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FRESH EVIDENCE IN CANADIAN CRIMINAL LAW: 1910-2010

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OVERVIEW

In the last four decades, there has been a dramatic increase in the number of fresh evidence cases before Canadian criminal law appellate courts. Yet when it was first introduced at the turn of the last century, this rule of evidence was meant to be an exception to the principle of the finality of judgments, to be used only on those rare occasions when a miscarriage of justice had occurred. It was intended to prevent the innocent from going to jail or worse, from perishing on the gallows. Historically, fresh evidence was used but rarely prior to 1970. However, starting in the mid 1970s these applications have grown significantly, exploding after the early 1980s.

Based on an analysis of an initial database of 2116 fresh evidence matters, the thesis examines the possible reasons for this phenomenon and concludes that there is a direct correlation between the rise in the number of fresh evidence cases after 1970 and the advances in science, including the use of new evidence, such as DNA and expert forensic evidence in criminal law cases. But if the advances in science have made a significant contribution to the growth of fresh evidence applications, it was the advent of the *Canadian Charter of Rights and Freedoms* that brought a sea change to Canadian criminal law fresh evidence jurisprudence. Through a theoretical framework constructed around the search for truth, rights and theories of fairness, the thesis traces the evolution of appellate adjudication in this area of law that from its origins was meant to be used but rarely in the interests of the administration of justice to prevent miscarriages of justice.

INTRODUCTION

Fresh evidence is a rule of evidence that was introduced in Canadian Criminal law in 1923¹ in an effort to avoid sending innocent men and women to jail or worse, to the gallows. Inspired by the legislative reforms in England of 1907², the Dominion Parliament gave appellate Courts broad new powers to receive fresh evidence as an exception to the principle of finality. The exercise of this new authority was reserved for those rare occasions when there was a clear miscarriage of justice. This was the practice up to and including the mid 1970s when fresh evidence cases were few and far between. They were limited to one or two cases per year and totalling just over 55 cases up to and including 1976 for all appellate jurisdictions combined.

Starting in 1977, there began a steady increase in the number of fresh evidence cases, averaging 5 cases per year. This number increased significantly after 1982, when appellate courts would be called upon to consider on average, about 15 cases per year up to and including 1991. In the decades that followed, the number of fresh evidence applications increased by an incredible 400% galloping from 145 cases between 1981 and 1990, to 727 cases between 1991 and 2000. This trend has continued at a similar pace since 2001.

Why then this significant increase in fresh evidence cases after 1977 and beyond? How can we explain this dramatic shift in the number of fresh evidence cases? What are the contributing factors of this phenomenon? Has the Canadian criminal justice system seen a corresponding growth in the number of miscarriages of justice during the same period? On a theoretical level, what are the main reasons given for this distinct change in the fresh evidence case load? These are the questions which animate this thesis.

An analysis of 1585 fresh evidence cases from 1910 to 2010 has pointed to two working hypotheses for this dramatic growth in fresh evidence cases. First, there is a direct link in the search for truth and the corresponding rise in fresh evidence cases in

¹ R.S.C., c. 41 at s. 1021 permitting appellate courts to entertain fresh evidence on appeals against conviction or acquittals. See also *C. cr.*, s. 1023 pertaining to powers of appellate courts to admit fresh evidence on sentence appeals.

² *Criminal Appeal Act, 1907* (U.K.), c. 23, s. 9,

the five years immediately prior to 1982. The analysis of the case law reveals that this period of growth is directly linked to the growth in DNA evidence and other advances in the forensic sciences that began to make their appearances in Canadian courtrooms both during criminal trials and at the appellate level. There is a direct correlation between the issues addressed in the case law and the growth in the testimony of forensic expert witnesses beginning in the mid to late 1970s. Within the theoretical framework, this growth is ascribed to the notion of the search for truth based on the outcomes and impact of DNA evidence for example on appellate review of the criminal trial records and or sentences.

The second working hypothesis adopts the position that the reclamation of rights following the advent of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)³, in 1982 has created a prolific new branch in fresh evidence jurisprudence, touching all aspects of the legal rights guaranteed in articles 7 to 14 of the *Charter*.⁴ The thesis examines the two most prevalent legal rights of this new genre and traces the direct correlation between the growth of fresh evidence applications and claims based on irregularities in Crown disclosure and allegations of incompetence of counsel at trial.

These two working hypotheses between truth propelled by the advances in forensic science evidence, on the one hand and rights in light of the advent of the *Charter*, on the other hand are reflected in the current debate in Canada between legal scholars who consider criminal law evidence as a tool to be used for the search for truth and those for whom the Canadian criminal justice system is defined by the protection of rights.⁵

³ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴ *Ibid.* at ss. 7-14.

⁵ See articles by David Paciocco, “Balancing the Right of the Individual and Society in matters of truth and proof: Part II – Evidence about Innocence” (2001) 80 *Can. Bar. Rev.* 433 and “Evidence about Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof” (2002) 81 *Can. Bar. Rev.* 39. Also consider writings by Richard C.C. Peck, “The Adversarial System: A Qualified Search for the Truth” (2001) 80 *Can. Bar Rev.* 456.

This thesis suggests however that this is a false dichotomy. While both positions may be correct, the outcomes of fresh evidence cases may more likely than not be determined on the basis of fairness, which is linked not only to the interests of the participants in the criminal law process but also to the interests of justice- a notion that includes the principles of fundamental justice, and the integrity of the administration of justice.⁶

The development and application of the rules of fresh evidence reveal that the relationship between truth and rights is shaped by a preoccupation to do what is fair and what is just. The thesis adopts the position that even if the truth may be made manifest by new DNA evidence and the rights of an accused protected under the *Charter*, Canadian appellate Courts will not admit fresh evidence, where in the interests of justice, it would not be fair to do so. Further, such evidence would not be admitted, if to do otherwise would compromise the administration of justice.

In addition to these possible theoretical explanations, the growth of fresh evidence is shaped by the following three factors: the definition of fresh evidence, the nature of the fresh evidence in question and the source of the application to adduce fresh evidence.

First, fresh evidence is broadly defined as any evidence that a Canadian appellate court has been asked to consider and which was not considered by the decision maker. It is new evidence in as much as it was not part of the trial record; the record of the sentencing judge; the documents under consideration by the Minister of Justice in extradition matters or the evidence before a Review Board under appellate review.

Because of this broad definition, fresh evidence applications may arise on any basis, including irrelevant frivolous claims that defy even the suspension of credulity. In this regard, decisions in Canadian criminal law appeals use the words “fresh,” “new” and “further” evidence interchangeably. In my view, they mean one and the same thing, which was best described in the early English civil law cases as evidence of

⁶ The principle of protecting the integrity of the administration of justice is enshrined in section 24(2), as one of the remedial provisions of the *Charter*. So too, where the question arises, appellate court judges considering fresh evidence applications will exclude fresh evidence if the court concluded that having regard to all the circumstances, the admission of the fresh evidence would bring the administration of justice into disrepute.

something that happened since the hearing below or has come to the knowledge only after that hearing.⁷ Fresh evidence should have a sense of ‘newness,’ in that the evidence was not used at the trial or hearing of the Court below. However, Morris LJ in *R. v. Medical Appeal Tribunal (North Midland Region), ex p Hubble*⁸ made an important distinction in the understanding of fresh evidence, which endures today as the due diligence principle. A party having knowledge of a material fact and decides not to use it at trial cannot adduce this material fact as fresh evidence on appeal. Fresh evidence must be evidence that was neither available nor attainable during the trial.

Second, in terms of the nature of the fresh evidence, it may appear in a variety of forms via affidavits from opinions of expert witnesses, DNA testing results, post verdict reports, recantations, confessions, and physical evidence, such as the recovery of a murder weapon, surveillance camera images that support or belie an alibi.

Also, in the context of criminal proceedings, the application to introduce fresh evidence may seek to overturn a verdict or vary a sentence or at times may involve an appeal from both verdict and sentence. The number of fresh evidence applications varies based on the nature of such applications. In the context of quasi criminal proceedings, the applicant pursues the reconsideration of a ministerial decision with respect to extradition proceedings or conclusions of Review Boards empowered with the charge and control of individuals admitted to correctional or mental health institutions following a final determination in a criminal court of law. It is more common for appeals to be taken against conviction and against both conviction and sentence than against sentence alone. This remains a contributing factor in the recent rise of fresh evidence cases.

Third, the source of the fresh evidence application also plays a role in the growth in fresh evidence cases. Appeals based on fresh evidence adduced by the

⁷ The notion of “fresh evidence” was first defined in civil law matters and then adopted in criminal law although with more leniency on the due diligence question. See for example, *Re Chennell, Jones v. Chennell* (1878), 8 Ch D 492 (CA); *Johnson v. Johnson* (1900) P 19; *Timmins v. Timmins* (1919), p. 75 and *Underwood v. Underwood*, [1946] p. 84.

⁸ [1959] 2 QB 408, [1959] 3 All ER 40, at 47 (CA).

individual, as opposed to the state accounted for the lion share of fresh evidence applications. Moreover, there were less than five self represented appellants seeking to adduce fresh evidence, providing a socio-economic reason that might impact on the high numbers of fresh evidence applications. Generally, people represent themselves on appeal for pecuniary reasons. That there are so few self-represented appellants, can possibly explain why the number of fresh evidence cases continue to grow; more people being able to assume the costs of pursuing fresh evidence applications on appeal.

For its part, the Crown rarely introduces applications to adduce fresh evidence providing support for the reverse argument that the increases in fresh evidence applications are impacted by its source of origin. Moreover, the Crown is limited to bringing appeals only on questions of law.⁹

Coupled with the three theoretical factors of truth, rights, and fairness, these three organic factors of definition, nature and source of fresh evidence have helped set the parameters of this research project; identifying the limitations of the study, highlighting what is excluded and what is not.

The thesis is based on an empirical study of fresh evidence cases from Canadian appellate Courts,¹⁰ with respect to criminal and quasi criminal proceedings.¹¹ Consequently, the application of fresh evidence in the civil law context

⁹ *Infra* note 57.

¹⁰ In addition to the Supreme Court of Canada (S.C.C.), these consist of decisions from past and present appellate courts, including the Alberta Court of Appeal (Alta. C.A.); the British Columbia Court of Appeal (B.C. C.A.); the Manitoba Court of Appeal (Man. C.A.); the Court of Appeal of New Brunswick (N.B. C.A.); the Newfoundland Supreme Court - Court of Appeal (Nfld. C.A.), whose name was changed on December 6, 2001 to the Newfoundland and Labrador Supreme Court - Court of Appeal (N.L. C.A.); the Court of Appeal for the Northwest Territories (N.T. C.A.); the Nova Scotia Court of Appeal (N.S. C.A.); the Court of Appeal of Nunavut (N.U. C.A.); the Court of Appeal for Ontario (Ont. C.A.); the Prince Edward Island Court of Appeal (P.E.I. C.A.); the Quebec Court of Appeal (Qc. C.A.); the Court of Appeal for Saskatchewan (Sask. C.A.); and the Yukon Territory Court of Appeal (Y. C.A.).

¹¹ Strict liability offences do not form part of the sample. There were four such regulatory offences cases, including *R. v. Yorke*, [1998] N.S.J. No. 3, 122 C.C.C. (3d) 298 (N.S.C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 97 (S.C.C.). In that case, Mr. Yorke was convicted of unlawfully importing foreign cultural property that had been illegally exported from Bolivia, contrary to s. 43 of the *Cultural Property Export and Import Act*, R.S.C. 1985, c. 51 (the Act). Among other grounds, the appellant had argued that s. 37(2) of the Act did not provide fair notice to citizens of Canada of what constitutes an offence. The Crown brought a fresh evidence application to show that the Government of Canada had publicized the Act. The Court in dismissing the appeal held that this fresh evidence

is excluded from this analysis. First, while this would appear to state the obvious, the distinction is necessary because the study does include two instances in which the outcome in the criminal trial was subsequently sought to be admitted as fresh evidence in a civil cause of action.¹² Second, the size of such an undertaking would be prohibitive, stretching the scope of the research beyond the humanly possible within the timeframe of the project.

Part I of the thesis provides quantitative and qualitative analyses of the findings. These include aspects of methodology, the sample size and exclusions. At the outset, I explored the idea whether there are differences in the approaches to fresh evidence in Canada's bijural legal traditions. Following invaluable interviews with representatives of the Quebec Court of Appeal in Montreal and the on-site observations of a fresh evidence criminal proceeding, I confirmed early on that there are no differences in approaches to appellate adjudication in fresh evidence criminal matters as between Quebec and its counterparts in the common law jurisdictions. This avenue of research was thus readily closed in favour of a review of the doctrine and the law of fresh evidence, which form the focus of Part II.

The first section of Part II examines the legal literature in Canada to determine the different doctrinal approaches to fresh evidence in criminal law proceedings. The thesis concludes that fresh evidence in Canadian criminal law has never before been the object of an in-depth study. Where legal scholars have turned their minds to the subject of fresh evidence in Canadian criminal law, the exercise may be characterized at best, as secondary to a larger subject matter. This doctrinal analysis is followed by a discussion of the evolution and current state of the law of fresh evidence, with respect to verdict and sentence appeals, as well as to references and the quasi criminal matters of extraditions.

showed limited publication but that this was justified because the Act was aimed at a very small specialized public involved in the import and export of cultural property. All four cases were very interesting and contain complex legal issues but none of them involves true crimes.

¹² See for example the following cases: *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 O.R. (3d) 124, 141 C.C.C. (3d) 403 (Ont. C.A.) and *R. v. Flis* (2006), 207 O.A.C. 228, 205 C.C.C. (3d) 384 (Ont. C.A.) reversing, [2004] O.J. No. 6083, (Ont. S.C.J.) leave to appeal refused (2006), 227 O.A.C. 396 (note), [2006] S.C.C.A. No. 120, (S.C.C.).

Part III establishes the theoretical framework to support the thesis that appellate adjudication is determined by an ideal of fairness that operates in the interests of justice and the integrity of the administration of justice rather than a quest for truth or the blind respect of legal rights. The thesis explores the values and factors that have driven fresh evidence applications and which are reflected in the cases and in the working hypotheses of appellate adjudication in this special area of law throughout the course of the last century.

Part IV develops two working hypotheses to provide elements of response to a distinct pattern uncovered in the cases and that is, the significant rise in the number of fresh evidence cases in Canadian criminal law appeals between the years 1910 and 2010. Whereas the number of fresh evidence cases prior to 1970 remained largely in the single digits, they tripled during the decade 1970 to 1980. While marked increases followed in the years 1980 to 1990, there was a dramatic explosion of fresh evidence cases in the last two decades of the 20th century. Part V provides a nexus between the growth of change and the three theoretical pillars provided by the search for truth, the *Charter* values of rights, and theories of justice as fairness as developed by John Rawls.

Based on a detailed examination of the fresh evidence case law, the thesis will demonstrate that the progress in expert forensic evidence in criminal proceedings coupled with the dogged determination of individuals devoted to the principles of justice have largely contributed to the initial growth in fresh evidence applications in Canadian criminal law appellate Courts, beginning in the 1970s.

But if the prevalence of new scientific evidence in the courtroom may be the source of this initial increase in fresh evidence applications, it does not explain the dramatic growth in such applications starting in the early 1980s. This leads to the second hypothesis that there is a direct correlation between the advent of the *Charter* and the change in both the number and complexity of issues observed in the fresh evidence jurisprudence after 1982. The thesis explores the strategies adopted in Ontario and Quebec, for example, to address this rise in fresh evidence applications, which threatens to overburden appellate Courts and impede the administration of justice in these two jurisdictions. The statistics for the period 1991 and 2000 confirm

that concerns expressed as early as 2000 regarding the burden posed by fresh evidence applications on the administration of justice in Ontario for example, are not altogether unfounded.

It is argued that but for these broad contributing factors, the number of fresh evidence cases would not be nearly as high and the finality of verdicts and sentences would be but rarely disturbed.

PART I METHODOLOGY

This research project followed a multipronged approach combining both quantitative and qualitative research methods. After addressing the sample size and exclusions, the second section of Part I examines the strengths and shortcomings of the qualitative research methods, including the interviews and the on-site observations of fresh evidence matters. Finally, I hope to demonstrate why it was necessary to turn to the source of the case law to mine the raw data to sustain my working hypotheses.

I.1 Shaping the Sample Size: inclusions and exclusions

The case study analysis is based on fresh evidence jurisprudence that spans a period of 100 years, between 1910 and 2010. The decade of 1910 is an appropriate place to start because the earliest Canadian fresh evidence criminal law case was published in 1915. In *Rex v. White*,¹³ the Ontario High Court dismissed a motion brought by the Crown to introduce fresh evidence at the close of the defence's case in order to support its theory that there was sufficient evidence to find the accused guilty of keeping a common betting-house. In dismissing the application, the Court held that the Crown intended to provide evidence in chief rather than evidence in reply, thereby requesting a trial *de novo*. The Court ruled that it was without jurisdiction to admit fresh evidence to retry the defendant.

¹³ (1915), 34 O.L.R. 370, 24 C.C.C. 277 (Ont. H.C.).

This early resistance to the reception of fresh evidence may explain why there was no such other reported case for almost 10 years. It was not until 1924 that the next fresh evidence case would be reported.¹⁴ This decision from the Nova Scotia Court of Appeal was rendered one year after Parliament, in 1923 added sweeping new powers to the *Criminal Code*¹⁵ granting Canadian appellate courts supplemental powers to admit fresh evidence both with respect to verdict appeals and appeals against sentence.¹⁶ As alluded to earlier, these legislative reforms were introduced in Canada in order to correct errors of justice that arise from wrongful convictions, acquittals and sentences where it is in the interest of justice to do so. These revolutionary amendments have withstood the test of time and have remained intact notwithstanding subsequent amendments to the *Criminal Code*.¹⁷

The study unearthed 2116 cases involving fresh evidence in a criminal or quasi criminal proceeding.¹⁸ Of these, 43 cases involved joint or multiple appellants. These cases are included in the sample as one fresh evidence matter. The sample was pruned of 14 duplicated cases that appeared under sub nom.,¹⁹ as well as five cases

¹⁴ *R. v. Cronan* (1924), 57 N.S.R. 25, 41 C.C.C. 320 (N.S.C.A.).

¹⁵ *C. cr.*, *supra* note 1.

¹⁶ *Ibid.* at s. 1023.

¹⁷ R.S.C. 1927, c. 36, s. 1021; R.S.C., 1953-54, c. 51, s. 592; R.S.C., 1970, c. 34, s. 610; R.S. C., 1985, c. 27, (1s Supp.), s. 144; R.S., c. 23 (4th supp.), s. 5; 1995, c. 22, s. 10 (Sch. 1, items 28 and 29); 1997, c. 18, ss. 97 and 141(b); 1999, c. 25, s. 15; 2002, c. 13, s. 67. These supplemental powers are currently found under ss. 683 and 687 pertaining to verdict and sentence appeals respectively.

¹⁸ These 2116 were collected from Quicklaw in September 2009 using a combination of the following key words: fresh evidence, further evidence, new evidence, nouvelle preuve et preuve nouvelle. The cases were noted up effective March 18, 2010.

¹⁹ For example, *R. v. M.M. (1)*, *R. M.M. (2)*, [2002] O.J. No. 3396, (sub nom. *R. v. Medeiros*) 163 O.A.C. 46 (Ont. C.A.) appeared in the sample both as *R. v. M.M. (1)*, *R. M.M. (2)*, [2002] O.J. No. 3396 (Ont. C.A.), and under the sub nom. *R. v. Medeiros*(2002), 163 O.A.C. 46 (Ont. C.A.). In this case a husband and wife pleaded guilty to criminal negligence causing death and abandoning four children under the age of ten years. The couple left their four young children in the care of their 10 year old sibling and the youngest; a toddler swallowed a screw and died. Four years later, the parents sought to introduce fresh evidence that they did not leave the children on their own after all. Rather M.M. (1)'s adult sister and her husband were there to watch over the children. However, this fresh evidence was incredible coming as it did four years after their guilty pleas. Moreover, both the sister and her husband contradicted this new position. Their appeal was dismissed.

in which applications to introduce fresh evidence before the Supreme Court of Canada were dismissed without reasons.²⁰

Similarly, the fresh evidence cases heard by the Supreme Court of Canada during the relevant time period are attributed to their jurisdiction of origin to avoid duplication. However, it is recognized that there may be occasion where the fresh evidence adduced before Canada's highest Court differed from the fresh evidence adjudicated by the appellate court below.

For instance, this is what happened in the matter of Mr. Robert Latimer who was found guilty of second degree murder for the mercy killing of his 12-year old daughter. Mr. Latimer was sentenced to the mandatory penalty of life in prison without parole for 10 years.²¹ On appeal against both conviction and sentence, Mr. Latimer sought leave to the Court of Appeal for Saskatchewan to adduce fresh evidence consisting of the widespread public support for his actions.

In addition to a petition that was presented to the House of Commons, Mr. Latimer provided numerous newspaper articles from various parts of the country to support his call for a constitutional exemption from the sentence, which was deemed to be far more punitive than the measure of gravity and the particular circumstances of the case warranted.²² Writing for the majority, Tallis J.A. dismissed the application to adduce fresh evidence concluding that it would not have assisted the panel in resolving the legal issues before the Court.

In a strong dissent, Bayda C.J.S disagreed with this outcome on the application for a constitutional exemption from the mandatory life sentence and parole ineligibility. Considering that this harsh sentence was a violation of section 12 of the *Charter*,²³

²⁰See (1) *R. c. Turcotte*, [2006] C.S.C.R. no 476 (S.C.C.); (2) *R. v. Van Boeyen*, [1993] S.C.C.A. No. 491 (S.C.C.); (3) *R. v. Wasylyshen*, [1990] S.C.C.A. No. 378 (S.C.C.); (4) *R. v. Whiteside*, [1983] S.C.C.A. No. 83 (S.C.C.); and (5) *R. v. Williams*, [1996] S.C.C.A. No. 307 (S.C.C.).

²¹ To illustrate, see *R. v. Latimer*, [1995] S.J. No. 402, 99 C.C.C. (3d) 481 (Sask. C.A.), reversed on other grounds, [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193 (S.C.C.).

²² *Ibid.* at para. 68.

²³ *Charter*, *supra* note 3 at s. 12, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

the Chief Justice would have admitted the fresh evidence in light of the public outcry and allowed the sentence appeal as demonstrated in the passage below:

The evidence, as disclosed by the affidavits and exhibits, of widespread public outrage in the nation resulting from this sentence is unmistakable. To ignore it, in my respectful view, is to risk arrogance. The hundreds of letters received by the appellant and his family, the many petitions and telephone calls, as well as the editorial commentary in the country's newspapers, were an unsolicited, spontaneous (and in many respects an unprecedented) public outcry in response to the sentence.²⁴

However, when the matter was appealed as of right to the Supreme Court of Canada, Chief Justice Lamer underlined at the very outset that this case was not about the issues that sparked such strong public debate, in essence the fresh evidence adduced below. Rather, one of the issues before the Court consisted of altogether different fresh evidence that only came to light after the adjudication of the appeal before the Court of Appeal for Saskatchewan.

This joint application to adduce fresh evidence included affidavits indicating that prior to jury selection, Crown counsel at trial in collaboration with RCMP officers tampered with the jury pool by sending questionnaires to 30 of the 198 potential jurors, five of whom eventually sat on the jury that found Mr. Latimer guilty.²⁵ In light of this fresh evidence, Chief Justice Lamer allowed the appeal, quashed the conviction and ordered a new trial.²⁶

This case illustrates how fresh evidence at the Supreme Court of Canada may be entirely different from the fresh evidence application that was considered in the same case as heard by the appellate court below. Such distinctions are taken into consideration in the sample size in an effort to avoid duplication and maintain accuracy.

The sample was further pruned of 119 cases that were not fresh evidence matters. These cases appear in the sample because they have cited a case that

²⁴ *Latimer*, *supra* note 21 at para. 155.

²⁵ [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193 (S.C.C.) at paras. 13-14.

²⁶ *Ibid.* at paras. 44-45.

involved fresh evidence. However, the legal issues in these 119 cases did not involve applications to introduce fresh evidence.

The final exclusion is procedural in nature. The sample contained 340 fresh evidence criminal cases involving appeals from a summary conviction or an appeal from sentence imposed by a summary appeal judge. These cases are excluded for two reasons. First, the thesis is founded on the process of appellate adjudication. Superior Court or Divisional Court judges who sit on appeals from summary proceedings are not appellate court judges. Second, summary conviction appeal cases are excluded from the study because “these decisions do not establish binding principles because Courts of Appeal have dealt with the relevant issues.”²⁷

Consequently and in general, there is a noticeable difference between the analyses accorded to the fresh evidence applications as between a superior court judge sitting alone pronouncing on a summary conviction appeal and as between the deliberative judgments from a panel of appellate court judges rendering decisions from a Court of Appeal.

It should be noted however, that while the fresh evidence rulings of a summary appeal judge are excluded, appeals heard by the Courts of Appeal from fresh evidence rulings by the summary conviction appeal judge do form part of the sample of fresh evidence cases. In other words, fresh evidence rulings made by a superior court Judge sitting as a summary appeal judge are excluded, but appeals from such summary appeal decisions involving fresh evidence cases are included in the data sample.²⁸

²⁷ I am indebted to Professor David Paciocco for this insightful comment in his Thesis Evaluation Report regarding the possible valid reasons for excluding summary appeal court decisions, at p. 5. I also wish to acknowledge the invaluable comments of the other two examiners, Professor Rachel Grondin and Professor Charles-Maxime Panaccio.

²⁸ Section 839(1) of the *Criminal Code* provides for an appeal to the Court of Appeal with leave based on a question of law alone. Also, the question must raise a matter of some public importance. See for example *R. v. Massot*, [1995] B.C.J. No. 1444 (B.C.C.A.) allowing an appeal against the decision of a summary court judge overturning the decision of a provincial court judge convicting the appellant of stealing hay over \$1000. Also, *R. v. Thompson*, [1996] B.C.J. No. 492 (B.C.C.A.) an impaired driving case; *R. v. Callahan*, [1990] N.J. No. 191, 83 Nfld. & P.E.I.R. 192 (Nfld. C.A.), a summary conviction sexual assault case; *R. v. Mahoney*, 2000 NFCA 62, 197 Nfld. & P.E.I.R. 1 (Nfld. C.A.), driving while disqualified to do so; *R. v. Meade*, [2004] N.J. No. 49, 2004 NLCA 11 (N.L.C.A.); and *R. v. Werner*, 2005 NWTCA 5, 205 C.C.C. (3d) 556 (N.T.C.A.).

When these possible duplications and exclusions are tabulated, the final sample size is 1585 cases²⁹ as recorded in Appendix 1. The data reveals that there has been a significant increase in the number of fresh evidence applications starting in the 1970s, with a significant rise during the early 1980s. Yet the numbers remain relatively low; moving from 18 cases across the country in the period from 1961 to 1970, to 30 and 145 cases in the succeeding two decades respectively. The numbers explode, increasing almost fivefold to 727 cases between 1991 and 2000. While there would appear to be a slight decrease between the decade of the nineties and the present, it cannot be confirmed that this is a trend.³⁰ Table I provides a global perspective of the final sample size based on the number of fresh evidence cases by decade over the course of 100 years, between 1910 and 2010.

Table I. Fresh evidence cases by decade: 1910-2010

Decade	No. of fresh evidence cases	% increase per Decade
1910-1920	1	0
1921-1930	8	+700%
1931-1940	4	-50%
1941-1950	11	+175%
1951-1960	6	-45%
1961-1970	18	+200%
1971-1980	30	+67%
1981-1990	145	+387%
1991-2000	727	+398%
2001-2010	635	-13%
Total	1585	

²⁹ A proviso should be inserted here to signal that there are also unreported cases that would not be captured in the original data base. This applies across the country. Further, in Quebec, not all judgments are translated or produced in English and thus they are not found in the QuickLaw data base from which the original sample finds its source. To compensate, I did search the decisions of the Quebec Court of Appeal in both French and English. However, here too, not all cases are published.

³⁰ The cases were collected in September 2009, a full quarter before the end of 2009 and the first quarter of 2010. Hence the figures for these two periods are incomplete. Consequently, it cannot be confirmed that there is a change in the trend set in the previous decade. A comparative analysis of the statistics shows that they are at par value.

A third column is added in Table 1 to give a close-up view of the magnitude of change from one decade to the next. To be of value however, these percentages are relative and do not reflect the magnitude of the number of cases in question. To illustrate, there is a 700% increase from the decade 1910-1920 to the period of 1921 to 1930. The raw figures would seem inconsequential moving as they do from one to eight cases in those two periods. Such data would obviously not give cause for alarm. In contrast, the almost 400% increase between the 145 cases in the period from 1981 to 1990 and the 727 cases in the decade immediately following this period is much more troubling both in terms of the raw figures and the possible impact on the caseload of appellate courts.

This is especially true for the Court of Appeal for Ontario, which had 315 or 43% of the total fresh evidence cases (n=727) based on the sample for the period 1991 to 2000.³¹ This is significant and would put pressures on the resources and administration of the criminal justice system in that province; justifying the concerns raised publicly at the Opening of the Courts Ceremony in 2000 by the Chief Justice for Ontario. In light of my study of the cases, that jurisdiction has adopted certain measures to address this heavy caseload of fresh evidence applications.³²

³¹ *Infra* note 33. Although it would have been useful to make the comparison, it is not possible to say that fresh evidence applications are more common in Ontario than elsewhere because appellate courts across the country do not provide statistics on the number of appeals heard annually. Notwithstanding, what can be gleaned from this statistic, i.e., that 43% of the fresh evidence cases between 1991 and 2000 were heard in Ontario is that the Court of Appeal for Ontario was at that time and indeed remains the busiest appellate jurisdiction in the country.

³² For example, the sample specifically includes the 385 fresh evidence matters that were dealt with as Endorsements. They are not excluded because they provide invaluable information often more detailed than some judgments rendered in other jurisdictions. It should also be noted that Ontario was the only jurisdiction to use Endorsements in its fresh evidence jurisprudence. Unlike the handwritten Endorsements that would not be published, these fresh evidence Endorsements are published and for these reasons merit inclusion in the sample. Further, the use of Endorsements, which are generally shorter than a full decision, is an important tool in husbanding precious judicial resources without sacrificing the merits of such claims. Finally, almost all these Endorsements were dismissed.

What are the possible causes for this dramatic growth in fresh evidence applications?³³ Before turning to the possible elements of response, the following section speaks to the qualitative research methods pursued.

I.2 Qualitative Research Methods: interviews, site visits and case law

The thesis is necessarily set in Canada's bijural legal system.³⁴ As such, the first line of enquiry was to determine whether there exist any distinguishing features in the application of fresh evidence principles by appellate Court Judges in the civil law jurisdiction of Quebec and its common law counterparts in the rest of the country.

It was in this vein that I undertook a series of three visits to the Quebec Court of Appeal, in Montreal, in October and November 2007,³⁵ where I conducted in-person interviews with a Judge of the Quebec Court of Appeal, as well as a Judicial Officer of that Court, both of whom have developed expertise in the Court's practice and procedures in relation to fresh evidence criminal law applications.

³³ In order to fully appreciate the magnitude of this increase, it would be necessary to consider the fact that there might have been an increase generally speaking in the number of cases heard by Courts since 1980. However, there are no statistics collected on the number of appeals heard by appellate Courts across the country. Even a visit to the websites of the respective appellate courts did not provide such statistics. According to Craig Grimes, Canadian Centre for Justice Statistics, there is no data available from Statistics Canada on criminal appeals. The scope for the Integrated Criminal Court Survey, which covers youth and adult criminal courts in Canada, does not include Courts of Appeal. Furthermore, Statistics Canada is not aware of any national survey of such appellate court matters. Although, it was not possible to find such comparative data, it does not undermine the fact that there was an almost 400% increase in fresh evidence applications between 1991 and 2000. It would seem to stretch credulity to think that there would be a corresponding increase in criminal appeals across the country on the one hand or that there was a similar rise in the incidence of miscarriages of justice under appellate review on the other hand. It is simply not possible to say one way or the other.

³⁴ As alluded to earlier, the Dominion Parliament was inspired by the evolution in English law in 1907, when in 1923 it adopted new powers granting the court of appeal supplementary powers to receive any new evidence it deemed would likely alter the outcome. The scope of my research did not permit a comparative analysis of the use of fresh evidence in other common law countries such as the United States of America or indeed France, the source of the Canadian civil law tradition. The study does however engage in a limited enquiry to determine whether there are distinctions in the application of fresh evidence rules and principles between the civil law and common law traditions in Canada.

³⁵ The interviews were conducted in the offices and in the Judge's Chamber at the Court in Montreal, on October 10, 31 and November 19, 2007.

Appendix 2 contains the prepared questionnaire, which formed the focus of these interviews. Full confidentiality is maintained both with respect to the identity of the interviewees, as well as the contents of the interviews. In keeping with the ethics policy of the University of Ottawa, their contributions to the study remain strictly without attribution.³⁶

In addition to the in-person interviews, I also did on-site observations of fresh evidence cases at that Court,³⁷ as well as at the Court of Appeal for Ontario, in the fall of 2007³⁸ and at the Supreme Court of Canada, in January 2008.³⁹ However, the observations drawn from these hearings were of limited benefit. To be able to rely on such on-site observations, it would have required at the minimum that I sit in on such hearings over an extended period of time on a regular basis, in the tradition set by Bruno Latour in his study of the judicial decision making process of the Conseil d'Etat in France.⁴⁰

Also such a study would have required sitting in on non fresh evidence criminal appeals with the same panel of judges and from different appellate courts across the country. In spite of these shortcomings, these visits and interviews provided a wealth

³⁶ Copies of the transcripts of the interviews were provided to each participant for additional comments or suggested changes and or corrections; the originals being sealed and deposited with the University of Ottawa, Faculty of Law, Civil Law Section. Also, the taped recordings of the interviews were erased.

³⁷ On November 19, 2007, the Quebec Court of Appeal heard one fresh evidence case during the Court's morning sitting, in the matter of *Bouchard c. Sa Majesté la Reine*, No. 500 10-003934-070. It was useful to have had the benefit before hand of discussing the case with the interviewees on which the application to adduce fresh evidence was based.

³⁸ On November 14, 2007, the Court of Appeal for Ontario heard an application to adduce fresh evidence on appeal in the matter of *R. v. Rybak*, 2008 ONCA 354, 90 O.R. (3d) 81 (Ont. C.A.). The two Counsel for the respondent were generous in answering questions about fresh evidence and in sharing their *factum just prior to the hearing*.

³⁹ *R. v. Beaulieu*, [2008] 1 S.C.R. 3, 2008 SCC 1 (S.C.C.). Without hearing from the Crown, in an oral judgment dismissing the application to admit fresh evidence, LeBel J. said, "[w]e all agree that the motion to adduce fresh evidence does not meet the criteria developed by the courts and that the majority of the Quebec Court of Appeal was right to dismiss it. We also believe that the appellant has not established a basis for this Court to intervene. In particular, it has not been shown that the guilty verdict is unreasonable or that there has been a miscarriage of justice. For these reasons, the appeal is dismissed."

⁴⁰ See Bruno Latour, *La Fabrique du droit une ethnographie du Conseil d'Etat* (Paris: Éditions La Découverte et Syros, 2002). This contains a detailed account of the ceremony of the proceedings, the comportment of the Judges and their interaction not only with each other but also with Counsel.

of information and context. While I cannot draw conclusions from these, they certainly added to my overall comprehension of the subject matter.⁴¹

But if the in-person interviews and on-site observations were necessarily on a much smaller scale and duration, the source of the study's findings lies squarely within the cases. After having defined the parameters of the sample, the cases were then classified by year and in alphabetical order by Court.

Before proceeding to studying the cases, the next step was to draw up the following list of questions and factors to consider as I read each case:

1. Who brought the appeal: The accused or the Crown? Or was it a reference by the Minister of Justice?
2. What decision was under appeal - the verdict or the sentence or both or was it an application to revoke a guilty plea based on fresh evidence?
3. Was the decision a jury trial or trial by judge alone? Or was it a guilty plea?
4. What were the offences involved?
5. What sentence was imposed?
6. What were the salient facts and determining factors to dispose of the fresh evidence application?
7. Was the fresh evidence application granted or rejected and why?
8. What was the outcome of the appeal?
9. Did the fresh evidence decide the appeal?

The answer to each question for each case was analyzed and collated in chart format in order of jurisdiction. This information formed the basis for the identification of the two working hypotheses for the possible causes of the rise in fresh evidence cases. The analytical charts for each jurisdiction also provided the opportunity to draw

⁴¹ I am indebted to the office of the Chief Justice of the Court of Appeal of Quebec in authorizing this research of its Court. This would not have been possible without the commitment and interest of the two participants in this evolving area of the law. Their assistance was invaluable. Finally, I assume full responsibility for this thesis. Any error as there might exist therein with respect to the Court of Appeal of Quebec is entirely of my doing.

further conclusions with respect to the universality of judicial treatment of fresh evidence applications in the civil and common law traditions.

For illustration purposes, Appendix 3 is a copy of the analysis of fresh evidence cases from the Court of Appeal of Nunavut, where there were but two such cases. As indicated in Table II, all appellate Courts in Canada are represented in the fresh evidence jurisprudence - from the Court of Appeal of Nunavut with two cases, to the largest, the Court of Appeal for Ontario with 675 fresh evidence cases.

Table II. Fresh evidence cases by Court: 1910 - 2010

Court⁴²	No. of fresh evidence cases
Alberta Court of Appeal	95
British Columbia Court of Appeal	311
Manitoba Court of Appeal	40
Court of Appeal of New Brunswick	30
Supreme Court of Newfoundland and Labrador, Court of Appeal ⁴³	32
Court of Appeal for the Northwest Territories	9
Nova Scotia Court of Appeal	108
Court of Appeal of Nunavut	2
Court of Appeal for Ontario	675
Prince Edward Island Court of Appeal	12
Quebec Court of Appeal	202
Court of Appeal for Saskatchewan	64
Yukon Territory Court of Appeal	5
Total	1585

Using all three methods –interviews, on-site visit and study of the case law- and in spite of obvious limitations, it came as no surprise to find that there is absolutely no difference in the treatment of fresh evidence cases by the Quebec Court of Appeal and in the rest of the country. Criminal law is a federal power and applies to both

⁴² Fresh evidence judgments by the Supreme Court of Canada do not appear separately but rather are incorporated in the statistics of the applicable jurisdiction of origin.

⁴³ On December 6, 2001 an amendment to the *Constitution Act of Canada, 1982* changed the name of Newfoundland to include Labrador; hence the two different court abbreviations. N.L. C.A. applies to decisions delivered after that date.

common law and civil law jurisdictions. It follows then that a review of the doctrine and the law of fresh evidence would be without distinction across the country and can inform my working hypotheses of the cause of the growth in fresh evidence applications through the last few decades. This aspect of the research is dealt with in Part II.

PART II DOCTRINE & THE LAW OF FRESH EVIDENCE

After a review of the treatment of fresh evidence by Canadian legal scholars, the developments in this part of the thesis examine the case law and highlight the principal points of reference in the evolution of the law of fresh evidence from 1910 to the present.

II. 1 Literature review: the treatment of fresh evidence by the doctrine

With the exception of the brief published remarks delivered in 1998 by the Honourable Mr. Justice Sopinka to the Advocacy Society, entitled, “Fresh evidence in the Supreme Court of Canada with respect to civil appeals, criminal appeals, applications for leave to appeal, and Charter cases,”⁴⁴ there has been no study conducted that is entirely devoted to fresh evidence in Canadian criminal law.⁴⁵

Those scholarly articles⁴⁶ that do make reference to fresh evidence cases fall into one of three categories: (i) references to cases where fresh evidence was a deciding factor; (ii) case studies; and (iii) media articles, speeches, lectures and book reviews.

⁴⁴ The Honourable Mr. Justice John Sopinka, “Fresh evidence in the Supreme Court of Canada” (Winter 1997/1998) 17 *Advocates' Soc. J.* No. 1, 27-30.

⁴⁵ It is possible that such works may exist in the civil law context but such an enquiry goes well beyond the scope of the thesis.

⁴⁶ A search on Quicklaw using the search terms “fresh evidence” and “new evidence” revealed a total of 47 articles.

II.1.1 Literature referring to fresh evidence cases

The overwhelming majority of articles consist of literature that makes reference to fresh evidence cases in the context of a broader unrelated subject matter. To illustrate, the authors of a comprehensive review⁴⁷ on the 10th anniversary of the *Young Offenders Act*,⁴⁸ refer to the role fresh evidence played in one case where the Youth Court Judge agreed to the Crown's transfer application and directed that the young offender be tried in ordinary court on a charge of first degree murder. This was confirmed on review.

The young offender appealed on the basis of fresh evidence in the form of an affidavit by his psychiatrist, which declared that the accused suffered from a panic attack during an unwelcomed homosexual encounter initiated by the victim. This fresh evidence contradicted the statements given by the accused to the police. Although the Crown agreed that the psychiatrist's report should be admitted as fresh evidence, the Court dismissed the appeal because of this contradiction.

While the article cites this case as an example of the appellate court's wide discretion when reviewing transfer decisions, the authors do not address the fact that the treatment of fresh evidence involving young offenders is circumscribed by the *Young Offenders Act*. As Carthy J.A. noted in dissent,

"a review under the *Young Offenders Act* is neither an appeal nor a trial de novo. This is affirmed by McLachlin J., as she then was in *R. v. M. (S.H.)*, [citation omitted]. A fresh discretion must be exercised, unlike an appeal, and deference must be given to the findings of fact and credibility of the judge who heard the witnesses, unlike a full trial de novo where the witnesses are heard for a second time. In the context of the treatment of fresh evidence, it is also important to note that the power of the reviewing court is limited by s. 16(9) and (10) of the Act to confirming or reversing the decision below."⁴⁹

⁴⁷ Janet Bolton, Jane Caskey, Suzanne Costom, Richard Fowler, Sivan Fox, Kirsten Hillman, Matthew Taylor, Rhonda Yarin, "The Young Offenders Act: Principles and Policy -- The First Decade in Review" ((1993) 38 *McGill L.J.* 939.

⁴⁸ *Young Offenders Act*, R.S.C. 1985, c. Y-1, enacted as S.C. 1980-81-82-83, c. 110, proclaimed in force 2 April 1984, SI 84-56, C. Gaz. 1984.II.1534.

⁴⁹ *R. v. G.S.*, [1991] O.J. No. 1731, 5 O.R. (3d) 97 (Ont. C.A.) leave to appeal to S.C.C. refused [1991] S.C.C.A. No. 494 (S.C.C.) at para. 10.

In their study of the wrongfully convicted, Braiden and Brockman provide another example of instances in the literature where fresh evidence is treated as a secondary issue in a broader unrelated subject.⁵⁰ However, unlike many of these articles, this study conveys more than a passing reference to fresh evidence cases, both with respect to the role of the Minister of Justice and the role of the appellate court in the context of section 690 applications.⁵¹ In fact, the authors' study shows that fresh evidence in section 690 applications plays a determinative role in the outcome of such applications that are brought by the wrongfully convicted. Fresh evidence plays a decisive role in the Minister's decision, as indicated in the six principles outlined by then Minister of Justice Alan Rock in the section 690 application brought by Mr. Colin Thatcher.⁵² The Minister's principles affirm the four-part test in *Palmer*,⁵³ which has guided appellate courts receiving fresh evidence since 1980.

Similarly, appellate courts are required more often than not to consider fresh evidence when deciding *References* from the Minister of Justice. According to the authors, "[o]f the 20 interventions between 1960 and 1997, eleven were referred to a court of appeal for hearing and determination under section 690(b)."⁵⁴ Further, of these 11 interventions, "six involved the introduction of new evidence relating to the

⁵⁰ Patricia Braiden and Joan Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice under Section 690 of the Criminal Code" (1999) 17 Windsor Y.B. Access Just. 3.

⁵¹ Section 690 was repealed in 2002. For an analysis of s. 690 references, see the LL.M. thesis by Patricia Lynn Braiden, *Wrongful convictions and section 690 of the Criminal Code: an analysis of Canada's Last-resort Remedy* (LL.M. Thesis, Simon Fraser University, 2000) [unpublished].

⁵² *Braiden and Brockman*, *supra* note 50 at 10. The fifth Principle states, "Where the applicant is able to identify such "new matters," the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be, "is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict?"

⁵³ *Palmer v. R.*, *R. v. Palmer*, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193 (S.C.C.) same case *R. v. Duncan*, [1980] 1 S.C.R. 783 (S.C.C.).

⁵⁴ *Braiden and Brockman*, *supra* note 50 at 17.

merits of the convictions.”⁵⁵ While these authors⁵⁶ make an invaluable contribution to legal scholarship, fresh evidence does not form the object of their inquiry.

Fresh evidence is a broad subject matter that may be adduced both by the accused and by the Crown⁵⁷ and as against both verdict and sentence. Fresh evidence may be invoked for any offence and can involve multiple complex issues from which it may not be necessary to consider the fresh evidence.⁵⁸ There are

⁵⁵ *Ibid.* at 18.

⁵⁶ See also Epstein J., “What factors affect the credibility of a witness?” (Summer 2002) 21 *Advocates' Soc. J. No. 1*, 10 – 16; Fred Ferguson, Q.C., “Advocacy in The New Millennium” (2003) 41 *Alta. L. Rev.* 527 – 545; The Honourable Mr. Justice George D. Finlayson, “Appellate Advocacy in an Abbreviated Setting” (Summer 1999) 18 *Advocates' Soc. J. No. 2*, 22-25; Gisli Gudjonsson, “Disputed Confessions and Miscarriages of Justice in Britain: Expert Psychological and Psychiatric Evidence in the Court of Appeal” (2006) 31 *Man. L.J.* 489 – 521; J. Andres Hannah-Suarez, “Moral Luck in Canadian Law: Socio-economic Deprivation, Retributive Punishment and the Judicial Interpretation of Section 718.2(e) of the Criminal Code” (2003) 2 *J.L. & Equality* 255; The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment: Accountability, Independence & Vulnerability in a Post-Appellate Conviction Review Process” (2002) 21 *Windsor Y.B. Access Just.* 569; L.H. Leigh, “Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission” (2000) 38 *Alta. L. Rev.* 365-377; Julie A. Maciura, “Health Professional - Patient Privilege: The Application of Wigmore's Criteria” (1993/94) 2 *Health L. Rev.* No. 3, 17-21; Dwight G. Newman, “A Study of the Judgments of the Saskatchewan Court of Appeal, 2000” (2002), 65 *Sask. L. Rev.* 107 – 137; Richard Overstall, “Mystical Infallibility: Using Probability Theorems to Sift DNA Evidence” (1999) 5 *Appeal* 28-37; Ryan Rempel, “1994 Survey of Decisions of the Saskatchewan Court of Appeal” (1995), 59 *Sask. L. Rev.* 1; Paul J. Saguil, “Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure” (2007) 45 *Alta. L. Rev.* 117 – 136; Lee Stuesser, “The Accused's Right to Silence: No Doesn't Mean No” (2002) 29 *Man. L.J.* 149 – 171; and Gary T. Trotter, “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2001), 26 *Queen's L.J.* 339 – 395.

⁵⁷ Fresh evidence may be adduced by the accused or convicted person for questions of fact or mixed fact and law and by the Crown only on questions of law, pursuant to subsection 676(1) (a) of the *Criminal Code*. See for example decisions from the Quebec Court of Appeal in *R. c. Bouillon*, 2006 QCCA 889, [2006] J.Q. no 6287(Qc. C.A.) at para. 40 and *R. c. Mora*, 2006 QCCA 9, [2006] J.Q. no 70 (Qc. C.A.) at para. 11.

⁵⁸ To illustrate see several fresh evidence cases under appellate review from British Columbia, including, *R. v. Canute*, [1990] B.C.J. No. 1274, 57 C.C.C. (3d) 58 (B.C.C.A.); *R. v. Charna*, [1990] B.C.J. No. 2378 (B.C.C.A.) a sentence appeal where the evidence was overwhelming; it was not necessary to consider the fresh evidence; *R. v. Fengstad*, [1994] 40 B.C.A.C. 39, 27 C.R. (4th) 383 (B.C.C.A.); and *R. v. Gatley*, [1992] 15 B.C.A.C. 162, 74 C.C.C. (3d) 468 (B.C.C.A.). See related fresh evidence procedural motion *R. v. Gatley*, 15 B.C.A.C. 161, [1992] B.C.J. No. 894 (B.C.C.A.); *R. v. Gauthier*, [1995] 62 B.C.A.C. 71, 28 W.C.B. (2d) 198 (B.C.C.A.); *R. v. Herman*, [1992] B.C.J. No. 318, 8 B.C.A.C. 317 (B.C.C.A.); *R. v. Hibbert*, [1996] B.C.J. No. 1660, 78 B.C.A.C. 277 (B.C.C.A.); *R. v. Jackson*, 2005 BCCA 539, 202 C.C.C. (3d) 228 (B.C.C.A.); *R. v. H.K.L.*, [1994] B.C.J. No. 3107, 53 B.C.A.C. 249 (B.C.C.A.); *R. v. Lawson*, [1994] B.C.J. No. 1818, 49 B.C.A.C. 301 (B.C.C.A.); *R. v. Learn* (1997), 144 W.A.C. 1 (sub nom. *R. v. L.R.L.*) 88 B.C.A.C. 1 (B.C.C.A.) leave to appeal dismissed [1997] S.C.C.A. No. 460 (S.C.C.); *R. v. Lee*, [1998] 106 B.C.A.C. 161, 124 C.C.C. (3d) 301 (B.C.C.A.); *R. v. Plewes*, 2000 BCCA 278, 144 C.C.C. (3d) 426 (B.C. C.A.); *R. v. D.E.S.*, [1998] B.C.J. No. 1817, 111 B.C.A.C. 320 (B.C.C.A.); and *R. v. Stolz* (sub nom. *R. v. Stoltz* (No. 2)), [1993] 32 B.C.A.C. 147, 84

instances also in the sample where the fresh evidence was so determinative that the panel of judges deemed it unnecessary to consider the other grounds of appeal.⁵⁹

II.1.2 Case studies involving fresh evidence

There are but three published case studies related to fresh evidence in Canadian criminal appeals.⁶⁰ Each of these case studies provides a detailed analysis of the particular case, including an examination of the many complex legal issues involved. However, not unlike the literature identified that makes reference to fresh evidence, none of the case studies is entirely devoted to a study of fresh evidence. In other words, they suffer from the same critique that fresh evidence is a mere reference, secondary to a larger purpose.

To illustrate, in her critique of the Court of Appeal for Saskatchewan in the aggravated assault case of *R. v. Keshane*,⁶¹ Grant's focus is entirely on what she argues is the Court's misinterpretation of the legislative intent of section 718.2(a) (i) and also its failure to take into consideration the sentencing principles of s. 718.2(e) of the *Criminal Code*⁶² and expanded upon in *R. v. Gladue*.⁶³ Mr. Keshane, an

C.C.C. (3d) 422 (B.C.C.A.) affirming [1993] B.C.J. No. 1601, 31 B.C.A.C. 89 (B.C.C.A.). The practice revealed in these 16 cases is not unique to the British Columbia Court of Appeal.

⁵⁹ This occurred less frequently than in those instances where it was not necessary to consider the fresh evidence. For some examples, see *R. v. Dalton*, [1998] N.J. No. 131, 163 Nfld. & P.E.I.R. 254 (Nfld. C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 294 (S.C.C.); *R. v. Hutchinson*, [1993] O.J. No. 820, 62 O.A.C. 381 (Ont. C.A.); and *R. v. McCullough*, [2000] O.J. No. 32, 142 C.C.C. (3d) 149 (Ont. C.A.).

⁶⁰ Andras Schreck, "Case Comment: *R. v. Delisle*, [1999] A.Q. No. 18 (C.A.): Ineffective Assistance of Counsel and the Scope of Counsel's Authority to Act" (June 15, 1999) *Ontario Criminal Lawyers' Association Newsletter*, Vol. 20, no. 2, p. 50; Candice Grant, "*R. v. Keshane*: Case Commentary" (2008), 71 Sask. L. Rev. 153 – 168; and John Kingman Phillips, "The Rest of the Story of *R. v. Stinchcombe*: A Case Study in Disclosure Issues" (2002) 40 Alta. L. Rev. 539 – 565.

⁶¹ *R. v. D.S.K.*, 2005 SKCA 18, (sub nom. *R. v. Keshane*) 257 Sask.R.161 (Sask. C.A.).

⁶² R.S.C. 1985, c. C-46.

⁶³ *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385 (S.C.C.) affirming (1997), 98 B.C.A.C. 120, 119 C.C.C. (3d) 481 (B.C.C.A.).

Aboriginal pleaded guilty to the offence, which involved a brutal attack laced with racial slurs against the victim, a White young man.

In increasing the sentence, the appellate court it is argued, failed to take into consideration Mr. Keshane's own Aboriginal status. The principle issue on appeal was the fresh evidence in the form of affidavits by two officers who took Mr. Keshane into custody. Mr. Keshane made statements that he wished the victim had died and threatened further violence upon his release. While the fresh evidence was admissible, a unanimous Court held that "they had been made in anger and did not reflect Mr. Keshane's true feelings about the offence." The fresh evidence while admissible did not determine the ultimate outcome of the appeal. This secondary treatment of fresh evidence is evident in the two other case studies. Can the same be said about the media articles, speeches, lectures and book reviews discussed below?

II.1.3 Media articles, speeches, lectures and book reviews

The media articles, as well as speeches, lectures and book reviews contribute to public awareness of appellate court decisions in criminal cases. There are eight such publications,⁶⁴ each in particular shining light on different aspects of matters involving fresh evidence in different jurisdictions across Canada.

However, all eight are addressed primarily to the legal profession and not to the general public at large, as the articles from the *Lawyers Weekly* demonstrate. So too

⁶⁴ Cristin Schmitz, "Incompetent counsel's effect on the trial determines fate of verdict, Ont. C.A. rules Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused." -- Mr. Justice David Doherty" (October 27, 1995) *The Lawyers Weekly* Vol. 15, No. 24; Anil Kapoor "Ineffective Assistance of Counsel & the Requirement to Seek and Follow Instructions" For the Defence (November/December 2000) *Ontario Criminal Lawyers' Association Newsletter*, Vol. 21, No. 6, p. 41; Cristin Schmitz, "Justice Minister Cotler orders re-examination of Andre Tremblay murder conviction" *The Lawyers Weekly* (July 22, 2005), Vol. 25, No. 12; John Jaffey, "Lack of Crown disclosure grounds for new trial, stay for two accused in murder" *The Lawyers Weekly* (January 9, 2004) Vol. 23, No. 33; The Honourable R. Roy McMurtry, "The opening of the courts, 2000" (Spring 2000) 18 *Advocates' Soc. J.* No. 4, 12-28; Jerome G. Miller, Book review by Wayne N. Renke, *Search and Destroy: African-American Males in the Criminal Justice System*, (Cambridge: Cambridge University Press, 1996); Editorial, "New evidence can be admitted on sentence appeals: B.C.C.A., *The Lawyers Weekly*, (February 4, 1994) Vol. 13, No. 36; and Anthony A. Peacock, ed., Book review by Jack Watson "Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory, (Don Mills: Oxford University Press, 1996)" (1996) 35 *Alta. L. Rev.* 813.

are the remarks of Chief Justice, the Honourable R. Roy McMurtry, at the Opening of the Courts Ceremony in 2000. The Chief Justice of Ontario expressed alarm at the burden of fresh evidence applications on the administration of justice in Ontario.

