrated, the provincial *Partnership Acts* must give way to that federal purpose. However, paramountcy only applies to the extent of the inconsistency. Therefore, the separate legal personality of the partnership must be only for the purposes of the criminal law;

### ***Imbuing the “Organization” with Separate Legal Personality for Limited Purposes – Practical Considerations***

This approach is most consistent with the intention of Parliament, in that it treats corporate and non-corporate entities in the same way. Case-law supports the idea that separate legal personality need not necessarily be given for all purposes and is instead determined by the intention of Parliament. Nonetheless, there are certain practical concerns with this approach. The issues to be considered in this section are not meant to be an exhaustive list.

While Bill C-45 attempts to treat corporate and non-corporate entities alike, there are differences between the corporation and the partnership that make a simple analogy difficult. These differences include:

### **Differences in organizational formation**

A corporation must be created on purpose; a partnership can be created by accident, even against the express wishes of the partners. This means that the “common fund” of the partnership may not even be known to the partners, making it difficult for the state to prove which assets constitute the fund. For larger partnerships (such as large legal or accounting practices), there is more likely to be a clear common fund for the partnership, because the parties will clearly have intended to create a partnership. This means that issues of property ownership are more easily resolved for larger partnerships than for smaller ones.

### **Avoidance of liability as a going concern**

In larger partnerships, partners can take steps to reduce the asset pool that is potentially at risk to pay partnership civil liabilities. While this may be acceptable in civil law, there is a serious question as to whether it should be acceptable in criminal law. The criminal law is designed to reflect basic morality. Should basic morality be thwarted by a well-informed partner?

Corporate law has certain provisions that ensure that there is at least a minimal level of assets available to pay creditors. Partnership law does not have similar provisions, because the assets of the partners are fully exigible to pay the civil debts of the partnership. Therefore, partnership law provides more expansive opportunities for the manipulation of the size of the common fund than does corporate law, and therefore, may make it easier for the partners to avoid criminal liability against the organization;

### **When does separate legal personality attach to the partnership?**

#### **1. At the time of the offence**

If the common fund becomes depleted in the ordinary course of business, then: (i) the court cannot trace the assets because the government had no legal interest in the assets at the time that they were disposed of; (ii) the partners at the time of the offence cannot be called upon to make good on the loss, nor can the partners of the partnership at the time of sentencing;

#### **2. At the time of sentencing**

This creates a further incentive for the partner to remove assets from the common fund at regular intervals. This could raise issues when there has been a change in the composition of the partnership between the time of the offence and the time of sentencing. Has the original partnership ceased to exist, and



been replaced by a new and separate partnership, composed of new partners? The new partnership did not exist at the time of the offence. If the partnership does not automatically cease to exist on a change of membership, the partners could write such a provision into the partnership agreement indicating that a new partnership is being created to end the existing one. The status of the partnership at the time of the offence would then be unclear. If there has been a complete turnover in the membership, does Bill C-45 foist the fine on a business now owned by different people? Corporations again are different, because those that choose to invest in them generally do so with knowledge of the separate legal personality of the corporation (and the continuity of existence that comes with it), whereas the *Partnership Act* would lead a partner to believe that the partnership does not have the same continuity of existence. Thus, incoming partners will likely take steps to protect their interests, including perhaps dissolving the earlier partnership and creating a new one. Regardless of when the separate legal personality attaches to the partnership, serious practical issues remain.

## V. WITHOUT IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY

Is government constitutionally permitted to assign liability to, for example, a partnership, *without* assigning or imbuing it with separate legal personality? In my view, this question must be answered in the negative.

A partnership cannot own property *per se*. The provincial *Partnership Acts* are explicit as to ownership of property used in the business of the partnership. In this regard, s. 23(1) of the *Partnership Act* (Manitoba) is representative:<sup>23</sup>

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act “partnership property”, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

Thus, although property may be committed to the purposes of the business, the partners continue to own that property. However, it is important to remember that once property is committed to the partnership’s business, the partner contributing that property loses the ability to withdraw it from the business on a whim. His or her fellow partners have the equitable right to

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<sup>23</sup> Manzer, *supra* note 8 at para. 3.1610; VanDuzer, *supra* note 8 at 11; see also *Partnership Act* (Manitoba), *supra* note 17, s. 23(1).

prevent this.<sup>24</sup> The equitable ownership of the property becomes collective – in the partners as a group – rather than individual, in the hands of the contributing partner.<sup>25</sup> This conclusion is further strengthened by s. 23(2) of the same *Act*, which provides as follows:<sup>26</sup>

The legal estate or interest in any land, that belongs to the partnership, shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but *in trust* so far as necessary, for the *persons beneficially interested* in the land under this section.

Therefore, the *Act* indicates that there is a trust relationship created with respect to interests in land.

Nonetheless, for immediate purposes, it is sufficient to say the “partnership” never has ownership of the property that is used to advance the interests for which it was formed. In general partnership law, as far as third-party creditors are concerned, there is no distinction between the property used in the business, on the one hand, and the personal assets of the individual partners, on the other. All assets of all partners are available to pay the debts of the business.<sup>27</sup>

So, to return to the hypothetical example set out in the previous section, Brian has an equitable interest in the property contributed to the business by both Adam and him. Assuming that Brian contributed some of his personal assets to the business, legal title to those assets may remain in his name.

Thus, it is probable that if the organization has no separate legal personality, some of the property used to pay a fine assessed against the organization would be property in which an innocent partner<sup>28</sup> has an interest.

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<sup>24</sup> R.C. l’Anson Banks, *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002) at paras. 18-07 & 19-03-19-04; Manzer, *ibid.*; VanDuzer, *ibid.* at 54.

<sup>25</sup> VanDuzer, *ibid.* at 53-54.

<sup>26</sup> *Partnership Act* (Manitoba), *supra* note 17 [emphasis added].

<sup>27</sup> *Ibid.*, s. 12.

<sup>28</sup> The characterization of an “innocent partner” may seem counterintuitive of some people. Some might argue that Brian’s voluntary choice to create a partnership with a person such as Adam is a choice that was (or should have been) undertaken with an appreciation of the consequences of such a decision. These consequences include the impact of Bill C-45. In essence, the argument runs, one has taken the benefits of entering into the partnership. One must also be willing to accept the burdens that come along with those benefits. For a similar argument accepted by the Supreme Court in the context of corporate law see *Kosmopoulos v. Continental Insurance Co. of Canada*, [1987] 1 S.C.R. 2, Wilson J., on this point).

There are several answers to this argument. The first is that the criminal law does not impose guilt through the principles of vicarious liability. Second, the law has not recognized liability for an offence of bad choices of associates, whether of partners or otherwise. The impact of Bill C-45 is *not* to alter this. Bill C-45 does not create personal liability on Brian. Rather, the primary focus of Bill C-45 is on the *organization* and *not* the individuals that make up the organization. Third, this would violate s. 2(d) of the *Charter*. See Part V(c), below.

In 1976, the Law Reform Commission of Canada issued its Working Paper entitled *Criminal Responsibility for Group Action*.<sup>29</sup> In this document, the Commission held the view, somewhat tentatively,<sup>30</sup> that non-corporate groups should be amenable to the criminal law.<sup>31</sup> In so concluding, the Commission attempted to respond to some of the rationales typically given as to why groups without separate legal personality should *not* be held criminally liable. According to the Commission, one such argument is that the group or organization could not hold property in its own name. With respect to this argument, the Commission wrote:<sup>32</sup>

In our view this [the capacity of the corporation to own property in its own name] is another tenuous basis for differentiation [between corporate and non-corporate groups]. Imposing group responsibility does not require that the group hold property in its name. While the capacity of corporations to hold property is obviously helpful in sanctioning a corporation, since a fine or restitution can be paid out of property "owned" by it, the fact that the property is held by the corporation is not, in our view, essential. Groups, though not incorporated, may have a common fund. Pecuniary sanctions can be related to the state of the fund so that the financial position of the group, not that of its members, can be taken as the basis for sanctioning. The technical question, who "owns" funds in a strict legal sense, is not of principal concern in criminal sanctioning, especially if there is a residual authority to deal with the members individually where the sanction is not complied with.

Three points are worthy of note. First, the Commission was unconcerned with technical rules on the ownership of property. Second, the expectation is that the "common fund" of the organization would be used to pay fines levied against it. By "common fund", I take the Commission to mean those assets that are used by the organization in carrying out its operations. Third, if the money in the common fund is insufficient to cover the full amount of the sanction, there is "residual authority" to recover the unpaid amount from the individual members.

With all due respect to the Law Reform Commission of Canada, the legal landscape has changed significantly since 1976. The most important of these changes is the advent of the *Charter*, which leads to two potential problems. The first problem revolves around s. 11(d) of the *Charter*, with respect to the presumption of innocence; the second concerns the freedom of association, as guaranteed by s. 2(d) of the *Charter*. Before turning to these substantive issues, however, it is necessary to interpret what Bill C-45 is meant to accomplish in

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<sup>29</sup> Law Reform Commission of Canada, Working Paper 16, *Criminal Responsibility for Group Action* (Ottawa: Information Canada, 1976) at 53-56 [*Criminal Responsibility for Group Action*].

<sup>30</sup> *Ibid.* at 56.

<sup>31</sup> *Ibid.* at 53-54.

<sup>32</sup> *Ibid.* at 55.

seeking to recover the fine. In other words, the question in the next section is: Who is being asked to pay the fine associated with the offence?<sup>33</sup>

## A. Interpretative Difficulties

Since I assume that the organization does not have a separate legal personality from those who manage its operations, and thus has no property of its own, the logical place to look for payment of a fine is the guilty partner. If this is all that is intended by Bill C-45, there are several problems of statutory interpretation. As Elmer A. Driedger explained in his seminal work, *The Construction of Statutes*:<sup>34</sup>

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In the case of Bill C-45, the scheme of the Act clearly contemplates the guilt of the “organization”, rather than individuals who are guilty for their own criminal acts. The definition of “organization” makes no reference to individuals<sup>35</sup> other than on an aggregate basis.<sup>36</sup> Therefore, the position that Bill C-45 is driven to convict the guilty partner but leave others untouched is simply unreasonable.

If such an interpretation were accepted, Bill C-45 would be superfluous in most cases. To return to our example, if Adam is party to the offence, then Bill C-45 is not needed to convict Adam of the offence. After all, Adam is responsible for his actions, regardless of whether those actions are in a context that furthers business or personal interests.<sup>37</sup> Therefore, if the provisions of Bill

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<sup>33</sup> For two examples where a statutory regime was interpreted prior to analyzing the provision’s constitutionality, see *R. v. Butler*, [1992] 1 S.C.R. 452; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

<sup>34</sup> (Toronto: Butterworths, 1974) at 67, quoted with approval in Ruth Sullivan, *Sullivan on Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada Inc., 2008) at 1 [Sullivan].

<sup>35</sup> Although the majority of Bill C-45 is directed to organizational liability, there is one section of the statute that is also directed to individuals. Bill C-45, *supra* note 1, s. 3 [now *Criminal Code*, *supra* note 2, s. 217.1]. For the full text of the section, see *infra* note 84 and related text.

<sup>36</sup> See *supra* note 12 and related text.

<sup>37</sup> The personal liability of directors for torts of the corporation is uncertain. See *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.) at 107-109 [ADGA]; *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (sub nom. ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.)* (1995), 26 O.R. (3d) 481 (C.A.) at 490-491 [ScotiaMcLeod]; and *Pryce v. Vuckovich* (2000), 144 O.A.C. 256; [2000] O.J. No. 3390 (C.A.)

In the area of corporate *criminal* activity on the other hand, the jurisprudence on the personal responsibility of those undertaking such activity is actually much clearer. *Canadian Dredge & Dock Co. Ltd. v. The Queen*, [1985] 1 S.C.R. 662 [Canadian Dredge] is the seminal decision which discusses the parameters of common-law corporate criminal liability in Canada. There, Estey J., speaking for the Court, was very plain that the liability of the

C-45 were intended only to allow the Crown to hold a guilty partner personally liable for his or her criminal acts, the law prior to Bill C-45 is sufficient, whether those actions are undertaken to benefit the business, rather than for personal motivations. Therefore, this interpretation renders Bill C-45 redundant.

The second problem is that such an interpretation – that Bill C-45 allows the conviction of the guilty partner – is inconsistent with the overall scheme of the Act. Above, I reproduced what is now paragraph 22.2(c) of the *Criminal Code*:<sup>38</sup>

The paragraph does not require that a senior officer (in our example, Adam) be guilty of the underlying offence in order to convict the organization.<sup>39</sup> To illustrate this, I need to slightly alter the facts of my example. Assume that a third person (“Charlie”) is an employee of the organization. Charlie is undertaking the same scheme to defraud customers as was earlier ascribed to Adam. In these altered facts, Adam is not undertaking any criminal activity. However, Adam becomes aware that Charlie intends to defraud customers, with a minor benefit to the partnership and a large benefit to Charlie. Adam does not try to stop Charlie’s scheme. At common law, Adam is not necessarily guilty of any crime due to his advanced knowledge of Charlie’s wrongdoing.<sup>40</sup> Bill C-45 does not change Adam’s culpability. Here, Charlie is a “representative” of the partnership. Adam is a “senior officer”. Charlie is guilty of fraud; Adam is guilty of nothing. However, the partnership can be held liable for Charlie’s acts, pursuant to paragraph 22.2(c). Therefore, Bill C-45 clearly allows the “organization” to be held liable, even without liability on Adam. On these altered facts, no partner is guilty. Therefore, the scheme of the Act is not restricted to the guilty partner, because no partner of the partnership need be found personally guilty of any offence.

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corporation was *in addition to*, and *not in substitution for*, the criminal liability of the human person undertaking the criminal activity. He wrote as follows: “Generally the directing mind is also guilty of the criminal offence in question. Glanville Williams states in *Textbook of Criminal Law* (London: Stevens, 1978) at 947: ‘...the director or other controlling officer will almost always be a co-perpetrator or or accessory in the offence...’”. Since the separation between director and corporation is much clearer than the separation between partner and partnership, it seems that the partners are personally liable for their crimes, even absent Bill C-45.

<sup>38</sup> Bill C-45, *supra* note 1, s. 2.

<sup>39</sup> For a more detailed discussion of paragraph 22.2(c), see MacPherson, “Extending Corporate Criminal Liability?”, *supra* note 4 at 262-266.

<sup>40</sup> One person’s simple knowledge of, and even presence at, the commission of the crime by another person does not make the first person a party to the offence committed by the second. See *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881 at 898, Dickson J. (as then he was).

The intent of Parliament is *not* served by such a restrictive interpretation of Bill C-45. Bill C-45 is not a codification of the previously existing law. The addition of non-corporate entities within its ambit is proof of this, since the common law did not apply to them. As well, the government has made clear that Bill C-45 was meant to “clarify and expand”<sup>41</sup> the law on the criminal liability of corporations. Therefore, it is clear both that: (i) the common law would allow the guilty partner to be convicted; and (ii) Bill C-45 was not a codification of the common law. Consequently, this restrictive interpretation of Bill C-45 is consonant with neither the object nor the scheme of the Act, nor with the stated intention of Parliament.

