

The Balancing Approach to *Charter* Interpretation: Theoretical and Practical Problems in the Context of Detention and Interrogation

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ABSTRACT

This paper explores different methods of interpreting the rights triggered upon custodial detention with particular reference to the right to counsel and the right to silence under ss. 10(b) and 7 of the *Charter*, respectively. This paper will discuss the common law and statutory antecedents of those rights to highlight the perceived need in the case law to adopt a generous approach to interpretation in the wake of the *Charter*. Early in the case law, the Supreme Court of Canada adopted the purposive approach to delineate the scope of the *Charter's* legal rights. The purposive approach was designed to ensure that individuals enjoy the full benefit of the procedural protections available under the *Charter*, which were intended to safeguard the principle against self-incrimination.

This paper takes the position that a second method of *Charter* interpretation emerged subsequently in the case law coming out of the Supreme Court of Canada. The analysis adopted in the case law shifted from assessing the purpose of the right to balancing the respective interests of the state with the interests of the individual engaged during custodial interrogation. This paper takes the position that balancing interests to delineate the scope of the *Charter's* legal rights is inappropriate from a

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theoretical and practical perspective. The balancing approach should be abandoned in favour of a return to the purposive approach.

Keywords: *Charter of Rights and Freedoms*; *Bill of Rights*; Legal Rights; Right to silence; s 7; Right to counsel; s 10(b); Principle against self-incrimination; Constitutional interpretation; Purposive approach; Balancing; Custodial detention; Interrogation

I. INTRODUCTION

During custodial interrogation, the detainee is afforded certain rights to safeguard their interests. The principle against self-incrimination maintains that, where the state alleges criminal wrongdoing, the state cannot force the target of the allegation to assist the state in proving it. Human dignity and autonomy require that the individual remains free to choose whether to cooperate with the state, and if they choose not to cooperate, to be left alone by the state.¹

The principle against self-incrimination is supported during police interrogation by procedural protections, such as the right to retain and instruct counsel and the right to silence, which have attracted constitutional status under the *Canadian Charter of Rights and Freedoms*² (“*Charter*”). The purpose of the *Charter* in its entirety is to constrain government action to conform with fundamental rights and freedoms. This is considered to be essential to a democratic society in which the basic dignity of all individuals is recognized.³ In the context of custodial interrogation, this places an obligation on the state to respect the principle against self-incrimination.

Following the entrenchment of the *Charter*, a substantial body of Supreme Court of Canada case law developed on the right to counsel under s 10(b). Subsequently, the right to silence under s 7 of the *Charter* developed its own case law more slowly. In the early *Charter* jurisprudence, the Supreme Court of Canada adopted a relatively generous approach to interpretation, which was premised on recognizing the disadvantaged position of the individual during detention. The Court gave meaning to the

¹ See *R v D’Amour* (2002), 166 CCC (3d) 477, 163 OAC 164 (ONCA) at para 25 [*D’Amour*].

² *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

³ See *R v Singh*, 2007 SCC 48, [2007] 3 SCR 405 at para 76 [*Singh*].

right to counsel under s 10(b) by holding that the right involved free and immediate legal advice or immediate consultation with counsel of choice, during which time the police are required to hold off from investigation. These protections are intended to protect the detainee's vulnerable position by ensuring fair treatment during detention so as to safeguard the principle against self-incrimination.

Subsequently, the Court endorsed a different approach to *Charter* interpretation. This emerged as a subtle shift beginning in 1989 with the Supreme Court of Canada decision in *R v Smith*,⁴ which culminated in three decisions collectively referred to as the interrogation trilogy: *R v Oickle*, *R v Singh*, and *R v Sinclair*.⁵ The new approach is fundamentally a balancing act. Instead of assessing the purpose of the right to delineate its scope, the new approach interprets *Charter* rights by attempting to reconcile the state's interest in law enforcement with the individual's interest in freedom from state intrusion. This paper will refer to the new approach as the "balancing approach."

The balancing approach is problematic from both a theoretical and a practical perspective. The balancing approach departs from accepted *Charter* interpretation by giving constitutional weight to societal interests at the stage of delineating the scope of the right rather than at the remedial stage of the analysis. This places an internal limitation *Charter* rights based on collective interests, which is wholly inconsistent with the very nature of fundamental freedoms, which are inherently individualistic rights.⁶

From a practical perspective, the balancing approach results in a narrowing of the protections available under the *Charter*'s legal rights. This is insufficient to safeguard the principle against self-incrimination for the average detainee. Under the balancing approach, the Supreme Court of Canada interprets ss 7 and 10(b) in a way which fails to recognize fully the practical realities of interrogation.⁷ The case law envisions relatively easy exchanges between officer and detainee, which minimizes the impact of the

⁴ *R v Smith*, [1989] 2 SCR 368, 39 BCLR (2d) 145 [Smith].

⁵ *R v Oickle*, 2000 SCC 38, [2000] 2 SCR 3; *Singh*, *supra* note 3; *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310 [Sinclair].

⁶ See Vanessa A MacDonnell, "R v Sinclair: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter" (2012) 38 Queen's LJ 137 (QL) at para 35 [MacDonnell].

⁷ See Steven Penney, "Triggering the Right to Counsel: "Detention" and Section 10 of the Charter" (2008) 40 SCLR (2d) 271 at 272 [Penney].

inherently coercive nature of detention. The case law seems to presume that the average detainee not only understands the scope of their rights, but how to assert and exercise them confidently and effectively. Practitioners will appreciate that this is inconsistent with their experience, even in respect of sophisticated clients. It is also inconsistent with empirical data on police interactions. The practical effects of the balancing approach are more restrictive than the case law which endorses the balancing approach seems willing to acknowledge.

This paper will explore the problems inherent in the balancing approach by analyzing the right to counsel under the *Canadian Bill of Rights*⁸ and under the *Charter's* purposive approach. This paper will then assess the right to counsel and the right to silence under the early case law which endorsed the balancing approach. This paper will conclude that the balancing approach should be abandoned in favour of a return to the purposive approach whereby consideration of the state's interest in law enforcement is reserved for the remedial analysis under ss 1 and 24 of the *Charter*.

II. THE RIGHT TO COUNSEL UNDER THE *BILL OF RIGHTS*

The right to counsel did not originate with the *Charter*. It was recognized at common law and ultimately codified under the *Bill of Rights* in 1960. The *Bill of Rights* provided under s. 2(c)(ii) that no law of Canada would be construed so as to deprive a detainee of the right to retain and instruct counsel without delay. Prior to the entrenchment of the *Charter*, however, the right to counsel was interpreted narrowly, as a result of which the detainee's procedural protections during the investigative stage of the criminal process were tenuous at best.

Under the *Bill of Rights*, the police were not required to advise the detainee of the right to counsel or to facilitate its exercise.⁹ The right to counsel was not usually interpreted as imposing limitations on the investigative powers of the state. The case law tended to bolster investigative powers unless the police demonstrated flagrant disregard for the detainee's right to counsel.¹⁰ In the decision in *R v Steeves*,¹¹ Chief Justice Ilesley held

⁸ *Bill of Rights*, SC 1960, c 44 [*Bill of Rights*].

⁹ See *R v Gray* (1962), 132 CCC 337 at para 16, 1962 CarswellBC 223 (BCCC) [*Gray*].

¹⁰ See Brian Donnelly, "Right to counsel" (1968) 11 Crim LQ 18 at 19 and 21 [Donnelly].

¹¹ *R v Steeves*, [1964] 1 CCC 266, 42 DLR (2d) 335 (NSSC) [*Steeves*].

that violations of pre-trial rights generally did not undermine trial fairness or the admissibility of evidence, stating that:

[T]he mere fact that the police have obtained in any case knowledge of a relevant fact as the result of holding out an improper inducement does not of itself render evidence of that fact inadmissible... No more, it seems to me, should the acquittal of an accused person or the dismissal of the charge against him necessarily result because at some pre-trial stage of the proceedings after he was arrested he was deprived of the right to instruct counsel without delay. Whatever the remedies, civil or criminal, may be against those who deprived him of the right to instruct counsel, the right to acquittal or dismissal of the charge does not, in my opinion accrue to him.¹²

In *R v O'Connor*,¹³ the detainee was detained for impaired driving. When placed in a cell for the night, he asked to contact counsel. He was unable to reach his lawyer and was denied further opportunity to consult with counsel. On appeal from conviction, Justice Haines commented that he was “considerably disturbed as to the timeliness” of the detainee’s request to contact counsel given that the police were under no obligation to inform him of that right or to facilitate it.¹⁴ The conviction was upheld.

On appeal to the Supreme Court of Canada,¹⁵ Justice Ritchie did not assess the meaning of the right to counsel, but proceeded straight to the remedial analysis. He did not consider whether the illegally-obtained evidence should be admitted or excluded, but asked whether the right, if properly exercised, could have affected the outcome of the trial. Notwithstanding that the violation deprived the detainee of the opportunity to obtain legal advice on the breathalyzer, the breath sample was admissible at trial.¹⁶

Under the *Bill of Rights*, the case law tended to blend the delineation stage of the analysis with the remedial stage. Other than outlining what the right did not include, little attention was paid to interpreting the scope of the right. To compound this problem, the case law highlighted a basic doctrinal unavailability of any remedy at all. A breach of the right to counsel under the *Bill of Rights* generally did not give rise to a remedy. This underscores the tenuous nature of the right to counsel under the *Bill of*

¹² *Ibid* at paras 12-13.

¹³ *R v O'Connor*, [1965] 1 OR 360, [1965] 1 CCC 20 (OHC) [O'Connor OHC].

¹⁴ *Ibid* at para 6.

¹⁵ *R v O'Connor*, [1966] SCR 619, [1966] 4 CCC 342 [O'Connor].

¹⁶ *Ibid* at para 16.

Rights. If a breach of a right has no real bearing on the way in which police conduct their investigations or the manner in which the prosecution unfolds, the right itself counts for little.

The narrow scope of the right to counsel began to shift in Justice Laskin's concurring opinion in the Supreme Court of Canada decision in *R v Brownridge*.¹⁷ In that case, the detainee's request to contact counsel was denied, and he refused to provide a breath sample. On appeal from conviction, Justice Laskin held that the right to counsel could not be interpreted so as to empower an arresting officer to determine, at their discretion, whether or when to permit the detainee to exercise the right. Justice Laskin's opinion was that the right to counsel could only have meaning if it was taken as raising a correlative obligation on the police to facilitate contact with counsel by providing access to a telephone if one was requested.¹⁸

On the admissibility of the illegally-obtained evidence, Justice Laskin stated that the Crown's need to have the benefit of the evidence was not more important than the detainee's need to have the benefit of counsel.¹⁹ In Justice Laskin's view, police could not be permitted to assert their powers, as if lawfully exercised, when that assertion amounted to a denial of legal rights. His opinion was that the rights of the detainee had to be affirmed, which meant that the state could not be permitted to use the violation of a right as an exercise of law enforcement powers to support the charge of a criminal offence.

Justice Laskin's comment on the Crown's need for the evidence and the detainee's need for legal counsel bespeaks the idea of balancing interests, albeit at the remedial stage of the analysis. As noted, the case law under the *Bill of Rights* tended to blend the delineation and remedial stages of the analysis, and certain decisions did endorse a balancing exercise. For example, in the decision in *R v Gray*,²⁰ Justice Ostler's opinion was that the interests of the community mandated that criminal investigations could not be "cramped" by the invocation of legal rights. This was because the "business of police officers in investigating offences is difficult enough without unnecessary obstacles being placed in the path."²¹

¹⁷ *R v Brownridge*, [1972] SCR 926, 7 CCC (2d) 417 [*Brownridge*].

¹⁸ *Ibid* at para 70.

¹⁹ *Ibid* at para 72.

²⁰ *Gray*, *supra* note 9.

²¹ *Ibid* at para 14.

At the appellate level in the *O'Connor* decision, Justice Haines similarly stated that:

Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from illegal invasions of his liberties by the authorities, and (b) the interest of the state to ensure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground... This right of the public to be free and safe from the depredations of other citizens is often overlooked in our zeal to accord those charged with crime what we consider to be certain basic rights or freedoms, which are nothing more than guarantees of balance between the exercise of police powers and individual rights. In the last analysis it is for our Courts to exercise a broad discretion to find that balance in each case and protect those competing interests.²²

The language employed is evocative of the balancing approach endorsed by the Supreme Court of Canada some 30 years later under the *Charter*. This might support recognition of a custom of balancing interests to delineate the scope of rights to which the Supreme Court of Canada ultimately returned. However, even if balancing interests influenced the interpretation of the right to counsel under the *Bill of Rights*, balancing interests to delineate the scope of constitutional rights is inappropriate.

In the decision in *R v Therens*,²³ Justice Le Dain noted that, while the framers of the *Charter* adopted the wording of s. 2(c)(ii) of the *Bill of Rights*, the framers could not be presumed to have intended for those words to be given the exact same meaning and interpretation.²⁴ The task of expounding a constitution is fundamentally different from that of construing a statute. For Justice Le Dain, this conclusion follows naturally from s. 52 of the *Constitution Act, 1982*, whereby any law which is inconsistent with the provisions of the constitution is of no force and effect, as well as from s. 24 of the *Charter*, which furnishes trial judges with broad discretion to remedy *Charter* violations.

Importantly, the *Charter* represents a new affirmation of legal rights. The narrow interpretation of the right to counsel under the *Bill of Rights*

²² *O'Connor OHCI*, *supra* note 15 at para 5.

²³ *R v Therens*, [1985] 1 SCR 613, 40 Sask R 122 [*Therens*].

²⁴ *Ibid* at para 47.

had to be abandoned in the face of a clear constitutional mandate to render decisions which could limit and qualify the traditional sovereignty of the state.²⁵ A new approach to the interpretation of legal rights was required whereby the delineation of the scope of a right and the remedial analysis to be applied on its breach remained separate inquiries. To meet this need, the Supreme Court of Canada developed the purposive approach.

III. THE PURPOSIVE APPROACH TO THE INTERPRETATION OF *CHARTER* RIGHTS

The purposive approach to *Charter* interpretation was adopted by the Supreme Court of Canada shortly after the *Charter's* entrenchment. In the decision in *R v Big M Drug Mart*,²⁶ Justice Dickson held that the meaning of a *Charter* right is to be ascertained through analysis of the right's purpose.²⁷ The interpretation must be generous rather than legalistic to secure the full benefit of the *Charter's* protection. Justice Dickson cautioned, however, that the analysis cannot overshoot the intended purpose of the right. While a narrow approach to interpretation risks impoverishing a *Charter* right, an overly generous approach risks expanding the protection beyond its intended scope.²⁸

Justice Dickson determined that, to assess the scope of a *Charter* right according to its purpose, the right must be placed in its proper linguistic and philosophic context. This must be done with a view to the larger objectives of the *Charter* itself and the historical origins of the concepts enshrined, as well as the meaning and purpose of other related rights and freedoms.²⁹

While the historic origins of a *Charter* right bear upon the delineation of its scope, prior conceptions of its scope are not determinative. Justice Le Dain made clear in the *Therens* decision that the constitutional status of the right to counsel meant that the right had to take on additional importance in the wake of the *Charter*.³⁰ The principles of statutory interpretation employed to construe the *Bill of Rights* was inappropriate for the *Charter*,

²⁵ *Ibid.*

²⁶ *R v Big M Drug Mart*, [1985] 1 SCR 295, 37 Alta LR (2d) 97 [*Big M Drug Mart*].

²⁷ *Ibid* at para 117.

²⁸ See *R v Grant*, 2009 SCC 32 at para 17, [2009] 2 SCR 353.

²⁹ *Big M Drug Mart*, *supra* note 26 at para 117.

³⁰ *Therens*, *supra* note 23 at para 48.

which required a broader approach. A statute defines present rights and obligations, but a constitution is drafted with an eye to the future. Its provisions must be capable of growth and development over time.³¹ Thus, narrow or technical approaches to interpretation, such as those employed under the *Bill of Rights*, risked subverting the goal of ensuring that each individual enjoys the full benefit and protection of the *Charter*.³² The result is that the scope of s. 10(b) of the *Charter* is not limited to the confines of s. 2(c)(ii) of the *Bill of Rights*. The historical origins of a *Charter* right are simply one factor to consider.

The purpose of the *Charter* right is the dominant concern when tasked with delineating its scope.³³ This requires consideration of the larger objective of the *Charter*'s legal rights, which are enshrined under ss. 7–14. In the early *Charter* case law, the Supreme Court of Canada held that the purpose of the *Charter*'s legal rights was to constrain government action to ensure that the detainee is treated fairly during the pre-trial criminal process.³⁴ The *Charter*'s legal rights acknowledge that the detainee, who possesses far fewer resources than the state, has been taken into state control and is at risk of self-incrimination. The goal is to limit the investigative powers of the state. This is necessary to protect the principle against self-incrimination.

IV. THE PURPOSEFUL APPROACH TO S. 10(B) OF THE *CHARTER*

Section 10(b) of the *Charter* provides that, on arrest or detention, everyone has the right “to retain and instruct counsel without delay and to be informed of that right.” The right to counsel is among the earliest of the *Charter*'s legal rights to develop a settled case law, which delineated the contours of s. 10(b).³⁵ The early case law interpreted the right as encompassing a wide range of protections in favour of the detainee, as well as concomitant obligations on the part of the police. This included

³¹ *Hunter v Southam Inc.*, [1984] 2 SCR 145, 33 Alta LR (2d) 193 at para 16 [*Hunter v Southam*].

³² *Big M Drug Mart*, *supra* note 26 at para 16.

³³ *Ibid.*

³⁴ *Clarkson v R* [1986] 1 SCR 383 at para 26, 69 NBR (2d) 40 [*Clarkson*].

³⁵ See Steve Coughlan & Robert J Currie, “Sections 9, 10 and 11 of the Canadian *Charter*” (2013) 62 SCRL (2d) 143 at para 37 (QL) [Coughlan and Currie].

categorizing the legal protections conferred by the right into informational and implementational components, as well as recognizing the right to counsel of choice and developing a test for waiver.