As Table I illustrates, by far the largest number of fresh evidence cases occurred in the decade 1991-2000. Fresh evidence appellate decisions from Ontario are the highest at 675 cases, which account for 43% of the sample of fresh evidence cases for the entire 100-year period under review, as demonstrated in Table II. Moreover, while Ontario is the largest appellate provincial jurisdiction in Canada, the fresh evidence statistics for that province stand well above those for British Columbia, the jurisdiction with the second largest number of fresh evidence cases, with 311 cases, or 20% and Quebec, with 202 cases, or 13% of the total.

As can be expected, this suggests some differences between the provinces; this is likely not due to civil law or common law traditions but there are some differences, which are only proportional to the numbers of cases these jurisdictions have to deal with every year,⁶⁵ as is revealed by the examination of the law of fresh evidence discussed in the next section.

II. 2 Case Law review: the evolution of the law of fresh evidence

As mentioned at the outset, in 1923, the Dominion Parliament gave broad discretionary powers to Canadian appellate courts to receive any evidence it deemed necessary and in the interest of justice to decide the issues on appeal against both verdict and sentence. However, unlike the pragmatic approach of the British, the Canadian legislators did not provide statutory guidance to the judiciary on the parameters for the exercise of this new power. It was therefore left to judges and the courts to fashion common law principles and procedures for the admission of fresh evidence with respect to verdict appeals, appeals from sentence and to a lesser extent references by the Minister of Justice to Canadian appellate courts. Each is discussed in turn in the sections that follow.

⁶⁵ As indicated earlier, the thesis does not propose to answer this question, the answer to which only further qualitative research could unveil.

II.2.1 Verdict appeals: incremental changes in the law of fresh evidence

The slow but steady evolution in Canadian fresh evidence law in criminal and quasi criminal proceedings can best be classified into two distinct periods: the pre-*Palmer* jurisprudence and the post-*Palmer* developments.

II.2.1 (i) Pre-*Palmer* Jurisprudence: 1910-1980

There have been incremental changes in the law of fresh evidence prior to the definitive judgment in *Palmer*⁶⁶ in 1980. In 1925, the British Columbia Court of Appeal was the first appellate court to apply the new powers enacted in 1923 to admit fresh evidence. Prior to these amendments, appellate courts could only review matters that were before the trial court. The Court in *R. v. Vye*⁶⁷, expressed reservations about applying these new powers. The views expressed by Martin J.A. sum up best this sentiment when he said:

This is a very unusual case in more than one respect, and as it is the first application we have had, under the change in the Criminal Code made in 1923, for the purpose of receiving fresh evidence after the trial, it is one which has given me much anxiety, I might say.

In this case, *Vye*, a medical doctor was convicted of raping his patient when he allegedly forced himself upon the complainant as payment in exchange for his services to perform an abortion. The complainant made a statement after trial that if true, contradicted her testimony at trial. Beyond its unusual facts, the case charted the course that these new powers should be used advisably and only in circumstances where it can be proven that the fresh evidence would alter the outcome at a new trial where the complainant can be cross-examined on the fresh evidence. Thus the test for the admission of fresh evidence in this maiden application of the collateral appellate powers required that the fresh evidence address a key issue at trial and be considered reasonably likely to alter the outcome.

⁶⁶ *Palmer*, *supra* note 53.

⁶⁷ [1925] 3 W.W.R. 100, 44 C.C.C. 249 (B.C.C.A.).

The following year in British Columbia, Chief Justice MacDonald refined the test in a case involving an application to extend the time to appeal in order to adduce fresh evidence. Given that this fresh evidence application in *R. v. Cumyow*⁶⁸ was brought without supporting evidence, the application was dismissed and the following test enunciated: “If evidence is discovered after the trial two things are necessary: first, it is necessary to shew (*sic*) that all due diligence was taken to have that evidence at the trial, and secondly, the new evidence must be such as to be practically decisive of the case.”⁶⁹ *Cumyow* introduces the principle of due diligence.

The next real modification to the law of fresh evidence occurred in 1944 and again in British Columbia where evidence that could have been available at trial was being introduced on appeal as fresh evidence. In *R. v. Martin*,⁷⁰ the accused sought to adduce fresh evidence on appeal of a corroborating witness who was available to the accused at trial and he chose to proceed to trial without the benefit of this evidence. Faced with these facts, the Court in *Martin* built on the due diligence principle in *Cumyow* and established the procedure for adducing fresh evidence where such evidence was available at trial. The person bringing such an application must do so by affidavit, which should “(a) indicate the evidence desired to be used; (b) set forth when and how the applicant came to be aware of its existence; (c) what efforts, if any, he made to have it adduced at the trial; and (d) in a criminal case, that he is advised and believed that if it had been so adduced, it might reasonably have induced the jury or the tribunal of fact to change its view regarding the guilt of the accused.”⁷¹

These general principles would be applied and or explained in the cases that followed⁷² up to and including the pivotal 1964 judgment from the Supreme Court of

⁶⁸ *R. v. Cumyow*, [1926] 1 D.L.R. 623, 45 C.C.C. 172 (B.C.C.A.).

⁶⁹ *Ibid.* at para. 4.

⁷⁰ [1944] B.C.J. No. 90, 82 C.C.C. 311 (B.C.C.A.).

⁷¹ *Ibid.* at para. 6.

⁷² See for example *R. v. Buckle*, [1949] 3 D.L.R. 418, 94 C.C.C. 84 (B.C.C.A.); *R. v. Davidoff (No. 2)*, [1951] B.C.J. No. 105, 101 C.C.C. 238 (B.C.C.A.) and *R. v. Lakatos* (1961), 35 C.R. 15, 129 C.C.C. 387 (B.C.C.A.).

Canada in *R. v. McMartin*,⁷³ reversing the decision of the British Columbia Court of Appeal. In that case, the accused was convicted of first degree murder of his wife. Fresh evidence in the form of psychiatric reports supported the question of insanity that was not introduced at trial. Relying upon the principles established in *Martin*, the Supreme Court of Canada cautioned against the overuse of the discretionary powers to receive fresh evidence as it was “clearly not in the interests of justice that this privilege should be extended to an appellant as a matter of course [. . .] special grounds must be shown in order to justify the Court in exercising the power conferred upon it by s. 589(1).”⁷⁴ Further on in his reasons, Ritchie J. affirmed a key fresh evidence principle in that, if the “evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury,” it should “not be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.”

Another important change was introduced to the common law on fresh evidence by the Supreme Court of Canada in *R. v. O'Brien*.⁷⁵ Mr. Justice Dickson, as he then was, affirmed that fresh evidence must first be admissible evidence before it could be considered for admission as fresh evidence. In *O'Brien*, two men were jointly charged with possession of a narcotic for the purpose of trafficking. The accused was arrested and his co-accused fled the country only to return to Canada after the accused was convicted. He confessed to the accused’s lawyer that he alone had committed the crime and agreed to so testify. But he died before the hearing. The British Columbia Court of Appeal allowed the accused’s lawyer to adduce the co-accused statements as fresh evidence. However on appeal by the Crown, the Supreme Court of Canada reversed that decision and ruled that the fresh evidence was inadmissible hearsay evidence.⁷⁶ “[i]t is a prerequisite that any evidence sought to be adduced under the discretion granted by [s. 610 of the Criminal Code, now s.

⁷³ *R. v. McMartin*, [1964] S.C.R. 484, [1965] 1 C.C.C. 142, (S.C.C.) reversing (1963), 43 W.W.R. 483, [1964] 1 C.C.C. 217 (B.C.C.A.).

⁷⁴ *Ibid.*

⁷⁵ *R. v. O'Brien*, [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209 (S.C.C.).

⁷⁶ *Ibid.*

683] be admissible evidence [...] The section is not operative until the threshold for admissibility as defined by common law and statute is crossed.”⁷⁷ These series of incremental changes in the law would be reunited in *Palmer*,⁷⁸ which ushered in a long period of stability in the law of fresh evidence, as discussed below.

II.2.1(ii) *Palmer and its companion cases: 1980-2010*

Palmer involved a case in which two brothers were convicted of conspiracy to traffic in heroin. A key Crown witness recanted his trial testimony and the accused brought an application to adduce this evidence because their conviction was based on now discredited evidence. In dismissing the appeal, the Supreme Court of Canada set out four clear principles to guide appellate judges when considering fresh evidence applications in criminal law appeals:

1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;⁷⁹
2. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

From 1980 to 1988, there were 65 fresh evidence cases applying the four-part conjunctive test admitting or rejecting fresh evidence applications based on whether they met all of the principles.⁸⁰ This is a significant increase when one considers that

⁷⁷ *Ibid.*

⁷⁸ *Palmer*, *supra* note 53.

⁷⁹ See *McMartin*, *supra* note 73.

⁸⁰ There were actually 69 fresh evidence cases, between 1980 and 1988. Of these, 65 were *Palmer* type fresh evidence cases. Of the remaining four cases, three involved disclosure issues, including *R. v. Amyotte* (1984), 58 A.R. 101 (Alta. C.A.); *R. c. Dufresne*, [1987] C.S.C.R. No 606 (S.C.C.) reversing

in the space of eight years, the number of fresh evidence cases – based on the sample selection, is identical to the total number of 69 fresh evidence cases dealt with between 1923, when new discretionary powers were enacted, and 1980 when the common law finally provided full guidance to complement the exercise of this new power.

What happened then in 1988? At the outset, it should be noted that what happened in 1988 did not nor was it intended to disturb the law established by *Palmer*. *Palmer* remained hermetically sealed. Instead, 1988 is a watershed year intending as it did to rationalize the procedure in relation to the hearing and the resolution of fresh evidence applications.

As indicated, fresh evidence applications are not final decisions. They are interlocutory judgments. As such, a panel of judges can use precious court time to hear and admit fresh evidence only to find that in the final analysis, the fresh evidence could not have affected the outcome of the appeal after full consideration of the entire trial record for the appeal on the merits. Also, as it often happened, a differently constituted panel of judges can hear the substantive appeal and arrive at a decision that vitiates the results in the associated fresh evidence motion.

This is exactly what happened in 1988, in *R. v. Stolar*⁸¹ when the Manitoba Court of Appeal allowed fresh evidence in the form of traffic offence notices that would attest to the whereabouts of the accused, a police officer convicted of murder. A differently constituted panel of the Manitoba Court of Appeal then proceeded to consider the remaining matters on the appeal, only to conclude that the fresh evidence would make little difference after all.⁸²

[1988] R.J.Q. 38, 11 Q.A.C. 20 (Qc. C.A.) and *R. v. Burr*, *R. v. Burr*, [1985] S.J. No. 743, 43 Sask.R. 183 (Sask. CA.), leave to appeal dismissed, [1986] S.C.C.A. No. 75 (S.C.C.). The fourth case, *R. c. Letiecq*, [1986] J.Q. no 633 (Qc. C.A.) involved a claim of ineffective assistance of counsel. As will be discussed in Part V of the Thesis, the *Palmer* four-part test does not apply to cases that challenge the fairness of the trial process itself such as arise in disclosure and competence of counsel matters. Unlike *Palmer*-type cases, these do not deal with issues determined at trial.

⁸¹ *R. v. Stolar*, [1988] 1 S.C.R. 480, 40 C.C.C. (3d) 1 (S.C.C.) reversing *R. v. Nielsen* (sub nom. *R. v. Stolar*) (1984), 30 Man. R. (2d) 81, 16 C.C.C. (3d) 39 (Man. C.A.).

⁸² *Ibid.* at para. 2.

To avoid such inconsistent rulings and improbable reversals, the Supreme Court of Canada affirmed both *O'Brien* and *Palmer* but added that once the thresholds established by these two seminal decisions have been met, the reviewing panel is to reserve its decision on the interlocutory fresh evidence application. The Court is encouraged to then consider the remainder of the appeal in light of the entire court record, before rendering its decisions both on the fresh evidence application and the appeal on the merits.⁸³

The principles developed in the trilogy of cases *O'Brien*, *Palmer* and *Stolar* have survived the advent of the *Charter*. Fresh evidence must be admissible under the ordinary rules that govern evidence in a criminal trial. To be admissible as fresh evidence, the evidence must also satisfy all four elements of the test set out in *Palmer*. Even today, fresh evidence matters follow the procedural protocol set in *Stolar*. However, as discussed in the following section, there has been a new development in the fresh evidence jurisprudence in *Truscott*,⁸⁴ which appears to have deconstructed the four-part test in *Palmer*.

II.2.3. *Truscott*: Restatement of the *Palmer* Principles

It may well be argued that the developments introduced by the *Truscott* Court in 2007 constitute a distinction without a difference. Rather, it combines the principles in both *O'Brien* and *Palmer* to create a new whole. The question then arises, is this new articulation a change in the law of fresh evidence? Does *Truscott* supersede *Palmer*? The answers to both questions lie firmly in the negative.

In 2007, the Court of Appeal for Ontario delivered its judgment in the ultimate *Reference* on behalf of Mr. Steven Truscott against his wrongful conviction for the murder of his young friend and classmate Lynne Harper, in the summer of 1959. A critical issue in this case was the time of death. In his autopsy Report, as well as in his testimony as a key Crown witness at trial, the pathologist, Dr. Penistan established

⁸³ *Ibid.* See e.g., paras. 6-8 for a comprehensive review of the pre-*Palmer* fresh evidence jurisprudence.

⁸⁴ *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321 (Ont. C.A.) [*Truscott*].

that based on the contents of the stomach, Lynne Harper died before 8 p.m., on June 9, 1959 and more precisely between 7:00 p.m. and 7:45 p.m. On this appeal, Mr. Truscott's legal team led substantive fresh evidence from a number of qualified experts, as well as archival documents to impeach the credibility of Dr. Penistan and the reliability of his findings. In admitting this fresh evidence, the Court said this:

[92] The admissibility of this kind of evidence on appeal is tested against the criteria articulated by the Supreme Court of Canada in *R. v. Palmer and Palmer* [citation omitted]. Those criteria are well known. They encompass three components:

- Is the evidence admissible under the operative rules of evidence?
- Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
- What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?

[93] The first two of these components are directed at preconditions to the admissibility of *Palmer* evidence under s. 683(1). Evidence that is not admissible under the usual rules of evidence governing criminal proceedings, or is not sufficiently cogent to potentially affect the verdict, cannot be admitted on appeal.⁸⁵

To the informed reader, this passage can raise three concerns. First, this is not exactly what the *Palmer* criteria establish. The first of the three components attributed in *Truscott* to those "well known criteria" in *Palmer* goes to admissibility which ironically is not articulated in the *Palmer* test. Compliance of fresh evidence with the accepted rules of evidence finds its source in *O'Brien* and not *Palmer*, in which admissibility was not an issue. *Palmer* it should be recalled involved the credibility of a disreputable Crown witness with a criminal record who recanted his trial testimony. In affirming the decision of the British Columbia Court of Appeal, the Supreme Court of Canada articulated the four part test: due diligence, relevance, credibility and ability to affect the result.

The second concern arises with the second of the three components in *Truscott*, which asks, "[i]s the evidence sufficiently cogent in that it could reasonably

⁸⁵ *Ibid.*

be expected to have affected the verdict?”⁸⁶ The Court in *Truscott* defines cogency as follows:

- Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
- Is the evidence credible in that it is reasonably capable of belief?
- Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result?⁸⁷

These three questions subsume parts 2, 3 and 4 of the *Palmer* test into one whole -the cogency factor. For its part, the due diligence factor, in other words, the first of the *Palmer* principles is relegated to the third criteria in *Truscott*. This restatement of the four *Palmer* principles turns the guiding principles not only upside down (principle 1 of due diligence ends up on the bottom) but also inside out, in that the vertical order of relevance, credibility and ability to alter the outcome, parts 2, 3 and 4 respectively of *Palmer*, become under *Truscott*, a horizontal framework that risks undermining the importance of each of these three elements in this conjunctive test because they are now lumped together, side by side as conditions precedent of cogency.

It is quite true that *Truscott* is a unique and confounding case involving several layers of different types of fresh evidence both archival and forensic that span matters determined at trial (*Palmer*) and fresh evidence that undermine the fairness of the trial process itself, involving serious disclosure issues. Can it be said that the serious legal issues of fresh evidence presented by this highly unusual and instructive case, justify the *Truscott* Court’s reordering of the fresh evidence governing principles?

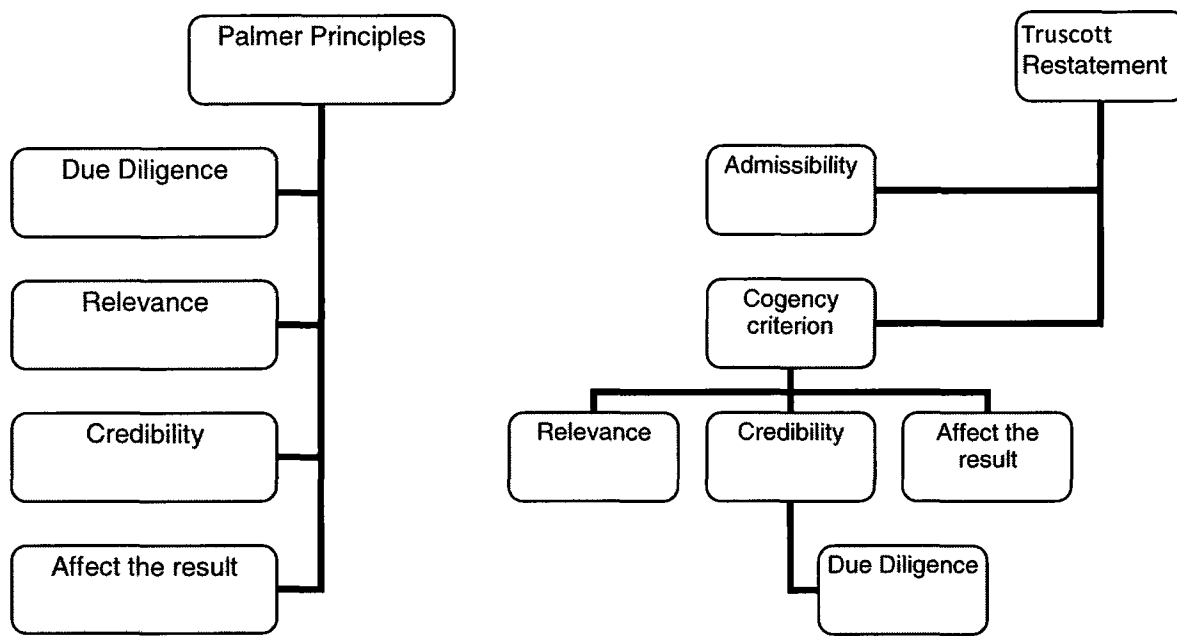
The third and final concern raised by the articulation in *Truscott* is that in addition to inserting the admissibility component in the *Palmer* analysis, the Court introduces a horizontal process that encompasses three key elements of the *Palmer* test. This poses the risk that future treatment of fresh evidence applications may falter on the choice as between *Palmer*, on the one hand and *Truscott*, on the other hand.

⁸⁶ *Ibid.* at 92.

⁸⁷ *Ibid.* at 99.

As illustrated in Diagram 1 below, it shifts the substance of the *Palmer* conjunctive test to a horizontal arrangement:

Diagram 1 *Palmer* Principles v. *Truscott* Restatement



In fairness, the *Truscott* Court did recognize that the first two components, which include the cogency considerations “are directed at preconditions to the admissibility of *Palmer* evidence under s. 683(1) of the *Criminal Code*.”⁸⁸ Moreover, *Truscott* is a unique case with a long judicial history involving multiple *References* before both the Court of Appeal for Ontario and the Supreme Court Canada.⁸⁹ The judicial treatment of the fresh evidence should be viewed in the context of each proceeding. The volume of fresh evidence, including forensic evidence and archival documents also make it a case of distinction.

Finally, in light of the principle of *stare decisis*, these concerns may be premature indeed unwarranted. In fact, in reordering the process for the assessment

⁸⁸ *Ibid.* at para. 93.

⁸⁹ *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321 (Ont. C.A.) see related cases in *Truscott (Re)*, [2006] O.J. No. 2050; *Truscott (Re)*, [2005] O.J. No. 2667 (Ont. C.A.), *R. v. Truscott*, [2004] O.J. No. 5052 (Ont. C.A.) and *R. v. Truscott*, [1967] S.C.R. 309 (S.C.C.).

of fresh evidence in an effort to make it more logical, the *Truscott* Court it would appear has done little harm to the authority of *Palmer* and *O'Brien*.

To illustrate, between 2007 and 2009, the decision in *Truscott* received judicial treatment in seven fresh evidence cases, four of which clearly give primacy to *Palmer* and or *O'Brien*.⁹⁰ The *Truscott* decision was merely mentioned in these four cases, as in a fifth case with respect to due diligence.⁹¹ The *Truscott* decision was followed in the remaining two cases but on other grounds, including how to fashion an appropriate remedy⁹² and unfairness at trial.⁹³

In the four fresh evidence cases⁹⁴ that have mentioned *Truscott*, none has demonstrated the slightest difficulty or hint of confusion in the analytical framework required for the admission of fresh evidence on a conviction appeal; on the contrary. This is also quite evident in the four judgments from the Ontario Courts that have mentioned *Truscott*, including three from the Court of Appeal for Ontario⁹⁵ and one from the Ontario Superior Court of Justice.⁹⁶

In this trial Court decision, A.J. O'Marra J. allowed an appeal from conviction by Mr. Jackson who was charged with driving with an alcohol level over the legal limit. On appeal he adduced as fresh evidence the receipts, accompanied by a letter of attestation from the establishment, to confirm the number of drinks he had consumed. Justice O'Marra turned immediately to *Palmer* dealing first with the reasons why due diligence had not been met in this case. In considering the second factor of relevance, in *Palmer*, the Superior Court Judge rightly considered not just the next but all three

⁹⁰ *R. v. Jackson*, [2009] O.J. No. 3166 (Ont. Sup. Jus.), at para. 30; *R. v. Reeve*, 2008 ONCA 340, 233 C.C.C. (3d) 104 (Ont. C.A.), at para. 66; *R. v. Phillips*, 2008 ONCA 726, 242 O.A.C. 63 (Ont. C.A.) at para. 45 on the question of admissibility; and *R. v. Mullins-Johnson*, 2007 ONCA 720, 228 C.C.C. (3d) 505 (Ont. C.A.), at para. 18.

⁹¹ *R. v. Dooley*, 2009 ONCA 910, 249 C.C.C. (3d) 449 (Ont. C.A.) at 107.

⁹² *Walsh v. New Brunswick*, 2008 NBCA 33, 238 C.C.C. (3d) 289 (N.B. C.A.), at para. 47.

⁹³ *R. v. Phillion*, 2009 ONCA 202, 241 C.C.C. (3d) 193 (Ont. C.A.), at paras. 71 and 259-261.

⁹⁴ *Supra* note 90.

⁹⁵ *Ibid.*

⁹⁶ *Jackson, ibid.*

steps in *Palmer* under the cogency criteria – the conditions precedent to the admission of the fresh evidence articulated in *Truscott*. The judge held:

The first question involving due diligence is not an essential requirement of the fresh evidence test in criminal matters. It was noted in *R. v. B. (G.D.)*, [citation omitted] that it should give way where a miscarriage of justice would otherwise result if the evidence was not admitted. However, the cogency criterion as reflected in the last three principles must be met: See the Ontario Court of Appeal decisions in *R. v. Truscott* [citation omitted] and in *R. v. Phillion*, [citation omitted].⁹⁷

In other words, the Jackson Court reverted to the traditional order of things established in *Palmer*, by considering first the elements pertaining to due diligence before turning to the cogency criterion contained in the last three *Palmer* factors. The approach adopted by the Superior Court Judge in *Jackson* is correct and confirms that *Truscott*, rather than superseding *Palmer*, complements the analysis long since established by the Supreme Court of Canada.

Like *Palmer*, it should be noted that none of these decisions rendered subsequently to *Truscott* have appeared to start out by asking the question: “is this fresh evidence admissible according to the operative rules of evidence?” Unless admissibility is at issue as in any *Palmer* type enquiry, it would appear, the question is not posed and the analysis proceeds directly to the four part conjunctive test, which is re-categorized into the second and third components developed in *Truscott*, i.e., the cogency criteria and due diligence principle respectively.

Finally, the debate between *Palmer* and *Truscott* may well be further characterized as a false one. There is no opposition between the two- the one comes to complement the other. This is perhaps why there has been such little judicial treatment of *Truscott*. As noted above, there have been seven such cases only.⁹⁸ In contrast, as the cases listed by Court and by year catalogued in Appendix 1 reveal, since August 28, 2007 when the judgment in *Truscott* was released, there were 71

⁹⁷ *Ibid.* at para. 30.

⁹⁸ In addition, in *R. v. Phillion*, 2009 ONCA 202, 241 C.C.C. (3d) 193 (Ont. C.A.), one of the four cases to mention *Truscott*, MacPherson J. cited the case in a dissenting opinion, albeit on other grounds at para. 259.

fresh evidence cases rendered in 2008 and 31 in 2009.⁹⁹ In other words, between its release in 2007 and 2009, *Truscott* has garnered judicial consideration in less than 10% of fresh evidence cases, all of which, except one, emanated from the Ontario Courts.¹⁰⁰

However, it is early yet to say what if any long term harm may be visited by the *Truscott* Court in this commendable effort to bring logic and a sense of order to the process as demanded by the circumstances of this case. The *Truscott* jurisprudence was further reviewed in preparation for the thesis defence on November 10, 2010. There were three judgments rendered in 2010, two of which followed *Palmer*,¹⁰¹ while at the same time clearly adopting the cogency formulation preferred by the *Truscott* Court. The third of these 2010 cases followed *Truscott* but on other grounds dealing with remedy.¹⁰² Thus, this may be a mere tempest in a teapot; quite harmless.¹⁰³

Do the principles in *Palmer* as reordered in *Truscott* apply equally to fresh evidence applications in sentence appeals, as well as in other matters, including *References* from the Minister of Justice and quasi criminal proceedings, such as extraditions? These questions are discussed in the following three sections.

II.3 Sentence Appeals

In 1923 when Parliament enacted new powers to remedy miscarriages of justice, it did so not only with respect to verdicts –whether acquittals, stays or

⁹⁹ It should be noted that while these cases may not all deal with issues that require the *Palmer* analysis, i.e., they do not deal with an issue determined at trial, the numbers permit the conclusion that the fresh evidence treatment in *Truscott* has had very limited resonance in the fresh evidence jurisprudence in the rest of the country.

¹⁰⁰ See *Walsh*, *supra* note 92.

¹⁰¹ See *R. v. West*, 2010 N.S.C.A. 16 (N.S.C.A.), at paras. 32-34 and *R. v. J.A.*, 2010 ONCA 491 (Ont. C.A.), at para. 70.

¹⁰² *Tremblay c. R.*, 2010 QCCA 1054 (Qc. C.A.), at para. 249.

¹⁰³ In terms of jurisdiction, two of the three 2010 cases came from outside Ontario, i.e., Quebec and Nova Scotia. Admittedly, such numbers are hardly indicative of a trend.

convictions but also in relation to sentences.¹⁰⁴ Like appeals against verdict, Canadian appellate Courts have power by statute to consider fresh evidence in appeals against sentence. Section 687 of the *Criminal Code*¹⁰⁵ gives appellate courts the power to receive fresh evidence and thereby vary sentences unless fixed by statute, or dismiss the appeal. Do then the principles for the admission of fresh evidence established in *Palmer* apply equally as well to the admission of fresh evidence on an appeal against sentence?

In *R. c. Levesque*,¹⁰⁶ the Supreme Court of Canada set out the factors to be considered for the admission of fresh evidence on appeal against sentence in criminal matters. In that case, the accused and two accomplices were involved in a robbery of a residence on June 22, 1996. His accomplices escaped and the accused pleaded guilty to 10 of 15 charges linked to the incidents, including kidnapping, confinement, assault with a weapon, uttering threats, disguise with intent, pointing a firearm, possession of an unregistered restricted weapon, robbery, breaking and entering a dwelling-house, and conspiracy to commit robbery. He was sentenced to a term of imprisonment of 10 and a half years for the kidnapping; the longest of the various concurrent sentences imposed by the trial judge.

Before the Quebec Court of Appeal, the appellant adduced fresh evidence in the form of the reports by two psychologists: Marc Daigle and Louis Morissette regarding his mental health trajectory. The Court unanimously held that the trial judge had erred in likening the events to those in cases involving hostage-taking for ransom in determining the appropriate sentence.

A majority also allowed the fresh evidence applications on the basis that the provisions governing the admission of fresh evidence on appeal are different, depending on whether the Court is ruling in respect of a verdict (s. 683 of the *Criminal Code*) or a sentence (s. 687 of the *Criminal Code*); "while the two sections [ss. 683

¹⁰⁴ *C. cr.*, *supra* note 1.

¹⁰⁵ *C. cr.*, *supra* note 62 at s. 687.

¹⁰⁶ *R. c. Lévesque*, 2000 SCC 47, 148 C.C.C. (3d) 193 (S.C.C.) reversing [1998] Q.J. No. 2680, 130 C.C.C. (3d) 107 (Qc. C.A.).

and 687 of the *Criminal Code*] do not establish different rules, [...] at the very least the wording of s. 687 prescribes a flexible and liberal approach."¹⁰⁷

In light of the error by the trial judge and the admissible fresh evidence, the Court of Appeal allowed the appeal and reduced the sentence imposed by the trial judge from ten and a half years to one of five and a half years. The Crown appealed to the Supreme Court of Canada.

The only issue on appeal before the Supreme Court of Canada was whether the rule that applies to the admission of fresh evidence established in *Palmer* applied to fresh evidence on appeal from a sentence. In allowing the Crown's appeal, Mr. Justice Gonthier established the necessary criteria for the admission of fresh evidence on an appeal against sentence. He established that the *Palmer* principles apply to the admission of fresh evidence in sentence appeals as they do in verdict appeals. He went further however to add, "[a]lthough the rules concerning sources and types of evidence are more flexible in respect of sentence, the criteria for admitting fresh evidence on appeal are the same, regardless of whether the appeal relates to a verdict or a sentence."¹⁰⁸

Unlike at trial, the sentencing Judge has the benefit of fresh evidence right before his or her eyes. Such evidence usually consists of reports from the Correctional institution about the individual's progress, medical and psychological assessments, as well as victim impact statements. Procedurally, the application to admit fresh evidence on appeal from sentence is done via the factum and on consent of the other party. The introduction of the fresh evidence is permitted only by leave of the Court and they are subject to the four-part test in *Palmer*. As noted by Mr. Justice Gonthier, because the fresh evidence is usually available prior to sentencing, the first due diligence criteria in *Palmer* is a non negotiable prerequisite for the introduction of the fresh evidence. Indeed, the applicant is required to then establish that they have met the other three criteria as well.

¹⁰⁷ *Ibid.* at para.8.

¹⁰⁸ *Ibid.* at para.16.

Although sentencing hearings are in general not subject to the stringent rules of evidence that operate during a criminal trial, the admission of fresh evidence follows the same rules as would appeals against verdict. As discussed below, similar principles apply with respect to References.

II.4 Other applications of fresh evidence criminal law

Fresh evidence law in criminal matters has application beyond verdicts and sentence appeals. Such applications find their source both in statute and in the common law. The remaining passages examine two such instances that appear in the fresh evidence jurisprudence: references and quasi criminal proceedings, such as extraditions.

II.4.1 References

Fresh evidence applications may also arise in the context of references by the Minister of Justice,¹⁰⁹ seeking an opinion from an appellate Court. These reference cases form a separate and distinct category because unlike applications brought by the accused or the Crown on appeal of a decision of a judge and or jury, the reference questions do not necessarily deal with the appeal of a decision *per se*.

In such instances, the Minister of Justice is seeking an opinion. By way of illustration, in *R. v. Kelly (sub nom. Reference re Kelly)*¹¹⁰, the Supreme Court of Canada held that the Court of Appeal for Ontario was asked to provide only an opinion to assist the Minister of Justice in coming to a final determination. This was an opinion

¹⁰⁹ Reference cases were ordinarily brought pursuant to s. 690 of the *Criminal Code*. However, this section was repealed in 2002. These powers of reference are found under s. 696.1. For an analysis of s. 690 references, see the LL.M. thesis by Patricia Lynn Braiden, *Wrongful convictions and section 690 of the Criminal Code: an analysis of Canada's Last-resort Remedy* (LL.M. Thesis, Simon Fraser University, 2000) [unpublished].

¹¹⁰ *R. v. Kelly (sub nom. Reference re Kelly)*, 2001 SCC 25, 153 C.C.C. (3d) 45 (S.C.C.) at para. 1.

and not a final judgment from a legal proceeding. Consequently, no appeal to the Supreme Court of Canada was available.

The principles of fresh evidence also come into play in *References* by the Minister of Justice, in that where a person believes there has been a miscarriage of justice for an offence in which the person has been wrongly convicted and sentenced and where all avenues of appeal have been exhausted, the *Criminal Code* makes allowance for an ultimate appeal upon the mercy of the Crown.¹¹¹ The Minister of Justice is endowed with broad discretionary powers under these provisions of the *Criminal Code*.¹¹² In exercising these powers to refer a case or question, the Minister of Justice must take into consideration all relevant matters including: (a) whether the application is supported by new matters of significance that were not considered by the courts or the Minister in an application in relation to the same conviction; (b) the relevance and reliability of the fresh information; and (c) the fact that an application is not meant to serve as a further appeal and only an extraordinary remedy is available.¹¹³

Parliament clearly envisaged in this section that the Minister of Justice shall take into consideration fresh evidence upon an application for a reference. However, this power is more restrictive than in the ordinary powers of an appellate court to receive fresh evidence under section 683(1) (d). Under a reference, the fresh evidence must not only be relevant and reliable but it must also be new matters of

¹¹¹ *C. cr.*, *supra* note 62 at s. 696.1, which provides that “[a]n application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

¹¹² See in particular the powers pursuant to: s. 696.3 (2) to refer to any court of appeal at any time for its opinion on any question; s. 696.3 (3) where the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred may under s. 696.3(3)(a)(i) direct a new trial or under s. 696.3(3)(a)(ii) refer the matter to any court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or under s. 696.3(3)(b) dismiss the application.

¹¹³ *Ibid.* s. 696.4.

significance that were not considered by the courts or previously considered by the Minister in a related application.

However, when the Minister of Justice refers a matter to a Court of Appeal under subsection 696.3(3) (a) (ii) that Court is to proceed as if it were an appeal by the convicted person. Consequently, the ordinary rules of procedure, including the ordinary operative rules of evidence (*O'Brien*) and the rules for the admission of fresh evidence (*Palmer*) are engaged; although in References, appeal courts are encouraged not to be bound to inflexible rules.¹¹⁴

Since 2002, when the *Criminal Code* was amended to improve the regime to review possible miscarriages of justice, Ministers of Justice have considered 83 reference applications and have referred 12 of these to the courts either for a new trial pursuant to s. 696.3(3) (a) (i) or for determination as an original appeal pursuant to section s. 696.3(3) (a) (ii).¹¹⁵

Based on the fresh evidence cases in Appendix 1, between 1983 and 2008, there have been 11 References before Canadian appeal courts involving fresh evidence.¹¹⁶ Each has followed the rules for the admission of fresh evidence. Also, as noted by Braiden,¹¹⁷ Allan Rock, former Minister of Justice adopted six principles

¹¹⁴ *R. v. Gorecki (No. 2)* (1977), 14 O.R. (2d) 218, 32 C.C.C. (2d) 135 (Ont. C.A.) at 29. See also *R. v. Nepoose (sub nom. Reference re Nepoose (Canada))*, [1992] A.J. No. 220, 71 C.C.C. (3d) 419 (Alta. C.A.) at 12.

¹¹⁵ See *Applications for Ministerial Review – Miscarriages of Justice Annual Report 2009 Minister of Justice*, Statistical Information, online: <<http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-rap09/p5.html#s3>>.

¹¹⁶ They include: *R. v. Truscott*, [1967] S.C.R. 309 (S.C.C.); *R. v. Marshall*, [1983] N.S.J. No. 322, 57 N.S.R. (2d) 286 (N.S.C.A.); *R. v. Thatcher*, [1986] S.J. No. 19, 24 C.C.C. (3d) 449 (Sask. C.A.) affirmed [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481 (S.C.C.); *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866, 71 C.C.C. (3d) 260 (S.C.C.) reversing [1971] 2 W.W.R. 266, 2 C.C.C. (2d) 206 (Sask. C.A.) leave to appeal refused (1971), 4 C.C.C. (2d) 566(note) (S.C.C.); *R. v. Nepoose (sub nom. Reference re Nepoose (Canada))*, [1992] A.J. No. 220, 71 C.C.C. (3d) 419 (Alta. C.A.); *Reference re Gruenke* (1998), 131 Man. R. (2d) 161, 131 C.C.C. (3d) 72 (Man. C.A.) affirmed 2000 SCC 32, 146 C.C.C. (3d) 319 (S.C.C.); *R. v. Kelly* (1999), 122 O.A.C. 201, (sub nom. *Reference re Kelly*) 135 C.C.C. (3d) 449 (Ont. C.A.) leave to appeal denied 2001 SCC 25, 153 C.C.C. (3d) 45 (S.C.C.); *Re. Dumont*, [2001] J.Q. no 596 (Qc. C.A.); *R. v. Wood*, 2006 ABCA 343, 214 C.C.C. (3d) 1 (Alta. C.A.); *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321 (Ont. C.A.) see related cases in *Truscott (Re)*, [2006] O.J. No. 2050 and *Truscott (Re)*, [2005] O.J. No. 2667 (Ont. C.A.) and *Walsh v. New Brunswick*, 2008 NBCA 33, 238 C.C.C. (3d) 289 (N.B. C.A.).

¹¹⁷ Braiden, *supra* note 51 at 143.

to guide his deliberations in the Reference on behalf of Mr. Colin Thatcher. The principles of due diligence, relevance, credibility and likelihood of affecting the results formed part of the ministerial review process.

Whether the appeals are brought against verdict, sentence or by reference, all appeal courts across Canada follow the same rules of procedure established in *Palmer* for verdicts and extended to sentences in *Lévesque*. Table III summarizes the statistics with respect to these three categories of fresh evidence appeals.

Table III. Types of Fresh Evidence appeals

Source /Type of appeal	Verdict	Sentence	Verdict & Sentence
Accused	969	191	272
Crown	62	77	3
Reference	10	0	1
Total= 1585	1041	268	276

Several observations can be drawn from the data in Table III. First, 66% of fresh evidence applications are brought on appeal against verdict. Of these, 93% were brought by an accused against conviction, compared with only 6% of applications by the Crown to revoke an acquittal and less than 1% (0.95) by Reference from the Minister of Justice. This is no doubt due to the fact that of the less than 10% of criminal cases in Canada that actually do go to trial, almost two-thirds result in a conviction.¹¹⁸ Appeals of verdict are thus more commonly brought by the convicted person who may seek to adduce fresh evidence on appeal to overturn a conviction or change a guilty plea.¹¹⁹ Further, verdict appeals by an accused are higher because the Crown can only appeal on questions of law and the stakes are also higher for an accused than for the Crown.

A second point of note from the data in Table III is that the number of appeals from sentence involving an application of fresh evidence is relatively low, accounting

¹¹⁸ Statistics Canada, *Adult criminal court statistics*, The Daily, Tuesday, May 20, 2008 2006/2007, online: <<http://www.statcan.gc.ca/daily-quotidien/080520/dq080520e-eng.htm>>.

¹¹⁹ Guilty pleas and the revocation of same were prevalent; the latter being linked to allegations of incompetence of counsel.

for 17% of the total number of fresh evidence appeals. Of these, just over 70% were applications brought by the accused to adduce fresh evidence against sentence. Also, there is a significant difference between the number of fresh evidence sentence appeals brought by the accused and those brought by the Crown, (n=191 and n=77 respectively).

However, in terms of the total number of fresh evidence applications on appeal brought by the Crown, a mere 142 cases, this amounts to less than 10% of the entire sample or 8.95%. Of these, the Crown is more likely to adduce fresh evidence on appeal against sentence. In fact, there were 77 such sentence appeals or 54% of the appeals involving fresh evidence brought by the Crown; whereas its applications to admit fresh evidence on appeal against verdict accounted for 44% of all Crown fresh evidence applications. This supports the observation made earlier that very few criminal cases end in an acquittal.

It follows thus that there are fewer fresh evidence applications brought by the Crown to impeach an acquittal, or the revocation of a guilty plea. Indeed, the data reveals that while the Crown brought more fresh evidence applications against sentence than a verdict, or an acquittal, these figures are but a fraction when considered in the broader picture. As indicated earlier, one reason for this tremendous disparity lies in the fact that unlike an accused, the Crown by statute can only bring an appeal against errors of law in criminal matters.

Third, applications to adduce fresh evidence in appeals against both sentence and verdict were rarely brought by the Crown. The cases reveal only 3 such instances. In contrast, the accused was more likely to bring an appeal involving fresh evidence against both sentence and verdict than simply against the sentence (n=272, n=191 respectively). Only 276 or 17% of cases seeking to adduce fresh evidence on appeal involved appeals against both verdict and sentence. In those instances, applications by the accused predominated; accounting for 99% of the applications against both verdict and sentence. When viewed by jurisdiction however, these statistics are more revealing. In Ontario, for example individuals are most likely to bring an appeal against both verdict and sentence than on any other basis.

Finally, appeals by Reference from the Minister of Justice involving fresh evidence were rare, arising in only 11 cases or less than 1% (0.69%) of the total number of fresh evidence cases in the sample. Unlike fresh evidence applications on appeals against verdict and sentence, the Reference appeals contribute little to the possible explanations for the dramatic rise in fresh evidence applications. Also, in quasi criminal proceedings such as extraditions *Palmer* presents certain limitations.

II.4.2 Fresh evidence law in Quasi criminal proceedings: Extraditions

As a general principle, extraditions in Canada are carried out in accordance with the *Extradition Act*¹²⁰ and any *Treaties* or agreements between Canada and states or entities designated as extradition partners.¹²¹ The extradition process is a two-part procedure, involving judicial and political phases in which the extradition judge and the Minister of Justice maintain distinct roles.¹²²

Recent extradition decisions from the Supreme Court of Canada have affirmed these separate statutory roles. In *Kwok*, Arbour J. noted that the extradition judge determines “whether the Requesting State has made out a *prima facie* case to commit the fugitive, while the Minister makes the ultimate discretionary decision to surrender the requested person¹²³.”

When Canada receives a request to extradite a person known to be in Canada,¹²⁴ the Minister of Justice is required by section 3 of the *Act* and the provisions

¹²⁰ *Extradition Act*, S.C. 1999, c. 18.

¹²¹ *Ibid.* at Schedule to the *Extradition Act*.

¹²² For a full discussion of the history and general principles of extraditions, see La Forest, Anne Warner. *La Forest's Extradition To and From Canada*, 3rd ed. (Aurora, Ont.: Canada Law Book Inc., 1991), chs. 1 and 2 respectively.

¹²³ See *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.), at para. 4, as well as the three related decisions rendered at the same time, including: *United States v. Cobb*, 2001 SCC 19, 152 C.C.C. (3d) 270 (S.C.C.); *United States of America v. Tsioubris*, [2000] S.C.C.A. No. 68 (S.C.C.); and *United States v. Shulman*, 2001 SCC 21, 152 C.C.C. (3d) 294, 1 R.C.S. 616 (S.C.C.) reversing (1998), 132 O.A.C. 262, 128 C.C.C. (3d) 475 (Ont. C.A.).

¹²⁴ *Extradition Act*, *supra* note 120.

of any existing Treaty between Canada and the requesting state, to assess whether to proceed. The extradition request must identify the person sought and the offence and or sentence¹²⁵ on which the extradition request is based. An extraditable offence must be punishable by the extradition partner, for a maximum term of two years or more in prison or other forms that would deprive the person of their liberty.¹²⁶ Further, the extraditable offence must have an equivalent offence punishable in Canada, by imprisonment for a maximum term of five years or more, or by a more severe punishment, in the case of a request based on a Treaty¹²⁷ and in any other case by imprisonment for a maximum term of two years or more.¹²⁸

Decisions taken at either the judicial phase or the ministerial phase must comply with the *Charter*.¹²⁹ The extradition judge enjoys broad powers to grant *Charter* remedies but such powers are limited to the committal phase.¹³⁰ Further, the decisions of the extradition judge may be appealed to the provincial court of appeal by both the person ordered for committal and or the Attorney General of Canada, acting on behalf of the extradition partner against the discharge of the person or a stay of proceedings.¹³¹ Similarly, as an administrative quasi criminal decision, the decisions of the Minister of Justice during any step of the ministerial phase of the extradition process are subject to judicial review.¹³² This hybridized structure has important implications for the admission of fresh evidence.

¹²⁵ *Ibid.*, subsection 3(3) where a sentence extradition request will be granted if the portion of the term remaining is at least six months long. See also *United States of America v. Maydak*, 2004 BCCA 478, [2004] B.C.J. No. 1937 (B.C. C.A.).

¹²⁶ *Ibid.*, s. 3 a).

¹²⁷ *Ibid.*, s. 3 b)(i).

¹²⁸ *Ibid.*

¹²⁹ *Charter*, *supra* note 3.

¹³⁰ *Kwok*, *supra* note 123 at paras. 5 and 44. See also, the *Extradition Act*, *supra* note 120 at s. 25, which imbues the extradition judge with all the powers of a superior court judge.

¹³¹ *Extradition Act*, *supra* note 120 at s. 49.

¹³² However, judicial review of the exercise of the powers of the Minister under s. 40 of the Act is not before the Federal Court but rather the appellate court of the province in which the order of committal was rendered. See also s. 57 of the Act.

As section 52(1) of the *Extradition Act*¹³³ illustrates, the fresh evidence provisions of the *Criminal Code* with respect to verdicts apply to extradition matters.¹³⁴ There were 17 cases in the data sample of fresh evidence case law involving extradition matters. In order of jurisdiction, only four provinces are represented: Alberta and Manitoba with 1 case each; British Columbia with 9 cases followed by Ontario with 6 such cases. The fresh evidence applications may be brought in relation to either the judicial phase of the extradition process or to revoke the decision of the Minister of Justice to surrender the individual to the requesting state, which is an administrative decision subject to different standards of review.¹³⁵

But more importantly, the common law framework for the admission of fresh evidence established in *Palmer*¹³⁶ is of limited application in the extradition context and may in fact lose its application in extradition cases. Consequently, in *United States v. Shulman [Shulman]*,¹³⁷ the Supreme Court of Canada set out guiding principles for the admission of fresh evidence in extradition matters. In such instances, it is important to consider the context and purpose for which the fresh evidence is being introduced.

Normally, the purpose of fresh evidence is to ask the Court of Appeal to review the decision in a Court below. However, in the extradition context, the fresh evidence is used to ask the Court of Appeal to use its jurisdiction or power to control its own process. Fresh evidence and the *Palmer* principles become of limited application however, when the applicant advances *Charter* rights issues for the first time on

¹³³ *Extradition Act*, *supra* note 120 at subsection 52(1).

¹³⁴ *Ibid.*, s. 52, whereby *C. cr.*, ss. 682 to 685 and 688 apply to extradition matters. This implies that *C. cr.*, s. 687 dealing with fresh evidence on sentence appeals would not apply to extraditions.

¹³⁵ For a comprehensive study of extradition matters based on a section by section analysis of the *Act* in Canada, see Elaine Krivel et al., *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002).

¹³⁶ *Palmer*, *supra* note 53.

¹³⁷ *United States v. Shulman*, 2001 SCC 21, 152 C.C.C. (3d) 294 (S.C.C.) reversing (1998), 132 O.A.C. 262, 128 C.C.C. (3d) 475 (Ont. C.A.).

appeal. For example, the *Palmer* test becomes inoperable after judicial review of the decision of the Minister of Justice to surrender the subject to the requesting state.¹³⁸

This limitation is twofold. First, in such instances, the proffered fresh evidence is not being advanced against a decision under appeal, a condition precedent for the application of the *Palmer* test. Second, in such circumstances as outlined in the example, the party is seeking an original remedy. Under *Palmer*, the disposition is an interlocutory decision, which does not constitute a final decision of the appeal. That is why fresh evidence may satisfy all the conditions of the *Palmer* test, yet only to have the substantive appeal dismissed. As such, fresh evidence in the extradition context must be relevant to the remedy sought at the Court of Appeal. The latter must be satisfied also that the proffered fresh evidence is not only credible but also sufficient, if not challenged by one of the parties to justify making an order.

To illustrate, in *Shulman*,¹³⁹ the United States of America requested the extradition of Mr. Shulman who along with several other individuals allegedly operated a fraudulent telemarketing scheme in the U.S. from Canada. While some of his alleged co-conspirators pleaded guilty and turned evidence against him, Mr. Shulman raised several grounds at his extradition hearing arguing that he required further disclosure; the extradition would violate of his rights under sections 6 and 7 of the *Charter*, in essence culminating in an abuse of process. However, the extradition judge denied these arguments and committed Mr. Shulman for surrender.

On appeal of this committal judgment, Mr. Shulman brought an application to adduce fresh evidence consisting of the public statements of two U.S. officers. First, Caldwell J., made a statement about the outstanding fugitives during the sentencing hearing of the appellant's alleged co-conspirators:

“... if we get them extradited and they're found guilty, as far as I'm concerned they're going to get the absolute maximum jail sentence that the law permits me to give”¹⁴⁰

¹³⁸ *Ibid.* at 44.

¹³⁹ *Ibid.* at paras. 36-53.

¹⁴⁰ As cited in *Shulman*, *ibid.* at para. 38.

The Court of Appeal for Ontario rejected this fresh evidence as evidence consistent with an abuse of process. This was upheld by the Supreme Court of Canada.

The second piece of fresh evidence was more compelling going as it did to the perceived fairness of the judicial phase of the extradition process. This fresh evidence consisted of the intimidating comments by Mr. Zubrod, the U.S. prosecutor in the case and which were aired on the CBC, *The Fifth Estate* after the extradition hearing.¹⁴¹ Among other egregious comments, Mr. Zubrod stated that those in the telemarketing scheme who resisted extradition would be dealt with more harshly in prison if convicted.

Recognizing that the Court of Appeal for Ontario erred in not allowing Mr. Zubrod's comments as fresh evidence, *Arbour J.* reviewed the *Palmer* principles and acknowledged that they apply to quasi-criminal proceedings such as extraditions. However, the *Palmer* principles may be of limited purpose depending on the context and purpose for which the fresh evidence is being introduced. In this case, the fresh evidence was not adduced to overturn a decision below but rather to ask the Court to reassess its extradition process in light of the new evidence.¹⁴²

Having considered the law of fresh evidence in its different applications, it is necessary to consider reasons why it is here argued that these cases are determined not by a search for truth or the vindication of rights but ultimately, appellate adjudication in this area of law is guided by the ideal of fairness. Isn't it the fair thing to do to allow fresh evidence and vary a sentence when the convicted person is stricken by a terminal illness? Wherein lies the truth when an otherwise fit sentence is varied to time served on compassionate grounds because of the human condition? But more importantly, this intersection between truth and rights has had a direct link to the escalation of fresh evidence applications in the last several decades.

¹⁴¹ *Ibid.* at para. 40.

¹⁴² As *Arbour J.* noted at para. 44, this can apply also where the fresh evidence is being introduced for the first time on appeal with respect to *Charter* claims that can only be addressed after the surrender phase of the extradition process.

PART III THEORETICAL FOUNDATIONS: TRUTH; RIGHTS & FAIRNESS

The very notion of fresh evidence constitutes an exception to the rule of finality of judgments. It also implies an element of fairness. For by its very existence, there is a tacit acknowledgement that a miscarriage of justice may have occurred and the ability to adduce fresh evidence is an exceptional tool of evidence to adjudicate the new matter. It is argued that having the ability to adduce fresh evidence is only fair. In conveying substantive powers on appellate Courts to receive new evidence on appeal, Parliament recognized that it would be unfair to deny the hearing of fresh evidence that could alter the errant course of justice. After discussing what is meant by truth and rights and their impact on fresh evidence cases, the remainder of Part III discusses the principle of justice as fairness in the context of the fresh evidence jurisprudence.

III.1 Truth

One of the principles of criminal law proceedings is that witnesses and by implication, the evidence they provide tell “the whole truth and nothing but the truth.” Yet far too many people are wrongfully convicted in our criminal justice system and most people who have witnessed a criminal event are often left with the impression that the trial represented a judicial construction of the truth. Truth therefore is not absolute. Like justice, truth is human. It is shaped by historical context, a product of its time. The prevalence of fresh evidence applications may speak to the tenuous existence of truth on trial.

What are the factors that influence the relationship between evidence and truth? What kind of truth? Is it the whole truth? Or is the truth merely relative, shaped by procedural constraints that colour its manifestation? If truth is relative and therefore subjective, can we really speak of truth as a singular conception? How can evidence be viewed as truth and not as truths? Finally, at the appellate level, where do we situate the search for truth in the admission of fresh evidence?

III.1.1. *Truth on trial*

Used in its non-defamatory context, *Black's Law Dictionary*¹⁴³ defines 'truth' as "[a] fully accurate account of events; factuality."

The word 'events' connotes people and action, while 'factuality,' as opposed to actuality, conveys the idea that truth is of the nature of facts. Understanding what is meant by a 'fully accurate account of events,' however is less straightforward as it depends on the vantage point of the person providing the "accurate account."

Knowledge of the subject providing an accurate account of the events depends on that person's experience and perspective of the facts that constitute the events in question. The truth is therefore, relative to the subject's experience. The accurate account provided by the Bank Teller who stared down the barrel of the bank robber's gun, for instance will not be any less accurate than the factuality lived by the Bank's customer held hostage, serving as the robber's human shield, en route to his getaway van; or that of the robber himself. The truth of the event –the Bank hold-up– becomes coloured by the knowledge of each subject. The fact that the Bank was robbed would be the foundational truth or the event. However the perspective of this truth is transformed, like ripples forming on a lake hit by a rock, expanding to reflect the subject's personal experience of the event.

The Parisian publication *Déviante et Société*¹⁴⁴ turned its mind to this debate in a series of articles published in 2000. The consensus arrived at can be summarized briefly as follows. Truth as an objective is central to justice in criminal law and is indispensable at three key stages of the penal law process: first, in identifying the

¹⁴³ Brian A. Garner, Editor in Chief, *Black's Law Dictionary* 7th ed. (St. Paul, Minn.: West Group, 1999), at 1520.