## B. Section 11(d) of the Charter

The ambit of s. 11 was discussed by the Supreme Court of Canada in *R. v. Wigglesworth*.<sup>42</sup> In that case, Justice Wilson, speaking for the Court, wrote as follows:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity ... *But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.*

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. *Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.* In “Annotation to *R. v. Wigglesworth*” (1984), 38 C.R. (3d) 388, at p. 389, Professor Stuart states:

... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).

<sup>41</sup> Department of Justice Canada, Minister of Justice, Press Release, “Parliament Passes Bill C-45: Stronger Laws Affecting the Criminal Liability of Organizations” (31 October 2003). [Press Release, Bill C-45].

<sup>42</sup> [1987] 2 S.C.R. 541.

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the “by nature” test but passing what I have called the “true penal consequence” test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the Charter only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the “by nature” test can be failed but the “true penal consequence” test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the “by nature” test must give way to the “true penal consequence” test.<sup>43</sup>

Several points are worthy of notice. First, although *Wigglesworth* was immediately concerned with s. 11(h),<sup>44</sup> the reasoning seems equally applicable to s. 11(d). Second, Justice Wilson clearly sets up a disjunctive two-part test, of which either component will be sufficient to engage s. 11 protection: (a) the “by nature” test; and (b) the “true penal consequences” test. Third, in the event that the two tests come to conflicting answers (assuming that this is possible), the “true penal consequences” test will likely prevail. Fourth, a fine qualifies as “true penal consequences” for these purposes, provided the fine is “designed to redress the harm done to society at large.”

Returning to the original facts of our example, if (i) the point of Bill C-45 is to expand criminal liability and (ii) the organization does not have a separate legal personality from those who control its operations, this leaves only innocent partner(s) as targets of the legislation. On the facts of our example, the partner uninvolved in the acts referred to (Brian) has done nothing criminal. Where is Brian’s presumption of innocence?

Some may answer that the “organization” is charged; therefore, Brian cannot assert s. 11 rights. However, the non-corporate organization does not have a separate legal personality from those who are involved in its operations. This means that the organization cannot own the property used in the business. From where, then, is the property intended to come? The

<sup>43</sup> *Ibid.* at 560-562 [emphasis added].

<sup>44</sup> See the quote from Stuart provided by Wilson J., *ibid.* at 561.

partners' property must then be intended to be available to pay the fine levied against the organization.<sup>45</sup> One of the goals of criminal liability for organizations is that of deterrence. It must be recalled that the provisions of Bill C-45 are part of the *Criminal Code*. Section 718 sets out the "fundamental purpose" of sentencing under the *Criminal Code*. The section reads as follows:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- ...
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.<sup>46</sup>

Since the avowed purpose of Bill C-45 is to make an organization an "offender" for *Criminal Code* purposes, society can only deter the organization if it imposes hard treatment<sup>47</sup> (in the case of an organization, a fine) on the organization in such a way that the imposition of the fine removes something that is important to the organization. Put another way, would it "promote a sense of responsibility" in the organization if the organization were able to externalize<sup>48</sup> the fine? Of course not. Therefore, paragraph 718(f) makes it clear that the penalty should be paid by the organization. Since it is clear that the payment of the fine is not restricted to the guilty partner, the closest remaining proxy available for the organization is the property of the partners used in the business.

Since Brian has rights in the property,<sup>49</sup> and the law demands that the fine be paid out of that property, the question becomes two-pronged. First, is the fine "by nature criminal", so as to engage s. 11? Second, is Brian suffering the "true penal consequences" of the wrongdoing? If either question is answered in the affirmative, then, according to *Wigglesworth*, the presumption of

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<sup>45</sup> One part of the scheme of Bill C-45 is to encourage the management of organizations to communicate with one another to prevent wrongdoing of people associated with the organization (employees and others). See *Criminal Code*, s. 22.2(c), *supra* note 38 and accompanying text.

<sup>46</sup> *Criminal Code*, *supra* note 2, s. 718.

<sup>47</sup> See e.g., Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Boston: Northeastern University Press, 1986) at 40-44; Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon, 1993) at 94-95.

<sup>48</sup> The process of externalization (and its negative impacts on society) is described in more detail in Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2005).

<sup>49</sup> See the discussion of partnership property, *supra* at note 23 and accompanying text.



innocence and the other protections of s. 11 are engaged. Let us examine each of these questions in turn.

### 1. “Criminal By Nature”

The nature of the prosecution is clearly criminal in this case, as it is carried out under the *Criminal Code*. *Wigglesworth* makes it clear that “all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.”<sup>50</sup> However, we need not stop there.

*Wigglesworth* discusses the “prosecution” being “criminal by nature”. Here, we are discussing the requirement that the innocent partner contribute property in which he has an interest to pay the fine levied against the organization. Therefore, we must assess whether such a contribution constitutes part of an “offence” for the purposes of s. 11.

Justice Wilson draws a distinction between prosecutions to “promote public order within a public sphere”, and those intended to “regulate conduct within a limited private sphere of activity”. Therefore, if one were to ask whether Brian is being asked to contribute to a fine in a “limited sphere of activity”, or to promote public welfare, the latter answer is far more likely.

The scheme of sentencing under the *Criminal Code* reinforces this conclusion, in at least two different ways. First, the level of the fine is relevant. Section 735(1) of the *Criminal Code* is set out immediately below:

An organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

- (a) that is in the discretion of the court, where the offence is an indictable offence; or
- (b) not exceeding one hundred thousand dollars, where the offence is a summary conviction offence.<sup>51</sup>

Therefore, there is now an unlimited power to fine provided in the *Criminal Code* under paragraph (a). As described by Justice Wilson, this is the first of two indicators that the prosecution is “criminal by nature”. The second indicator is that the fine is “redressing the wrong done to society at large”. A sentence for a criminal offence is supposed to “provide reparations for harm done to victims or to the community”, among other things.<sup>52</sup> It is clear that the general sentencing provisions of the *Code* also apply both to human beings and organizations. Section 718.21 of the *Code* provides in part as follows: “A court

<sup>50</sup> *Supra* note 42 at 560.

<sup>51</sup> *Criminal Code*, *supra* note 2, s. 735(1), as amended by Bill C-45, *supra* note 1, ss. 20(1) and (2).

<sup>52</sup> *Supra* note 46, s. 718(f) and accompanying text [emphasis added].

that imposes a sentence on an organization shall *also* take into consideration the following factors: ..." <sup>53</sup> [emphasis added]. The use of the word "also" implies that both (i) the factors applicable to other offenders, <sup>54</sup> and (ii) the "fundamental principle" which underlies the inclusion of the factors applicable in the sentencing of individuals <sup>55</sup> are both also to be considered in an organizational offender's sentence.

Thus, a criminal sentence imposed on an organizational offender is at least partly to repair the harm done to society. Therefore, a criminal sentence is designed to "promote public order and welfare within a public sphere of activity". This is sufficient to attract the protection of s. 11 of the *Charter*. It should make no difference that the "offender" is technically the "organization" rather than the individual. The very fact that the fine is being levied to protect the public engages s. 11 rights, including the presumption of innocence for whoever must pay the fine.

This conclusion is strengthened when one remembers that the fine is imposed with the knowledge that the "offender" has no assets of its own with which to pay the fine, and the property of someone else would have to be used to pay the fine. Should the government be allowed to avoid the application of s. 11 simply because the law has charged one "offender", despite the knowledge that an innocent individual will be required to pay the resulting fine? Surely, s. 11 protection should not be so easily avoided. <sup>56</sup>

## 2. "True Penal Consequences"

The previous paragraph applies equally to discussion of the "true penal consequences" test in *Wigglesworth*. Parliament must be presumed to know the law of partnership, <sup>57</sup> and thus, that the partnership does not own the property used in carrying out the partnership's business operations. Once it is established that (i) there are partners who have an interest in the property to be used to pay the criminal fine, (ii) these partners have done nothing criminal, then (iii) it necessarily follows that the innocent partners are suffering "true

<sup>53</sup> Bill C-45, *supra* note 1, s. 14 [now *Criminal Code*, *supra* note 2, s. 718.21] [emphasis added].

<sup>54</sup> *Criminal Code*, *ibid.*, s. 718.2.

<sup>55</sup> *Ibid.*, s. 718.

<sup>56</sup> This also answers the potential use of the decision in *R. v. Church of Scientology of Toronto*, [1997], 33 O.R. (3d) 65 (C.A.) in these circumstances. The individual partners are being charged directly (for the purposes of the discussion in this Part) with the crime. Therefore, the Court's analysis of the potential applicability of s. 7 of the *Charter* (with which I disagree, but this is not the forum for that argument) is inapplicable in this scenario.

<sup>57</sup> See *Sullivan*, *supra* note 34 at 205. This is so even though the constitutional power to regulate partnerships generally lies with the provinces in which the partnership carries on business. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5. We will discuss the division of powers in more detail in Part VI, below.

penal consequences” within the meaning of that term as described by Justice Wilson. Even if the reader were not to accept my conclusion with respect to the “criminal by nature” test, the payment of a fine for public purposes qualifies as “true penal consequences”. This is sufficient, in and of itself, to engage the protections of s. 11 of the *Charter*.

It has been suggested to me that a partner’s obligation to pay a criminal fine levied on a partnership is no different from other business-related liabilities. In the ordinary course of business, partners are often saddled with responsibilities to which they did not themselves assent. For example, one partner may be liable to pay a creditor owing under a contract entered into by his or her fellow partner, based on the law of agency. This is so *even if* the first partner specifically told the second that such a contract was not an acceptable commitment of partnership resources. Each partner is deemed to be both the agent of, and the principal to, his or her fellow partners.<sup>58</sup> Under agency law, a person with whom an agent purports to make a contract may be able to enforce that contract against the principal even if the agent was specifically told by the principal not to make the contract in question.<sup>59</sup> Thus, it is argued, a criminal fine is simply another undesired liability for the unwilling partner, and should attract no different treatment than any other liability incurred in the course of the partnership business.

My response to this point is that criminal sanctions are unlike civil liabilities. Certainly, in both cases, the party liable can be deprived of financial resources. However, sanctions for crimes involving mental fault are an assignment of moral blameworthiness against those required to pay them.<sup>60</sup> Civil liabilities, on the other hand, are often less a matter of moral blame,<sup>61</sup> although the civil law may have some grounding in the moral realm. Rather, civil law is more often thought of as an assertion of policy goals, such as wealth redistribution (in the case of torts)<sup>62</sup> or the importance of commercial certainty and respect for the allocation of risk made by the parties (in the case of

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<sup>58</sup> *Partnership Act* (Manitoba), *supra* note 17, s. 8.

<sup>59</sup> Cameron Harvey and Darcy L. MacPherson, *Agency Law Primer*, 4<sup>th</sup> ed. (Toronto: Carswell, 2009) at 67.

<sup>60</sup> Adekemi Odujirin, *The Normative Basis of Fault in Criminal Law* (Toronto: University of Toronto Press, 1998) at 69.

<sup>61</sup> In this context, there is a distinction to be made between *blame simpliciter*, on the one hand, and *moral blame*, on the other. For a more detailed discussion of what is referred to here as *blame simpliciter* in a different context, see Darcy L. MacPherson, “Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Reconceptualization” in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2005) 248 at 258-260.

<sup>62</sup> Anthony M. Dugdale *et al.*, eds., *Clerk & Lindsell on Torts*, 19<sup>th</sup> ed. (London: Sweet & Maxwell, 2006) at paras. 1-12.

contracts).<sup>63</sup> The attribution of criminal wrongdoing to an organization pursuant to Bill C-45 is an assignment of moral blame to the organization.<sup>64</sup> Further, if (i) there is no separate legal personality in the organization, and (ii) the organization cannot hold legal title to property, and (iii) Parliament demands payment from another source, then (iv) this is equally an assignment of moral blame to the innocent partner. This is why the provisions of Bill C-45 should trigger constitutional imperatives of s. 11, while other liabilities imposed by civil law do not.<sup>65</sup>

### C. Section 2(d)

If the argument with respect to the applicability of s. 11(d) of the *Charter* is well-founded, this sufficiently dismisses the government's ability to apply the criminal law to a partnership without imbuing the partnership with separate legal personality. In such circumstances, no further analysis would be required on this point. However, for the remainder of this section, I will assume that some readers remain unconvinced by the s. 11(d) analysis offered above. Therefore, it is necessary to consider whether other *Charter* guarantees might potentially be engaged in a prosecution under Bill C-45.

At first blush, it may seem unusual to consider freedom of association, as guaranteed by s. 2(d) of the *Charter*, in this context. After all, the federal government is not attempting to limit the ability of persons to enter into partnership. Rather, the government is assigning a consequence to criminal

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<sup>63</sup> S. M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at para. 4. As I write this (April 2010), the next edition of this book is scheduled to be published in June 2010.

<sup>64</sup> On this point, Welling asserts the stigma is of major importance in corporate criminal liability, and that the sentence itself (that is, the fine) can be relatively insignificant. See Welling, *supra* note 4 at 171, n. 43. I disagree with his assertion that the economic impact can be "relatively insignificant", but we do agree that the imposition of a criminal sanction is designed to express society's judgment of moral blameworthiness.

<sup>65</sup> My thanks to a colleague, who shall remain unnamed, whose passionate argument convinced me to deal explicitly with this issue herein.

This analysis with respect to the difference between the criminal and civil law is also implicitly supported by the fact that it is clear, in both Canada and the U.K., the attribution of intent to an organization for the purposes of the criminal law is governed by the identification doctrine (or its statutory derivative, pursuant to Bill C-45). On this point, see *Tesco*, *infra* note 81 (U.K.), and *Canadian Dredge*, *supra* note 37 (Canada, prior to Bill C-45).

However, in the civil context, the division between the identification doctrine, on the one hand, and principles of vicarious liability in the law of tort is sometimes unclear. In some cases where the identification doctrine might be thought to be applicable, the courts have held that principles of vicarious liability are actually in issue. This paper is focused on the criminal (and not the civil) application of the identification doctrine. Thus, it is not necessary to resolve in this forum issues around the exact relationship between the identification doctrine, on the one hand, and vicarious liability on the other.

behaviour within the associational context so created. With all due respect to those who might hold a contrary view, I believe that a significantly more sophisticated analysis is necessary.

This analysis has three major thrusts. First, s. 2(d) is engaged because Bill C-45 removes the right of the innocent partner to do nothing if the innocent knows of the actions of the guilty partner. Second, there are “qualitative differences” between the individual partner and the partnership. These “qualitative differences” are engaged in five separate ways by the provisions of Bill C-45. *Dunmore v. Ontario (Attorney General)*<sup>66</sup> and subsequent case-law points out that a nuanced and contextualized appreciation of the scope of s. 2(d) is necessary. Third, Bill C-45 discourages the collective pursuit of common goals simply because those goals are pursued in a manner that is associational in nature. According to *Dunmore*, this is a violation of s. 2(d). A relatively minor fourth point is that the scope of s. 2(d) should be determined in light of *Charter* values.