A. The Informational Component

The informational component of the right to counsel provides the detainee with an opportunity to obtain basic information about the protections conferred by s 10(b). The police are required to advise the detainee of the right itself, as well as the availability of legal aid and duty counsel.³⁶ This enjoins the police from providing misinformation on the right to counsel. A breach of s. 10(b) will be made out where police belittle the legal advice the detainee has received with the goal of undermining the detainee's confidence in their relationship with counsel.³⁷

The early case law established that the right to counsel is triggered by the act of detention within the meaning of ss. 9 and 10 of the *Charter*, which includes investigative detention.³⁸ Effective community policing must allow officers to approach persons in the community to ask questions of a general nature, in which case there is no obligation to inform the citizen of their legal status or rights. However, if the conversation shifts from general inquiries to a focused investigation, the law recognizes that the individual needs immediate legal protection.³⁹

In the decision in *R v Bartle*,⁴⁰ Chief Justice Lamer recognized that, pursuant to s. 10(b), the detainee requires information about their legal rights in a timely and comprehensive manner to make an informed decision on whether to exercise their legal rights.⁴¹ As a result, "without delay" under s. 10(b) of the *Charter* means "immediately". The immediacy requirement can only be displaced by urgent and compelling circumstances, such as medical emergency or legitimate concerns for officer or public safety.⁴² The desire for investigatory and evidentiary expediency cannot suffice.⁴³

³⁶ See *R v Bartle*, [1994] 3 SCR 173 at para 18, 19 OR (3d) 802.

³⁷ See Coughlan & Currie, *supra* note 35 at para 52.

³⁸ See *R v Prosper*, [1994] 3 SCR 236 at para 41, 133 NSR (2d) 321 [*Prosper*].

³⁹ *Grant*, *supra* note 28 at para 22.

⁴⁰ *Bartle*, *supra* note 36.

⁴¹ *Ibid* at paras 20–21.

⁴² *Ibid* at para 2.

⁴³ *Prosper*, *supra* note 38 at para 42.

The detainee must be informed of their right to counsel as soon as detention arises to give meaning to the right to counsel.⁴⁴ This is highlighted by the Supreme Court of Canada decision in *R v Evans*.⁴⁵ The detainee was asked if he understood his right to counsel as read, and he replied in the negative. The officer made no attempt to explain the substance of right and proceeded with a nine-hour interview. On appeal from conviction, Justice Wilson held that, if the detainee indicates that they do not understand their rights as the police have read them, the officer must take steps to facilitate satisfactory comprehension.⁴⁶ A mechanical recitation of the right to counsel, as read from the standard *Charter* card, was insufficient given that the detainee unequivocally expressed his lack of comprehension.⁴⁷ The officers should have done more under the circumstances in order to facilitate understanding.

Pursuant to s. 10(b), the police are required to follow up or make further inquiries if the detainee demonstrates a lack of understanding about the information provided on their right to counsel. A sufficient level of understanding is necessary for a detainee to assert and exercise their legal rights effectively. In reality, the operational determinant is knowledge of the right itself: those lacking knowledge or understanding about their right to counsel will ultimately cease to have the right.⁴⁸ Insofar as s 10(b) is intended to foster fairness in the pre-trial criminal justice process, knowledge and understanding on the part of the detainee is necessary to give full effect to the right to counsel.

B. The Implementational Component

Similar to the informational component, the implementational component of the right to counsel under s. 10(b) of the *Charter* affords the detainee certain entitlements and imposes correlative obligations on the police. The implementational component recognizes that, once the detainee is informed of the right to counsel, the detainee requires an opportunity to exercise the right. From the police obligation to facilitate the right to counsel flows the concomitant “hold off” duty, which prohibits

⁴⁴ See *R v Suberu*, 2009 SCC 33, [2009] SCR 460 [*Suberu*].

⁴⁵ *R v Evans*, [1991] 1 SCR 869, 63 CCC (3) 289 [*Evans*].

⁴⁶ *Ibid* at para 39.

⁴⁷ *Ibid*.

⁴⁸ Alan Gold, “Chief Justice Lamer and the Right to Counsel under Section 10(b) of the *Charter*; an Admirable Legacy” (2000) 5 Can Crim L Rev 91 at 93 [Gold].

police from eliciting evidence from the detainee until a reasonable opportunity to consult with counsel has been provided.

This was confirmed in the seminal Supreme Court of Canada decision in *R v Manninen*.⁴⁹ In that case, the detainee invoked his right to counsel at the scene of his arrest. The officers immediately proceeded with interrogation on scene, and the detainee made inculpatory statements constituting the basis of his conviction at trial. On appeal to the Supreme Court of Canada, Justice Lamer considered that the right to counsel is intended to afford the detainee an opportunity to obtain advice on how to exercise their legal rights more generally. He concluded that the right to counsel could only be effective and meaningful if the detainee receives access to legal advice before they are questioned or otherwise required to give evidence.⁵⁰

In keeping with this, Justice Lamer determined that the right to counsel imposes a positive obligation upon police to facilitate contact with counsel. He noted that, in *Manninen*, a telephone was readily available where the detainee had been arrested, which the police had used themselves, and there were no exigent circumstances precluding the detainee's use of the telephone.⁵¹ Under the *Bill of Rights*, the detainee was only entitled to use a telephone if such a request was made and a telephone was available.⁵² The purpose of s. 10(b), however, mandated enhanced procedural protections in favour of the detainee. Under the purposive approach, s. 10(b) recognizes that, insofar as the detainee is in the control of the state, the detainee cannot realistically exercise their right to counsel unless the police provide an opportunity to do so.⁵³ A request for a telephone to contact counsel is therefore unnecessary; its provision should be standard and automatic.

The case law recognizes that, for safety reasons, police are generally not expected to provide the detainee with their own cell phone at roadside.⁵⁴ However, the case law also recognizes that circumstances may require cell phone use at roadside to facilitate contact with counsel in order to give meaning to s 10(b). This was considered by the New Brunswick Court of

⁴⁹ *R v Manninen*, [1987] 1 SCR 1233, 61 OR (2d) 736 [*Manninen*].

⁵⁰ *Ibid* at para 23.

⁵¹ *Ibid* at para 25.

⁵² *Ibid* at para 22.

⁵³ *Ibid* at para 21.

⁵⁴ *R v Taylor*, 2014 SCC 50 at para 32, [2014] 2 SCR 495 [*Taylor*].

Appeal in its decision in *R v Landry*.⁵⁵ In that case, the detainee requested to use his own cell phone to contact counsel at roadside after he was arrested for impaired driving. He was advised that he could only contact counsel at the detachment. The detainee's trial position was that he had no choice but to provide samples of his breath.

On appeal, Justice LaBlond considered that the "overarching purpose" of s. 10(b) is to avoid involuntary incrimination.⁵⁶ With respect to telephone use, Justice LaBlond stated that:

[T]he case law could not be clearer on the issue of when an accused is entitled to avail himself or herself of his or her right to counsel. The right applies immediately following arrest and reading of constitutional rights, insofar as the circumstances of the case allow. No evidence may be obtained before the right is exercised. The Supreme Court of Canada clearly stated in *R. v. Manninen*, [1987] 1 S.C.R. 1233, [1987] S.C.J. No. 41 (QL), that the right requires the police officer to allow the accused to use any available telephone... In *Manninen*, the Supreme Court cited *R. v. Dombrowski*, [1985] S.J. No. 951 (QL) (Sask. C.A.), in which the Saskatchewan Court of Appeal held there is no justification for the police to insist that the right can be exercised only upon arrival at the police station.⁵⁷

Justice LaBlond confirmed that, under the existing circumstances, the accused was entitled to use his own cell phone at roadside to contact counsel. For Justice LaBlond, the right to counsel cannot be effectively exercised unless the detainee "is in a position to receive legal advice".⁵⁸ If the accused was not entitled to avail themselves of the right to counsel immediately following arrest, s.10(b)'s purpose of protecting the principle against self-incrimination would be frustrated.

C. The Right to the Counsel of Choice

The right to counsel under s. 10(b) includes the right to consult with one's counsel of choice. This was initially recognized in the Supreme Court of Canada's decision in *R v Ross*.⁵⁹ In that case, the detainee was unsuccessful in reaching counsel via telephone, and he was not asked if he wished to contact another lawyer. On appeal, Justice Lamer affirmed that the purpose of the right to counsel is to ensure that detainees are advised of their legal

⁵⁵ *R v Landry*, 2020 NBCA 72, 2021 CarswellNB 27 [*Landry*].

⁵⁶ *Ibid* at para 20.

⁵⁷ *Ibid* at para 19.

⁵⁸ *Ibid* at para 20.

⁵⁹ *R v Ross*, [1989] 1 SCR 3, 46 CCC (3d) 129 [*Ross*].

rights and how to exercise them when dealing with the authorities. His opinion was that the purpose of s. 10(b) would be subverted if it was open to police to proceed with the investigation when the right to the counsel of choice had been clearly invoked.⁶⁰ There were no urgent circumstances requiring the police to investigate before providing an opportunity to contact counsel of choice during regular business hours the following morning.⁶¹

Under the purpose approach, s. 10(b) was interpreted as including the right to decline to speak with alternative counsel and to wait to speak with counsel of choice if counsel is not immediately available. During that time, the police are required to hold off from investigation.⁶² The detainee can only be expected to exercise s. 10(b) by contacting another lawyer if counsel of choice cannot be available within a reasonable time.⁶³ These entitlements and obligations ensure that the detainee is in a position to obtain legal advice and information, which facilitates fairness in the process and protects against the risk of self-incrimination.

D. Waiver

While the informational component of the right to counsel is triggered upon detention, the implementational obligations on the part of the police are triggered by the detainee's choice to exercise the right. The detainee in the *Manninen* decision invoked his right to counsel, but he was not afforded an opportunity to exercise the right. Justice Lamer reasoned that, where a detainee asserts their intention to exercise the right to counsel and police ignore the request by proceeding with interrogation, the detainee is likely to feel that their rights have no effect such that they must answer.⁶⁴ As a result, it could not be said that the detainee in *Manninen* actually intended to waive his right to counsel simply because he answered the questions posed by police.

However, if the detainee chooses not to exercise the right to counsel or is not reasonably diligent in exercising the right, the police's implementational obligations either do not arise or are suspended

⁶⁰ *Ibid* at para 23.

⁶¹ *Ibid* at paras 16, 21.

⁶² See *R v Willier*, 2010 SCC 37 at para 35, [2010] 2 SCR 429 [*Willier*].

⁶³ *Ross*, *supra* note 59 at para 16.

⁶⁴ *Manninen*, *supra* note 49.

altogether.⁶⁵ Under those circumstances, the police are not required to hold off and may proceed with the investigation. Given the consequences of failing to exercise the right to counsel, the Supreme Court of Canada made clear in a number of early *Charter* decisions that the threshold for a valid waiver is high.⁶⁶ Before a detainee can be said to have waived the right to counsel, the detainee must have enough information to allow them to make an informed choice on whether to exercise the right or to waive it.⁶⁷

In *R v Clarkson*,⁶⁸ the highly-intoxicated detainee responded that there was “no point” in consulting with counsel when her aunt encouraged her to contact a lawyer during police interview. On appeal from conviction, Justice Wilson considered that the purpose of the right to counsel is to ensure that the accused is treated fairly in the criminal process. In keeping with this purpose, the test for a valid waiver must encompass principles of adjudicative fairness.⁶⁹ Justice Wilson’s view was that the continued interrogation of a detainee who incriminates themselves without being aware of the consequences is incompatible with the need for fairness in the process.⁷⁰

Justice Wilson held that, for s. 10(b) purposes, waiver must be clear and unequivocal in terms of the detainee’s understanding that they are waiving a constitutional safeguard. This requires voluntarily action on the part of the detainee, which must have been based upon full knowledge of both the nature of the right and the effect that waiver will have on the right.⁷¹ Waiver of the right to counsel is only valid if it is voluntary and informed.

E. The Purposive Approach and Self-Incrimination

Justice Wilson’s reasons emphasize that adjudicative fairness is the pivotal function in the test for waiver. This underscores the importance attributed to procedural fairness by the purposive approach more generally. Under the purposive approach, s. 10(b) confers legally-protected entitlements in favour of the detainee and imposes correlative obligations on the part of the police because s. 10(b) is aimed at protecting against

⁶⁵ See *Bartle*, *supra* note 36 at para 19.

⁶⁶ See *Clarkson*, *supra* note 34; *R v Brydges*, [1990] 1 SCR 190, 1045 Alta LR (2d) 145.

⁶⁷ See *Gold*, *supra* note 48 at 97.

⁶⁸ *Clarkson*, *supra* note 34.

⁶⁹ *Ibid* at paras 19, 26.

⁷⁰ *Ibid* at para 21.

⁷¹ *Ibid* at para 24.

involuntary incrimination, which is the overarching purpose of s. 10(b).⁷² The goal is to limit the investigative power of the state to foster fairness during the pre-trial criminal process. The scope of the right to counsel must be broad enough to incorporate the necessary procedural protections to achieve that goal.

The right to counsel must therefore afford the detainee an opportunity to learn about the charge they face, as well as the limits of legitimate police power and the extent of their legal rights under the circumstances existing at the material time. This includes information on whether the detainee should or must submit to police power. The right to counsel was viewed under the *Bill of Rights* as an inconvenient barrier to the search for truth. Under the *Charter*, the right to counsel is an indispensable protector of the principle against self-incrimination, which acknowledges the autonomy and dignity of each person. The principle against self-incrimination maintains that allowing the state to employ any and all means to enforce the law would give rise to an undemocratic state in which few people would want to live.⁷³ People are not simply a vehicle through which to obtain evidence. They are vested with constitutional rights, which must be respected.

The right to counsel is necessarily a limitation on the state's investigative power. The purposive approach begins with that premise. Despite its breadth, however, the right to counsel does not prohibit self-incrimination. It provides an opportunity to consult with counsel, but it does not demand consultation.⁷⁴ The detainee is free to make their own choices, and they may waive the right to counsel so long as that waiver is voluntary and informed. The detainee is equally free to ignore any and all legal advice obtained by exercising the right to counsel. This is consistent with *Charter* values of dignity and autonomy.

V. THE BALANCING APPROACH

A diverging approach to constitutional interpretation eventually emerged in the case law, which is referred to as the “balancing approach.” While the purposive approach assesses the purpose of a *Charter* right in light of its historical, linguistic, and philosophic context, as well as the larger

⁷² See *Landry*, *supra* note 55 at para 20.

⁷³ See Alan D Gold & Michelle Fuerst, “The Stuff that Dreams are Made of! – Criminal Law and the Charter of Rights” (1992) 24 *Ottawa L Rev* 13 at 16 [Gold and Fuerst].

⁷⁴ See *Penney*, *supra* note 7 at 275.

objectives of the *Charter* itself, the balancing approach is fundamentally a balancing act. It employs an exercise whereby the interests of the individual are weighed against the interests of the state. The assessor attempts to reconcile the competing interests in order to delineate the scope of the *Charter* right. Under the balancing approach, the nature and extent of the procedural protections conferred to the individual are achieved by striking the proper balance between individual and collective interests.

The balancing approach initially emerged in a s. 10(b) decision, *R v Smith*,⁷⁵ which considered the hold off duty. The balancing approach then re-emerges in the decision in *R v Hebert*,⁷⁶ and subsequently in the interrogation trilogy. The interrogation trilogy governs the current framework for procedural safeguards available to the detainee during custodial interrogation. Use of the balancing approach has highly influenced the current legal landscape.

A. The *Smith* Decision

In *Smith*, the detainee expressed the intention to exercise his right to counsel outside of normal office hours. The private phone number for his counsel of choice was not listed in the phone book, and he decided to wait until morning to place the call, despite urging from the police. During the night, the detainee was interrogated. He invoked his right to counsel three times but was not afforded an opportunity to contact counsel.

On appeal from conviction, the issue was whether police provided the detainee with a reasonable opportunity to exercise the right to counsel. Justice Lamer noted that, when the detainee asserted his s. 10(b) right upon arriving at the detachment, the police's implementational duties were triggered. However, Justice Lamer held that such duties were suspended because the detainee had not been reasonably diligent in exercising same. While the detainee believed it was useless to call his lawyer given the late hour, it could not be said that it was impossible to contact counsel. Justice Lamer noted that defence lawyers are typically available outside of normal office hours, and calling the office number may have provided another phone number by which to reach counsel.⁷⁷

⁷⁵ *Smith*, *supra* note 4.

⁷⁶ *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1 [*Hebert*].

⁷⁷ *Ibid* at paras 12-14.

This suggests that, if the detainee had attempted to contact counsel but failed to reach him, he would have been entitled to wait until morning to call counsel again and subsequently decide whether to call another lawyer. The police would have been required to hold off from interrogation until that time. The decision not even to try to contact counsel was fatal.⁷⁸ For Justice Lamer, the fact that the detainee invoked his right to counsel repeatedly was inconsequential. A detainee who has been given a reasonable opportunity to exercise their right but who fails to do so with reasonable diligence cannot expect the police to continue to suspend their investigation.⁷⁹

In Justice Lamer's view, reasonable diligence is an essential limitation on the right to counsel; without it, the detainee would be empowered to delay the investigation endlessly, which risks the destruction or loss of evidence.⁸⁰ Justice Lamer drew a distinction between the right to counsel on the one hand and the police duty to provide an opportunity to exercise the right and to hold off from interrogation on the other. He stated that:

One who is not diligent in the exercise of his right to retain counsel does not lose this right; one can always exercise it. However, one cannot require that the police respect the duty imposed on them to cease questioning until he has had a reasonable opportunity to exercise his right. The duty imposed on the police to refrain from attempting to elicit evidence from a person until this person has had a reasonable opportunity to communicate with counsel is suspended and is not again "in force" when the arrested or the detained person finally decides to exercise his right. A different conclusion would render meaningless the duty imposed on a detained or arrested person to be diligent in the exercise of his rights. This would enable one to do exactly what this obligation seeks to prevent, that is, delaying needlessly and with impunity the investigation and, in certain cases, to allow for an important piece of evidence to be lost, destroyed or, for whatever reasons, made impossible to obtain.⁸¹

In his dissenting opinion, Justice La Forest followed *Manninen* and held that the detainee in *Smith* did not waive his right to counsel simply by answering the questions put to him by police. Pursuant to the decision in *Ross*, if the detainee invokes the right to the counsel of choice, the burden of establishing waiver rests with the Crown.⁸² The inculpatory statement in *Smith* was given after the detainee invoked the right to the counsel of choice,

⁷⁸ *Ibid* at paras 16-17.

⁷⁹ *Ibid* at para 18.

⁸⁰ *Ibid* at para 15.

⁸¹ *Ibid* at para 19.

⁸² *Ibid* at para 34-36.

and the detainee purported to give a statement “off the record.” Insofar as the police did nothing to disabuse the detainee of that notion, it could not be said that he was fully aware of the consequences of making the statement without first consulting with counsel.⁸³

Imbuing the s. 10(b) analysis with law enforcement concerns fails to confer the necessary procedural protections to safeguard the principle against self-incrimination. The detainee loses the benefit of the implementational duties, which includes the hold off duty. Justice Lamer reasoned that the detainee will not lose the right to counsel because they can always exercise it; the detainee simply cannot expect police to hold off from interrogation if the detainee is not reasonably diligent. This is a *non sequitur*. A lack of reasonable diligence ultimately amounts to an implied waiver of the right in a situation where the validity of the waiver is assessed by the state official who stands to benefit from the waiver itself. This approach fails to recognize that, if police are permitted to interrogate without any correlative duty to implement the right invoked, the detainee is effectively powerless to exercise their rights.