¹⁴⁴ *Déviante et Société* (Paris: Éditions Médecine et Hygiène, 2000). See in particular articles by Dominique Duprez, "Modes d'apprentissage et formes de savoirs. Une comparaison police-douanes en France," "Forms of apprenticeship and forms of knowledge : a comparison between police and customs in France," and Michel van de Kerchove, "La Vérité judiciaire : quelle vérité, rien que la vérité, toute la vérité?" "Judicial Truth: What Truth? Nothing but the Truth? All the truth?" at 91.

facts; second, in testing the evidence and finally, in determining the outcome –guilty or not guilty and the sentence to be meted out in the case of finding of the former.¹⁴⁵

In light of these three stages of the process, truth becomes a central objective in a criminal law trial. A. Baratta and R. Hohmann¹⁴⁶ argue that it is around the search for truth that the parties and the public seek justice. While this may be the practice in continental Europe, it is far from being the reality in Canada. In fact, both doctrine and jurisprudence affirm that this remains a theoretical ideal rather than a regular practice. For while the search for truth remains an end in itself, it is a goal that can be easily traded in the negotiation between competing values and interests. Bringing to the light of day the truth of what actually happened in a criminal law matter, may not always be possible. Procedural safeguards, plea bargaining and competing values, such as individual freedoms may conspire to stifle the truth or retards its revelation.¹⁴⁷

As Dominique Duprez¹⁴⁸ reminds us, the goal of plea bargaining is not to arrive at the truth but rather to mitigate the consequences of going to trial. Defence Counsel, the Accused and the Prosecution or the Crown may conduct a cost benefit analysis of the individual and social consequences of a conviction or an acquittal of a guilty person. A person who is not guilty may yet so plead based on a realistic risk assessment of the possible outcomes at trial.¹⁴⁹

In his contribution to the debate, Michel van de Kerchove¹⁵⁰ argues that the content of truth is meagre at best because it is not the whole truth. It is also generally not all the truth. Even though witnesses and evidence proffered are deemed to be the essence of truth, “the whole truth and nothing but the truth,” more often than not the

¹⁴⁵ *Ibid.*, Dominique Duprez discusses these three stages in the criminal trial where truth is required.

¹⁴⁶ *Ibid.*, A. Baratta and R. Hohmann, “Débat: Vérité procédurale ou vérité substantielle,” at 91-93.

¹⁴⁷ *Ibid.* at 91.

¹⁴⁸ *Ibid.* at 89.

¹⁴⁹ The sample of fresh evidence cases is replete with examples particularly in instances where fresh evidence is adduced to revoke a guilty plea, which was entered into because of undue pressure from defence counsel or on faulty assumptions that the sentencing judge would accept the joint submissions on sentencing. Such instances can have significant consequences –loss of liberty and as in some instances the term of sentence may have unintended immigration implications that lead to deportation.

¹⁵⁰ *Ibid.* at 96.

truth at trial is manipulated and massaged, subsumed by other competing goals and values such as procedural fairness, defence strategies and disclosure issues.

It may be further suggested that the truth a witness tells is shaped also by the questions asked, as well as by those questions that were never put to the witness either in examination in chief, cross examination or in reply. Consequently, the truth, as presented by the witness may not even be the whole truth the witness has come prepared to tell. These obstacles to the unimpeded search for truth at trial are both human and judicial. Justice is human and so too is truth. Both are thus neither objective nor absolute. People make choices for tactical or strategic purposes. Judges are people too. However, where a Judge determines that an error has occurred appropriate remedial steps are taken to address the matter to avoid even the appearance of unfairness at trial and thereby protect the integrity of the criminal justice process and guard against miscarriages of justice. Similarly, members of the jury may misapprehend the Judge's instructions on questions of fact and law or on the substantial components of the offence, leading to a wrongful conviction or indeed the acquittal of a guilty man.

Judicial factors that conspire against the search for truth lie in the Rules of evidence and criminal procedure. This may not be of public concern if the search for truth is not at the forefront of criminal law trial. However, I would suggest that it ought to be and should give cause for concern to the public. By way of illustration, the rules of the inadmissibility of evidence from a preliminary hearing can present real obstacles to the search for truth. Thus in a criminal law trial, when we speak of truth, we speak of a social, political and judicial construct marred by its own imperfections that may stem from both procedural and substantive limitations.

As Michel van de Kerchove explains the fundamental question as to whether the search for truth is central, indeed exclusive to criminal trials evokes a mitigated response. On the one hand, there are philosophers such as the utilitarian Jeremy Bentham who declared that criminal procedure and trials had anything but the search for truth as their principal objectives and for whom Judges were not advocates of truth. On the other hand, thinkers such as Hélié who saw but one goal in view –the search

for truth or J. Spencer for whom there is only one goal behind criminal procedure and that is the search for truth.¹⁵¹

In fairness to Michel van de Kerchove, he does go beyond this over simplification putting Bentham against Hélié and Spencer. There is a third option between these two hardened opposing positions. This reasoned middle ground involves an acknowledgment that while the search for truth is a noble and achievable goal, it is not the only laudable end. Its blind pursuit may prove to be counter-productive resulting in miscarriages of justice.

Two decisions of the Supreme Court of Canada (SCC) provide ample illustration of this principle, the quest for truth.¹⁵² Writing for the majority, in *R. v. Nikolovski*,¹⁵³ Mr. Justice Peter Cory identified the invaluable role played by technological aids in the quest for truth. The issue before the SCC was whether a videotape alone of a crime was enough evidence for the trier of fact to conclude that the accused had committed the crime. Justice Cory held that the ultimate aim of any trial, criminal or civil, must be to ascertain the truth.¹⁵⁴ Rather than exclude such evidence, it can be argued that the trier of fact ought to be given such evidence provided that it is relevant and sufficiently convincing to prove beyond a reasonable doubt that the accused is guilty of the crime or indeed is entirely innocent.

The second case that merits consideration to illustrate the importance of the search for truth in criminal law matters is *R. v. Noël*,¹⁵⁵ which dealt with self-incriminating evidence pursuant to section 13 of the *Charter*¹⁵⁶ and section 5 of the *Canada Evidence Act*.¹⁵⁷ Writing, albeit in dissent on other grounds, Madame Justice Claire l'Heureux-Dubé sets out the "General principles of evidence – The Search for

¹⁵¹ van de Kerchove, *supra* note 144 at 97.

¹⁵² These two decisions do not deal with fresh evidence.

¹⁵³ *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, [1996] S.C.J. No. 122 at paras. 13, 14, 18 & 22.

¹⁵⁴ *Ibid.* at para.13.

¹⁵⁵ *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433 at paras. 83-87.

¹⁵⁶ *Charter*, *supra* note 3 at s. 13.

¹⁵⁷ R.S.C. 1985, c. C-5, s. 5.

Truth.”¹⁵⁸ This segment of the reasons advances the position that the search for truth should be qualified to ensure that an accused gets a fair trial, that the police do not act with impunity and that the integrity of the administration of justice remains intact. The search for truth is thus a dispensable proposition, subject to the circumstances of each case.

Thus in *Nikolovski* and *Noël*, the SCC reaffirms two principles: the search for truth is one of the goals of criminal trials and judges have an important discretionary role to play in weighing the evidence before them between the competing interests of the individual’s rights and the larger interests of society.

Finally, as in its absence from the *Charter*, the search for truth as a goal at trial is not mentioned in the *Criminal Code*¹⁵⁹. While there are a dozen references to the word “truth” in the *Criminal Code*, ranging from municipal corruption to defamation, the concept of truth is reserved only for oath taking or affirmation for witnesses giving testimony by video link either from within or outside Canada.¹⁶⁰

In light of the preceding discussion, it is reasonable to conclude that in theory, the search for truth in criminal law trials is always to be encouraged. In practice however, the search for truth may not always be pursued, especially where to do so would put the administration of justice into disrepute. Truth is not absolute and it is not uncommon to observe that it will be sacrificed in favour of other Canadian values protected by the *Charter*. This is evident in the fresh evidence cases and the rise in these following the growth in the forensic sciences to help unearth the truth of what actually happened when a crime was committed. The search for truth in this sense while not ordinarily within the mandate at the appellate level nonetheless can play a decisive role in the outcomes of fresh evidence applications and an appeal. In fact, it was the desire to prevent innocent men and women from being put to death by the state, which led to the development of the power to admit fresh evidence on appeal.

¹⁵⁸ *Noël*, *supra* note 155 at paras. 83 to 87.

¹⁵⁹ *C. cr.*, *supra* note 62 at ss. 714.2, 714.4 and 714.5.

¹⁶⁰ *ibid.* at 714.5.

Thus, the search for truth, like the element of fairness forms part of the very foundation of fresh evidence law.

III.1.2. *Truth on appeal*

The question arises, at the appellate level, where does the search for truth figure in the admission of fresh evidence? Where it is established that there has been a miscarriage of justice and the administration of justice has been consequently held in disrepute, such findings have come only after the long and arduous process of the admission of fresh evidence. It can however be argued, that the admission of fresh evidence by a Canadian appellate Court does not necessarily depart from the same judicial treatment accorded to the search of the truth, in other words that fresh evidence even after it has passed the admissibility test, does not escape the possibility of being sacrificed for other values.

By way of background, it is important to note that appellate Courts are cognizant of the long list of individuals who have been wrongfully convicted.¹⁶¹ In *United States v. Burns*,¹⁶² a case in which there was ample evidence to justify the extradition of respondents Glen Burns and Atif Rafay to Washington State to stand trial on charges of aggravated first degree murder, where they would face the death penalty, the Supreme Court of Canada took pains to review the long line of cases where miscarriages of justice have led to the wrongful conviction of the innocent.

The Court noted that while this phenomenon highlighted the fallibility of our criminal justice system and such weaknesses were not unique to Canada, they constituted but a small fraction of the thousands of cases that have traversed our criminal justice system. That is why the Court also recognizing that the respondents in *Burns*, faced the death penalty, the Minister of Justice was required to seek assurances from the requesting state that they would not, if found guilty as charged, be sentenced to capital punishment.

¹⁶¹ See for example *United States v. Burns*, [2001] 1 S.C.R. 283, at paras. 95-117.

¹⁶² *Ibid.*

This case also illustrates that the search for truth is not part of an appellate court's mandate. Judicial truth at the Court of appeal becomes something illusive. First, the evidence is usually offered by way of documents, including affidavits or sometimes by examination and cross examination on affidavit. Thus Justices of the Court of Appeal are not in the same position as Trial judges or the judge and jury at first instance who enjoy the advantage of seeing the witnesses give their testimony in Court.

Consequently, it is necessary to look at the documentary evidence and determine the plausibility of the proffered explanation. In other words, if there is a witness, the appellate Court judges can examine the credibility of the witness and must also consider the accuracy, reliability or dependability of the evidence. Thus is this a credible person? However, this question does not resolve the question because a credible person can also be fooled or be misled. In essence, credibility and plausibility do not necessarily go hand in hand.

The reverse may also be true. It is possible that a person who is not credible, could nevertheless be telling the truth. Thus unlike at trial, the truth is not readily discernable in the eyes, words and body language of the witness. This is not the case when looking at documentary evidence, which demands that greater credence is given to the plausibility of the documentary evidence.

The operative word in this exercise at the appellate level is plausibility. How plausible is this person's story? It is even more a question of appearance than plausibility because at the appellate level, the Judges may not always pronounce on the finality of a case, as new trials are frequently ordered. The role of the appellate Court judge is thus to determine if the evidence is susceptible or would have an impact on the verdict. Consequently, the question remains whether the test is based on appearance of plausibility or both. If it is clear that the testimony could not be believed on its face, and upon reading the evidence along with the entire trial record, it will be excluded. It is quite clearly a different exercise based on documentary evidence and appearance and plausibility.

The search for truth is not a question for the appellate Court, whose role is not to decide the truth of the matter. Yet it has an impact on it. Rather, the role of the

appellate Court is to decide if there is sufficient likelihood to cause them to conclude that the new evidence could have had an impact on the verdict, in which case it is preferable to leave this delicate task of truth searching to a new jury or a new judge to decide if it is true or not. In terms of truth, the test of veracity is lower at the appellate level than at trial.

The link between truth and reality or reliability when fresh evidence is presented, raises the question whether this fresh evidence is likely to alter the outcome at trial. The four criteria established in *Palmer*, provide tried and true safeguards against such dangers. The construction of this fresh evidence belies the notion of truth. If the evidence before the trial was not entirely the truth, how can the appellate Court be assured that this fresh evidence is the truth or is indeed fresh and has not passed its due date? The means of overcoming this difficulty is by cross-examination. As discussed earlier, cross-examination serves as the crucible in which the truth, a fully accurate account of the events is purified. The Trier of fact has the witness before the Court and can observe whether what the witness is saying or has said is plausible or not.

To conclude, the search for the truth does not fall within the province of the court of appeal. Ordinarily, the appellate Court is required to consider the trial record, the proffered fresh evidence and determine on the basis largely of this documentary evidence, where direct human contact is absent, the plausibility of the evidence. The pursuit of the truth in a criminal trial is a noble goal. However, it is constrained by its servitude to loftier ideals. It is opportune to conclude like Peck, and adopt the position of the Honourable G. Arthur Martin in *R. v. Yakeleya*¹⁶³ and state:

The search for truth is not, of course, an absolute value in a criminal trial and must sometimes yield to other values recognized by the criminal justice system such as fairness, openness and protection from oppressive questioning.

This is all the more polemical at the Appellate level, where the search for truth is not part of its mandate. The interviews conducted with representatives of the Quebec Court of Appeal provided some elements of response. Both interviewees

¹⁶³ *R. v. Yakeleya*, [1985] O.J. No. 144, 9 O.A.C. 284, 20 C.C.C. (3d) 193 (Ont. C.A.) as cited in Peck, *supra* note 5 at 480.

recognized, although they hoped not, at the appellate level, the truth may be sacrificed for other values. “Justice is human.” As a result it is, in the final analysis a good justice all things considered.

Are there errors? Certainly, there must be. However, the administrators of justice are diligent to assure a safe and just outcome. Moreover, the fact is there are strict Rules of evidence and Rules of procedure in criminal proceedings providing safeguards against derivatives and miscarriages of justice. Consequently, there are provisions in place that protect against abuse of the process. If for instance a convicted person comes on appeal alleging an unfair trial due to incompetence of Counsel, there are Rules in place highlighting the steps to follow in order to proceed.¹⁶⁴

This question of competence of counsel brings us to the next theoretical point in the debate and that is the issue of rights. What do we mean by rights? How has the principle of rights affected the course of fresh evidence jurisprudence in criminal matters in Canada?

III.2. Theoretical debate between Truth and Rights

Canadian legal scholars such as David Paciocco¹⁶⁵ and Richard Peck¹⁶⁶ ascribe to the same pragmatic and functional approach when confronted by the competing interests between the search for truth and other juridical values, requiring a balancing of individual rights and broader interests that form the foundation of our free and democratic society.

In the Canadian context, the debate between rights and truth is constant. Proponents in both sides of the debate acknowledge that one overriding obstacle to

¹⁶⁴ The following is a website link to the new Rules of the Court of Appeal of Quebec in Criminal Matters, which was published in the *Canada Gazette*, Part II, vol. 140, No. 25. Online: <<http://canadagazette.gc.ca/partII/2006/20061213/pdf/g2-14025.pdf>> (accessed October 31, 2007). The specific sections of the new Rules are Rule 26, dealing with incompetence of Counsel and Rule 54 for fresh evidence. See pp. 157 and 161–of-192 respectively.

¹⁶⁵ Peck, *supra* note 5.

¹⁶⁶ *Ibid.*

the search for truth resides in the constitutional authority of the individual rights and freedoms protected by the *Charter*. As Peck¹⁶⁷ points out, prior to the advent of the *Charter*, in 1982, the search for truth was predominant among competing values in the Canadian criminal justice system, including the rights of the individual. In his view, it was not uncommon for the trial Judge to admit evidence, providing reliable proof of guilt even though that evidence was obtained through the use of threats, entrapment and forced confessions at the hands of state authorities and notably the police.

Moreover, it is important to note that in the discussion of rights, the word “truth” appears nowhere in the *Charter*. The search for truth is thus not a constitutionally sanctioned ideal to be assured and protected at all costs. In fact, it would appear that quite the opposite was intended by the constitutional framers when they included the remedial provisions of section 24 of the *Charter*.¹⁶⁸

In addition, the administration of justice is enshrined in the remedial provisions of the *Charter*, a constitutional principle that can trump all other goals no matter how noble. Could that not include the search for truth?¹⁶⁹ I would argue that while section 24(2) speaks to “evidence” and not “fresh evidence” it also implies that the purpose for which evidence may be proffered, i.e., to unearth the truth, could be excluded. The search for truth then is not a protected goal at trial. The exclusion of evidence obtained in a manner that infringed or denied any rights that are protected by the *Charter*, implies that the truth can be sacrificed because of this constitutional exclusionary principle.

It is important to add however, that Judges have an important discretionary role to play in determining whether the alleged *Charter* breach requires a section 24 remedy to protect the administration of justice from disrepute. As Peck correctly points out, a breach of *Charter* rights will not automatically trigger a section 24 remedy. Courts will be guided by the unique facts of each case, in order to determine whether the evidence in question will be excluded to protect the administration of justice from falling into disrepute. Such a decision is also shaped by the impact not only on the

¹⁶⁷ *Supra* note 5 at 469.

¹⁶⁸ *Charter*, *supra* note 3 at s. 24.

accused but also on public perception of the criminal justice system. To illustrate, Peck cites T. Lynch as follows:

When executive agents bypass the warrant application procedure or disregard the terms and conditions of search warrants, they engage in unlawful behaviour. [...] The judiciary can respond to executive mischief by barring the admission of illegally seized evidence in criminal trials. The purpose of the exclusionary rule is to compel respect for the judiciary's warrant - issuing prerogative.¹⁷⁰

Over and beyond the doctrine discussed above, the criminal law jurisprudence in Canada confirms that in the debate between truth and rights, the search for truth is but one of several objectives to be sought at trial provided its pursuit does not violate *Charter* rights in a manner that would bring the administration of justice into disrepute. The protection of rights remains a strong goal however in terms of the law of evidence in criminal law proceedings at both the trial and appellate levels.

Examining the question of rights with respect to fresh evidence, the case law reveals that the violation of the constitutional rights will be remedied. This is notably evident where disclosure issues arise and in applications to adduce evidence based on allegations of incompetence of counsel. These are two issues that compromise the fairness of trial leading to potential miscarriages of justice.

These two rights go to the fairness of trial. For the allegations of the breach of the right to full disclosure it is considered to be an obstacle to an accused's right to make full answer and defence and as such requires a more flexible standard than in *Palmer*, above. The right to the assistance of competent counsel also has led to the introduction of specific rules of Court over and beyond the *Palmer* test. In these two instances where the rights of the accused have been violated, the overriding concern remains the protection of the principle of the fairness of the trial as an examination of these two rights in the context of fresh evidence illustrates.

¹⁷⁰ Peck, *supra* note 5 at 469-70 citing in footnote 76, T. Lynch, "In Defence of the Exclusionary Rule", (2000) 23 Harv. J.L. & Pub. Policy 711.

III.3 Fairness

How then should we understand what is meant by fairness as is demonstrated in the pattern of decision making in Canadian appellate court judges when considering fresh evidence? At the outset, it merits noting that this concept of fairness is viewed only through the lens of the language used by appellate Court Judges when determining whether to admit fresh evidence. Consequently, it would be beyond the scope of my research to conclude that this notion of fairness applies to all judicial decision making.

It should also be pointed out that fairness as understood from a reading of the case law is not akin to the concept of equity in the tradition of Lord Denning who used the Courts of Chancery to enable the law to make provision for the human conditions that defy the application of Black letter law; yet cry out for a just and equitable resolution.¹⁷¹ Rather, the principle of fairness that runs throughout the fresh evidence cases, regardless of jurisdiction follows two strands of the theory of “justice as fairness” developed by the political philosopher John Rawls.¹⁷²

Briefly stated, the theory of justice as fairness developed by John Rawls is based on a hypothetical situation where everyone starts from an original position of equality. No one knows his position in society, such as status, wealth or even one's natural abilities, including intelligence and strength. The main idea of the theory of justice as fairness lies in this original position where everyone is equal, existing as it were behind a “veil of ignorance” and from which the principles of justice are determined. Consequently, since everyone starts from the same rational and disinterested position where no one knows his or her relative strengths and weaknesses vis-à-vis others, the choices made are fundamentally fair. For Rawls, the members of this hypothetical society chose principles of justice based on fairness.

¹⁷¹ It is true that the law of equity favoured by Lord Denning was developed in the context of civil law and not criminal proceedings.

¹⁷² John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). The theory of justice as fairness was first developed in John Rawls, “Justice as fairness”, *Philosophical Review*, 67 (1958) (Cincinnati, Ohio: Anderson Pub. Co. c.1981).

This of course does not imply that choosing the principles of justice that should guide society would be an easy undertaking. In fact, from the outset Rawls cautions that the problem of choice of principles is extremely difficult.¹⁷³ Hence, like most contractual arrangements, justice as fairness has two parts as explained below:

- (1) An interpretation of the initial situation and of the problem of choice posed there, and (2) a set of principles which, it is argued would be agreed to. One may accept the first part of the theory (or some variant thereof), but not the other and conversely.¹⁷⁴

Rawls presented clear principles of justice as fairness that would determine the choice of just institutions. He also held the view that these choices to create just institutions would be unanimous. However, as Amartya Sen explains in his critique of the theory of justice,¹⁷⁵ this is an untenable proposition. Rawls in later writings recognized the limits of this hypothetical situation. For example, life behind the “veil of ignorance” is based on the creation of just institutions and overlooked in some measure that in order to create just institutions it is necessary first to recognize the diversity of the very people themselves who are shaped by differences of beliefs fostered by religious and cultural affiliations. But Rawls never abandoned the basic idea that justice is fairness. Among the attributes of this controlling idea is the principle that fairness implies impartiality and the avoidance of bias. It also implies that cooperation between people and their institutions will be accompanied by a measure of procedural fairness.

These two attributes find expression in the fresh evidence jurisprudence in Canadian criminal law. In consideration of impartiality and avoidance of bias, appellate court judges are empowered by statute to receive any fresh evidence and admit such evidence in the interests of justice. Canadian appellate courts each have

¹⁷³ *Ibid.* at 11. This is further developed at p 342 ff where Rawls sets out the argument for the principles of fairness not only with respect to natural duty but also with regard to obligations.

¹⁷⁴ *Ibid.* at 15.

¹⁷⁵ Amartya Sen, *The Idea of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 2009) at 52-55. Sen notes that Rawls in later publications such as *Political Liberalism* (1993) gave a fuller defense of how the process of fairness ought to work. Rawls recognized the differences between people and provided guidance on how people can cooperate in a society despite holding deeply opposing views.

rules of practice and procedure in criminal proceedings that deal with interlocutory motions, such as fresh evidence applications. It is thus not surprising to find in the case law instances where appellate courts receive fresh evidence applications based on rules that are applied equally to the individual as to the Crown.¹⁷⁶ In instances, for example where the applicant does not follow the established rules of court or the rules of evidence, the appellate court will dismiss such an application with clear reasons. Having rules of court and practices for the introduction of fresh evidence help to avoid bias and ensure impartiality.

Moreover, this abiding commitment to be fair by virtue of judicial impartiality is evident in the development and application of the rules of fresh evidence. The data sample of cases reveal that the relationship between truth and rights is shaped by a preoccupation to do what is fair and what is just. Hence, there are clear instances where even if the truth may be made manifest by new DNA evidence and the rights of an accused ought always to be protected under the *Charter*, Canadian appellate Courts will not admit fresh evidence, where in the interests of justice, it would not be fair to do so. Further, such evidence would not be admitted, if to do otherwise would compromise the administration of justice.

To illustrate, there are 35 cases in the data sample of fresh evidence case law where DNA evidence was instrumental in either establishing innocence or establishing guilt. Several of these cases cite DNA evidence as an example of how important such compelling evidence is to the search for truth. These DNA relevant cases involve different types of appellate proceedings, including appeals against bail, conviction, sentence or both conviction and sentence.

Of these 35 cases, 18 decisions¹⁷⁷ demonstrate that where there is convincing DNA evidence to exonerate or establish innocence, appellate courts will in every case

¹⁷⁶ However, at trial, the Crown and the individual are not on the same level, in that the legal burden lies on the Crown to make out its case against the accused beyond a reasonable doubt. The accused is presumed innocent and except in instances where there is a defence of alibi, he or she has the right to remain silent. On appeal however, the presumption of innocence no longer exists. The rules for the admission of fresh evidence take this fact into consideration by making these rules equally applicable to both the individual and the Crown.

¹⁷⁷ In order of jurisdiction, these DNA cases establishing innocence include: 1) *R. v. Cooper*, 1999 ABCA 249, 138 C.C.C. (3d) 292 (Alta. C.A.); 2) *R. v. Karas*, 2007 ABCA 362, 422 A.R. 344 (Alta. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 22 (S.C.C.); 3) *R. v. Wood*, 2006 ABCA 343, 214 C.C.C.

determine the outcome based on this DNA fresh evidence. The remaining 17 cases deal with instances where DNA evidence served to establish guilt.¹⁷⁸ In these instances, it was not in the interest of justice to discount the DNA evidence. It would not be fair to do so. However, as Professor David Paciocco points out, “there is no inherent “justice” or fairness in denying access to information that helps find the truth.”¹⁷⁹

Further, in those instances where fresh evidence is excluded for procedural reasons, for example, where the appellant fails to follow the proper rules of evidence or for the admission of fresh evidence, such exclusions are necessary in order to protect the integrity of the process and the administration of justice.

Fairness in this rawlsian sense is also a constitutional principle that is prevalent in the fresh evidence jurisprudence. Among the legal rights for proceedings in criminal

(3d) 1 (Alta. C.A.); 4) *R. v. Sprayson*, 2007 ABCA 56, 404 A.R. 38 (Alta. C.A.); 5) *R. v. Arnold*, 2001 BCCA 374, 155 C.C.C. (3d) 263 (B.C.C.A.); 6) *R. v. Bowers*, [1997] 90 B.C.A.C. 233, 34 W.C.B. (2d) 263 (B.C.C.A.). See also appeal of conviction from second trial, *R. v. Bowers*, 2002 BCCA 343, 166 C.C.C. (3d) 87 (B.C.C.A.); 7) *R. v. Connors*, [1998] 102 B.C.A.C. 1, 121 C.C.C. (3d) 358 (B.C.C.A.); 8) *R. v. Henry*, 2009 BCCA 12, 264 B.C.A.C. 244 (B.C.C.A.). See also *R. v. Henry*, [1997] B.C.J. No. 2792, 100 B.C.A.C. 183 (B.C.C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 77 (S.C.C.); 9) *R. v. Purdy*, [2008] B.C.J. No. 401, 2008 BCCA 95 (B.C.C.A.); 10) *R. v. Rose*, [1998] B.C.J. No. 1360, 108 B.C.A.C. 221 (B.C.C.A.). See related fresh evidence application in *R. v. Rose*, [1997] B.C.J. No. 2989, 37 W.C.B. (2d) 158 (B.C.C.A.); 11) *R. v. Titian*, [1998] B.C.J. No. 2993, 116 B.C.A.C. 294 (B.C.C.A.); 12) *R. v. Folland*, [1999] O.J. No. 143, 43 O.R. (3d) 290 (Ont. C.A.); 13) *R. v. Hanemaayer*, 2008 ONCA 580, 234 C.C.C. (3d) 3 (Ont. C.A.). See para. 29 for commentary on DNA and false identification by honest but mistaken compelling eye witnesses. 14) *R. v. LaFramboise*, [2005] O.J. No. 5785, 203 C.C.C. (3d) 492 (Ont. C.A.); 15) *R. v. McCullough*, [2000] O.J. No. 32, 142 C.C.C. (3d) 149 (Ont. C.A.); 16) *R. v. Vanezis*, [2002] O.J. No. 994, 156 O.A.C. 143 (Ont. C.A.) See related appeal from third trial *R. v. Vanezis* (2006), 217 O.A.C. 127, 213 C.C.C. (3d) 449 (Ont. C.A.); 17) *Marshall c. R.*, 2005 QCCA 852, [2005] J.Q. no 14018 (Qc. C.A.); and 18) *R. v. Johnson*, 2003 YKCA 2, [2003] Y.J. No. 32 (Y.C.A.).

¹⁷⁸ These include: 1) *R. v. Curry*, 2004 BCCA 144, 61 W.C.B. (2d) 206 (B.C.C.A.); 2) *R. v. Falkner*, 2008 BCCA 277, 235 C.C.C. (3d) 72 (B.C.C.A.); 3) *R. v. Hibbert*, [1996] B.C.J. No. 1660, 78 B.C.A.C. 277 (B.C.C.A.); 4) *R. v. Sauve*, [1997] 101 B.C.A.C. 21, 121 C.C.C. (3d) 225 (B.C.C.A.). See related case [1998] 110 B.C.A.C. 122, B.C.J. No. 1610 (B.C.C.A.); 5) *R. v. L.E.B.*, [2001] N.S.J. No. 386, 2001 NSCA 146 (N.S.C.A.); 6) *R. v. Whynder*, [1996] N.S.J.No. 110, 149 N.S.R. (2d) 241 (N.S. C.A.) appeal dismissed [1996] S.C.C.A. No. 430 (S.C.C.); 7) *R. v. Archer*, [2005] 203 O.A.C. 56, 202 C.C.C. (3d) 60 (Ont. C.A.); 8) *R. v. Carriere*, [2004] 72 O.R. (3d) 767, [2004] O.J. No. 4363 (Ont. C.A.); 9) *R. v. Clark*, [2004] O.J. No. 195, 69 O.R. (3d) 321 (S.C.C.); 10) *R. v. Culham*, [2007] O.J. No. 4379, 2007 ONCA 775 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 107 (S.C.C.); 11) *R. v. Giovannetti*, [1991] O.J. No. 47 (Ont. C.A.); 12) *R. v. Grayer*, 2007 ONCA 13, 215 C.C.C. (3d) 505 (Ont. C.A.); 13) *R. v. Larabie*, [2003] O.J. No. 2832 (Ont. C.A.); 14) *R. v. Patenaude*, [2001] O.J. No. 660 (Ont. C.A.); 15) *R. v. Perlett*, [2006] 214 O.A.C. 264, 212 C.C.C. (3d) 11(Ont. C.A.) leave to appeal dismissed [2007] S.C.C.A. No. 96 (S.C.C.); 16) *R. c. Paquet*, 2005 QCCA 889, [2005] J.Q. no 14552 (Qc. C.A.); and 17) *R. v. Oxby*, 2000 SKCA 129, [2000] S.J. No. 667 (Sask. C.A.).

¹⁷⁹ Professor David Paciocco, Examiner C, Thesis Evaluation Report, at p. 5.

and penal matters enshrined in the *Charter*¹⁸⁰ is the principle that any person charged with an offence has the right to be “presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” While it is generally recognized that on appeal the presumption of innocence has lost its currency; fairness requires that appellate court judges do not suspend their duty of impartiality. Appellate court judges have a duty to uphold the constitution and this is especially true when dealing with fresh evidence applications because as fresh evidence, appellate court judges assume the role of surrogate trial judges in hearing fresh facts being introduced for the first time on appeal.¹⁸¹

The second idea from John Rawls’ theory of justice as fairness that is manifested in the Canadian fresh evidence jurisprudence is procedural fairness. Justice as fairness requires that there be procedural fairness especially in the criminal law context where the stakes are much higher for the individual whose liberty may be at stake or is subject to mandatory sentences that to his or her eyes may be considered overly harsh, perhaps disproportionate to the circumstances of a case and hence cruel. This is significant in terms of the statistics presented in Table III where applications to adduce fresh evidence on appeal are brought by the Crown in less than 10% of the cases. The vast majority of these are brought not against a verdict – whether of an acquittal, a stay or the revocation of a guilty plea – but rather against sentence.

Viewed in this light, the attributes of justice as fairness must necessarily rise above the debate among liberal scholars between the search for truth and rights. The search for truth finds its full force in the adversarial arena of the trial courts. That is why fresh evidence cases do not follow the same trajectory. However, the statute does make provision for the appointment of a special commissioner to inquire into and

¹⁸⁰ *Charter*, *supra* note 3 at s. 11.

¹⁸¹ The term surrogate trial judge is used to refer only to the function of appellate court judges to receive any new evidence deemed in the interests of justice to consider. Further, studying the cases leads ineluctably to the observation that appellate court judges systematically refrain from adjudicating the facts in fresh evidence applications; preferring to refer the matter to a fact finding commission of inquiry, particularly where questions of credibility arise, pursuant to the *C.cr.*, ss. 683 (1)(e) and (f). Alternatively and more commonly, appellate judges refrain from pronouncing on the fresh evidence and refer the matter to be determined by the trier of fact at a new trial where circumstances require.

report on any matter on appeal that “(i) involves prolonged examination of writings or accounts, or scientific or local investigation, and (ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal.”¹⁸² Such special commissions provide an important additional mechanism to maximize the unearthing of the truth and minimize the risk of miscarriages of justice.¹⁸³ This is only fair and in keeping with our democratic values and the rule of law.

The next section, Part IV examines the principles of truth and fairness and provides an explanation for the initial growth of fresh evidence cases.

PART IV. FORENSIC SCIENCE & THE GROWTH OF FRESH EVIDENCE

The data in Appendix 1 indicates that prior to the advent of the *Charter* in 1982, there were only 81 cases dealing with fresh evidence. The numbers rise dramatically after 1982 and especially during the 1990s. They would reach their zenith in 2007 when, with 97 cases noted, the highest number in any single year surpassed the number of fresh evidence applications for the entire 70-year pre-*Charter* era.¹⁸⁴ A close study of the cases permits the conclusion that the advent of the *Charter* was a determinative factor in this significant increase in the number of cases.

If the advent of the *Charter* provides a sound explanation for the significant rise in the number of fresh evidence cases after 1982, as discussed in Part V, then the adoption of the *Charter* could not have been the only reason for these dramatic increases. As Appendix 1 illustrates, the growth in fresh evidence cases began in the mid 1970s and well before 1982. Viewed over the decade, the effect is dramatic as summarized in Table 1. That is exactly what Part IV sets out to explore. Through

¹⁸² *C.cr.*, *supra* note 62 at subsection 683 1)(e),

¹⁸³ The appellate Court has the power to refer a question or issue on an appeal to a special commissioner for an inquiry and report. Examples in the fresh evidence jurisprudence include: *R. v. Manning*, [2001] P.E.I.J. No. 106, 2001 PESCAD 26 See related matter *R. v. Manning*, 2001 PESCAD 13, [2001] P.E.I.J. No. 68 (P.E.I. C.A.); *R. v. L.S.C.*, 2003 ABCA 105, 13 C.R. (6th) 390 (Alta. C.A.); *R. v. B. (G.D.)*, 2000 SCC 22, 143 C.C.C. (3d) 289 (S.C.C.) affirming 1999 ABCA 104, 232 A.R. 307, 133 C.C.C. (3d) 309 (Alta. C.A.); and *R. v. Budai*, 2000 BCCA 266, 144 C.C.C. (3d) 1 (B.C.C.A.).

¹⁸⁴ See Appendix 1 for 2007.

the lens of the cases, what are the possible sources of the pre-*Charter* growth in fresh evidence applications in Canadian appellate law?

IV.1. PRE-*CHARTER* GROWTH: EXPERT FORENSIC EVIDENCE

After providing a classification of cases to take into consideration the use of certain scientific advances and expert forensic evidence, represented in the case law, the second half of this section examines the contribution of new evidence scholarship to the phenomenal growth of fresh evidence cases in Canada starting in the pre-*Charter* era. This final section will also use the *Truscott* case as a case study to demonstrate how the growth in forensic science coincides with the twin goals of preventing miscarriages of justice and overturning wrongful convictions. What role did the fresh evidence play in the ultimate outcome in this case? What lessons can be learnt from *Truscott*? Have fresh evidence applications today become part of the problem rather than part of the solution to avoid miscarriages of justice?

Again, these questions raise issues of fairness and commitment to maintaining the legitimacy and authority of the courts and of the administration of justice. For control purposes, this examination is limited to the years 1977 to 1981, in other words the 5 years immediately preceding the adoption of the *Charter* when the first signs of growth began to materialize in Canadian fresh evidence applications. What conclusions can be drawn from these 25 cases?¹⁸⁵ That is the question that animates the analysis in the following sections.

IV.1.1. *Typology of Fresh Evidence Cases: 1977-1981*

For ease of reference, these 25 pre-*Charter* cases may best be classified into two groups. The first class of cases is called the “Ordinary Fresh Evidence Class

¹⁸⁵ See Appendix 1 for the following: 4 cases listed in each of the years 1977 and 1978; 6 cases in 1979; 8 cases in 1980 and 3 cases in 1981.

(OFEC).” They involve a range of fresh evidence issues in relation to sentence and verdict appeals by both accused and the Crown with respect to issues such as, revocation of a guilty plea;¹⁸⁶ credibility issues including recantation;¹⁸⁷ and procedural matters,¹⁸⁸ among others.¹⁸⁹

The second class of cases is called the “Forensic Fresh Evidence Class (FFEC)”. These pioneer fresh evidence cases are at the beginning of a movement – the advancement of science in the cause of justice. The cases involve a *Reference* by the Minister of Justice regarding fresh evidence of a disease of the mind and the defence of insanity that was not evoked at the trial of an accused found guilty of killing his wife.¹⁹⁰ The FFEC category also includes the use of expert forensic evidence to establish that the appellant was not the author of the crime.¹⁹¹

¹⁸⁶ *R. v. Foster*, [1977] A.J. No. 679, 2 W.C.B 85 (Alta. C.A.) pertaining to fresh evidence to affirm that the appellant did not live off the avails of prostitution between the alleged time period.

¹⁸⁷ *R. v. F.G.*, [1977] M.J. No. 72 (Man. C.A.) in relation to the revocation of a guilty plea by the accused who only pleaded guilty to the offences of incest to avoid his daughters the ordeal of testifying against him; and *R. v. Steinmiller*, [1979] O.J. No. 856, 47 C.C.C. (2d) 151 (Ont. C.A.) fresh evidence going to credibility.

¹⁸⁸ *R. v. O'Brien*, [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209 (S.C.C.) establishing that fresh evidence must be admissible under the operable rules of evidence; *R. v. Moore and Parsons*, [1979] 35 N.S.R. (2d) 85, 62 A.P.R. 85 (N.S. C.A.) fresh evidence inadmissible based on *O'Brien*; *R. v. Hogan* (1979), 34 N.S.R. (2d) 641, 50 C.C.C. (2d) 439 (N.S.C.A.) requiring that fresh evidence applications should not be made through briefs but by affidavits; and *Palmer v. R. and Palmer v. R.*, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193 (S.C.C.) same case *R. v. Duncan*, [1980] 1 S.C.R. 783 (S.C.C.).

¹⁸⁹ *R. v. Rosa*, [1978] B.C.J. No. 1045, 6 C.R. (3d) 84 (B.C.C.A.); *R. v. Adams*, [1978] N.S.J. No. 664, 30 N.S.R. (2d) 47 (N.S.S.C.A.D.); *R. c. Gervais*, [1978] J.Q. no 181 (Qc. C.A.); *R. v. C. (C.)*, [1979] A.J. No. 140 (Alta. C.A.); *R. v. Irwin*, [1979] 16 A.R. 566, 48 C.C.C. (2d) 423 (Alta. C.A.); *R. v. Mahoney* (1979), 11 C.R. (3d) 64, 50 C.C.C. (2d) 380 (Ont. C.A.) affirmed [1982] 1 S.C.R. 834, 67 C.C.C. (2d) 197 (S.C.C.); *R. v. Hardy*, [1980] B.C.J. No. 2436, 57 C.C.C. (2d) 73 (B.C.C.A.); *R. v. Ross*, [1980] B.C.J. No. 608, [1980] 5 W.W.R. 261 (B.C.C.A.), leave to appeal dismissed [1987] S.C.C.A. No. 6 (S.C.C.); *R. v. Godin*, [1980] N.B.J. No. 291, 32 N.B.R. (2d) 608 (N.B.C.A.); and *R. v. Winters*, [1981] 27 B.C.L.R. 385, 59 C.C.C. (2d) 454 (B.C.C.A.).

¹⁹⁰ *Gorecki (No. 2)*, *supra* note 114.

¹⁹¹ Other issues involve medical fresh evidence going to establish state of mind and mental condition as in the case of the accused in *R. v. Olbey*, [1980] 1 S.C.R. 1008, 50 C.C.C. (2d) 257 (S.C.C.) affirming, [1977] O.J. No. 1199, 38 C.C.C. (2d) 390 (Ont. C.A.), in which the affidavit of a doctor contradicts the evidence of a key Crown witness as to the mental capacity of the appellant on the issue of provocation. Another example is found in *R. v. Oda*, *R. v. Lawrence*, [1980] B.C.J. No. 480, 54 C.C.C. (2d) 466 (B.C.C.A.), where fresh evidence of a psychiatrist elucidated the mental state of the Crown's key witness who committed suicide. The Court dismissed the appeal because there was ample evidence to persuade the jury of the guilt of the two accused. Equally consistent with this line of cases in the pre-*Charter* period is the case from the Quebec Court of Appeal in *R. v. Julien* (1980), 57 C.C.C. (2d) 462

The intrigue and acceptance that come with the seal of scientific approval in the cases in this second category of cases – the forensic expert evidence cases- may be a possible contributing factor to the growth of fresh evidence cases beginning around 1977.¹⁹² This is particularly true in the case of *R. v. Roberts*.¹⁹³

In that case, Mr. Roberts was charged and convicted of the murder of the lady who lived in the apartment located directly below his. Samples of human hair were found on the victim, including on her body, on her night shirt and on her bed. But not all of them were hers. The Crown called an expert in forensic hair analysis who gave compelling scientific evidence at trial,¹⁹⁴ which went unanswered by the defence.

In his preparation to appear as an expert Crown witness, Mr. Von Gemmingen examined one hundred and fifty-five hairs under the microscope and came to several conclusions, including that hairs found on the body of the deceased were similar to the appellant's hair. Also, hair strands caught in the grasp of the lady's left hand and right foot were similar to the appellant's hair samples.

On appeal, the defence adduced fresh evidence in the form of affidavits from two scientists who challenged the reliability of Mr. Von Gemmingen's method of analyzing human hair with the human eye under a microscope. Dr. Harold O. Klingele the first expert and source of the fresh evidence testified that the appellant's hair was similar to those found at the scene of the crime. However, in his view, there is a relatively large margin of error in comparative microscopic analysis of blonde and light

(Qc. C.A.), in which the appellant sought to adduce fresh evidence in the form of the affidavit from the psychiatrist of the only witness who could link the accused to this murder crime, carried out by setting fire to the victim's apartment, which fire also caused the death of another tenant in the building. The case of *R. v. Harper*, [1980] M.J. No. 104, 2 Man. R. (2d) 153 (1980) (Man. C.A.) reversed on other grounds [1980] 2 S.C.R. 366, 6 Man. R. (2d) 253 (S.C.C.) is also in this vein of FFEC cases where the appellant sought unsuccessfully to challenge the testimony of a forensic specialist and a medical examiner. See also *R. v. Popen*, [1981] O.J. No. 921 (Ont. C.A.); and *R. v. Miller*, [1981] S.J. No. 1389, 59 C.C.C. (2d) 131 (Sask. C.A.).

¹⁹² It would have been opportune to conduct a review of the public archives between 1977 and 1981 to determine what publication, if any, each of these 25 cases might have received from the general public newspapers, as well as in the publications destined to members of the legal profession. Such information might inform the notion that the publicity from these cases encouraged future fresh evidence claimants to bring similar applications on appeal.

¹⁹³ *R. v. Roberts*, [1977] O.J. No. 282, 34 C.C.C. (2d) 177 (Ont. C.A.).

¹⁹⁴ *Ibid.* This passage is a summary of the evidence presented at paras. 4-6.

coloured hairs because there are no pigmentation granules in blonde hair, like the appellant's."¹⁹⁵

The pith of Dr. Klingele's analysis was that "neutron activation analysis of hair was a much more reliable test" than hair analysis "done through visual microscopic examination." The authority for this view comes from the testimony and reputation itself of Dr. Robert E. Jervis, the second forensic expert introduced to support the appellant's fresh evidence application on appeal.

Dr. Jervis is an eminent scientist from the University of Toronto and internationally recognized for his work and for having discovered neutron activation analysis, which is now used around the world by forensic scientists in the multi-element analysis of from twenty to thirty-five elements found in hair, for the purpose of determining the source of the hair. According to Dr. Jervis' testimony, a hair sample is irradiated with neutrons in a nuclear reactor for varying periods of time. Once this is done isotopes of the various elements present in the hair can be detected and accurately measured. These measurements are used to ascertain, with the aid of computers, the amount of trace element concentration in the hair.¹⁹⁶

Dr. Jervis subjected the hair samples from the crime scene, along with samples from the appellant to this innovative neutron activation analysis. In spite of rigorous cross-examination, Dr. Jervis maintained that based on the results of his neutron activation multi-element analysis of the hairs found on and near the deceased and the hairs plucked from the appellant's head showed "that the differences in concentration of the trace elements in the hair found on the deceased's body, (said by Mr. Von Gemmingen to be similar to the appellant's hair), and hair strands known to have come from the appellant's head, were such as to make it "very unlikely" that the hair was, in fact, hair from the appellant."¹⁹⁷

¹⁹⁵ *Ibid.* at para.10.

¹⁹⁶ *Ibid.* at para. 11.

¹⁹⁷ *Ibid.* at para.12.

This of course was a pre-*Palmer* case, where the operable test for the admission of fresh evidence is set out in *McMartin v. The Queen*.¹⁹⁸ Although there was other compelling evidence upon which the jury did convict and the fresh evidence was not conclusive, the Court admitted the fresh evidence of Drs. Klingele and Jervis considering “it is of sufficient strength that it might reasonably affect the verdict of the jury and it would be a miscarriage of justice not to allow it to go before a jury to be weighed by that jury in the light of all the evidence.”¹⁹⁹ The discredit of the Crown’s principal expert witness in this case is unfortunately but one of multiple examples where faulty testimony by forensic experts would serve to wrongfully convict innocent men and women.²⁰⁰

Overall, eight of the 25 pre-*Charter* cases fall within the Forensic Fresh Evidence Category, enough I believe to contribute to the rise in fresh evidence cases in the years just prior to the seismic change brought about by the *Charter*. Among the striking observations in the pre-*Charter* cases study is the fact that this rise in forensic expert evidence continues at a slow and steady pace even after the adoption of the *Charter*. By 1994 however, the number of fresh evidence applications rose dramatically. This was followed by the decision of Sopinka J. in *Mohan*²⁰¹ who defined the four principles governing the admissibility of expert evidence:

- (a) relevance;
- (b) necessity in assisting the Trier of fact;

¹⁹⁸ *McMartin, supra* note 73, which as cited in *Roberts, supra* note 193 at para.16 states in part “[. . .] If the newly-discovered evidence is in its nature conclusive, then the Court of Appeal, in both civil and criminal cases, may itself finally deal with the matter [...]. If, on the other hand, in a criminal case, the new evidence does not exert such a compelling influence, but is however of sufficient strength that it might reasonably affect the verdict of a jury, then, in my opinion, the Court may admit that evidence and direct a new trial, so that such evidence might be added to the scale and weighed by the trial tribunal in the light of all the facts.”

¹⁹⁹ *Roberts, supra* note 193 at para.17. These reasons for admitting the fresh evidence were followed by the Alberta Court of Appeal in *Foster, supra* note 186 at para. 5.

²⁰⁰ In Canada, this was the case for example of Dr. Penistan whose erroneous pathological opinion as to the time of death of Lynne Harper would seal the fate of the young Steven Truscott. So too is the case of the discredited Dr. Smith who through his life long career served as a Crown expert witness and whose flawed disposition would lead to the wrongful conviction of so many.

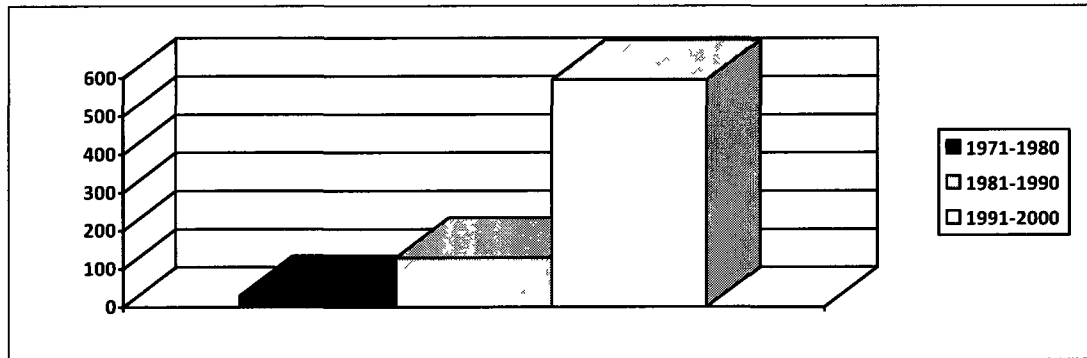
²⁰¹ See the four part test for the accreditation of expert evidence developed by the Supreme Court of Canada in *R. Mohan, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402 (S.C.C.)*.

- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.

In his critique of the *Mohan* Court, however, Kent Roach²⁰² warns against the dangers of adopting a checklist approach. First, all lists are limited not only by what they include but also by what is omitted, especially when omissions, such as reliability, remain critical throughout the law of evidence. As professor Roach observes, reliability is not among the four factors in the *Mohan* test. Furthermore, reliability applies to every expert forensic witness and to both novel and well established scientific evidence. Finally, the checklist approach “suggests only a binary in/out choice with respect to admissibility.”²⁰³

As an extrapolation of the sample, Chart 1 illustrates the stark contrast of the number of fresh evidence applications over the course of three decades between 1971 and 2000.

Chart 1. Fresh Evidence cases: Three decades of stark contrasts



While it is not possible to conclude that there is a direct cause and effect, between the influence of *Mohan* and the sharp rise in fresh evidence cases beginning in 1994,²⁰⁴ it is undeniable that the numbers represent a remarkable coincidence.

²⁰² See May Conference, *infra* note 209, Kent Roach, “Threshold Reliability and Admissibility of Expert Evidence,” at slide 8. See also The Honourable Stephen T. Goudge, Commissioner, *Inquiry into Pediatric Forensic Pathology in Ontario*, vol. 3, “Policy and Recommendations”, ch. 18 “The Role of the Court” at 494.

²⁰³ *Ibid.*

²⁰⁴ 1994 was the first year that the numbers in any given year reached the number 70 and the numbers progressed to reach 97 cases in 2007, the highest in any given year.

There is a confluence of factors, to which the rise in new evidence literature in both the U.S. and Canada has contributed.

IV.2 Contribution of New Evidence Literature

At the outset, it is important to define what is meant by the phrase “new” evidence. Is it the same as “fresh” evidence? Throughout the fresh evidence jurisprudence, appellate court judges invariably refer to fresh evidence as “new” evidence or “further” evidence. In Quebec, fresh evidence is translated more often than not as “nouvelle preuve” or less frequently, although more grammatically correct as “preuve nouvelle.” Consequently, it is easy to see why “new” evidence and “fresh evidence” can be mistaken to mean one and the same thing.

However, in substantive law they are not one and the same. There are at least two distinct meanings of the term “new” evidence. First it is sometimes used in instances where either the Crown or the defence seeks to reopen its case and either amend the indictment or seek to adduce new issues or new evidence that were not part of the case.

Each case is governed by its facts. Such practice is discouraged by appellate court judges in the interest of justice. To be granted permission to introduce a new issue, new witnesses or new evidence at trial that was not part of the preliminary hearing, the Crown for instance must demonstrate that the defence has been given ample opportunity to examine the new evidence and has had sufficient time to mount full answer and defence. Such cases are not necessarily true fresh evidence cases,²⁰⁵ as commonly understood and do not form part of the sample unless it also involves an application on appeal to adduce fresh evidence either with respect to evidence that

²⁰⁵ See for example, *Caccamo v. The Queen* (1975), 21 C.C.C. (2d) 257 where the established rule requires that the Crown provide the defence and the Court in writing, the nature of the new evidence, the will say statements of such additional witness. If this new evidence is sprung in surprise under exigent circumstances the defence is entitled to a postponement in order to have adequate opportunity to consider the new evidence. Adequate opportunity depends on the complexity and nature of the new evidence. If it is a simple issue or a complex matter requiring expert witnesses to rebut, the trial judge will tailor the duration of the postponement to meet the circumstances and ensure the fairness of trial to the accused.

was not before the Trier of fact or because it goes to the fairness and integrity of the trial itself and would more likely than not affect the outcome of the case.

This was the case in *R. v. K.G.*²⁰⁶ a historical sexual assault case. After his conviction on two counts of sexual assault against his 11 year old adopted daughter and one of her friends, the appellant reopened his case after conviction to introduce evidence from his urologist to support his testimony of impotence. The trial judge heard the evidence but affirmed the conviction in light of the damning testimony of a doctor from the Hospital for Sick Children in Toronto who had examined the adopted daughter. The trial judge considered the appellant's testimony of his impotence following an industrial accident in 1977 to be a pure concoction given the contradictory testimony of his wife at the time who testified for the defence. In the absence of supporting medical evidence, the trial judge was also persuaded by the fact that the accused had remarried in 1987. However, the second wife gave evidence at the sentencing hearing to the effect that the marriage was never consummated.

On appeal against both conviction and sentence, the appellant adduced several documents as fresh evidence, including an affidavit by defence counsel at trial regarding his unawareness of phallometric testing, a sound scientific method that would confirm the appellant's testimony and disturb the original findings of the trial judge. In quashing the convictions, the Court recognized that had this evidence been led at trial, it could not be said that the outcome would be the same.²⁰⁷

Returning now to the inquiry on "new" evidence, the second manner in which this term is used in both the jurisprudence and the legal literature is descriptive. It is used to describe a multitude of new methods and investigative techniques that have, through the advances of science shaped and in many ways changed forever the face of criminal trials. This in turn has correspondingly increased the number of fresh evidence cases on appeal. The remaining passages of this part of the thesis examine this second type of "new" evidence through a critical analysis of the legal scholarship

²⁰⁶ *R. v. K.G.*, [1993] O.J. No. 1752, 83 C.C.C. (3d) 140 (Ont. C.A.).

²⁰⁷ *Ibid.* at paras. 45-47. interestingly however, Austin J.A. did not order an acquittal because there was other compelling evidence that could sustain a conviction.

on new evidence that was the subject of two conferences, the one in the United States²⁰⁸ and the other more recently in Canada.²⁰⁹

IV.2.1 U.S. New Evidence Scholarship

The U.S. new evidence scholarship began in the 1960s when a few law professors began studying the implications of the advances in different fields of science on the law of evidence. They focused on fields such as mathematics, probability theory, statistics and decision theory. This sparked a movement of legal scholarship entirely devoted to the study of new evidence and its impact in the courtroom. As more and more forensic techniques came to the fore and scientific studies were published in peer reviewed articles, they became more prevalent in criminal proceedings and fresh evidence cases.