### **1. Protection of that which is legal if done by an individual**

The scope of s. 2(d) of the *Charter* was explained by Justice Bastarache, speaking for the majority of the Supreme Court of Canada in *Dunmore*:

On the basis of this principle, McIntyre J. confined s. 2(d) to three elements: (1) the freedom to join with others in lawful, common pursuits and to establish and maintain organizations and associations (with which all six justices agreed), (2) the freedom to engage collectively in those activities which are constitutionally protected for each individual (with which three of six justices agreed) and (3) the freedom to pursue with others whatever action an individual can lawfully pursue as an individual (with which three of six justices agreed). These three elements of freedom of association are summarized, along with a crucial fourth principle, in the oft-quoted words of Sopinka J. in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (“*PIPSC*”), at pp. 401-2:

Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.<sup>67</sup>

For our purposes, it is sufficient to restrict the analysis to the fourth proposition offered by Justice Sopinka in *PIPSC*, namely, “that s. 2(d) protects

<sup>66</sup> 2001 SCC 94, [2001] 3 S.C.R. 1016 [*Dunmore*].

<sup>67</sup> *Ibid.* at para. 14 [emphasis added by Bastarache J. in *Dunmore*].

the exercise in association of the lawful rights of individuals.”<sup>68</sup> It is important to recall our hypothetical example. Brian has done nothing that the criminal law currently recognizes as wrong. Hence, if Brian is punished for doing in a partnership what he is legally entitled to do alone, s. 2(d) is engaged.

At common law, if Brian knew of the wrongdoing of either Adam (in our original facts) or Charlie (in our altered facts), it is clear that it is entirely lawful for Brian to do nothing.<sup>69</sup> As mentioned earlier,<sup>70</sup> Bill C-45 does nothing to change this. Yet, the combination of: (i) exercising his legal right to not prevent the crime; and (ii) his membership as a partner of the organization; then creates (iii) the requirement that his property be made available to pay the fine levied. Therefore, a substantive s. 2(d) claim is possible on these facts. According to both the *Alberta Reference*<sup>71</sup> and *PIPSC*,<sup>72</sup> this is sufficient to establish the *prima facie* s. 2(d) violation.<sup>73</sup> Given that (i) *Dunmore* is one of the most recent pronouncements by the Supreme Court of Canada on the scope of s. 2(d) of the *Charter*; and (ii) the majority of the Court specifically approved the *Alberta Reference* and *PIPSC*, it would seem the argument made herein might be sufficient to prove a *prima facie* violation of s. 2(d) if one adopts this interpretation of Bill C-45.

## 2. “Qualitative differences”

However, since *Dunmore* is significantly more recent than either the *Alberta Reference* or *PIPSC*, we will consider the language of *Dunmore* with respect to the s. 2(d) claim. A claim under s. 2(d) is even stronger, given that the prohibition of the exercise of one’s legal right (in this case, Brian’s legal right to do nothing to prevent a crime) is specifically aimed at activity that can only be undertaken on a collective basis. As Justice Bastarache wrote:

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<sup>68</sup> *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 403 [PIPSC] cited with approval in *Dunmore*, *ibid*.

<sup>69</sup> See *supra* note 40.

<sup>70</sup> *Ibid.* and accompanying text.

<sup>71</sup> *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 365-367 [*Alberta Reference*]. Some of the substantive holdings of the *Alberta Reference* were later overruled by the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391. However, it is important to note that the holdings in the *Health Services and Support* case were *designed to extend* s. 2(d) protection to certain aspects of the collective bargaining process. Such an approach, in my view, was not to diminish the scope of the protections of s. 2(d) *recognized* by the majority in the *Alberta Reference*. Rather it was to add to them. Therefore, despite the subsequent case law, the *Alberta Reference* remains relevant as s. 2(d) still protects activities carried out by a collective which an individual can lawfully undertake alone.

<sup>72</sup> *Supra* note 68 at 381-384.

<sup>73</sup> The potential impact of s. 1 of the *Charter* is dealt with in sub-Part (d) below.

As I see it, the very notion of “association” recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members....[B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be “the lawful activities of individuals”. Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level.<sup>74</sup>

Is Bill C-45 driven at the “qualitative differences between individuals and collectivities”, in the sense described by Justice Bastarache? I believe that it is. There are at least five reasons for this. The first is based on the statutory definition of “organization”.<sup>75</sup> The catch-all part of the definition is specifically driven at “associations of persons” which hold themselves out to the public as such.<sup>76</sup> Therefore, Bill C-45 is specifically driven at activity carried out in association with others.

Second, the treatment of partners under Bill C-45 reinforces this conclusion. Partners are individually designated as “representatives” of the organization,<sup>77</sup> but not necessarily included as “senior officers” of the partnership. It is important to recall that the wrongdoing of a representative is not sufficient to hold the partnership liable for a crime.<sup>78</sup> A senior officer must be involved in some way.<sup>79</sup> If Parliament were not attempting to draw a meaningful difference between a partner (the individual) and the partnership (the collectivity), why not at least designate all partners as senior officers?<sup>80</sup> In my view, by designating all partners as “representatives” but not as “senior officers”, Parliament shows that it does not see each partner as the equivalent

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<sup>74</sup> *Supra* note 66 at para. 17. This paragraph of the reasons of Bastarache J. were cited with approval and parts of it were specifically emphasized in the judgment of McLachlin C.J.C. and LeBel J., for the majority in *Health Services and Support*, *supra* note 71 at para. 28.

<sup>75</sup> *Supra* note 12 and accompanying text.

<sup>76</sup> *Ibid.*, para. (b).

<sup>77</sup> Bill C-45, *supra* note 1, s. 1(2) [now *Criminal Code*, *supra* note 1, s. 2]; reproduced above, see *supra* note 12 and accompanying text.

<sup>78</sup> MacPherson, “Extending Corporate Criminal Liability?”, *supra* note 4 at 258-259.

<sup>79</sup> *Ibid.* at 258.

<sup>80</sup> It is not that partners can *never* be senior officers of the partnership. Senior officers of a partnership will likely be partners. However, the definitions show that only those partners who “play an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities” are senior officers of the partnership.

– or the “alter ego”<sup>81</sup> – of the partnership. If some partners are not the equivalent of the partnership, it seems difficult to argue that Parliament is not trying to separate the individual partner from the collectivity of the partnership of which he or she is a member.

Third, in passing Bill C-45, it is clear that Parliament was aware that there could be “organizational” (collective) liability in the absence of independent liability on each of the principals (individual partners) of the organization. Our hypothetical example shows that at least one partner (the individual) may not be criminally liable, even when the organization is liable.

As mentioned earlier,<sup>82</sup> the converse is also true. Bill C-45 also does not affect the pre-existing position of the criminal law that the guilt of the organization does not affect the liability of a guilty partner. The liability of the organization in no way negates the personal liability of guilty senior officers. The Crown need not choose between prosecuting either the individual senior officer or the organization. Both can be pursued. The conviction of one does not affect the other. Therefore, the collectivity is targeted by most sections of Bill C-45, while the individual is a target to a much lesser extent.<sup>83</sup> Therefore, Parliament saw a distinction between the individual and the collective.

Fourth, on a related point, Bill C-45 includes a new s. 217.1 of the *Criminal Code* that reads as follows:

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.<sup>84</sup>

Therefore, even though the Act is titled “*An Act to Amend the Criminal Code (criminal liability of organizations)*”,<sup>85</sup> Parliament clearly added a duty for individuals as well as organizations. Note that s. 217.1 is not restricted to either individuals or organizations, as both are equally covered. This is confirmed by the definition of “every one” in the *Criminal Code*, as amended by Bill C-45:

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<sup>81</sup> The “alter ego” language was used to bring together an individual with the enterprise in *Tesco Supermarkets v. Natrass*, [1972] A.C. 153 (H.L.) at 192-193. But this is not directly applicable to Bill C-45, although it was previously influential in Canada. See *Canadian Dredge & Dock*, *supra* note 37 at 684-685.

<sup>82</sup> See *supra* note 37 and related text.

<sup>83</sup> Subject to the one notable exception to be discussed immediately below, the liability of the individual is in general, not determined by Bill C-45. Instead, for individuals the remainder of the *Criminal Code* remains unchanged.

<sup>84</sup> Bill C-45, *supra* note 1, s. 3.

<sup>85</sup> Bill C-45 *supra* note 1 [emphasis added].



“every one”, “person” and “owner”, and similar expressions, include Her Majesty and an organization;<sup>86</sup>

This is a non-exhaustive definition that specifically encompasses organizations.<sup>87</sup> The addition of s. 217.1 in Bill C-45 demonstrates two things. First, that Bill C-45 was not drafted solely to deal with group activity, in that the statute contains obligations for individuals as well as for organizations.<sup>88</sup>

Second, it reinforces the point that Parliament did not create “organizational” liability in a vacuum, without considering individual liability as well, albeit in the context of criminal liability of individuals for lapses in occupational health and safety standards resulting in death or serious injury to workers. By having a number of sections restricted to organizations, and one section that applies to individuals as well as organizations, the distinction between an organization and the individuals that comprise it is clearly made out.

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<sup>86</sup> Bill C-45, *supra* note 1, s. 1(1) [now *Criminal Code*, *supra* note 2, s. 2]. Interestingly, in *United Nurses of Alberta v. Alberta (Attorney-General)*, [1992] 1 S.C.R. 901, McLachlin J. (as she then was) [*United Nurses*], the majority held that (i) the union was an “unincorporated association” (at 928); (ii) the union was not incorporated under the *Societies Act* of Alberta, (now R.S.A. 2000, c. S-14) (at 929); (iii) the union *may* qualify (McLachlin J.’s words) as a “society” under the then-existing definition of “every one” in the *Criminal Code* (at para. 929). Cory J., with Lamer C.J.C. concurring (dissenting in the result), agreed that unions are subject to the criminal contempt jurisdiction of the courts, because they are given the right to sue. If they are given the right to sue, as litigants, they must necessarily be subject to the jurisdiction of the court to impose criminal contempt (at para. 910). McLachlin J. also held that, notwithstanding the fact that the union was not incorporated, it is a legal entity (at para. 41), citing *International Longshoremen’s Association, Locals 273, 1039, 1764 v. Maritime Employers’ Association et al.*, [1979] 1 S.C.R. 120, at 137 [*International Longshoremen’s*]. Therefore, notwithstanding the non-incorporation of the union, it is still a separate legal entity. Although the Court is not explicit about this issue, presumably, the union is separate from those who are its members and those who manage its operations. If this is so, then *United Nurses* does not resolve the issue confronted herein. McLachlin J. avoids the issue of the amenability to the criminal law of an unincorporated association that has no separate legal personality from that of its members by finding that a union is a separate legal entity. Cory J., on the other hand, restricts his comments on the status of the union to issues of criminal contempt. Sopinka J. (dissenting in the result) finds it unnecessary to deal with this issue given his result in the case (at 951). We are dealing with partnerships herein. A partnership is an unincorporated association without separate legal personality from its members. Thus, *United Nurses* is not directly on point. For further discussion of whether separate legal personality might apply to partnerships, see *infra* notes 155 and 156 and accompanying text.

<sup>87</sup> On the fact that the use of the term “includes” in general refers to a non-exhaustive definition, see *Sullivan*, *supra* note 34 at 238-239.

<sup>88</sup> *Criminal Code*, *supra* note 2, s. 217.1, unlike many other sections of the *Criminal Code*, does not actually create a new offence. Rather it simply places supervisors under a legal duty to protect subordinates from injury, so that where there is a lapse in workplace safety measures and someone suffers injury or death as a result, liability for criminal negligence may apply (under *Criminal Code*, *supra* note 2, ss. 219-221).

Fifth, one of the examples of the “qualitative differences” between the individual and the association used by Justice Bastarache in *Dunmore* – namely, the formulation of a political platform by a trade union – is analogous to the situation under Bill C-45. The political platform formulated by a trade union is unlikely to correspond to the political beliefs of each individual member of the union. Therefore, as Justice Bastarache points out, the union’s priorities are independent of those of its members.<sup>89</sup>

The same is true under Bill C-45. The decision of one senior officer to use the organization as a means to commit a crime may be contrary to the fundamental moral fibre of every other senior officer and representative of the organization. There may even be specific instructions from the highest levels of the organization indicating that such behaviour will not be tolerated. Nonetheless, even at common law, an order to obey the law will not protect the organization from the criminal liability that would otherwise attach. The perpetrator’s contravention of instructions is irrelevant for assessing criminal liability for fault-based offences. *Canadian Dredge & Dock Co. Ltd. v. The Queen* was the seminal case from the Supreme Court of Canada on the common-law principles of corporate criminal liability prior to the passage of Bill C-45. In that case, Justice Estey, speaking for the Court, dismissed this argument as follows:

If the law recognized such a defence [that is, that contravention of orders from above would eliminate the organization’s liability], a corporation might absolve itself from criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law. That is not to say that such an element is without relevance when considering corporate liability with reference to offences of strict liability, *supra*. Where, however, the court is concerned with those *mens rea* offences which can in law be committed by a corporation, the presence of general or specific instructions prohibiting the conduct in question is irrelevant. The corporation and its directing mind became one and the prohibition directed by the corporation to others is of no effect in law on the determination of criminal liability of either the directing mind or the corporation itself by reason of the actions of the directing mind. This accords with the result reached in other courts.<sup>90</sup>

In other words, at common law, even if the management team as a whole was fundamentally opposed to criminal behaviour, this is insufficient to protect the corporation from criminal sanction. There is nothing in the language of Bill C-45 to suggest that this common-law principle has been altered statutorily. Given that Bill C-45 was meant to “clarify and expand” the criminal liability of organizations,<sup>91</sup> a statutory reversal of the common-law position on this point seems unlikely. The innocent partners may make their

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<sup>89</sup> *Dunmore*, *supra* note 66 at para. 17, and see *supra* note 74.

<sup>90</sup> *Canadian Dredge*, *supra* note 37 at 699.

<sup>91</sup> Press Release, Bill C-45, *supra* note 41 [emphasis added].

position on criminal conduct within the organization clear through an instruction to avoid even the appearance of criminality. However, the personal desires of the innocent partners may be different from the mental state ascribed to the partnership under Bill C-45. Thus, just as a political platform of an organization may be different from the political views of most of its members, the criminality of the organization may not accord with the views of many of the senior officers of the organization.

Furthermore, organizational liability draws upon the position of the representative who commits the *actus reus*. Therefore, just as a political platform put forward by a single worker will not have the same impact as one with the force of “organized labour” behind it, Adam (on the original facts) or Charlie (on the altered facts) would not have had the power to set the criminal scheme in motion without utilizing their position within the organization to do so. Their positions within the associational framework of the partnership give Adam or Charlie the power needed to accomplish the desired criminal ends. Just as the associational nature of a trade union gives power to bring forward a political platform that will be taken seriously, the association of the partnership gives Adam or Charlie power to conduct their criminal scheme.

From Justice Bastarache’s *obiter* statement in *Dunmore*, it is clear that the trade union’s ability to adopt a political platform is likely protected by s. 2(d). As shown above, there are significant similarities between the adoption of a political platform by a trade union, and the impacts of Bill C-45.