Justice Lamar’s approach is fundamentally a balancing act, which gives effect to law enforcement concerns and investigative expediency. This is in direct conflict with the purpose of the *Charter*’s legal rights. Justice Lamer’s application of the balancing approach is further complicated by the fact that he did not outline what constitutes reasonable diligence in exercising the right to counsel. A finding of a lack of reasonable diligence will depend on the circumstances of the case, but little assistance was afforded to lower courts in making that determination. This cast the scope of the detainee’s right to counsel into ambiguity, which rendered the law on s. 10(b) somewhat uncertain and unpredictable. What was certain, however, was that the detainee would lose their right to counsel if the detainee did not indicate a desire to exercise the right and take positive steps to exercise same expeditiously. This fails to recognize fully the power imbalance inherent in custodial detention.

B. The Right to Silence

Section 7 of the *Charter* provides that:

⁸³ *Ibid* at para 31.

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to silence is closely related to the right to counsel. One of the most important functions of legal advice upon detention is to ensure that the detainee understands their rights, and chief among them is the right to silence.⁸⁴ A crucial piece of legal advice the detainee will receive from counsel on arrest or detention is the right to remain silent during interrogation.

Similar to the right to counsel, the right to silence safeguards the principle against self-incrimination by entitling the detainee not to incriminate themselves with their own words.⁸⁵ When faced with interrogation, the detainee may choose to say nothing and they cannot be compelled to speak. The trier of fact cannot draw an inference of guilt from the fact that the detainee remained silent during interrogation. Even if the circumstances of an accusation cry out for an explanation, silence is not evidence to be used against the detainee.⁸⁶

This is because the right to silence hinges on the premise that the individual cannot be forced to assist the state in making out the case against them. The right acknowledges that compelling self-incrimination amounts to treating the detainee as a mere means to the state's objective of law enforcement.⁸⁷ In order to recognize the individual's dignity and autonomy, the right to silence is triggered whenever the coercive power of the state is brought to bear upon the individual during interrogation.⁸⁸

Unlike the right to counsel, the right to silence did not attract a substantial body of Supreme Court of Canada jurisprudence immediately following the entrenchment of the *Charter*. In 1988, the Ontario Court of Appeal held that the right to silence was a well-settled principle in its decision in *R v Woolley*.⁸⁹ The Court recognized that, at common law, the detainee was under no legal obligation to speak to the authorities during the investigate stage of the criminal process. The Court made clear that the

⁸⁴ *Ibid* at para 109.

⁸⁵ *Ibid* at para 20.

⁸⁶ *Ibid* at para 20.

⁸⁷ See Hamish Stewart, "The Confessions Rule and the *Charter*" (2009) 54 McGill L J 517 at 521 [Stewart].

⁸⁸ Gold & Fuerst, *supra* note 73 at para 5.

⁸⁹ *R v Woolley*, (1988), 40 CCC (3d) 531, 25 OAC 390 (CA) [Woolley].

right to silence constitutes a basic tenant of the criminal justice system such that it comes within the purview of s. 7 of the *Charter*.⁹⁰

C. The Hebert Decision

The Supreme Court of Canada initially recognized the right to silence under s. 7 of the *Charter* in the *Hebert* decision. In that decision, Justice McLachlin reinforced the balancing approach to the interpretation of *Charter* rights, which emerged in the *Smith* decision.

In *Hebert*, Justice McLachlin examined the historical origins of the right in keeping with the purposive approach. She concluded that the right to silence is informed by the common law privilege against self-incrimination and the voluntary confessions rule. She noted that, unlike the right to silence, the privilege against self-incrimination arises only at trial by enjoining the state from forcing the accused to testify.⁹¹ Similarly, however, the right to silence and the privilege against self-incrimination are premised on the proposition that it is the Crown's obligation to prove its case; the accused cannot be compelled to assist the state in doing so.⁹²

The voluntary confessions rule shares certain characteristics with the right to silence, but bears important differences. The voluntary confessions rule is primarily concerned with the reliability of evidence at trial. The common law has long recognized that coercive police tactics do not extract truthful statements from detainees, but are wont to elicit statements designed to alleviate the pressure of interrogation so as to bring about its conclusion. Pursuant to the voluntary confessions rule, coerced confessions are inadmissible at trial due to their inherent unreliability.⁹³ The issue is whether the accused's decision to speak to the police was freely made and prompted by personal reasons, or otherwise arose as a result of coercive and oppressive police conduct, such as threats, promises, or violence.⁹⁴

Both the privilege against self-incrimination and the voluntary confessions rule are concerned with the choice to remain silent when the power of the state is brought to bear against the individual. In terms of the scope of the right to silence under the *Charter*, however, the privilege against

⁹⁰ *Ibid* at paras 19-20.

⁹¹ *Hebert*, *supra* note 76 at para 19.

⁹² *Ibid* at para 101.

⁹³ See Stewart, *supra* note 87 at 522.

⁹⁴ *Ibid* at 544.

self-incrimination and the voluntary confessions rule could not be determinative. Echoing Justice Le Dain's comments in the *Therens* decision, Justice McLachlin reasoned that it would be incorrect to assume that the fundamental guarantees of the *Charter* are to be interpreted according to the law as it stood in 1982.⁹⁵ The *Charter* fundamentally changed the Canadian legal landscape, and to define *Charter* rights in accordance with their common law and statutory antecedents denies the supremacy of the constitution.⁹⁶ As a result, Justice McLachlin held that the scope of the right to silence under s. 7 of the *Charter* extends beyond the relevant common law doctrines.⁹⁷

Justice McLachlin concluded that the right to silence cannot be limited to the trial stage of the criminal process. A person whose liberty is in jeopardy because of detention cannot be forced by the state to give evidence against themselves. The right to silence is informed by *Charter* values, such as dignity and autonomy. Under the *Charter*, compelled statements are not rejected simply because they are unreliable, but because the detainee is importantly not a resource to be exploited for law enforcement purposes. Thus, the right to silence under s. 7 must be available during custodial interrogation. The protection conferred by a legal system which grants immunity from self-incrimination at trial, but offers no protection with respect to pre-trial statements would be illusory.⁹⁸ The right to silence must include not only a negative right to be free from coercive and oppressive investigative tactics, but must denote a positive right to make a free choice to remain silent or to speak during interrogation.⁹⁹

The right to silence under s. 7 of the *Charter* therefore mandates that, where the detainee chooses not to make a statement, the state is precluded from using its superior power to override the detainee's will so as to negate that choice.¹⁰⁰ The choice is defined objectively: where the right to silence is invoked, the focus shifts to the conduct of the authorities to determine whether police effectively deprived the detainee of the right to choose to speak.¹⁰¹

⁹⁵ *Hebert*, *supra* note 76 at para 73.

⁹⁶ *Ibid* at paras 26, 75.

⁹⁷ *Ibid* at para 104.

⁹⁸ *Ibid* at paras 102-104.

⁹⁹ *Ibid* at para 111.

¹⁰⁰ *Ibid* at para 122.

¹⁰¹ *Ibid* at para 126.

However, Justice McLachlin held that s. 7 does not require that police act in a manner so as to protect the detainee from making a statement, and s. 7 does not enjoin police from using means of persuasion, which fall short of coercion, to encourage the detainee to speak.¹⁰² Justice McLachlin reasoned that a right to silence, which could only be discharged by waiver, would be “absolute” and overshoot the purpose of the right, thereby expanding it beyond its intended scope.¹⁰³ In Justice McLachlin’s view, s. 7 simply requires that police allow the detainee to make an informed choice on whether to speak by providing an opportunity for the detainee to exercise their right to counsel.¹⁰⁴

In her reasons, Justice McLachlin employed some aspects of the purposive approach to delineate the scope of the protections conferred under s. 7, such as considering the historical origins of the right to silence. Her analysis, however, was importantly a balancing exercise. While Justice McLachlin noted that the *Charter’s* legal rights are aimed at limiting the superior power of the state vis-a-vis the individual, she invoked the internal balancing component of s. 7 to support the position that s. 7 seeks to strike a balance between the individual’s interests and those of the state. She noted that s. 7 is not absolute; the wording acknowledges that the state may deprive an individual of certain interests in conformity with the principles of fundamental justice. Justice McLachlin reasoned that the purpose of s. 7 is to balance the individual’s interest in protection from unfair use of state power with the state’s interest in maintaining power to deprive life, liberty, and security of the person.¹⁰⁵ On that basis, Justice McLachlin saw fit to consider the state’s interest in law enforcement when delineating the scope of the right to silence.

In her minority opinion, Wilson J took issue with McLachlin J’s approach to the right to silence. Wilson J’s opinion was that, in order to determine whether police conduct offends principles of fundamental justice contrary to s 7, the focus should be on the police conduct and not on the state’s objective of law enforcement.¹⁰⁶

¹⁰² *Ibid* at para 110.

¹⁰³ *Ibid* at para 129.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at paras 119-121.

¹⁰⁶ *Ibid* at para 8.

Justice Wilson followed the decision in *Big M Drug Mart* and reaffirmed that *Charter* rights must be given a generous interpretation, which is aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. In her view, it was inappropriate to qualify a *Charter* right by balancing the interests of the state against the interests of the right holder. She stated that it was contrary to the purposive approach to inject into the analysis of the right's scope justificatory considerations for placing limits upon the right.¹⁰⁷ Justice Wilson would have held that the interests of the state are relevant only to the remedial stage of the analysis after the scope of the right has been considered and a breach of the right has been established. She made clear that the state's interests have no bearing on delineating the scope of the right itself.¹⁰⁸

Even in the context of s. 7 of the *Charter*, which includes an internal balancing component, employing a balancing exercise to delineate the scope of legal rights is problematic. The language of s 7 provides that the state may only deprive an individual of their right to life, liberty and security of the person in accordance with the principles of fundamental justice. In *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*,¹⁰⁹ Chief Justice Lamer held that the meaning of "principle of fundamental justice" must be determined by reference to the interests that s. 7 is meant to protect. Principles of fundamental justice are found in the basic tenants of the legal system; they do not lie in the realm of public policy or public interest, but are contained within the inherent domain of the judiciary as guardian of the justice system and the constitution.¹¹⁰ This indicates that the state's interest in law enforcement does not constitute a principle of fundamental justice, which should influence the interpretation of the right to silence. Nor could it be used to justify a restrictive interpretation of the right to silence.

It is implicit in the balancing exercise that s. 7 intends to maintain the state's ability to use its law enforcement powers in a fair manner. A finding that s. 7 supports unfair uses of state power would violate principles of fundamental justice. Even if s. 7 only supports fair uses of state power, it appears unfair for interrogation to proceed where the detainee has positively invoked their right to silence even where the state's means of persuading

¹⁰⁷ *Ibid* at paras 7-8.

¹⁰⁸ *Ibid* at para 9.

¹⁰⁹ *Reference re s 94 of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 69 BCLR 145 [*Reference re MVA BC*].

¹¹⁰ *Ibid* at paras 30, 37.

the detainee to speak are “legitimate.” Proceeding with interrogation under those circumstances suggests very heavily that the right to silence has little meaning and cannot be exercised effectively. Any distinction between legitimate means of persuasion and negating the detainee’s choice to speak arguably borders on semantics. If the state’s interest lies in its law enforcement power and the individual’s interest lies in seeing that power limited, it is unlikely that these competing interests can be truly reconciled.

D. The Interrogation Trilogy

Despite Justice Wilson’s cautions, the balancing approach to the interpretation of the *Charter*’s legal rights did not end with the decision in *Hebert*. As noted, the balancing approach was employed as the interpretative tool of choice for analyzing the legal rights enshrined under ss. 7 and 10(b) of the *Charter* in the interrogation trilogy.

1. The *Oickle* Decision

In *Oickle*, the first decision in the interrogation trilogy, Justice Iacobucci considered the voluntary confessions rule in light of the *Charter*. He noted that, while s. 10 is triggered only upon arrest or detention, the confessions rule applies whenever an individual speaks with a person in authority. An involuntary statement is strictly inadmissible under the confessions rule, but illegally-obtained evidence may still be admitted at trial under s. 24(2) of the *Charter*.¹¹¹ Justice Iacobucci determined the voluntary confessions rule constitutes a protection offered at common law, which extends beyond the protections guaranteed by the *Charter*. His opinion was that the common law rule is broader than the *Charter*’s guarantees. The *Charter* is not an exhaustive catalogue of rights, but a floor below which the law cannot fall.¹¹²

Justice Iacobucci’s view of the *Charter* as a minimal source of protections underscores the impetus to give a broader definition to the common law rule. In his view, the confessions rule is not strictly concerned with evidential reliability; like the *Charter*’s legal rights, it is imbued with concerns of adjudicative fairness. Interestingly, Justice Iacobucci’s reasons make little reference to the right to silence, yet his analysis of the voluntary confession’s rule was evocative of Justice McLachlin’s analysis of the right to silence in *Hebert*.

¹¹¹ *Oickle*, *supra* note 5 at para 30.

¹¹² *Ibid* at paras 31-32.

For Justice McLachlin, the right to silence protects the detainee's power to make a free and meaningful choice on whether to speak to police. For Justice Iacobucci, the voluntary confessions rule overlaps considerably with that purpose. His opinion was that, like the right to silence, the voluntary confessions rule is a manifestation of the broader principle against self-incrimination.¹¹³ *Quid pro quo* inducements are impermissible because the detainee may confess so as to gain the benefit offered by the interrogator rather than based upon the personal desire to confess.¹¹⁴ The *quid pro quo* is prohibited because it effectively empowers the state to negate the detainee's free choice to decide whether to speak with police. According to the reasons in *Hebert*, this is exactly what the right to silence is intended to protect.

Justice Iacobucci's approach to the voluntary confessions rule expanded the rule's scope; however, the procedural protections available to the detainee remained largely unchanged. The rule clearly prohibited coercive police tactics, but the threshold for coercion and oppression is very high. Coercive conduct is improper only when it is strong enough to raise a reasonable doubt as to whether the will of the detainee has been overborne.¹¹⁵ Subjecting the detainee to utterly intolerable conditions or offering inducements strong enough to produce an unreliable confession will meet this threshold, but eliciting a statement under false pretenses will not.

Justice Iacobucci held that confronting the detainee with inadmissible or fabricated evidence to convince them to speak will not offend the rule. So long as there is no *quid pro quo* or egregious conduct, coercive behaviour on the part of police may be permitted under the voluntary confessions rule. Indeed, Justice Iacobucci found that the detainee's statements in *Oickle* were voluntary despite the fact that the police subjected him to investigative tactics which arguably constituted inducements or threats, including making suggestions of packing/bundling charges and offering psychiatric help, as well as threatening to interrogate the detainee's girlfriend if he did not confess.

2. *The Singh Decision*

¹¹³ See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence*, 4th ed (Markham: LexisNexis Canada Inc., 2014) at §8.43 [Lederman, Bryant & Fuerst].

¹¹⁴ *Oickle*, *supra* note 5 at para 56.

¹¹⁵ *Ibid* at para 57.

The low threshold under the voluntary confessions rule is important for *Charter* purposes given the doctrinal muddling which occurred in *Singh*. Justice Charron employed the balancing approach to expand upon Justice McLachlin's analysis of the right to silence in *Hebert*. The detainee in *Singh* repeatedly expressed that he did not wish to discuss the incident constituting the subject matter of the investigation with police, invoking his right to silence a total of 18 times during interrogation.¹¹⁶ On appeal, the detainee invited the Supreme Court of Canada to hold that s. 7 includes a hold off duty whereby police cease questioning if the right to silence is invoked. Justice Charron rejected that interpretation on the grounds that it ignored the "critical balancing of state and individual interests which lies at the heart of this Court's decision in *Hebert*."¹¹⁷

Justice Charron held that s. 7 recognizes the individual's right not to speak; unlike s. 10(b), it does not confer the right not to be spoken to by state authorities.¹¹⁸ Justice Charron reasoned that the right to silence is, by its very nature, exercised differently from the right to counsel. While the detainee is dependent upon police to facilitate the right to counsel, exercising the right to silence is fully within the control of the detainee. Justice Charron reasoned that hold off duties and waiver requirements are therefore unnecessary. In Justice Charron's view, the law recognizes the detainee's freedom of choice, but it was their responsibility to decide to speak or to remain silent.

The distinction between being made to listen and being forced to speak allowed Justice Charron to interpret the right to silence in a manner which gave effect to the state's interest in law enforcement.¹¹⁹ She characterized the detainee as an important, fruitful source of information in the state's search for truth. While detention triggers the detainee's immediate need for protection, the interests of the state and society more broadly mandate that the police are empowered to "tap this valuable source."¹²⁰ For Justice Charron, the power to use legitimate means of persuasion to encourage the

¹¹⁶ *Singh*, *supra* note 3 at para 58.

¹¹⁷ *Ibid* at paras 6-7.

¹¹⁸ *Ibid* at para 28.

¹¹⁹ See Lisa Dufrainmont, "The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law" (2011) 54 SCRL (2d) 1 at para 31 [Dufrainmont].

¹²⁰ *Singh*, *supra* note 3 at para 45.

detainee to speak gave effect to the “critical” balance between individual and societal interests.¹²¹

Justice Charron held that whether persuasion is legitimate would be assessed under the voluntary confessions rule. She reasoned that the common law rule denotes respect for individual freedom of will and overall fairness in the process by supporting the detainee’s right to make a meaningful choice on whether to speak with a person in authority.¹²² Where a person in authority interrogates a detainee, the voluntary confessions rule and the right to silence would be functionally equivalent such that a finding of voluntariness would be determinative of the s. 7 issue.¹²³

Justice Charron cautioned that voluntariness is highly fact-driven. She recognized that, in some cases, continued interrogation in the face of repeated assertions of the right to silence would effectively deny the detainee’s *Charter* rights and call into question the voluntariness of the statement made. However, Justice Charron made clear that the frequency with which the right is asserted only constitutes part of the analysis and is not itself determinative. She held that the ultimate question is whether the accused exercised their free will by choosing to make a statement.¹²⁴ An application of this approach to the right to silence led Justice Charron to find that the detainee’s rights in *Singh* had not been breached. This gave rise to a very strong dissent.

In his dissenting opinion, Justice Fish took issue with the conflation of the right to silence and the voluntary confessions rule. In his view, the purposive approach made plain that the right to silence under s. 7 was not eclipsed by the voluntary confessions rule under *Oickle*.¹²⁵ Justice Fish’s opinion was that the right to silence extends beyond the common law rule because it rests on a different foundation of principles. Even under its broader formulation in *Oickle*, the voluntary confessions rule remained primarily concerned with the reliability of evidence. Under the purposive approach, the *Charter*’s aim was to constrain government action, which is essential for a democratic society in which the basic dignity of all persons is recognized.¹²⁶

¹²¹ *Ibid* at para 47.