Members of this elite group of scholars met at a conference in Spring 1991 to reflect upon the movement and deliberate on the current state of the law; legal research in multiple fields and the possible applications to the study of the law of evidence. The papers and conclusions of this two-day conference were published in the *Cardozo Law Review*.²¹⁰

While studies attached to the new evidence scholarship have tended to remain on a theoretical plain, with little attention to practical application to litigation or criminal proceedings and real life circumstances, they serve to stimulate debate and offer new options that heretofore would not be associated with the law of evidence and the outcomes both at trial and on appeal. That is what the 1991 Conference was supposed to do – move the new evidence scholarship from the stratosphere of legal

²⁰⁸ Peter Tillers, Chairman, *The Cardozo Conference on Decision and Inference in Litigation*, Cardozo Conference on Decision and Inference in Litigation, Cardozo School of Law, Yeshiva University, March 24-26, 1991.

²⁰⁹ Dr. Michael S. Pollanen and Mark Sandler, Co-Chairs, *Expert Forensic Evidence in Criminal Proceedings: Avoiding Wrongful Convictions*, Centre for Forensic Science & Medicine, University of Toronto, May 9, 2009 [May Conference].

²¹⁰ Peter Tillers, Chairman, *The Cardozo Conference on Decision and Inference in Litigation* (1991-1992) 13 *Cardozo L. Rev* 253.

theory down to the real life experiences in the context of the law of evidence in the courtroom.²¹¹

Discussions focused on four areas: (1) the economic restraints on the process of proof; (2) the interaction between reasoning about facts and reasoning about norms; (3) the dynamic character of litigation and of preparation for litigation; and (4) the relationship between decision and inference in litigation.²¹² One segment of the conference explored the controversies linked to the use of mathematics in litigation, statistics and probability.

What conclusions can be drawn from this new evidence scholarship in the United States? For one, this new evidence scholarship deals with litigation and not criminal prosecutions and thus, it is in some parts, of very limited application to the study of fresh evidence in criminal law. The keynote paper²¹³ for instance, considers the fact finding process in trade law and intellectual property in New Zealand.²¹⁴ While trade law and intellectual property may seem far removed from the matter at hand, this paper triggers the reflection that perhaps if the fact finding process in criminal matters were more efficient, then there would not be so many fresh evidence cases.

If this, as the author of the keynote address readily acknowledges is an aberration in a conference devoted to the study of new evidence in litigation, there are some papers in the Collection that are central to the law of evidence in the context of criminal law.

²¹¹ *Ibid.* at 254. That the *Cardozo Law Review* devoted an entire Issue (from Issues 2-3), November 1991 to the papers presented at this Conference is a measure of the success of the Conference in realizing this lofty goal. This is not to imply however that the papers displace the importance of analytical reasoning, theory and normative analysis. Theory and practice are not mutually exclusive goals. To be effective, they must complement each other and go hand in hand.

²¹² *Ibid.*

²¹³ Christopher Finlayson, "Proving your case – Evidence and Procedure in Action" *The Cardozo Conference on Decision and Inference in Litigation* (1991-1992) 13 *Cardozo L. Rev* 253 at 303.

²¹⁴ *Ibid.* at 260. Interestingly, the New Zealand Waitangi Tribunal to redress historical wrongs is based on Canadian precedents.

In this regard, Professor Richard Lempert, from the University of Michigan Law School²¹⁵ makes an invaluable contribution to the debate on the use of DNA evidence at trial. He argues in caveat that while the use of DNA has been significant in identifying the perpetrators of such serious crimes as rape and homicides, it must be acknowledged that there are proven limits to DNA identification processes and the ways experts can present such DNA identification evidence to the Trier of fact in a criminal law trial. Herein lies the second lesson. These articles date from 1991 and are retrospective rather than prospective. Thus, the issues raised more than a quarter century ago have been resolved by scientific progress.

Lempert dates the forensic use of DNA to find criminals in the U.S. back to 1989 or less than 5 years prior to the date of the Conference in 1991.²¹⁶ One of the criticisms leveled at DNA testing at least at this early stage of its use as forensic evidence is what is known as the “prosecutor’s fallacy.”²¹⁷ This argument goes as follows, ordinarily DNA found at the scene of the crime and DNA samples from the suspect are scientifically tested to determine whether there are matches (or not) between the two samples. Once a determination is made, the sample is measured based on the frequency by which it would apply to a random person from a controlled population.²¹⁸

The fallacy of such DNA profiling is that the prosecutor, it could also be the defence, presents this DNA evidence to the Trier of fact asking the judge and jury to infer a direct link incriminating the suspect because there is 1 in a million chances that

²¹⁵ Richard Lempert, “Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes” *The Cardozo Conference on Decision and Inference in Litigation* (1991-1992) 13 *Cardozo L. Rev.* 253 at 257.

²¹⁶ *Ibid.* at 303 where Lempert cites a number of articles already published on this “new” evidence e.g., Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 *Va. L. Rev.* (45) (1989); Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 *Stan. L. Rev.* 465 (1990) (authored by J.C. Hoeffel); Note, *DNA Typing: A Rush to Judgment*, 24 *Ga. L. Rev.* 669 (1990).

²¹⁷ *Ibid.* at 305.

²¹⁸ DNA profiling is measured of selected population based on age, gender and especially race. Thus, if the suspect is a white female, the DNA evidence would be presented to the trier of fact that there is for example 1 in a million chances that the DNA at the scene of the crime would belong to a white female; implying thereby that if the suspect’s DNA provides an exact match with the sample at the crime scene, then it must be hers.

the DNA belongs to someone else. This forensic DNA profiling does not ask however, what is the probability that the suspect's DNA profile forms part of the pool drawn from the wider population.

Moreover, as Lempert observes, there are subpopulations within any given sample pool. The DNA sample of a Black male West Indian suspect may not be representative of the wider Black population, which may be dominated by people from continental Africa, for example. Moreover, the DNA profile of siblings and other close relatives may harvest similar matches,²¹⁹ yet such possibilities may not be properly drawn to the attention of the judge and or jury. In spite of these short comings, there are clear benefits to DNA profiling, which has been the single most important fact in the declaration of factual innocence of a wrongfully convicted person. This of course is equally the case in Canada as documented in several wrongful conviction cases and commissions of inquiry.²²⁰

This phenomenon was studied for the first time in the empirical research conducted in the United States by Brandon L. Garrett and Peter J. Neufeld.²²¹ As part of the Innocence Project, Garrett and Neufeld studied the forensic testimony of 142 individuals who were exonerated based on fresh evidence resulting from post conviction DNA testing.

The results of this first empirical study of its kind are revealing. The authors of the study read the trial transcripts of 120 of the 142 exonerees and came to the

²¹⁹ A good illustration can be found in *R. v. Karas*, 2007 ABCA 362, 422 A.R. 344 (Alta. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 22 (S.C.C.). In this Alberta case, the appellant's father provided a voluntary blood sample to the police in its outreach to all males in the community where the 58 year-old victim was found sexually assaulted, strangled and stabbed 31 times. Although there was no exact match, DNA testing showed that the murderer was a first degree relative of Mr. Karas'. Further DNA tests solicited from the appellant, Mr. Karas' son proved to be an exact match of the DNA profile residing in the tiny bit of seminal fluid found on the victim.

²²⁰ See e.g., The Honourable Fred Kaufman, Commissioner, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, vol. 1 & 2, (Toronto: Queen's Printer, 1998). The Commissioner concluded his Report by observing that "An innocent person was convicted of a heinous crime he did not commit. Science helped convict him. Science exonerated him. We will never know if Guy Paul Morin would ever have been exonerated had DNA results not been available. One can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable."

²²¹ Brandon L. Garrett and Peter J. Neufeld, *Improper Forensic Science and Wrongful Convictions*, (Charlottesville, VA: 95 Va. L. Rev. 2009).

following conclusions. First, each of the 120 was convicted because of the forensic testimony of prosecution witnesses. Second, these trials more often than not involved serological analysis and microscopic hair comparison.²²² Third, approximately two-thirds of the forensic analysts called by the prosecution testified improperly at trial and tended to exaggerate the probative value of forensic evidence.

Finally, Garrett and Neufeld lament the breakdown of the adversarial system where defence counsel failed to properly cross examine the Crown's forensic expert witnesses. Further, the defence often failed to call its own forensic witnesses. For their part, in addition to forging lies upon the court through such expert witnesses, prosecutors tended to massage the truth in their closing remarks. But if Counsel for the defence and the Crown were guilty of contributing to miscarriages of justice and the conviction of innocent men and women, then trial judges were of little avail in instructing the Trier of fact about the evidence.

In order to protect the integrity of the trial process and ensure that no innocent man, woman or young person be wrongfully convicted, the authors call for fundamental reforms to the use of forensic evidence at trial. These findings are not far removed from the pre-*Charter* cases in the sample.

IV. 2.2. Canadian new evidence discussion: Truscott Case Study

As indicated earlier, there is significant work being conducted in Canada as demonstrated by the annual conference on expert forensic evidence in criminal proceedings, the 10th annual of which was held in Toronto on May 9, 2009. In many cases, without new evidence from forensic expert witnesses, fresh evidence applications would fail. Consequently, the availability of new forensic evidence fuels fresh evidence applications particularly in those instances where the fresh evidence application deals with a determination at trial, triggering the application of the *Palmer* fresh evidence framework.

²²² *Ibid.* at 41-47. Other forensic evidence leading to wrongful convictions included improper bite mark testimony, shoe print, soil, fiber, and fingerprint comparisons.

In addition to presentations by scholars,²²³ academics,²²⁴ defence counsel,²²⁵ as well as Crown counsel,²²⁶ other practitioners²²⁷ and judges,²²⁸ the May Conference also included representations from the medical²²⁹ and scientific²³⁰ communities and the Innocence Project in New York,²³¹ whose work in the forensic sciences have been instrumental in avoiding and indeed overturning wrongful convictions in Canada.

The remaining passages address some of their contributions to illustrate through the case study in *Truscott* how fresh evidence applications have accompanied the advances in scientific techniques over the past two decades –explaining in large measure the phenomenal rise in fresh evidence applications. The *Truscott* case study may help to elucidate the relationship that exists between fresh evidence and “new” evidence to prevent miscarriages of justice.²³²

²²³ Professor Kent Roach, Faculty of Law, University of Toronto, Pritchard-Wilson Chair of Law and Public Policy, Director of Research, *Inquiry into Pediatric Forensic Pathology in Ontario*.

²²⁴ Michael Saks, Professor of Law and Psychology, Sandra Day O'Connor School of Law, Arizona State University; Dr. Gary Edmond, Associate Professor, Faculty of Law, University of New South Wales (Sydney, Australia) and Dr. Michelle Shouldice, Assistant Professor and Clinician – Teacher in the Department of Paediatrics.

²²⁵ James Lockyer, Lockyer Campbell Posner; Mark Sandler, Cooper & Sandler, Barristers and Solicitors Special Counsel, Criminal Law, Goudge Inquiry and Joe Di Luca, Di Luca Copeland Davies LLP, Barristers.

²²⁶ Gregory J. Tweney, Counsel, Crown Law Office-Criminal, Court of Appeal for Ontario; and Mary Humphrey, Assistant Crown Attorney, Court of Appeal for Ontario.

²²⁷ Sheila Macdonald, Provincial Coordinator, Ontario Network of Sexual Assault/Domestic Violence Care & Treatment Centres (SATC), Associate Member, School of Graduate Studies, at the University of Toronto Faculty of Nursing, Women's College Hospital.

²²⁸ The Honourable Stephen T. Goudge, Court of Appeal for Ontario; The Honourable Justice Michael Moldaver, Court of Appeal for Ontario; and The Honourable Justice Todd Ducharme Ontario Superior Court of Justice.

²²⁹ Dr. Michael S. Pollanen, Interim Director, Centre for Forensic Science & Medicine, University of Toronto, Chief Pathologist for Ontario.

²³⁰ Dr. Sherah VanLaerhoven, Forensic Entomologist Academic Chair, Forensic Sciences Program and Assistant Professor, Department of Biological Sciences, University of Windsor and Dr. Nicholas Diamant, Gastroenterologist, Senior Scientist, Division of Clinical Investigation & Human Physiology, Toronto Western Research Institute, University Health Network – Toronto Western Hospital.

²³¹ Peter Neufeld, Co-Director, The Innocence Project New York, NY.

²³² Much has been written about this unique and compelling case, for that reason, the reader is invited to consult the excellent report of the Honourable Sydney L. Robins, *In The Matter of Steven Truscott*

As outlined in the decision from the Court of Appeal for Ontario, the Crown's case against Steven Truscott at his trial in September 1959 was built on circumstantial evidence to support the premise that Lynne Harper died between 7:00 p.m. and 7:45 p.m. The Crown's case was based on the following four Pillars:²³³

1. medical evidence on the time of Lynne Harper's death. The Crown relied on the opinion of the attending pathologist, Dr. Penistan that Lynne died where her body was found and that her death occurred between 7:00 and 7:45 p.m. on June 9. Dr. Penistan based his opinion on the time of death on his observations of the stomach contents of the deceased, the degree to which rigor mortis affecting the body had subsided, and the extent to which the body had decomposed;
2. the County Road evidence of various eyewitnesses as to the locations and times Steven Truscott and Lynne Harper were seen on the evening of her disappearance. The Crown used this evidence to infer that Steven Truscott must have taken Lynne into Lawson's Bush where her partially clad body was found two days later;
3. evidence of Steven Truscott's post-offence conduct, which the Crown argued was indicative of a guilty frame of mind. For example, the Crown adduced evidence to demonstrate the physical impossibility of his claim to police in the days immediately after the disappearance that, as he was standing on the bridge, he watched Lynne get picked up at the intersection of the County Road and Highway 8 by a late-model Chevrolet with a yellow licence plate. Also, there was evidence that Steven Truscott asked his friend Arnold George to lie to the police and say that he saw him at the river on the evening of the disappearance;
4. medical evidence of the lesions observed on Steven Truscott's penis at the time of his arrest that could have been caused by sexual assault of a young girl. This was coupled with Dr. Penistan's evidence that Lynne Harper suffered severe vaginal injuries indicative of a sexual assaulted.²³⁴

These four pillars remained undisturbed over a period of four decades in spite of the theory of the defence; supporting fresh forensic evidence and two References, first to the Supreme Court of Canada²³⁵ and then to the Court of Appeal for Ontario.

Advisory Opinion on the Issue of Compensation, March 28, 2008, online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins_report.pdf.

²³³ *R. v. Truscott*, [2007] ONCA 575 at para. 28.

²³⁴ *Ibid.* at paras. 29, 30, 31.

²³⁵ *R. v. Truscott*, [1967] S.C.R. 309 (S.C.C.).

The fresh evidence before the latter included advances in forensic pathology that undermined the first pillar position that Lynne Harper died between 7:00 p.m. and 7:45 p.m. This fresh evidence was based on the study and post exhumation autopsy of Lynne Harper, performed by Dr. Pollanen.

First, Dr. Pollanen followed the new evidence-based approach to remove the rationale behind the first Pillar in relation to the contents of the stomach. This new evidence, which was also *Palmer* based fresh evidence, came from new developments in gastroenterology. This involved new techniques that were not available at the first trial in 1959 or in the Reference to the Supreme Court of Canada, in 1967.

This new technology reveals that the emptying of the stomach proceeds in two stages: a lag phase and an emptying phase. The duration of the lag phase depends on a variety of factors and is less predictable. And therefore it was impossible for Dr. Panistan to have established with such precision that based on the stomach contents, Lynne Harper died between 7:00 p.m. and 7:45 p.m.

To illustrate that it is impossible with today's new evidentiary techniques to predict the time of death from stomach emptying, Dr. Diamant²³⁶ conducted experiments at Toronto Western Hospital that confirm that the 'stomach is a poor timekeeper.' His evidence-based knowledge of gastric physiology and emptying revealed that the stomach can still contain food six or more hours after a meal.²³⁷

Fresh evidence based on the post exhumation autopsy²³⁸ also destroyed the first and fourth pillars with respect to the degree of decomposition of the body and the severe injuries to the vaginal region. Dr. Pollanen concluded that there was no reviewable evidence of vaginal injury; thus sexual assault cannot be concluded or excluded on pathological grounds.²³⁹ With respect to time of death, this could not be

²³⁶ Diamant, *supra* note 230.

²³⁷ *Ibid.*

²³⁸ The body of Lynne Harper was exhumed on April 6, 2002 and an autopsy conducted by Dr. Pollanen entitled, Office of the Chief Coroner (Ontario) Provincial Forensic Pathology Unit, April 26, 2006.

²³⁹ *Ibid.* at 23.

determined with any degree of certainty based on the autopsy findings “and it certainly cannot be specified to between 7:00 p.m. and 7:45 p.m. or a couple of hours after her last known meal.” In light of this fresh evidence, the Court of Appeal for Ontario concluded that Dr. Penistan’s opinion as to time of death could no longer be reliable. If Lynne Harper did not die before 8:00 p.m., then Steven Truscott could not have been the perpetrator of the crime, the last person to see her alive.²⁴⁰

The substantial fresh evidence also dealt with the second type of fresh evidence where the integrity of the process itself is impugned. This fresh evidence is based on archival documentation revealing that the Crown did not disclose information to the defence that would have undermined the evidence that it was impossible for Steven Truscott to see a vehicle licence plate colour from his location on the County Road Bridge. This evidence also showed that there was important fresh evidence that challenged the reliability of the medical and scientific evidence against him.

This case illustrates that as forensic science makes advances, and new techniques are developed, fresh evidence applications will be brought in larger numbers to correct and avoid miscarriages of justice. Fresh evidence was adduced on appeal and before the Supreme Court of Canada but it was not possible without the dogged determination by Mr. Truscott, his wife, family and friends and especially his legal team, that “new” evidence would validate the fresh evidence applications and correct the miscarriage of justice.

A closer examination of the case law points also in another direction towards the rise in fresh evidence applications that do not deal with issues raised at trial but rather with the second type of fresh evidence application that goes to the very integrity of the administration of justice and the fairness of the trial itself.

In order to fully appreciate the increase in fresh evidence applications the study of the jurisprudence leads ineluctably to a consideration of the impact of the *Charter* in criminal law appeals fresh evidence applications in Canada. As is discussed in Part V, this increase coincides with the advent of the *Charter* and the rise in a sense of entitlement on the part of appellants to reclaim certain legal rights.

²⁴⁰ As discussed by Garrett and Neufeld, *supra* note 221, there are political and economic aspects of scientific testimonies, where experts are shopped after and hired to show something. In addition, in this case, Dr. Penistan has been totally discredited by the Press and the Scientific Community.

This accrued sense of entitlement is matched only by the burden on the Crown to administer justice both fairly and justly. Generally, the *Palmer* principles apply only where the fresh evidence is directed to an issue decided at trial. The principles in *Palmer* will not apply however, if the fresh evidence is proffered in relation to concerns that go to the regularity of the process or to a request for an original remedy in the appellate court.²⁴¹

Consequently, it is necessary in Part V, to first examine the law of fresh evidence prior to 1982 before considering the distinct changes the *Charter* brought to bear as revealed in the case law. These changes are limited to the factors from the case law such that not all legal rights enshrined in the *Charter* are addressed. The analysis is thus limited to disclosure issues and the question of the right to effective assistance of counsel that together account for the sharpest rise in fresh evidence applications in criminal law appeals since the mid 1980s.

PART V. IMPACT OF THE *CHARTER* ON FRESH EVIDENCE LAW

The fresh evidence cases in the sample reveal a high correlation between the significant growth in fresh evidence applications across all jurisdictions, since 1982 when the *Charter* came into force. This is reflected in the complexity and variety of legal issues addressed in fresh evidence applications after 1982. For example, of the 81 cases considered that were adjudicated prior to the *Charter*, none dealt with the legal rights enshrined in the *Charter*.²⁴²

Notably, the legal rights enshrined in sections 7-14 of the Charter protect the life, liberty and security of the person (s. 7); prevent unreasonable search and seizure (s. 8); guard against arbitrary detention or imprisonment (s. 9); circumscribe rights and conditions upon arrest or detention (s. 10); ensure fairness of proceedings in criminal and penal matters (s. 11); prohibit cruel and unusual treatment or punishment (s. 12);

²⁴¹ For a full description of *Palmer* and its application in the two types of fresh evidence see the judgment of Cromwell J.A., as he then was, from the Nova Scotia Court of Appeal in *R. v. Wolkins*, 2005 NSCA 2, 192 C.C.C. (3d) 378 (N.S. C.A.) at paras. 57-61.

²⁴² *Charter*, *supra* note 3 at ss. 7-14.

ensure immunity from self incrimination (s. 13)²⁴³; and the right to the assistance of an interpreter to give voice to the principle that an accused has the right to be present when charged (s. 14).

Instead, the pre-*Charter* fresh evidence jurisprudence involve questions or issues that arose at trial – recantations; new circumstances such as deterioration in health that may impact the decision to vary a sentence on appeal. These are all issues for which *O'Brien, Palmer, Stolar and Lévesque* were and are still required today. The study of the case law reveals that there is a clear link between the growth in fresh evidence cases and the engagement of legal rights that go not so much to the issues decided at trial but at the very process itself. Thus from 1982 onwards, the fresh evidence cases tend to fall into one of two categories or at times both –the fresh evidence matters where *Palmer* and *Lévesque* apply and those that go to the integrity of the trial where *Palmer* and its progeny have no application.

This is a natural progression whereby the invocation of rights enshrined in the *Charter* has created as it were a fork in the road – a clear and distinct branch in the fresh evidence jurisprudence between issues decided at trial and rights based issues affecting the integrity of the trial.

In addition, the increase in fresh evidence applications can be attributed to the broadening of the issues upon which fresh evidence may be adduced. This is significant in that as compared with the pre-*Charter* fresh evidence jurisprudence, the cases after 1982 tend to deal with more than one issue. For example, there may be up to three or four issues, sometimes overlapping with different *Charter* rights as between disclosure and competence of counsel to cite but two.

The case law is consistent with the view that prior to 1982 when the legal rights provisions of the *Charter* came into force, there were no applications to adduce fresh evidence on the basis of a breach of disclosure permitting an accused to know the case to meet and thereby make full answer and defence. Nor too does the sample of cases prior to 1982 uncover instances where an accused adduced fresh evidence on

²⁴³ This was the case in *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, 89 C.C.C. (3d) 289 (S.C.C.) reversing [1992] 9 O.R. (3d) 424, 72 C.C.C. (3d) 121 (Ont. C.A.).

appeal alleging a miscarriage of justice because of the ineffective assistance of counsel.

Yet, by far, these two categories of fresh evidence applications overwhelm the sample beginning in the mid 1980s and ballooning through the years to unprecedented heights in 2007. Of course the legal rights enshrined in the *Charter* did not exist in a vacuum. It does not mean that these rights have not been violated before the *Charter* and that they underlie the decisions to file a motion on fresh evidence. Rather, it is just that such concerns were not articulated since there were no legal categories to receive those stories prior to 1982. The passages which follow address the two most prominent prongs: (1) disclosure and (2) ineffective representation of counsel as revealed in the case sample.²⁴⁴

V.1. Disclosure

A controlled review of all the fresh evidence cases in the sample shows that there were 182 cases in which disclosure was at issue. The first of these cases appeared in 1984.²⁴⁵ In other words, there were no fresh evidence cases involving disclosure issues prior to the advent of the *Charter*. Also, as Table IV below illustrates, there was a sharp increase in the number of disclosure matters after 1991, the year when the Supreme Court of Canada rendered its seminal decision in *Stinchcombe*,²⁴⁶ imposing strict disclosure obligations on the Crown.

Table IV Disclosure fresh evidence cases by year/frequency

²⁴⁴ It should be noted that while disclosure issues (s. 7) and competence of counsel (s. 7 and 10 (b)) do predominate in this field, there are compelling fresh evidence cases that invoke other legal rights, including the right to interpretation (s. 14); the right against self conscription (s. 13); the marshalling of fresh evidence to signal inordinate delay (s. 11 (a)); irregularities that compromise the impartiality of the jury (11 (d)); significant new circumstances that justify reasonable bail pending appeal (11(e)); and instances in which fresh evidence was adduced to challenge the reasonableness of search and seizure (s. 8).

²⁴⁵ See *R. v. Amyotte* (1984), 58 A.R. 101 (Alta. C.A.).

²⁴⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 (S.C.C.).

Year	Frequency	Year	Frequency	Year	Frequency
1984	1	1993	5	2002	5
1985	1	1994	12	2003	8
1986	2	1995	11	2004	9
1987	1	1996	14	2005	10
1988	1	1997	7	2006	9
1989	0	1998	5	2007	14
1990	3	1999	14	2008	8
1991	10	2000	7	2009	9
1992	7	2001	8	Total	182

There is perhaps little significance in these bare statistics when viewed on their own in this manner in Table IV. However, when considered in the broader context of fresh evidence cases, disclosure is the most frequent issue that calls into question the integrity of the trial process itself. To fully appreciate the significance of this finding, it is necessary to examine the test for disclosure in fresh evidence and some of the recurring themes raised in these disclosure cases.

V.1.1 Disclosure: The fresh evidence test

In fresh evidence applications where a breach of disclosure is alleged, the test to be applied is whether the right to a fair trial may have been affected by the non-disclosure.²⁴⁷ It is irrelevant whether the non-disclosure may have been inadvertent or the Crown acted in good faith or even where as in *O'Grady*,²⁴⁸ the Crown swore that it was not aware of the experiment conducted by Staff Sergeant Silvester, a blood splatter expert and a key Crown witness in this murder case.

The real determining factor is whether the non disclosure prevented the accused from having a fair trial. Did the non disclosure prevent defence counsel from cross examining a witness on a material issue? But for the non-disclosure would the

²⁴⁷ *R. v. O'Grady*, [1995] B.C.J. No. 2041, 64 B.C.A.C. 111 (B.C.C.A.) at para. 20. See also, *R. v. Creamer*, [1995] 57 B.C.A.C. 62, 97 C.C.C. (3d) 108 (B.C.C.A.) and especially *R. c. Taillefer*, 2003 SCC 70, 179 C.C.C. (3d) 353 (S.C.C.) reversing [2001] J.Q. no 3975 (Qc. C.A.) and reversing *R. c. Duguay*, [2001] J.Q. no 4037 (Qc. C.A.).

²⁴⁸ *O'Grady*, *ibid.*

outcome have been the same? Had defence been privy to the non disclosed information, would it have let the accused take the stand? Or would they have foregone calling that expert witness to counter the evidence of a Crown witness? Why should the jury be deprived of the tests of the blood splatter expert, for instance, when the experiment exculpated the accused?

In this regard, two themes emerge from the case law: the Crown has a legal obligation to disclose relevant and material evidence not subject to privilege²⁴⁹ and the defence in turn has a corollary duty to ensure that any breaches of this obligation are brought without delay to the attention of the trial judge.²⁵⁰

The Courts have been strict in holding defence counsel to its duty to initiate a review when an issue arises with respect to the exercise of the Crown's discretion in meeting its disclosure obligations. This is an important factor in some fresh evidence applications where irregularities in Crown disclosure obligations were sought to be introduced for the first time on appeal. In such instances, appellate courts have not granted defence applications to adduce fresh evidence particularly in circumstances where the defence was aware of the breach of disclosure yet decided to proceed to trial without seeking judicial intervention to correct such breaches at trial.²⁵¹

This is what transpired in *R. v. Gumbly*,²⁵² where the fresh evidence application was dismissed when defence counsel failed to act diligently to notify the judge of the lack of proper Crown disclosure.²⁵³ Similarly, in *R. v. Schmidt*,²⁵⁴ the

²⁴⁹ *Stinchcombe*, *supra* note 246 at para. 21.

²⁵⁰ *Ibid.* at para. 24.

²⁵¹ In *R. v. Bramwell*, [1996] B.C.J. No. 503, the British Columbia Court of Appeal, stated at para. 34: "Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made." For a succinct overview of the disclosure regime in relation to a fresh evidence application, see the decision from the Newfoundland and Labrador Court of Appeal in *R. v. Ryan*, 2004 NLCA 2, 233 Nfld. & P.E.I.R. 51 (N.L.C.A.) at para. 20.

²⁵² [1996] N.S.J. No. 454, 112 C.C.C. (3d) 61 (N.S.C.A.).

²⁵³ Similarly, in *R. v. Smith and R. v. James*, 2007 NSCA 19, 216 C.C.C. (3d) 490 (N.S.C.A.) appeal dismissed 2009 SCC 5, 238 C.C.C. (3d) 481 (S.C.C.), the Court dismissed the fresh evidence application because the defence failed to signal that the Crown did not make proper disclosure.

British Columbia Court of Appeal dismissed a fresh evidence application which raised disclosure issues on appeal. The Court held that where defence counsel believes that there has been a failure of disclosure at trial, the defence should bring this to the attention of the trial judge so that the matter may be resolved.

The Court further underscored that “[i]t is not open to the defence simply to ignore what they believe to be a failure of disclosure, and then attempt to raise the alleged failure for the first time on appeal.”²⁵⁵ Such tactical measures stand in contrast to the fact that prior to the advent of the *Charter*, and the principles embodied in *Stinchcombe*, the defence had no enforceable right to disclosure and correspondingly, the Crown had no obligation to make disclosure to the defence.²⁵⁶

In *Stinchcombe*, the accused was a lawyer charged with breach of trust, fraud and theft. His former secretary gave favourable testimony at the preliminary hearing and was subsequently interviewed by the Crown to appear as its witness. However, the Crown decided not to call her as a witness.²⁵⁷ The defence sought disclosure of the statements and the Crown refused. The defence brought an application for disclosure of the statements, which was dismissed by the trial judge, holding that the Crown had no obligation to disclose the statements to the defence. That decision was affirmed by the Alberta Court of Appeal and the matter was appealed to the Supreme Court of Canada.

During arguments before the Supreme Court of Canada, the Crown brought an application to introduce the statements and tapes of the interview as fresh evidence. The Supreme Court of Canada rejected the fresh evidence application on

²⁵⁴ 2001 BCCA 3, 151 C.C.C. (3d) 74 (B.C.C.A.).

²⁵⁵ *Schmidt, ibid.* at para. 18. See also an earlier decision from the British Columbia Court of Appeal dismissing a fresh evidence application evoking fault in disclosure obligations: *R. v. MacKay*, [1992] B.C.J. No. 1941, 17 B.C.A.C. 100 (B.C.C.A.) at para. 20.

²⁵⁶ This was especially true prior to the coming into force of s. 278.1 to regulate the production of medical records of victims to the defence in 1997. See *R. v. O'Connor*, [1994] 42 B.C.A.C. 105, 89 C.C.C. (3d) 109 (B.C.C.A.) affirmed by [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 (S.C.C.). See related case [1993] B.C.J. No. 570 (B.C.C.A.) and *R. v. Stewart*, 2000 BCCA 498, 148 C.C.C. (3d) 68 (B.C.C.A.) at para. 19.

²⁵⁷ *Stinchcombe, supra* note 246 at paras. 2 and 5.

the basis that it would be impossible at that stage to determine whether the statements would be favourable to the accused or would have altered the outcome at trial. Moreover, such an inquiry would be best examined at trial where the defence could test the evidence through cross examination and shape its full answer and defence accordingly.

The Court was satisfied that in light of the facts of the case, it appeared likely that the decision not to call the witness was an important factor in the subsequent decision by the Crown not to disclose the statements. If the defence and the trier of fact had access to this favourable evidence, it may very well have affected the outcome at trial. The appeal was allowed and a new trial ordered on the basis that the Crown had a legal duty to disclose all relevant information to the defence, “[. . .] the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.”²⁵⁸

As the circumstances of this case illustrate, the question of Crown non disclosure seriously undermines the very trial process itself rather than the content of what transpires during the course of the trial, which in my view is what *Palmer* is intended to protect. The general *Palmer* test is meant to correct errors of fact and law during the trial process.²⁵⁹ It follows therefore that the test would be inapplicable to the non-disclosure by the Crown because the evidence was not before the Trier of fact.²⁶⁰

Moreover, Crown non-disclosure, whether inadvertent or by design would continue to be a pressing issue in fresh evidence law after *Stinchcombe*. Indeed there are 86 Crown disclosure matters in the sample of fresh evidence cases, only 4 of which were rendered between 1982 and 1991. In other words, almost all of these cases were rendered after 1991 when *Stinchcombe* was decided.²⁶¹

²⁵⁸ *Ibid.* at para. 22.

²⁵⁹ See *R. c. Comtois-Barbeau*, [1996] J.Q. no 1030, 110 C.C.C. (3d) 69 (Que. C.A.) at para. 26.

²⁶⁰ Evidently there was thus no reason for the Court to rely on *Palmer* in its decision in *Stinchcombe*.

²⁶¹ See for instance the following 18 fresh evidence cases where late or non disclosure by the Crown formed the basis of the application to adduce fresh evidence post *Stinchcombe*: *R. v. Creamer* (1995),

The opening words expressed by Mr. Justice LeBel in *R. v. Taillefer* (*R. v. Duguay*) with respect to the right to disclosure remain relevant.²⁶²

The application of the constitutional principles set out in the *Canadian Charter of Rights and Freedoms* developed it. Our Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, enshrined it among the fundamental rules of Canadian criminal procedure. It facilitates the trial process, but, most importantly, it affords additional protection for the right of accused persons to make full answer and defence. The way in which the disclosure of evidence was viewed in the past -- as an act of goodwill and cooperation on the part of the Crown -- played a significant part in catastrophic judicial errors. On this point, we need only recall that the Royal Commission on the Donald Marshall, Jr., Prosecution identified the failure to disclose all the relevant evidence as one of the causes of the judicial error that deprived Donald Marshall of his liberty for 11 years, for a crime he had not committed.

After *Stinchcombe*, there was a period of fluctuation in the fresh evidence jurisprudence regarding the correct test to follow when applications to adduce fresh evidence were grounded in allegations of unfairness of trial due to the non disclosure of relevant information by the Crown. There were nine decisions rendered over a five year period following *Stinchcombe*, beginning with *R. v. McAnespie*,²⁶³ in 1993 and ending with *R. v. Dixon*²⁶⁴ in 1998, which struggled with the issue whether the test in

57 B.C.A.C. 62, 97 C.C.C. (3d) 108, (B.C.C.A.); *R. v. Curry*, 2004 BCCA 144, 61 W.C.B. (2d) 206 (B.C. C.A.); *R. v. Dixon*, [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17 (S.C.C.); *R. v. Dugan*, [1994] A.J. No. 59, 22 W.C.B. (2d) 314 (Alta. C.A.); *R. v. Iachetta*, [1994] B.C.J. No. 423, 40 B.C.A.C. 214 (B.C. C.A.); *R. v. Khela*, [1995] 4 S.C.R. 201, 102 C.C.C. (3d) 1 (S.C.C.); *R. v. L. (C.)* (1999), 124 O.A.C. 45, 138 C.C.C. (3d) 356 (Ont. C.A.); *R. v. Lawrence*, [1996] B.C.J. No. 129 (B.C. C.A.); *R. v. Lowther*, 2004 BCSC 1661, 12 M.V.R. (5th) 292 (B.C. S.C.); *R. v. MacInnis*, 2006 NSCA 92, 212 C.C.C. (3d) 103 (N.S. C.A.); *R. v. McAnespie*, [1993] 4 S.C.R. 501, 86 C.C.C. (3d) 191 (S.C.C.) reversing (1993), 64 O.A.C. 70, 82 C.C.C. (3d) 527 (Ont. C.A.); *R. v. Millward* (1995), 174 A.R. 183, 33 C.R.R. (2d) 185 (Alta. C.A.); *R. v. Niebergall*, 2003 BCCA 500, 187 B.C.A.C. 152 (B.C.C.A.); *R. v. Peterson*, [1996] O.J. No. 714, 106 C.C.C. (3d) 64 (Ont. C.A.); *R. v. Pratt*, 2002 BCSC 198 (B.C.S.C.); *R. v. Reid* (2003), 65 O.R. (3d) 723, 177 C.C.C. (3d) 260 (Ont. C.A.); *R. v. Schmidt*, 2001 BCCA 3, 151 C.C.C. (3d) 74 (B.C.C.A.); *R. c. Taillefer* (sub nom. *R. v. Taillefer*), 2003 SCC 70, 179 C.C.C. (3d) 353 (S.C.C.) reversing [2001] J.Q. no 3975 (Que. C.A.) and reversing *R. c. Duguay*, [2001] J.Q. no 4037 (Que. C.A.) and *R. v. Young*, 2007 ONCA 714, 230 O.A.C. 24 (Ont. C.A.).

²⁶² *Taillefer*, *ibid.* at para. 1.

²⁶³ *McAnespie*, *ibid.*

²⁶⁴ *Dixon*, *ibid.*

Palmer, for determining the admissibility of fresh evidence on appeal, applied in instances where the Crown had breached its disclosure obligations.²⁶⁵

The cases leading up to the 1998 decision in *Dixon*, held that the test set out in *Palmer* does not apply where the Crown has breached its disclosure obligations. In fact, it could not apply particularly since Crown disclosure was never at issue in *Palmer*.²⁶⁶

In *R. v. Creamer*,²⁶⁷ on appeal from a conviction of sexual assault, the defence discovered on the day before the hearing of the appeal before the British Columbia Court of Appeal that the complainant had given a lengthy statement to the police, which supported the defence's theory of the case that there was consent. One of the grounds of appeal was the issue of the Crown's non disclosure of this statement, which the defence sought to introduce as a fresh evidence application.

In allowing the fresh evidence, Donald J.A. held that the *Palmer* test should be modified when the fresh evidence sought to be introduced on appeal relates to non-disclosure of relevant information. Unlike the facts in *Palmer*, where the resulting test to be applied is whether the fresh evidence would likely have altered the outcome, here, in non disclosure questions, the test to be applied "should be whether the right to a fair trial may have been affected."²⁶⁸

Now the question of rights coupled with fairness of trial is not absolute. Even if the Crown were to fail to disclose relevant information to the defence or to be tardy in so doing, this failure does not automatically imply that the trial was unfair. Having first established that there has been a breach of disclosure, the defence must then demonstrate on a balance of probabilities that this breach of his or her constitutional right to make full answer and defence has been compromised, such that the trial was unfair.

²⁶⁵ These nine cases are *R. v. McAnespie*, [1993]; *R. v. Dugan*, [1994]; *R. v. Iachetta*, [1994]; *R. v. Creamer* (1995); *R. v. Khela*, [1995]; *R. v. Millward* (1995); *R. v. Lawrence*, [1996]; *R. v. Peterson*, [1996] and *R. v. Dixon*, [1998].

²⁶⁶ See analysis by Mr. Justice LeBel in *Taillefer*, *supra* note 261 at paras. 73-84.

²⁶⁷ *Creamer*, *supra* note 261.

²⁶⁸ *Ibid.* at paras. 19, 20, 23 and 25.

To illustrate, the circumstances in the case of *McAnespie*, were such that there was indeed a breach of disclosure by the Crown, which the defence successfully entered on appeal and won a new trial. However, in an oral judgment rendered by Mr. Justice Sopinka, the Supreme Court of Canada allowed the Crown's appeal as of right on the basis that the majority of the Court of Appeal for Ontario had erred in allowing the fresh evidence and ordering a new trial. Although the disclosure obligations had not been met, the defence had full knowledge of the information contained in the complainant's victim impact statement, in other words the fresh evidence, but had made a tactical decision not to raise the matter before the trial Judge at the earliest opportunity as required.

Crown non-disclosure is thus an important instance in which the traditional rules for the admission of fresh evidence may be relaxed in the interests of justice. Of the totality of fresh evidence cases, seven cases stand out²⁶⁹ for the manner in which the validity of the trial process was called into question due to non disclosure by the Crown. There have been cases where the Crown has sought to introduce fresh evidence in the interests of the accused, in light of new information received after trial. These seven cases however all called into question the fairness of the trial because of non disclosure by the Crown.

Without addressing each of these seven cases, two would suffice to illustrate the attitude of the appellate Courts toward such failure on the part of the Crown. Indeed such behaviour is deemed unacceptable if not inexcusable as it denies the accused the right to a fair trial and brings the administration of justice into disrepute.

First, in *R. c. Taillefer*, the Supreme Court of Canada condemned the flagrant non disclosure of important evidence to the two accused (Billy Taillefer and Hugues Duguay) at trial for first degree murder and manslaughter respectively. They were both convicted.²⁷⁰ However following an investigation by the Poitras Commission, it

²⁶⁹ 1) *Taillefer*, *supra* note 261; 2) *R. v. Ahluwalia*, [2000] O.J. No. 4544, 149 C.C.C. (3d) 193 (Ont. C.A.). 3) *R. v. Warsing*, [1998] 3 S.C.R. 579, 130 C.C.C. (3d) 259 (S.C.C.) affirming (1997), 97 B.C.A.C. 137, 119 C.C.C. (3d) 385 (B.C.C.A.); 4) *R. v. Peterson*, [1996] O.J. No. 714, 106 C.C.C. (3d) 64 (Ont. C.A.); 5) *R. v. O'Connor*, [1993] B.C.J. No. 570 (B.C. C.A.); 6) *R. v. McGill* (1986), 15 O.A.C. 266, 17 W.C.B. 13 (Ont.C.A.); and 7) *R. v. Dunbar*, 2003 BCCA 667, 191 B.C.A.C. 223 (B.C. C.A.) leave to appeal refused, [2004] S.C.C.A. No. 30 (S.C.C.).

²⁷⁰ *Taillefer*, *supra* note 261 at paras.1-4 for an overview of the case.

was revealed that both the Sûreté du Québec (Provincial police) and the Crown “had failed to disclose the existence of a considerable amount of evidence relevant to the charge or to the defence to the appellants during their first trial at the criminal assizes in 1991.”²⁷¹ As a result of these serious violations of their fundamental rights, Mr. Justice LeBel writing for a unanimous Court set aside the decision of the Quebec Court of Appeal and ordered a new trial for Mr. Taillefer on the charge of first degree murder. Mr. Justice LeBel ordered a stay of proceedings in Mr. Duguay's case since he had already served at least eight years of any possible prison sentence.²⁷²

In addition, the Supreme Court of Canada held that the Quebec Court of Appeal made a fundamental error in analysing the fresh evidence by addressing its individual parts, rather than analysing it as a whole, in order to assess its impact on the trial process. In other words, the Court of Appeal applied the more exacting test to the assessment of the impact of fresh evidence than the "reasonable possibility" test. It applied the wrong test, determining instead whether fresh evidence would actually have changed the verdict. That is too high a standard when the trial process is in issue. Mr. Justice LeBel found the Court of Appeal made some additional errors in its assessment of the impact of the failure to disclose on the overall fairness of the trial of one accused, and on the decision of the other accused to plead guilty.

The second case deals with a federal drug matter. In *R. v. Ahluwalia*,²⁷³ Counsel for the accused sought to admit fresh evidence that would allegedly reveal non disclosure by the prosecutor of prior criminal convictions of a key witness, an undercover police involved in an entrapment scheme. The appellant sought a new entrapment hearing. Mr. Justice Doherty found that this was not a non disclosure issue in that the prosecutor could not control what a third party, in this case the F.B.I. had or had not disclosed. Consequently, Mr. Justice Doherty analyzed the fresh evidence not in the light of a possible miscarriage of justice but in accordance with the four fold test set out in Palmer.

²⁷¹ *Ibid.* at para. 2.

²⁷² *Ibid.* at para. 3.

²⁷³ *Ahluwalia*, *supra* note 269.

He nevertheless held that there were unsettling questions left unanswered by the prosecution regarding the fresh evidence, which revealed that the key witness had committed perjury in which the state appeared to be complicit. Before allowing the appeal, quashing the convictions and allowing a new entrapment hearing, Mr. Justice Doherty expressed concern that when faced with its own witness's perjury, the Crown did not take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence. The Crown owed both the appellant and the Court a fuller explanation than it chose to provide.²⁷⁴

These non disclosure cases of fresh evidence applications stand for the proposition therefore that the *Palmer* test does not apply and something more is required than a mere demonstration of the breach of disclosure before the fairness of trial can be called into question. This new non-*Palmer* test for fresh evidence cases involving non disclosure matters was definitively defined in *Dixon*,²⁷⁵ in 1998.

There are several possible lessons to be learned from the study of the fresh evidence cases and the prevalence of disclosure issues. First, it can be argued that while the rights of the accused are protected by the *Charter*, those constitutional rights must be applied fairly. Second, appellate Court Judges have demonstrated that they will not uphold rights at all costs and certainly not at the expense of fairness in the administration of justice.

Third, there are far too many disclosure problems in fresh evidence applications. Unless resolved, these problems of tardy and incomplete disclosure jeopardize everyone's *Charter* rights. These shortcomings expose all citizens to state abuses through police and prosecutorial powers.

Finally, without the existing disclosure obligations, there will be miscarriages of justice and innocent men and women may be wrongly convicted. These conclusions support the fact that between truth and rights, fairness will generally prevail.

As indicated, disclosure remains an area of concern given the number of fresh evidence cases that involve different shortcomings in Crown disclosure. Certainly

²⁷⁴ *Ibid.* at para. 72.

²⁷⁵ *Dixon*, *supra* note 261 at paras. 23-38. See also *Taillefer*, *supra* note 261 at paras. 77-84, making favourable reference to the test set out in *Dixon*.

today breaches of the Crown's disclosure obligations are subject to serious sanctions where judicial review reveals a violation. As discussed in *Regan*,²⁷⁶ until the *Stinchcombe* decision in 1991, for example, courts tolerated Crown conduct respecting disclosure that today would result in stays or other remedies.

Because of the burden that accompanies this legal disclosure obligation, both defence and Crown ought always to work together to advance the course of justice in criminal trials and appeals. In *Regan*, the Court repeated the passage by Rand J. in *R. v. Boucher* highlighting the role of the Crown in criminal proceedings:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have the duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.²⁷⁷

The observation in *Boucher*, above, remains apposite today when considering some of the recurring themes in the disclosure fresh evidence cases.

V.1.2 Disclosure: Recurring themes

Several cases involve allegations of failure to make full, complete or proper disclosure.²⁷⁸ This lack of disclosure undermines the right of the accused to know the case to meet and provide full answer and defence. Other fresh evidence applications

²⁷⁶ *R. v. Regan*, [1999] N.S.J. No. 293, 137 C.C.C. (3d) 449 (N.S.C.A.) appeal dismissed 2002 SCC 12, 161 C.C.C. (3d) 97 (S.C.C.) at paras. 59-61.

²⁷⁷ *R. v. Boucher*, [1955] S.C.R. 16 (S.C.C.). *Ibid.*, as cited at para. 60.

²⁷⁸ *R. v. Smith* and *R. v. James*, 2007 NSCA 19, 216 C.C.C. (3d) 490 (N.S.C.A.) appeal dismissed 2009 SCC 5, 238 C.C.C. (3d) 481 (S.C.C.); *R. v. Curry*, 2004 BCCA 144, 61 W.C.B. (2d) 206 (B.C.C.A.), involving improper disclosure of DNA evidence; *R. v. Engerdahl*, [1993] 54 W.A.C. 317; 33 B.C.A.C. 317 (B.C. C.A.) leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 34 (S.C.C.) and *R. v. Harvey*, [1996] 80 B.C.A.C. 40, 109 C.C.C. (3d) 108 (B.C.C.A.).

are brought on the basis that there has been untimely disclosure by the Crown.²⁷⁹ Late disclosure engenders delay and engages section 11(b) of the *Charter* and the right to be tried within a reasonable time.²⁸⁰

In light of the large number of fresh evidence cases and the prevalence of disclosure problems, from the wealth of these cases, the reader cannot but ask what can be done to correct at least some of these shortcomings that create delay, and that tax the limited time and resources of Canadian appellate courts. Disclosure obligation rests with the Crown but the defence also has a burden to make enquiries and where appropriate and reasonable raise any disclosure concerns punctually before the presiding trial judge.

As Table V illustrates, disclosure issues affect a number of provinces and territories to an unequal degree. In three regions, there are no disclosure fresh evidence cases at all.

Table V Disclosure fresh evidence cases by court/jurisdiction

Court/Jurisdiction	Disclosure cases	Court/Jurisdiction	Disclosure cases
Alberta	13	Nunavut	0
British Columbia	33	Ontario	69
Manitoba	2	Prince Edward Island	0
New Brunswick	2	Quebec	25
Newfoundland & Labrador	4	Saskatchewan	11
Northwest Territories	0	Yukon	1
Nova Scotia	22	Total	182

²⁷⁹ To illustrate, this was a concern in the appeal against conviction in the sexual assault case in *R. v. N.C.*, [1991] 5 B.C.A.C. 285, 70 C.C.C. (3d) 350 (B.C.C.A.) leave to appeal refused (sub nom. *R. v. Chand*), [1992] S.C.C.A. No. 40, 71 C.C.C. (3d) vii (S.C.C.). Similarly, a key concern was the late disclosure of a photograph in *R. v. Kim*, 2007 BCCA 25, 235 B.C.A.C. 191 (B.C.C.A.). *R. v. Valdiris-Ahumada*, [1994] B.C.J. No. 528, 40 B.C.A.C. 261 (B.C.C.A.) provides another instance where late disclosure was at issue.

²⁸⁰ See for example the fresh evidence application in relation to s. 11(b) and inordinate delay due to late disclosure set out in *R. v. Pan*, 2001 SCC 42, 155 C.C.C. (3d) 97 (S.C.C.) affirming *R. v. Pan* [1999], 120 O.A.C. 1, 134 C.C.C. (3d) 1 (Ont. C.A.) and affirming *R. v. Sawyer*, [1999] 120 O.A.C. 114, 134 C.C.C. (3d) 152 (Ont. C.A.).

These statistics show that there remain far too many instances involving disclosure issues that call into question the integrity of the criminal justice system. Moreover, it must be recognized that in addition to these cases, there may be some problems not evidenced by the cases as not everybody will file an application to adduce fresh evidence.

Finally, non disclosed evidence may never be discovered. Has the time not come for appellate Courts across the country with double digit numbers to establish rules of practice, protocols for both Crown and defence counsel to redress the recurring themes and problems of disclosure that contribute to the ever growing rates of fresh evidence applications in Canadian criminal law appeals?

Emphasis on the role of the defence is not displaced. While the disclosure obligation lies squarely on the Crown, the study uncovers several fresh evidence applications where disclosure issues are coupled with allegations of incompetence of trial counsel.²⁸¹ This ever growing area of fresh evidence law is the subject of the final segment of the thesis.

V.2. Incompetence of Counsel

²⁸¹ Among these are the following: *R. v. B. (G.D.)*, 2000 SCC 22, 143 C.C.C. (3d) 289 (S.C.C.) affirming 1999 ABCA 104, 232 A.R. 307, 133 C.C.C. (3d) 309 (Alta. C.A.); *R. v. Engerdahl*, [1993] 54 W.A.C. 317; 33 B.C.A.C. 317 (B.C. C.A.) leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 34 (S.C.C.); *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75 (B.C.C.A.) where a lack of preparation of defence counsel was the source of the disclosure problem. See also, *R. v. Pan*, 2001 SCC 42, 155 C.C.C. (3d) 97 (S.C.C.) affirming *R. v. Pan* [1999], 120 O.A.C. 1, 134 C.C.C. (3d) 1 (Ont. C.A.) and affirming *R. v. Sawyer*, [1999] 120 O.A.C. 114, 134 C.C.C. (3d) 152 (Ont. C.A.); *R. c. Peters*, 2001 SCC 34, 156 C.C.C. (3d) 222 (S.C.C.) affirming [1999] R.J.Q. 2304, [1999] 140 C.C.C. (3d) 52 (Qc. C.A.) and affirming *R. v. Denton*, [1999] R.J.Q. 2281, 140 C.C.C. (3d) 12 and affirming *R. v. Rendon*, [1999] R.J.Q. 2281, 140 C.C.C. (3d) 12 (Qc. C.A.); *R. v. Whynder*, [1996] N.S.J.No. 110, 149 N.S.R. (2d) 241 (N.S. C.A.) appeal dismissed [1996] S.C.C.A. No. 430 (S.C.C.); *R. v. O'Connor*, [1994] 42 B.C.A.C. 105, 89 C.C.C. (3d) 109 (B.C.C.A.) affirmed by [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 (S.C.C.). See related case [1993] B.C.J. No. 570 (B.C.C.A.); *R. v. Sauve*, [1997] 101 B.C.A.C. 21, 121 C.C.C. (3d) 225 (B.C.C.A.). See related case [1998] 110 B.C.A.C. 122, B.C.J. No. 1610 (B.C.C.A.); *R. v. Tanasichuk*, 2007 NBCA 76, 227 C.C.C. (3d) 446 (N.B.C.A.) leave to appeal dismissed [2009] S.C.C.A. No. 18 (S.C.C.); *R. v. Dixon*, (N.S.S.C. sub nom. *R. v. McQuaid*), [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17 (S.C.C.) affirming *R. v. McQuaid*, [1996] N.S.J. No. 332, 152 N.S.R. (2d) 321 (N.S.C.A.); *R. v. Laffin*, 2009 NSCA 19, 275 N.S.R. (2d) 244 (N.S.C.A.); *R. v. Wolkins*, 2005 NSCA 2, 192 C.C.C. (3d) 378 (N.S. C.A.) and *R. v. Wood*, 2001 NSCA 38, 157 C.C.C. (3d) 389 (N.S.C.A.).

In order to give life to the legal rights protected by the *Charter*²⁸² an accused has ordinarily come to expect to receive effective representation by counsel. The governing bodies of the legal profession, such as the Quebec Bar and the Law Societies set rules of professional conduct, competency and ethics to regulate members in good standing in the legal profession within the different jurisdictions across the country. After a brief review of the doctrinal treatment of this growing body of fresh evidence law, the second part of this segment considers the strategies adopted to address this serious problem that undermines the administration of justice.

V.2.1 Doctrinal treatment of claims of Incompetence of Counsel

The study of the case law shows that there is a segment of fresh evidence applications that contain allegations of ineffective representation of counsel at trial or improper conduct by Crown Counsel. In this regard, there are three doctrinal articles on the issue of incompetence of trial counsel that also deal directly with fresh evidence.²⁸³

The first of these articles was published following the release of the seminal decision by the Court of Appeal for Ontario in *R. v. Joannis*.²⁸⁴ This decision clarified the circumstances under which allegations of ineffective assistance of counsel at trial will be allowed. In this case from North Bay, the accused was found guilty of second degree murder of his common law wife and sentenced to the

²⁸² *Charter*, *supra* note 3 at ss. 7-10, which set out these legal rights, and in particular the right to retain counsel in subsection 10(b).