These five elements suggest that Parliament, in passing Bill C-45, was attempting to draw a distinction between the individual (the partner) and the collectivity (the partnership). Therefore, if the constitutionality of Bill C-45 were challenged, it would be difficult for the Crown to argue that the language of Bill C-45 does not appreciate this qualitative difference. This distinction is obviously essential to the very concept of “organizational” liability. Therefore, it seems as though Bill C-45 is aimed at the “qualitative differences” referred to by Justice Bastarache, because distinctions based on those differences animate the very core of Bill C-45.

One minor point remains to be made about this approach to “qualitative differences” as set out in *Dunmore*. A knowledgeable reader might suggest that if Bill C-45 sets up a “qualitative difference” between the individual partner and the partnership, this must mean that Bill C-45 creates a separate legal personality for the organization as a means to recognize that difference. The best answer to this assertion is that separate legal personality would make this distinction clear, and would perhaps be effective.<sup>92</sup> However, it is important to recognize that this is only one possibility. The law has often drawn meaningful

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<sup>92</sup> The effectiveness of attributing a separate legal personality to the partnership as a means to accomplish the ends of Bill C-45 are discussed in Parts VI and VII below.

qualitative differences between the individual and the collective, without assigning separate legal personality to the collective. In fact, we have already seen this with respect to partnership property. Section 23 of the *Partnership Act* (Manitoba)<sup>93</sup> makes clear that there is a distinction between property for the private use of the individual and property for the use of the partnership. However, it is clear that this distinction alone does not allow the partnership to develop a separate legal personality. Therefore, the distinction *may* be sufficiently “qualitative” to engage s. 2(d) consideration, without necessarily granting a separate personality to the organization.

**3. Discouragement of the collective pursuit of common goals because the manner in which those goals are pursued is “associational” in nature**

The third element with respect to s. 2(d) is captured in the following quotation from *Dunmore*:

... the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone.<sup>94</sup>

Several points are worthy of note. First, the four-part test from *PIPSC* still applies, despite different formulations of the test for resolving s. 2(d) claims. Second, the four-part test from *PIPSC* is not exhaustive, meaning that more activity may be covered, even if it does not meet the *PIPSC* test.<sup>95</sup> Third, some activities that are protected by s. 2(d) will not be the collective equivalent of individual action. Fourth, the inquiry focuses on state discouragement of associational activity because of its associational nature.

The first point further validates the earlier assertion (in sub-Part (i) above) that *Dunmore* did not limit the protection offered by the analyses in the *Alberta Reference* or *PIPSC*. Rather, it extended them. The second point confirms the need to analyze *Dunmore* separately from earlier jurisprudence (done in sub-Part (ii) above).<sup>96</sup>

<sup>93</sup> *Partnership Act* (Manitoba), *supra* note 17, s. 23. See also *supra* notes 23 and 26.

<sup>94</sup> *Supra* note 66 at para. 16 [emphasis in original].

<sup>95</sup> This is reinforced in *Health Services and Support*, *supra* note 71 at para. 22.

<sup>96</sup> See *ibid*.

The third point from this quotation avoids difficult analogies between the partnership, and its individual equivalent, that is, the sole proprietorship. Interestingly, a business run as a sole proprietorship, unlike both a partnership and a corporation, is not specifically listed as an “organization” under Bill C-45. There are three major forms of business organization in Canada today.<sup>97</sup> The fact that only two of these are specifically listed in the definitional section of the statute is a strong indication that the third may not be an “organization”. This conclusion is further reinforced by the catchall portion of the definition, which requires a group that holds itself out to the public as an “association of persons”. The sole proprietorship is, by definition, not an association of persons; the business is owned by a single individual, who is responsible for all obligations and liabilities of the business.<sup>98</sup> Therefore, it seems unlikely that a sole proprietorship would qualify as an “organization”. Because of this definitional matrix, an organization cannot be the functional equivalent of the actions of an individual. This conclusion furthers buttresses the argument made above with respect to the “qualitative differences” between the individual (the partner) and the collective (the partnership).

The fourth point from this quotation is perhaps the most difficult issue to confront. In the case of Bill C-45, the state is not attempting to “preclude the activity because of its associational nature”. The state is not attempting to control the entering into partnerships, or any other associational context, for that matter.

Nonetheless, it is important to remember *Dunmore’s* factual background. In *Dunmore*, there was a specific statutory scheme (the “first statute”) designed to govern, amongst other things, the certification of a trade union as a collective bargaining agent.<sup>99</sup> Workers involved in agriculture were specifically excluded from the ability to bargain collectively.<sup>100</sup> In 1994, Ontario passed a second statute<sup>101</sup> providing organizing rights to agricultural workers.<sup>102</sup> A third statute<sup>103</sup> repealed the second, and removed organizational rights from workers who had such rights under the second statute, but not the first. Workers then applied for a declaration that their *Charter* rights had been

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<sup>97</sup> See VanDuzer *supra* note 8 at 7-19. VanDuzer does discuss other forms of business organization, such as the franchise (at 21), the distributorship (at 22), the strategic alliance (at 20) and the joint venture (at 20), among others. However, it is clear that the corporation, the partnership and the sole proprietorship are by far the three most common.

<sup>98</sup> See VanDuzer, *ibid.* at 7.

<sup>99</sup> *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A [LRA].

<sup>100</sup> *Ibid.*

<sup>101</sup> *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6.

<sup>102</sup> *Dunmore*, *supra* note 66 at para. 3.

<sup>103</sup> *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1.

violated. Therefore, the Court in *Dunmore* was dealing with the complete preclusion of a group of people from undertaking the formation of an association. This element of the facts in *Dunmore* explains why the “single enquiry” commanded by s. 2(d) is framed as follows: “Has the state precluded activity because of its associational nature?” However, the framing of the question in these terms is, in my view, a result of the facts of the case that the Supreme Court was being called upon to decide, rather than an attempt by Justice Bastarache to limit s. 2(d) to laws that specifically preclude association by certain groups. It is also important to recall that the question asked by Justice Bastarache is framed in the following terms: “Has the state precluded activity because of its associational nature, *thereby discouraging the collective pursuit of common goals?*”<sup>104</sup>

The *Health Services and Support* case refined and extended this concept. Chief Justice McLachlin and Justice LeBel write as follows:

Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals.<sup>105</sup>

The lesson to be learned from the combination of *Dunmore* and *Health Services and Support* is that the protection of s. 2(d) is engaged, if all of the following statements are true:

- I. the state seeks to either prevent or provide a specific disincentive to the pursuit of the common goals, or the actions of the state have the effect of substantially interfering with the pursuit of the common goals, and
- II. but for the prohibition or disincentive at issue, the common goals are legally allowed; and
- III. the disincentive at issue is driven at the associational nature of the goals sought to be pursued.

Is there a disincentive created by Bill C-45? In my view, the unquestionable answer is “yes”. Would a person be more or less inclined to join a partnership if the person knew that his or her assets could be used to satisfy a criminal fine? The fact that many people might decide to join a partnership notwithstanding this disincentive does not negate the disincentive’s existence.<sup>106</sup> Therefore, the first step in the analysis is satisfied.

<sup>104</sup> *Dunmore*, *supra* note 66 at para. 16 [emphasis added].

<sup>105</sup> *Health Services and Support*, *supra* note 71 at para. 90.

<sup>106</sup> The power of the disincentive to alter the behaviour of individuals may be relevant at the s. 1 stage of the constitutional inquiry. For example, if it could be shown on a balance of probabilities that Bill C-45 had no negative impact on the willingness of people to join partnerships, this could be a valid consideration when weighing the salutary effects against

The second step recognizes a basic point made by Justice McIntyre in the *Alberta Reference*: s. 2(d) does not permit persons to carry on any activity, simply because it is done collectively.<sup>107</sup> For example, a criminal conspiracy does not become legal simply because it is carried on by persons acting in concert. One might argue that the goal of the guilty partner is illegal, and thus, the second step of the test set out is not satisfied.

It is important to remember that the “discouragement of the collective pursuit of *common goals*” [emphasis added] (borrowing from *Dunmore and Health Services and Support*) is the concern here. This raises the question: what are the *common goals* of the association? Assuming that not all partners are involved in criminal activity,<sup>108</sup> the individual innocent partner does not share in the goal. The common goal of any partnership is to “carry on business with a view to profit”. To turn to our example, Adam and Brian do not share a common goal to commit a criminal offence. Brian would be opposed to any such action if he were aware of it. How, then, can this be a common goal of the partnership?<sup>109</sup>

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its deleterious effects, at the third stage of the *Oakes* proportionality analysis. For a comparison of the *Oakes* decision to the possible impacts of Bill C-45, see sub-Part V(d), below.

<sup>107</sup> *Supra* note 71 at 398-399.

<sup>108</sup> If the common goal of all those involved (in this case, all the partners of the partnership) is to commit a crime, then the potential liability of the partnership is largely academic. If all of partners share a common criminal purpose, then there is a criminal conspiracy. If you can convict all the members of the organization and take all the property that they own (including assets used in the business) to pay the resulting fine, organizational liability of the partnership becomes less of a concern. The government can impact the business simply by making the fine against the individuals involved sufficiently large to require payment out of the sale of assets used in the business.

<sup>109</sup> Paradoxically, under the application of Bill C-45, the intention of the guilty senior officer (in our example, Adam) becomes the intention of the partnership. Therefore, it could be argued that once it is the intention of the partnership to commit a crime, this is a goal of the partnership-any goal of the partnership is necessarily a common one. If it is a common goal of the partnership to commit a crime, the common goal is illegal, and therefore unprotected by s. 2(d).

The problem with this is the reasoning is circular. In order to prove that Bill C-45 is constitutional, the provisions of Bill C-45 must be applied. In other words, for the argument to succeed, Adam’s criminal intent must also be the criminal intent of the partnership. If not, Adam’s criminal goal is once again not a common one. However, the only way to impute Adam’s criminal intention to the partnership is by the application of Bill C-45. Yet, the constitutionality of Bill C-45 cannot be justified on the assumption that if one applies the provisions, this in itself will resolve the constitutional infirmities of the legislation.

For a similarly circular argument in the application of the common-law identification doctrine in the civil context, see *Hart Building Supplies Ltd. v. Deloitte & Touche*, 2004 BCSC 55, 41 C.C.L.T. (3d) 240 at para. 63, Baker J. For commentary on this decision see D.L. MacPherson, “Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v.*

There can be no doubt that Bill C-45 is aimed at the associational nature of the crime, and not at the crime itself. After all, Bill C-45 does not make membership in an organization a crime.<sup>110</sup> It simply makes one partner liable to pay the criminal fine resulting from the wrongdoing of a fellow partner within the business of the partnership, even if the first partner has done nothing wrong. In other words, Parliament is using the criminal law to create negative consequences for partners, *specifically because they are associated with another person in a lawful association*. Despite Parliament's statement that the "partnership" committed the offence, the effect on the innocent partner (in our example, Brian) is both tangible and intended.

To return to our hypothetical example, if Brian were *not* Adam's partner, and Adam were to commit criminal wrongdoing, then Brian has no liability for Adam's wrongdoing unless he is also a party to the same offence. On the other hand, under Bill C-45, as soon as the following statements are true, different consequences result:

- (i) Adam and Brian become partners; and
- (ii) Adam manages an important aspect of the business; and
- (iii) Adam commits criminal wrongdoing designed at least in part to benefit the partnership.

In such a case, Brian is liable to pay the fine resulting from Adam's wrongdoing, because of Brian's associational ties to Adam. Therefore, Bill C-45 is concerned with Brian only because he is acting in a lawful association with Adam. This is the very type of state action that is the concern of s. 2(d). Thus, a criminal fine levied against the partnership without imbuing the partnership with separate legal personality would breach s. 2(d) of the *Charter*.

#### 4. *The protection of other Charter values*

Where protection of a s. 2(d) right is consistent with other values in the *Charter*, this militates in favour of s. 2(d) recognition.<sup>111</sup> In *Health Services and Support*, Chief Justice McLachlin and Justice LeBel point out that "Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*".<sup>112</sup> The judges then reason that since collective bargaining would enhance human

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*Deloitte & Touche*" (2005) 41 C.B.L.J. 471, in particular at 485, and D.L. MacPherson, "*Hart Building Supplies Ltd. v. Deloitte & Touche – Annotation*" (2005), 41 C.C.L.T. (3d) 240.

<sup>110</sup> Certain sections of the *Criminal Code* do make it illegal to belong to certain groups, such as recognized terrorist organizations. See *Criminal Code*, *supra* note 2, ss. 468.1 - 468.14. While it is clear that there is a possible s. 2(d) challenge to these sections, this is not the forum for a discussion of this possibility.

<sup>111</sup> See *Health Services and Support*, *supra* note 71, at para. 80.

<sup>112</sup> *Ibid.* at para. 81



dignity, equality, liberty, autonomy, and democracy,<sup>113</sup> protection of the collective bargaining process under s. 2(d) is important to the internal consistency of the *Charter*.<sup>114</sup> It is important to note that neither human dignity nor autonomy is a specifically enumerated right under the *Charter*.<sup>115</sup> Thus, it is clearly not necessary that every *Charter* value have a specific *Charter* right attached to it.

While this paper is not the place for a full discussion of *Charter* values at play in the criminal law, a short point should be made here. The rule of law is a *Charter* value to be upheld.<sup>116</sup> In fact, the preamble to the *Charter* reads as follows: "Whereas Canada is founded upon principles that recognize the supremacy of God and *the rule of law*"<sup>117</sup>. The rule of law as a constitutional value is explained in part by Hogg and Zwibel as follows:<sup>118</sup>

*The Manitoba Language Reference* supports our suggestion that one ingredient of the rule of law is a body of laws that are publicly available, generally obeyed, and generally enforced. A law that is vague, or incomprehensible for some other reason, would not be publicly available in any real sense and could not easily be obeyed or enforced. Of course, for the reasons already given, the rule of law does not operate as a direct restraint on legislative action, and therefore the rule of law alone cannot invalidate a law that is vague or incomprehensible. However, the rule of law can play a role in influencing the interpretation of constitutional provisions that do operate as direct restraints on legislative action.

From this quotation, the following conclusions can be drawn. First, avoiding excessive vagueness in the drafting of laws is a part of the rule of law.<sup>119</sup> Second, the law must be "publicly available" because the rule of law

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<sup>113</sup> *Ibid.* at paras. 82-85.

<sup>114</sup> *Ibid.* at para. 86.

<sup>115</sup> Autonomy is not a right recognized anywhere in the *Charter*. "Human dignity" is an important component of the analysis of the constitutional protection of equality under s. 15 of the *Charter*. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51, Iacobucci J. [Law]. However, human dignity is a *not* free-standing *Charter* right. "Liberty" is constitutionally protected by s. 7 of the *Charter*, but only where the deprivation of it is not in accordance with the principles of fundamental justice. Equality is also a specifically-recognized *Charter* right, but it is limited to certain specific enumerated grounds, or grounds analogous thereto. *Law* at para. 84.

<sup>116</sup> See Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715 at 718.

<sup>117</sup> *Supra* note 6.

<sup>118</sup> Hogg & Zwibel, *supra* note 116 at 722-723.