¹²² *Ibid* at paras 30, 35.

¹²³ *Ibid* at paras 37, 39.

¹²⁴ *Ibid* at para 53.

¹²⁵ *Ibid* at para 77.

¹²⁶ *Ibid* at paras 56, 76.

For Justice Fish, it was the Court's duty to ensure that the right to silence is respected by interrogators once it has been unequivocally asserted. He stated that the right to silence cannot be disregarded by police or insidiously undermined as an investigative stratagem.¹²⁷ Given the low threshold for voluntariness under the voluntary confessions rule, it could not be said that a confession passing common law muster invariably represents a free and meaningful choice to speak to the police for the purposes of the *Charter*. In Justice Fish's view, the majority opinion's concern with police powers was incongruous with the approach mandated by the *Charter*. Justice Fish stated that:

The work of the police would be made easier (and less challenging) if police interrogators were permitted to undermine the constitutionally protected rights of detainees, including the right to counsel and the right to silence – either by pressing detainees to waive them, or by "unfairly frustrat[ing]" their exercise. More draconian initiatives might prove more effective still. Nonetheless and without hesitation, I much prefer a system of justice that permits the effective exercise by detainees of the constitutional and procedural rights guaranteed to them by the law of the land. The right to silence, like the right to counsel, is in my view a constitutional promise that must be kept.¹²⁸

The rights enshrined in the *Charter* were not given constitutional status on the condition that they remain unexercised, lest the investigation of crime is impeded.¹²⁹ In the *Manninen* decision, the Court acknowledged that, where the right to counsel is invoked and police proceed with interrogation, the detainee will conclude that their rights have no effect such that they must answer. This applies equally to the right to silence. Detainees who are left alone to face interrogators, who persistently ignore assertions of the right to silence, are powerless and bound to feel that their rights have no meaning such that they have no choice but to speak.¹³⁰ Justice Fish's opinion was that there was no support in the common law for the proposition that the police may press detainees to waive their *Charter* rights or to frustrate deliberately their effective exercise. On a purposive approach, the policy of the law is to facilitate, not to frustrate, the effective exercise of *Charter*

¹²⁷ *Ibid* at para 57.

¹²⁸ *Ibid* at paras 96-97.

¹²⁹ *Ibid* at para 87.

¹³⁰ *Ibid* at para 81.

rights.¹³¹ Justice Fish would have allowed the detainee's appeal from conviction.

The combined effect of the decisions in *Oickle* and *Singh* dictates that the right to silence provides no protection beyond that already offered by the voluntary confessions rule. The *Charter* right was entirely subsumed by the common law rule of evidence. Interestingly, this is contrary to Justice McLachlin's opinion in *Hebert* that the scope of the right to silence should extend beyond the relevant common law doctrines.¹³² The doctrinal muddling in *Singh* results in narrowed protection against the risk of self-incrimination. In the decision in *R v McKay*,¹³³ Justice Duval questioned the efficacy of the right to silence in the wake of the *Oickle* and *Singh* decisions, noting that:

Other than covering his ears and standing mute in response to anything said by the police, how is the detained person to exercise his/her right to remain silent? How long is he to be detained in an interview room after he has stated that he has nothing to say while police persist with an interrogation? At what point in time will the assertion of a right to remain silent be respected by ceasing questioning?¹³⁴

Under the authority of s. 503 of the *Criminal Code*, police are empowered to hold a detainee for up to 24 hours. During that time, police are permitted to persuade the detainee to speak so long as the persuasion is "legitimate." *Oickle* and *Singh* addressed disconcerting police conduct, which pushed the line between persuasion and coercion, but such conduct was endorsed as legitimate by the Court.¹³⁵ This suggests that police are permitted to exploit emotions and conscience, as well as family or romantic ties. A confession may be voluntary if the interrogation continues for hours over and above the detainee's protests that they wish to remain silent. Sustained efforts to override the assertion of the right to silence, to obtain a confession "no matter what," are acceptable.¹³⁶ 24 hours is a very long time for the detainee to exercise their free choice to withstand these investigative tactics.

3. *The Sinclair Decision*

¹³¹ *Ibid* at paras 71 & 87.

¹³² *Hebert*, *supra* note 76 at para 104.

¹³³ *R v McKay*, 2003 MBQB 141, 175 Man R (2d) 121 [*McKay*].

¹³⁴ *Ibid* at para 100.

¹³⁵ See Dufraimont, *supra* note 119 at para 40.

¹³⁶ See Don Stuart, Faculty of Law, Queen's University, Annotation of *R v Singh* 2007 SCC 48, [2007] 3 SCR 405 [Stuart].

In *Sinclair*, the Supreme Court of Canada further constrained the protections available during custodial interrogation. On appeal, the detainee's position was that s. 10(b) gives rise to a duty on the part of the police to hold off from questioning where a detainee asserted the desire to speak with counsel after previously exercising the right. The detainee also contended that s. 10(b) requires police to facilitate requests for counsel's presence during interrogation. The detainee submitted that the plain wording of s. 10(b) did not restrict the right to initial, preliminary consultation, but affords ongoing protection, similar to the *Miranda* rights, which included hold off duties and the right to speak with counsel at any time.¹³⁷ The Crown's position on appeal was that s. 10(b) concerns only a specific point in time, not a continuum.¹³⁸

In *Hebert*, Justice McLachlin justified a balancing approach to the right to silence based upon s. 7's internal balancing component. Despite the absence of an internal balancing component contained in s. 10(b), the majority in *Sinclair* applied the balancing approach to the right to counsel. Chief Justice McLachlin and Justice Charron purported to apply a purposive approach to construe s. 10(b), but their analysis hinged on balancing the individual's interests against those of the state. They reasoned that, in defining the contours of s. 10(b) of the *Charter* "consideration must be given not only to the protection of the rights of the accused but also to the societal interest in the investigation and solving of crimes."¹³⁹

For Chief Justice McLachlin and Justice Charron, the scope of the right to counsel had to strike a balance between the state's interest in law enforcement and the detainee's interest in being left alone.¹⁴⁰ They stated that the purpose of the right to counsel is to provide preliminary advice on the right to silence so that the decision to speak with police is free and informed. Section 10(b) of the *Charter* simply gives the detainee the opportunity to access legal advice relevant to that choice.¹⁴¹

Chief Justice McLachlin and Justice Charron held that s. 10(b) is satisfied by a one-time-only consultation with counsel, after which police are

¹³⁷ See *Michigan v Mosley*, 423 US 96 at 103, 96 S Ct 321 (US Sup Ct 1975) [*Michigan v Mosley*].

¹³⁸ *Sinclair*, *supra* note 5 at para 21.

¹³⁹ *Ibid* at para 63.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*. at paras 24–25.

free to question the detainee. The detainee is only entitled to exercise s. 10(b) a second time where a reasonably-observable change in circumstances makes re-consultation necessary to fulfill the purpose of s. 10(b) to inform the detainee of the right to silence, such as a change in the jeopardy or where there is reason to believe that the detainee did not understand the initial advice received from counsel.¹⁴² Chief Justice McLachlin and Justice Charron held that s. 10(b) does not afford the right to counsel's presence during interrogation. They reasoned that recognizing protections such as those conferred by American law would upset the proper balance between the respective interests of the state and those of the individual.¹⁴³

Under Chief Justice McLachlin and Justice Charron's approach, it is assumed that the initial legal advice given by counsel was sufficient. A simple request for re-consultation, without more, is not enough to trigger police implementational duties to facilitate the right to counsel and to hold off from investigation. Largely, the police are entitled to assume that their duties have been satisfied following a single consultation, even where the jeopardy is serious and the detainee consulted with counsel for only a few minutes.¹⁴⁴ As noted, re-consultation will only be facilitated where there is some observable change in the circumstances, which is assessed by the interrogating officer himself. This gives rise to the possibility that the right to re-consultation will only be recognized on a *voire dire*. An *ex post facto* acknowledgement of the right does little to provide sufficient protection to the detainee, especially since any inculpatory statement made by the detainee may still be admitted at trial under s. 24(2) of the *Charter*.

The majority's interpretation of the right to counsel gave rise to two dissenting opinions. In his opinion, Justice Binnie noted that the majority's approach disproportionately favoured the interests of the state in the investigation of crime over the rights of the individual.¹⁴⁵ He felt that the majority conflated the right to silence and the right to counsel, thereby resulting in an unduly impoverished view of s. 10(b), which belies the liberal, generous interpretation applied in earlier *Charter* case law.¹⁴⁶ Justice Binnie noted that the right to counsel was intended to ensure fair treatment in the criminal process. The analysis to be applied must consider the

¹⁴² *Ibid* at paras 50-52, 57.

¹⁴³ *Ibid* at para 38.

¹⁴⁴ See Coughlan & Currie, *supra* note 35 at para 63.

¹⁴⁵ *Sinclair*, *supra* note 5 at para 77.

¹⁴⁶ *Ibid* at para 84.

integrity of the justice system rather than focusing on the need for short-term results in the interrogation room. Justice Binnie felt that the six minutes of legal advice enjoyed by the detainee in connection with a murder charge could hardly be said to exhaust the right to counsel.¹⁴⁷

In their separate dissenting opinion, Justices LeBel and Fish stated that the majority's interpretation placed limitations on s. 10(b), which were inconsistent with its purpose.¹⁴⁸ In their view, there was nothing to suggest that the phrase "on arrest or detention" limited s. 10(b) to a single point in time. Read in its entirety, the right signified ongoing entitlement to legal assistance.¹⁴⁹ This was evidenced by the French "*l'assistance d'un avocat*", which is triggered "*en cas d'arrestation*". *L'assistance* connoted a broader role for counsel than simply advising the detainee to "keep quiet" during interrogation. As such, s. 10(b) could not be confined to a single consultation for the sole purpose of informing the detainee to remain silent. Such an interpretation was minimalistic and redundant in terms of the s. 7 right to silence. It suggested that the role of counsel could be achieved by playing for the detainee a recorded message on an answering service, which instructs the detainee to remain silent.¹⁵⁰

An interpretation of s. 10(b) which conceives of the right in such a way that it could be replaced with a recording undermines the integrity of the right. The role of defence counsel under s. 10(b) should be broader than the majority would have it. The advice given by counsel at the pre-trial stage is crucial; the events surrounding detention determine whether the detainee can be charged, prosecuted, and convicted. By prohibiting the detainee from consulting with counsel at this time, the majority recognizes a new police power of virtually unfettered access for the purposes of seemingly endless interrogation in the name of law enforcement.

The result is that the constitution empowers the police to compel the detainee to speak until a confession is obtained, which undermines the effective exercise of s. 10(b). For Justices LeBel and Fish, to suggest that the right to counsel and its exercise must be interpreted so as to assist the state in securing a conviction "turns the system of criminal justice on its head."¹⁵¹

¹⁴⁷ *Ibid* at para 79, 83.

¹⁴⁸ *Ibid* at para 170.

¹⁴⁹ *Ibid* at paras 145-47.

¹⁵⁰ *Ibid* at para 151.

¹⁵¹ *Ibid* at para 128.

In their view, if the effective exercise of the right to counsel truly constitutes a threat to law enforcement such that the two must be reconciled, it is the system of justice, not the right to counsel, which should be openly and honestly questioned.¹⁵²

4. The Culmination of the Balancing Approach

The majority opinion in *Sinclair* represents the culmination of the balancing approach, which displaced the purposive approach as the interpretive tool of choice to analyze the *Charter's* legal rights in the interrogation trilogy. Since the Supreme Court of Canada handed down the interrogation trilogy, the balancing approach has been applied in the context of arbitrary detention cases under s. 9 of the *Charter* and unlawful search cases under s. 8. In *R v Grant*,¹⁵³ Chief Justice McLachlin and Justice Charron stated that the ambit of detention for constitutional purposes is informed by the need to safeguard the individual's choice not to cooperate with the police without impairing effective law enforcement. In *R v Saeed*,¹⁵⁴ Justice Moldaver recognized warrantless penile swabs as a valid search under s. 8 on the grounds that the state's interest in law enforcement outweighs the individual's interest in privacy.

The easy manner with which the Supreme Court of Canada continued to embrace the balancing approach is troubling. Justices LeBel and Fish stated in the *Sinclair* decision that the interrogation trilogy resulted in significant and unacceptable consequences for the constitutional rights triggered upon detention.¹⁵⁵ Justice Binnie expressed that the majority tightened "the noose" around *Charter* rights such that police are afforded more power over the detainee than the *Charter* actually intended.¹⁵⁶ In the aftermath of the interrogation trilogy, the detainee may be detained, isolated, and interrogated for hours on end, during which time the interrogator may ignore assertions of the right to silence and the right to counsel. Interrogation amounts to an endurance contest, a battle of the wills, in which the police hold all the important legal cards.¹⁵⁷

¹⁵² *Ibid* at para 204.

¹⁵³ *Grant*, *supra* note 28.

¹⁵⁴ *R v Saeed* 2016 SCC 24, [2016] 1 SCR 518 [*Saeed*].

¹⁵⁵ *Sinclair*, *supra* note 5 at para 180.

¹⁵⁶ *Ibid* at para 84.

¹⁵⁷ *Ibid*.

The balancing approach is therefore problematic from a theoretical and practical perspective. It violates established constitutional norms and leaves the detainee with diminished protections, which is contrary to the purpose of the *Charter's* legal rights. This results in an unworkable approach to constitutional interpretation.

VI. THEORETICAL PROBLEMS WITH THE BALANCING APPROACH

From a theoretical perspective, the balancing approach is problematic due to the very act of balancing itself. Giving weight to societal and state interests at the stage of delineating the scope of legal rights, rather than at the later stage of remedial analysis, is contrary to established modes of constitutional analysis.¹⁵⁸

Balancing interests occurs as a matter of course under ss. 1 and 24 of the *Charter*. This was made clear in the seminal s. 1 decision in *R v Oakes*,¹⁵⁹ as well as the *Grant* decision on s. 24(2). Since the Supreme Court of Canada's decision in *Oakes*, *supra*, analysis under s. 1 has followed a standard form. First, the scope of the right is determined according to its purpose. There is no balancing at the delineation stage. The issue is then whether an infringement of the right is established. If so, the analysis shifts to the remedial stage. At that stage, the issue is whether the infringement can be saved under s. 1 of the *Charter*, which provides that the state may enact *Charter*-infringing laws so long as those laws can be justified in a free and democratic society. The Court in *Oakes* held that an infringing law is justified if the state can prove that: the limit imposed on the right is prescribed by law, the limit supports a pressing and substantial objective, the limit is minimally impairing, and the limit is proportional in that the associated benefits outweigh its costs.

The "prescribed by law" requirement may preclude an application of s. 1 in the context of *Charter* breaches arising during custodial interrogation. A limitation is prescribed by law within the meaning of s. 1 if it is expressly provided by statute or regulation, or otherwise results by necessary implication from the terms of a statute, regulation, or its operating requirements. A prescribed limitation may also result from the application

¹⁵⁸ MacDonnell, *supra* note 6 at paras 1, 4.

¹⁵⁹ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

of a common law rule.¹⁶⁰ When police questioning creates a coercive environment or frustrates access to counsel, such actions do not constitute a limitation prescribed by law. Police have statutory and common law powers, but exerting undue pressure on a detainee to elicit a confession is not an action undertaken in the execution of a statutory or regulatory duty, and it does not result from the application of a common law rule.¹⁶¹ The justificatory analysis of s. 1 is largely unavailable unless statutory police powers are squarely at issue.¹⁶²

In the context of the *Charter's* legal rights, the remedial analysis will typically involve application of ss. 24(1)-(2). Section 24(1) of the *Charter* furnishes courts of competent jurisdiction with the discretion to grant such relief “as the court considers appropriate and just in the circumstances.” Whether a mistrial should be granted, for example, involves balancing the injustice inflicted upon the accused as a result of the *Charter* breach with the seriousness of the offence and the public’s interest in law enforcement.¹⁶³ Under s. 24(2), illegally-obtained evidence may be excluded from trial if its admission would bring the administration of justice into disrepute. Pursuant to the decision in *Grant*, the court is required to weigh three factors: the seriousness of the *Charter*-infringing conduct, the impact on the accused’s *Charter*-protected interests, and society’s interest in adjudication on the merits.¹⁶⁴ The remedial analysis under s. 24 of the *Charter* hinges on balancing the state’s interests against those of the individual.

Regardless of whether the remedial analysis occurs by way of ss. 1 or 24, standard *Charter* interpretation reserves balancing interests for the remedial stage. As Justice Wilson noted in her dissenting opinion in *Hebert*, it is inappropriate to qualify a *Charter* right by balancing the interests of the state against it.¹⁶⁵ Imbuing the analysis with societal or state interests imposes an internal limitation on the *Charter* right, which is inconsistent with the very nature of individualistic rights themselves. The *Charter's* substantive

¹⁶⁰ See *Therens*, *supra* note 23 at para 60.

¹⁶¹ See *Hebert*, *supra* note 76 at para 141

¹⁶² See MacDonnell, *supra* note 6 at para 2.

¹⁶³ *R v Burke*, 2002 SCC 55, [2002] 2 SCR 857 at para 75 [*Burke*].

¹⁶⁴ See *Grant*, *supra* note 28 at paras 72-86.

¹⁶⁵ See *Hebert*, *supra* note 76 at para 7.

guarantees are simply not designed to protect state and collective interests.¹⁶⁶

While each *Charter* right must necessarily have an outer boundary, the scope of the right must be considered in light of its purpose.¹⁶⁷ Justice Dickson held in *Big M Drug Mart*, that the purpose of a right must be assessed with a view to the larger objectives of the *Charter* itself as well as the meaning and purpose of other related rights and freedoms.¹⁶⁸ Such related rights and freedoms does not include the state's interest in law enforcement. Under the purposive approach, the case law has consistently held that the purpose of the *Charter's* legal rights is to acknowledge the vulnerable position of the detainee by limiting the investigative powers of the state to ensure procedural fairness.¹⁶⁹ Importantly, locating the boundary of the *Charter's* legal rights before the point at which their effective exercise could restrict the state's investigative power substantially undermines the purpose of the *Charter* in its entirety. The state's interests should have no bearing on delineating the scope of the *Charter* right and should be reserved for the remedial analysis.