²⁸³ See Andras Schreck, "Case Comment: *R. v. Delisle*, [1999] A.Q. No. 18 (C.A.): Ineffective Assistance of Counsel and the Scope of Counsel's Authority to Act" (June 15, 1999) *Ontario Criminal Lawyers' Association Newsletter*, Vol. 20, no. 2, p. 50; Cristin Schmitz, "Incompetent counsel's effect on the trial determines fate of verdict, Ont. C.A. rules Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused." -- Mr. Justice David Doherty" (October 27, 1995) *The Lawyers Weekly* Vol. 15, No. 24; and Anil Kapoor "Ineffective Assistance of Counsel & the Requirement to Seek and Follow Instructions" For the Defence (November/December 2000) *Ontario Criminal Lawyers' Association Newsletter*, Vol. 21, No. 6, p. 41.

²⁸⁴ *R. v. Joannis*, [1995] O.J. No. 2883, 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal dismissed [1996] S.C.C.A. No. 347(S.C.C.).

mandatory life in prison without eligibility for parole for 10 years. Mr. Joanisse lived with her and her baby daughter in a basement apartment in which a fire broke out in the early hours of July 18, 1988. Mr. Joanisse escaped with the baby. However, the mother did not make it out alive. In fact, she couldn't have. She was already dead. She died of asphyxiation.

There were two issues on appeal,²⁸⁵ the second of which alleged that even if the Court were to find that Mr. Joanisse wasn't impaired, his senior counsel at trial, failed to provide effective legal assistance, and accordingly the conviction should be quashed and a new trial ordered. In particular, However, Mr. Justice Doherty found no "indicia of incompetence" as alleged by Mr. Edward Greenspan, appellate counsel for Mr. Joanisse.²⁸⁶ While the wiser course of action would no doubt have been for trial counsel to seek an adjournment when at the last day of the Crown's evidence the accused got cold feet and refused to take the stand, more was required than a mere possibility of incompetence to ground an appeal on incompetence of counsel.

Given the number of such cases, Mr. Justice Doherty seized the opportunity to review the law and clarify the legal principles that apply when on the basis of fresh evidence it is alleged that trial counsel fell short of the minimum standard of effective legal representation. Given also that such allegations call into question the fairness of the trial itself, and further given the facility with which such claims can be made, judicial caution is required. To that end, the Joanisse Court adopted a tripartite test that must be satisfied in order to successfully advance a fresh evidence application on the basis of ineffective assistance of trial counsel. The three elements of this cautious approach are as follows:

1. The appellant must establish the facts on which the claim of incompetence is based.

²⁸⁵ In the first issue on appeal, counsel for Mr. Joanisse argued based on fresh evidence that his client was so impaired by drugs at his 1990 trial that he couldn't meaningfully take part in the proceedings, effectively instruct his counsel or testify on his own behalf. There was no semblance of truth the appellate court judges found and dismissed this fresh evidence application and related ground of appeal. (The accused's evidence on that score "smacks of fabrication" and was "not reasonably capable of belief," the appeal court said, flatly rejecting this ground of appeal, based on the submissions of Crown counsel David Butt.).

²⁸⁶ *Joanisse*, *supra* note 284 at para. 62.

2. The appellant must establish that the representation provided by trial counsel was incompetent.
3. The appellant must establish that the incompetent representation resulted in a miscarriage of justice.²⁸⁷

Like other fresh evidence applications, the burden lies on the applicant to establish the facts on a balance of probabilities. Furthermore, it is not enough to prove that trial counsel was indeed incompetent. The applicant must then go on to show that Counsel's performance or lack thereof undermined the reliability of the verdict and the fairness of the trial itself.²⁸⁸ But for Counsel's incompetence the outcome at trial would have been different, thus leading to a miscarriage of justice. In *Joanisse*, Counsel failed to meet this third component of the test. The appeal was dismissed. Leave to appeal to the Supreme Court of Canada was dismissed without reasons.

Writing about this judgment in *The Lawyers Weekly*, Cristin Schmitz²⁸⁹ provided a balanced and accurate account of the principal findings in the case. Indeed, the author considered not only the main judgment delivered by Doherty J.A. but also the separate reasons of Austin J.A., concurred in by Robins J.A. The Reporter highlighted the Court's clarification of the law. The 1600 word article made several observations, the most relevant of which for the purposes of the thesis pertained to the fact that ineffective trial representation claims were becoming more common in Ontario. The approach developed by this decision remains the law on fresh evidence applications on the competence of counsel.

In addition to the interest generated by such claims in doctrinal articles, this phenomenon within the fresh evidence case law has prompted some appellate Courts to implement specific rules of procedure for the introduction of fresh evidence applications on appeal based on incompetence of counsel. Some of these strategies are considered below.

²⁸⁷ *Ibid.* at paras. 65-69.

²⁸⁸ *Ibid.* See discussion of the law of legal representation in paras. 75-80.

²⁸⁹ *Schmitz, supra* note 283 at 2.

V.2.2 Strategies to address claims of incompetence of counsel

The Court of Appeal of Quebec adopted new rules in December 2006²⁹⁰ to address its ever growing fresh evidence case load involving allegations of incompetence of counsel. In addition to claims of incompetence leveled against inexperienced Counsel, these cases also involve allegations of conflict of interest against seasoned members of the Quebec Bar that would be deemed to undermine the right to a fair trial.²⁹¹

Two new provisions the Court's procedural rules deal specifically with fresh evidence applications. The first, Rule 26 deals with the procedures an appellant must follow in order to bring an application to adduce fresh evidence based on allegations of professional incompetence. There are several steps in this process.²⁹²

First the appellant who alleges the incompetence of counsel who acted on behalf of the appellant in first instance must notify the counsel by serving on the latter a copy of the written proceedings containing the allegation.²⁹³ Second, if the appellant intends to rely on evidence that is not already in the trial record, written notice must be given to the Chief Justice, with copies to both the Attorney General and the appellant's trial counsel. This notice must describe the content of the evidence and the procedure the appellant proposes for taking the evidence.

Third, in a similar manner, if the Attorney General wishes, in rebuttal of this ground of appeal, to introduce evidence that is not already in the trial record, the

²⁹⁰ The following is a website link to the new Rules of the Court of Appeal of Quebec in Criminal Matters, which was published in the *Canada Gazette*, Part II, vol. 140, No. 25 on December 13, 2006, online: <<http://canadagazette.gc.ca/partII/2006/20061213/pdf/g2-14025.pdf>>. The specific sections of the new Rules are Rule 26, dealing with incompetence of Counsel and Rule 54 for fresh evidence. See pp. 157 and 161–of-192 respectively.

²⁹¹ See for example *Comtois-Barbeau*, *supra* note 2593, as well as *Ludovic Bouchard c. Sa Majesté la Reine*, No. 500 10-003934-070, the fresh evidence matter heard by the Court of Appeal of Quebec, in Montreal on November 19, 2007.

²⁹² I wish to pause here to re-acknowledge the invaluable contribution and generosity of the participants in the interviews at the Quebec Court of Appeal. The information contained in these passages was obtained through my interviews with them in Montreal, which I may not have had otherwise (or in less detail).

²⁹³ *Rules of Qc. CA*, *supra* note 304 at R. 26(1).

Attorney General must also notify the Chief Justice in writing, with copies to the appellant and the appellant's trial counsel. Likewise, the Attorney General's notice must describe the content of the evidence and the procedure the Attorney General proposes for its reception.

Fourth, if counsel against whom incompetence has been alleged wishes to respond, that counsel must notify the Chief Justice in writing, with a copy to the parties, and must also describe the means considered appropriate to present that counsel's position.

Fifth, in an effort to streamline the process, a Judge may use the occasion of a management conference in criminal matters to attempt to have the parties agree on the means by which the evidence may be received, as well as a timetable for the way forward.

Sixth, the parties are required to present appropriate motions in order to be authorized to produce any new evidence alleging incompetence of counsel.

This process is intended to manage the large number of cases of this nature that are presented on appeal.

The second, Rule 54²⁹⁴ concerns the general procedures to be followed for the admission of fresh evidence. Paragraph 1 of Rule 54 represents the four principles found in *Palmer*, where applicants are required to introduce fresh evidence by way of motion. The moving party must identify the nature of the fresh evidence and the efforts that have been taken to exercise due diligence to obtain the proffered fresh evidence.

Also, the moving party must explain why the fresh evidence is relevant and credible and if believed, could be expected to affect the result. These in a nutshell are the four *Palmer* principles. Rule 54 also makes provision in paragraphs 2 and 3 for procedural matters on the motion. Notably, notice and terms of a fresh evidence application are required.

²⁹⁴ *Règles de la Cour d'appel du Québec en matière criminelle* (TR/2006-142, 2006) 140 *Gazette Canada*, Partie II, 2113, art. 54.

To that end, once the party has presented its motion explaining how it meets the four part test in Rule 54, the party presenting such a fresh evidence motion must also notify the other parties of the motion as soon as possible and is required to attempt to come to an agreement with them regarding a timetable and the terms that will govern the process – including the exchange of documents and cross examinations where warranted. The appellant is required to submit this proposed timetable and the terms of an agreement to the Court.

Once these two initial steps have been taken, the application is considered by the Court for a two-stage determination. In the first stage, the Court must either authorize or refuse the taking of fresh evidence and determine, if applicable, the terms by which relevant documents will be exchanged and cross-examinations undertaken. At the second stage and after the evidence has been taken, the Court hearing the appeal will determine its admissibility.

Consequently, different members of the Court will consider the fresh evidence applications in this distinct two-stage determination process. These rules and procedures help to minimize the possibility of errors of justice and protect the administration of justice from the dangers of human error.

More importantly, they also discourage individuals from presenting repeated fresh evidence claims on the basis of incompetence of Counsel. One must have solid proof of incompetence and the impugned Counsel has an opportunity to respond by affidavit testimony of what services he or she rendered during the retainer at trial.

Notwithstanding, the results of the in-person interviews reveal that there are a number of instances where such allegations are not unfounded when levelled against young and inexperienced Counsel. In instances such as these, the Court will seek to resolve the matter in the fair administration of justice.

These new Rules follow the principles set out by the late Mr. Justice Proulx, in the 1999 decision of *R. c. Delisle*.²⁹⁵ In this seminal decision, the Crown agreed that the applicant's allegations of incompetence of counsel were not unfounded and had indeed led to a miscarriage of justice.

²⁹⁵ [1999] J.Q. no 18, 133 C.C.C. (3d) 541 (Que. C.A.).

In fact, it was found that the trial counsel did not believe the accused, ignored his instructions to call him as a witness and failed to interview a third party who confessed to having committed the offence. It was the occasion for Mr. Justice Proulx to address the question and provide some guidance to the Quebec bar and the judiciary for dealing with allegations of incompetence of counsel.

Several observations are called for. First, in *Delisle*, Justice Proulx reiterated that such applications are by their very nature fresh evidence applications because they deal with matters that were not part of the trial record. Further, they were not live issues before the trial Judge and therefore did not fall into the *Palmer* category of fresh evidence cases.

Second, because these cases deal with incompetence of counsel; a serious allegation that compromises the rights of an accused to be represented by competent counsel,²⁹⁶ the very nature of these allegations go to the fairness of the trial itself and

²⁹⁶ At paras.7-9, Mr. Justice Proulx sets the legal framework of the right to competent counsel. He held as follows:

I - Les fondements du droit à un avocat compétent

7 L'inculpé qui choisit d'être défendu par un avocat à son procès est en droit de s'attendre à une représentation adéquate et convenable ("effective assistance of counsel"). Cette proposition a été largement discutée dans des arrêts de cette Cour, notamment *Toussaint c. R.* (1984), 40 C.R. (3d) 230 et, sous la plume du juge Fish, dans *R. c. Brigham* (1992), 18 C.R. (4th) 309, p. 340 sq., de même que le juge LeBel dans l'arrêt *Placide Renaud c. La Reine, C.A.* Québec no 200-10-000220-967, le 8 décembre 1998 [les juges LeBel, Nuss et Biron (ad hoc)]. Il y a lieu également de souligner, sur ce point, les arrêts *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225, *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 et *R. v. White* (1997), 114 C.C.C., de la Cour d'appel d'Ontario.

8 La crédibilité du système judiciaire serait gravement compromise si on ne pouvait plus compter sur la présence d'avocats compétents dans la défense des accusés. À quoi bon en effet ériger alors le meilleur système de justice et vouloir en assurer le maintien par des garanties enchâssées dans la Charte canadienne des droits, si la personne accusée est laissée dans l'ignorance de ses droits et n'est pas à proprement parler "défendue" à son procès?

9 Le droit à une représentation adéquate, comme élément constitutif du droit à une défense pleine et entière et du droit à un procès juste et équitable, prend sa source, dans la common law, dans le *Code criminel* [par. 650(3)] et dans les articles 11(d) et 7 de la *Charte canadienne des droits et libertés*, en tant que principe de justice fondamentale. Dans une perspective plus globale, ce droit à un avocat compétent constitue l'une des composantes du droit à la représentation adéquate d'un avocat, tout comme l'est le droit à l'assistance ou à la présence même de l'avocat de son choix¹ ou encore le droit d'être représenté par un avocat qui ne soit pas en conflit d'intérêts. [Foot notes removed]

not to the legal or factual findings of the trier of fact, which as was alluded to earlier, are governed by the general 4-part test enunciated in *Palmer*.

Third, these new rules of Court in fresh evidence matters are not unique to Quebec. In fact, Mr. Justice Proulx was inspired by the professional conduct jurisprudence authored by Mr. Justice Doherty²⁹⁷ emanating from the Court of Appeal for Ontario, which in 2000 adopted its own protocol²⁹⁸ outlining the rules that generally govern the procedure to follow where the appellant proposes to allege that his or her counsel at trial conducted him or herself in a manner that would amount to professional incompetence or otherwise contributed to a miscarriage of justice.²⁹⁹

Allegations of incompetence of trial Counsel also cast aspersions on the fairness of trial since it often implies that the accused was denied the opportunity to make full answer and defence. Allegations of incompetence of Counsel to impeach a verdict are not uncommon.

In *R. v. Dunbar*,³⁰⁰ for example, the appellants were four accused convicted of second degree murder in separate trials. The appellants were represented at trial by the same Counsel. On appeal, they argued incompetence of Counsel and sought to introduce fresh evidence, including documents from the Law Society of British Columbia pertaining to disciplinary proceedings with respect to the trial Counsel.

The appeal was dismissed because the appellants failed to establish on a balance of probabilities, both that the representation provided by the trial Counsel was incompetent and that this incompetence resulted in a miscarriage of justice. To

²⁹⁷ Most notably, see *R. v. W. (W.)*, [1995] O.J. No. 2383, 100 C.C.C. (3d) 225 (Ont. C.A.) and *R. v. Joannis*, [1995] O.J. No. 2883, 102 C.C.C. (3d) 35 (Ont. C.A.).

²⁹⁸ *Rules of the Court of Appeal of Ontario, Criminal Procedure*, "Procedural Protocol Re Allegations of Incompetence of Trial Counsel in Criminal Cases" (2000), 47 O.R. (3d) xx. This protocol came into effect on May 1, 2000; just five months after the Opening of the Courts Ceremony, when Chief Justice McMurtry raised alarm signals of the increase in fresh evidence applications.

²⁹⁹ *Ibid.* at para. 19.

³⁰⁰ *R. v. Dunbar*, 2003 BCCA 667, 191 B.C.A.C. 223 (B.C. C.A.) leave to appeal refused, [2004] S.C.C.A. No. 30 (S.C.C.). For the case authorities in Ontario, please see Mr. Justice Doherty's seminal decision in *R. v. W. (W.)* (1995), 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 (Ont. C.A.). Also see, *R. v. Joannis*, [1995] O.J. No. 2883, 102 C.C.C. (3d) 35 (Ont. C.A.); *R. v. B. (L.C.)*, [1996] O.J. No. 283, 104 C.C.C. (3d) 353 (Ont. C.A.) and *R. v. Rajaefard*, [1996] 27 O.R. (3d) 323, 104 C.C.C. (3d) 225 (Ont. C.A.).

reiterate, this is a two-part test where the appellant must draw a link between the alleged incompetence and the prejudice suffered. Moreover, the Court held that “the Law Society material requires separate consideration as fresh evidence because it is protected by a statutory privilege.”³⁰¹

The British Columbia Court of Appeal concluded that “the Appellants have failed to demonstrate that the Law Society material is likely relevant to their arguments regarding the incompetence of Counsel at their respective trials.”³⁰²

In a controlled review of the data base, there are 147 fresh evidence cases that raise issues of competence of Counsel at trial. A small number also deal with allegations of incompetence or improper conduct on the part of Crown Counsel at trial. It should be noted that none of these decisions in which incompetence of trial counsel is alleged was rendered prior to 1982.

In other words, these cases all arose in the post *Charter* era, with the first appearing in 1986.³⁰³ Interestingly, however, there is one pre-*Charter* case in which the accused alleged that she was denied impartial counsel contrary to the *Canadian Bill of Rights*.³⁰⁴ According to the appellant, counsel entered into a contract with her to share the profits of a book that was likely to be written about the trial.³⁰⁵ The Court dismissed this ground of appeal and held that “the impropriety of the literary contract did not affect her representation at the preliminary hearing or at the trial and she was afforded the opportunity of making full answer and defence.”³⁰⁶ The language in the *Charter* in relation to the right to counsel is very similar to that contained in the *Bill of*

³⁰¹ *Dunbar, ibid.* at para. 24.

³⁰² *Ibid.* at para. 70.

³⁰³ *R. c. Letiecq*, [1986] J.Q. no 633 (Qc. C.A.).

³⁰⁴ *Canadian Bill of Rights*, S.C. 1960, c. 44 at s. 2(c) (ii), which provides that upon arrest or detention, an individual has the right of access to counsel without delay.

³⁰⁵ *R. v. Harper*, [1980] M.J. No. 104, 2 Man.R. (2d) 153 (1980) (Man. C.A.) reversed on other grounds [1980] 2 S.C.R. 366, 6 Man. R. (2d) 253 (S.C.C.).

³⁰⁶ *Ibid.* at para. 3.

Rights; thus the claiming of such rights at least was in the legal lexicon prior to the *Charter*.³⁰⁷

In terms of the Post-*Charter* decisions, Table VI summarizes the data on incompetence of counsel for the factors of year and frequency, while Table VII provides a breakdown by jurisdiction or court.

Table VI Incompetence of Counsel in fresh evidence cases by year/frequency

Year	Frequency	Year	Frequency	Year	Frequency
1986	1	1996	9	2004	5
1989	2	1997	8	2005	6
1990	2	1998	10	2006	12
1991	4	1999	10	2007	10
1992	2	2000	11	2008	10
1993	3	2001	13	2009	4
1994	2	2002	5	2010	N/A
1995	8	2003	10	Total	147

The data in Table VI reveals that for the past 20 years, there has been at least one such fresh evidence application where the competence or decisions or omissions of trial counsel is raised. There are some years of multiple cases. However, as Table VII indicates, these clusters of cases are concentrated in the largest jurisdictions of Ontario, Quebec and British Columbia.

The data also shows that this is not an issue in three jurisdictions, the Northwest Territories, Nunavut and Prince Edward Island. In studying the cases for the control factor of competency of trial counsel, it is clear that there is no distinction in the approach adopted by appellate Courts all across the country where such issues arise. Each follows the guidance provided in *Delisle*, in Quebec, and in *R. v. W. (W.)*³⁰⁸ and *R. v. Joannis*,³⁰⁹ both from Ontario, in the rest of the country.

Table VII Incompetence of Counsel Fresh Evidence Cases by Jurisdiction

³⁰⁷ However, it should be noted that the *Canadian Bill of Rights* was never given the constitutional status that the *Charter* has and very little was achieved through it.

³⁰⁸ *R. v. Widdifield*, [1995] 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 (sub nom. *R. v. W. W. and I.W.*), [1995] O.J. No. 2383 (Ont. C.A.).

³⁰⁹ *Joannis*, *supra* note 298.

Court/Jurisdiction	Incompetence Cases	Court/Jurisdiction	Incompetence cases
Alberta	12	Nunavut	0
British Columbia	20	Ontario	42
Manitoba	1	Prince Edward Island	0
New Brunswick	4	Quebec	29
Newfoundland & Labrador	4	Saskatchewan	12
Northwest Territories	0	Yukon	1
Nova Scotia	22	Total	147

In terms of fairness, the protocol and the new Rules in Ontario and Quebec, for example provide clear parameters within which such applications can be made. A close examination of these protocols confirm that these procedural measures are sufficiently strict perhaps even onerous in the case of Ontario that it would give pause to individuals before they embark on applications to enter fresh evidence based on allegations of professional incompetence of trial Counsel.

Finally, it is worth noting that unlike the distinction that exists between the application of the *Palmer* general test and the *Dixon* test where disclosure breaches have compromised the fairness of trial, the right to competent counsel as a ground of appeal to receive fresh evidence enjoys no such exception. The party alleging incompetence of Counsel is not only subject to the strict Rules of procedure governing such matters where these exist, but they must also satisfy, on the balance of probabilities that all four factors of *Palmer* have been met.³¹⁰

Also, unlike the disclosure cases where a *Charter* remedy is available where it is established that a breach of disclosure has resulted in a miscarriage of justice, there is no such *Charter* remedy where an appeal court is satisfied that but for the ineffective assistance of trial counsel, the accused would have had a fair trial and the outcome would have been ultimately different.

To illustrate, in the 1993 decision from the Court of Appeal for Ontario, Mr. Justice Finlayson had to consider this same question in a sentence appeal. In *R. v.*

³¹⁰ It is accepted that the first of the four criteria, i.e., the due diligence factor is applied with some leniency to criminal law matters.

Newman,³¹¹ the appellant pleaded guilty to conspiring to import cannabis resin and was sentenced to seven years' imprisonment. One of the grounds of his appeal from sentence was based on the allegation that he was deprived of his right to the effective assistance of counsel and that this is a right protected by ss. 7 (principles of fundamental justice), 10(b) (right to counsel) and 11(d) (fair hearing) of the Charter.³¹²

There is a long line of jurisprudence where appellate courts have recognized that the effective assistance of counsel is a constitutionally given.³¹³ Yet the Court in *Newman* declined to elevate the right to effective assistance of counsel as a *Charter* right. The *Charter* guarantees the right to retain and instruct counsel upon detention and the right to be informed thereof.

Coupled with the protocols as designed by the appellate Courts in both Ontario and Quebec, the resort to allegations of incompetence of trial counsel will tend to fall off in the coming years. This projection is supported also by the data with respect to the outcomes of these 147 fresh evidence cases alleging or that raise concerns with the performance of counsel at trial. Of these 147 cases, two-thirds were dismissed.

This would also suggest that between truth, rights and fairness, there may be a fourth explanation and that is appellate decisions in fresh evidence cases also encompass concerns for the administration of justice. This would follow Douglas Hay's³¹⁴ insight into legitimation theory, which may be included to form part of the explanation of the high rate of dismissal of fresh evidence claims of ineffective assistance of counsel.

Hay's thesis is based on an empirical analysis of the social history of the criminal law system in eighteenth century England, according to which, criminal law was an ideological tool used to protect the property interests of the ruling class. As

³¹¹ (1993), 12 O.R. (3d) 481, [1993] O.J. No. 536 (Ont. C.A.).

³¹² *Ibid.*

³¹³ For example, consider the following cases cited in *Newman*: *R. v. Garofoli* (1988), 43 C.R.R. 252, 41 C.C.C. (3d) 97 at p. 150; and *R. v. Silvini* (1991), 5 O.R. (3d) 545, 68 C.C.C. (3d) 251 at p. 262.

³¹⁴ Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow, *Albion's Fatal Tree* (New York: Pantheon Books, 1975).

such, it was used by the few to control the masses. This ideology prevailed in three ways: by the majesty of criminal law, by its sense of providing justice and in its benevolent role as the dispenser of mercy.

Hay's legitimation theory has application to modern phenomena in the criminal justice system as it provides a model for understanding legal phenomena –not unlike the dramatic rise in fresh evidence applications and the rate of dismissal of claims that question the competence of trial counsel.

Applied to this research, the behaviour of appellate court judges with respect to the high rate of dismissal of allegations of incompetence may reflect an unconscious bias to protect the administration of justice by making it very difficult to successfully level fresh evidence that contest the competence of trial counsel. Such claims go to the heart of the integrity of the profession.

To sum up my findings on the possible causes of the rise in fresh evidence cases, the study of the cases reveals that the first signs of increase began in the mid to late 1970s when the use of DNA evidence and other expert forensic evidence became more and more common in criminal trials not only in Canada but in the United States as well. This initial increase in the number of fresh evidence applications does not account for the explosion of these types of applications after 1982. Coupled with advances in forensic science, the advent of the *Charter* would significantly change the course of fresh evidence applications in criminal appeals in Canadian appellate law.

CONCLUSION

The main theoretical argument of my thesis is anchored in the notion that at the appellate level, the debate among Canadian scholars on the Canadian criminal justice system ought not only to engage the search for truth and the protection of rights. The debate must also include consideration of the principle of fairness.

At the appellate level, the fresh evidence cases reveal, the search for truth is not absolute. In fact, when fresh evidence is presented the question is not whether this evidence is true or this evidence will unearth “the” truth, which remained elusive

at trial. Rather the question is whether this fresh evidence will, if found to be admissible, and also reliable and credible would likely have affected the decision.

I also argue that the search for truth is not the only goal of the criminal justice system. The vindication of rights is also prevalent; a modern construct that was present in the spirit of the *Canadian Bill of Rights*³¹⁵. However, the vindication of rights takes flight only with the advent of the *Canadian Charter of Rights and Freedoms*. The thesis argues that the evolution in fresh evidence law reflects these competing goals between truth and rights but there is always an element of fairness that may trump the truth and may trump rights when it is in the interests of justice to do so. It follows thus that the debate must also include consideration of the principle of fairness. This is all the more relevant because Justice is human. The criminal law system although very strong and just is not infallible and on those rare occasions when errors occur, fresh evidence is an effective mechanism to help right such wrongs.

Indeed, sometimes innocent people are wrongfully convicted.³¹⁶ Sometimes too, guilty people are acquitted. In both instances, fresh evidence may be one of the only ways that such wrongs can be made right. Unfortunately, in and of themselves, fresh evidence may not always overturn a wrongful conviction and it may be decades, a long time coming. Nevertheless, both by statute and the common law, fresh evidence plays an important role in Canadian appellate criminal law. Indeed, it was precisely because of the realization that innocent people had been sent to jail in England and in the Dominions that as early as 1923, Canada's Parliament followed

³¹⁵ *Bill of Rights, supra* note 319.

³¹⁶ There are no known statistics to indicate the exact number of wrongful convictions in Canada. Commissioner Kaufman, former judge of the Quebec Court of Appeal, appointed to inquire into the causes of the wrongful conviction of Guy Paul Morin, observed in his 1998 *Report*,

The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide.

[Ontario. *Commission on Proceedings Involving Guy Paul Morin, Volumes 1 and 2*, by The Honourable Fred Kaufman, C.M., Q.C., Chair (Toronto: Queen's Printer for Ontario, 1998.) at p. 1243.]

the evolution in English law and amended the *Criminal Code*, to grant broad supplementary powers to appellate courts, to receive fresh evidence, "[i]f it thinks it necessary or expedient in the interests of justice."

Certainly, the use of fresh evidence in wrongful convictions has entered the public discourse as a result of the tireless efforts of the Association in Defence of the Wrongly Convicted (AIDWYC) whose successes in the highly publicized cases of wrongful convictions are now firmly part of the long list of instances where the justice system failed. They are all noteworthy cases of miscarriages of justice, as the following case summaries illustrate.

Mr. David Milgaard was convicted of the murder of Miss Gail Miller by a Saskatchewan jury after a fair trial in 1970. He had served almost 23 years of a life sentence before fresh evidence in the form of DNA testing results served to unseal his fate, in 1997. Lack of disclosure played a role in Mr. Milgaard's wrongful conviction. That is why something needs to be done to address the rise in fresh evidence applications and the predominance of disclosure concerns in the criminal law process.

Similarly, Mr. Donald Marshall, Jr. was convicted by a jury in Nova Scotia in 1971, of the murder of Mr. Sandford (Sandy) Seale. He was acquitted following the unearthing of highly relevant fresh evidence that had not been disclosed to the defence. Mr. Marshall Jr. was exonerated by a Royal Commission in 1989."

The story of Mr. Guy Paul Morin stands out by the singular nature of the facts and sequence of applicable fresh evidence. Mr. Morin was charged with first degree murder of the death of his five year old neighbour, Christine Jessop, who went missing after school on October 3, 1984. Her partially clad remains were found in an isolated grassy field on December 31, 1984, just over 50 kilometres from her home. She had been raped. There were multiple stab wounds to both her chest and back; where three of the five wounds to the chest penetrated from behind.

Mr. Morin had two trials and proclaimed his innocence throughout. At the first trial, Mr. Morin pleaded not guilty or in the alternative, if he had committed the murder he was not guilty by reason of insanity. There was substantial evidence regarding Mr. Morin's mental health. He was acquitted by a jury on February 7, 1986. The Crown appealed his acquittal. Mr. Morin brought an application to adduce fresh evidence in

the form of affidavit from expert witnesses regarding his mental illness and lack of propensity to commit such a crime. The Court of Appeal for Ontario dismissed the application to adduce fresh evidence, allowed the Crown's appeal and ordered a new trial.

At the conclusion of the second trial, Guy Paul Morin was found guilty of first degree murder by judge and jury and sentenced on July 30, 1992, to life in prison without eligibility for parole for 25 years. However, in 1995, in a novel move, the defence and the Crown made a joint application to introduce as fresh evidence the results of DNA analysis of saliva and semen on the victim's undergarments found at the scene of the crime. The DNA tests results proved that neither body fluid belonged to Guy Paul Morin. The Court of Appeal for Ontario admitted the fresh evidence, allowed the appeal and not only set aside the conviction but also rendered an outright acquittal. Mr. Morin was not guilty. He had protested his innocence all along and thanks to the science of DNA, fresh evidence proved him right.

These are just a small sampling of the far too many instances where the life stories of those wrongfully convicted have become etched in the Canadian public psyche. For the purposes of this research, these highly mediatized cases have served to shine the spotlight on the important role fresh evidence can play in the administration of justice and its correction where required.

Appellate Court Judges are the final arbiter in the outcome of an appeal. Thus, fresh evidence even the most widely documented cases must be weighed in the balance to ensure that where miscarriages of justice have occurred or where there is a danger that fresh evidence is being used as a tool to circumvent the trial process and retry a case, that appellate Court Judges stand vigil to act in the interests of justice to protect the integrity of the administration of justice.

While such murder cases of wrongful convictions have received prominence in Canadian media, the lion's share of fresh evidence applications never rise to the level of newsworthy coverage. It was thus useful to identify the different types of offences that have been the subject of fresh evidence applications and determine what patterns if any might exist not only in the nature of the offence but also in the frequency with which such offences led to fresh evidence applications.

When Parliament extended broad corollary powers to Canadian appellate Courts in 1923, it did so to correct human error that may lead to miscarriages of justice. Used with clear reluctance, appellate Courts have made steady incremental changes to give full life to the values and legal rights embodied in the *Canadian Bill of Rights* and broadened as constitutional rights in the *Charter*.

When viewed through the lens of the cases based on jurisdiction, and by year, fresh evidence applications follow the same principles whether through *Palmer* for verdict appeals or through *Levesque* for sentence appeals. Where there are allegations of breaches of the Crown's disclosure obligations or incompetence of Counsel, so too the approach is the same.

The data reveals most of all that there is a sharp increase in the number of applications beginning in the latter part of the 1970s. This pre-*Charter* period coincides with the scientific progress and the increasing use of expert forensic evidence to avoid miscarriages of justice.

With this rise in the use of fresh evidence applications, the question arises whether fresh evidence has become a burden and is more a part of the problem than the solution in the criminal justice system. The remarks of the Chief Justice of Ontario at the 2000 Opening of the Courts Ceremony sent up a red flag signaling that the time for reform had come.

One option for reform lies in the area of breach of disclosure obligations. There are still far too many instances across the country where the *Charter* right to make full answer and defence is not consistently upheld. Because the appellate courts are masters of their own rules of procedure, it is recommended that in this area, Courts, especially in Quebec and Ontario where the statistics are most pronounced, consider the adoption of a protocol for disclosure purposes, addressed to both the Crown and defence counsel. Protocols to deal with the many allegations of incompetence of counsel already exist in these two jurisdictions.

Over the course of one hundred years, Canadian appellate courts have evolved, adapting to face new developments in the law and the many new influences that shape its original goals: to act in the interests of justice and avoid miscarriages of justice. Fresh evidence in Canadian criminal law between 1910 and 2010 reflects this

same ability to evolve in the face of new pressures whether through the advances in science or constitutional changes crystallized by the *Charter*.

The growth in fresh evidence applications in the recent decades shifts this discretionary appellate power from its original purpose to be used but rarely to avoid and correct miscarriages of justice. While both fairness and the law require that all claims of fresh evidence be duly considered, it is hoped that the thesis has demonstrated that but for the advances in forensic science and the advent of the *Charter*, the finality of judgments, including both verdicts and sentences would be but rarely disturbed.

THE END

FRESH EVIDENCE CASES BY YEAR: in alphabetical order by Court**1915**

1. *R. v. White* (1915), 34 O.L.R. 370, 24 C.C.C. 277 (Ont. H.C.).

1924

1. *R. v. Cronan* (1924), 57 N.S.R. 25, 41 C.C.C. 320 (N.S.C.A.).

1925

1. *R. v. Vye*, [1925] 3 W.W.R. 100, 44 C.C.C. 249 (B.C.C.A.).
2. *R. v. West*, [1925] O.J. No. 470, 28 O.W.N. 397 (Ont. C.A.).

1926

1. *R. v. Cumyow*, [1926] 1 D.L.R. 623, 45 C.C.C. 172 (B.C.C.A.).
2. *R. v. Olney*, [1926] B.C.J. No. 43, 46 C.C.C. 96 (B.C.C.A.).

1927

1. *R. v. Sankey* (1927), 38 B.C.R. 361, 48 C.C.C. 28 (B.C.C.A.) reversed on other grounds [1927] S.C.R. 436, 48 C.C.C. 97 (S.C.C.).
2. *R. v. Shumarin*, [1927] B.C.J. No. 123, [1928] 1 W.W.R. 300 (B.C.C.A.).

1930

1. *Rex v. Matthews*, [1930] O.J. No. 168, 38 O.W.N. 51 (Ont. C.A.).

1931

1. *R. v. Gauthier*, [1931] O.J. No. 109, 40 O.W.N. 129 (Ont. C.A.).

1933

1. *Rex v. Wilson*, [1933] A.J. No. 3, 60 C.C.C. 309 (Alta. C.A.).

1936

1. *R. v. Jarvis*, [1936] O.J. No. 27, 66 C.C.C. 20, (Ont. C.A.).

1939

1. *R. v. Wexler*, [1939] S.C.R. 350 (S.C.C.).

1944

1. *R. v. Findlay*, [1944] 2 D.L.R. 773, 81 C.C.C. 183 (B.C.C.A.).
2. *R. v. Mackie*, [1944] B.C.J. 47, 81 C.C.C. 338 (B.C.C.A.).
3. *R. v. Martin*, [1944] B.C.J. No. 90, 82 C.C.C. 311 (B.C.C.A.).

1945

1. *R. v. Johnson*, [1945] B.C.J. No. 25, 85 C.C.C. 56 (B.C.C.A.).
2. *R. v. Prince*, [1945] B.C.J. No. 15, 62 B.C.R. 99 (B.C.C.A.).
3. *R. v. Grigoreshenko*, [1945] 3 W.W.R. 734, 85 C.C.C. 129, (Sask. C.A.).

1947

1. *R. v. Feeney*, [1947] 1 D.L.R. 392, 86 C.C.C. 429 (B.C.C.A.).
2. *R. v. Deacon (No. 2)*, [1947] M.J. No. 2, 88 C.C.C. 308 p (Man. C.A.).

1949

1. *R. v. Buckle*, [1949] 3 D.L.R. 418, 94 C.C.C. 84 (B.C.C.A.).
2. *R. c. Beaulieu* (1949), 8 C.R. 345, [1949] J.Q. no 11(Qc. C.A.).

1950

1. *R. v. Lalonde* (1950), 11 C.R. 71, 98 C.C.C. 363 (Ont. C.A.).

1951

1. *R. v. Davidoff (No. 2)*, [1951] B.C.J. No. 105, 101 C.C.C. 238 (B.C.C.A.).
2. *R. v. Russell*, [1951] B.C.J. No. 89, 99 C.C.C. 316 (B.C.C.A.).

1952

1. *R. v. Kissick (No. 1)* (1952), [1952] 1 S.C.R. 343, 102 C.C.C. 129 (S.C.C.) affirming (1951), 12 C.R. 366, 100 C.C.C. 130 (Man. C.A.).

1954

1. *R. v. Milligan*, [1954] 35 M.P.R. 372, 110 C.C.C. 225 (N.B.C.A.).

1958

1. *R. v. Gould*, [1958] O.J. No. 408, 122 C.C.C. 253 (Ont. C.A.).

1959

1. *R. v. Doré* (1959), 30 C.R. 281, 125 C.C.C. 194 (Qc. C.A.).

1961

1. *R. v. Liscomb*, [1961] 36 W.W.R. 665, 131 C.C.C. 418 (Alta. C.A.).
2. *R. v. Lakatos* (1961), 35 C.R. 15, 129 C.C.C. 387 (B.C.C.A.).
3. *R. v. Easton*, [1961] Q.J. No. 16, 36 C.R. 392 (Qc. C.A.).

1963

1. *R. v. Grabinsky*, [1963] O.J. No. 313 (Ont. C.A.).
2. *Reference re Roberts*, [1963] 1 O.R. 280, [1963] 1 C.C.C. 27 (Ont. C.A.).
3. *R. c. Leclair*, [1963] J.Q. no 38, 43 C.R. 184 (Qc. BancReine), appeal dismissed, [1963] J.Q. no 38 (S.C.C.).

1964

1. *R. v. McMartin*, [1964] S.C.R. 484, [1965] 1 C.C.C. 142, (S.C.C.) reversing (1963), 43 W.W.R. 483, [1964] 1 C.C.C. 217 (B.C.C.A.).
2. *R. v. P.A.*, [1964] O.J. No. 232 (Ont. C.A.).
3. *R. v. Gaudet*, [1964] O.J. No. 138 (Ont. C.A.).

4. *R. v. McNamara*, [1964] 2 O.R. 310, [1964] 3 C.C.C. 32 (Ont. C.A.).

1965

1. *R. v. D.A.D.*, [1965] O.J. No. 222 (Ont. C.A.).
2. *R. v. Kosina*, [1965] O.J. No. 275 (Ont. C.A.).
3. *Marcotte v. The Queen*, [1965] S.C.R. 209, [1965] 3 C.C.C. 285 (S.C.C.).

1966

1. *R. v. Smith*, [1966] B.C.J. No. 59, [1966] 3 C.C.C. 391 (B.C.C.A.).

1967

1. *R. v. Truscott*, [1967] S.C.R. 309 (S.C.C.).

1968

1. *R. v. Black, R. v. Schmidt*, [1968] 65 W.W.R. 400, [1969] 2 C.C.C. 68 (B.C.C.A.).

1970

1. *R. v. Young*, [1970] 1 N.S.R. (2d) 725, [1970] 5 C.C.C. 142 (N.S.C.A.).
2. *R. v. McDonald*, [1970] 2 O.R. 114, [1970] 3 C.C.C. 426 (Ont. C.A.).

1972

1. *R. v. Stewart*, [1972] B.C.J. No. 649, 8 C.C.C. (2d) 137 (B.C.C.A.) leave to appeal refused [1972] S.C.J. No. 146, 8 C.C.C. (2d) 280 (S.C.C.).
2. *R. v. Lester*, [1972] 2 O.R. 330-338 (Ont. C.A.).
3. *R. v. Lockwood*, [1972] 1 O.R. 831-832 (Ont. C.A.).

1973

1. *R. v. Partridge* (1973), 5 Nfld. & P.E.I.R. 420, 15 C.C.C. (2d) 434 (P.E.I.C.A.).

1974

1. *R. v. Sode*, [1974] 10 N.S.R. (2d) 250, 22 C.C.C. (2d) 329 (N.S.C.A.).

1975

1. *R. v. Taylor*, [1975] 3 W.W.R. 485, 22 C.C.C. (2d) 321 (Alta. C.A.).
2. *R. v. Leonard*, [1975] O.J. No. 1084, (sub nom. *R. v. P.L.*) 29 C.C.C. (2d) 252, (Ont. C.A.).

1976

1. *R. v. Demeter*, [1976] 10 O.R. (2d) 321 (Ont. C.A.).

1977

1. *R. v. Foster*, [1977] A.J. No. 679, 2 W.C.B 85 (Alta. C.A.).
2. *R. v. F.G.*, [1977] M.J. No. 72 (Man. C.A.).
3. *R. v. Gorecki (No. 2)* (1977), 14 O.R. (2d) 218, 32 C.C.C. (2d) 135 (Ont. C.A.).
4. *R. v. Roberts*, [1977] O.J. No. 282, 34 C.C.C. (2d) 177 (Ont. C.A.).

1978

1. *R. v. O'Brien*, [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209 (S.C.C.).
2. *R. v. Rosa*, [1978] B.C.J. No. 1045, 6 C.R. (3d) 84 (B.C.C.A.).
3. *R. v. Adams*, [1978] N.S.J. No. 664, 30 N.S.R. (2d) 47 (N.S.S.C.A.D.).
4. *R. c. Gervais*, [1978] J.Q. no 181, 43 C.C.C. (2d) 533 (Qc. C.A.).

1979

1. *R. v. C. (C.)*, [1979] A.J. No. 140 (Alta. C.A.).
2. *R. v. Irwin*, [1979] 16 A.R. 566, 48 C.C.C. (2d) 423 (Alta. C.A.).
3. *R. v. Hogan* (1979), 34 N.S.R. (2d) 641, 50 C.C.C. (2d) 439 (N.S.C.A.).
4. *R. v. Moore and Parsons*, [1979] 35 N.S.R. (2d) 85, 62 A.P.R. 85 (N.S. C.A.).
5. *R. v. Mahoney* (1979), 11 C.R. (3d) 64, 50 C.C.C. (2d) 380 (Ont. C.A.) affirmed [1982] 1 S.C.R. 834, 67 C.C.C. (2d) 197 (S.C.C.).
6. *R. v Steinmiller*, [1979] O.J. No. 856, 47 C.C.C. (2d) 151 (Ont. C.A.).

1980

1. *R. v. Hardy*, [1980] B.C.J. No. 2436, 57 C.C.C. (2d) 73 (B.C.C.A.).
2. *R. v. Oda, R. v. Lawrence*, [1980] B.C.J. No. 480, 54 C.C.C. (2d) 466 (B.C.C.A.).
3. *Palmer v. R. and Palmer v. R.*, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193 (S.C.C.) same case *R. v. Duncan*, [1980] 1 S.C.R. 783 (S.C.C.).
4. *R. v. Ross*, [1980] B.C.J. No. 608, [1980] 5 W.W.R. 261 (B.C.C.A.), leave to appeal dismissed [1987] S.C.C.A. No. 6 (S.C.C.).
5. *R. v. Harper*, [1980] M.J. No. 104, 2 Man.R. (2d) 153 (1980) (Man. C.A.) reversed on other grounds [1980] 2 S.C.R. 366, 6 Man. R. (2d) 253 (S.C.C.).
6. *R. v. Godin*, [1980] N.B.J. No. 291, 32 N.B.R. (2d) 608 (N.B.C.A.).
7. *R. v. Olbey*, [1980] 1 S.C.R. 1008, 50 C.C.C. (2d) 257 (S.C.C.) affirming, [1977] O.J. No. 1199, 38 C.C.C. (2d) 390 (Ont. C.A.).
8. *R. v. Julien*, [1980] J.Q. no 223, 57 C.C.C. (2d) 462 (Qc. C.A.).

1981

1. *R. v. Winters*, [1981] 27 B.C.L.R. 385, 59 C.C.C. (2d) 454 (B.C.C.A.).
2. *R. v. Miller*, [1981] S.J. No. 1389, 59 C.C.C. (2d) 131 (Sask. C.A.).
3. *Protection de la jeunesse - 43*, [1981] J.Q. no 268 (Qc. C.A.).

1982

1. *R. v. Brown* (1982), 30 C.R. (3d) 1, [1982] 1 S.C.R. 859 (S.C.C.) reversing (1981), 23 C.R. (3d) 313, [1981] A.J. No. 107 (Alta. C.A.).
2. *R. v. Grdic*, [1982] 6 W.W.R. 184, 3 C.C.C. (3d) 379 (B.C.C.A.) reversed [1985] 1 S.C.R. 810, 19 C.C.C. (3d) 289 (S.C.C.).
3. *R. v. Johnson*, [1982] B.C.J. No. 1906, 68 C.C.C. (2d) 65 (B.C.C.A.).
4. *R. v. Walsh*, [1982] N.B.J. No. 372, 43 N.B.R. (2d) 145 (N.B.C.A.).
5. *R. v. Walsh*, [1982] N.B.J. No. 252, 41 N.B.R. (2d) 196 (N.B.C.A.).

6. *R. v. Clayton* (1982), 69 C.C.C. (2d) 81, (sub nom. *R. v. G.C.*) [1982] O.J. No. 490 (Ont. C.A.).
7. *R. v. Norona*, [1982] O.J. No. 71 leave to appeal refused [1984] S.C.C.A. No. 210 (S.C.C.).
8. *Cardinal v. Kent Institution*, [1982] B.C.J. No. 2301 (B.C.C.A.).

1983

1. *R. v. Penney*, [1983] N.J. No. 5, 40 Nfld. & P.E.I.R. 78 (Nfld. C.A.).
2. *R. v. Hennigar*, [1983] N.S.J. No. 424, 58 N.S.R. (2d) 110 (N.S.S.C.A.D.).
3. *R. v. Lindsay*, [1983] 57 N.S.R. (2d) 342, 6 C.R.R. 119 (N.S.C.A.) leave to appeal dismissed [1987] S.C.C.A. No. 109 (S.C.C.).
4. *R. v. Marshall*, [1983] N.S.J. No. 322, 57 N.S.R. (2d) 286 (N.S.C.A.).
5. *R. v. Shalley*, [1983] O.J. No. 168, (sub nom. *R. v. R.J.S.*), 2 O.A.C. 398 (Ont. C.A.).
6. *R. c. St-Laurent*, [1983] J.Q. no 9386 (Qc. C.A.).
7. *R. v. Hahn*, [1983] S.J. No. 309, 23 Sask. R. 105 (Sask. C.A.).

1984

1. *R. v. Amyotte* (1984), 58 A.R. 101 (Alta. C.A.).
2. *R. v. Boles* (1984), 57 A.R. 232, [1984] A.J. No. 945 (Alta. C.A.).
3. *R. v. Boross*, [1984] A.J. No. 2568, 12 C.C.C. (3d) 480 (Alta. C.A.).
4. *R. v. Gill*, [1984] A.J. No. 934, 56 A.R. 217 (Alta. C.A.).
5. *R. v. Nehring*, [1984] 3 W.W.R. 632, 30 Alta. L.R. (2d) 289 (Alta. C.A.) leave to appeal dismissed [1986] 2 S.C.R. 709, 31 C.C.C. (3d) 191 (S.C.C.).
6. *R. v. Hallett, Bonderud and Coutu*, [1984] M.J. No. 388, 28 Man. R. (2d) 241, (Man. C.A.).
7. *R. v. Petrovic*, [1984] 47 O.R. (2d) 97, 13 C.C.C. (3d) 416 (Ont. C.A.).
8. *R. v. Stephenson*, [1984] O.J. No. 88, 13 C.C.C. (3d) 112 (Ont. C.A.).

1985

1. *R. v. Smith*, [1985] 66 A.R. 195, 15 W.C.B. 367 (Alta. C.A.).
2. *R. v. Tsang*, [1985] B.C.J. No. 1762, 27 C.C.C. (3d) 365 (B.C.C.A.).
3. *R. v. Dunphy*, [1985] N.S.J. No. 423 (N.S.S.C.A.D.).
4. *R. v. Cave*, [1985] O.J. No. 176, 10 O.A.C. 94 (Ont. C.A.) leave to appeal refused, [1986] S.C.C.A. No. 23 (S.C.C.).
5. *R. v. Musitano et al.*, [1985] 53 O.R. (2d) 321 (Ont. C.A.).
6. *R. v. Yanover (No. 1)*, *R. v. Gerol*, [1985] O.J. No. 123, 20 C.C.C. (3d) 300 (Ont. C.A.).
7. *R. v. Burr*, *R. v. Burr*, [1985] S.J. No. 743, 43 Sask. R. 183 (Sask. CA.), leave to appeal dismissed, [1986] S.C.C.A. No. 75 (S.C.C.).
8. *R. v. St. Denis*, [1985] S.J. No. 448, 42 Sask. R. 261 (Sask. C.A.).

1986

1. *R. v. McIlvride*, [1986] B.C.J. No. 634, 29 C.C.C. (3d) 348 (B.C.C.A.).
2. *R. v. Downey*, [1986] N.S.J. No. 431, 76 N.S.R. (2d) 217 (N.S.C.A.).
3. *R. v. Keefe*, [1986] N.S.J. No. 178, 72 N.S.R. (2d) 252 (N.S.C.A.).

4. *R. v. D.R. L.*, [1986] 75 N.S.R. (2d) 373, (sub-nom *R. v. Leggett*) 186 A.P.R. 373 (N.S.C.A.).
5. *R. v. Cacciotti*, [1986] O.J. No. 2782 (Ont. C.A.).
6. *R. v. McGill*, [1986] O.J. No. 610, 15 O.A.C. 266 (Ont. C.A.).
7. *R. c. Bienvenu* (1986), 2 Q.A.C. 305, [1986] J.Q. no 1601 (Qc. C.A.).
8. *R. c. Letiecq*, [1986] J.Q. no 633 (Qc. C.A.).
9. *R. c. McGuire*, [1986] J.Q. no 1651, [1986] R.J.Q. 2720 (Qc. C.A.).
10. *R. c. Tremblay*, [1986] J.Q. no 2239, 7 Q.A.C. 131 (Qc. C.A.).
11. *R. v. Thatcher*, [1986] S.J. No. 19, 24 C.C.C. (3d) 449 (Sask. C.A.) affirmed [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481 (S.C.C.).
12. *R. v. Yuzik*, [1986] S.J. No. 7 (Sask. C.A.).

1987

1. *R. v. R.J.L.*, [1987] M.J. No. 187, 46 Man.R. (2d) 135 (Man. C.A.) leave to appeal dismissed on other grounds (sub nom. *R. v. Lang*) [1988] 1 S.C.R. 618, 52 Man.R. (2d) 80 (S.C.C.).
2. *R. v. McBain*, [1987] M.J. No. 222, (sub nom. *R. v. M. (L.F.)*) 46 Man.R. (2d) 297 (Man. C.A.).
3. *R. v. Babineau*, [1987] N.B.J. No. 1118, 84 N.B.R. (2d) 282 (N.B.C.A.).
4. *R. v. Diggs*, [1987] N.S.J. No. 143, (sub nom. *R. v. D.E.D.*), 77 N.S.R. (2d) 432 (N.S.C.A.).
5. *R. v. R.M.L.*, [1987] 77 N.S.R. (2d) 224 (sub-nom *R. v. Langille*), [1987] N.S.J. No. 87 (N.S.C.A.).
6. *R. v. MacDonald*, [1987] N.S.J. No. 433, (1987), 82 N.S.R. (2d) 38 (N.S.C.A.).
7. *R. v. Sunila*, [1987] N.S.J. No. 129, 35 C.C.C. (3d) 289 (N.S.S.C.A.D.).
8. *R. v. Tucker*, [1987] N.S.J. No. 72, 77 N.S.R. (2d) 78 (N.S.C.A.). See also *R. v. Tucker*, [1988] N.S.J. No. 33, 83 N.S.R. (2d) 6 (N.S.C.A.).
9. *R. v. Katsigiorgis* (1987), 62 O.R. (2d) 441, [1987] O.J. No. 937 (Ont. C.A.).
10. *R. v. Taubler*, [1987] O.J. No. 332, 20 O.A.C. 64 (Ont. C.A.).
11. *R. c. Drapeau*, *R. v. Fréchette* [1987] J.Q. no 659 (Qc. C.A.).
12. *R. c. Dufresne*, [1987] C.S.C.R. No 606 (S.C.C.) reversing [1988] R.J.Q. 38, 11 Q.A.C. 20 (Qc. C.A.).
13. *R. v. Roy* (sub nom. *R. c. Roy (No. 1)*), [1987] J.Q. no 1056, 11 Q.A.C. 207 (Qc. C.A.).
14. *R. v. Grohs*, [1987] S.J. No. 316, 59 Sask.R. 65 (Sask. C.A.).
15. *R. v. Lemaigre*, [1987] S.J. No. 78, 56 Sask. R. 300 (Sask. C.A.).

1988

1. *R. v. Simoneau*, [1988] A.J. No. 262, 84 A.R. 155 (Alta. C.A.).
2. *R. v. Downing*, [1988] B.C.J. No. 804 (B.C.C.A.).
3. *R. v. Marchant*, [1988] B.C.J. No. 1413 (B.C.C.A.).
4. *R. v. Wiggins*, [1988] B.C.J. No. 1027, 42 C.C.C. (3d) 303 (B.C.C.A.) affirmed [1990] 1 S.C.R. 62, 53 C.C.C. (3d) 476 (S.C.C.).
5. *R. v. Stolar*, [1988] 1 S.C.R. 480, 40 C.C.C. (3d) 1 (S.C.C.) reversing *R. v. Nielsen* (sub nom. *R. v. Stolar*) (1984), 30 Man. R. (2d) 81, 16 C.C.C. (3d) 39 (Man. C.A.).

6. *R. v. Gillespie & R. v. Mailman*, [1988] N.B.J. No. 115, 214 A.P.R. 439 (N.B.C.A.) leave to appeal dismissed [1992] S.C.C.A. No. 247, [1994] 1 S.C.R. vii (S.C.C.).
7. *R. v. Sheppard*, [1988] N.J. No. 116, 70 Nfld. & P.E.I.R. 275 (Nfld. C.A.).
8. *R. v. Balian, R. v. Gharakhanian*, [1988] O.J. No. 1692, 29 O.A.C. 387 (Ont. C.A.).
9. *R. v. Bookman* (1988), 28 O.A.C. 150 (Ont. C.A.).
10. *R. v. Caffrey*, [1988] O.J. No. 1609 (Ont. C.A.).
11. *R. v. Glassford*, [1988] O.J. No. 359, 42 C.C.C. (3d) 259 (Ont. C.A.).
12. *R. v. Goacolou*, [1988] O.J. No. 2304 (Ont. C.A.).
13. *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193 (S.C.C.) affirming 21 O.A.C. 38, 36 C.C.C. (3d) 50 (Ont. C.A.).
14. *R. v. Quach*, [1988] S.C.C.A. No. 254 (S.C.C.).
15. *R. c. D'Amours*, [1988] J.Q. no 8, 15 Q.A.C. 58 (C.A.Q.) appeal dismissed on other grounds, [1990] 1 S.C.R. 115 (S.C.C.).
16. *R. c. Lalancette*, [1988] J.Q. no 1013 (Qc. C.A.).
17. *R. v. Lafond, R. v. Fox* (1988), 66 Sask. R. 182, 5 W.C.B. (2d) 67 (Sask. C.A.).
18. *R. v. Sorenson*, [1988] S.J. No. 467, 67 Sask. R. 312 (Sask. C.A.).
19. *Webb v. Lower Mainland Regional Correctional Centre* (1988), 51 D.L.R. (4th) 726, 42 C.C.C. (3d) 267 (B.C.C.A.).