<sup>119</sup> The jurisprudence under s. 7 of the *Charter* sets out a test for vagueness which is relevant here. As Lamer J. (as he then was) wrote in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at para. 38, vagueness applies where "a law ...does not give fair notice to a person of the conduct that is contemplated as criminal". He also held (at para. 34): "It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and

demands that a person *be able to know in advance* what the law requires of him or her,<sup>120</sup> and when he or she is in danger of breaching one of its prohibitions, particularly in the criminal law.<sup>121</sup> Third, the rule of law cannot and should not be used to invalidate legislation.<sup>122</sup> Pursuant to Bill C-45, there is no way for a partner to know in advance whether his or her actions will trigger the need to pay a fine, because the actions of the guilty partner are sufficient to trigger liability. No action on the part of the innocent partner is necessary. Some might suggest that it is the decision of the innocent partner to enter into partnership

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explicit legislative standards (see Professor L. Tribe *American Constitutional Law* (2nd ed. 1988), at p. 1033). This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law." [emphasis added].

In same case, Dickson C.J.C., writing for himself and LaForest and Sopinka J., held at para. 17: "*Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not.*" [emphasis added]. Note that both statements make specific reference to the liberty interest at stake in most criminal prosecutions. Organizational liability under Bill C-45 does not carry with it the potential for incarceration, and therefore, does not engage the liberty interest under s. 7. However, whether this *alone* would be sufficient to alter the applicability of the above Supreme Court *dicta* is an open question.

Section 7 of the *Charter* is not directly applicable to Bill C-45 for a number of reasons. This is not the forum to do a detailed analysis of the interrelationship between s. 7 and the provisions of Bill C-45. However, it does seem unlikely that any of "life, liberty or security of the person" is engaged by Bill C-45. Thus, according to the Supreme Court's s. 7 jurisprudence – see e.g. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at paras. 82-83 and *R. v. Heywood*, [1994] 3 S.C.R. 761 at paras. 54-55 – a direct attack on s. 7 grounds would likely prove fruitless. However, as will be explained in more detail below, the point here is *not* to establish the violation of a constitutional right separate from s. 2(d). Rather, the purpose of this analysis is to inform the content of s. 2(d), by taking account of other values that underlie the *Charter*. In such an analysis, proof of a s. 7 violation is unnecessary.

<sup>120</sup> This is not to be confused with needing to know that what one is doing breaches the law. Ignorance of the law is no excuse. This is codified in our criminal law. See *supra* note 2, s. 19.

<sup>121</sup> The *Charter*, *supra* note 6 at s. 11(g) reads as follows: "Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations". The Canadian Constitution thus upholds the value that the criminal law should *not* be imposed on those who have no opportunity to know in advance what will constitute a breach of the criminal law.

<sup>122</sup> In *British Columbia v. Imperial Tobacco*, [2005] 2 S.C.R. 473 at para. 59 [*Imperial Tobacco*], the Court, speaking through Major J., held that, on the facts of the case, "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content". The Court, at para. 58, limited the "rule of law" to requiring that: (i) the law applies to government as well as the individuals within the state; (ii) there must be a set of laws; (iii) the law must be used to regulate the relationship between the individual and the state. However, in the *Imperial Tobacco* case, it is important to point out that the appellants' arguments were driven at having the Court declare legislation to be invalid based on its alleged incongruity with the rule of law (at para. 63).

with the guilty partner that triggers the liability. However, two comments can be made. First, such a response only enhances the strength of the contention that Bill C-45 is focused on behaviour specifically because it is carried on in association with others. In other words, the argument that could be made in opposition to the consideration of *Charter* values in a Bill C-45 actually enhances the contention that s. 2(d) is engaged. Second, even pursuant to Bill C-45, being in partnership with someone who later proves to be a criminal is *not* a crime. Therefore, to make entering into partnership the behaviour of the innocent partners that triggers criminal liability seems incongruous, to put it mildly.

To be clear, my argument is *not* to say that Bill C-45 necessarily contravenes the rule of law. Nor is my argument that the rule of law as a constitutional principle can be used to invalidate legislation that does not infringe any other specifically enumerated *Charter* guarantee. Nor am I advocating that the rule of law can or should be used to create broader constitutional protection than those rights specifically enumerated in the *Charter*. Rather, the focus here is to suggest that protection under s. 2(d) is justified in these circumstances, because to find that s. 2(d) applies will enhance the rule of law. Thus, just as a desire to uphold the values of human dignity and autonomy informed the content of s. 2(d) in the *Health Services and Support* case, a desire to uphold and enhance the rule of law as a *Charter* value could impact the analysis of s. 2(d) in a case involving Bill C-45.

## D. Section 1

As most readers will be aware, s. 1 of the *Charter* applies to any *prima facie* violations of *Charter* rights. The section provides as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>123</sup>

Once again, this is not the proper forum for a comprehensive discussion of s. 1 justifications with respect to Bill C-45. After all, the burden of such justification lies on the party seeking to invoke s. 1.<sup>124</sup> For example, only the government would be able to present long-term sociological studies tending to show the need to deter criminal conduct in the business setting. This is neither to suggest that such studies necessarily exist, nor conversely, that they do not. Having not done the sociological research necessary to draw any such conclusion, it is not the goal here to make a full-blown s. 1 analysis. However, it would be both misleading and irresponsible to not deal with s. 1 in some way.

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<sup>123</sup> *Supra* note 6.

<sup>124</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [Oakes].

In *R. v. Oakes*,<sup>125</sup> the constitutionality of what was then s. 8 of the *Narcotic Control Act*<sup>126</sup> was tested and found wanting. Section 8 created a rebuttable presumption that a person found in possession of a narcotic was in possession of the drug for the purposes of trafficking.<sup>127</sup> The challenge was upheld, as s. 8 violated s. 11(d) of the *Charter*.<sup>128</sup> The government could not successfully invoke s. 1 of the *Charter* in *Oakes*, because the fact proven (that is, the simple possession of a narcotic) was not “rationally connected” to the presumption.

Notice that in *Oakes*, the person whom the Crown sought to have convicted of the offence (possession for the purposes of trafficking) was already convicted of the lesser offence (the simple possession of a narcotic). In other words, the presumption further punished the criminal behaviour of the accused. The greater offence is certainly related to the lesser offence (in the sense that they both involve possession of a narcotic). Nonetheless, the Supreme Court held that the rational connection between the two offences was not sufficiently established for the rebuttable presumption created by s. 8 of the *Narcotic Control Act* to be saved under s. 1.

In the context of Bill C-45, there is no underlying offence committed by the innocent partner. There is no express rationale given for creating what appears to be the equivalent of an irrebuttable presumption that:

- I. if a senior officer of the partnership commits an offence with the intention of benefiting the partnership; and
- II. any person is a partner of the partnership, then
- III. the partner (who is innocent of any crime) should suffer the consequence of a finding of guilt vis-à-vis the partner's assets.

With all due respect to Parliament, *Oakes* establishes that the rebuttable presumption that a person who is criminally convicted of possession of a drug intends to traffic in that drug, does not have a sufficiently rational connection for the purposes of s. 1. Bill C-45 creates a situation where a person who has done nothing criminal will be irrebuttably presumed to be connected with a crime committed by someone else, so as to make him liable to make good the economic consequences of that crime. If this is so, then it seems inconceivable that Bill C-45 will be found to have a sufficiently rational connection to pass this branch of the *Oakes* test.

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Narcotic Control Act*, R.S.C. 1970, c. N-1.

<sup>127</sup> *Oakes*, *supra* note 124 at 116.

<sup>128</sup> *Ibid.* at 134-135.

## VI. IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY FOR ALL PURPOSES

The preceding discussion establishes that there are significant issues that result from using Bill C-45 to go after assets in which the innocent partner has an interest without imbuing the partnership with separate legal personality. But this is not the end of the matter. The next question becomes: what if Bill C-45 was intended to give separate legal personality to a partnership for all purposes?

Clearly, if the non-corporate organization were given a legal personality separate from those who own and control it, this would resolve the constitutional issues around the presumption of innocence and freedom of association, in that the partnership (the person to whom the mental state is attributed according to the new rules) is being held liable. The innocent partner (to whom the mental state is *not* attributed) is not asked to put his property forward to pay the fine. Rather it would be the property belonging to the partnership that would be at stake. Therefore, there is no true penal consequence imposed on the innocent partner. Thus, s. 11 of the *Charter* would not be engaged.

Second, the partnership would be a person. Therefore, the fact that a group of individuals stands behind the “person” of the partnership would be irrelevant, in much the same way that the group of individuals standing behind the corporate person was irrelevant when the common-law rules of criminal liability were previously applied to corporate “persons”. Therefore, the constitutional problems of freedom of association tied to compelling the individual partners to pay the fine (because they are partners of the firm) are also no longer at issue if the partnership (the guilty party) is actually paying the fine out of its own property. Therefore, s. 2(d) of the *Charter* is not problematic.

However, even though the *Charter* issues are reduced in importance if Bill C-45 is interpreted to have granted to a partnership the status of a legal personality separate from those who control its operations or have an ownership stake in the business, other constitutional issues arise. In particular, the division of powers is engaged. Section 92(13) gives the provinces legislative jurisdiction over “Property and Civil Rights in the Province”.<sup>129</sup> This section provides the provinces with legislative jurisdiction over the regulation of businesses carried on in the province, subject to notable exceptions.<sup>130</sup>

<sup>129</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, [*Constitution Act, 1867*].

<sup>130</sup> For a discussion of these exceptions, see Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2007) vol. 1, s. 21.6 at 21-8-21-9.

There can be little doubt that an amendment to the *Criminal Code* is a valid exercise of the federal government's legislative competence over criminal law.<sup>131</sup> While the criminal law can be used to regulate businesses, even business that would otherwise be the subject of provincial legislative jurisdiction, this power is circumscribed. As Hogg explains:

But the gaps in federal power are very important and extensive. The trade and commerce power will authorize a federal prohibition of the importation of margarine, but not a prohibition of its manufacture or sale. .... The criminal law power may be used to prohibit undesirable commercial practices, but if the law departs from the conventional criminal format the criminal law power will not sustain it. The criminal law power may also be used to enforce closing hours on businesses for religious reasons, but not for secular reasons. ...[This] is not intended to be an exhaustive list of the gaps in the federal power to regulate business. It is simply a recitation of the better-known arenas of controversy.<sup>132</sup>

Thus, it is clear that Bill C-45 is a proper use of the criminal-law power by the federal government. However, the federal government does not have the jurisdiction to regulate business in general. The federal government has jurisdiction over the criminal law. The federal government cannot do anything (in this case, regulating business in general) through the back door (in this case, through the criminal-law power) that it is not constitutionally allowed through the front door. In order to give effect to this principle, it seems as though it is necessary to limit the imposition of a separate legal personality on a non-corporate organization to situations where the criminal-law power is validly invoked. Let us assume that the federal government were to try to use Bill C-45 to take legislative jurisdiction over businesses in general, where the business's conduct was not criminal (that is, the imposition of separate legal personality on the partnership went beyond applying separate legal personality when it was incidental to a criminal prosecution). This would be a massive intrusion into the provincial jurisdiction over Property and Civil Rights in the Province; thus, it would constitutionally impermissible.

Beyond this, an analogy to the constitutional jurisdiction over corporations is also instructive. Both the federal government (under the residual power granted pursuant to the "peace, order and good government" clause of s. 91 of the *Constitution Act, 1867*) and the provincial governments (pursuant to s. 92(11)) have the legislative jurisdiction to pass incorporation statutes.<sup>133</sup> The Privy Council has decided that the apparent limit on the provincial power in this area ('corporations with provincial objects') is not a territorial limit on the ability of provincially incorporated companies to carry on business in other jurisdictions, if the laws of the other jurisdiction so

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<sup>131</sup> *Constitution Act, 1867*, *supra* note 129, s. 91(27). See also *ibid.*, c. 19.

<sup>132</sup> Hogg, *supra* note 130, s. 21.6 at 21-9.

<sup>133</sup> *Ibid.*, s. 23.1 at 23-1.

allow.<sup>134</sup> Thus, as in the case of Bill C-45, both the provincial and federal governments are involved in this legislative area, and they must co-exist. In *John Deere Plow Co. v. Wharton*,<sup>135</sup> and *Great West Saddlery Co. v. Saskatchewan*,<sup>136</sup> the Privy Council decided that the essential characteristics (referred to in the cases simply as “status”) of a federally incorporated corporation could not be impaired by provincial licensing legislation. In the *Great West Saddlery* case, Viscount Haldane explains as follows:

If therefore in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any Province, it may not the less, consistently with the general scheme, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such Provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilise or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred.<sup>137</sup>

From this excerpt, it is clear that the provincial government cannot use its legislative powers to interfere with the essential characteristics of a federally incorporated corporation. The remaining question is whether the converse is also true. Can a federal law determine the essential characteristics of a provincial corporation? Although there is case-law directly on this point, in my view, just as clearly as Viscount Haldane laid out the answer to the question before the Judicial Committee in *Great West Saddlery*, the answer to the question above must be answered ‘No’. This means that a federal law cannot be used to strip a provincially incorporated corporation of the powers conferred by provincial legislation. If the right to carry on business anywhere in Canada is fundamental to the federally-incorporated corporation (as held in *Great West Saddlery*),<sup>138</sup> then it seems obvious that the separate legal personality of a corporation is at least equally important to a corporation as the ability to carry on business. Furthermore, the separate legal personality is a power specifically provided by the statute. Section 15 of the Manitoba statute is representative for our purposes here:

<sup>134</sup> *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566 at 578-579 (J.C.P.C.).

<sup>135</sup> *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (J.C.P.C.).

<sup>136</sup> *Great West Saddlery Co. v. Saskatchewan*, [1921] 2 A.C. 91 (J.C.P.C.) [*Great West Saddlery*].

<sup>137</sup> *Ibid.* at 100.

<sup>138</sup> *Ibid.* at 114-115.

15(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

15(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Manitoba to the extent that the laws of that jurisdiction permit.<sup>139</sup>

Both subsections of s. 15 are reproduced for a simple reason: *Great West Saddlery* clearly indicates the ability to carry on business is part of the “status” of a corporation, granted by its enabling legislation. The other level of government cannot interfere with the elements of this status. By the structure of s. 15, the Manitoba legislation draws a link between the separate legal personality of the corporation (s. 15(1)), on the one hand, and the ability of the corporation to carry on business, on the other (s. 15(2)).<sup>140</sup> *Great West Saddlery* is quite specific that the latter is constitutionally protected from interference by laws passed by the other level of government. Thus, the former should receive the same level of protection.

Careful readers will undoubtedly point out that the entire paper thus far has drawn a distinction between the corporation, and the non-corporate organization. Yet, here, I am specifically drawing on the constitutional jurisprudence on the law of corporations to make a point. Therefore, it is legitimate to ask: “Is this not inconsistent?”

I do not believe that the corporate-law constitutional jurisprudence is necessarily dispositive here. However, stripping a provincially incorporated corporation of its separate legal personality would be impermissible for the federal government, as an incursion into the legislative competence of the provinces under s. 92(11).