Adopting an approach to *Charter* interpretation which is contrary to established constitutional theory raises the issue of the court's role. The concern with police powers and law enforcement bespeaks the proposition that there is no need to augment the detainee's rights by applying a generous interpretation in newly emerging factual situations. It underscores the public perception that criminals enjoy too many protections and entitlements, which should not be allowed to hamper the state's search for truth. Lee Stuesser notes that this perception results in legislative inertia; while it is always open to Parliament to provide for greater individual protections, there is no political will to do so. There are simply too few votes to be had in basing a political campaign on protecting the rights of people who come into conflict with the law.¹⁷⁰ Ultimately, getting "tough" on crime is good for politics. Politicians may be content to leave protecting the detainee to the judiciary.¹⁷¹

¹⁶⁶ See MacDonnell, *supra* note 6 at paras 4, 36.

¹⁶⁷ *Ibid* at para 43.

¹⁶⁸ *Big M Drug Mart*, *supra* note 26 at para 117.

¹⁶⁹ See Sinclair, *supra* note 5 at para 85.

¹⁷⁰ Lee Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002) 29 Man LJ 149 at 149-150 [Stuesser].

¹⁷¹ *Ibid* at 149.

In the early decisions following the entrenchment of the *Charter*, the judiciary embraced this responsibility as the “guardian of constitutional rights”, which was a title coined by Justice Dickson in the decision in *Hunter v Southam Inc.*¹⁷² As Justice Le Dain noted in the *Therens* decision, the *Charter* is not only a new affirmation of protected rights, but an affirmation of judicial power and responsibility by virtue of s. 52 of the *Constitution Act, 1982*.¹⁷³ The *Charter* signified a shift from a system of Parliamentary supremacy to constitutional supremacy. The separation of powers mandates the independence of the judiciary from the legislative and executive branches of government, thereby empowering the judiciary to make decisions according to the dictates of the constitution alone.¹⁷⁴ Judicial independence denotes the complete freedom to hear and to decide cases independent of any outside interference or influence, whether arising from another judge, individual, group, or branch of government.¹⁷⁵ This independence is limited only by the requirements of the law and justice.¹⁷⁶

Under the *Charter*, the judiciary has been assigned an interpretive, remedial role to settle disputes on the meaning of constitutional rights.¹⁷⁷ This includes the authority to determine the limits of state power to ensure that the rights of individual citizens are respected during interactions with the authorities in which the coercive power of the state is brought to bear upon the individual.¹⁷⁸ Application of the balancing approach undermines the Court’s proper role as the guardian of *Charter* rights. It implicitly supports, if not bolsters, police powers.¹⁷⁹ Limiting the protection afforded to individuals by constitutional mandate for the sake of law enforcement ultimately amounts to making a policy choice. This blurs the line between judicial and political spheres, which is inconsistent with the court’s role as the defender of *Charter* rights.¹⁸⁰ The role of the judiciary is to uphold and

¹⁷² *Hunter v Southam*, *supra* note 31 at para 16.

¹⁷³ *Therens*, *supra* note 23 at para 47.

¹⁷⁴ See *Vriend v Alberta*, [1998] 1 SCR 493 at para 131, 136, 67 Alta LR (3d) 1 [*Vriend v AB*].

¹⁷⁵ *R v Beaugard* [1986] 2 SCR 56, 30 DLR (4th) 481 at para 21 [*Beaugard*].

¹⁷⁶ *Mackin v New Brunswick (Minister of Justice)* [2002] 1 SCR 405, 245 NBR (2d) 299 at para 37 [*Mackin*].

¹⁷⁷ See *Beaugard*, *supra* note 175 at paras 131-134.

¹⁷⁸ See MacDonnell, *supra* note 6 at para 53.

¹⁷⁹ *Ibid* at paras 36 & 55.

¹⁸⁰ *Ibid* at paras 50 & 55.

affirm the constitution.¹⁸¹ It is importantly not the task of the judiciary to make policy choices which prefer law enforcement over individual rights.

VII. PRACTICAL PROBLEMS WITH THE BALANCING APPROACH

Under the balancing approach, the expansion of police powers and concomitant restriction of individual rights occurred at the expense of constitutional law theory. The Supreme Court of Canada did not subject the police powers it legitimized in the interrogation trilogy to any concrete justificatory process.¹⁸² No criteria were identified to govern the balancing exercise under this approach.¹⁸³ This has a direct impact on the way in which investigations and prosecutions unfold, from preliminary advice to plea bargaining and *Charter* applications. From a practical perspective, the efficacy with which *Charter* rights confers the intended protection to the detainee is suspect.

The power to detain for law enforcement purposes is one of the most invasive powers the state possesses.¹⁸⁴ During detention, the average detainee will tend to perceive a police direction or question as a demand mandating compliance.¹⁸⁵ The fact that a command or line of questioning is not justified in law does not make it any less of an imperative in the eyes of the detainee.¹⁸⁶ The detainee is likely to err on the side of caution by acting in a manner so as to comply with the police's wishes.¹⁸⁷

This problem is compounded when the detainee is disenfranchised person or a member of a marginalized group. Visible minorities are at a particular risk of police intervention.¹⁸⁸ Aboriginal and Black Canadians are placed under the microscope of police surveillance and are subjected to interactions with the police at disproportionality higher rates than members

¹⁸¹ See *Beauregard*, *supra* note 175 at para 136.

¹⁸² See *Sinclair*, *supra* note 5 at para 191.

¹⁸³ See *MacDonnell*, *supra* note 6 at para 54.

¹⁸⁴ See A Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 *Osgoode Hall L J* 329 at 329 [Young].

¹⁸⁵ See *Grant*, *supra* note 30 at para 171.

¹⁸⁶ See *Suberu*, *supra* note 46 at para 61.

¹⁸⁷ *Ibid* at para 57.

¹⁸⁸ See *Grant*, *supra* note 28 at para 154.

of other racial groups.¹⁸⁹ Unfortunately, state intrusion in the name of law enforcement is not always undertaken to foster the search for truth. It can be used as a tool to exert social control of marginalized groups.¹⁹⁰

In the aftermath of the interrogation trilogy, the courts have stated in their reasons that detention and interrogation are inherently coercive.¹⁹¹ However, the perceived need to safeguard investigative powers suggests an implicit unwillingness to recognize fully the disadvantaged position of the individual from a practical perspective. This is not only contrary to the purpose of the *Charter's* legal rights, but irreconcilable with the need to recognize *Charter* values of dignity and autonomy when interpreting legal rights.

Charter values, such dignity and autonomy, resound with Lockean notions of liberalism.¹⁹² The individual is not simply a vehicle through which to obtain evidence. Defining the right to silence as the choice to speak is premised on the proposition that individuals are free, equal, and autonomous. If the detainee is weak-willed and succumbs to the temptation to answer police questions, that is their right and their problem. In *Sinclair*, the majority associated the free choice to speak with power over the interrogation process. Insofar as the detainee has the right to decide to speak by answering questions put to them, the majority felt that the detainee was vested with “ultimate control over the interrogation.”¹⁹³

This does not align with reality. It cannot be said that the accused in *Singh*, who invoked the right to silence 18 times and asked repeatedly to be returned to his cell exerted ultimate control over the interrogation process. He was under the control of the state and was not free to leave. The only way in which the detainee in *Singh* could have controlled the process was to bring about its end by making an inculpatory statement. The reality of custodial detention is that, if the detainee’s autonomy is to be preserved and respected during interrogation so as to safeguard the risk against self-incrimination, which is s. 10(b)’s over-arching purpose, procedural protections must be amplified, not limited.

¹⁸⁹ See David M Tanovich “Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 *Osgoode Hall LJ* 145 at 162 [Tanovich].

¹⁹⁰ Young, *supra* note 184 at 333.

¹⁹¹ See e.g. reasons in *Grant*, *supra* note 28, and *Suberu*, *supra* note 44.

¹⁹² Young, *supra* note 184 at 343.

¹⁹³ *Sinclair*, *supra* note 5 at para 58.

Insofar as the balancing approach affords restricted protections, it cannot be said that the detainee has any power to control the interrogation process unless they truly understand the nature of their rights and the scope of police power. The detainee is unlikely to be legally trained, and they are unlikely to be a resilient, sophisticated opponent for the police, who is capable of confidently and effectively exercising their rights. In *Evans, supra*, the detainee spoke with his brother via telephone during custodial detention and was asked if he knew about his rights. The detainee responded by mimicking the *Miranda* rights caution and added “I watch TV, man, I know what’s going on.”¹⁹⁴ This distorted understanding of the right to counsel is not an isolated phenomenon. The very fact that s. 10(b) was interpreted to furnish the detainee with information on that right recognizes that the average person cannot be expected to know their *Charter* rights, the scope and nature of the protections afforded under the *Charter*, or the scope of legitimate police power.

Experimental studies demonstrate that it is rare for a detainee to understand their rights when those rights are read to them. A study¹⁹⁵ conducted by three forensic psychologists examined 126 police interviews of adult suspects, which were obtained from police organizations in Atlantic Canada between 1995–2009. The *Charter* cards used in the interviews remained unchanged over the time period explored in the study.¹⁹⁶ The study determined that information on the right to silence was missed or read incorrectly in 4.5% of the interviews. Nearly 98% of the detainees responded affirmatively when asked if they understood their right to silence.¹⁹⁷ In approximately 24% of the interviews, information on the right to counsel was missed or stated incorrectly. Only 52% of the detainees were asked if they understood the right to counsel, and 94% of those detainees responded affirmatively.¹⁹⁸ Very few attempts were made by police to explain the rights contained in each caution.¹⁹⁹

¹⁹⁴ *Evans, supra* note 45 at para 18.

¹⁹⁵ Brent Snook, Joseph Eastwood & Sarah MacDonald, “A Descriptive Analysis of How Canadian Police Officers Administer the Right to Silence and the Right to Legal Counsel Cautions” (2010) 52:5 CJCCJ 545 [Snook, Eastwood & MacDonald].

¹⁹⁶ *Ibid* at 549.

¹⁹⁷ *Ibid* at 552.

¹⁹⁸ *Ibid* at 553.

¹⁹⁹ *Ibid* at 554.

The authors of the study determined that the average rate of speed at which the *Charter* cards were read exceeded rates allowing for adequate comprehension. The authors noted that there is a rapid decrease in comprehension on the part of the listener when the speaker's rate of speech exceeds 200 words per minute. In the study, 65% of the cautions on the right to silence exceeded that benchmark by a rate of 31%. In 32% of interviews, information on the right to counsel was delivered at a rate that was 2% faster than that benchmark. This suggests that a significant number in the sample struggled to understand their legal rights, despite their own claims of comprehension.²⁰⁰

This is consistent with controlled, experimental studies in which individuals claim comprehension regarding legal rights when comprehension is in fact low.²⁰¹ The authors pointed to an experiment in which only 4% of a sample understood the right to silence when the right was read. Only 7% of the sample understood the right to counsel. Another study conducted in 2002 found that none of the participants in its sample demonstrated full comprehension of the content of police cautions, yet 96% of the sample claimed to understand.²⁰²

Insofar as comprehension of rights is low in controlled settings, it is reasonable to conclude that comprehension levels are equally low or lower during real police interviews. The authors of the study noted that comprehension becomes increasingly difficult during interrogation due to the stressful environment. Moreover, detainees have low literacy levels and high rates of cognitive impairments compared to the general population.²⁰³ This suggests that detainees may struggle to understand their *Charter* rights even when police cautions are administered at an acceptable rate.

The problem of low comprehension is compounded by high levels of acquiescence. The authors of the study noted that acquiescence, despite a lack of comprehension, can result from a desire on the part of the detainee to take the path of least resistance. Acquiescence in general occurs more frequently where the individual has poor intellectual functioning and faces uncertain situations. Admitting a lack of comprehension may lead to an unpredictable and undesirable outcome, such as feelings of embarrassment, police frustration, or a lengthier process. By asserting comprehension, the

²⁰⁰ *Ibid* at 555.

²⁰¹ *Ibid* at 555-556.

²⁰² *Ibid*.

²⁰³ *Ibid* at 555.

detainee feels that they are providing the police with the response they desire, and cooperation is believed to expedite the process and even to provide a better outcome overall.²⁰⁴

A superficial understanding of *Charter* rights paired with a willingness to assert comprehension is problematic given the restrictive interpretation the balancing approach gives to the right to counsel and the right to silence. If the detainee acquiesces when they do not truly understand, the detainee may fail to avail themselves of the right to counsel or the right to silence. It cannot be said that this choice is made in a way which protects against self-incrimination or supports *Charter* values like dignity and autonomy.

The detainee will be hard-pressed to prove on a *Charter* application that their rights were violated. They will be unable to prove that they requested an opportunity to consult with counsel, but were denied the opportunity. The detainee will be found not to have been reasonably diligent in exercising s 10(b), which results in a loss of that right altogether. If the detainee consults with counsel and affirms their understanding and satisfaction when they are in fact confused or uncertain, the detainee is precluded from a second consultation. It is at the discretion of the police.

This seriously impairs the detainee's ability to decide how they will participate in the investigation process. Even under the balancing approach, this is exactly what the right to silence purports to protect. This results in a gap between the state of the law as enunciated by the Supreme Court of Canada and the practical effects of its application.²⁰⁵

VII. CONCLUSION

This paper has discussed differing approaches to the interpretation of the *Charter's* legal rights to explore the problems inherent in adopting a balancing exercise to delineate the scope of constitutional rights. A balancing approach to the interpretation of the *Charter's* legal rights is theoretically problematic and results in impoverished rights, which offers insufficient protection to the principle against self-incrimination.

The primary concern animating the balancing approach is the perceived need to reconcile state and individual interests, which are diametrically-opposed. By delineating the scope of *Charter* rights in a manner which gives

²⁰⁴ *Ibid* at 556.

²⁰⁵ Tanovich, *supra* note 189 at 177.

meaning to state interests, the balancing approach bolsters police investigative powers while restricting the protections available to the detainee. This tips the scale in favour of the state.

Under the balancing approach, the right to counsel is exhausted by a single phone call, which may be waived inadvertently without any appreciation of the consequences of waiving a constitutional right. Moreover, the right to silence under the balancing approach cannot be effectively exercised. The interrogation trilogy created a state of affairs whereby detention and interrogation amount to an endurance contest in which the police invariably possess the upper hand. The state's interest in detaining and questioning the detainee relentlessly and aggressively in order to secure a conviction "no matter what" simply cannot be reconciled with the individual's interest in being free from governmental interference.

From a theoretical perspective, the balancing approach departs from the standard mode of interpretation by giving weight to the state's interest in law enforcement at the delineation stage of the analysis. This undermines the proper role of the courts as well as the very purpose of the *Charter's* legal rights themselves. Under the balancing approach, the Court conceives of the detainee's primary concern as the interest in being left alone. This is minimalistic in terms of the overarching purpose of s. 10(b) particularly, which is to protect against self-incrimination. Insofar as the purpose of the *Charter's* legal rights in their entirety is to limit the state's law enforcement powers to secure fairness in the process, this necessarily precludes consideration of the state's interest in law enforcement when assessing the scope of the right. Under the purposive approach, this allows the police more investigative powers than the drafters of the *Charter* intended.

Despite the fact that s. 7 of the *Charter* contains its own internal balancing mechanism, balancing state interests against individual interests is not appropriate when assessing the scope of a constitutional right. Justice Lamer noted in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* that principles of fundamental justice do not lie in the realm of public interest, but within the inherent domain of the judiciary as the guardian of the constitution. The principle of against self-incrimination has been recognized as a principle of fundamental justice within s. 7 of the *Charter*. In the decision in *R v P(MB)*,²⁰⁶ the Supreme Court of Canada reaffirmed that the accused cannot be forced to assist the state in making out the

²⁰⁶ *R v P(MB)* [1994] 1 SCR 555, 89 CCC (3d) 289 [P(MB)].

Crown's case. It is a principle of fundamental justice that it is up to the state to investigate and prove the charge, and the detainee cannot be "conscripted into helping the state fulfill this task."²⁰⁷

Under the balancing approach, the state is empowered to treat the detainee as a resource to be exploited for the purposes of law enforcement, and repeated invocations of the right to silence may go unacknowledged. The detainee is powerless to exercise their rights in an effective manner, which suggests that *Charter* rights count for little and are meaningless. Empowering the police to negate the detainee's choice to remain silent is not consistent with the principles of fundamental justice. This raises the issue of the constitutionality of the interpretation of the right to silence coming out of the interrogation trilogy.

While all *Charter* rights are not absolute and must necessarily have limits and outer boundaries, the proper approach is to determine the boundary in light of the right's purpose and the interests it is intended to protect. As Justice Binnie noted in his dissenting opinion in *Sinclair*, the focus cannot be the need for short-term results in the interrogation room. As noted, Justice Dickson held in *Big M Drug Mart* that the purpose of a *Charter* right must be assessed with a view to the *Charter*'s larger objectives as well as the meaning and purpose of other related rights and freedoms. Importantly, this does not include the state's interest in law enforcement.

The state's interests in law enforcement and the collective interest in the search for truth must be reserved for the remedial analysis. This gives full effect to the interests that the *Charter*'s legal rights are intended to serve. The balancing approach should be abandoned in favour of a return to the purposive approach.

²⁰⁷ *Ibid* at paras 38, 41.

Trade Unions and Remediation Agreements – Does the Criminal Law Favour Management Over Labour?

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

I. INTRODUCTION

Since 2019, much has been made of the pressure allegedly brought to bear on then-Attorney-General Jodi Wilson-Raybould to reconsider her decision not to offer a remediation agreement with respect to wrongdoing allegedly committed by SNC-Lavalin Group Inc.¹ However, this contribution is relatively unconcerned with the political fallout of the decisions made with respect to SNC-Lavalin. Rather, consider that the Prime Minister's repeated assertion that he was trying to protect jobs and the Québec economy by attempting to convince the Attorney-General to

* Professor, Faculty of Law, University of Manitoba, Winnipeg, Manitoba; Winnipeg, Manitoba. Thanks are owed to the driving forces behind RobsonCrim, namely Dean Richard Jochelson and Professor David Ireland, the student editors of the Manitoba Law Journal and the anonymous peer reviewers who provided their expertise. My colleague, Dr. Bruce Curran provided valuable feedback on a number of issues in one of the drafts. My research student, Ben Manness, provided editorial review. The contributions of each are acknowledged and appreciated. Of course, any errors that remain are solely my own.