1989

1. *R. v. Bathgate*, [1989] 92 A.R. 157, 6 W.C.B. (2d) 246 (Alta. C.A.).
2. *R. v. Horsman*, [1989] A.J. No. 499, 95 A.R. 232 (Alta. C.A.) leave to appeal dismissed [1989] S.C.C.A. No. 433 (S.C.C.).
3. *R. v. Bailey*, [1989] B.C.J. No. 1690 (B.C.C.A.).
4. *R. v. Dhaliwal*, [1989] B.C.J. No. 540 (B.C.C.A.).
5. *R. v. Dhindsa*, [1989] B.C.J. No. 2194 (B.C.C.A.) leave to appeal refused, [1990] S.C.C.A. No. 27 (S.C.C.).
6. *R. v. Nenadic*, [1989] B.C.J. No. 2134 leave to appeal refused [1990] S.C.C.A. No. 24 (S.C.C.).
7. *R. v. MacKenzie*, [1989] M.J. No. 668 (Man. C.A.).
8. *R. v. Swan*, [1989] M.J. No. 516 (Man. C.A.).
9. *R. c. Syliboy*, [1989] N.B.J. No 1159, 51 C.C.C. (3d) 503 (N.B.C.A.).
10. *R. v. Cruickshanks*, [1989] N.S.J. No. 215, 7 W.C.B. (2d) (N.S.C.A.).
11. *R. v. D.J.K.*, [1989] N.S.J. No. 352 (N.S.S.C.A.D.).
12. *R. v. Mattie*, [1989] N.S.J. No. 139 (N.S.C.A.).
13. *R. v. McLellan*, [1989] N.S.J. No. 353 (N.S.S.C.A.D.).
14. *R. v. Roshanimeydan*, [1989] N.S.J. No. 363, 94 N.S.R. (2d) 70 (N.S.C.A.).
15. *R. v. C.E.S.*, [1989] N.S.J. No. 62, (sub nom. *R. v. Seymour*) 89 N.S.R. (2d) 114 (N.S.C.A.).
16. *R. v. Ashberry and R. v. Mills*, [1989] O.J. No. 101, 47 C.C.C. (3d) 1 (Ont. C.A.) leave to appeal dismissed [1989] S.C.C.A. No. 136 (S.C.C.).
17. *R. v. Buxbaum*, [1989] O.J. No. 539, 33 O.A.C. 1 (Ont. C.A.) leave to appeal dismissed [1989] S.C.C.A. No. 239 (S.C.C.).
18. *R. v. R.C.*, [1989] O.J. No. 115, 47 C.C.C. (3d) 84 (Ont. C.A.).

19. *R. v. Gardner*, [1989] O.J. No. 2328 (sub nom. *R. v. G. (J.M.)*) (Ont. C.A.).
20. *R. v. Krolyk*, [1989] O.J. No. 1128 (Ont. C.A.).
21. *R. v. Lauzon*, [1989] O.J. No. 1678 (Ont. C.A.).
22. *R. c. Larue*, [1989] J.Q. no 1053, 29 Q.A.C. 157 (Qc. C.A.).
23. *R. c. Mancuso*, [1989] 35 Q.A.C. 118, 51 C.C.C. (3d) 380 (Qc. C.A.) leave to appeal refused [1990] C.S.C.R. No 178 (S.C.C.).
24. *R. v. McLeod*, [1989] O.J. No. 1729, 51 C.C.C. (3d) 257 (Ont. C.A.).
20. *R. v. Robinson*, [1989] S.C.C.A. No. 99 (S.C.C.).
25. *R. v. Shafie*, [1989] O.J. No. 102, 47 C.C.C. (3d) 27 (Ont. C.A.).
26. *R. v. Walkes*, [1989] O.J. No. 844, 34 O.A.C. 313 (Ont. C.A.).
27. *R. c. Richard*, [1989] J.Q. no 230, [1989] R.L. 30 (Qc. C.A.).
28. *R. v. Roy* (sub nom. *R. c. Roy (No. 2)*), [1989] J.Q. no 1876, 73 C.R. (3d) 291 (Qc. C.A.).
29. *R. c. Vaudry*, [1989] J.Q. no 1624, 51 C.C.C. (3d) 410 (Qc. C.A.).
30. *R. v. Goulet*, [1989] S.J. No. 553, (1989), 80 Sask. R. 158, (sub nom. *R v. G (AE)*), 8 W.C.B. (2d) 737 (Sask. C.A.).
31. *R. v. Morrell, R. v. Smith, R. v. Hampton*, [1989] S.J. No. 37, 74 Sask.R. 126 (Sask. C.A.).
32. *R. v. Nilghe*, [1989] S.J. No. 78, 74 Sask. R. 158 (Sask. C.A.).
33. *R. v. Osiowy, R. v. Osiowy*, [1989] S.J. No. 547, 52 C.C.C. (3d) 500 (Sask. C.A.).
34. *United States of America v. Peltier*, [1989] S.C.C.A. No. 207 (S.C.C.).

1990

1. *R. v. Bullis (R. v. McDonald and R. v. Coles)*, [1990] B.C.J. No. 1697, 57 C.C.C. (3d) 438 (B.C.C.A.).
2. *R. v. Canute*, [1990] B.C.J. No. 1274, 57 C.C.C. (3d) 58 (B.C.C.A.).
3. *R. v. Charna*, [1990] B.C.J. No. 2378 (B.C.C.A.).
4. *R. v. Cheung*, [1990] 56 C.C.C. (3d) 381, 10 W.C.B. (2d) 149 (B.C.C.A.).
5. *R. v. Hodgson*, [1990] B.C.J. No. 1471, 57 C.C.C. (3d) 278 (B.C.C.A.).
6. *R. v. Davy*, [1990] M.J. No. 571, 71 Man.R. (2d) 166 (Man. C.A.).
7. *R. v. Callahan*, [1990] N.J. No. 191, 83 Nfld. & P.E.I.R. 192 (Nfld. C.A.).
8. *R. v. Fletcher*, [1990] N.S.J. No. 254, 99 N.S.R. (2d) 258 (N.S.S.C.A.D.).
9. *R. v. S.D.B.*, [1990] O.J. No. 2185 (Ont. C.A.).
10. *R. v. Chase*, [1990] 38 O.A.C. 172, 56 C.C.C. (3d) 521 (Ont. C.A.).
11. *R. v. Clement*, [1990] 41 O.A.C. 313, 11 W.C.B. (2d) 213, (Ont. C.A.) leave to appeal refused, [1991] S.C.C.A. No. 2 (S.C.C.).
12. *R. v. Collins*, [1990] O.J. No. 2816 (Ont. C.A.).
13. *R. v. Cullen*, [1990] O.J. No. 1917 (Ont. C.A.).
14. *R. v. Francisco*, [1990] O.J. No. 190 (Ont. C.A.).
15. *R. v. Kozy*, [1990] O.J. No. 954 (Ont. C.A.).
16. *R. v. M. (M.)*, [1990] S.C.C.A. No. 161 (S.C.C.).
17. *R. v. McTaggart*, [1990] O.J. No. 467 (Ont. C.A.).
18. *R. v. Seeklus*, [1990] O.J. No. 711 (Ont. C.A.).
19. *R. v. Zigelstein*, [1990] O.J. No. 1552 (Ont. C.A.).
20. *R. c. Butcher*, [1990] J.Q. no 2085 (Qc. C.A.).

21. *R. c. C. (G.)*, [1990] J.Q. no 1666 (Qc. C.A.).
22. *R. c. Cisternas*, [1990] J.Q. no 1894 (Qc. C.A.).
23. *R. c. Cordonero*, [1990] J.Q. no 1895 (Qc. C.A.).
24. *R. c. Henry*, [1990] J.Q. no 1629, 61 C.C.C. (3d) 455 (Qc. C.A.).
25. *R. c. Martinez*, [1990] J.Q. no 1896 (Qc. C.A.).
26. *R. c. St-Laurent*, [1990] J.Q. no 304, 57 C.C.C. (3d) 564 (Qc. C.A.).
27. *R. c. Tremblay*, [1990] J.Q. no 1438 (Qc. C.A.) appeal dismissed [1990] C.S.C.R. No 455 (S.C.C.).
28. *R. c. Valiquette*, [1990] J.Q. no 1070, 60 C.C.C. (3d) 325 (Qc. C.A.).
29. *R. v. D.G.H.*, [1990] S.J. No. 623, 88 Sask.R. 115 (Sask. C.A.).
30. *R. v. G.H.*, [1990] S.J. No. 624, 88 Sask. R. 123 (Sask. C.A.).
31. *Le Petit Cafe Ltd. v. Cheung*, [1990] O.J. No. 1224 (Ont. C.A.).

1991

1. *R. v. Bruneau*, [1991] 115 A.R. 346, 12 W.C.B. (2d) 385 (Alta. C.A.).
2. *R. v. Emmanouel*, [1991] A.J. No. 215 (Alta. C.A.) leave to appeal refused [1991] S.C.C.A. No. 171 (S.C.C.).
3. *R. v. Horne*, [1991] 117 A.R. 24, 2 W.A.C. 24 (Alta. C.A.).
4. *R. v. Leaney, R. v. Rawlinson*, [1991] 82 Alta. L.R. (2d) 63, 117 A.R. 202 (Alta. C.A.) reversed on other grounds [1989] 2 S.C.R. 393, 50 C.C.C. (3d) 289 (S.C.C.).
5. *R. v. Pelletier*, [1991] A.J. No. 892, 117 A.R. 211 (Alta. C.A.).
6. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 (S.C.C.).
7. *R. v. Stonechild*, [1991] A.J. No. 649, 120 A.R. 127 (Alta. C.A.).
8. *R. v. Buick*, [1991] 1 B.C.A.C. 30, 1 W.A.C. 30 (B.C.C.A.).
9. *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, 63 C.C.C. (3d) 385 (S.C.C.) reversing (1988) 46 C.C.C. (3d) 142, 6 W.C.B. (2d) 300 (B.C.C.A.).
10. *R. v. N.C.*, [1991] 5 B.C.A.C. 285, 70 C.C.C. (3d) 350 (B.C.C.A.) leave to appeal refused (sub nom. *R. v. Chand*), [1992] S.C.C.A. No. 40, 71 C.C.C. (3d) vii (S.C.C.).
11. *R. v. Ealey*, [1991] B.C.J. No. 3226 (B.C.C.A.).
12. *R. v. Hammerbeck*, [1991] 2 B.C.A.C. 123, 68 C.C.C. (3d) 161 (B.C.C.A.).
13. *R. v. Hedstrom*, [1991] B.C.J. No. 414, 63 C.C.C. (3d) 261 (B.C.C.A.).
14. *R. v. Howard*, [1991] 8 B.C.A.C. 241, 17 W.A.C. 241 (B.C.C.A.). See related fresh evidence application *R. v. Howard*, [1991] B.C.J. No. 4036 (B.C.C.A.).
15. *R. v. Pelletier*, [1991] B.C.J. No. 165 (B.C.C.A.) leave to appeal refused [1991] S.C.C.A. No. 380 (S.C.C.).
16. *R. v. White*, [1991] N.B.J. No. 428, 115 N.B.R. (2d) 369 (N.B.C.A.).
17. *R. v. B.C.*, [1991] N.J. No. 231, 93 Nfld. & P.E.I.R. 324 (Nfld. C.A.).
18. *R. v. Boudreau*, [1991] N.S.J. No. 276, (sub nom. *R. v. P.W.B.*) 105 N.S.R. (2d) 15 (N.S.C.A.).
19. *R. v. J.A.M.*, (sub nom. *R. v. Matheson*), [1991] N.S.J. No. 85 (N.S.S.C.A.D.).
20. *R. v. Nickerson*, [1991] N.S.J. No. 238 (N.S.S.C.A.D.).
21. *R. v. Nixon*, [1991] N.S.J. No. 298, 104 N.S.R. (2d) 178 (N.S.S.C.A.D.).
22. *R. v. Baker*, [1991] O.J. No. 2740 (Ont. C.A.).
23. *R. v. Buyukaksoy*, [1991] O.J. No. 2882 (Ont. C.A.).

24. *R. v. Chivers*, [1991] O.J. No. 913, 46 O.A.C. 172 (Ont. C.A.).
25. *R. v. D'Abreau*, [1991] O.J. No. 3081 (Ont. C.A.).
26. *R. v. Douglas*, [1991] 71 O.A.C. 74, 5 O.R. (3d) 29 (Ont. C.A.) leave to appeal refused [1992] S.C.C.A. No. 68 (S.C.C.).
27. *R. v. Duncan*, [1991] O.J. No. 3270 (Ont. C.A.).
28. *R. v. Feijo*, [1991] O.J. No. 3054 (Ont. C.A.).
29. *R. v. K.R.G.*, [1991] O.J. No. 1858, 68 C.C.C. (3d) 268 (Ont. C.A.).
30. *R. v. Gesualdo*, [1991] O.J. No. 3066 (Ont. C.A.).
31. *R. v. Giovannetti*, [1991] O.J. No. 47 (Ont. C.A.).
32. *R. v. Ingraham*, [1991] O.J. No. 956, 66 C.C.C. (3d) 27 (Ont. C.A.).
33. *R. v. Kraftchick*, [1991] O.J. No. 452, 44 O.A.C. 313 (Ont. C.A.).
34. *R. v. Michael Motors*, [1991] O.J. No. 2924 (Ont. C.A.).
35. *R. v. Min*, [1991] O.J. No. 2814 (Ont. C.A.).
36. *R. v. Nuosci* (1991), 6 O.R. (3d) 316, 69 C.C.C. (3d) 64 (Ont. C.A.).
37. *R. v. Orrico*, [1991] O.J. No. 1971 (Ont. C.A.).
38. *R. v. Papaioannou*, [1991] O.J. No. 2934 (Ont. C.A.).
39. *R. v. Paton*, [1991] O.J. No. 2796 (Ont. C.A.).
40. *R. v. R.R.*, [1991] O.J. No. 2762 (Ont. C.A.).
41. *R. v. Ratti*, [1991] 1 S.C.R. 68, 62 C.C.C. (3d) 105 (S.C.C.).
42. *R. v. Reckzin*, [1991] O.J. No. 3281 (Ont. C.A.).
43. *R. v. G.S.*, [1991] O.J. No. 1731, 5 O.R. (3d) 97 (Ont. C.A.) leave to appeal to S.C.C. refused [1991] S.C.C.A. No. 494 (S.C.C.).
44. *R. v. S.W.*, [1991] O.J. No. 1081 (Ont. C.A.).
45. *R. v. O'Halloran*, [1991] P.E.I.J. No. 64, 97 Nfld. & P.E.I.R. 12 (P.E.I.C.A.).
46. *R. c. Comeau*, [1991] J.Q. no 2308, [1992] R.J.Q. 339 (Qc. C.A.), affirmé par [1992] 3 R.C.S. 473 (C.S.C.).
47. *R. c. Fengstad*, [1991] J.Q. no 1265, 40 Q.A.C. 224 (Qc. C.A.).
48. *R. v. J.H.*, [1991] J.Q. no 1817 (Qc. C.A.).
49. *R. c. Laliberté*, [1991] J.Q. no 1839 (Qc. C.A.).
50. *R. c. Parant*, [1991] J.Q. no 1606, 41 Q.A.C. 115 (Qc. C.A.).
51. *Perreault c. R.*, [1991] J.Q. no 2615 (Qc. C.A.).
52. *R. c. Perron*, [1991] J.Q. no 2254, 44 Q.A.C. 10 (Qc. C.A.), voir aussi requete de preuve nouvelle, *R. c. Perron*, [1990] J.Q. no 1898 (Qc. C.A.).
53. *R. c. Plamondon*, [1991] J.Q. no 479, 65 C.C.C. (3d) 402 (Qc. C.A.).
54. *R. c. Steele*, [1991] J.Q. no 240, 63 C.C.C. (3d) 149 (Qc. C.A.).
55. *R. c. Savard*, [1991] J.Q. no 1632 (Qc. C.A.).
56. *R. c. Savard*, [1991] J.Q. no 1635 (Qc. C.A.).
57. *R. c. Sinju*, [1991] J.Q. no 1672 (Qc. C.A.).
58. *R. c. Tenorio*, [1991] J.Q. no 670, 66 C.C.C. (3d) 429 (Qc. C.A.), requête en autorisation de pourvoi rejetée, [1991] C.S.C.R. No 279 (C.S.C.).
59. *R. v. Bilusack*, [1991] S.J. No. 43, 90 Sask.R. 114 (Sask. C.A.).
60. *Fullerton v. Matsqui (District)* (1991), 6 B.C.A.C. 119, 62 B.C.L.R. (2d) 273 (B.C. C.A.).
61. *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1 (S.C.C.).
62. *Scott. v. Yukon Territory (Commissioner)*, [1991] Y.J. No. 159 (Y.T.C.A.).

1992

1. *R. v. Brasnett*, [1992] A.J. No. 1022 (Alta. C.A.).
2. *R. v. Nepoose*, [1992] 125 A.R. 28, 71 C.C.C. (3d) 419 (Alta. C.A.).
3. *R. v. Price*, [1992] A.J. No. 429, 131 A.R. 54 (Alta. C.A.) affirmed [1993] 3 S.C.R. 633, 145 A.R. 231 (S.C.C.).
4. *R. v. Vaughan* (1992), 135 A.R. 144, [1992] A.J. No. 1104 (Alta. C.A.).
5. *R. v. Archibald*, [1992] 15 B.C.A.C. 301, 16 W.C.B. (2d) 522 (B.C.C.A.).
6. *R. v. Burns*, [1992] 15 B.C.A.C. 264, 74 C.C.C. (3d) 124 (B.C.C.A.) reversed on other grounds [1994] S.C.J. No. 30, 89 C.C.C. (3d) 193 (S.C.C.).
7. *R. v. J.D.G.*, [1992] 10 B.C.A.C. 38, B.C.J. No. 2904 (B.C.C.A.).
8. *R. v. Gatley*, [1992] 15 B.C.A.C. 162, 74 C.C.C. (3d) 468 (B.C.C.A.). See related fresh evidence procedural motion *R. v. Gatley*, 15 B.C.A.C. 161, [1992] B.C.J. No. 894 (B.C.C.A.).
9. *R. v. Herman*, [1992] B.C.J. No. 318, 8 B.C.A.C. 317 (B.C.C.A.).
10. *R. v. M.R.I.*, [1992] B.C.J. No. 1305, 14 B.C.A.C. 65 (B.C.C.A.).
11. *R. v. Johnson*, [1992] 13 B.C.A.C. 81, 16 W.C.B. (2d) 257 (B.C.C.A.).
12. *R. v. MacKay*, [1992] B.C.J. No. 1941, 17 B.C.A.C. 100 (B.C.C.A.).
13. *R. v. Parent*, [1992] 12 B.C.A.C. 125, 15 W.C.B. (2d) 643 (B.C.C.A.).
14. *R. v. Roy* (sub nom. *R. c. Roy (No. 1)*), [1992] B.C.J. No. 368, 11 B.C.A.C. 57 (B.C.C.A.).
15. *R. v. Trieu*, [1992] B.C.J. No. 540, 9 B.C.A.C. 220 (B.C.C.A.).
16. *R. v. Ubhi*, [1992] B.C.J. No. 2895, 17 B.C.A.C. 84 (B.C.C.A.). See also *R. v. Ubhi* (sub nom. *R. v. Ubhi (No. 3)*), [1994] B.C.J. No. 255, 40 B.C.A.C. 248 (B.C.C.A.) leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 155, 5 M.V.R. (3d) 249 (S.C.C.) and subsequently, *R. v. Ubhi* (sub nom. *R. v. Ubhi (No. 2)*), [1996] B.C.J. No. 1416, 109 C.C.C. (3d) 379 (B.C.C.A.).
17. *R. v. Copping*, [1992] M.J. No. 319 (Man. C.A.).
18. *R. v. Kozak*, [1992] M.J. No. 630 (Man. C.A.).
19. *R. v. Alegria*, [1992] N.J. No. 94, 96 Nfld. & P.E.I.R. 128 (Nfld. C.A.) leave to appeal dismissed [1992] S.C.C.A. No. 225 (S.C.C.).
20. *R. v. T.G.L.*, [1992] N.S.J. No. 507, 118 N.S.R. (2d) 428 (N.S.S.C.A.D.).
21. *R. v. M.L.M.*, [1992] N.S.J. No. 523, 78 C.C.C. (3d) 318 (N.S.S.C.A.D.) reversed by [1994] 2 S.C.R. 3, 89 C.C.C. (3d) 96 (S.C.C.).
22. *R. v. Sarson*, [1992] N.S.J. No. 394, 77 C.C.C. (3d) 233 (N.S.S.C.A.D.).
23. *R. v. Tully*, [1992] N.S.J. No. 30, 109 N.S.R. (2d) 53 (N.S.S.C.A.D.).
24. *R. v. T.C.*, [1992] O.J. No. 3471 (Ont. C.A.).
25. *R. v. Duodo*, [1992] O.J. No. 673 (Ont. C.A.) leave to appeal dismissed [1992] S.C.C.A. No. 279 (S.C.C.).
26. *R. v. S.F.*, [1992] O.J. No. 778 (Ont. C.A.).
27. *R. v. Gauthier*, [1992] O.J. No. 3391 (Ont. C.A.).
28. *R. v. Ghrairi*, [1992] O.J. No. 1348 (Ont. C.A.).
29. *R. v. Hartman*, [1992] O.J. No. 3524 (Ont. C.A.).
30. *R. v. C.J.*, [1992] O.J. No. 3503 (Ont. C.A.).
31. *R. v. Liscombe*, [1992] O.J. No. 3219 (Ont. C.A.).
32. *R. v. P.S.M.*, (sub nom. *R. v. M.*), [1992] O.J. No. 2410, 77 C.C.C. (3d) 402 (Ont. C.A.).

33. *R. v. McGuire*, [1992] O.J. No. 1026 (Ont. C.A.) leave to appeal refused [1993] S.C.C.A. No. 329, 65 O.A.C. 320 (note) (S.C.C.).
34. *R. v. J.P.*, [1992] O.J. No. 3549 (Ont. C.A.).
35. *R. v. P. (P.)*, [1992] O.J. 1799 (Ont. C.A.).
36. *R. v. Privitera*, [1992] O.J. No. 3439 (Ont. C.A.).
37. *R. v. Pugliese*, [1992] 8 O.R. (3d) 259, [1992] O.J. No. 450 (Ont. C.A.).
38. *R. v. Rhyno*, [1992] O.J. No. 3277 (Ont. C.A.).
39. *R. v. Rider*, [1992] O.J. No. 356 (Ont. C.A.).
40. *R. v. Ryan*, [1992] O.J. No. 315, 12 C.R. (4th) 173 (Ont. C.A.).
41. *R. v. Sagon*, [1992] O.J. No. 863 (Ont. C.A.).
42. *R. v. Sharma*, [1992] 1 S.C.R. 814, 71 C.C.C (3d) 184 (S.C.C.).
43. *R. v. Singh*, [1992] O.J. No. 219 (Ont. C.A.).
44. *R. v. Stewart*, [1992] O.J. No. 263 (Ont. C.A.).
45. *R. v. K.T.*, [1992] O.J. No. 427 (Ont. C.A.).
46. *R. v. Town*, [1992] O.J. No. 475 (Ont. C.A.).
47. *R. v. Young*, [1992] O.J. No. 1317, 73 C.C.C. (3d) 289 (Ont. C.A.) leave to appeal dismissed [1992] S.C.C.A. No. 474 (S.C.C.).
48. *R. v. Zubi*, [1992] O.J. No. 159 (Ont. C.A.).
49. *R. c. Bouchard*, [1992] J.Q. no 1698, [1993] R.L. 480 (Qc. C.A.).
50. *R. c. A.C.*, [1992] J.Q. no 438, 71 C.C.C. (3d) 529 (Qc. C.A.), requête en autorisation de pourvoi rejetée, (sub nom. *R. c. Caron*), [1992] C.S.C.R. No 215 (C.S.C.).
51. *R. c. Fillion*, [1992] J.Q. no 669, 75 C.C.C. (3d) 83 (Qc. C.A.).
52. *R. c. Kirby*, [1992] J.Q. no 618, 47 Q.A.C. 292 (Qc. C.A.).
53. *R. c. Pelletier*, [1992] J.Q. no 81 (Qc. C.A.), requête en autorisation de pourvoi rejetée, [1992] C.S.C.R. No 140 (C.S.C.).
54. *R. c. Villeneuve*, [1992] J.Q. no 1672, 77 C.C.C. (3d) 171 (Qc. C.A.).
55. *R. v. B. (E.J.)*, [1992] S.J. No. 546, 76 C.C.C. (3d) 530 (Sask. C.A.).
56. *R. v. A.V.P.*, [1992] S.J. No. 478, 105 Sask.R. 95 (Sask. C.A.).
57. *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866, 71 C.C.C. (3d) 260 (S.C.C.) reversing [1971] 2 W.W.R. 266, 2 C.C.C. (2d) 206 (Sask. C.A.) leave to appeal refused (1971), 4 C.C.C. (2d) 566(note) (S.C.C.).
58. *R. v. St. Jean*, [1992] S.J. No. 552, 105 Sask.R. 305 (Sask. C.A.) leave to appeal to S.C.C. refused, [1992] S.C.C.A. No. 589 (S.C.C.).
59. *United States of America v. Berlady*, [1992] B.C.J. No. 1290, 14 B.C.A.C. 302 (B.C.C.A.) leave to appeal dismissed [1992] S.C.C.A. No. 328 (S.C.C.).
60. *États-Unis d'Amérique c. Chouinard*, [1992] J.Q. no 1842, 51 Q.A.C. 26 leave to appeal dismissed [1992] C.S.C.R. No 570 (S.C.C.).

1993

1. *R. v. B. (R.V.)*, [1993] 145 A.R. 218, 55 W.A.C. 218 (Alta. C.A.).
2. *R. v. Cobham*, [1993] 135 A.R. 249, 80 C.C.C. (3d) 449 (Alta. C.A.) reversed on other grounds [1994] 3 S.C.R. 360, 92 C.C.C. (3d) 333 (S.C.C.).
3. *R. v. Dodds*, [1993] 141 A.R. 256, 20 W.C.B. (2d) 329 (Alta. C.A.).
4. *R. v. Ferguson*, [1993] A.J. No. 980 (Alta. C.A.).
5. *R. v. Horne*, [1993] A.J. No. 643, 145 A.R. 51 (Alta. C.A.).

6. *R. v. T.C.C.*, [1993] B.C.J. No. 191 (B.C.C.A.).
7. *R. v. Deneault*, [1993] B.C.J. No. 192 (B.C.C.A.).
8. *R. v. Engerdahl*, [1993] 54 W.A.C. 317; 33 B.C.A.C. 317 (B.C. C.A.) leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 34 (S.C.C.).
9. *R. v. Flesh*, [1993] 23 B.C.A.C. 194, 18 W.C.B. (2d) 495 (B.C.C.A.).
10. *R. v. Gillese*, [1993] 27 B.C.A.C. 69, 19 W.C.B. (2d) 510 (B.C.C.A.).
11. *R. v. P.H.*, [1993] B.C.J. No. 1436, (sub nom. *R. v. Halcrow*) 28 B.C.A.C. 297 (B.C.C.A.).
12. *R. v. Huenemann*, [1993] B.C.J. No. 2576, 38 B.C.A.C. 20 (B.C.C.A.).
13. *R. v. Kamil*, [1993] B.C.J. No. 3142, 35 B.C.A.C. 140 (B.C.C.A.).
14. *R. v. Khan*, [1993] B.C.J. No. 1347, 28 B.C.A.C. 1 (B.C.C.A.).
15. *R. v. McFarlane*, [1993] B.C.J. No. 1788, 34 B.C.A.C. 158 (B.C.C.A.).
16. *R. v. Novak*, [1993] 28 B.C.A.C. 276, 20 W.C.B. (2d) 133 (B.C.C.A.).
17. *R. v. Olson*, [1993] B.C.J. No. 1344, 28 B.C.A.C. 288 (B.C.C.A.).
18. *R. v. Parr*, [1993] B.C.J. No. 2918, 50 M.V.R. (2d) 47 (B.C.C.A.). See related case [1993] B.C.J. No. 2749, 36 B.C.A.C. 198 (B.C.C.A.).
19. *R. v. Stewart*, [1993] B.C.J. No. 210 (B.C.C.A.).
20. *R. v. Stolz* (sub nom. *R v. Stoltz (No. 2)*), [1993] 32 B.C.A.C. 147, 84 C.C.C. (3d) 422 (B.C.C.A.) affirming [1993] B.C.J. No. 1601, 31 B.C.A.C. 89 (B.C.C.A.).
21. *R. v. T.J.C.*, [1993] 88 Man.R. (2d) 183, 86 C.C.C. (3d) 181 (Man. C.A.).
22. *R. v. Sowa*, [1993] M.J. No.418, 88 Man. R. (2d) 62 (Man. C.A.).
23. *R. v. W.M.*, [1993] N.J. No. 38 (Nfld. C.A.).
24. *R. v. Grenkow*, [1993] N.S.J. No. 396, 125 N.S.R. (2d) 178 (N.S.C.A.).
25. *R. v. Jacquard*, [1993] N.S.J. No. 265, 123 N.S.R. (2d) 177 (N.S.C.A.).
26. *R. v. Nickerson*, [1993] N.S.J. No. 188, 81 C.C.C. (3d) 398 (N.S.C.A.).
27. *R. v. Oickle*, [1993] N.S.J. No. 35 (N.S.S.C.A.D.).
28. *R. v. Ross*, [1993] N.S.J. No. 171, 81 C.C.C. (3d) 234 (N.S.C.A.) leave to appeal to S.C.C. refused (sub nom. *R. v. K.A.R.*, [1993] 3 S.C.R. viii, 83 C.C.C. (3d) vi (S.C.C.). See also *R. v. Ross*, [1993] N.S.J. No. 18, 79 C.C.C. (3d) 253 (N.S.C.A.).
29. *R. v. Ward*, [1993] N.S.J. No. 119, 121 N.S.R. (2d) 172 (N.S.C.A.).
30. *R. v. Anderson*, [1993] O.J. No. 3930 (Ont. C.A.).
31. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, [1993] S.C.J. No. 22 (S.C.C.) reversing (1991), 49 O.A.C. 30 (Ont. C.A.).
32. *R. v. Beckwith*, [1993] O.J. No. 2218 (Ont. C.A.).
33. *R. v. DeFreitas*, [1993] O.J. No. 3538 (Ont. C.A.).
34. *R. v. Fournier*, [1993] O.J. No. 3817 (Ont. C.A.).
35. *R. v. K.G.*, [1993] O.J. No. 1752, 83 C.C.C. (3d) 140 (Ont. C.A.).
36. *R. v. Gallagher*, [1993] 2 S.C.R. 861, 83 C.C.C. (3d) 122 (S.C.C.) leave to appeal refused [1992] O.J. No. 3566 (Ont. C.A.).
37. *R. v. General*, [1993] O.J. No. 3672 (Ont. C.A.).
38. *R. v. Graaskamp*, [1993] O.J. No. 4068 (Ont. C.A.).
39. *R. v. Hibbert*, [1993] O.J. No. 3796 (Ont. C.A.).
40. *R. v. Hibbert*, [1993] O.J. No. 3796 (Ont. C.A.) reversed [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193 (S.C.C.).

41. *R. v. Hutchinson*, [1993] O.J. No. 820, 62 O.A.C. 381 (Ont. C.A.).
42. *R. v. King*, [1993] S.C.C.A. No. 236 (S.C.C.).
43. *R. v. Lobello*, [1993] O.J. No. 1001 (Ont. C.A.).
44. *R. v. Mangat*, [1993] O.J. No. 3881 (Ont. C.A.).
45. *R. v. McAnespie*, [1993] 4 S.C.R. 501, 86 C.C.C. (3d) 191 (S.C.C.) reversing (1993), 64 O.A.C. 70, 82 C.C.C. (3d) 527 (Ont. C.A.).
46. *R. v. Myers*, [1993] 1 S.C.R. 893, 71 O.A.C. 73 (S.C.C.) reversing (sub nom. *R. v. Douglas*) [1991] 5 O.R. (3d) 29, 71 O.A.C. 74 (Ont. C.A.).
47. *R. v. G.J.P.*, [1993] O.J. No. 3813 (Ont. C.A.).
48. *R. v. Piccinato*, [1993] O.J. No. 3926 (Ont. C.A.).
49. *R. v. Skelton*, [1993] O.J. No. 3974 (Ont. C.A.).
50. *R. v. Stocking*, [1993] O.J. No. 3941 (Ont. C.A.).
51. *R. v. Snyder*, [1993] O.J. No. 3785 (Ont. C.A.).
52. *R. v. Thompson*, [1993] O.J. No. 3764 (Ont. C.A.).
53. *R. v. J.V.*, [1993] O.J. No. 299, (sub nom. *R. v. Van Ekeren*) 60 O.A.C. 385 (Ont. C.A.).
54. *R. v. Verney*, [1993] O.J. No. 2632, 87 C.C.C. (3d) 363 (Ont. C.A.).
55. *R. v. Walters*, [1993] O.J. No. 3472 (Ont. C.A.).
56. *R. v. Wilson*, [1993] O.J. No. 3863 (Ont. C.A.).
57. *R. c. Bordeleau*, [1993] J.Q. no 2049 (Qc. C.A.).
58. *R. c. Carrier*, [1993] J.Q. no 1619, 58 Q.A.C. 263 a 264 (Qc. C.A.).
59. *R. v. H.W.C.*, [1993] S.J. No. 370, 113 Sask. R. 73 (Sask. C.A.).
60. *Davidson v. British Columbia (Attorney General)*, [1993] B.C.J. No. 2214 (B.C.C.A.).
61. *J.P.G. v. British Columbia (Superintendent of Family and Child Services)*, [1993] B.C.J. No. 560 (B.C.C.A.).
62. *United States of America v. Desfossés*, [1993] S.C.C.A. No. 247 (S.C.C.).
63. *United States of America v. Desfossés*, [1993] J.Q. no 476 (Qc. C.A.).

1994

1. *R. v. Dugan*, [1994] 149 A.R. 146, 22 W.C.B. (2d) 314 (Alta. C.A.).
2. *R. v. Fraser*, [1994] A.J. No. 1040, 162 A.R. 170 (Alta. C.A.).
3. *R. v. Plourde*, [1994] A.J. No. 178 (Alta. C.A.).
4. *R. v. Robinson*, [1994] A.J. No. 503, 155 A.R. 70 (Alta. C.A.).
5. *R. v. Sobotiak*, [1994] 155 A.R. 16, 23 W.C.B. (2d) 580 (Alta. C.A.) leave to appeal refused [2003] S.C.C.A. No. 295 (S.C.C.).
6. *R. v. Feldman*, [1994] 42 B.C.A.C. 31, 91 C.C.C. (3d) 256 (B.C.C.A.) appeal dismissed [1994] 3 S.C.R. 832, 93 C.C.C. (3d) 575 (S.C.C.).
7. *R. v. Fengstad*, [1994] 40 B.C.A.C. 39, 27 C.R. (4th) 383 (B.C.C.A.).
8. *R. v. Fournier*, [1994] 48 B.C.A.C. 216, (sub nom. *R. v. F. (B.N.)*), [1994] B.C.J. No. 1630 (B.C.C.A.).
9. *R. v. Gauthier*, [1994] 42 B.C.A.C. 239, 67 W.A.C. 239 (B.C.C.A.).
10. *R. v. Gill*, [1994] 45 B.C.A.C. 150, 24 W.C.B. (2d) 107 (B.C.C.A.).
11. *R. v. S.E.H.*, [1994] 54 B.C.A.C. 9, 25 W.C.B. (2d) 574 (B.C.C.A.).
12. *R. v. Herman* (1994), 39 B.C.A.C. 241, 64 W.A.C. 241 (B.C. C.A.) affirmed (sub nom. *R. v. L.M.H.*, [1994] 3 S.C.R. 758, 175 N.R. 323 (S.C.C.)).

13. *R. v. Iachetta*, [1994] B.C.J. No. 423, 40 B.C.A.C. 214 (B.C.C.A.) see related case *R. v. Iachetta*, [1994] B.C.J. No. 289 (B.C.C.A.).
14. *R. v. D.R.J.*, [1994] B.C.J. No. 307, 22 W.C.B. (2d) 533 (B.C.C.A.).
15. *R. v. Kanaly*, [1994] B.C.J. No. 667, 42 B.C.A.C. 288 (B.C.C.A.).
16. *R. v. Kelly*, [1994] B.C.J. No. 1315 (B.C.C.A.).
17. *R. v. H.K.L.*, [1994] B.C.J. No. 3107, 53 B.C.A.C. 249 (B.C.C.A.).
18. *R. v. Lawson*, [1994] B.C.J. No. 1818, 49 B.C.A.C. 301 (B.C.C.A.).
19. *R. v. P.E.M.*, [1994] 45 B.C.A.C. 291, 91 C.C.C. (3d) 51 (B.C.C.A.) leave to appeal to dismissed [1994] S.C.C.A. No. 377 (S.C.C.).
20. *R. v. Morris*, [1994] B.C.J. No. 3024, 53 B.C.A.C. 296 (B.C.C.A.).
21. *R. v. O'Connor*, [1994] 42 B.C.A.C. 105, 89 C.C.C. (3d) 109 (B.C.C.A.) affirmed by [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 (S.C.C.). See related case [1993] B.C.J. No. 570 (B.C.C.A.).
22. *R. v. Olimb*, [1994] B.C.J. No. 1051 (B.C.C.A.).
23. *R. v. Paquette, R. v. Henry*, [1994] 47 B.C.A.C. 60, 24 W.C.B. (2d) 238 (B.C.C.A.) leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 456 (S.C.C.).
24. *R. v. G.S.*, [1994] B.C.J. No. 2869, 53 B.C.A.C. 217 (sub nom. *R. v. Smaaslet*), (1994) 87 W.A.C. 217 (B.C.C.A.).
25. *R. v. Valdiris-Ahumada*, [1994] B.C.J. No. 528, 40 B.C.A.C. 261 (B.C.C.A.).
26. *R. v. Ribaric*, [1994] M.J. No. 335 (Man. C.A.).
27. *R. v. Pitre*, [1994] N.B.J. No. 181, 23 W.C.B. (2d) 376 (N.B. C.A.).
28. *R. v. Marks*, [1994] N.J. No. 241, 91 C.C.C. (3d) 421 (Nfld. C.A.).
29. *R. v. Newman*, [1994] N.J. No. 54, 115 Nfld. & P.E.I.R. 197 (Nfld. C.A.).
30. *R. v. Hawco*, [1994] N.S.J. No. 56, 129 N.S.R. (2d) 388 (N.S.C.A.).
31. *R. v. S.L.J.*, [1994] N.S.J. No. 413, 134 N.S.R. (2d) 24 (N.S.C.A.).
32. *R. v. Kirton*, [1994] N.S.J. No. 55 (N.S.C.A.).
33. *R. v. M.L.M.*, [1994] 2 S.C.R. 3, 89 C.C.C. (3d) 96 (S.C.C.), reversing [1992] 117 N.S.R. (2d) 74, 78 C.C.C. (3d) 318 (N.S.C.A.).
34. *R. v. Maloney*, [1994] N.S.J. No. 460, 136 N.S.R. (2d) 23 (N.S.C.A.).
35. *R. v. Porter*, [1994] N.S.J. No. 304, 132 N.S.R. (2d) 107 (N.S.C.A.).
36. *R. v. Timmons*, [1994] N.S.J. No. 343, 132 N.S.R. (2d) 360 (N.S.C.A.).
37. *R. v. Allegretti*, [1994] O.J. No. 172 (Ont. C.A.) leave to appeal dismissed [1994] S.C.C.A. No. 121 (S.C.C.).
38. *R. v. Altug*, [1994] O.J. No. 3572 (Ont. C.A.).
39. *R. v. Burgess*, [1994] O.J. No. 3695 (Ont. C.A.).
40. *R. v. L.E. and R. v. E.E.*, [1994] O.J. No. 2641, 94 C.C.C. (3d) 228 (Ont. C.A.).
41. *R. v. Farshid-Ghazi*, [1994] O.J. No. 1890 (Ont. C.A.) leave to appeal dismissed [1995] S.C.C.A. No. 60 (S.C.C.).
42. *R. v. Fieldhouse and R. v. Hunter*, [1994] O.J. No. 1889, 74 O.A.C. 299 (Ont. C.A.) leave to appeal to S.C.C. refused, [1995] S.C.C.A. No. 320, [1995] S.C.C.A. No. 52 (S.C.C.).
43. *R. v. Foshay*, [1994] O.J. No. 2106 (Ont. C.A.) leave to appeal refused [1994] S.C.C.A. No. 347 (S.C.C.).
44. *R. v. Glean*, [1994] O.J. No. 3508 (Ont. C.A.).
45. *R. v. Hatfield*, [1994] O.J. No. 3875 (Ont. C.A.).
46. *R. v. Joseph*, [1994] O.J. No. 3521 (Ont. C.A.).

47. *R. v. Luke*, [1994] O.J. No. 176, 87 C.C.C. (3d) 121 (Ont. C.A.) leave to appeal dismissed [1994] S.C.C.A. No. 299 (S.C.C.).
48. *R. v. W.M.*, [1994] O.J. No. 3817 (Ont. C.A.).
49. *R. v. McKellar*, [1994] O.J. No. 2046, 19 O.R. (3d) 796 (Ont. C.A.).
50. *R. v. Mills*, [1994] O.J. No. 3490 (Ont. C.A.).
51. *R. v. Morin*, [1994] O.J. No. 3731 (Ont. C.A.).
52. *R. v. Muller*, [1994] O.J. No. 1762 (Ont. C.A.).
53. *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, 89 C.C.C. (3d) 289 (S.C.C.) reversing [1992] 9 O.R. (3d) 424, 72 C.C.C. (3d) 121 (Ont. C.A.).
54. *R. v. Pizzardi*, [1994] O.J. No. 552, 17 O.R. (3d) 623 (Ont. C.A.).
55. *R. v. Polera*, [1994] O.J. No. 1234 (Ont. C.A.).
56. *R. v. A.R.*, [1994] O.J. No. 2693 (Ont. C.A.).
57. *R. v. Sharif*, [1994] O.J. No. 1109 (Ont. C.A.).
58. *R. v. Sit*, [1994] O.J. No. 3141 (Ont. C.A.).
59. *R. v. Sriskantharajah*, [1994] O.J. No. 1098, 90 C.C.C. (3d) 559 (Ont. C.A.).
60. *R. v. St. Denis*, [1994] O.J. No. 3373 (Ont. C.A.).
61. *R. v. Stewart*, [1994] 18 O.R. (3d) 509 (Ont. C.A.) leave to appeal dismissed [1994] S.C.C.A. No. 290 (S.C.C.).
62. *R. v. Venema*, [1994] O.J. No. 1329 (Ont. C.A.).
63. *R. v. Yusif*, [1994] O.J. No. 2337, 74 O.A.C. 348 (Ont. C.A.).
64. *R. v. Brossard*, [1994] J.Q. no 67 (Qc. C.A.).
65. *R. v. Hinse*, [1994] 64 Q.A.C. 53, 24 W.C.B. (2d) 130 (Qc. C.A.), stay overturned, [1997] 1 S.C.R. 3, 112 C.C.C. (3d) 383 (S.C.C.).
66. *R. c. M.L.*, [1994] J.Q. no 171, 89 C.C.C. (3d) 264 (Qc. C.A.).
67. *R. c. Morin*, [1994] J.Q. no 4, 62 Q.A.C. 1 (Qc. C.A.).
68. *R. v. Linklater*, [1994] S.J. No. 345 (Sask. C.A.).
69. *R. v. Nielson*, [1994] S.J. No. 576, 125 Sask. R. 210 (Sask. C.A.).
70. *R. v. Parkinson*, [1994] S.J. No. 688, 128 Sask.R. 69 (Sask. C.A.).

1995

1. *R. v. Blair*, [1995] 174 A.R. 307, 28 W.C.B. (2d) 346 (Alta. C.A.).
2. *R. v. Bolt*, [1995] 162 A.R. 204, 26 W.C.B. (2d) 18 (Alta. C.A.).
3. *R. v. Duong*, [1995] A.J. No. 360 (Alta. C.A.).
4. *R. v. Le*, [1995] A.J. No. 933 (Alta. C.A.) leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 179 (S.C.C.).
5. *R. v. K.M.M.*, [1995] A.J. No. 946 (Alta. C.A.).
6. *R. v. Millward*, [1995] 174 A.R. 183, 33 C.R.R. (2d) 185 (Alta. C.A.).
7. *R. v. Underwood* (1995), 174 A.R. 234, 102 C.C.C. (3d) 281 (Alta. C.A.) reversed on other grounds [1998] 1 S.C.R. 77, 121 C.C.C. (3d) 117 (S.C.C.).
8. *R. v. Creamer*, [1995] 57 B.C.A.C. 62, 97 C.C.C. (3d) 108 (B.C.C.A.).
9. *R. v. Curson*, [1995] B.C.J. No. 211 (B.C.C.A.).
10. *R. v. Driscoll*, [1995] B.C.J. No. 312, 55 B.C.A.C. 241 (B.C.C.A.).
11. *R. v. Gauthier*, [1995] 62 B.C.A.C. 71, 28 W.C.B. (2d) 198 (B.C.C.A.).
12. *R. v. Good*, [1995] 66 B.C.A.C. 308, 29 W.C.B. (2d) 231 (B.C.C.A.).
13. *R. v. Huffman*, [1995] B.C.J. No. 1487 (B.C.C.A.).

14. *R. v. Letourneau*, [1995] B.C.J. No. 201, 55 B.C.A.C. 130 (B.C.C.A.) additional reasons to (1994), 53 B.C.A.C. 81, 87 C.C.C. (3d) 481 (B.C.C.A.) leave to appeal refused [1995] S.C.C.A. No. 163, 102 C.C.C. (3d) vi (S.C.C.).
15. *R. v. Markovitch*, [1995] 64 B.C.A.C. 140, 28 W.C.B. (2d) 378 (B.C.C.A.).
16. *R. v. Massot*, [1995] B.C.J. No. 1444 (B.C.C.A.).
17. *R. v. O'Grady*, [1995] B.C.J. No. 2041, 64 B.C.A.C. 111 (B.C.C.A.).
18. *R. v. G.P.*, [1995] B.C.J. No. 1136, 59 B.C.A.C. 291 (B.C.C.A.).
19. *R. v. Silliker*, [1995] B.C.J. No. 2274, 65 B.C.A.C. 191 (B.C.C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 639 (S.C.C.).
20. *R. v. Strauss*, [1995] 61 B.C.A.C. 241, 100 C.C.C. (3d) 303 (B.C.C.A.).
21. *R. v. Temple*, [1995] B.C.J. No. 331, 56 B.C.A.C. 58 (B.C.C.A.).
22. *R. v. Thomson*, [1995] 63 B.C.A.C. 60, 102 C.C.C. (3d) 350 (B.C.C.A.).
23. *R. v. Thornington*, [1995] B.C.J. No. 498, 56 B.C.A.C. 231 (B.C.C.A.).
24. *R. v. D.V.*, [1995] B.C.J. No. 1282, 60 B.C.A.C. 163 (B.C.C.A.).
25. *R. v. Morris*, [1995] N.J. No. 381 (Nfld. C.A.).
26. *R. v. J.H.B.*, [1995] N.S.J. No. 353, 101 C.C.C. (3d) 1 (N.S.C.A.).
27. *R. v. Jesty*, [1995] N.S.J. No. 327, 143 N.S.R. (2d) 223 (N.S.C.A.).
28. *R. v. R.J.S.*, [1995] N.S.J. No. 214, 141 N.S.R. (2d) 386 (N.S.C.A.).
29. *R. v. Shermetta*, [1995] N.S.J. No. 195, 141 N.S.R. (2d) 186 (N.S.C.A.).
30. *R. v. Aguiar*, [1995] O.J. No. 1254 (Ont. C.A.).
31. *R. v. Burt*, [1995] O.J. No. 3091, 86 O.A.C. 55 (Ont. C.A.).
32. *R. v. Codina*, [1995] O.J. No. 6, 95 C.C.C. (3d) 311 leave to appeal dismissed [1995] S.C.C.A. No. 95 (Ont. C.A.).
33. *R. v. Cooney*, [1995] O.J. No. 945, 98 C.C.C. (3d) 196 (Ont. C.A.).
34. *R. v. Court and R. v. Monaghan*, [1995] O.J. No. 1368, 99 C.C.C. (3d) 237 (Ont. C.A.).
35. *R. v. Ferrante*, [1995] O.J. No. 3563 (Ont. C.A.).
36. *R. v. Groot*, [1995] O.J. No. 11, 77 O.A.C. 226 (Ont. C.A.).
37. *R. v. Hollinsky*, [1995] O.J. No. 3521, 103 C.C.C. (3d) 472 (Ont. C.A.).
38. *R. v. Joanisse* (1995), 85 O.A.C. 186, 102 C.C.C. (3d) 35 (Ont. C.A.) leave to appeal dismissed [1996] S.C.C.A. No. 347 (S.C.C.).
39. *R. v. S.K.* (1995), 24 O.R. (3d) 199, [1995] O.J. No. 1627 (Ont. C.A.).
71. *R. v. Lajlo*, [1995] O.J. No. 666 (Ont. C.A.).
40. *R. v. Langer*, [1995] O.J. No. 396 (Ont. C.A.).
41. *R. v. Lieug* (1995), 82 O.A.C. 317, 28 W.C.B. (2d) 173 (Ont. C.A.).
42. *R. v. Macleod*, [1995] O.J. No. 398 (Ont. C.A.).
43. *R. v. Marshall*, [1995] O.J. No. 738 (Ont. C.A.).
44. *R. v. Meister*, [1995] O.J. No. 3472 (Ont. C.A.).
45. *R. v. Morin*, [1995] O.J. No. 350, 37 C.R. (4th) 395, (Ont. C.A.).
46. *R. v. Nicholson*, [1995] O.J. No. 3152 (Ont. C.A.).
47. *R. v. Perry*, [1995] O.J. No. 2729 (Ont. C.A.).
48. *R. v. Rabishaw*, [1995] O.J. No. 784 (Ont. C.A.).
49. *R. v. F.S.*, [1995] O.J. No. 2413 (Ont. C.A.).
50. *R. v. Schryer*, [1995] O.J. No. 3470 (Ont. C.A.).
51. *R. v. Tallen*, [1995] 24 O.R. (3d) 77, [1995] O.J. No. 1647 (Ont. C.A.).
52. *R. v. Vallieres*, [1995] O.J. No. 3511 (Ont. C.A.).

53. *R. v. M.L.W.*, [1995] O.J. No. 1826, 82 O.A.C. 397 (Ont. C.A.).
54. *R. v. V.I.W.*, [1995] O.J. No. 1602, 82 O.A.C. 49 (Ont. C.A.).
55. *R. v. Watt*, [1995] O.J. No. 2766 (Ont. C.A.).
56. *R. v. Wernikowski*, [1995] O.J. No. 3913 (Ont. C.A.).
57. *R. v. Widdifield*, [1995] 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 (sub nom. *R. v. W. W. and I.W.*), [1995] O.J. No. 2383 (Ont. C.A.).
58. *R. v. Worth*, [1995] O.J. No. 1063, 98 C.C.C. (3d) 133 (Ont. C.A.) leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 314 (S.C.C.).
59. *R. v. T.J.S.*, [1995] P.E.I.J. No. 36, 126 Nfld. & P.E.I.R. 264 (P.E.I.C.A.).
60. *R. c. A.B.*, [1995] J.Q. no 908 (Qc. C.A.).
61. *R. c. A.B.*, [1995] J.Q. no 715 (Qc. C.A.).
62. *R. v. Khela*, [1995] 4 S.C.R. 201, 102 C.C.C. (3d) 1 (S.C.C.) reversing [1994] 63 Q.A.C. 273, 92 C.C.C. (3d) 81(Qc. C.A.).
63. *R. c. Laperrière*, [1995] J.Q. no 635, 101 C.C.C. (3d) 462 (Qc. C.A.) reversed, [1996] 2 S.C.R. 284, 109 C.C.C. (3d) 347 (S.C.C.).
64. *R. c. Levac*, [1995] J.Q. no 904 (Qc. C.A.).
65. *R. c. Patoine*, [1995] J.Q. no 595 affirming [1993] J.Q. no 2268, 60 Q.A.C. 91 (Qc. C.A.) leave to appeal refused *R. c. Patoine*, [1995] C.S.C.R. no 370 (S.C.C.).
66. *R. c. Tremblay*, [1995] J.Q. no 624, 101 C.C.C. (3d) 538 (Qc. C.A.), requête en autorisation de pourvoi rejetée, [1995] C.S.C.R. no 423 (C.S.C.).
67. *R. v. Foster*, [1995] S.J. No. 173, 128 Sask.R. 292 (Sask. C.A.), leave to appeal refused, [1995] S.C.C.A. No. 566 (S.C.C.).
68. *R. v. Latimer*, [1995] S.J. No. 402, 99 C.C.C. (3d) 481 (Sask. C.A.), reversed on other grounds, [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193 (S.C.C.).
69. *R. v. Ledinski*, [1995] S.J. No. 545, 102 C.C.C. (3d) 445 (Sask. C.A.) rehearing allowed (1996), 141 Sask. R. 210, 106 C.C.C. (3d) 287 (Sask. C.A.).
70. *R. v. D.R.*, *R. v. H.R.*, *R. v. D.W.*, [1995] S.J. No. 278, 98 C.C.C. (3d) 353 (Sask. C.A.), reversed on other grounds, [1996] 2 S.C.R. 291, 107 C.C.C. (3d) 289 (S.C.C.).
71. *R. v. T.S.*, [1995] S.J. No. 225, 98 C.C.C. (3d) 529 (Sask. C.A.).
72. *British Columbia (Forensic Psychiatric Institute) v. Johnson*, [1995] B.C.J. No. 2247 (B.C.C.A.).
73. *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.).

1996

1. *R. v. But and Truong*, [1996] A.J. No. 32 (Alta. C.A.).
2. *R. v. J.D.D.*, [1996] 184 A.R. 381, 108 C.C.C. (3d) 368 (Alta. C.A.).
3. *R. v. Huynh*, [1996] A.J. No. 136, 178 A.R. 396 (Alta. C.A.).
4. *R. v. Lawes* (1996), 44 Alta. L.R. (3d) 25, 187 A.R. 321 (Alta. C.A.) leave to appeal [1997] 3 S.C.R. 694, 119 C.C.C. (3d) 289 (S.C.C.).
5. *R. v. Poitras*, [1996] 187 A.R. 286, 32 W.C.B. (2d) 212 (Alta. C.A.) leave to appeal dismissed [1996] S.C.C.A. No. 521 (S.C.C.A.).
6. *R. v. C.A.B.*, [1996] 83 B.C.A.C. 209, 32 W.C.B. (2d) 477(B.C.C.A.).