Provided that this argument is sound, the relevant question is: “How does this argument affect partnerships?” An argument could be framed as follows: The federal government does not have the constitutional authority to strip a corporation incorporated under provincial law of either:

1. its right to carry on business within its home province (or any other province(s) or jurisdictions that choose to allow the corporation carry on business, for that matter);
2. the separate legal personality of the corporation assigned to it by its enabling statute.

Since the federal government does not have the constitutional authority to strip a corporation of its separate legal personality, it equally does not have the ability to impose a separate legal personality on a business over which it does not have regulatory jurisdiction. Put another way, the legislative branches of

<sup>139</sup> *The Corporations Act*, C.C.S.M. c. C225, s. 15.

<sup>140</sup> See *Sullivan*, *supra* note 34 at 360-361.



the provincial government has made the decision not to grant a separate legal personality to a partnership. If, on the one hand, the *Partnership Act* of a given province was passed *prior* to the incorporation statute in the relevant province, then the legislature could have amended the *Partnership Act* to mirror the newly passed incorporation statute. If the legislature had intended to confer “the capacity ... rights, powers and privileges of a natural person” on a partnership, the passage of the incorporation statute would have provided the perfect opportunity to make this clear, through a concurrent amendment to the *Partnership Act*.

If, on the other hand, the *Partnership Act* of a given province was passed *after* the incorporation statute in the relevant province, then the legislature clearly made a choice not to adopt the statutory model of the corporation (that is, including a separate legal personality for the organization). If this argument is valid, the federal government should not have the legislative power to interfere with the specific legislative choice not to confer such status on provincially regulated, non-corporate enterprises, such as partnerships. Thus, in my view, the federal government should not be constitutionally allowed to utilize its criminal-law power to confer separate legal personality on enterprises over which it does not have specific legislative jurisdiction.<sup>141</sup>

This conclusion is strengthened by the fact that the point of granting separate legal personality to a partnership is designed to ensure that the “partnership property” can be legally owned by the partnership, so that the federal government can avoid the constitutional impediments that would exist if they were to seek to force individual partners to pay the fine levied against the partnership.<sup>142</sup> In other words, if Bill C-45 were to imbue a partnership with separate legal personality for all purposes, the federal government would specifically be trying to affect the ownership of property in the province where the property is situated. This is particularly problematic given that the head of legislative power that entitles the provinces to regulate business in general is called “*Property and Civil Rights in the Province*”. It seems obvious that who owns property situated in a given province is within the competence of the legislature of that province. As Hogg puts it:

The creation of property rights, their transfer and their general characteristics are within property and civil rights in the province. Thus, the law of real and personal property and all its various derivatives, such as landlord and tenant, trusts and wills, succession on intestacy, conveyancing, and land use planning, are within provincial power.<sup>143</sup>

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<sup>141</sup> For a list of some of the areas where the federal government could unilaterally impose a separate legal personality, because it does have specific legislative jurisdiction, see Hogg, *supra* note 130, s. 21.6 at 21-9-21-10.

<sup>142</sup> See Part V, above, for more on this topic.

<sup>143</sup> Hogg, *supra* note 130, s. 21.11(a) at 21-25.

The conclusion that the general application of property law to partnerships is a matter of provincial legislative competence is further reinforced by the fact that the provinces have passed a provision, contained in the *Partnership Act*, which deals with the ownership of property. Although discussed above, the relevant section with respect to property ownership is reproduced here for ease of reference:

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act “partnership property”, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.<sup>144</sup>

The section continues as follows:

The legal estate or interest in any land, that belongs to the partnership, shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but *in trust* so far as necessary, for the *persons beneficially interested* in the land under this section.<sup>145</sup>

These provisions make it clear that the provincial government has exercised its legislative competence to determine the property interests of partners with respect to both real and personal property. Therefore, in the civil context, the federal government cannot dictate the ownership of property.

In the criminal context, however, this is a different story. Clearly, Bill C-45 contemplates an organization having property of its own (separate from that of its partners) with which to pay the fine assessed. Yet, the provincial statute dealing with the ownership of property in these circumstances could, if strictly applied, effectively strip Bill C-45 of its desired impact. One might think about it this way: The law of partnership (governed provincially) says that the “partnership” (as a legal entity separate from the partners) does not own property. Therefore, if the *Partnership Act* were followed, no association without separate legal personality would have assets with which to pay any fine levied against it.

As mentioned earlier, the federal government has legislative competence over criminal law. A provincial statute cannot “trump” a valid federal objective. In such a case – where the valid provincial statute would, if applied expansively, create a conflict with the purpose of a federal one – the doctrine of federal paramountcy applies. Federal paramountcy means that to the extent that there is an inconsistency between a federal law and a provincial statute, the federal law will prevail.

There are a number of ways in which inconsistency (for paramountcy purposes) can manifest itself. The first of these is often referred to as “express

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<sup>144</sup> See *supra* note 17, s. 23(1).

<sup>145</sup> *Ibid.*, s. 23(2) [emphasis added].

contradiction". This arises where there is an impossibility of compliance with both statutes. One statute expressly contradicts the other, and compliance with one requires the breach of the other. The second is where the provincial law (if applied) would have the effect of blunting the purpose of the federal statute. Hogg explains:

Canadian courts also accept a second case of inconsistency, namely, where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, that is also a case of inconsistency. This is often regarded as a subset of express contradiction, although it is much less "express" than the impossibility of dual compliance. The courts have to interpret the federal law to determine what the federal purpose is, and then they have to decide whether the provincial law would have the effect of frustrating the federal purpose.<sup>146</sup>

Therefore, the provincial *Partnership Act* cannot dictate the frustration of a federal purpose. In this case, the federal purpose is to ensure that the offender (that is, the organization) is amenable to the criminal law. The government, in passing Bill C-45, makes its intention in this regard clear.<sup>147</sup> The criminal law is generally driven at punishment of the guilty. It is equally clear that fines are the principal means of punishing a corporation under Bill C-45.<sup>148</sup> If the organization has no property that can be removed from it as a form of punishment, this clearly frustrates the federal purpose of punishment. Thus, in my view, the provincial law on the ownership of property must yield to the federal statute with respect to criminal law.

However, it is also clear that paramouncy only applies to the extent of the inconsistency.<sup>149</sup> In the case of Bill C-45, the inconsistency only exists to the extent that Bill C-45 applies, that is, in the criminal sphere. In other words, in the civil context, the Bill C-45 is not meant to apply, and so there is no inconsistency. Thus, the ownership of partnership property (and the obligations attached to ownership, such as fiduciary and trust obligations) would continue to be determined by the *Partnership Act* of the given province. Once we step into a *Criminal Code* offence, the property used by the organization in carrying out its activities<sup>150</sup> is that of the organization,

<sup>146</sup> Hogg, *supra* note 130, s. 16.3(b) at 16-6.1.

<sup>147</sup> *Supra* note 21.

<sup>148</sup> See *supra* note 2, s. 735, as am. by Bill C-45, s. 20. Bill C-45 also introduces the concept that an organization may be put on probation. See *supra* note 2, s. 732.1 as am. by Bill C-45, s. 18(2)

<sup>149</sup> Hogg, *supra* note 130, s. 16.6 at 16-19-16-20.

<sup>150</sup> We will see in Part VII, below, that assessing what constitutes "the property used by the organization in carrying out its activities" may not be a simple exercise. However, given that the other two alternatives are, according to the analysis above, unconstitutional, it seems important to at least attempt to find a solution that given meaning to Bill C-45's specific inclusion of partnerships within its ambit.

regardless of whom the law of property for the individual province – both statute and common law – would define as the owner. In other words, when the criminal law is involved, the organization is the “owner” of the property.

The analysis provided above, in my view, creates the necessity of giving to a non-corporate organization a separate legal personality, but only in the required context. In the case of Bill C-45, separate legal personality is required only for the purposes of the criminal law. Therefore, if one were to view Bill C-45 as implicitly granting a separate legal personality for the limited purpose of providing a non-corporate organization with a means of holding the property used in carrying out its activities, a constitutional quagmire is avoided. First, the individuals behind the non-organization are not having their property taken away. This avoids issues of the applicability of ss. 2(d) and 11(d) of the *Charter*, as well as concerns about the potential application of s. 1. Second, such a compromise ensures that the provincial regulatory jurisdiction is respected. Third, the Parliamentary purpose is not blunted by provincial legislation. Thus, in my view, the compromise position – separate legal personality for organizations for the limited purposes of the criminal law – resolves the constitutional issues identified above.<sup>151</sup> So, it would have undoubtedly been helpful if the legislative drafters of Bill C-45 had made explicit the basis for holding non-corporate organizations criminally liable. Since the legislative drafters did not do so, the courts will be charged with the task of interpreting the statute. I am hopeful that the court will be able to fill the void so as to ensure that Bill C-45 is constitutional.

As we will see, constitutionality is not the end of the story. There remain several practical impediments to the implementation of the Parliamentary purpose in enacting Bill C-45. It is to these practical impediments which we now turn our attention.

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<sup>151</sup> During the writing process for this paper, one notable constitutional scholar encouraged me to make the argument that the imposition of separate legal personality on a partnership for limited purposes is really just a smokescreen for imposing liability on the partners directly. While I agree that this is a definite possibility, this would simply be a colourable attempt to impose liability on the partners. I have already dealt with the constitutional problems around the imposition of such direct liability in Part V, above. Those arguments will not be repeated. I choose in this section of the paper to adopt the perspective that it is at least constitutionally possible to give separate legal personality to a partnership for the limited purposes of the criminal law, and discuss the practical implications of this possibility, assuming that this was the Parliamentary intent evidenced by the passage of Bill C-45.

## VII. IMBUING THE “ORGANIZATION” WITH SEPARATE LEGAL PERSONALITY FOR LIMITED PURPOSES – PRACTICAL CONSIDERATIONS

In the first place, the approach adopted above does seem to come closest to the avowed intention of Parliament.<sup>152</sup> This interpretation of Bill C-45 treats corporate and non-corporate organizations alike.<sup>153</sup> After all, a shareholder does not expect that his or her personal assets can be used to pay a fine levied against a corporation in which he or she is a shareholder. However, the assets of the corporation’s business may be used to pay the fine. If we adopt a similar approach to partnerships (that is, the assets of the individual partner not used in the business are immune from seizure, but the assets used in the business may be used), we achieve the parity between forms of business organization sought by Parliament.

There is also some case-law to support the idea that legislation may, in order to achieve its purpose, grant a limited separate legal personality to an entity which otherwise would not have one at law. As the House of Lords (adopting wording of Justice Farwell, as he then was, at trial) put it in the case of *The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants*:

Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature ...<sup>154</sup>

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<sup>152</sup> However, the intention of Parliament in this regard (at least as drawn from the text of the legislation itself) is neither unambiguous nor as clear as legislative drafting could allow. Unlike its Canadian counterpart, the *Corporate Manslaughter and Corporate Homicide Act 2007* (U.K.), 2007, c. 19 is explicit about this issue. Section 14 of the United Kingdom Act reads as follows: “14 Application to partnerships (1) For the purposes of this Act a partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate; (2) Proceedings for an offence under this Act alleged to have been committed by a partnership are to be brought in the name of the partnership (and not in that of any of its members); (3) A fine imposed on a partnership on its conviction of an offence under this Act is to be paid out of the funds of the partnership. (4) This section does not apply to a partnership that is a legal person under the law by which it is governed.” This, however, is not the forum for a detailed analysis of the U.K. legislation, nor an in-depth comparative piece. This will have to wait for another day.

<sup>153</sup> See *supra* note 21.

<sup>154</sup> [1901] A.C. 426 (H.L.).

The above statement was adopted, albeit in a slightly different context,<sup>155</sup> by the Supreme Court of Canada in *International Longshoremen's*.<sup>156</sup> The Legislature must be presumed to know the bounds of its constitutional authority and to remain within them.<sup>157</sup> In the case of Bill C-45, the intention of the Legislature was clearly in the realm of criminal law. Therefore, the separate legal personality conferred by Parliament under the provisions of Bill C-45 is limited to those occasions where the criminal-law power is engaged.

Having disposed of constitutionality, therefore, there remain a number of practical considerations that remain for discussion. Bill C-45 seems to fail to appreciate (at least outwardly) the differences between partnerships and corporations. The simplistic analogy between the two organizational forms is, however, fraught with practical difficulties that are not easily overcome. In this Part, my attention will focus on problems arising out of the differences between corporations, on the one hand, and partnerships, on the other, at various stages in the process. For example, in sub-Part (a), one of the differences in the formation of the two types of organization expose potential issues with regard to the use of a separate legal personality for limited purposes. In sub-Part (b), I look at the rules preventing a transfer of assets from the owner for criminal law purposes (that is, the organization, be it a corporation or the partnership) to the individuals behind the organization (be it a shareholder or the partners). In sub-Part (c), I will discuss perhaps the most problematic issue of all: At what stage of the partnership's existence does this separate legal personality attach to the partnership? As will be seen below, the answer to this question is likely to create many problems for the courts in dealing with Bill C-45.

To be clear, first, I do not believe that this is an exhaustive list of all the issues created by the application of these rules to non-corporate entities. On the contrary, it is very likely that there are other issues, not dealt with below, that may cause problems for the implementation of the strategy of creating a

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<sup>155</sup> The case discusses the amenability of a trade union certified as a bargaining agent for employees to prosecution under the provisions of the *Canada Labour Code*, S.C. 1972, c. 18, s. 1, dealing with illegal strikes and lockouts.

<sup>156</sup> *Supra* note 86 at 120, Estey J. Furthermore, in *Berry v. Pulley*, [2002] 2 S.C.R. 493 at para. 39 [Berry], Iacobucci J. held that the grant of statutory rights, powers and immunities implicitly justifies the grant of separate legal personality to a trade union (citing *International Brotherhood of Teamsters v. Thérien* [1960] S.C.R. 265 at 277-278), given its statutory mandate (Berry at para. 9), and its specific amenability to prosecution under labour relations legislation (Berry at para. 42). See *Partnership Act*, *supra* note 17, for a discussion related to the holding of property are not such as to create the implicit basis for the creation of a separate legal personality. Notwithstanding this, Bill C-45 could provide a sufficient basis for the implicit grant of separate legal personality.

<sup>157</sup> *Sullivan*, *supra* note 34 at 459-461. See also *R. v. McKay*, [1965] S.C.R. 798 at 803-804, Cartwright J. (as he then was).

separate legal personality for limited purposes.<sup>158</sup> The discussion below is only meant to identify some of the more obvious problems created by Bill C-45 for partnerships, on which little practical guidance exists.

Second, it is important to point out that I do not profess to have the answers necessary to resolve these practical issues. Some of these issues may even defy simple solutions. However, the goal is not necessarily to resolve the issues that may confront (or even confound) the criminal courts for years to come. Instead, the focus here is simply to flag the issues on which further guidance and insight may be necessary, either in the form of statutory amendment,<sup>159</sup> or strong judicial reasoning.