¹ See e.g. Amanda Coletta, "Canadian political Scandal deepens as ex-justice minister testifies that Trudeau's office pressured her in criminal case", *The Washington Post* (27 February 2019) online: <www.washingtonpost.com/world/the_americas/canadian-political-scandal-deepens-as-ex-justice-minister-testifies-that-trudeaus-office-pressured-her-in-criminal-case/2019/02/27/04587380-3ada-11e9-b10b-f05a22e75865_story.html?noredirect=on&utm_term=.5b6901267944> [perma.cc/E65D-F994]; Robert Fife & Steven Chase, "Wilson Raybould alleges 'consistent and sustained' effort by Trudeau, officials to 'politically interfere' in SNC-Lavalin case", *The Globe & Mail* (27 February 2019) online: <www.theglobeandmail.com/politics/article-wilson-raybould-said-she-was-subjected-to-veiled-threats-in-snc/> [perma.cc/HFC2-9NQ7].

offer a remediation agreement to SNC² would seem to suggest a desire to protect workers.³

This is a jumping-off point to consider whether the remediation provisions of the *Criminal Code*⁴ expressly favour management over workers. Trade unions are specifically precluded from receiving remediation agreements from government prosecutors. This was not an oversight that created a lacuna within the legislative scheme. It was a deliberate choice. The basic question that I will attempt to answer here is: “Can this legislative choice be justified?” There are a number of reasons that this policy choice is suspect. This paper will question the clear legislative decision to exclude trade unions from accessing remediation agreements. As trade unions serve a vital role in protecting workers, the decision to preclude them from an agreement that is designed to consider workers interests is nonsensical. A constitutionally protected entity that is by its very design mandated to protect workers is left without the diversion from prosecution that the Prime Minister claims is to protect said workers, while the employer (which often antagonistic to the union) is granted the use of the workers interests as a shield when using a remediation agreement.

² See e.g. David Ljunggren, “Government has a responsibility to defend jobs, Trudeau says amid SNC-Lavalin allegations”, *Global News* (22 February 2019) online: <globalnews.ca/news/4988388/justin-trudeau-snc-lavalin-jobs/> [perma.cc/S6KT-PVQ5]; Josh Wingrove, “Trudeau says fears of job losses drove SNC-Lavalin talks”, *BNN Bloomberg* (15 February 2019), online: <www.bnnbloomberg.ca/trudeau-says-fears-of-job-losses-drove-talks-about-snc-lavalin-1.1215115> [perma.cc/9DM8-K97D].

³ For the purposes of this paper, I take this assertion at face value. A more cynical observer might legitimately point to the importance of the province of Quebec in establishing federal electoral success. To be clear, some of the articles referred to above (see *supra* note 1) make reference to the political implications of the choices made.

My goal here is not to resolve whether the Prime Minister did consider, or could legitimately consider, the potential electoral impacts of this decision. One could certainly make an argument that those might have been considerations for the Prime Minister (who is, after all, the leader of a political party, as well as the leader of the executive branch of government), that are not legitimate for a decision such as the one with respect to SNC-Lavalin. This is a legitimate question for lawyers, political scientists, and ethicists. My point is a simpler one: to analyze the appropriateness of the specific legislative exclusion of unions from the possibility of remediation agreements.

⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], ss 715.3- 715.42. These provisions were added by the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 (originally Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, s 404 (assented to 21 June 2018)).

Part II will discuss the general amenability of trade unions to the criminal law, by considering both the historical common law position that existed prior to the current statutory language, and then the subsequent amendment to the *Criminal Code*⁵ that created statutorily-based organizational criminal liability.⁶ Part III of this paper turns to the legislative framework for remediation agreements under the recently-added Part XXII.1 of the *Criminal Code*, which will include a discussion of the non-availability of these agreements to public bodies, municipalities and trade unions. Part IV deals with trade unions in particular, and whether they should be excluded from the remediation agreement regime. Part V concludes.

II. ARE TRADE UNIONS SUBJECT TO THE CRIMINAL LAW AT ALL?

The short answer to the question posed in the title of this section is, that trade unions are subject to the criminal law. Under both the common law (in place up to March 2004), and the statutory language that has covered most of the field from March 31, 2004 onward, it is quite clear that trade unions are, in and of themselves, actors beyond the individual trade union members (who, as individuals, are certainly subject to the criminal law). Below, we examine the historical stance taken in common law and the current statutory language in turn:

A. The Historical Application of the Common Law to Trade Unions

While the current statutory language provides the answer, it is important to consider the route that led to the amendments. There are some common-law principles that indicate the amenability of trade unions to the criminal law. For example, as Justice Cory, dissenting in the result, but not on this point (Chief Justice Lamer concurring) explains somewhat tersely in *United Nurses of Alberta v. Alberta (Attorney General)*:

(a) Are Unions Subject to Criminal Contempt?

There can be no doubt that unions have the legal status to sue and to be sued in civil matters. They can and do present and defend cases before the courts. They

⁵ *Ibid.*

⁶ See Bill C-45, *infra* note 13.

make full use of the courts and the remedies they provide. If unions avail themselves of court facilities, they must be subject to the court's rules and restraints placed on the conduct of all litigants. It follows that they are subject to prosecution for the common law offence of criminal contempt. There can be no question that unions fall within the scope of the term "societies" in the *Criminal Code's* definition of person and they must be equally liable for prosecution for a common law crime.⁷

Justice McLachlin (as she then was), writing for the majority in the same case, comes to a similar conclusion. She writes in part:

I see nothing in the authorities to suggest that the general applicability of the law to unions should not extend to the common law offence of contempt. In so far as the common law denied unions legal status, it was to impede the effective enforcement of collective agreements: see *Young v. C.N.R.*, [1931] 1 D.L.R. 645 (P.C.). That notion has long since died. Having been given legal status for collective bargaining purposes, unions now find themselves subject to the responsibilities that go with that right. If they exercise their rights unlawfully, they may be made to answer to the court by all the remedies available to the court, including prosecution for the common law offence of criminal contempt.⁸

These paragraphs make clear that the majority of the Supreme Court of Canada viewed trade unions as being amenable to the criminal law, at least insofar as the law of criminal contempt was concerned. However, Justice McLachlin did not stop there. She addresses whether in fact trade unions should be amenable to the *Criminal Code* in general. Later in the same judgment, she continues:

The union argues that while the *Criminal Code*, R.S.C., 1985, c. C-46, includes "societies" in its definition of "person",⁹ the union is not a society because it is not so defined under the *Alberta Societies Act*, R.S.A. 1980, c. S-18. This argument depends on defining "societies" in the *Code* as limited to those entities recognized by provincial legislation. It also assumes that the definition of society in the *Alberta Act* is exhaustive. In fact, it is not. Section 1(c), provides that "In this Act . . . (c) 'society' means a society incorporated under this Act". This clearly implies that there may exist societies which are not incorporated under the Act. Thus it appears that the union may be a "society" under the *Code*. If the union may be

⁷ *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 [*United Nurses*] at 910, 89 DLR (4th) 609.

⁸ *Ibid* at 928-929.

⁹ At the time of *United Nurses*, *ibid.*, the relevant portion of the *Criminal Code* read as follows: "every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively".

prosecuted for a criminal offence under the *Code*, there appears to be little basis for suggesting that it cannot be prosecuted for a criminal offence at common law.¹⁰

Despite the language of uncertainty (“Thus it appears that the union may be a ‘society’ under the *Code*. ... If the union may be prosecuted for a criminal offence under the *Code*, ...”), the fact is that this analysis by the majority is designed to hold the union liable for criminal concept. Thus, while it may appear to some that the Supreme Court left open the question of criminal liability more generally, the paragraph quoted should be taken to be, in fact, a very strong statement of the majority of the Supreme Court of Canada that under the then-current language of the *Criminal Code*, trade unions were amenable to the criminal law. After all, if Justice McLachlin meant only to suggest the possibility of amenability to the criminal law as codified in the *Criminal Code*, this would not provide much support for the idea that a non-codified offence could nonetheless be pursued against a trade union.

Furthermore, if that does not definitively determine the issue, consider turning Justice McLachlin’s sentiment on its head. The argument would run as follows: as a general rule, most “true” criminal offences¹¹ are codified.¹² Given this statutory rule requiring codification, it follows that the exception to that general rule (criminal contempt) should not be more widely available to the courts than should its codified counterparts. As the courts have already determined that trade unions are amenable to the non-

¹⁰ *United Nurses, ibid* at 929.

¹¹ “True” criminal offences (as the term is used here) are to be contrasted with “public welfare offences.” The former category would include most, if not all, of the offenses contained within the *Criminal Code*, *supra* note 4, where *mens rea* is generally required. The latter category, on the other hand, is generally more concerned with offences of strict liability or of absolute liability. For a more detailed discussion of this distinction, please see the judgment of Justice Dickson, as he then was, for the court, in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309-1310, 85 DLR (3d) 161.

¹² The notable exception to this general rule is that of criminal contempt. Section 9 of the *Criminal Code* reads as follows: “Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730, (a) of an offence at common law, (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada, but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.”

codified offence of criminal contempt, it should then follow that those offences that have been codified under the *Criminal Code* should at least apply no less broadly in terms of the offenders to which they can be applied (in this case, trade unions) than would their non-codified counterpart. Thus, the historical perspective forwarded by the common law supports the idea that trade unions were always amenable to the criminal law generally.

B. The Statute

Now turning to the language that was implemented following the common law position discussed above, which currently governs the issue. Under Bill C-45,¹³ since March 30, 2004,¹⁴ any remaining ambiguity as to the amenability of trade unions has been clarified. Section 2 of the *Criminal Code*¹⁵ provides as follows in the relevant definitions:

every one, person and *owner*, and similar expressions, include Her Majesty and an organization;

...

organization means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons;

Thus, the general definition of “organization” specifically includes trade unions within its ambit, within paragraph (a).

Similarly, even if trade unions were not specifically mentioned, for the same reasons referred to by Justice McLachlin, as she then was, in *United Nurses*,¹⁶ a trade union is likely also a “society” within the meaning likely to

¹³ Bill C-45, 2nd Sess, 37th Parl, *An Act to Amend the Criminal Code (criminal liability of organizations)* (Royal Assent 7 November 2003), now SC 2003, c 21 [Bill C-45].

¹⁴ This is fixed as the date on which most of the operative provisions of Bill C-45 came into force. See Privy Council Minute 2004-90 (16 February 2004). One section of the Bill had come into force on assent.

¹⁵ *Criminal Code*, *supra* note 4, s 2, *sv* “every one” and *sv* “organization” [emphasis added].

¹⁶ *United Nurses*, *supra* note 7, at 928-929.

be ascribed to it under the definition of “organization.” In my view, the definition of *“every one, person and owner, and similar expressions”* was meant to expand the definition, and not to narrow, or contract, it.¹⁷

Furthermore, as a thought experiment on the application of the relevant terms above, even if we were to ignore paragraph (a) of the definition entirely, it is clear that a trade union fits the definition under paragraph (b). It is an “association of persons with a common purpose and an operational structure that holds itself out to the public as an association of persons,” as those terms are used in paragraph (b) of the definition of “organization.” The union, virtually by definition, requires more than one person to join it. Otherwise, it remains an individual, and nothing more. It has been clearly established that the associational aspect of union membership has been recognized and affirmed by the Supreme Court of Canada itself.¹⁸ One of the most impactful statements with respect to the

¹⁷ Underlining was added for emphasis by the author of the current article.

In other fora, I made the argument that the overarching purpose of Bill C-45 was to expand corporate criminal liability as it had been understood up to that point under the common law. On this point, see, for example, Darcy L. MacPherson, “Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45” (2004) 30 Man LJ 253; Darcy L. MacPherson, “Criminal Liability of Partnerships: Constitutional and Practical Impediments” (2010) 33 Man. LJ 329.

The reason for the question mark in the first of these titles was that not every element of Bill C-45 actually has the effect of extending liability to places where it did not previously exist. In a small number of examples, it is at least arguable, if not clear, that there were areas where corporate criminal liability became more difficult to establish, making corporate criminal liability narrower, rather than expanding it. However, in my view, it is equally clear, if not more so, that, overall and on balance, Bill C-45 did have the effect of expanding liability beyond the contours that were previously in place in the common-law version of corporate criminal liability.

The second article makes clear that whatever the intention of Parliament, the statute did not necessarily clear away all the impediments to achieving the goals that were set for the statute. Nonetheless, it is quite clear that the intention of the government of the day at the time of the introduction of Bill C-45 was to “clarify and expand” as well as to “modernize” corporate criminal liability. See Canada, Department of Justice, Press Release, “Justice Minister Introduces Measures to Protect Workplace Safety and Modernize Corporate Liability” (Ottawa, June 12, 2003).

¹⁸ See *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 [*Dunmore*]; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 (providing constitutional protection for collective bargaining); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4,

difference between the individual and the collective is in *Dunmore*, where Justice Bastarache, for the majority, writes as follows:

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.¹⁹

This would appear to be sufficient to satisfy the first of the requirements (that is, an association of persons). The second element of an operational structure would also be present in virtually any conceivable case. After all, to fulfil its legislative mandate of representing workers, administrative tribunals routinely treat unions as a singular actor, as opposed to a collection of workers.²⁰ The union is recognized by statute for this purpose.²¹ Clearly, the third element is satisfied, as the union is the actor that negotiates the collective agreement on behalf of the employees.²² Thus, it is held out to the employer (and to the general public) as representing the employees collectively in their dealings with the employer. Thus, either paragraph of the definition of “organization” would support the fact that trade unions are “organizations” for the purposes of the *Criminal Code* under the prevailing statutory language.²³

III. WHAT IS A REMEDIATION AGREEMENT?

[2015] 1 SCR 245 (holding that the right to strike is an indispensable part of the constitutionally-protected right to bargain collectively).

¹⁹ *Dunmore*, *ibid* at para. 17.

²⁰ See The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 9th ed (Toronto: Irwin Law, 2018) at 538, para 7:100: “Collective bargaining law is concerned with the substantive requirements and procedural standards of *bargaining between the employer and the employees seen as a unit*. Collective bargaining is one of the principal reasons why employees join a union and why unions secure the right to represent employees through certification or voluntary recognition. Once a union secures the status of collective bargaining agent, it supersedes individual bargaining between employer and employee...” [emphasis in original].

²¹ *The Labour Relations Act*, CCSM, c L10, para 4(1)(c).

²² *Ibid*, s 1 *sv* “bargaining agent”.

²³ *Criminal Code*, *supra* note 4.

As I have covered in other articles,²⁴ a remediation agreement is an agreement between an alleged organizational offender, on the one hand, and the prosecutor, on the other.²⁵ In this agreement, the organizational offender agrees to take certain steps, and if the organizational offender complies with the agreement, the prosecutor agrees to stay any charges which have already been laid.

In some cases, one group of persons which is sought to be protected by the adoption of a remediation agreement (in lieu of a criminal charge and trial) is employees. In fact, the relevant statutory language reads as follows [underlining for emphasis added by the current author]:

715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

...

- (f) to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

In my view, part of the reason for this approach is that there may be certain cases where the harm to innocent third parties resulting from the conviction may be so severe and widespread that it could be legitimately taken into account in determining the value of calling the organization a “criminal.” Often this harm may be borne by individuals who are in some way related to the organization who could neither avoid the wrongdoing, nor prevent it. With respect to employees, there is at least one example where a criminal trial (even where the conviction was later vacated by an

²⁴ See e.g. Darcy L. MacPherson, “When Is a Criminal Not Really a Criminal? When It Is a Corporation with a Remediation Agreement - Deferred Prosecution Agreements Come To Canada” *Robson Crim Legal Blawg* (16 July 2018) online: <www.robsoncrim.com/single-post/2018/07/16/WHEN-IS-A-CRIMINAL-NOT-REALY-A-CRIMINAL-WHEN-IT-IS-A-CORPORATION-WITH-A-REMEDIATION-AGREEMENT--deferred-prosecution-agreements-come-to-Canada> [perma.cc/ZAG7-9BXY]; Darcy L. MacPherson, “Politics, Discretion and the Rule of Law as Applied to the Criminal Law: A Case Study of SNC Lavalin” *Robson Crim Legal Blawg* (12 March 2018) online: <www.robsoncrim.com/single-post/2019/03/12/POLITICS-DISCRETION-AND-THE-RULE-OF-LAW-AS-APPLIED-TO-THE-CRIMINAL-LAW-A-CASE-STUDY-OF-SNC-LAVALIN> perma.cc/SE7C-EG75].

²⁵ *Criminal Code*, *supra* note 4, s-s 715.3(1) *sv* “remediation agreement.”

appellate court²⁶) led to massive job losses arising from the insolvency of the firm due to the charges, despite the fact that the firm was not ultimately convicted of a crime.²⁷ Thus, even the potential of ultimate acquittal does not necessarily protect workers. Such protection is even more tenuous when the crime is proven in court and the organized is properly punished.

A remediation agreement allows an organization to state (correctly) that it has not been convicted of, or punished for, a criminal offence.²⁸ The same cannot be said for the trade union that represents workers of a corporate employer. The language in the relevant section of the *Criminal Code*²⁹ provides as follows:

715.3(1) The following definitions apply in this Part [30].

organization has the same meaning as in section 2[31] but does not include a public body, trade union or municipality.³²

In other words, public bodies, trade unions and municipalities are “organizations” for the general purposes of the *Code*.³³ This means that these are all organizations that are subject to the criminal law, in the sense that the organization can be labeled as a “criminal” in appropriate circumstances. However, unlike other forms of organizations, such as corporations (which can enter into a remediation agreement if invited by the prosecutor³⁴), trade unions have no access to this mechanism to avoid being labeled a “criminal” if the alleged conduct is substantiated.

Municipalities and public bodies should be excluded from accessing remediation agreements. Municipalities and public bodies are inherently keepers of the public trust. Any crime committed to their benefit is virtually by definition a violation of that very trust. A violation of the public trust should be dealt with very seriously. Furthermore, public bodies and

²⁶ *Arthur Andersen LLP v United States*, 544 US 696 (2005), per Chief Justice Rehnquist, for the Court.

²⁷ *Ibid.* For an academic perspective on this point, see

²⁸ *Criminal Code*, *supra* note 4, s. 715.4(2).

²⁹ *Ibid.*, s. 715.3(1).

³⁰ The reference to “this Part” is a reference to Part XXII.1 of the *Criminal Code*, *supra* note 4, that is, the Part of the *Code* that deals with remediation agreements.

³¹ The definition of “organization” for the purpose of section 2 of the *Criminal Code* is reproduced in the text associated with note 15, *supra*.

³² The underlining was added by the current author for the purposes of emphasis.

³³ *Criminal Code*, *supra* note 4.