7. *R. v. Dean*, [1996] B.C.J. No. 1957 (B.C.C.A.). See related interlocutory motion *R. v. Dean*, [1997] B.C.J. No. 2996, 102 B.C.A.C. 81 (B.C.C.A.).
8. *R. v. Gauthier* (1996), 78 B.C.A.C. 85, 108 C.C.C. (3d) 231 (B.C.C.A.).
9. *R. v. M.G.H.*, [1996] 84 B.C.A.C. 81, [1996] B.C.J. No. 2300 (B.C.C.A.).
10. *R. v. Harvey*, [1996] 80 B.C.A.C. 40, 109 C.C.C. (3d) 108 (B.C.C.A.).
11. *R. v. Hibbert*, [1996] B.C.J. No. 1660, 78 B.C.A.C. 277 (B.C.C.A.) leave to appeal allowed 2002 SCC 39, 163 C.C.C. (3d) 129 (S.C.C.).
12. *R. v. Jansen*, [1996] 68 B.C.A.C. 256, 104 C.C.C. (3d) 237 (B.C.C.A.). See related matter *R. v. Jansen*, [1996] B.C.J. No. 1396, 77 B.C.A.C. 236 (B.C.C.A.) and further matter *R. v. Jansen*, [1996] B.C.J. No. 3122 (B.C.C.A.).
13. *R. v. Lawrence*, [1996] B.C.J. No. 129 (B.C.C.A.) appeal dismissed [1998] S.C.C.A. No. 198 (S.C.C.).
14. *R. v. Maloy*, [1996] B.C.J. No. 2493 (B.C.C.A.).
15. *R. v. Nguyen*, [1996] B.C.J. No. 2342 (B.C.C.A.).
16. *R. v. O'Malley*, [1996] B.C.J. No. 1647 (B.C.C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 94 (S.C.C.).
17. *R. v. Pangan*, [1996] B.C.J. No. 2616, 85 B.C.A.C. 54 (B.C.C.A.) additional reasons at [1997] B.C.J. No. 1876, 95 B.C.A.C. 233 (B.C.C.A.).
18. *R. v. Pereira*, [1996] B.C.J. No. 3021, 83 B.C.A.C. 13 (B.C.C.A.).
19. *R. v. Teneycke*, [1996] 77 B.C.A.C. 138, 108 C.C.C. (3d) 53 (B.C.C.A.).
20. *R. v. Thompson*, [1996] B.C.J. No. 492 (B.C.C.A.).
21. *R. v. Tyrrell*, [1996] B.C.J. No. 1289 (B.C.C.A.).
22. *R. v. Van Haarlem*, [1996] B.C.J. No. 372, 71 B.C.A.C. 24 (B.C.C.A.) appeal dismissed [1992] 1 S.C.R. 982, 71 C.C.C. (3d) 448 (S.C.C.).
23. *R. v. G.Z.*, [1996] B.C.J. No. 2100 (B.C.C.A.).
24. *R. v. H. H.*, [1996] M.J. No. 325, 108 C.C.C. (3d) 447 (Man. C.A.).
25. *R. v. Pitt*, [1996] N.B.J. No. 280, 179 N.B.R. (2d) 135 (N.B.C.A.) leave to appeal dismissed [1996] S.C.C.A. No. 494 (S.C.C.).
26. *R. v. C.W.*, [1996] N.J. No. 255 (Nfld. C.A.).
27. *R. v. Boudreau*, [1996] N.W.T.J. No. 55, [1996] N.W.T.R. 252 (N.T.C.A.).
28. *R. v. Epsilon*, [1996] N.W.T.J. No. 9, 29 W.C.B. (2d) 520 (N.T.C.A.).
29. *R. v. Gumbly*, [1996] N.S.J. No. 454, 112 C.C.C. (3d) 61 (N.S.C.A.).
30. *R. v. Jesty*, [1996] N.S.J. No. 445, 155 N.S.R. (2d) 186 (N.S.C.A.).
31. *R. v. Keating*, [1996] N.S.J. No. 4, 147 N.S.R. (2d) 80 (N.S.C.A.).
32. *R. v. Langille*, [1996] N.S.J. No. 2, 147 N.S.R. (2d) 137 (N.S.C.A.).
33. *R. v. Pottie*, [1996] N.S.J. No. 138, 150 N.S.R. (2d) 56 (N.S.C.A.).
34. *R. v. G.R.S.*, [1996] N.S.J. No. 69, 148 N.S.R. (2d) 175 (N.S.C.A.).
35. *R. v. Sadler*, [1996] N.S.J. No. 215 (N.S.C.A.).
36. *R. v. Strickland*, [1996] N.S.J. No. 16, 148 N.S.R. (2d) 231 (N.S.C.A.).
37. *R. v. Whynder*, [1996] N.S.J. No. 110, 149 N.S.R. (2d) 241 (N.S. C.A.) appeal dismissed [1996] S.C.C.A. No. 430 (S.C.C.).
38. *R. v. A.N.*, [1996] O.J. No. 827, 89 O.A.C. 389 (Ont. C.A.).
39. *R. v. Ali*, [1996] O.J. No. 4855 (Ont. C.A.).
40. *R. v. L.C.B.*, [1996] O.J. No. 283, 104 C.C.C. (3d) 353 (Ont. C.A.).
41. *R. v. Beattie*, [1996] O.J. No. 3620 (Ont. C.A.).
42. *R. v. Brown*, [1996] O.J. No. 2616 (Ont. C.A.).

43. *R. v. Cain*, [1996] O.J. No. 1588 (Ont. C.A.) leave to appeal dismissed, [1997] S.C.C.A. No. 388 (S.C.C.).
44. *R. v. Coulombe*, [1996] O.J. No. 1570 (Ont. C.A.).
45. *R. v. J.R.E.*, [1996] O.J. No. 2127 (Ont. C.A.).
46. *R. v. Edwards* (sub nom. *R. v. Levo*), [1996] O.J. No. 464, 105 C.C.C. (3d) 21 (Ont. C.A.) leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 201 (S.C.C.).
47. *R. v. Emsley*, [1996] O.J. No. 939 (Ont. C.A.).
48. *R. v. D.F.*, [1996] O.J. No. 1037, 89 O.A.C. 267 (Ont. C.A.).
49. *R. v. Frumusa*, [1996] O.J. No. 4370, 112 C.C.C. (3d) 211 (Ont. C.A.).
50. *R. v. Gibson*, [1996] O.J. No. 176, 87 O.A.C. 393 (Ont. C.A.) leave to appeal dismissed [1996] S.C.C.A. No. 559 (S.C.C.).
51. *R. v. Graham*, [1996] O.J. No. 3896 (Ont. C.A.).
52. *R. v. Gundrum*, [1996] O.J. No. 2452 (Ont. C.A.).
53. *R. v. Henrich* (1996), 29 O.R. (3d) 740, [1996] O.J. No. 2537 (Ont. C.A.) see addendum *R. v. Henrich*, [1996] O.J. No. 3438, 110 C.C.C. (3d) 533 (Ont. C.A.).
54. *R. v. Kowall*, [1996] 92 O.A.C. 82, 108 C.C.C. (3d) 481 (Ont. C.A.) leave to appeal refused [1996] S.C.C.A. No. 487 (S.C.C.).
55. *R. v. Lake* (1996), 91 O.A.C. 75, 20 M.V.R. (3d) 50 (Ont. C.A.).
56. *R. v. M. (A.)*, [1996] S.C.C.A. No. 137 (S.C.C.).
57. *R. v. Mommo*, [1996] O.J. No. 1992 (Ont. C.A.).
58. *R. v. Monteith*, [1996] O.J. No. 4115 (Ont. C.A.).
59. *R. v. Mulvina*, [1996] O.J. No. 301 (Ont. C.A.).
60. *R. v. Newland*, [1996] O.J. No. 780 (Ont. C.A.).
61. *R. v. Nourhaghghi*, [1996] O.J. No. 1686 (Ont. C.A.).
62. *R. v. Paredes*, [1996] O.J. No. 882 (Ont. C.A.).
63. *R. v. Peterson*, [1996] 27 O.R. (3d) 739, 106 C.C.C. (3d) 64 (Ont. C.A.) leave to appeal dismissed [1996] S.C.C.A. No. 202 (S.C.C.).
64. *R. v. Qoraishi*, [1996] O.J. No. 3073 (Ont. C.A.).
65. *R. v. Rajaeefard*, [1996] O.J. No. 108, 104 C.C.C. (3d) 225 (Ont. C.A.).
66. *R. v. Robb*, [1996] O.J. No. 1494 (Ont. C.A.).
67. *R. v. Sarcevich*, [1996] O.J. No. 257 (Ont. C.A.) appeal refused [1996] S.C.C.A. No. 178 (S.C.C.).
68. *R. v. Thomas*, [1996] O.J. No. 1507 (Ont. C.A.).
69. *R. v. Vargas*, [1996] O.J. No. 3642 (Ont. C.A.).
70. *R. v. Watson* (1996), 92 O.A.C. 397, 32 W.C.B. (2d) 73 (Ont. C.A.).
71. *R. c. Bouchard*, [1996] J.Q. no 1502 (Qc. C.A.).
72. *R. c. Brochu*, [1996] J.Q. no 529 (Qc. C.A.), demande d'autorisation d'appel rejetée, [1996] C.S.C.R. no 280 (C.S.C.).
73. *R. c. Comtois-Barbeau*, [1996] J.Q. no 1030, 110 C.C.C. (3d) 69 (Qc. C.A.).
74. *R. v. Gagnon*, [1996] 1 R.C.S. 185 (S.C.C.) reversing [1992] J.Q. no 2243 (Qc. C.A.).
75. *R. c. Lippé*, [1996] J.Q. no 2215, 111 C.C.C. (3d) 187 (Qc. C.A.).
76. *R. v. Potvin*, [1996] J.Q. no 4181 (Qc. C.A.).
77. *R. v. Muirhead*, [1996] S.J. No. 353, 144 Sask.R.158 (Sask. C.A.), leave to appeal refused, [1996] S.C.C.A. No. 404 (S.C.C.).

78. *R. v. Sutherland*, [1996] S.J. No. 855, 112 C.C.C. (3d) 454 (Sask. C.A.).
79. *Children's Aid Society of Metropolitan Toronto v. S.H.*, [1996] O.J. No. 2578 (Ont. C.A.).
80. *White v. London Psychiatric Hospital*, [1996] O.J. No. 3024 (Ont. C.A.).

1997

1. *R. v. Bezanson*, [1997] 160 W.A.C. 308, 209 A.R. 308 (Alta. C.A.).
2. *R. v. Gellvear*, [1997] A.J. No. 421, 196 A.R. 18 (Alta. C.A.) leave to appeal dismissed [1998] 1 S.C.R. 1218 (S.C.C.).
3. *R. v. James*, [1997] A.J. No. 1277 (Alta. C.A.) appeal dismissed [1998] S.C.C.A. No. 40 (S.C.C.).
4. *R. v. May*, [1997] A.J. No. 713, 200 A.R. 315 (Alta. C.A.).
5. *R. v. Pham*, [1997] A.J. No. 923 (Alta. C.A.).
6. *R. v. J.M.R.*, [1997] A.J. No. 747, 200 A.R. 338 (Alta. C.A.).
7. *R. v. C.G.B.*, [1997] 95 B.C.A.C. 213, 35 W.C.B. (2d) 399 (B.C.C.A.).
8. *R. v. Bowers*, [1997] 90 B.C.A.C. 233, 34 W.C.B. (2d) 263 (B.C.C.A.).
9. *R. v. Charalambous* (1997), 92 B.C.A.C. 1, 34 W.C.B. (2d) 530 (B.C.C.A.) leave to appeal refused, [1997] S.C.C.A. No. 365 (S.C.C.).
10. *R. v. Cue*, [1997] B.C.J. No. 2059, 96 B.C.A.C. 63 (B.C.C.A.).
11. *R. v. Davis*, [1997] B.C.J. No. 1033, 90 B.C.A.C. 293 (B.C.C.A.).
12. *R. v. Dean*, [1997] B.C.J. No. 1808, 95 B.C.A.C. 278 (B.C.C.A.). See also related matters in *R. v. Dean*, [1997] B.C.J. No. 1354 (B.C.C.A.) and in *R. v. Dean*, [1996] B.C.J. No. 1957 (B.C.C.A.).
13. *R. v. Foster*, [1997] 90 B.C.A.C. 243, 34 W.C.B. (2d) 454 (B.C.C.A.).
14. *R. v. A.M.G.*, [1997] B.C.J. No. 2760 (B.C.C.A.) leave to appeal refused (sub nom. *R. v. Gascon*), [1997] S.C.C.A. No. 635 (S.C.C.).
15. *R. v. Henry*, [1997] B.C.J. No. 2792, 100 B.C.A.C. 183 (B.C.C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 77 (S.C.C.).
16. *R. v. Hoang*, [1997] B.C.J. No. 8 (B.C.C.A.).
17. *R. v. Khan*, [1997] B.C.J. No. 1653, 95 B.C.A.C. 26 (B.C.C.A.).
18. *R. v. Learn* (1997), 144 W.A.C. 1 (sub nom. *R. v. L.R.L.*) 88 B.C.A.C. 1 (B.C.C.A.) leave to appeal dismissed [1997] S.C.C.A. No. 460 (S.C.C.).
19. *R. v. Lutz*, [1997] 99 B.C.A.C. 60, 121 C.C.C. (3d) 216 (B.C.C.A.).
20. *R. v. Sauve*, [1997] 101 B.C.A.C. 21, 121 C.C.C. (3d) 225 (B.C.C.A.). See related case [1998] 110 B.C.A.C. 122, B.C.J. No. 1610 (B.C.C.A.).
21. *R. v. Sykora*, [1997] B.C.J. No. 2695 (B.C.C.A.).
22. *R. v. Welsh*, [1997] B.C.J. No. 2343, 120 C.C.C. (3d) 68 (sub nom. *R. v. F.D.W.* (1997), 97 B.C.A.C. 266, (B.C.C.A.).
23. *R. v. Wilder*, [1997] M.J. No. 20, 115 Man.R. (2d) 65 (Man. C.A.).
24. *R. v. Connors*, [1997] N.B.J. No. 469, 194 N.B.R. (2d) 91 (N.B.C.A.).
25. *R. v. Cyr*, [1997] N.J. No. 80, 150 Nfld. & P.E.I.R. 1 (Nfld. C.A.).
26. *R. v. E.P.G.*, [1997] N.W.T.J. No. 27 (N.T.C.A.). See also *R. v. E.P.G.*, [1997] N.W.T.J. No. 32, [1998] N.W.T.R. 152 (N.T.C.A.).
27. *R. v. Kaunak*, [1997] N.W.T.J. No. 71, [1998] N.W.T.R. 98 (N.T.C.A.).
28. *R. v. Warren*, [1997] N.W.T.J. No. 41, 117 C.C.C. (3d) 418 (N.T.C.A.).
29. *R. v. Leger*, [1997] N.S.J. No. 245, 160 N.S.R. (2d) 143 (N.S.C.A.).

30. *R. v. MacGregor*, [1997] N.S.J. No. 128, 159 N.S.R. (2d) 391 (N.S.C.A.).
31. *R. v. Matheson*, [1997] N.S.J. No. 307, 161 N.S.R. (2d) 146 (N.S.C.A.).
32. *R. v. Parker*, [1997] N.S.J. No. 194, 116 C.C.C. (3d) 236 (N.S.C.A.).
33. *R. v. Phalen*, [1997] N.S.J. No. 328, 160 N.S.R. (2d) 371 (N.S.C.A.).
34. *R. v. Armstrong*, [1997] O.J. No. 45, 33 W.C.B. (2d) 254 (Ont. C.A.).
35. *R. v. Babinski*, [1997] O.J. No. 4170, 36 W.C.B. (2d) 117 (Ont. C.A.).
36. *R. v. Boucher*, [1997] O.J. No. 3859, 36 W.C.B. (2d) 69 (Ont. C.A.).
37. *R. v. C.D.C.*, [1997] O.J. No. 338 (Ont. C.A.).
38. *R. v. Daniels*, [1997] O.J. No. 4023, 119 C.C.C. (3d) 413 (Ont. C.A.).
39. *R. v. Drummond*, [1997] O.J. No. 3096 (Ont. C.A.).
40. *R. v. Gallant*, [1997] O.J. No. 4188 (Ont. C.A.).
41. *R. v. E.F.H.*, (sub nom. *R. v. Hamilton*) 105 C.C.C. (3d) 233 (Ont. C.A.) leave to appeal refused [1997] S.C.C.A. No. 256, 117 C.C.C. (3d) vi (note) (S.C.C.).
42. *R. v. Hann*, [1997] O.J. No. 5157, 37 W.C.B. (2d) 32 (Ont. C.A.).
43. *R. v. James*, [1997] O.J. No. 2806 (Ont. C.A.).
44. *R. v. Ly, R. v. Thanh Phong Nguyen* (1997), 32 O.R. (3d) 392, 114 C.C.C. (3d) 279 (Ont. C.A.).
45. *R. v. Z.M.*, [1997] O.J. No. 647 (Ont. C.A.).
46. *R. v. McIntosh, R. v. McCarthy* (1997), 35 O.R. (3d) 97, 117 C.C.C. (3d) 385 (Ont. C.A.) leave to appeal dismissed [1997] S.C.C.A. No. 610 (S.C.C.).
47. *R. v. Mesgun*, [1997] O.J. No. 5158, 121 C.C.C. (3d) 439 (Ont. C.A.).
48. *R. v. S.N.*, [1997] O.J. No. 1564 (Ont. C.A.).
49. *R. v. R.R.O.*, [1997] O.J. No. 341, 33 W.C.B. (2d) 429 (Ont. C.A.).
50. *R. v. Pellicore*, [1997] O.J. No. 226 (Ont. C.A.).
51. *R. v. Pinto*, [1997] O.J. No. 2802 (Ont. C.A.).
52. *R. v. Prokopik*, [1997] S.C.C.A. No. 456 (S.C.C.).
53. *R. v. Pyne*, [1997] O.J. No. 4279 (Ont. C.A.).
54. *R. v. Russel*, [1997] O.J. No. 4001, 103 O.A.C. 318 (Ont. C.A.).
55. *R. v. J.A.S.*, [1997] O.J. No. 1666 (Ont. C.A.).
56. *R. v. L.J.S.*, [1997] O.J. No. 2286, 116 C.C.C. (3d) 477, (Ont. C.A.) leave to appeal refused [1997] S.C.C.A. No. 329 (S.C.C.).
57. *R. v. Samadi*, [1997] O.J. No. 5056 (Ont. C.A.).
58. *R. v. Schaafsma*, [1997] O.J. No. 2785 (Ont. C.A.).
59. *R. v. Silva*, [1997] O.J. No. 3861 (Ont. C.A.).
60. *R. v. Smith*, [1997] O.J. No. 3924, 119 C.C.C. (3d) 547 (Ont. C.A.).
61. *R. v. Swick*, [1997] 35 O.R. (3d) 472, [1997] O.J. No. 3580 (Ont. C.A.).
62. *R. v. Vargas*, [1997] O.J. No. 3254 (Ont. C.A.).
63. *R. v. J.W.*, [1997] 99 O.A.C. 161, 115 C.C.C. (3d) 18 (sub nom. *R. v. Wismayer*, [1997] 33 O.R. (3d) 225 (Ont. C.A.)).
64. *R. v. P.W.*, [1997] O.J. No. 1787 (Ont. C.A.).
65. *R. v. White, R. v. Sennet*, [1997] 32 O.R. (3d) 722, 114 C.C.C. (3d) 225 (Ont. C.A.) leave to appeal dismissed [1997] S.C.C.A. No. 248 (S.C.C.).
66. *R. v. G.Y.*, [1997] O.J. No. 4536 (Ont. C.A.).
67. *R. c. Dumont*, [1997] J.Q. no 84 (Qc. C.A.).
68. *R. c. Jerome*, [1997] J.Q. no 722 (Qc. C.A.).

69. *R. c. Labelle*, [1997] J.Q. no 1814, (sub nom. *R. c. M.L.*) [1997] R.J.Q. 1575 (Qc. C.A.), demande d'autorisation d'appel rejetée, [1997] C.S.C.R. no 409 (C.S.C.).
70. *R. c. G.P.*, [1997] J.Q. no 1073 (Qc. C.A.).
71. *R. v. Big Eagle*, [1997] S.J. No. 825,163 Sask.R. 3 (Sask. C.A.), application for leave to appeal dismissed, [1998] S.C.C.A. No. 132 (S.C.C.).
72. *R. v. RN.L.N.*, [1997] S.J. No. 581, 158 Sask. R. 221 (Sask. C.A.).
73. *R. v. Wigmore Consultants Ltd.*, [1997] S.J. No. 16 (Sask. C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 168 (S.C.C.).
74. *R. v. H.W.C.*, [1997] Y.J. No. 111 (Y.C.A.).
75. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1997] S.C.C.A. No. 117 (S.C.C.).
76. *United States of America v. Desfossés*, [1997] 2 S.C.R. 326, 115 C.C.C. (3d) 257 (S.C.C.).
77. *États-Unis d'Amérique c. Guérin*, [1997] J.Q. no 54 (Qc. C.A.).

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1. *R. v. Comsa*, 1998 ABCA 129, 216 A.R. 346 (Alta. C.A.) leave to appeal refused [1998] S.C.C.A. No. 284 (S.C.C.).
2. *R. v. R.E.G.*, [1998] A.J. No. 57 (sub nom. *R. v. Gaudry*) 1998 ABCA 18, 212 A.R. 39 (Alta. C.A.).
3. *R. v. Hardy*, 1998 ABCA 264, 219 A.R. 152 (Alta. C.A.).
4. *R. v. Loomis*, 1998 ABCA 43, 212 A.R. 47 (Alta. C.A.).
5. *R. v. Loutfi*, 1998 ABCA 59, 212 A.R. 156 (Alta. C.A.).
6. *R. v. Anderson*, [1998] B.C.J. No. 1651 (B.C. C.A.).
7. *R. v. Bell*, [1998] 103 B.C.A.C. 258, 37 W.C.B. (2d) 247 (B.C.C.A.).
8. *R. v. Chow*, [1998] 113 B.C.A.C. 165, 39 W.C.B. (2d) 424 (B.C.C.A.).
9. *R. v. Chow*, [1998] 107 B.C.A.C. 281, 38 W.C.B. (2d) 425 (B.C.C.A.).
10. *R. v. Connors*, [1998] 102 B.C.A.C. 1, 121 C.C.C. (3d) 358 (B.C.C.A.).
11. *R. v. Desjardins*, [1998] 110 B.C.A.C. 33, 39 W.C.B. (2d) 184 (B.C.C.A.).
12. *R. v. Elahe*, [1998] B.C.J. No. 826 (B.C.C.A.).
13. *R. v. Hamm* (1998), 191 W.A.C. 234, 117 B.C.A.C. 234 (B.C.C.A.).
14. *R. v. Khan*, [1998] 111 B.C.A.C. 221, 129 C.C.C. (3d) 4509 (B.C.C.A.).
15. *R. v. Lee*, [1998] 106 B.C.A.C. 161, 124 C.C.C. (3d) 301 (B.C.C.A.).
16. *R. v. F.G. N.*, [1998] B.C.J. No. 2170, 112 B.C.A.C. 148 (B.C.C.A.) appeal dismissed [1998] S.C.C.A. No. 554 (S.C.C.).
17. *R. v. Nguyen*, [1998] B.C.J. No. 1534, 110 B.C.A.C. 185 (B.C.C.A.).
18. *R. v. Rose*, [1998] B.C.J. No. 1360, 108 B.C.A.C. 221 (B.C.C.A.). See related fresh evidence application in *R. v. Rose*, [1997] B.C.J. No. 2989, 37 W.C.B. (2d) 158 (B.C.C.A.).
19. *R. v. B.K.S.*, [1998] B.C.J. No. 507, 104 B.C.A.C. 149 (B.C.C.A.).
20. *R. v. D.E.S.*, [1998] B.C.J. No. 1817, 111 B.C.A.C. 320 (B.C.C.A.).
21. *R. v. Smith*, [1998] B.C.J. No. 2616 (B.C.C.A.).
22. *R. v. Stark*, [1998] B.C.J. No. 573, 104 B.C.A.C. 189 (B.C.C.A.) leave to appeal refused [1998] S.C.C.A. No. 382 (S.C.C.).
23. *R. v. W.J.T.*, [1998] B.C.J. No. 439, 104 B.C.A.C. 72 (B.C.C.A.).

24. *R. v. Titian*, [1998] B.C.J. No. 2993, 116 B.C.A.C. 294 (B.C.C.A.).
25. *R. v. Warsing*, [1998] 3 S.C.R. 579, 130 C.C.C. (3d) 259 (S.C.C.) affirming (sub nom. *R. V. K.W.*) (1997), 97 B.C.A.C. 137, 119 C.C.C. (3d) 385 (B.C.C.A.).
26. *R. v. Wilson*, [1998] B.C.J. No. 3206, 124 B.C.A.C. 266 (B.C.C.A.).
27. *Reference re Gruenke* (1998), 131 Man. R. (2d) 161, 131 C.C.C. (3d) 72 (Man. C.A.). affirmed 2000 SCC 32, 146 C.C.C. (3d) 319 (S.C.C.).
28. *R. v. B.R.T.*, [1998] N.B.J. No. 200, [1998] N.B.R. (2d) (Supp.) No. 47 (N.B.C.A.).
29. *R. v. Dalton*, [1998] N.J. No. 131, 163 Nfld. & P.E.I.R. 254 (Nfld. C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 294 (S.C.C.).
30. *R. v. Cain* (1998), 170 N.S.R. (2d) 393, 41 W.C.B. (2d) 236 (N.S.C.A.).
31. *R. v. Dixon*, [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17 (S.C.C.) affirming *R. v. McQuaid*, [1996] N.S.J. No. 332, 152 N.S.R. (2d) 321 (N.S.C.A.) and *R. v. McQuaid (Dixon Appeal)*, [1997] N.S.J. No. 20, 156 N.S.R. (2d) 81 (N.S.C.A.), *R. v. McQuaid (Robart Appeal)*, [1997] N.S.J. No. 21 (N.S.C.A.), *R. v. McQuaid (Skinner Appeal)*, [1997] N.S.J. No. 22 (N.S.C.A.), *R. v. McQuaid*, [1997] N.S.J. No. 23 (N.S.C.A.), and *R. v. McQuaid (Smith Appeal)*, [1997] N.S.J. No. 24 (N.S.C.A.).
32. *R. v. Johnson*, [1998] N.S.J. No. 381, 131 C.C.C. (3d) 343 (N.S.C.A.).
33. *R. v. MacNeil*, [1998] N.S.J. No. 457 (N.S.C.A.).
34. *R. v. McNamara*, [1998] N.S.J. No. 261, 169 N.S.R. (2d) 165 (N.S.C.A.).
35. *R. v. B.W.R.*, [1998] N.S.J. No. 359 (N.S.C.A.).
36. *R. v. L.J.R.*, [1998] N.S.J. No. 493 (N.S.C.A.).
37. *R. v. Reynolds*, [1998] N.S.J. No. 432, 171 N.S.R. (2d) 387 (N.S.C.A.).
38. *R. v. H. A.*, [1998] O.J. No. 4351, 40 W.C.B. (2d) 104 (Ont. C.A.).
39. *R. v. J.S.B.*, [1998] O.J. No. 4533 (Ont. C.A.).
40. *R. v. Beckett*, [1998] O.J. No. 2670 (Ont. C.A.).
41. *R. v. Blakeley*, [1998] 40 O.R. (3d) 541 (Ont. C.A.).
42. *R. v. Brownlow*, [1998] O.J. No. 1510 (Ont. C.A.).
43. *R. v. D.C.*, [1998] O.J. No. 5007 (Ont. C.A.).
44. *R. v. Carvalho*, [1998] O.J. No. 4168 (Ont. C.A.).
45. *R. v. J.D.*, [1998] O.J. No. 5237 (Ont. C.A.).
46. *R. v. Dunn*, [1998] O.J. No. 807 (Ont. C.A.).
47. *R. v. Duong*, [1998] 108 O.A.C. 378, 124 C.C.C. (3d) 392 (Ont. C.A.).
48. *R. v. Elliott*, [1998] O.J. No. 739 (Ont. C.A.) leave to appeal dismissed [1998] S.C.C.A. No. 185 (S.C.C.).
49. *R. v. A.G.*, [1998] O.J. No. 733, 123 C.C.C. (3d) 350 (Ont. C.A.).
50. *R. v. A.G.*, [1998] O.J. No. 2970 (Ont. C.A.).
51. *R. v. T.G.*, [1998] O.J. No. 2088 (Ont. C.A.).
52. *R. v. Gagne*, [1998] O.J. No. 2267, 111 O.A.C. 153 (Ont. C.A.).
53. *R. v. Gassyt and R. v. Markowitz*, [1998] O.J. No. 3232, 127 C.C.C. (3d) 546 (Ont. C.A.) leave to appeal refused [1999] S.C.C.A. No. 143 (S.C.C.).
54. *R. v. Gendey*, [1998] O.J. No. 3343 (Ont. C.A.).
55. *R. v. Grant*, [1998] O.J. No. 1511 (Ont. C.A.).
56. *R. v. Gray*, [1998] O.J. No. 1915 (Ont. C.A.).
57. *R. v. J.H.*, [1998] O.J. No. 5056 (Ont. C.A.).

58. *R. v. Iemmolo*, [1998] O.J. No. 948 (Ont. C.A.).
59. *R. v. E.A.L.*, [1998] O.J. No. 4160, 130 C.C.C. (3d) 438 (Ont. C.A.) leave to appeal dismissed (sub nom. *R. v. Lance*) [1999] 3 S.C.R. 658, 139 C.C.C. (3d) 227 (S.C.C.).
60. *R. v. Lee*, [1998] O.J. No. 2881 (Ont. C.A.).
61. *R. v. Lugosi*, [1998] O.J. No. 2758 (Ont. C.A.).
62. *R. v. Meyer*, [1998] O.J. No. 2331 (Ont. C.A.).
63. *R. v. Mombourquette*, [1998] O.J. No. 1582 (Ont. C.A.).
64. *R. v. Nelson*, [1998] O.J. No. 3036 (Ont. C.A.).
65. *R. v. Osborne*, [1998] O.J. No. 2488 (Ont. C.A.).
66. *R. v. Palmer*, [1998] O.J. No. 151 (Ont. C.A.).
67. *R. v. Pregent*, [1998] O.J. No. 153 (Ont. C.A.).
68. *R. v. Previdsa*, [1998] O.J. No. 1845 (Ont. C.A.).
69. *R. v. Quader*, [1998] O.J. No. 993 (Ont. C.A.).
70. *R. v. Roberts*, [1998] O.J. No. 461 (Ont. C.A.).
71. *R. v. Ruhland, R. v. Tanasescu*, [1998] O.J. No. 781, 123 C.C.C. (3d) 262 (Ont. C.A.).
72. *R. v. Saunders*, [1998] O.J. No. 2863 (Ont. C.A.).
73. *R. v. Shawdover*, [1998] O.J. No. 3285 (Ont. C.A.).
74. *R. v. J.C.T.*, [1998] 114 O.A.C. 186, 124 C.C.C. (3d) 385 (Ont. C.A.).
75. *R. v. Thessin*, [1998] O.J. No. 1982 (Ont. C.A.).
76. *R. v. Walsh*, [1998] O.J. No. 2145 (Ont. C.A.).
77. *R. v. Wilgosz*, [1998] O.J. No. 1041 (Ont. C.A.).
78. *R. v. Winn*, [1998] O.J. No. 393 (Ont. C.A.).
79. *R. c. Barbeau*, [1998] J.Q. no 1563, 127 C.C.C. (3d) 104 (Qc. C.A.).
80. *R. c. Bates*, [1998] J.Q. no 1373 (Qc. C.A.).
81. *R. v. Gagné*, [1998] J.Q. no 580 (Qc. C.A.).
82. *R. c. Marois, R. c. Gaumont*, [1998] J.Q. no 363 (Qc. C.A.).
83. *R. c. Obadia*, [1998] J.Q. no 2484, [1998] R.J.Q. 2581 (Qc. C.A.).
84. *R. c. Plamondon*, [1998] J.Q. no 3167 (Qc. C.A., demande d'autorisation d'appel rejetée, [1999] C.S.C.R. no 67 (C.S.C.)).
85. *R. c. Renaud* (sub nom. *R. c. P.R.*), [1998] A.Q. no 3656, 132 C.C.C. (3d) 72 (Qc. C.A.).
86. *R. v. D.J.J.*, [1998] S.J. No. 881, 172 Sask.R. 182 (Sask. C.A.).
87. *United States of America v. Shulman*, [1998] S.C.C.A. No. 513 (S.C.C.).
88. *Thailand v. Saxena*, [1998] B.C.J. No. 2624 (B.C.C.A.).

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1. *R. v. Cooper*, 1999 ABCA 249, 138 C.C.C. (3d) 292 (Alta. C.A.) and also 2000 ABCA 75, 160 C.C.C. (3d) 420 (Alta. C.A.).
2. *R. v. McArthur*, 1999 ABCA 117, 232 A.R. 349 (Alta. C.A.).
3. *R. v. Scarth*, 1999 ABCA 326, [1999] A.J. No. 1294 (Alta. C.A.).
4. *R. v. R.T.*, 1999 ABCA 162, [1999] A.J. No. 573 (Alta. C.A.).
5. *R. v. Weir*, 1999 ABCA 275, 140 C.C.C. (3d) 441 (Alta. C.A.).
6. *R. v. Akan*, 1999 BCCA 452, 128 B.C.A.C. 158 (B.C.C.A.).
7. *R. v. Curti*, [1999] B.C.J. No. 411, 1999 BCCA 97 (B.C.C.A.).

8. *R. v. Garramone*, 1999 BCCA 201, [1999] B.C.J. No. 790 (B.C.C.A.).
9. *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385 (S.C.C.) affirming (1997), 98 B.C.A.C. 120, 119 C.C.C. (3d) 481 (B.C.C.A.).
10. *R. v. Gustavson*, 1999 BCCA 399, [1999] B.C.J. No. 1469 (B.C. C.A.) leave to appeal refused [1999] S.C.C.A. No. 538 (S.C.C.). See related cases *R. v. Gustavson*, 2000 BCCA 649, 148 B.C.A.C. 310 (B.C. C.A.) and *R. v. Gustavson*, 2005 BCCA 32, 193 C.C.C. (3d) 545 (B.C. C.A.).
11. *R. v. R.L.M.*, [1999] B.C.J. No. 797, 1999 BCCA 205 (B.C.C.A.).
12. *R. v. S.G.N.*, 1999 BCCA 362, 125 B.C.A.C. 161 (B.C.C.A.).
13. *R. v. L.H.S.*, 1999 BCCA 307, 122 B.C.A.C. 300 (B.C.C.A.).
14. *R. v. Sharpe*, 1999 BCCA 416, 136 C.C.C. (3d) 97 (B.C.C.A.) reversed on other grounds 2001 SCC 2, 150 C.C.C. (3d) 321 (S.C.C.).
15. *R. v. Silverquill*, [1999] B.C.J. No. 494, 121 B.C.A.C. 126 (B.C.C.A.) leave to appeal refused [1999] S.C.C.A. No. 353 (S.C.C.).
16. *R. v. Watkins*, [1999] B.C.J. No. 1131, 1999 BCCA 286 (B.C.C.A.).
17. *R. v. Yews*, 1999 BCCA 624, 131 B.C.A.C. 189 (B.C.C.A.).
18. *R. v. Ryszard*, [1999] M.J. No. 288, 138 Man. R. (2d) 95 (Man. C.A.).
19. *R. v. C.J.S.*, [1999] M.J. No. 408 (Man. C.A.).
20. *R. v. Sanderson, Sanderson and Tews*, [1999] M.J. No. 114, 134 Man.R. (2d) 191 (Man. C.A.) leave to appeal dismissed [1999] S.C.C.A. No. 275 (S.C.C.).
21. *R. v. K.M.C.*, [1999] N.J. No. 298, 182 Nfld. & P.E.I.R. 201 (Nfld. C.A.) leave to appeal dismissed without reasons [2000] S.C.C.A. No. 56 (S.C.C.).
22. *R. v. C.S.D.*, [1999] N.J. No. 105, 174 Nfld. & P.E.I.R. 1 (Nfld. C.A.).
23. *R. v. Druken*, [1999] N.J. No. 183, 43 W.C.B. (2d) 156 (Nfld. C.A.).
24. *R. v. D.P.F.*, [1999] N.J. No. 353, 141 C.C.C. (3d) 391 (Nfld. C.A.).
25. *R. v. D.A.P.*, [1999] N.J. No.142 (Nfld. C.A.).
26. *R. v. Reid*, [1999] N.J. No. 145, 42 W.C.B. (2d) 480 (Nfld. C.A.).
27. *R. v. Rideout*, [1999] N.J. No. 294, 182 Nfld. & P.E.I.R. 227 (Nfld. C.A.) leave to appeal dismissed 2001 SCC 27, [2001] 1 S.C.R. 755 (S.C.C.).
28. *R. v. C.S.*, [1999] N.J. No. 43, 172 Nfld. & P.E.I.R. 175 (Nfld. C.A.).
29. *R. v. Stacey*, [1999] N.J. No. 377, 184 Nfld. & P.E.I.R. 7 (Nfld. C.A.).
30. *R. v. Turner*, [1999] N.J. No. 46, 133 C.C.C. (3d) 180 (Nfld. C.A.).
31. *R. v. Andersen*, [1999] N.S.J. No. 115, 175 N.S.R. (2d) 362 (N.S.C.A.).
32. *R. v. D.W.B.*, [1999] N.S.J. No. 56, 174 N.S.R. (2d) 240 (N.S.C.A.).
33. *R. v. E.R.H.*, [1999] N.S.J. No. 55, 174 N.S.R. (2d) 298 (N.S.C.A.).
34. *R. v. Hache*, [1999] 175 N.S.R. (2d) 297, 136 C.C.C. (3d) 285 (N.S.C.A.).
35. *R. v. Regan*, [1999] N.S.J. No. 293, 137 C.C.C. (3d) 449 (N.S.C.A.) appeal dismissed 2002 SCC 12, 161 C.C.C. (3d) 97 (S.C.C.).
36. *R. v. Babinski*, (1999), 44 O.R. (3d) 695, 135 C.C.C. (3d) 1 (Ont. C.A.).
37. *R. v. Burk*, [1999] 124 O.A.C. 269, 139 C.C.C. (3d) 266 (Ont. C.A.).
38. *R. v. Canhoto*, [1999] 127 O.A.C. 147, 140 C.C.C. (3d) 321 (Ont. C.A.).
39. *R. v. Carson*, [1999] O.J. No. 1124 (Ont. C.A.).
40. *R. v. Chciuk*, [1999] O.J. No. 3, 131 C.C.C. (3d) 552 (Ont. C.A.).
41. *R. v. J.D.*, [1999] O.J. No. 2637 (Ont. C.A.).
42. *R. v. P.D.*, [1999] O.J. No. 3375, 139 C.C.C. (3d) 274 (Ont. C.A.).
43. *R. v. Elliott*, [1999] O.J. No. 1518 (Ont. C.A.).

44. *R. v. G.F.*, [1999] 43 O.R. (3d) 290, 132 C.C.C. (3d) 14 (Ont. C.A.).
45. *R. v. Find*, [1999] O.J. No. 3295 (Ont. C.A.).
46. *R. v. Folland*, [1999] O.J. No. 143, 43 O.R. (3d) 290 (Ont. C.A.).
47. *R. v. Garcia*, [1999] O.J. No. 1356, 42 W.C.B. (2d) 58, (Ont. C.A.).
48. *R. v. Ghorvei*, [1999] O.J. No. 3241, 46 O.R. (3d) 63, 138 C.C.C. (3d) 340 (Ont. C.A.).
49. *R. v. Green*, [1999] O.J. No. 1772 (Ont. C.A.).
50. *R. v. J.H.* (1999), 118 O.A.C. 354, 135 C.C.C. (3d) 338 (Ont. C.A.).
51. *R. v. Henderson*, [1999] O.J. No. 1216, 44 O.R. (3d) 628 (Ont. C.A.).
52. *R. v. Kelly* (1999), 122 O.A.C. 201, (sub nom. *Reference re Kelly*) 135 C.C.C. (3d) 449 (Ont. C.A.) leave to appeal denied 2001 SCC 25, 153 C.C.C. (3d) 45 (S.C.C.).
53. *R. v. Kennedy, R. V. J.G.F.*, [1999] O.J. No. 4278, 140 C.C.C. (3d) 378 (Ont. C.A.).
54. *R. v. Killam*, [1999] O.J. No. 4289, 126 O.A.C. 281 (Ont. C.A.).
55. *R. v. C.L.*, [1999] O.J. No. 3268, 138 C.C.C. (3d) 356 (Ont. C.A.).
56. *R. v. Logan* (1999), 125 O.A.C. 152, 139 C.C.C. (3d) 57 (Ont. C.A.).
57. *R. v. M.M.*, [1999] O.J. No. 2630 (Ont. C.A.).
58. *R. v. MacLaren*, [1999] O.J. No. 2566, 122 O.A.C. 177 (Ont. C.A.).
59. *R. v. Mathison*, [1999] O.J. No. 5021 (Ont. C.A.).
60. *R. v. McGregor* (1999), 43 O.R. (3d) 455, 134 C.C.C. (3d) 570 (Ont. C.A.).
61. *R. v. Meiler*, [1999] O.J. No. 1506, 136 C.C.C. (3d) 11 (Ont. C.A.).
62. *R. v. Nikkanen*, [1999] O.J. No. 3822, 140 C.C.C. (3d) 423 (Ont. C.A.).
63. *R. v. Olsen, R. v. Podniewicz*, [1999] O.J. No. 218, 131 C.C.C. (3d) 355 (Ont. C.A.).
64. *R. v. Pham*, [1999] O.J. No. 3444, 124 O.A.C. 154 (Ont. C.A.).
65. *R. v. Phillips*, [1999] O.J. No. 2848, 138 C.C.C. (3d) 297 (Ont. C.A.).
66. *R. v. Pirani*, [1999] O.J. No. 1660, 120 O.A.C. 191 (Ont. C.A.).
67. *R. v. Romanowicz*, [1999] O.J. No. 3191, 138 C.C.C. (3d) 225 (Ont. C.A.).
68. *R. v. Roy*, [1999] O.J. No. 4804 (Ont. C.A.).
69. *R. v. Spencer*, [1999] O.J. No. 214 (Ont. C.A.).
70. *R. v. Valentini et al.*, [1999] 43 O.R. (3d) 178, [1999] O.J. No. 251 (Ont. C.A.).
71. *R. v. Wallace*, [1999] O.J. No. 1828 (Ont. C.A.).
72. *R. v. Windle*, [1999] O.J. No. 2206 (Ont. C.A.).
73. *R. v. Winmill* (1999), 42 O.R. (3d) 582, 131 C.C.C. (3d) 380 (Ont. C.A.).
74. *R. c. Delisle*, [1999] J.Q. no 18, 133 C.C.C. (3d) 541 (Qc. C.A.).
75. *R. c. Flamand*, [1999] J.Q. no 4361, 141 C.C.C. (3d) 169 (Qc. C.A.), demande d'autorisation d'appel rejetée, [1999] C.S.C.R. no 534 (C.S.C.).
76. *R. c. Galantai*, [1999] J.Q. no 412 (Qc. C.A.) leave to appeal refused 1999] C.S.C.R. no 230 (S.C.C.).
77. *R. v. Jetté*, [1999] J.Q. no 4641, 141 C.C.C. (3d) 52 (Qc. C.A.).
78. *R. v. Cary*, [1999] S.J. No. 456 (Sask. C.A.).
79. *R. v. Ross*, [1999] S.J. No. 198 (Sask. C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 201 (S.C.C.).
80. *Firm of Kirkland, Murphy & Ain v. Wernikowski* (1999), 50 O.R. (3d) 124, 141 C.C.C. (3d) 403 (Ont.C.A.).

81. *Horsefield v. Ontario (Registrar of Motor Vehicles)*, [1999] 44 O.R. (3d) 73 (Ont. C.A.).
82. *United States of America v. Cobb*, [1999] S.C.C.A. No. 561 (S.C.C.).

2000

1. *R. v. B. (G.D.)*, 2000 SCC 22, 143 C.C.C. (3d) 289 (S.C.C.) affirming 1999 ABCA 104, 232 A.R. 307, 133 C.C.C. (3d) 309 (Alta. C.A.).
2. *R. v. Wells*, 2000 SCC 10, 141 C.C.C. (3d) 368 (S.C.C.) affirming 1998 ABCA 109, 125 C.C.C. (3d) 129 (Alta. C.A.).
3. *R. v. Tidey*, 2000 ABCA 130, 255 A.R. 389 (Alta. C.A.).
4. *R. v. Alvarez*, [2000] B.C.J. No. 1259, 2000 BCCA 401 (B.C. C.A.) leave to appeal refused [2000] S.C.C.A. No. 437 (S.C.C.).
5. *R. v. James*, 2000 BCCA 616, 149 C.C.C. (3d) 534 (B.C. C.A.).
6. *R. v. Janik*, [2000] B.C.J. No. 1110, 2000 BCCA 3400 (B.C. C.A.).
7. *R. v. Plewes*, 2000 BCCA 278, 144 C.C.C. (3d) 426 (B.C. C.A.).
8. *R. v. Poole*, [2000] B.C.J. No. 1787, 2000 BCCA 481 (B.C.C.A.) leave to appeal refused [2000] S.C.C.A. No. 608 (S.C.C.).
9. *R. v. Snow*, 2000 BCCA 113, 137 B.C.A.C. 109 (B.C.C.A.).
10. *R. v. Stewart*, 2000 BCCA 498, 148 C.C.C. (3d) 68 (B.C. C.A.).
11. *R. v. Catcheway*, 2000 SCC 33, 146 C.C.C. (3d) 97 (S.C.C.), reversing (1999), 134 Man. R. (2d) 129, 41 W.C.B. (2d) 143 (Man. C.A.).
12. *R. v. R.G.* (2000), 145 Man. R. (2d) 161, 218 W.A.C. 161 (Man. C.A.).
13. *R. v. Hoepfner*, [2000] M.J. No. 95, 145 Man.R. (2d) 151 (Man. C.A.) appeal allowed on other grounds [1999] S.C.C.A. No. 237 (S.C.C.A.).
14. *R. v. Khan*, 2000 SCC 63, 147 C.C.C. (3d) 87 (S.C.C.).
15. *R. v. Luhowy*, [2000] M.J. No. 122, 144 Man.R. (2d) 185 (Man. C.A.).
16. *R. v. E.J.P.*, 2000 MBCA 146, 153 Man.R. (2d) 84 (Man. C.A.).
17. *R. v. Unfried*, 2000 MBCA 92, 47 W.C.B. (2d) 349 (Man. C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 16, 156 Man.R. (2d) 319 (S.C.C.).
18. *R. v. Booker*, [2000] N.B.J. No. 45 (N.B.C.A.).
19. *R. v. Murray*, [2000] N.B.J. No. 359, 2000 NBCA 2 (N.B.C.A.).
20. *R. v. Mahoney*, 2000 NFCA 62, 197 Nfld. & P.E.I.R. 1 (Nfld. C.A.).
21. *R. v. Campbell and R. v. Barrett*, 2000 NSCA 76, 184 N.S.R. (2d) 374 (N.S.C.A.).
22. *R. v. MacDonald*, [2000] N.S.J. No. 143, 2000 NSCA 60 (N.S.C.A.).
23. *R. v. K.N.*, 2000 NSCA 36, 183 N.S.R. (2d) 52 (N.S.C.A.).
24. *R. v. Ahluwalia*, [2000] O.J. No. 4544, 149 C.C.C. (3d) 193 (Ont. C.A.).
25. *R. v. Allen*, [2000] O.J. No.2469 (Ont. C.A.).
26. *R. v. J.B.*, [2000] O.J. No. 3250 (Ont. C.A.).
27. *R. v. Baltovich*, [2000] 47 O.R. (3d) 761, 144 C.C.C. (3d) 233 (Ont. C.A.).
28. *R. v. Bates*, [2000] O.J. No. 2558, 146 C.C.C. (3d) 321 (Ont. C.A.).
29. *R. v. Bedard*, [2000] O.J. No. 3992 (Ont. C.A.) leave to appeal refused [2001] S.C.C.A. No. 4 (S.C.C.).
30. *R. v. Beyo*, [2000] 47 O.R. (3d) 712, [2000] O.J. No. 888 (Ont. C.A.) leave to appeal dismissed [2000] S.C.C.A. No. 239 (S.C.C.).

31. *R. v. Budreo*, [2000] O.J. No. 72, 142 C.C.C. (3d) 225 (Ont. C.A.) leave to appeal dismissed [2000] S.C.C.A. No. 542 (S.C.C.).
32. *R. v. D.W.C.*, [2000] O.J. No. 3759 (Ont. C.A.).
33. *R. v. Deane*, [2000] O.J. No. 403, 143 C.C.C. (3d) 84 (Ont. C.A.) leave to appeal dismissed [2000] S.C.C.A. No. 93 (S.C.C.).
34. *R. v. Dobson*, [2000] S.C.C.A. No. 148 (S.C.C.).
35. *R. v. Duhaney*, [2000] O.J. No. 829 (Ont. C.A.).
36. *R. v. Dunseith*, [2000] O.J. No. 2470 (Ont. C.A.).
37. *R. v. S.F.*, [2000] O.J. No. 60, 141 C.C.C. (3d) 225 (Ont. C.A.).
38. *R. v. Finkle*, [2000] O.J. No. 1817 (Ont. C.A.).
39. *R. v. Hector*, [2000] O.J. No. 1597, 146 C.C.C. (3d) 81 (Ont. C.A.).
40. *R. v. Johnston*, [2000] O.J. No. 3539, 136 O.A.C. 190 (Ont. C.A.).
41. *R. v. Jones*, [2000] O.J. No. 446 (Ont. C.A.).
42. *R. v. Kinghorn*, [2000] O.J. No. 3690 (Ont. C.A.).
43. *R. v. Krushel; R. v. Connors; R. v. Grey*, [2000] O.J. No. 302, 142 C.C.C. (3d) 1 (Ont. C.A.) leave to appeal dismissed [2002] S.C.C.A. No. 293 (S.C.C.).
44. *R. v. B.R.L.*, [2000] O.J. No. 3370 (Ont. C.A.).
45. *R. v. Langevin*, [2000] O.J. No. 4648, 138 O.A.C. 326 (Ont. C.A.).
46. *R. v. Lewis*, [2000] O.J. No. 2245 (Ont. C.A.).
47. *R. v. McCullough*, [2000] O.J. No. 32, 142 C.C.C. (3d) 149 (Ont. C.A.).
48. *R. v. Nash*, [2000] O.J. No. 4639 (Ont. C.A.).
49. *R. v. Parker*, [2000] 49 O.R. (3d) 481, 146 C.C.C. (3d) 19 (Ont. C.A.).
50. *R. v. Pavich*, [2000] O.J. No. 4209 (Ont. C.A.).
51. *R. v. Ploumis*, [2000] O.J. No. 4731, 150 C.C.C. (3d) 424 (Ont. C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 69 (S.C.C.).
52. *R. v. Regina*, [2000] O.J. No. 4708 (Ont. C.A.).
53. *R. v. Robert*, [2000] O.J. No. 688, 143 C.C.C. (3d) 330 (Ont. C.A.).
54. *R. v. Rodgers*, [2000] O.J. No. 1772, 132 O.A.C. 373 (Ont. C.A.). See related application *R. v. Rodgers*, [2000] O.J. No. 1065, 144 C.C.C. (3d) 568 (Ont. C.A.).
55. *R. v. D.S.*, [2000] O.J. No. 2611 (Ont. C.A.).
56. *R. v. Seeley*, [2000] O.J. No. 4325 (Ont. C.A.).
57. *R. v. Seiffenasr*, [2000] O.J. No. 1155 (Ont. C.A.).
58. *R. v. Stark*, [2000] O.J. No. 1406, 145 C.C.C. (3d) 129 (Ont. C.A.) leave to appeal refused [2000] S.C.C.A. No. 326 (S.C.C.).
59. *R. v. Shahnawaz*, [2000] O.J. No. 4151, 51 O.R. (3d) 29 (Ont. C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 24 (S.C.C.).
60. *R. v. Yaworski* (2000), 134 O.A.C. 154, [2000] O.J. No. 2613, (Ont. C.A.).
61. *R. c. Bergeron*, [2000] J.Q. no 503 (Qc. C.A.).
62. *R. c. Daoulov*, [2000] J.Q. no 1042 (Qc. C.A.).
63. *R. c. Fortin*, [2000] J.Q. no 1771 (Qc. C.A.).
64. *R. c. Lévesque*, 2000 SCC 47, 148 C.C.C. (3d) 193 (S.C.C.) reversing [1998] Q.J. No. 2680, 130 C.C.C. (3d) 107 (Qc. C.A.).
65. *R. c. Morielli*, [2000] J.Q. no 43, [2000] R.J.Q. 364 (Qc. C.A.).
66. *R. v. McCullough*, 2000 SKCA 128, [2000] S.J. No. 666 (Sask. C.A.).
67. *R. v. Oxyby*, 2000 SKCA 129, [2000] S.J. No. 667 (Sask. C.A.).

68. *R. v. Scott*, 2000 SKCA 150, [2000] S.J. No. 843 (Sask. C.A.).
69. *R. v. Van Bergen*, 2000 ABCA 216, 261 A.R. 387 (Alta. C.A.) leave to appeal refused [2000] S.C.C.A. No. 403 (S.C.C.).
70. *Office des services a l'enfant et a la famille de Winnipeg c. K.L.W.*, [2000] 2 R.C.S. 519 (C.S.S.).
71. *F. (S.) v. Canada (Attorney General)* (2000), 128 O.A.C. 329, 141 C.C.C. (3d) 225 (Ont. C.A.).
72. *United States of America v. Tsioubris*, [2000] S.C.C.A. No. 68 (S.C.C.).