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<sup>158</sup> As an example of one additional problem that the courts may have to approach with caution is as follows: how will the government be able to present evidence as to how a given asset was used at the relevant time, such that it should be considered partnership property? In the civil realm, a designation of a particular asset as partnership property is not relevant to creditors, who can seek recovery based on ownership by one of the partners, whether the property is partnership property or not.

However, only partnership property is subject to the fiduciary obligation that it be used for the purposes of the business of the partnership. See *Partnership Act* references, *supra* note 23. The fiduciary obligation is owed to the other partners. If one partner makes an allegation that another is not using the partnership property appropriately, each is involved in the business. Therefore, the one partner should be in a reasonable position to present evidence in support of this conclusion. In its prosecution of the partnership, the government, on the other hand, is not likely to be intimately familiar with the use of particular pieces of property. If that familiarity is lacking, it may be difficult to prove whether a particular asset is used in the business or not. Clearly, if it is not used in the business, it cannot be part of the common fund. If it is not part of the common fund, the government cannot force payment of a criminal fine from the property. On the other hand, if it is used in the business, it is most likely part of the common fund. If it were part of the common fund, it would be exigible to pay the fine. Therefore, knowledge of whether an asset is used in the business would seem to be essential to a successful prosecution under Bill C-45.

<sup>159</sup> The likelihood of statutory amendment seems low. This is true for a number of reasons. Three spring immediately to mind. First, the Westray mine disaster in Stellarton, Nova Scotia was one major impetus for Bill C-45. The loss of the lives of 26 miners in a 1992 underground methane gas explosion led to calls for reform, especially after the attempt to convict the corporate owner of the mine, Curragh Resources, Inc., and its managers of criminal offences were unsuccessful. Notwithstanding the strong public pressure, it took until 2003 for the statutory amendment to be passed.

Second, politically, in the absence of disasters like Westray, there is little reason to engage in a prolonged study of the issue, because getting it right (assuming that there is a single "right" answer) is simply not part of the daily consciousness of everyday Canadians. The economy, infrastructure, social programs, and other government initiatives are all more likely to be direct concerns of a larger segment of the populace than is the organizational liability of partnerships for crimes. Therefore, the political will to amend the law is more difficult to provoke than in these other areas, because changes in these other areas are more likely to produce reactions from voters, and thus, potentially impact the outcome of the next election.

Third, knowing for certain that there is an issue with which Parliament should concern itself is a difficult exercise. Before Parliament will amend a statute, the government will want to see how the courts are interpreting the statute at issue. If the courts are deciding cases in the

## A. Differences in organizational formation

The first distinction between corporate and non-corporate forms is that one does not create a corporation by accident, or more importantly, without knowing that a corporation has been created. This gives the participants a clear indication of the separation created between themselves and the business.<sup>160</sup> However, in a partnership situation, a partnership can be created by accident,<sup>161</sup> and can even be created contrary to the express intentions of those alleged to be partners.<sup>162</sup> This distinction is crucial.

The idea of a separate legal personality for limited purposes assumes that the court can tell the difference between the property that is owned by the partnership and that which is owned by the partners. For the sake of convenience, I shall adopt the nomenclature of Law Reform Commission of Canada in reference to the property that is held by the partnership as the “common fund” of the organization.<sup>163</sup>

If one does not think that one is in a partnership, that person has little reason to clarify that certain assets are used in the business, while others are not. The idea of concerning oneself with the distinction between one’s personal and business assets has no application when a person does not think that he or she is in business with anyone else. This is particularly true since, until Bill C-45 was created, there is no business advantage to placing property in the common fund. Personal assets are equally available to pay business debts, in addition to the assets dedicated to the business.<sup>164</sup> In determining whether to extend credit to the business, therefore, the creditor can take into account both the assets used in the business the partnership, as well as the combined net worth of the partners. So, for a small, unincorporated business

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way that the government intended when it passed the statute, then the government is unlikely to intervene, despite what may be the actual or perceived weaknesses in the statutory drafting. Parliament is more likely to intervene where the reasoning of a court can be seen as undermining public confidence. For an example of a Parliamentary amendment designed to overturn a court decision, see *Criminal Code*, *supra* note 2, s. 33.1 (a direct response to the reasoning of the majority of the Supreme Court of Canada in *R. v. Daviault*, [1994] 3 S.C.R. 63). Unfortunately, despite the fact that Bill C-45 was passed in 2003, and came into force in 2004, there has yet to be a case where a charge laid pursuant to one of its provisions has gone to trial. Therefore, the government has yet to be given the opportunity to assess the impact of Bill C-45 on organizations. Until such an assessment can be made, it is unlikely that the government will seek to amend these provisions.

<sup>160</sup> This is so, even there are cases where those who have incorporated a business did not fully understand the implications of the incorporation. See *Kosmopoulos*, *supra* note 28.

<sup>161</sup> See *Seiffart v. Irving* (1887), 15 O.R. 173 at 175 (H.C.J., Ch. Div.), Chancellor Boyd, *aff’d* (1887), 15 O.R. 177 at 179-180 (Div. Ct.), Proudfoot J., and at 180, Ferguson J.

<sup>162</sup> See *Redfern Farm Services Ltd. v. Wright*, *supra* note 20.

<sup>163</sup> *Criminal Responsibility for Group Action*, *supra* note 29 at 55.

<sup>164</sup> See *VanDuzer*, *supra* note 8 at 31.



such as many partnerships, the individuals involved may not know that there is a distinction between themselves and the business. As such, it may be very difficult to ascertain what property, if any, will belong in the common fund.

As discussed above, the presumption of innocence must mean that the innocent partner cannot be forced to pay any fine levied against the partnership out of his or her personal assets.<sup>165</sup> Therefore, it seems clear that either:

- (i) the government must prove (at least on the balance of probabilities) that the asset sought to be used to pay the fine was that of the organization; or
- (ii) the organization or the partners must place a reasonable doubt as to the ownership of the asset in issue and at that point, the government must then prove (at least on the balance of probabilities) that the asset sought be used to pay the fine was that of the organization.<sup>166</sup>

Since the principals of the business may not have turned their minds to the ownership of the property at issue, it would seem difficult for the state to prove how exactly the property was being used.

In contrast, a corporation has a separate legal personality that provides a business-related incentive to put the assets to be used in the business into the corporation, and keep personal assets in the individual's own name. The individual is more inclined to move assets used in the business into the corporation to, for example, reduce the likelihood that a personal guarantee will be necessary to obtain credit for the corporation.<sup>167</sup> If the principals of the corporation do not have to give a personal guarantee, the principals are generally able to ensure their personal assets are protected from seizure by business creditors.<sup>168</sup>

Small partnerships can be formed by accident. Large partnerships, such as large law and accounting practices, would rarely be created other than with

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<sup>165</sup> See Part V(b), above.

<sup>166</sup> The second option is drawn from jurisprudence with respect to the sanity of the accused, pursuant to the *Criminal Code*, *supra* note 2, s. 16. See *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1342.

<sup>167</sup> Creditors who are uncertain as to the ability of the corporation to repay the amounts owed often exact a personal guarantee given by the principals of a business corporation. Despite the separate legal personality of the corporation, the guarantee means that the principals of the corporation are responsible for the liabilities incurred by the corporation to the extent that the corporation is unable to make good on those liabilities.

<sup>168</sup> The courts have reserved the ability to ignore or disregard the separate legal personality of the corporation. This is often referred to as "piercing the corporate veil". For discussions of piercing the corporate veil, see e.g. *Kosmopoulos*, *supra* note 28 at 10-12; *VanDuzer*, *supra* note 8 at 129-138.

the specific knowledge and intention of the principals therein. Large partnerships are more likely to be formed under a specific partnership agreement, and bank accounts of the firm would exist which could be accessed as part of the common fund. In other words, under Bill C-45, to this extent at least, the assets involved in the criminal activity of large partnerships will be more easily accessible than those of their smaller counterparts.

It is interesting to note that this is the opposite of the English experience with *corporate criminal* liability for manslaughter. Convictions have only been registered against smaller companies, while the attempts to convict larger corporations have been unsuccessful.<sup>169</sup> However, despite the fact that there is much in common between the two countries in this area of the law, Canada and the United Kingdom do not necessarily operate in the same way. As Estey, J., explained:

The application of the identification rule in *Tesco, supra*, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made.<sup>170</sup>

So, even at common law, it is possible that the Canadian rules on corporate criminal liability did not suffer from the same difficulties, as did their English counterparts. The passage of Bill C-45 has now increased the distinction between the two jurisdictions. However, it is clear that it may be difficult to implement the separate legal personality of organizations for small partnerships, where the participants do not make the distinction between the common fund, on the one hand, and personal assets of the partners, on the other. Bill C-45 provides no meaningful guidance on this issue.

## **B. Avoidance of liability as a going concern**

As mentioned earlier, for larger partnerships, the fear of catching the participants off-guard with respect to having created a partnership is unlikely. Unlike smaller “accidental” partnerships, there will most certainly be a common fund from which recovery of the criminal fine can be sought. Nonetheless, a second practical problem presents itself. This problem revolves around the ability (and willingness) of partners in larger partnerships to structure their affairs so as to minimize liability risks. To take a simple example, Lawyer A is a partner in Firm X. The lawyer is concerned about the prospect of losing his or her house, car, or other valuable personal assets if Firm X is sued. What does Lawyer A do in such a circumstance? One possible answer is to transfer the assets to Lawyer A’s spouse, who may have employment that has a significantly lower risk of being sued personally.

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<sup>169</sup> Sherna Noah, “Why previous corporate manslaughter cases have collapsed” *Press Association News* (9 July 2003).

<sup>170</sup> *Canadian Dredge, supra* note 37 at 693.

Assume that Firm X is then successfully sued by one of its creditors, while Lawyer A is a partner of the firm. Lawyer A's assets are still made available to pay the judgment against the partners, but the assets which were transferred earlier to Lawyer A's spouse are not available. Through one transaction, Lawyer A has potentially avoided the full extent of his or her liability to creditors.

In other cases, the avoidance of liability can be more elaborate. Some large law firms in major Canadian cities have two organizations. The first is a partnership for the legal side of the business (that is, the partnership employs the associates). But, in addition, the partners also set up a corporation of which each partner owns a percentage. The corporation employs the administrative staff that works at the law firm (e.g. secretarial assistants, financial services, maintenance staff, human-resource professionals, etc.). Therefore, if there is a legal action involving something other than the direct provision of legal services, this could be the responsibility of the corporation, rather than the partnership. The partners would then only be liable to the extent of their respective investment in the corporation, rather than having all of their assets (both business and personal) at risk. Thus, the people involved in large partnerships are able to manipulate the amount of property at risk at any given time.

Some may ask "If the manipulation of property ownership to avoid partnership liability is common in the civil sphere, why should we be so concerned with it in the criminal sphere?" The answer, in my view, lies in the distinction between the criminal law and its civil counterpart referred to earlier.<sup>171</sup> The criminal law is a statement of basic morality. The law of contracts is concerned with promoting economic certainty and the allocation of risk. Clearly, the contractual creditors of the business are taking a risk if they do not: (i) investigate the personal and business creditworthiness of the partners so that they know the available assets from which they can reasonably expect recovery; and (ii) place restrictions on the right of the partners to alienate those assets. The law of torts is concerned with wealth redistribution and compensation. Yet, generally, the economic motives of the tort system are not considered to be more important than those of the law of property.

But, to put the question rhetorically: "Should society set up a system of criminal justice where those who break the criminal law can arrange their affairs as to minimize or avoid any form of punishment?" In other words, our society did not make a system of criminal justice at which people can thumb their noses if they had the foresight to know in advance that a crime might be committed and the resources to arrange that their business be unable to pay a

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<sup>171</sup> See Part V(b), above.

fine levied against it. This is a practical problem for the organizational liability of partnerships.

Again, a corporation is different. There are compelling business reasons to put assets into – and leave assets in – the corporation. As a general rule, the shareholders can only receive dividends to the extent that the corporation will be able to pay its debts. The *Canada Business Corporations Act* provides as follows:

A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that

- (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
- (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.<sup>172</sup>

This provision means that the money paid to the corporation in return for the issuance of shares generally remains with the corporation as long as it is a going concern.<sup>173</sup> This ensures that pool of assets will be available to pay debts, including criminal fines, if necessary. The law of partnership contains no similar provisions. This is unsurprising, given that the law allows creditors to seek repayment from the partners personally, as well as from business assets. So, if a partner withdraws an asset from the business, even to sell it for personal benefit, the proceeds remain exigible to pay business creditors. Therefore, unlike a corporation, the transfer of an asset to a principal of the partnership business is generally not problematic from a creditor's point of view.

Thus, if Bill C-45 is simply meant to provide parity between incorporated businesses and partnerships, the ease with which partnership property can be moved between the partnership and the partners makes this supposed parity exceptionally difficult to achieve.

### C. When does separate legal personality attach to the partnership?

It is clear that attaching separate legal personality to the partnership may be necessary in order to facilitate the operation of Bill C-45 and avoid problems with the guarantees provided by the *Charter*. It is equally clear that the

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<sup>172</sup> R.S.C. 1985, c. C-44, s. 42 [CBCA].

<sup>173</sup> In general, "stated capital" is the aggregate of all consideration received in returned for shares issued by the corporation (*ibid.*, s. 26). While a shareholder can, by special resolution, reduce stated capital (*ibid.*, s. 38(1)), this can only be done if there are no reasonable grounds for believing that: (a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due; or (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities (*ibid.*, s. 38(3)). In other words, creditors cannot be negatively impacted by the reduction in stated capital.

division of powers under the *Constitution Act, 1867* prevents the federal government from ascribing a separate legal personality to the partnership until the partnership comes into contact with the criminal law. This leaves open the following question: If the partnership does not begin with a separate legal personality, when exactly does it acquire this personality? Depending on the answer to the question, different practical consequences arise.

### 1. The time of the offence

The earliest point at which the partnership could acquire the separate legal personality ascribed to it by Bill C-45 is when the offence occurred. At that point, it is at least possible that the partnership may come into contact with the criminal-justice system. It could be argued that the criminal law has an interest in the property of the partnership at that time; therefore, the assets of the partners used in the business of the partnership could be transferred to the partnership, which now has separate legal personality. The problem with this approach is that the innocent partners have no idea that the offence has occurred, and therefore will assume that they continue to own the assets at issue.

To better explain this, I shall again add some facts to our original hypothetical fact-scenario.<sup>174</sup> Assume the following facts:

- i. Adam commenced his scheme on January 1, 2006;
- ii. At that time, \$20,000 of assets are dedicated to the business;
- iii. There is no written partnership agreement between Adam and Brian;
- iv. Every December 31, the partners remove all profit from the partnership, with the exception of amounts required to cover debts incurred in the year just ending, but to be paid in the following year, plus \$20,000 for operating expenses for the coming year;
- v. On August 1, 2008, one of the intended victims becomes aware of the fraud and reports it to Brian;
- vi. Brian immediately confronts Adam, and puts a stop to the activity;
- vii. After this, most of the assets that are part of the \$20,000 on the partnership books as of January 1, 2006 are used to pay bills, accumulated as part of the business of the partnership, while the remainder is used to acquire further assets;
- viii. On June 1, 2009, Adam and Brian take on a new partner, named Derek;

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<sup>174</sup> See Part III, above.