³⁴ See Bill C-74, *supra* note 4, s 404, now *Criminal Code*, *supra* note 4, s 715.33(1).

municipalities can rely on government coffers to pay any financial penalty assessed due to criminal wrongdoing. A remediation agreement negotiated by one part of a government with respect to alleged wrongdoing by another part of the same government seems at best an exercise in futility, transferring the value from one government account to another. Additionally, a remediation agreement allows the public institutions at issue to avoid the label of “criminality.” Commentators in the U.S. have made it clear that the appropriateness of the behaviour of public officials should be, at least in large part, decided through the electoral mechanism of the country.³⁵

However, it also follows that government institutions should be subject to the same basic rules as are individuals. This is the very essence of the rule of law. The label of “criminality” is something that even the most unengaged voter can understand as being a statement about the morality of the actions undertaken.³⁶ Trying to explain that an agreement with the prosecutor can effectively mean the same thing may not be as easily understood by a large part of the electorate. The criminality of an administration may affect its chance of being re-elected. Allowing the government to essentially make a deal with itself (or to perhaps be perceived as doing so) in an effort to re-label the actions of that administration as being non-criminal could fundamentally alter the relationship between the governors and the governed in the electoral process.³⁷

This fundamental relationship between public officials, on the one hand, and the electorate on the other, was described in very lucid fashion

³⁵ See Richard Cohen, “Opinion: The best way to get rid of Trump? Beat him at the ballot box.” (The *Washington Post*, March 25, 2019), online: < www.washingtonpost.com/opinions/the-best-way-to-get-rid-of-trump-beat-him-at-the-ballot-box/2019/03/25/ba98b344-4f2f-11e9-8d28-f5149e5a2fda_story.html?noredirect=on&utm_term=.e82be17497d1> [perma.cc/93FH-PEGH].

³⁶ With respect to the moral element inherent in the criminal law, see, for example, Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993) at 9-10.

³⁷ Examples of government largesse being used as a method to influence the political process are not uncommon, nor are they unique to people of any particular political stripe. For example: in 2015, then-Prime Minister Stephen Harper’s Conservative government disproportionately allocated federal infrastructure funds to ridings represented by Conservative Members of Parliament in the months leading up to an election. See Chris Hannay, “Federal infrastructure fund spending favoured Conservative ridings” *The Globe and Mail* (29 June 2015) online: < www.theglobeandmail.com/news/politics/federal-infrastructure-fund-spending-favoured-conservative-ridings/article25172781/> [perma.cc/XAX7-VCSZ].

in the concurring opinion of Justice Hugo Black (Justice William O. Douglas concurring) of the United States Supreme Court in *New York Times Co. Ltd. v. U.S.*:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the founders hoped and trusted they would do.³⁸

Of course, readers would be correct to point out that this arose in a very different context (publication of sensitive government materials by a newspaper) than the one under consideration here. It also did not arise in Canada, and thus took place under a very different constitutional framework. Notwithstanding all those acknowledged differences, what I take away from this famous piece of judicial writing is that there is an obligation to hold government to account in a democracy. If this is so (and I believe that Justice Black is very much correct in holding that it was at the time of his writing, and continues to be so), it follows that allowing governments to make remediation agreements with other government actors may be injurious to the public interest. By specifically excluding public bodies and municipalities from the availability of a remediation agreement, the legislation makes clear that the ability to label a bad government actor as being “criminal” is a very important step in holding elected officials to account. Although, below, the argument will be made that not allowing trade unions to have access to the possibility of a remediation agreement is probably ill-conceived, the exclusion of public bodies and municipalities is completely justified.

IV. WHAT ABOUT TRADE UNIONS?

³⁸ *New York Times Co Ltd v US*, 403 US 713 (1971) at 717.

A. Introduction

Notwithstanding the previous argument in respect to both public bodies and municipalities, there are several reasons as to why trade unions stand on quite a different footing compared to the other two excluded groups.

First, trade unions are statutorily recognized for a very specific purpose, that is, to help protect the rights of workers vis-à-vis their employers. However, the attempts to use the remediation agreement regime show that, in an attempt to avoid criminal sanctions, the employer is the one who gets to argue that it is protecting the employees by seeking a remediation agreement, as was seen when the Prime Minister urged the consideration of a remediation agreement for SNC-Lavalin to avoid the loss of jobs in Quebec.³⁹ This is true even when the relationship between management and labour may be quite antagonistic (where, for example, there are constant complaints about working conditions, or protracted job action every time that the collective agreement between management labour is up for renegotiation). While an employer may use the negative impacts of a potential conviction on its labour force as a reason for the government to engage in the negotiation of a remediation agreement, the trade union representing the same employees is not accorded this same ability.

Second, trade unions are not only statutorily recognized, their activities on behalf of workers are also constitutionally recognized as protected pursuant to the *Canadian Charter of Rights and Freedoms*.⁴⁰ To give less protection to a trade union (which is not allowed to access the mediation agreement regime) and more protection to an employer corporation (which is at least not statutorily prohibited from negotiating a remediation agreement) would seem to turn this constitutional protection on its head.

Third, there is an issue as to whether or not it is legitimate to remove the possibility of a remediation agreement from a trade union due to the source of its funding. Under the Rand formula in Canadian labour law,

³⁹ *Supra* note 2.

⁴⁰ *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, in particular, para. 2(d). In terms of cases that have recently considered the content of this paragraph in the labour context, see e.g.: *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391; *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Dunmore*, *supra* note 18; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

even non-members of the union can be required by law to contribute to its economic well-being by paying an amount equal to the dues paid by its members. Therefore, just like the innocent employees of a corporation who will be negatively affected by criminal conviction of their employer, non-members of the union may be unduly affected by a criminal conviction of the union to which they were forced to contribute by operation of law. Put another way, given that people are statutorily forced to contribute money to a trade union even if they are not members of it, it does seem particularly harsh that the trade union can never avoid the label of “criminality.”

Fourth, it does seem counter-intuitive that the legislation specifically provides that remediation agreements are to be used where damage can be done to innocent third parties, while at the same time, in a situation where there will clearly be innocent third parties, the use of a remediation agreement is statutorily prohibited. It is doubtful that every member of the rank-and-file in a trade union will be actively involved in wrongdoing, no matter what its goal, so those people are innocent of the wrongdoing, at least to that extent. Relatedly, the damage to the union of being labelled a “criminal” may actually be greater because the achievement of its goals through, for example, strike action, may be undermined because the employer will be able to paint it as untrustworthy given its criminal history.

Below, we consider each of these arguments in turn.

B. The Unequal Relationship of the Protection of Workers in the Context of a Remediation Agreement

As the reference to the SNC-Lavalin affair in the introduction makes illusion, the sitting Prime Minister’s desire in trying to cause the Attorney-General to allow the negotiation of a remediation agreement was, at least allegedly, in large part driven by the protection of jobs. In other words, the reason the employer corporation should, in the view of the Prime Minister at least, be allowed to negotiate a remediation agreement is to protect the economic interest of employees. Yet, the blanket exclusion of trade unions from the ability to negotiate a remediation agreement serves the exact opposite purpose. The trade union exists as a means of protecting the collective interests of workers.⁴¹ Those interests may be economic, but they

⁴¹ *The Labour Relations Act*, *supra* note 21, s 1, *sv* “union” means any organization of employees formed for purposes which include the regulation of relations between employers and employees.

also may be much broader than merely the quantity of remuneration received. The collective agreement represents “the law of the shop.”⁴² Put another way, two of the matters with which any trade union should be genuinely concerned are generally the working conditions and job security for its members.⁴³ This is not to say that all members of any given trade union should all have the same working conditions or level of job security, but rather, that these issues are often collectively bargained, with the union representing the interests of the workers.

So, when an employer is a wrongdoer, not only is the potential effect of the criminal sanction on the workers a relevant consideration, but it may be the single most important consideration, at least according to the Prime Minister of the government that introduced the concept of a remediation agreement in the first place. Yet, the same government is willing to disallow the protection of a remediation agreement from the direct representative whose job it is to protect the welfare of workers, that is, the trade union of which the workers are members.

To be clear, there is no issue with any assertion that the vast majority of workers may be entirely innocent of the wrongdoing that leads to the potential criminal charges. Nor is there any issue with an assertion that if the criminal sanction for wrongdoing is too heavy, there may be unintended, negative consequences for the workforce of the corporate wrongdoer, both individually and collectively. Rather, the sole point here is that sauce for the goose is sauce for the gander.

Both employer and union are incentivized to protect the workforce of the employer. Each of them does this in a different way. The employer protects the workforce by hiring other competent people, including competent management, to oversee the work done by the rest of the workforce. Many employers want to create an identity of interest with their work forces so that everyone can feel the pride of a job well done. This type of pride furthers an identity of interest that encourages both hard work in the short term, and commitment to the workplace in the longer term.⁴⁴ One

⁴² On this point, see William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: The Osgoode Society for Canadian Legal History, 2009) [Kaplan, *Canadian Maverick*] at 432.

⁴³ *Ibid* at 176.

⁴⁴ See Daphne G Taras & Morley Gunderson, “Chapter 1: Canadian Labour and Employment Relations” in Morley Gunderson & Daphne Gottlieb Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson/Addison Wesley, 2009) at 8-12.

can see this in the transition from “workers” to “human resources.” One reason for this change is to recognize the value of the workers to the enterprise that the corporation operates.⁴⁵

The trade union, on the other hand, is in place to protect the interests of the worker when that identity of interest between employer, on the one hand, and the employee, on the other, breaks down. Where the employer becomes the antagonist to the employee’s interests, the trade union (and the collective agreement that it negotiates) is generally meant to ensure the employee is treated fairly when dealing with the antagonistic employer.

In the context of remediation agreements, however, the employer has the possibility of receiving one; the union does not. The categorical removal of the possibility of a remediation agreement from a trade union is a step that places employers on a better footing than the representative of the overall interests of employees, that is, the trade union to which those employees belong.

C. The Constitutional Protection of Trade Unions and Their Activities

As a general rule, the right of employers to carry on business is not constitutionally protected. Corporations and other non-individual businesses do not even have the same rights as individuals.⁴⁶ Meanwhile,

⁴⁵ *Ibid.*

⁴⁶ On this point, see e.g. *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 per Chief Justice Dickson, Justice Lamer (as he then was), and Justice Wilson, as the majority, but speaking for the Court on this issue (holding that s. 7 is unavailable to corporations in the absence of specific penal proceedings). Justices Beetz and McIntyre dissenting on other grounds (in particular, finding that there was a violation of the freedom of expression not justified under s. 1 of the *Charter*), but agreeing with the majority with respect to the non-applicability of s. 7.

The Supreme Court of Canada has also determined that s. 12 of the *Charter* (prohibiting “cruel and unusual punishment”) does not apply to corporations. See *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32. In fact, this is one of the few areas where the majority (Justices Brown and Rowe, writing jointly, with Chief Justice Wagner, and Justices Moldaver and Coté, concurring) and the minority (Justice Abella, writing, and Justices Karakatsanis and Martin, concurring) are in agreement, Justice Kasirer wrote a limited judgment, agreeing with both the reasons of Justices Rowe and Brown, on the one hand, and those of Justice Abella, on the other, with respect to this issue. With respect to other issues, there were significant disagreements between the majority and the dissent, notably with respect to the proper role of constitutional documents from other countries in domestic constitutional interpretation.

many of the activities of a recognized trade union are constitutionally protected under the *Charter*.⁴⁷

To be clear, it is not intended to suggest, by the argument made below, that all activities undertaken by a trade union are of necessity constitutionally protected. Clearly, where a trade union engages in criminal conduct no suggestion has been made that any court has ever indicated that the trade union cannot be prosecuted for the criminal conduct. Rather, the argument is that by excluding a trade union from ever being a proper subject of a remediation agreement, one may in fact be undermining the constitutional protection provided to certain types of activities under recent jurisprudence. For example, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, the majority held as follows:

Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference” with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether “excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association” (para. 23). Or to put it another way, does the state action target or affect the associational activity, “thereby discouraging the collective pursuit of common goals”? (*Dunmore*, at para. 16) 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. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.⁴⁸

This paragraph could easily be adapted to make an argument that the deliberate exclusion of trade unions from the possibility of remediation agreements could constitute a “substantial interference” with the ability of the trade union to carry out its functions. While a full *Charter* analysis will not be conducted here, several points could be made in favour of such an approach. First, all goals of a trade union are typically for an association of

⁴⁷ *Charter*, *supra* note 40.

⁴⁸ *Health Services and Support – Facilities Subsector Bargaining Assn*, *supra* note 18, at para 90, per Chief Justice McLachlin, and Justice LeBel, writing in joint reasons for the majority.

persons, that is, the collective membership of the trade union. Secondly, it is important to remember that an “organization” as defined in the *Criminal Code*⁴⁹ can only be convicted where the criminal activities undertaken were undertaken with the intent of benefitting the organization.⁵⁰ One could certainly see benefit flowing to a trade union if it is able to achieve the associational goals of its membership. In other words, while not completely overlapping, one could certainly see a connection between the associational goals of a trade union, on the one hand, and overall benefit to the organization even if some of the activity might technically violate the *Criminal Code*.

A simple example may assist here. Section 322 of the *Criminal Code* provides in part as follows:

- 322(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
 - (b) to pledge it or deposit it as security;
 - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
 - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

⁴⁹ *Criminal Code*, *supra* note 4.

⁵⁰ On this point, see the wording of section 22.2 of the *Criminal Code*, *ibid*. The relevant wording provides in part as follows: “22.2 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 ... (c) 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.”

- (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.⁵¹

One can certainly imagine a situation where a management-level employee of the trade union⁵² steals information (or causes another person to steal information) in the run-up to a potential strike about the plans of management in the event of a strike. It is, therefore, at least arguable that subsection 322(1) might apply. Law enforcement officials decide to charge the trade union and the thieving employee with contravention of subsection 322(1).⁵³

Theft could never be countenanced. Yet, strike preparations could certainly be considered part of the “associational activity” of a trade union,

⁵¹ *Criminal Code*, *supra* note 4, s. 322.

⁵² “Senior officer” as the term is used in s. 22.2 (the relevant wording of this section is reproduced at note 50, *supra*) of the *Criminal Code*, *supra* note 4, is defined as follows: “**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”.

⁵³ Section 322 is not chosen at random. Under s. 1 of the Schedule to Part XXII.1, only certain *Criminal Code* offences are eligible for remediation agreement. Section 1 provides as follows: 1 An offence under any of the following provisions of this Act: (a) section 119 or 120 (bribery of officers); (b) section 121 (frauds on the government); (c) section 123 (municipal corruption); (d) section 124 (selling or purchasing office); (e) section 125 (influencing or negotiating appointments or dealing in offices); (f) subsection 139(3) (obstructing justice); (g) section 322 (theft); (h) section 330 (theft by person required to account); (i) section 332 (misappropriation of money held under direction); (j) section 340 (destroying documents of title); (k) section 341 (fraudulent concealment); (l) section 354 (property obtained by crime); (m) section 362 (false pretence or false statement); (n) section 363 (obtaining execution of valuable security by fraud); (o) section 366 (forgery); (p) section 368 (use, trafficking or possession of forged document); (q) section 375 (obtaining by instrument based on forged document); (r) section 378 (offences in relation to registers); (s) section 380 (fraud); (t) section 382 (fraudulent manipulation of stock exchange transactions); (u) section 382.1 (prohibited insider trading); (v) section 383 (gaming in stocks or merchandise); (w) section 389 (fraudulent disposal of goods on which money advanced); (x) section 390 (fraudulent receipts under Bank Act); (x.1) section 391 (trade secret); (y) section 392 (disposal of property to defraud creditors); (z) section 397 (books and documents); (z.1) section 400 (false prospectus); (z.2) section 418 (selling defective stores to Her Majesty); and (z.3) section 426 (secret commissions); (z.4) section 462.31 (laundering proceeds of crime). Accessory, attempt, and counselling liability for the same offences is also included. Certain other crimes outside the *Code* (notably under the *Corruption of Foreign Public Officials Act*, SC 1998, c 34) also potentially have remediation agreements available in appropriate circumstances.

and a criminal charge could be seen as government “thereby discouraging the collective pursuit of common goals.” In other words, the government’s blanket denial of a remediation agreement based on the form of organization (a trade union) and/or its goals (the protection of the interests of workers) seems contrary to permitting “the collective pursuit of common goals”.

To return for a moment to the statutory framework of remediation agreements, a remediation agreement is a contract.⁵⁴ Nothing in this paper is meant to suggest that a trade union should have any greater likelihood of achieving a remediation agreement, but under the right circumstances, the negotiation of such an agreement should at least not be statutorily prohibited. Yet, the definition of “organization” for these purposes has exactly that effect.

Meanwhile, this might also be a perfect case for the use of a remediation agreement. If the crime of theft caused loss to a public body employer or other private interests, a remediation agreement might be one way to ensure that the union makes reparations to those interests, without requiring private legal action in order to seek redress. Put another way, allowing for a remediation agreement in appropriate circumstances may allow the government to mediate the rights of the trade union, on the one hand, and those public and private entities who may be negatively affected by the exercise of those rights, on the other. The use of the remediation agreement mechanism may be one way that the government can show that it has taken minimally impairing steps⁵⁵ to respect the rights of the trade union while, for example, providing financial reparations for those whose interests might have been damaged beyond a *de minimus* level.⁵⁶

D. The Impact of the Rand Formula

⁵⁴ According to J.D. McCamus, a contract is “any enforceable promise” arising out of a “bargain”. See John D McCamus, *The Essentials of Canadian Law – The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 1.

⁵⁵ Of course, “minimal impairment” of a constitutionally-protected right is part the test propounded in the judgment of Chief Justice Dickson in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, for the majority, and its multitudinous progeny.

⁵⁶ For example, providing financial recompense to affected parties, for both direct and indirect costs, plus an amount to recognize the wrongfulness of the act, could easily be part of the remediation agreement.

I have argued elsewhere the impacts on individuals or organizations other than those charged with an offence is generally not considered the “punishment” of that other.⁵⁷ Think of it this way: when Bernard Madoff went to jail for massive criminal fraud, his wife and sons lost their lifestyles, and were the subject of significant social ostracization,⁵⁸ to the point that one of his sons committed suicide.⁵⁹ Yet, by virtually all accounts, they knew nothing of the wrongdoing that was occurring,⁶⁰ despite the fact that the sons worked for the organization. From the point of view of the criminal law, they are not being “punished,” even though their lives are made significantly more difficult and less comfortable by the conviction of Mr. Madoff. The reason they are not being punished is they have not had the stigma of the criminal conviction attached to them. Even though they are certainly suffering negative consequences resulting from their association with the criminal (these consequences are sometimes referred to as “hard treatment”⁶¹), the moral statement of culpability (sometimes referred to as “censure”⁶²) is notably absent as against those around the direct wrongdoer.

Of course, the same can be said of union leadership and rank-and-file members of the trade union who have nothing to do with the wrongdoing that leads to criminal charges against the trade union itself. Nothing below should be taken to indicate that the negative effects of criminal sanction that may be unintentionally foisted upon non-wrongdoers should be considered as a reason not to pursue the wrongdoer in criminal proceedings. The argument offered here assumes that there is at least a substantial and plausible argument that the criminal sanction is one

⁵⁷ On this point, see Darcy L MacPherson, “‘A Centenary of a Mistake?’: An Outsider’s Critical Analysis of, and Reply To, The Approach of Professor Hasnas” (2018) 18 *Asper Rev Intl Business Trade L* 104 [“MacPherson, ‘A Centenary of a Mistake?’”] at 132.