- ix. Derek pays \$10,000 in return for his partnership interest;
- x. On April 1, 2010, Brian withdraws from the partnership. His former partners agreed to pay him over time from the earnings of the partnership, which took place every month from May 1, 2010 to September 1, 2012. As of September 1, 2012; Brian is still owed \$5,000 from his former partners;
- xi. In June 2010, the partnership takes on a new partner, named Ethan, who pays \$25,000 for his partnership interest;
- xii. In October, 2010, unbeknownst to any of the partners (current or former), the police begin an investigation into the activities of the partnership between January 1, 2006 and August 1, 2008 relating to the fraud undertaken by Adam;
- xiii. By February 1, 2011, the partnership has assets worth \$60,000, and additional cash of about \$15,000;
- xiv. On February 1, 2011, Adam, without the consent of his partners, withdraws \$10,000 in cash from the firm account, and withdraws from the partnership, to take up residence in the Cayman Islands;
- xv. On March 1, 2011, the remaining partners are informed of the police investigation;
- xvi. On November 1, 2011, the partnership was charged with fraud over \$5,000 under the *Criminal Code*;
- xvii. On September 1, 2012, the matter came to trial before a judge alone.

On these facts, what are the assets of the partnership as of the date of the offence? Clearly, this would be the \$20,000 assets mentioned at point (ii). But, as mentioned at point (vi), most of these assets have been used to pay debts of the partnership.<sup>175</sup> It is also clear that none of the partners who comprised the firm at the time of the offence are still partners of the firm at the time of the trial. This having been established, at least three subsidiary questions remain for consideration. First, can the government seek to recover the assets that belonged to the partnership on January 1, 2006 (that were subsequently used to pay debts of the partnership) from the creditors who were paid with those assets? Secondly, if not, can the partners at the time of the offence be asked to make good on the value of the assets lost between the time of the offence and the time of trial out of assets that are not part of the common fund of the partnership? Third, can the new partners be expected to make good on the fine assessed at trial, if any?

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<sup>175</sup> For the sake of simplicity, I am assuming that the partners have not dissipated any of the assets in an attempt to render the partnership judgment-proof. This is not the forum in which to confront these issues.

On the first issue, the equitable remedy of tracing would seem to be the proprietary remedy at issue. The *Personal Property Security Act*<sup>176</sup> seems to be far broader in its use of tracing than its common law counterpart. Tracing is defined as “a process where an owner with a legal or equitable interest can trace the original property to the new [property]”.<sup>177</sup> I leave aside issues of the need for a fiduciary relationship in order to assert a claim against the property followed through the tracing process.<sup>178</sup> It is elementary that assets used to pay bills are not traceable into the hands of the creditors whose debt was extinguished by the transfer of the assets.<sup>179</sup> Perhaps even more importantly, tracing is not available until the person seeking to trace the asset is in a position to assert an interest, be it legal or equitable, in the property sought to be traced into a new form of property.<sup>180</sup> In the case of Bill C-45, the potential defendant organization does not owe a debt or obligation in respect of the offence charged until the sentence is imposed. It is not entirely clear that Parliament intended to be able to trace the assets out of the separate legal entity of the partnership, and into the hands of the individual partners. There is nothing in the language of the statute to suggest this. However, even assuming that this is Parliament’s intention, the common law does not allow this to occur until there is a claim to the property. There can be no claim until there is a finding of guilt. Until then, whether the partnership is a separate legal person from the partners or not, the property can be dealt with as the business requires, and no tracing process is likely to succeed. Therefore, in my

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<sup>176</sup> *The Personal Property Security Act*, C.C.S.M. c. P35 [PPSA (Manitoba)] will be used for illustrative purposes. Each of the common-law provinces and territories has a statute based on similar principles.

<sup>177</sup> *Sneddon v. British Columbia Hydro & Power Authority* (2003), 16 B.C.L.R. (4th) 254 (S.C.) at para. 41, aff’d (2004), 35 B.C.L.R. (4th) 212 (C.A.).

<sup>178</sup> In the PPSA context, the requirement for a fiduciary relationship has been removed by statutory amendment. See PPSA (Manitoba), *supra* note 176, s. 2(3). For a discussion of the fiduciary requirement, under the PPSA, see *General Motors Acceptance Corp. of Canada Ltd. v. Bank of Nova Scotia* (1986), 55 O.R. (2d) 438 (Ont. C.A.).

<sup>179</sup> A.H. Oosterhoff *et al.*, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed. (Toronto: Carswell, 2009) at 1267-1268 [*Oosterhoff on Trusts*]. However, there is some uncertainty whether a debt-repayment transfer may be traceable if it appears that the debt was created for the purchase a particular property, and was repaid by assets sought to be traced, see Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Essentials of Canadian Law: Personal Property Security Law* (Toronto: Irwin Law, 2005) at 475. The authors of *Oosterhoff on Trusts* similarly question the appropriateness of the “no proceeds from payment of a debt” rule, but seem to acknowledge that this is a statement of the law, as it currently stands. For the purposes of the present discussion, the debt is acquired by criminal wrongdoing and would not have a strong connection with acquiring any particular asset, and so this uncertainty in the law does not affect the immediate issues.

<sup>180</sup> *Oosterhoff on Trusts*, *ibid.* at 1235-1237.

view, the answer to the first subsidiary question posed above must be a resounding “no”.

As to the second subsidiary question, I believe that the answer is equally in the negative. After all, the entire point of giving separate legal personality to the partnership is to separate the assets belonging to the partnership from those owned personally by the partners. If, once the charge is laid, the partners at the time of the offence are expected to ensure that the partnership has at least as much property as on the date of the offence, this essentially makes the partners guarantors of the payment of the fine up to that amount. If this is so, then, to the extent that the partnership is unable to pay the fine levied, the partners are personally liable for the shortfall. As soon as the partners are liable to dip into their personal assets to pay any shortfall that has resulted from the imposition of a criminal fine against someone who is not guilty of the underlying offence, “true penal consequences” are being foisted upon that person. As discussed earlier, this raises constitutional issues with respect to the presumption of innocence.<sup>181</sup> Therefore, it is unlikely to be constitutional to demand that the partners at the time of the offence contribute to the assets of the partnership.

The answer remains the same for forcing the new partners to use their personal assets to pay the fine. On the facts presented, neither of the people who are the partners at the time of the verdict – and the imposition of sentence – were members of the partnership at the time of the offence. Clearly, just as Brian has done nothing wrong on the original facts, Derek and Ethan have done nothing wrong on the additional facts set out in this Part. To ask them to pay the fine levied against the partnership raises (and exacerbates) the same constitutional issues referred in Part V. The new partners were not members of the partnership when the offence took place. Therefore, the case in favour of *not* requiring the new partners to contribute personal assets to ensure that the partnership has at least as much property as on the date of the offence to pay the fine is *even stronger* on these facts than it is when the original partners remain involved in the business of the partnership.

## 2. The time of sentencing

If Bill C-45 attaches separate legal personality to a partnership as of the date of sentencing, different issues arise. Clearly, this avoids issues of forcing partners to provide their personal assets to the partnership to make up any difference between the assets at the date of the offence and the date of sentencing. Whatever partnership property exists at the time of sentence would be exigible to pay the fine levied against the partnership. Thus, the

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<sup>181</sup> See the discussion of the importance of “true penal consequences”, Part V(b), above.



assets in the partnership as at the date of the offence would be irrelevant for the purposes of the criminal law.

Take the facts of our example. At the time of sentencing, the partnership is comprised of partners who had nothing to do with the wrongdoing being punished. Yet, it is the assets with which those people (in our example, Derek and Ethan) seek to make their livelihood that are being removed on account of wrongdoing that occurred before they became involved in the partnership.

Nonetheless, in civil law, the incoming partner is not personally liable for obligations arising prior to his or her becoming a partner.<sup>182</sup> Notwithstanding this fact, the value of the interest purchased by the incoming partner may be reduced by the need to pay the debt out of partnership property.<sup>183</sup> Thus, it is unclear whether Derek and Ethan have any reason to think that the assets given by them will be used to pay debts arising prior to their arrival. As Manzer puts it:

The admission of a new partner to a partnership may result in the creation of a new partnership and the dissolution of the old one. Whether this occurs will depend upon the relevant provincial legislation and the terms of the specific partnership agreement.<sup>184</sup>

Thus, whether the admission of a new partner (or the retirement of a current one) will dissolve the partnership is highly fact-dependent. Anything fact-dependent creates uncertainty. This uncertainty could in turn generate a desire to manage the risk that it creates. The tax system already creates a significant incentive for partners to remove profit from the partnership on an ongoing basis, because it forces partners to pay tax on earnings, even if those earnings remain in the business, and are *not* used for the personal purposes of the individual partner. Therefore, the tax system causes the individual partner to take money from the common fund of the partnership, if only to pay the tax on the earnings.<sup>185</sup>

The provisions of Bill C-45 may increase this incentive to remove profit from the partnership. Bill C-45 creates the possibility that the partners may have property of the business taken away to pay criminal fines resulting from events occurring prior to when they became partners. This seems likely to increase the perceived need to engage in activities that lower the amount of partnership property that is exigible to pay debts at any given time. The civil

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<sup>182</sup> See *Partnership Act* (Manitoba), *supra* note 17, s. 20(1).

<sup>183</sup> See VanDuzer, *supra* note 8 at 58, Figure 2.4.

<sup>184</sup> *Supra* note 8 at para. 6.480.

<sup>185</sup> The taxpayer is the individual partner. The amount of income or loss is calculated at the level of the partnership (see *Income Tax Act*, *supra* note 18, s. 96(1)), and then each partner must pay tax on his or her share of the income so calculated, or to deduct the loss so calculated from the partner's other income, if any. See *Backman*, *supra* note 18.

law allows such techniques to be employed.<sup>186</sup> For reasons mentioned earlier, differences between the purposes of the criminal and the civil law (morality v. compensation) may mandate a different approach in criminal cases than that taken in the civil law.

Perhaps even more important are the purposes of sentencing. This leads me to question what is just about holding the partnership liable for the action of a former partner, when the current partners are completely different from those in place at the time of the offence.

In fact, one could claim that once all the people who were partners at the time of the offence have left the partnership, the partnership that existed at the time of the offence no longer exists. In other words, since a partnership is a relationship amongst people, if none of the people in the relationship were the original parties to it, does the original relationship continue to exist?<sup>187</sup> If not, then the partnership does not exist at the time of the sentence, and this makes fining the partnership exceptionally problematic.

Even if the *Partnership Acts* do not specifically provide that the partnership is terminated by a change of partners, it is clear that the partners may, by agreement, choose to terminate the partnership on the retirement of any partner. The remaining partners can then reform the partnership with the remaining partners only, while informing creditors of the firm that the retired partner is no longer part of the firm.<sup>188</sup> This may provide some protection for innocent partners.

This is not to suggest that there are no negative consequences to this approach. The tax consequences may be bad for the partners. In her discussion of tax, Manzer explains,

As previously mentioned, a properly drafted partnership agreement will provide that the admission of a new partner does not terminate the old partnership but continues the existing one. ... Generally, one would want to ensure that the partnership is not dissolved on the admission of a new partner.<sup>189</sup>

However, under the right circumstances, the innocent partners may be willing to accept the negative tax consequences of dissolution to ensure that

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<sup>186</sup> See Part VII(b), above.

<sup>187</sup> It is clear that any partner may terminate the partnership on notice to his or her partners, unless this right is removed by the unanimous agreement of the partners. The *Partnership Act* (Manitoba), *supra* note 17, s. 29 is representative. It reads as follows: 29(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention to do to all the other partners; 29(2) For the purpose of subsection (1) where the partnership was originally constituted by deed, a notice in writing, signed by the partner giving it, is sufficient.

<sup>188</sup> *Partnership Act* (Manitoba), *ibid.*, s. 40.

<sup>189</sup> Manzer, *supra* note 8 at para. 6.490.

the wrongdoing of the former partners of the firm are not visited upon the assets from which the current partners intend to make their livelihood.

The partners can choose the events that will cause dissolution in advance of their occurrence. The partners are free to choose that the partnership be dissolved by any activity by any partner that could subject the partnership to criminal liability. How the courts might choose to deal with this is at best unclear.

The dissolution of partnerships is different from that of corporations. First, if the shareholders of a corporation choose dissolution, there is a significant procedure that must be followed to dissolve the corporation.<sup>190</sup> Also, the government official in charge of administering the incorporating statute must issue a document before the corporation may dissolve. According to the CBCA, it is clear that:

- i. the existence of the corporation continues notwithstanding a stated intent of the shareholders to dissolve it;
- ii. public notification of the intent to dissolve must be provided; and
- iii. the Director can ask for court supervision of a corporate dissolution.

Thus, the Crown in the province where criminal charges may be laid could potentially ask the Director to seek court supervision if charges have been, or are soon to be, laid against the corporation. The Court could then manage the risk that the corporation will be dissolved prior to the verdict in the criminal case.

There is a second difference between the partnerships and corporations that is also relevant here. Shareholders know before buying shares that there is a continuity of existence of the corporation by virtue of its separate legal personality. In other words, shareholders should know that whomever else holds shares in the corporation does not affect the liability of the business. The shares are separate property from the business itself.

With partnerships, separate legal personality is not an issue in civil law. Partners may only find out after purchasing their partnership interest that there is a continuity of existence in the partnership for limited purposes – that is, the partnership continues to exist as its membership changes – and that notwithstanding the provisions of the *Partnership Act*, assets which the new partners bring to the business may be exigible to pay for wrong of other partners occurring prior to his or her admission to the partnership.

Consequently, regardless of when the separate legal personality attaches to the partnership, practical issues arise. Since the legislative branch of

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<sup>190</sup> CBCA, *supra* note 172.

government has provided no guidance on these difficult issues, the courts will undoubtedly be forced to confront them.

### VIII. WHAT COMES NEXT?

The conclusions sought to be drawn from the analysis above have already been set out,<sup>191</sup> and will not be repeated. However, it is interesting to speculate about the questions that will need to be answered in the future. In my view, the next move belongs to prosecutors. Will the Crown choose to aggressively pursue potentially criminal wrongdoing occurring in partnerships? Or, on the other hand, will prosecutors wait for a test case that might not offer so many practical difficulties as the hypothetical facts used herein, before invoking Bill C-45 against the partnership form? When a test case does arise, will prosecutors attempt to analogize the partnership to its corporate cousin? If so, how successful will this analogy be? Will prosecutors find a legal theory that allows the courts to resolve the practical problems of criminal liability for partnerships on an intellectually defensible basis? If so, what will that basis be? If not, how will the courts interpret Bill C-45 when applying its provisions to partnerships?

While the questions are numerous, the answers may have to wait for judges and lawyers to wade into the fray. The goal of this paper was to identify the issues that might need to be answered, and point out some of the roadblocks between Bill C-45 and its intention to create the possibility of holding a partnership liable for an offence requiring proof of *mens rea*. Unfortunately, only the development of case law in this area will tell us for certain whether or not these roadblocks can be overcome.

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<sup>191</sup> See Part IV, above.