⁵⁸ Kaitlyn Menza, “How Bernie Madoff Took His Family Down”, *Town & Country* (19 May 2017) online: <www.townandcountrymag.com/society/money-and-power/a9656715/bernie-madoff-ponzi-scheme-scandal-story-and-aftermath/> [perma.cc/4THJ-L8HB].

⁵⁹ Diana B Henriques & Al Baker, “A Madoff Son Hangs Himself on Father’s Arrest Anniversary”, *New York Times* (11 December 2010) online: <www.nytimes.com/2010/12/12/business/12madoff.html> [perma.cc/5K9Z-7TF4].

⁶⁰ Erik Larson, “The Madoff Players: Where Are They Now?” *Bloomberg* (11 December 2018) online: <www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now> [perma.cc/7XAN-XC2P].

⁶¹ MacPherson, “‘A Centenary of a Mistake?’”, *supra* note 57 at 130.

⁶² *Ibid* at 132.

potentially appropriate tool to be used to discourage inappropriate conduct by a trade union. In other words, it is accepted that the trade union may commit criminal wrongdoing, and that the criminal sanction may be an appropriate remedy.

Notwithstanding this concession, the question which remains is whether, given the framework which governs a trade union, is the trade union's blanket exclusion from the potential use of a remediation agreement appropriate?

In this regard, there is a specific element of the make-up of a Canadian trade union (and particularly, its funding model) that needs to be considered here. The Rand formula means that all the holders of positions within a unionized work environment who are members of the bargaining unit are required to pay the equivalent of union dues to the trade union, whether they are members of the trade union or not.⁶³

The majority of the Supreme Court of Canada has recognized that the payment of dues to a trade union pursuant to the Rand formula can invoke the freedom not to associate⁶⁴ which has been recognized to be part of the freedom to associate guaranteed by para. 2(d) of the *Charter*.⁶⁵ Nonetheless, the majority in *Lavigne* held that the forced payment of an amount equivalent to trade union dues by non-members of the trade union was a justified infringement on the freedom to associate.⁶⁶ Given the negative financial impact on non-members of the trade union who have paid the equivalent of union dues to the trade unions despite not being members of it, it would seem that this is yet another group of truly innocent third parties who could reasonably be protected through the use of a remediation agreement. Put another way, in a more typical situation of corporate wrongdoing, scholars have argued that criminal penalties are inappropriate, mainly because the people who will pay those penalties are not the corporation itself, but rather, shareholders who will have the value of their shares reduced when the corporation pays the fine levied against it.⁶⁷ As I have argued elsewhere,⁶⁸ a significant weakness that inherently

⁶³ On this point, see *Lavigne v OPSEU*, [1991] 2 SCR 211, 81 DLR (4th) 545.

⁶⁴ *Ibid* at 340, per Justice LaForest, writing for the majority.

⁶⁵ *Charter*, *supra* note 40.

⁶⁶ *Lavigne*, *supra* note 63 at 323.

⁶⁷ See John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) *Am Crim L Rev* 1329 at 1339.

⁶⁸ MacPherson, "A Centenary of a Mistake?", *supra* note 57 at 131.

produces a great deal of trouble with this proposition is that the shareholders of a corporation are speculating the value of the shares will increase. If they are correct in this, few if any of them would ask why they were allowed to benefit. If this is so, why then, should those same people be allowed to question the reason for the decline in the value of their shares? Why, from the point of view of the shareholder, should a criminal fine be treated any differently than any other expense that a corporation is to pay?⁶⁹ Regardless of the strength of the argument when applied to corporations, what is important about these arguments is that, in virtually every case, when considering a corporation, the relationship is a voluntary one. Workers are generally able to choose their employer. Shareholders are allowed to choose the companies in which they invest. Financial and other trade creditors are allowed to refuse to do business with any borrower, as they see fit. This is not necessarily true of the person who gives money to a trade union. The Rand formula can and does force people who do not wish to be financially supportive of the trade union to nonetheless provide financial security to that very same trade union.

To be clear again about the scope of this argument, there is no suggestion that non-members of the trade union should not be expected to have their money contributed toward any fine or other financial consequence of the wrongdoing. As soon as the money is properly received by the trade union, it is also fully available to be dispensed by the trade union in accordance with its activities.⁷⁰ Rather, the argument is that

⁶⁹ There are other arguments that, in my view at least, counter the "innocent shareholder" thesis to oppose corporate criminal liability. These arguments are beyond the scope of the current paper. For some of these arguments, see e.g. MacPherson, "A Centenary of a Mistake?", *ibid* at 130-133.

⁷⁰ Both the majority and the concurring opinions in *Lavigne* make clear that there have historically been restrictions placed on the ability of trade unions to spend money on certain activities. On this point, Justice Wilson writes as follows (at 297): "Mr. Lavigne notes that legislatures have in the past placed restrictions on the way compelled dues could be spent: see *Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c. 31, s. 5, and *The Industrial Relations Act*, S.P.E.I. 1962, c. 18, s. 48. Both these provisions restricted only the right to make contributions for electoral purposes and not for the "non-collective bargaining" purposes cited by the appellant. These provisions have since been repealed: see *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 151, and *Prince Edward Island Labour Act*, S.P.E.I. 1971, c. 35, s. 76(1)(a). To my mind, the fact that some jurisdictions at one time imposed restrictions on the Rand formula does not advance the inquiry. We simply do not know whether the old system worked or why it was abandoned."

unlike most creditors of a corporation,⁷¹ the employees, who pay union dues or the equivalent of union dues, are not doing so in any sense that is truly and meaningfully “voluntary.” Rather, employees are required by law to make those payments because this serves a policy rationale. This rationale runs something like this: unions protect the interests of workers, and the employer is likely to give a similar deal to all employees in the same or similar positions, whether they are members of the union or not.⁷² As a result, the worker is assumed to benefit from the unionized environment, regardless of whether they are members of the union or not.⁷³ However, if the worker receives the same benefit from the employer regardless of union membership, there is a temptation to not join the union so as to receive the benefits (better working conditions) without the underlying costs (that is, union dues).⁷⁴ The union needs financial security (a relatively consistent level of money coming into its coffers, mostly in the form of dues, or the equivalent)⁷⁵ in order to perform its role as the protector of employees.⁷⁶ The tension between these last two sentences (the economic reality is that if the result of paying and not is the same, most people will choose to receive benefits but not to pay, despite the need

⁷¹ The notable exception to this general rule of course are “classic” tort victims. On this point, see the judgment of Justice LaForest (in partial dissent, by not on this point), in *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 S.C.R. 299 at 342-343, 97 D.L.R. (4th) 261. “Classic” tort victims are those tort victims who have no connection with the corporation prior to the tort. As Justice LaForest explains: “Nonetheless, for one reason or another, the employer may not be available as a source of compensation. In my view, in what may be termed a ‘classic’ or non-contractual vicarious liability case, in which there are no ‘contractual overtones’ concerning the plaintiff, the concern over compensation for loss caused by the fault of another requires that as between the plaintiff and the negligent employee, the employee must be held liable for property damage and personal injury caused to the plaintiff. An example of such a case is a plaintiff who is injured by an employee while the employee, acting in the course of employment, is driving on the road. In this context, the plaintiff obviously never chose to deal with a limited liability company.”

⁷² Kaplan, *Canadian Maverick*, *supra* note 42 at 168.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

for consistent funding to maintain the benefits achieved) is known as the “free rider problem.”⁷⁷

The goal is to point out that the Rand formula creates more people who are truly innocent. The shareholders of a company are generally “innocent” in the sense that, as a group, they do not share the *mens rea* of the actual individual perpetrators of the underlying crime. However, as shareholders, they have put their faith voluntarily into the directors of the corporation, as well as the people who report to them.⁷⁸ In most business corporations, this is generally done in an effort to reap financial reward from the success of the business of the corporation.⁷⁹ Put another way, there is an immediate identity of financial interest between the shareholders, on the one hand, and the activities of the corporation, on the other. This is not to say that the shareholders would necessarily support the undertaking of illegal activity in order to try to create the economic outcome of increased share value. Rather, this is simply an acknowledgement that in the traditional corporate setting, the shareholder chooses to speculate (along with management) that the activities undertaken in the name of the corporation will be profitable and attempts to share that profitability if it occurs.

For those people paying the equivalent of dues pursuant to the Rand formula, that identity of interest may, frankly, be lacking. The person forced to pay dues in this way may in fact be philosophically opposed to the collective and associational nature of the union’s activities. Nonetheless, so as to avoid the free rider problem, Canadian law mandates that at least for financial purposes, they are required to contribute to the trade union that represents a bargaining unit that

⁷⁷ Interview of Horace Pettigrove (27 October 1989) cited in Kaplan, *Canadian Maverick*, *ibid* at 463.

⁷⁸ See e.g. s 107 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA], which mandates that the shareholders with the right to vote are permitted to vote in the election of directors. Section 102(1) of the CBCA gives the directors the duty to manage, or oversee the management of, the business and affairs of the corporation. Section 121 of the same statute gives the power to the directors to appoint the officers of the corporation. The by-laws of most CBCA corporations will define the rights, obligations, and powers of the Corporation of the offices created by the by-laws. The by-laws must be passed by the board of directors, and subsequently approved by the shareholders acting in general meeting. See CBCA, s 103.

⁷⁹ See J Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships and Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 124-125.

includes their position. While moral innocence does not easily permit of gradations in this respect, it is quite clear that those non-members of a trade union who are nonetheless compelled to contribute financially to it are even more morally innocent than those shareholders who contribute to a corporation and expect to share in the rewards thereof. The reason for this is simple: shareholding is generally a voluntary activity.⁸⁰ According to Canadian law, contribution to a union may not be. If part of the goal of a remediation agreement is avowedly “to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing,”⁸¹ it would seem to me that this would apply to a union even more than it would apply to the shareholders of a corporation. Similarly, the employees of a corporation generally choose their employer. The law does not allow them to choose to not contribute financially to the union that represents other employees, even if they do not choose to be a member of the union themselves. At the very least, those employees who contribute to the union are in no worse position than the employees and shareholders who are generally considered to be “innocent” of the wrongdoing. Yet, the employees of a corporate offender are a reason to give a remediation agreement, while neither the rank-and-file employees who are members of the union, nor the non-members who were required by law to contribute to it as part of their employment are legally allowed to qualify for the same treatment. This seems to run counter to one of the very purposes that remediation agreements are designed to serve.

⁸⁰ Of course, there are scenarios where voluntariness can be more questionable than the standard purchase of a share or particular corporation by a particular individual. For example, the acquisition of a share upon the death of its original holder and the receipt of that year by either operation of law under a will, or intestacy would be one example. One could also make the case that the acquisition of shares of a company through a mutual fund with a person who buys the mutual fund and was unaware of the underlying holdings of the mutual fund, or where the mutual fund changed its holdings after the person acquired an interest in the mutual fund may be different as well. Neither of these scenarios may be as “voluntary” as the scenario contemplated here, where a person specifically decides to acquire shares of a particular corporation in an attempt to benefit financially from the operations of that particular corporation.

⁸¹ See *Criminal Code*, *supra* note 4, para 715.31(f).

E. The Publicity Effect of Labelling a Union as a Criminal, and Giving to a Corporation – Its Opponents in Negotiation – a Remediation Agreement

It is readily observable that, in a situation of labour strife, there is clearly a public element to the private dispute. In a strike situation, one of the goals of the strike is to remove labour from the employer in an effort to return the employer to negotiations with the union to resolve the dispute, by giving the employer an economic incentive to negotiate in a more concessionary fashion. Further, the law clearly allows the union and its membership to picket.⁸² Picketing makes the dispute a public one. For the union, the hope is, at least in part, that when the public becomes aware of the employer's unwillingness to accede to the reasonable demands of the union, the public will be less likely to purchase the goods and services offered by the employer, thereby increasing economic and political pressure on the employer.⁸³

Assuming that there is in fact a public component to a strike, how does the lack of availability of a remediation agreement affect this public aspect of a strike? The potential for such an affect is real and important. Let us imagine that there is a situation where the corporate employer has been pursued in the past for criminal contempt of court for ignoring a court order.⁸⁴ However, the corporate employer was given a remediation agreement with respect to that transgression. Then, later the trade union is pursued for criminal contempt of court for ignoring a court order, arising out of its associational activities. Subsequent to both of these events, there is a strike situation between the employer and the trade union representing its unionized employees. When there is picketing to inform the public as to the plight of the workers, the corporate employer then points out "the

⁸² See e.g. "Winnipeg's Canada Post employees back on the picket line" (15 November 2018), CBC, online: <www.cbc.ca/news/canada/manitoba/canada-post-rotating-strikes-winnipeg-1.4906465> [perma.cc/BYD6-E28W]; Talia Ricci & Katie Dangerfield, "Faculty on strike at the University of Manitoba" (1 November 2016), *Global News*, online: <globalnews.ca/news/3037596/faculty-will-strike-at-university-of-manitoba-tuesday-morning/> [perma.cc/98HW-K4FA].

⁸³ See "Demonstrators picket Tim Hortons after cuts to employee benefits" (10 January 2018), CBC, online: <www.cbc.ca/news/business/tim-hortons-protest-rally-picket-ontario-employee-benefits-1.4480559> [perma.cc/ZC8J-UEQG].

⁸⁴ I choose this particular offence simply because it is clear that a trade union may be liable for this particular offence (under both the common law and the statute), and it is easy to imagine a situation where similar conduct by a corporate employer could result in similar potential liability.

criminal past” of the trade union in its dealings with the corporate employer, pointing specifically to the conviction of the trade union for failure to obey a court order. The public statements always end with the same question to the public: “Do you want to put your faith in a criminal organization?” Of course, the trade union will want to point out that the corporate employer has engaged in similar behaviour. However, the question of criminality cannot legitimately be raised. The trade union has been adjudged to be a criminal; the corporate employer has avoided a similar fate, given the diversionary tools available to it that are specifically made unavailable to a trade union, namely, the remediation agreement.

Given the public nature of the pressure that is attempted to be exerted by strike action by a trade union, asking the general public to fully understand the differences and similarities between the actions of the trade union in its past, when compared to the actions of the corporate employer in its past, is, quite unrealistic. The general public understands what criminality is. Many members of the public have a visceral reaction to the label of “criminal.” The entire purpose of the remediation agreement provisions of the *Criminal Code*⁸⁵ is to avoid labelling an organization as a criminal where such a label would be permissible under the law as it now stands, but where it would nonetheless be inappropriately harsh to do so. Through the inability of trade unions to access the remediation agreement regime, there is certainly the suggestion that it is never inappropriately harsh to label the actions of a trade union as being “criminal” where it fits the strict letter of the law to do so.

Moreover, a strike is an area where organized labour is generally considered to be an antagonist to an employer, group of employers (if the employers are related) or to an industry as a whole.⁸⁶ Given the antagonism that exists in a strike situation, it seems as though the government’s decision

⁸⁵ *Criminal Code*, *supra* note 4.

⁸⁶ While it would be rare for a strike to be organized against an entire industry, there can be little doubt that the effect of a strike and its resolution by one employer will affect how the remainder of the industry will deal with its labour strife. Technically, the Rand formula was only meant to resolve a singular strike at Ford. On this point, see Kaplan, *Canadian Maverick*, *supra* note 42 at 217. However, it is equally clear that the Rand formula has become fundamentally part of Canadian law which is applied across industries. It is equally clear that the resolution of the dispute with Ford was going to inform how other employers in the automotive industry would deal with their labour strife going forward. On this point, see Kaplan, *Canadian Maverick* at 217.

to deny access to the remediation agreement regime to one side of that antagonism (the trade union) while granting it to the other (the corporate employer) could be seen as the government favouring the employer in the resolution of the strike situation, to the concomitant disadvantage of the trade union.

In other words, labour relations legislation⁸⁷ is designed to ensure the resolution of strikes,⁸⁸ and to put limits on the actions of the parties thereto in an effort to succeed through strike action (or their response to that action),⁸⁹ it would seem very unusual for a level government to explicitly favour one side in this dispute, particularly where there may be significant antagonism between management and labour, and management may effectively be allowed to use the protection of labour as a reason why it should be allowed to access the remediation agreement regime. This seems all the more unusual given that this is to use the criminal law as a means to provide that advantage.

V. CONCLUSION

In the end, this paper accepts the idea that remediation agreements are an appropriate part of our criminal law. They are properly used where the stigma of the criminal sanction would simply be too heavy and create too much collateral damage for those who did not intend to carry out the criminal wrongdoing undertaken on behalf of an organization. However, this paper seriously questions the clear legislative decision to exclude trade unions from the ambit of the remediation agreement regime. Trade unions serve a socially valuable role in protecting the rights and working conditions of employees. Some of the activities of trade unions are constitutionally protected, so as to ensure they are able to carry out this socially important role. It therefore seems quite incongruous to suggest that there would never be a circumstance in which it would be appropriate that a trade union be

⁸⁷ *The Labour Relations Act*, *supra* note 21.

⁸⁸ See e.g. *ibid.*, at ss 83.1-83.3. Even in those provinces where there are similar statutory provisions, there is undoubtedly an interest for both the general public and the government of the day to ensure that strikes and other labour disruptions remain within manageable limits, given the social and economic costs and losses for both sides. This may explain why, more than 75 years ago, a Justice of the Supreme Court of Canada was asked to find a solution to a strike with difficult economic and social consequences. See Kaplan, *Canadian Maverick*, *supra* note 42, c 5.

⁸⁹ *The Labour Relations Act*, *supra* note 21, Part V.

given the opportunity to enter into a remediation agreement. Yet, this is clearly the legislative choice that Parliament has made. This paper has attempted to demonstrate that even accepting Parliament's purposes for creating the remediation agreement regime in the first place, this legislative exclusion does not appear to serve the purposes of the regime itself and appears to run directly counter to it.

Of course, it may be possible for a trade union to mount a constitutional challenge to this legislative exclusion. However, laying out the grounds of such a challenge will have to wait for another day. For now, this paper has simply attempted to lay out an incongruity within a legislative scheme. That incongruity leads to certain results that can be considered untenable, including what appears to be a direct interference into the resolution of labour disputes. How this incongruity will be resolved by Parliament in the future is anyone's guess. If Parliament decides to leave the current legislative exclusion of trade unions in place in the remediation agreement regime, at the very least, I hope that Parliamentarians are asked to explain the approach that justifies such an exclusion. Perhaps there is one that has not been canvassed here. It is only by pointing out the incongruity that we can ask for a justification. The motive of this paper was to point out the incongruity so that the groundwork can be laid to seek a justification. Until that justification is provided (assuming that there is one), there are only unanswered questions. One can only hope that, in the near future, answers to these questions will be forthcoming.