2001

1. *R. v. Hardy*, 2001 ABCA 101, 281 A.R. 57 (Alta. C.A.) leave to appeal refused [2001] S.C.C.A. No. 329 (S.C.C.).
2. *R. v. Soosay*, 2001 ABCA 287, 160 C.C.C. (3d) 437 (Alta. C.A.).
3. *R. v. Arnold*, 2001 BCCA 374, 155 C.C.C. (3d) 263 (B.C.C.A.).
4. *R. v. Belrose*, 2001 BCCA 427, 157 B.C.A.C. 80 (B.C.C.A.).
5. *R. v. Budai*, 2001 BCCA 349, 154 C.C.C. (3d) 289 (B.C. C.A.) leave to appeal refused, [2001] S.C.C.A. No. 415, 172 B.C.A.C. 160 (note) (S.C.C.). [See related cases regarding schedule set to hear fresh evidence application *R. v. Budai*, 1999 BCCA 731, [1999] B.C.J. No. 2886 (B.C.C.A.); regarding application by respondents for a publication ban on evidence, including fresh evidence in this appeal *R. v. Budai*, 2000 BCCA 266, 144 C.C.C. (3d) 1 (B.C.C.A.)].
6. *R. v. P.T.C.*, 2001 BCCA 473, 50 W.C.B. (2d) 550 (B.C.C.A.).
7. *R. v. Dempsey*, 2001 BCCA 122, 153 C.C.C. (3d) 311 (B.C.C.A.).
8. *R. v. Flores-Escovar*, 2001 BCCA 38, 149 B.C.A.C. 87 (B.C.C.A.).
9. *R. v. Fربول*, 2001 BCCA 205, 152 C.C.C. (3d) 449 (B.C.C.A.) leave to appeal refused [2001] S.C.C.A. No. 342 (S.C.C.). See related fresh evidence order to seal *R. v. Fربول*, 2001 BCCA 157 (B.C.C.A.).
10. *R. v. Gregory*, 2001 BCCA 358, 50 W.C.B. (2d) 141 (B.C.C.A.).
11. *R. v. R.A.K.*, 2001 BCCA 547, (sub nom. *R. v. Kleven*) 158 B.C.A.C. 203 (B.C.C.A.).
12. *R. v. Kaiser*, 2001 BCCA 494, 158 B.C.A.C. 169 (B.C. C.A.).
13. *R. v. D.A.S.*, [2001] B.C.J. No. 1801, 2001 BCCA 502 (B.C.C.A.).
14. *R. v. Schmidt*, 2001 BCCA 3, 151 C.C.C. (3d) 74 (B.C.C.A.).
15. *R. v. Spence*, 2001 BCCA 521, 159 B.C.A.C. 171 (B.C.C.A.).
16. *R. v. Wilson*, 2001 BCCA 405, 155 B.C.A.C. 10 (B.C.C.A.).
17. *R. v. L.I.H.*, 2001 MBCA 92, 155 C.C.C. (3d) 247 (Man. C.A.).
18. *R. v. McCoy*, 2001 MBCA 71, 156 Man.R. (2d) 278 (Man. C.A.).
19. *R. v. I.B.*, [2001] N.B.J. No. 199, [2001] A.N.-B. no 199 (N.B.C.A.).
20. *R. v. Hudnut*, 2001 NBCA 7, 236 N.B.R. (sub nom. *R. v. H. (H.T.)*), [2001] N.B.J. No. 72 (N.B.C.A.).
21. *R. v. Wright*, 2001 NBCA 23, [2001] N.B.R. (2d) (Supp.) No. 12 (N.B.C.A.).
22. *R. v. Carroll*, 2001 NFCA 59 (sub nom. *R. v. F.J.C.*), 206 Nfld. & P.E.I.R. 341 (Nfld. C.A.).
23. *R. v. Valchanov*, [2001] N.J. No. 373, 2001 NFCA 18 (Nfld. C.A.).
24. *R. v. L.E.B.*, [2001] N.S.J. No. 386, 2001 NSCA 146 (N.S.C.A.).

25. *R. v. C.D.C.*, [2001] N.S.J. No. 481, (sub nom. *R. v. Chambers*) 2001 NSCA 175 (N.S. C.A.).
26. *R. v. Lawrence*, 2001 NSCA 44, 192 N.S.R. (2d) 43 (N.S.C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 219 (S.C.C.).
27. *R. v. Wile*, 2001 NSCA 183, 200 N.S.R. (2d) 77 (N.S.C.A.).
28. *R. v. Wood*, 2001 NSCA 38, 157 C.C.C. (3d) 389 (N.S.C.A.).
29. *R. v. Alexander*, [2001] O.J. No. 4096, 150 O.A.C. 160 (Ont. C.A.).
30. *R. v. Appleton*, [2001] O.J. No. 3338, 55 O.R. (3d) 321 (Ont. C.A.).
31. *R. v. Biscoombe*, [2001] O.J. No. 4221 (Ont. C.A.).
32. *R. v. Boyce*, [2001] O.J. No. 991 (Ont. C.A.).
33. *R. v. Burke*, [2001] O.J. No. 3281 (Ont. C.A.).
34. *R. v. Cann*, [2001] O.J. No. 1881 (Ont. C.A.).
35. *R. v. Caya*, [2001] O.J. No. 503 (Ont. C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 171 (S.C.C.).
36. *R. v. D.D.*, [2001] O.J. No. 4923 (sub nom. *R. v. Dzikowski*) (Ont. C.A.).
37. *R. v. Dallaire*, [2001] O.J. No. 1722, 50 W.C.B. (2d) 53 (Ont. C.A.).
38. *R. v. Dallaire*, [2001] O.J. No. 140, 141 O.A.C. 65 (Ont. C.A.).
39. *R. v. Duong*, [2001] O.J. No. 5004, 160 C.C.C. (3d) 467 (Ont. C.A.).
40. *R. v. G. (G.)*, [2001] O.J. No. 4130, 150 O.A.C. 206 (Ont. C.A.).
41. *R. v. Ganesalingam & Suventhiran Sellathamby*, [2001] O.J. No. 2712 (Ont. C.A.).
42. *R. v. Gayle*, [2001] O.J. No. 1559, 54 O.R. (3d) 36 (Ont. C.A.).
43. *R. v. Gurney*, [2001] O.J. No. 2227 (Ont. C.A.).
44. *R. v. Harry*, [2001] O.J. No. 4799 (Ont. C.A.).
45. *R. v. Hofung* (2001), 53 O.R. (3d) 535, [2001] O.J. No. 1342 (Ont. C.A.).
46. *R. v. J.*, [2001] O.J. No. 2064 (Ont. C.A.).
47. *R. v. Lam*, [2001] O.J. No. 1000 (Ont. C.A.).
48. *R. v. Lindsay*, [2001] O.J. No. 1745 (Ont. C.A.).
49. *R. v. Lyon*, [2001] O.J. No. 2939 (Ont. C.A.).
50. *R. v. J.M.* (2001), 147 O.A.C. 388, (sub nom. *R. v. Mason*) 156 C.C.C. (3d) 97 (Ont. C.A.).
51. *R. v. Mathison*, [2001] O.J. No. 4834 (Ont. C.A.).
52. *R. v. Mendoza*, [2001] O.J. No. 1440 (Ont. C.A.).
53. *R. v. Nelson*, [2001] O.J. No. 3405 (Ont. C.A.).
54. *R. v. Pan*, 2001 SCC 42, 155 C.C.C. (3d) 97 (S.C.C.) affirming *R. v. Pan* [1999], 120 O.A.C. 1, 134 C.C.C. (3d) 1 (Ont. C.A.) and affirming *R. v. Sawyer*, [1999] 120 O.A.C. 114, 134 C.C.C. (3d) 152 (Ont. C.A.).
55. *R. v. W.R.*, [2001] O.J. No. 489 (Ont. C.A.).
56. *R. c. Racine*, [2001] O.J. No. 4296 (Ont. C.A.).
57. *R. v. Rozon*, [2001] O.J. No. 2872 (Ont. C.A.).
58. *R. v. Sabourin*, [2001] O.J. No. 4649 (Ont. C.A.).
59. *R. v. D.P.*, [2001] O.J. No. 2865, 148 O.A.C. 56 (Ont. C.A.).
60. *R. v. Patenaude*, [2001] O.J. No. 660 (Ont. C.A.).
61. *R. v. Satkunanathan*, *R. v. Michaelpillai*, *R. v. Francis*, *R. v. Chelliah*, *R. v. Thuraisingam*, *R. v. Manoranjan*, *R. v. Palanithurai*, [2001] O.J. No. 1019, 152 C.C.C. (3d) 321 (Ont. C.A.).

62. *R. v. Scott*, [2001] O.J. No. 4188 (Ont. C.A.).
63. *R. v. Senior*, [2001] O.J. No. 3465, 149 O.A.C. 197 (Ont. C.A.).
64. *R. v. Shay*, [2001] O.J. No. 2072 (Ont. C.A.).
65. *R. v. Shepherd*, [2001] 54 O.R. (3d) 199, [2001] O.J. No. 1490 (Ont. C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 326 (S.C.C.).
66. *R. v. Shergill*, [2001] O.J. No. 3489 (Ont. C.A.).
67. *R. v. Sinclair*, [2001] O.J. No. 5080 (Ont. C.A.).
68. *R. v. Smith*, [2001] 154 O.A.C. 51, 161 C.C.C. (3d) 1 (Ont. C.A.) leave to appeal dismissed [2002] S.C.C.A. No. 156 (S.C.C.).
69. *R. v. Soby*, [2001] O.J. No. 417 (Ont. C.A.).
70. *R. v. Sooknanan*, [2001] O.J. No. 4785 (Ont. C.A.).
71. *R. v. Tavenor*, [2001] O.J. No. 207, 140 O.A.C. 78 (Ont. C.A.).
72. *R. v. Wang, R. v. Lo*, [2001] O.J. No. 1491, 153 C.C.C. (3d) 321 (Ont. C.A.) additional reasons at [2001] O.J. No. 1961 (Ont. C.A.).
73. *R. v. Wedderburn*, [2001] O.J. No. 4812 (Ont. C.A.).
74. *R. v. Zafis*, [2001] O.J. No. 4107 (Ont. C.A.).
75. *R. v. Manning*, [2001] P.E.I.J. No. 106, 2001 PESCAD 26 See related matter *R. v. Manning*, 2001 PESCAD 13, [2001] P.E.I.J. No. 68 (P.E.I. C.A.).
76. *Re. Dumont*, [2001] J.Q. no 596 (Qc. C.A.).
77. *R. c. James*, [2001] J.Q. no. 5232 (Qc. C.A.).
78. *R. c. D.L.*, [2001] J.Q. no 4808 (Qc. C.A.), demande d'autorisation d'appel rejetée, [2001] C.S.C.R. no 521 (C.S.C.).
79. *R. c. Nuckle*, [2001] J.Q. no 802 (Qc. C.A.).
80. *R. c. C.É.P.*, [2001] J.Q. no 2863 (Qc. C.A.). See related case *R. c. C.P.*, [1998] J.Q. no 2829 (Qc. C.A.).
81. *R. c. Peters*, 2001 SCC 34, 156 C.C.C. (3d) 222 (S.C.C.) affirming [1999] R.J.Q. 2304, [1999] 140 C.C.C. (3d) 52 (Qc. C.A.) and affirming *R. v. Denton*, [1999] R.J.Q. 2281, 140 C.C.C. (3d) 12 and affirming *R. v. Rendon*, [1999] R.J.Q. 2281, 140 C.C.C. (3d) 12 (Qc. C.A.).
82. *Tremblay c. R.*, [2001] J.Q. no 7945 (Qc. C.A.).
83. *United States v. Burns*, 2001 SCC 7, 151 C.C.C. (3d) 97 (S.C.C.).
84. *United States v. Cobb*, 2001 SCC 19, 152 C.C.C. (3d) 270 (S.C.C.).
85. *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.).
86. *United States v. Shulman*, 2001 SCC 21, 152 C.C.C. (3d) 294, 1 R.C.S. 616 (S.C.C.) reversing (1998), 132 O.A.C. 262, 128 C.C.C. (3d) 475 (Ont. C.A.).
87. *United States of America v. Waldman*, [2001] S.C.C.A. No. 560 (S.C.C.).

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1. *R. v. Cruickshank*, 2002 ABCA 168, 312 A.R. 187 (Alta. C.A.).
2. *R. v. C.E.K.*, 2002 ABCA 295, 317 A.R. 234 (Alta. C.A.).
3. *R. v. J.A.S.*, 2002 ABCA 311, 56 W.C.B. (2d) 368 (Alta. C.A.).
4. *R. v. Underwood #2*, 2002 ABCA 310, 170 C.C.C. (3d) 500 (Alta. C.A.).
5. *R. v. Bowers*, 2002 BCCA 343, 166 C.C.C. (3d) 87 (B.C.C.A.).
6. *R. v. Bridal*, 2002 BCCA 22, 163 B.C.A.C. 49 (B.C.C.A.).
7. *R. v. Ellard*, 2002 BCCA 184, 53 W.C.B. (2d) 197 (B.C.C.A.).

8. *R. v. K.R.H.*, 2002 BCCA 575, (sub nom. *R. v. Henry*) 174 B.C.A.C. 238 (B.C. C.A.).
9. *R. v. Johnson*, 2002 BCCA 97, 173 B.C.A.C. 219 (B.C.C.A.).
10. *R. v. Khadikin*, 2002 BCCA 558, 55 W.C.B. (2d) 457 (B.C.C.A.).
11. *R. v. F.E.L.*, 2002 BCCA 67, 53 W.C.B. (2d) 124 (B.C.C.A.).
12. *R. v. M. (E.B.)*, 2002 BCCA 278, 165 C.C.C. (3d) 39 (B.C.C.A.).
13. *R. v. M.S.R.*, 2002 BCCA 268, (sub nom. *R. v. Reid*) 2002, 168 B.C.A.C. 107 (B.C.C.A.).
14. *R. v. Rothgardt*, 2002 BCCA 607, 177 B.C.A.C. 173 (B.C.C.A.).
15. *R. v. Stojanovski*, 2002 BCCA 368, 170 B.C.A.C. 92 (B.C.C.A.).
16. *R. v. K.W.*, 2002 BCCA 131, 167 C.C.C. (3d) 545 (B.C.C.A.).
17. *R. v. Romolo*, 2002 MBCA 66, 54 W.C.B. (2d) 169 (Man. C.A.).
18. *R. v. N.G.B.*, 2002 NBCA 81, (sub nom. *R. v. Belong*) 252 N.B.R. (2d) 398 (N.B.C.A.).
19. *R. v. J.G.G.*, 2002 NBCA 99, 254 N.B.R. (2d) 131 (N.B.C.A.).
20. *R. v. J.J.J.*, 2002 NFCA 31, 212 Nfld. & P.E.I.R. 224 (N.L.C.A.).
21. *R. v. Smith*, 2002 NFCA 8, 161 C.C.C. (3d) 353 (N.L. C.A.).
22. *R. v. C.J.C.*, [2002] N.S.J. No. 158, 2002 NSCA 45 (N.S.C.A.).
23. *R. v. Anaso*, [2002] O.J. No. 4452 (Ont. C.A.).
24. *R. v. J.B.*, [2002] O.J. No. 320 (Ont. C.A.).
25. *R. v. Benjamin*, [2002] O.J. No. 410 (Ont. C.A.).
26. *R. v. D.D.*, [2002] O.J. No. 1061, 2002, 58 O.R. (3d) 788 (Ont. C.A.).
27. *R. v. Dekoning*, [2002] O.J. No. 4363 (Ont. C.A.).
28. *R. v. Dhillon*, [2002] O.J. No. 2775, 166 C.C.C. (3d) 262 (Ont. C.A.).
29. *R. v. Dobis*, [2002] O.J. No. 646, 58 O.R. (3d) 536 (Ont. C.A.).
30. *R. v. Esmonde*, [2002] O.J. No. 2544, 161 O.A.C. 40 (Ont. C.A.).
31. *R. v. R.F.*, [2002] O.J. No. 2348 (Ont. C.A.).
32. *R. v. Graham*, [2002] O.J. No. 4439 (Ont. C.A.).
33. *R. v. Holub and R. v. Kufin* (2002), 155 O.A.C. 278, 163 C.C.C. (3d) 166 (Ont. C.A.).
34. *R. v. Jackson* (2002), 58 O.R. (3d) 593, [2002] O.J. No. 1097 (Ont. C.A.).
35. *R. v. Joshi*, [2002] O.J. No. 1119 (Ont. C.A.).
36. *R. v. Knight* (2002), 55 W.C.B. (2d) 212, [2002] O.J. No. 3392 (Ont. C.A.).
37. *R. v. Lukacko* (2002), 59 O.R. (3d) 58, 164 C.C.C. (3d) 550 (Ont. C.A.).
38. *R. v. A.M.*, [2002] O.J. No. 439, 156 O.A.C. 89 (Ont. C.A.).
39. *R. v. M.M. (1), R. M.M. (2)*, [2002] O.J. No. 3396, (sub nom. *R. v. Medeiros*) 163 O.A.C. 46 (Ont. C.A.).
40. *R. v. Mac*, [2002] O.J. No. 2179 (Ont. C.A.).
41. *R. v. Malik*, [2002] O.J. No. 3780 (Ont. C.A.).
42. *R. v. Malik*, [2002] O.J. No. 3877, 55 W.C.B. (2d) 355 (Ont. C.A.).
43. *R. v. Markman*, [2002] O.J. No. 4250 (Ont. C.A.) leave to appeal refused [2003] S.C.C.A. No. 49, 320 N.R. 186 (note) (S.C.C.).
44. *R. v. Myers*, [2002] O.J. No. 965 (Ont. C.A.).
45. *R. v. Naderi*, [2002] O.J. No. 1032 (Ont. C.A.).
46. *R. v. F.O., R. v. K.G.*, [2002] O.J. No. 461, 163 C.C.C. (3d) 426 (Ont. C.A.).
47. *R. v. P. (T.)*, [2002] 59 O.R. (3d) 577, [2002] O.J. No. 2142 (Ont. C.A.).

48. *R. v. Pelletier*, [2002] O.J. No. 3359 (Ont. C.A.).
49. *R. v. Pickett*, [2002] O.J. No. 406 (Ont. C.A.).
50. *R. v. Pilotte*, [2002] O.J. No. 866, 163 C.C.C. (3d) 225 (Ont. C.A.) leave to appeal dismissed [2002] S.C.C.A. No. 379 (S.C.C.).
51. *R. v. Pine*, [2002] O.J. No. 280 (Ont. C.A.).
52. *R. v. Rutt*, [2002] O.J. No. 2336 (Ont. C.A.).
53. *R. v. Schreinert, R. v. Winter*, [2002] O.J. No. 2015, 165 C.C.C. (3d) 295 (Ont. C.A.).
54. *R. v. Sellathamby*, [2002] O.J. No. 3784 (Ont. C.A.).
55. *R. v. Swearengen*, [2002] O.J. No. 3102 (Ont. C.A.).
56. *R. v. Ta* (2002), 58 O.R. (3d) 737, 164 C.C.C. (3d) 97 (Ont. C.A.).
57. *R. v. G.V.*, [2002] O.J. No. 4673 (Ont. C.A.).
58. *R. v. Vanezis*, [2002] O.J. No. 994, 156 O.A.C. 143 (Ont. C.A.) See related appeal from third trial *R. v. Vanezis* (2006), 217 O.A.C. 127, 213 C.C.C. (3d) 449 (Ont. C.A.).
59. *R. v. A.C.W.*, [2002] O.J. No. 3395 (Ont. C.A.).
60. *R. v. Young*, [2002] O.J. No. 4359, 55 W.C.B. (2d) 669 (Ont. C.A.).
61. *R. v. Monaghan*, 2002 PESCAD 10, 212 Nfld. & P.E.I.R. 261 (P.E.C.A.).
62. *R. v. Fortin*, [2002] J.Q. no 3561 (Qc. C.A.) leave to appeal refused [2002] C.S.C.R. no. 518 (S.C.C.).
63. *R. c. Grenier*, [2002] J.Q. no 8453 (Qc. C.A.).
64. *R. c. Laflamme*, [2002] J.Q. no 26 (Qc. C.A.), demande d'autorisation d'appel rejetée, [2002] C.S.C.R. no 122 (C.S.C.).
65. *R. c. Lefebvre*, [2002] J.Q. no 977 (Qc. C.A.) appeal refused [2002] C.S.C.R. no 258 (S.C.C.)
66. *R. c. Myrthil*, [2002] J.Q. no 473 (Qc. C.A.) leave to appeal refused [2002] C.S.C.R. no 213 (S.C.C.).
67. *R. c. Olivier*, [2002] J.Q. no 1019 (Qc. C.A.).
68. *R. c. Papp, R. c. Laberge*, [2002] J.Q. no 333 (Qc. C.A.).
69. *R. v. Moore*, 2002 SKCA 30, 163 C.C.C. (3d) 343 (Sask. C.A.).

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1. *R. v. L.S.C.*, 2003 ABCA 105, 13 C.R. (6th) 390 (Alta. C.A.).
2. *R. v. Phillips*, 2003 ABCA 4, 172 C.C.C. (3d) 285 (Alta. C.A.) affirmed 2003 SCC 57, 181 C.C.C. (3d) 321 (S.C.C.).
3. *R. v. Aghabeigi*, 2003 BCCA 573, 189 B.C.A.C. 228 (B.C.C.A.).
4. *R. v. Armistead*, 2003 BCCA 699, 192 B.C.A.C. 227 (sub nom. *R. v. R.R.A.*), [2002] B.C.J. No. 1478, 2002 BCCA 414 (B.C.C.A.).
5. *R. v. Barton*, 2003 BCCA 206, 180 B.C.A.C. 286 (B.C.C.A.).
6. *R. v. Bekar*, 2003 BCCA 325, 175 C.C.C. (3d) 97 (B.C.C.A.).
7. *R. v. Chan, R. v. Perrier*, 2003 BCCA 508, 178 C.C.C. (3d) 97 (B.C.C.A.) reversed 2004 SCC 57, 188 C.C.C. (3d) 14 (S.C.C.).
8. *R. v. Chow, R. v. Mapara*, 2003 BCCA 248, 182 B.C.A.C. 88 (B.C.C.A.) affirmed 2005 SCC 24, 195 C.C.C. (3d) 246 (S.C.C.).
9. *R. v. Dunbar, R. v. Pollard, R. v. Leiding and R. v. Kravit*, 2003 BCCA 667, 191 B.C.A.C. 223 (B.C.C.A.) leave to appeal refused, [2004] S.C.C.A. No. 30

- (S.C.C.). See related motions *R. v. Dunbar*, [2003] B.C.J. No. 1949, 2003 BCCA 465 (B.C.C.A.) and *R. v. Dunbar*, [2003] B.C.J. No. 2127 (B.C.C.A.).
10. *R. v. Green*, 2003 BCCA 51, 291 W.A.C. 43 (B.C.C.A.).
 11. *R. v. Grewall*, 2003 BCCA 441, 185 B.C.A.C. 247 (B.C. C.A.) leave to appeal refused [2003] S.C.C.A. No. 425 (S.C.C.). See related fresh evidence order *R. v. Grewall*, [2002] B.C.J. No. 2686 (B.C.C.A.).
 12. *R. v. M.H.*, 2003 BCCA 607, 188 B.C.A.C. 315 (B.C.C.A.).
 13. *R. v. F.K.*, 2003 BCCA 703, 181 C.C.C. (3d) 391 (B.C.C.A.).
 14. *R. v. K.W.M.*, 2003 BCCA 688, 190 B.C.A.C. 294 (B.C.C.A.).
 15. *R. v. MacMillan*, [2003] B.C.J. No. 1479, 2003 BCCA 372 (B.C.C.A.).
 16. *R. v. Niebergall*, 2003 BCCA 500, 187 B.C.A.C. 152 (B.C.C.A.).
 17. *R. v. J.G.T.*, 2003 BCCA 1, 178 B.C.A.C. 29 (B.C.C.A.).
 18. *R. v. Thompson*, 2003 BCCA 308, 183 B.C.A.C. 42 (B.C.C.A.).
 19. *R. v. Woods*, 2003 BCCA 539, 179 C.C.C. (3d) 408 (B.C.C.A.).
 20. *R. v. Thiessen*, 2003 MBCA 121, [2004] 3 W.W.R. 421 (Man. C.A.) leave to appeal dismissed [2003] S.C.C.A. No. 460 (S.C.C.).
 21. *R. v. Hasan*, [2003] N.B.J. No. 271 (N.B.C.A.).
 22. *R. v. K.M.P.*, [2003] N.J. No. 261, 2003 NLCA 54 leave to appeal allowed in part but dismissed [2004] S.C.C.A. No. 22 (S.C.C.).
 23. *R. v. Sheppard*, 2003 NLCA 2, 220 Nfld. & P.E.I.R. 299 (N.L.C.A.).
 24. *R. v. Nilaulak*, [2003] N.W.T.J. No. 40, 2003 NWTCA 7 (N.T.C.A.).
 25. *R. v. T.L.*, 2003 NSCA 44, 174 C.C.C. (3d) 326 (N.S.C.A.).
 26. *R. v. K.L.R.*, 2003 NSCA 54, 216 N.S.R. (2d) 125 (N.S.C.A.).
 27. *R. v. R.A.*, [2003] O.J. No. 4414, 59 W.C.B. (2d) 406 (Ont. C.A.).
 28. *R. v. Al-Diasty*, [2003] O.J. No. 1498, [2003] 64 O.R. (3d) 618 (Ont. C.A.).
 29. *R. v. Bajrangie-Singh*, [2003] O.J. No. 1166, 174 C.C.C. (3d) 351 (Ont. C.A.).
 30. *R. v. Borde* (2003), 63 O.R. (3d) 417, 172 C.C.C. (3d) 225, (sub nom. *R. v. Q.B.*, [2003] O.J. No. 354 (Ont. C.A.).
 31. *R. v. Clark*, [2003] O.J. No. 699 (Ont. C.A.).
 32. *R. v. Clark*, [2003] O.J. No. 1966 (Ont. C.A.).
 33. *R. v. Doney*, [2003] O.J. No. 1675 (Ont. C.A.).
 34. *R. v. English*, [2003] O.J. No. 4217 (Ont. C.A.).
 35. *R. v. Froman*, [2003] O.J. No. 4222 (Ont. C.A.).
 36. *R. v. Fuentes*, [2003] O.J. No. 2545 (Ont. C.A.).
 37. *R. v. Hayes*, [2003] O.J. No. 4590 (Ont. C.A.).
 38. *R. v. Homer*, [2003] O.J. No. 1172 (Ont. C.A.).
 39. *R. v. T.J.K.*, [2003] O.J. No. 4088 (Ont. C.A.).
 40. *R. v. Kanounnikoff*, [2003] O.J. No. 2511 (Ont. C.A.).
 41. *R. v. Larabie*, [2003] O.J. No. 2832 (Ont. C.A.).
 42. *R. v. B.M.*, [2003] O.J. No. 22 (Ont. C.A.).
 43. *R. v. I.E.M.* (2003), 169 O.A.C. 240, 173 C.C.C. (3d) 515 (Ont. C.A.).
 44. *R. v. Mallais*, [2003] O.J. No. 774 (Ont. C.A.).
 45. *R. v. Morgan* (2003), 171 O.A.C. 161, [2003] O.J. No. 1776 (Ont. C.A.).
 46. *R. v. E.O.*, [2003] O.J. No. 563, 169 O.A.C. 110 (Ont. C.A.).
 47. *R. v. Origen*, [2003] O.J. No. 683 (Ont. C.A.).

48. *R. v. Owen*, 2003 SCC 33, 174 C.C.C. (3d) 1 (S.C.C.) reversing [2001] O.R. (3d) 257, 155 C.C.C. (3d) 82 (Ont. C.A.).
49. *R. v. L.P., R. v. R.B.*, [2003] O.J. No. 251, 172 C.C.C. (3d) 195 (Ont. C.A.).
50. *R. v. M.R.*, [2003] O.J. No. 2557 (Ont. C.A.).
51. *R. v. W.R.*, [2003] O.J. No. 2294, 173 O.A.C. 16 (Ont. C.A.).
52. *R. v. Y.J.R.*, [2003] O.J. No. 2144 (Ont. C.A.).
53. *R. v. Reid* (2003), 65 O.R. (3d) 723, (sub nom. *R. v. K.E.R.*)177 C.C.C. (3d) 260 (Ont. C.A.).
54. *R. v. Reid*, [2003] O.J. No. 3255 (Ont. C.A.).
55. *R. v. Smolyar*, [2003] O.J. No. 3542, 59 W.C.B. (2d) 137 (Ont. C.A.) additional reasons at [2003] O.J. No. 3688 (Ont. C.A.).
56. *R. v. Wilson*, [2003] O.J. No. 4069 (Ont. C.A.).
57. *R. v. Casford*, 2003 PESCTD 44, [2003] P.E.I.J. No. 57 (P.E.C.A.).
58. *R. c. Briand*, [2003] J.Q. no 18059 (Qc. C.A.) leave to appeal refused, [2004] C.S.C.R. no 20 (S.C.C.).
59. *R. c. Carignan*, [2003] J.Q. no 2581, [2003] R.J.Q. 1022 (Qc. C.A.).
60. *R. c. Deragon*, [2003] J.Q. no 13442, [2003] R.J.Q. 2691 (Qc. C.A.).
61. *R. c. Greer*, [2003] J.Q. no 14876 (Qc. C.A.).
62. *R. c. S.H.*, [2003] J.Q. no 7609 (sub nom. *R. v. Harrison*), [2002] J.Q. no 3059 (Qc. C.A.).
63. *R. c. Popov*, [2003] J.Q. no 13929 (Qc. C.A.).
64. *R. c. Taillefer*, 2003 SCC 70, 179 C.C.C. (3d) 353 (S.C.C.) reversing [2001] J.Q. no 3975 (Qc. C.A.) and reversing *R. c. Duguay*, [2001] J.Q. no 4037 (Qc. C.A.).
65. *R. v. Friskie*, 2003 SKCA 72, 177 C.C.C. (3d) 72 (Sask. C.A.).
66. *R. v. Peepeetch*, 2003 SKCA 76, 177 C.C.C. (3d) 37 (Sask. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 457 (S.C.C.).
67. *R. v. Johnson*, 2003 YKCA 2, [2003] Y.J. No. 32 (Y.C.A.).
68. *United States of America v. Taylor*, 2003 BCCA 250 (B.C.C.A.).

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1. *R. v. Hunt*, 2004 ABCA 88, 346 A.R. 45 (Alta. C.A.).
2. *R. v. T.K.*, 2004 ABCA 269, 357 A.R. 18 (Alta. C.A.).
3. *R. v. Simpson*, 2004 ABCA 146, 348 A.R. 178 (Alta. C.A.).
4. *R. v. Wagner*, [2004] A.J. No. 713, 2004 ABCA 220 (Alta. C.A.).
5. *R. v. Aghabeigi*, 2004 BCCA 263, 195 B.C.A.C. 317 (B.C.C.A.) leave to appeal refused [2003] S.C.C.A. No. 551 (S.C.C.).
6. *R. v. Braun*, 2004 BCCA 222, 61 W.C.B. (2d) 508 (B.C.C.A.).
7. *R. v. Curry*, 2004 BCCA 144, 61 W.C.B. (2d) 206 (B.C.C.A.).
8. *R. v. L.C.D.*, 2004 BCCA 405, 200 B.C.A.C. 155 (B.C.C.A.).
9. *R. v. Grinshpun*, 2004 BCCA 579, 190 C.C.C. (3d) 483 leave to appeal refused [2004] S.C.C.A. No. 579 (S.C.C.).
10. *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75 (B.C.C.A.).
11. *R. v. Kim*, 2004 BCCA 57, 195 B.C.A.C. 6 (B.C.C.A.).
12. *R. v. Lohrer*, 2004 SCC 80, 193 C.C.C. (3d) 1 (S.C.C.) affirming 2003 BCCA 457, 186 B.C.A.C. 58 (B.C.C.A.).

13. *R. v. Andrews*, 2004 MBCA 60, 183 C.C.C. (3d) 321 (Man. C.A.).
14. *R. v. P. F.*, 2004 MBCA 1, 184 Man.R. (2d) 29 (Man. C.A.).
15. *R. v. Meade*, [2004] N.J. No. 49, 2004 NLCA 11 (N.L.C.A.).
16. *R. v. Normore*, 2004 NLCA 76, 191 C.C.C. (3d) 129 (N.L.C.A.).
17. *R. v. Ryan*, 2004 NLCA 2, 233 Nfld. & P.E.I.R. 51 (N.L.C.A.).
18. *R. v. Barry*, [2004] N.S.J. No. 469, 2004 NSCA 145 (N.S.C.A.).
19. *R. v. MacLeod*, 2004 NSCA 31, 182 C.C.C. (3d) 470 (N.S.C.A.).
20. *R. v. Schneider*, 2004 NSCA 151, [2004] N.S.J. No. 489 (N.S.C.A.) appeal dismissed [2005] C.S.C.R. no 57 (S.C.C.).
21. *R. v. Baltovich*, [2004] 73 O.R. (3d) 481, 191 C.C.C. (3d) 289 (Ont. C.A.).
22. *R. v. Bennett*, [2004] O.J. No. 1146, 184 C.C.C. (3d) 290 (Ont. C.A.).
23. *R. v. Bertelsen*, [2004] O.J. No. 243 (Ont. C.A.).
24. *R. v. Bigos*, [2004] O.J. No. 2097, 61 W.C.B. (2d) 648 (Ont. C.A.) leave to appeal refused, [2004] S.C.C.A. No. 538 (S.C.C.).
25. *R. v. Carriere*, [2004] 72 O.R. (3d) 767, [2004] O.J. No. 4363 (Ont. C.A.).
26. *R. v. Cece and R. v. Taylor*, [2004] O.J. No. 3938, 72 OR. (3d) 321 (Ont. C.A.).
27. *R. v. Cicchini*, [2004] O.J. No. 1365 (Ont. C.A.).
28. *R. v. Clark*, [2004] O.J. No. 195, 69 O.R. (3d) 321 (S.C.C.).
29. *R. v. D.H.D.*, [2004] O.J. No. 1736, 185 O.A.C. 377 (Ont. C.A.).
30. *R. v. J.S.D.*, [2004] O.J. No. 2142, 186 C.C.C. (3d) 304 (Ont. C.A.) leave to appeal dismissed [2004] S.C.C.A. No. 365 (S.C.C.).
31. *R. v. A.G.*, [2004] O.J. No. 4563, 190 C.C.C. (3d) 508 (Ont. C.A.).
32. *R. v. Giroux*, [2004] O.J. No. 2054, 62 W.C.B. (2d) 41 (Ont. C.A.).
33. *R. v. Harripersad*, [2004] O.J. No. 2321 (Ont. C.A.).
34. *R. v. Heywood*, [2004] O.J. No. 1959 (Ont. C.A.).
35. *R. v. Howard*, [2004] O.J. No. 3687 (Ont. C.A.).
36. *R. v. Ibrahim*, [2004] O.J. No. 4514 (Ont. C.A.) (sub. nom *R. v. Ahmed*, [2005] S.C.C.A. No. 333 (S.C.C.)).
37. *R. v. McArthur*, [2004] O.J. No. 721, 182 C.C.C. (3d) 230 (Ont. C.A.).
38. *R. v. McCue*, [2004] O.J. No. 2503, 62 W.C.B. (2d) 178 (Ont. C.A.).
39. *R. v. Nakhostin-Ansari* 2004, 73 O.R. (3d) 478 (Ont. C.A.).
40. *R. v. Palmer*, [2004] O.J. No. 2711 (Ont. C.A.).
41. *R. v. Peterman*, [2004] O.J. No. 1758, 2004, 70 O.R. (3d) 481 (Ont. C.A.).
42. *R. v. Roosen*, [2004] O.J. No. 104 (Ont. C.A.).
43. *R. v. Ross*, [2004] O.J. No. 2104 (Ont. C.A.).
44. *R. v. B.S.*, [2004] O.J. No. 1170, 185 O.A.C. 45 (Ont. C.A.).
45. *R. v. Sadler*, [2004] O.J. No. 1237 (Ont. C.A.).
46. *R. v. Sauvé* (sub nom. *R. v. Trudel*), [2004] O.J. No. 248, 182 C.C.C. (3d) 321 (Ont. C.A.) leave to appeal refused [2004] S.C.C.A. No. 246 (S.C.C.).
47. *R. v. Smith*, [2004] O.J. No. 43, (Ont. C.A.).
48. *R. v. Tessling*, 2004 SCC 67, 189 C.C.C. (3d) 129 (S.C.C.) reversing 63 O.R. (3d) 1 (Ont. C.A.).
49. *R. v. J.W.* (2004), 189 O.A.C. 347, (sub nom. *R. v. Wubbolt*) [2004] O.J. No. 3591 (Ont. C.A.).
50. *R. v. Wilson* (2004), 1 M.V.R. (5th) 16, [2004] O.J. No. 1332 (Ont. C.A.).
51. *R. v. Zellman*, [2004] O.J. No. 4159 (Ont. C.A.).

52. *Arsenault c. R.*, [2004] J.Q. no 3241 (Qc. C.A.).
53. *Arsenault c. R.*, [2004] J.Q. no 8884 (Qc. C.A.) requête en prorogation rejetée [2005] C.S.C.R. no 150 (C.S.C.).
54. *Bissonnette c. R.*, [2004] J.Q. no 6691, 67 W.C.B. (2d) 264 (Qc. C.A.).
55. *R. c. D. (R.)*, [2004] J.Q. no 29 (Qc. C.A.), voir *R. c. R.D.*, [2002] J.Q. no 4400 (Qc. C.A.).
56. *Gagnon c. R.*, [2004] J.Q. no 10538 (Qc. C.A.).
57. *R. c. Maher*, [2004] J.Q. no 9175 (Qc. C.A.).
58. *R. v. Halonen*, 2004 SKCA 160, [2004] S.J. No. 736 (Sask. C.A.).
59. *R. v. Lemaigre*, 2004 SKCA 125, 189 C.C.C. (3d) 492 (Sask. C.A.).
60. *R. v. MacDonald*, 2004 SKCA 152, [2004] S.J. No. 701 (Sask. C.A.).
61. *R. v. F.S.V.*, 2004 SKCA 173, [2004] S.J. No. 814 (Sask. C.A.).
62. *United States of America v. Gillingham*, 2004 BCCA 226, 184 C.C.C. (3d) 97 (B.C.C.A.).
63. *United States of America v. Maydak*, 2004 BCCA 478, [2004] B.C.J. No. 1937 (B.C. C.A.).
64. *United States of America v. Turenne*, 2004 MBCA 120, 187 C.C.C. (3d) 375 (Man. C.A.).
65. *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] S.C.C.A. No. 96 (S.C.C.).
66. *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, 182 C.C.C. (3d) 214 (S.C.C.) affirming [2002] O.J. No. 958, 54 W.C.B. (2d) 203 (Ont. C.A.).
67. *Shaikh v. Whitby Mental Health Centre*, [2004] O.J. No. 4155 (Ont. C.A.).

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1. *R. v. B. (O.F.)*, 2005 ABCA 451, 68 W.C.B. (2d) 325 (Alta. C.A.).
2. *R. v. Chalifoux*, 2005 ABCA 207, 371 A.R. 17 (Alta. C.A.).
3. *R. v. Chern*, 2005 ABCA 28, 194 C.C.C. (3d) 431 (Alta. C.A.) leave to appeal dismissed [2005] S.C.C.A. No. 160 (S.C.C.).
4. *R. v. Morehouse*, 2005 ABCA 336, 67 W.C.B. (2d) 8 and related case 2006 ABCA 172, 70 W.C.B. (2d) 173 (Alta. C.A.).
5. *R. v. Anderson*, 2005 BCCA 143, 210 B.C.A.C. 44 (B.C.C.A.).
6. *R. v. Dennis*, 2005 BCCA 475, 218 B.C.A.C. 67 (B.C.C.A.).
7. *R. v. Dick*, 2005 BCCA 486, 220 B.C.A.C. 133 (B.C.C.A.).
8. *R. v. Friesen*, 2005 BCCA 251, 212 B.C.A.C. 68 (B.C.C.A.).
9. *R. v. Jackson*, 2005 BCCA 539, 202 C.C.C. (3d) 228 (B.C.C.A.).
10. *R. v. Lord*, [2005] B.C.J. No. 627, 2005 BCCA 165 (B.C.C.A.).
11. *R. v. J.S.M.*, 2005 BCCA 417, 200 C.C.C. (3d) 400 (B.C.C.A.).
12. *R. v. Talman*, 2005 BCCA 279, 213 B.C.A.C. 43 (B.C.C.A.).
13. *R. v. Wormell*, [2005] B.C.J. No. 1289 (B.C.C.A.) appeal dismissed [2005] S.C.C.A. No. 371 (S.C.C.).
14. *R. v. Young*, 2005 BCCA 261, 213 B.C.A.C. 27 (B.C.C.A.).
15. *R. v. Hall*, [2005] M.J. No. 314, 2005 MBCA 103 (Man. C.A.).
16. *R. v. Babineau*, 2005 NBCA 42, 283 N.B.R. (2d) 59 (N.B.C.A.).
17. *R. v. Sweeney*, [2005] N.B.J. No. 431, 2005 NBCA 91 (N.B.C.A.).
18. *R. v. Werner*, 2005 NWTCA 5, 205 C.C.C. (3d) 556 (N.T.C.A.).

19. *R. v. Hill*, 2005 NSCA 130, 237 N.S.R. (2d) 314 (N.S.C.A.).
20. *R. v. Wolkins*, 2005 NSCA 2, 192 C.C.C. (3d) 378 (N.S. C.A.).
21. *R. v. Albay*, [2005] O.J. No. 355 (Ont. C.A.).
22. *R. v. Archer*, [2005] 203 O.A.C. 56, 202 C.C.C. (3d) 60 (Ont. C.A.).
23. *R. v. Bain*, [2005] O.J. No. 1237 (Ont. C.A.).
24. *R. v. Bradford*, [2005] O.J. No. 2244 (Ont. C.A.).
25. *R. v. Bragnalo*, [2005] O.J. No. 1495 (Ont. C.A.).
26. *R. v. Brooks*, [2005] O.J. No. 1603 (Ont. C.A.).
27. *R. v. R.D.C.*, [2005] O.J. No. 2922 (Ont. C.A.).
28. *R. v. Cozzi*, [2005] O.J. No. 1402, 64 W.C.B. (2d) 539 (Ont. C.A.).
29. *R. v. Crandall*, [2005] O.J. No. 3781 (Ont. C.A.).
30. *R. v. Curtone*, [2005] O.J. No. 4225, 67 W.C.B. (2d) 278 (Ont. C.A.).
31. *R. v. Davies*, [2005] O.J. No. 4829, 199 C.C.C. (3d) 389 (Ont. C.A.).
32. *R. v. Dell*, [2005] O.J. No. 863, 194 C.C.C. (3d) 321 (Ont. C.A.) leave to appeal refused [2005] S.C.C.A. No. 524 (S.C.C.).
33. *R. v. Downey*, [2005] O.J. No. 3920, 67 W.C.B. (2d) 26 (Ont. C.A.).
34. *R. v. Dubinsky*, [2005] O.J. No. 862 (Ont. C.A.).
35. *R. v. Folino*, [2005] O.J. No. 4737, 77 O.R. (3d) 641 (Ont. C.A.).
36. *R. v. F.H.G.*, [2005] O.J. No. 1954, 197 O.A.C. 222 (Ont. C.A.).
37. *R. v. Grant*, [2005] O.J. No. 1771, 65 W.C.B. (2d) 1 (Ont. C.A.).
38. *R. v. Johnston* (2005), 202 O.A.C. 271, 66 W.C.B. (2d) 637 (Ont. C.A.).
39. *R. v. Jones*, [2005] O.J. No. 2662, 198 C.C.C. (3d) 519 (Ont. C.A.).
40. *R. v. LaFramboise*, [2005] O.J. No. 5785, 203 C.C.C. (3d) 492 (Ont. C.A.).
41. *R. v. Lawrence*, [2005] O.J. No. 2210 (Ont. C.A.).
42. *R. v. A.M.*, [2005] O.J. No. 4017 (Ont. C.A.).
43. *R. v. McArthur*, [2005] O.J. No. 502 (Ont. C.A.).
44. *R. v. McCallum*, [2005] O.J. No. 1178, 201 C.C.C. (3d) 541 (Ont. C.A.) leave to appeal dismissed [2006] S.C.C.A. No. 145 (S.C.C.).
45. *R. v. Migliore* (2005), 68 W.C.B. (2d) 91, [2005] O.J. No. 4642 (Ont. C.A.).
46. *R. v. Pearson*, [2005] O.J. No. 3736 (Ont. C.A.).
47. *R. v. B.S.*, [2005] O.J. No. 4319 (Ont. C.A.).
48. *R. v. Siiman*, [2005] O.J. No. 2676 (Ont. C.A.).
49. *R. v. Taipow*, [2005] O.J. No. 4643, 203 O.A.C. 219 (Ont. C.A.).
50. *R. v. Wagman*, [2005] O.J. No. 1419 (Ont. C.A.).
51. *R. v. Wood*, [2005] O.J. No. 1611 (Ont. C.A.).
52. *R. v. Yarlasky*, [2005] O.J. No. 606 (Ont. C.A.).
53. *Balafrej c. R.*, 2005 QCCA 18, 197 C.C.C. (3d) 88 (Qc. C.A.).
54. *Chevreuil c. R.*, 2005 QCCA 978, [2005] J.Q. no 15568, affirmé par 2005 QCCA 1224, [2005] J.Q. no 18323 (Qc. C.A.).
55. *Denis c. R.*, 2005 QCCA 1089, [2005] J.Q. no 16616 (Qc. C.A.), demande d'autorisation d'appel rejetée [2006] C.S.C.R. no 14 (C.S.C.).
56. *Fleury c. R.*, 2005 QCCA 436, [2005] J.Q. no 4769 (Qc. C.A.).
57. *R. c. Gillet*, 2005 QCCA 1008, [2005] J.Q. no 15796 (Qc. A.).
58. *Girardin c. R.*, 2005 QCCA 904, [2005] J.Q. no 14658 (Qc. A.).
59. *Hatzidoyannakis c. R.*, 2005 QCCA 326, [2005] J.Q. no 2821 (Qc. C.A.).

60. *R. c. Leboeuf*, 2005 QCCA 637, 219 C.C.C. (3d) 1 (Qc. C.A.), demande d'autorisation d'appel rejetée, [2006] C.S.C.R. no 477 (C.S.C.).
61. *Marshall c. R.*, 2005 QCCA 852, [2005] J.Q. no 14018 (Qc. C.A.).
62. *Nersysyan c. R.*, 2005 QCCA 606, [2005] J.Q. no 7952 (Qc. C.A.).
63. *R. c. Ngoc Nguyen*, 2005 QCCA 15, [2005] J.Q. no 90 (Qc. C.A.).
64. *R. c. O'Brien*, 2005 QCCA 744, [2005] J.Q. no 12199 (Qc. C.A.).
65. *R. c. Paquet*, 2005 QCCA 889, [2005] J.Q. no 14552 (Qc. C.A.).
66. *R. c. Samson*, 2005 QCCA 1151, [2005] J.Q. no 17404 (Qc. C.A.).
67. *R. v. D.S.K.*, 2005 SKCA 18, (sub nom. *R. v. Keshane*), 257 Sask.R. 161 (Sask. C.A.).
68. *May v. Ferndale Institution*, 2005 SCC 82, 204 C.C.C. (3d) 1 (S.C.C.) reversing, 2003 BCCA 536, 188 B.C.A.C. 23 (B.C. C.A.).
69. *Canada (Minister of Justice) v. Hanson*, 2005 BCCA 77 (B.C. C.A.).
70. *United States of America v. Reumayr*, 2005 BCCA 391, [2005] B.C.J. No. 1705 (B.C. C.A.).
71. *United States v. Taylor*, 2005 BCCA 440, 200 C.C.C. (3d) 388 (B.C.C.A.).
72. *Delagarde c. États-Unis d'Amérique*, [2005] N.B.J. No. 400, 293 N.B.R. (2d) 80 (N.B.C.A.).
73. *Ontario v. Vancurenko*, [2005] C.C.S. No. 12036, [2005] O.J. No. 1942 (Ont. C.A.).
74. *United States of America v. Fong*, [2005] O.J. No. 270, 193 C.C.C. (3d) 533 (Ont. C.A.).

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1. *R. v. Smalley*, 2006 ABCA 310, 71 W.C.B. 119 (Alta. C.A.).
2. *R. v. Thompson*, 2006 ABCA 366, 71 W.C.B. (2d) 840 (Alta. C.A.).
3. *R. v. Wood*, 2006 ABCA 343, 214 C.C.C. (3d) 1 (Alta. C.A.).
4. *R. v. Duong*, 2006 BCCA 325, 142 C.R.R. (2d) 261 (B.C.C.A.).
5. *R. v. Julson*, 2006 BCCA 41, 68 W.C.B. (2d) 587 (B.C.C.A.).
6. *R. v. Nicol, R. v. Araujo*, 2006 BCCA 370, 211 C.C.C. (3d) 33 (B.C.C.A.).
7. *R. v. M.P.*, 2006 BCCA 236, 226 B.C.A.C. 182 (B.C.C.A.).
8. *R. v. Roberds*, [2006] B.C.J. No. 2624, 2006 BCCA 415 (B.C.C.A.).
9. *R. v. Taylor*, [2006] B.C.J. No. 2751, 2006 BCCA 450 (B.C.C.A.).
10. *R. v. White*, [2006] B.C.J. No. 390, 2006 BCCA 87 (B.C.C.A.).
11. *R. v. Wilder*, 2006 BCCA 290, 227 B.C.A.C. 310 (B.C.C.A.). See related sentence appeal *R. v. Wilder*, [2008] B.C.J. No. 1878, 2008 BCCA 370 (B.C.C.A.) leave to appeal refused [2008] S.C.C.A. No. 498 (S.C.C.).
12. *R. v. Ferris*, [2006] N.B.J. No. 259, 2006 NBCA 97 (N.B.C.A.).
13. *R. v. Winmill*, 2006 NBCA 77, 300 N.B.R. (2d) 125, (N.B.C.A.).
14. *R. v. Ford*, 2006 NLCA 70, (sub nom. *R. v. C.P.F.*), [2006] N.J. No. 354 (N.L.C.A.).
15. *R. v. Assoun*, 2006 NSCA 47, 207 C.C.C. (3d) 372 (N.S.C.A.) leave to appeal refused [2006] S.C.C.A. No. 233 (S.C.C.).
16. *R. v. Cave*, 2006 NSCA 52, 70 W.C.B. (2d) 387 (N.S.C.A.).
17. *R. v. T.C.F.*, 2006 NSCA 42, (sub nom. *R. v. Farler*) 212 C.C.C. (3d) 134 (N.S.C.A.).

18. *R. v. Fitzpatrick*, 2006 NSCA 65, 244 N.S.R. (2d) 304 (N.S.C.A.).
19. *R. v. Gibson*, 2006 NSCA 51, 208 C.C.C. (3d) 248 (N.S.C.A.) affirmed 2008 SCC 16, 230 C.C.C. (3d) 97 (S.C.C.).
20. *R. v. James, R. v. Smith*, 2006 NSCA 57, 209 C.C.C. (3d) 135 (N.S.C.A.).
21. *R. v. Jones*, 2006 NSCA 136, 249 N.S.R. (2d) 388 (N.S.C.A.).
22. *R. v. MacInnis*, 2006 NSCA 92, 212 C.C.C. (3d) 103 (N.S.C.A.).
23. *R. v. Nevin*, 2006 NSCA 72, 210 C.C.C. (3d) 81 (N.S.C.A.).
24. *R. v. Baker*, [2006] O.J. No. 2329, 209 C.C.C. (3d) 508 (Ont. C.A.) leave to appeal dismissed [2006] S.C.C.A. No. 464 (S.C.C.).
25. *R. v. Bellas*, [2006] O.J. No. 2511, 70 W.C.B. (2d) 915 (Ont. C.A.).
26. *R. v. Davis* (2006), 218 O.A.C. 267, 73 W.C.B. (2d) 82 (Ont. C.A.) leave to appeal refused, [2007] S.C.C.A. No. 73 (S.C.C.).
27. *R. v. Flis and R.v.Grande*, [2006] O.J. No. 442, 205 C.C.C. (3d) 384 (Ont. C.A.) leave to appeal refused, [2006] S.C.C.A. No. 120 (S.C.C.).
28. *R. v. Formosa*, [2006] O.J. No. 4847, 218 O.A.C. 48 (Ont. C.A.).
29. *R. v. Francis*, [2006] O.J. No. 1287, 79 O.R. (3d) 551 (Ont. C.A.).
30. *R. v. Freeman*, [2006] O.J. No. 1021 (Ont. C.A.).
31. *R. v. G.G.*, [2006] O.J. No. 1427, 208 O.A.C. 348 (Ont. C.A.).
32. *R. v. George*, [2006] O.J. No. 3712 (Ont. C.A.).
33. *R. v. Jacobson* (2006), 209 O.A.C. 162, 207 C.C.C. (3d) 270 (Ont. C.A.).
34. *R. v. Jarvis*, [2006] O.J. No. 3241, 211 C.C.C. (3d) 20 (Ont. C.A.).
35. *R. v. Johnson*, [2006] O.J. No. 2182 (Ont. C.A.).
36. *R. v. Knox* (2006), 80 O.R. (3d) 515, 209 C.C.C. (3d) 76 (Ont. C.A.).
37. *R. v. Lawes* (2006), 80 O.R. (3d) 192 206 C.C.C. (3d) 15 (Ont. C.A.) leave to appeal dismissed [2006] S.C.C.A. No. 175 (S.C.C.).
38. *R. v. Linkie* (2006), 217 O.A.C. 57, 71 W.C.B. (2d) 71 (Ont. C.A.).
39. *R. v. Mahalingan* (2006), 80 O.R. (3d) 35, 208 C.C.C. (3d) 515 (Ont. C.A.), aff'd 2008 SCC 63, 237 C.C.C. (3d) 417 (S.C.C.).
40. *R. v. Perlett*, [2006] 214 O.A.C. 264, 212 C.C.C. (3d) 11(Ont. C.A.) leave to appeal dismissed [2007] S.C.C.A. No. 96 (S.C.C.).
41. *R. v. B.R.*, [2006] 212 C.C.C. (3d) 65 (sub nom. *R. v. R. (B.S.)*) 2006, 81 O.R. (3d) 641 (Ont. C.A.).
42. *R. v. L.W.*, [2006] O.J. No. 955 (sub nom. *R. v. Walsh*) 206 C.C.C. (3d) 543 (Ont. C.A.).
43. *R. v. R.W.*, [2006] O.J. No. 807, 207 C.C.C. (3d) 137 (Ont. C.A.) leave to appeal dismissed [2007] S.C.C.A. No. 337 (S.C.C.).
44. *R. v. Brown*, 2006 PESCAD 17, 212 C.C.C. (3d) 86 (P.E.I.S.C.A.D.).
45. *R. c. Angelillo*, 2006 SCC 55, 214 C.C.C. (3d) 309 (S.C.C.) affirming, [2004] J.Q. no 11670 (Qc. C.A.).
46. *Beaucicaut c. R., Moïse c. R.*, 2006 QCCA 1452, [2006] J.Q. no 16827 (Qc. C.A.), demande d'autorisation d'appel rejetée, [2007] C.S.C.R. no 188 (C.S.C.).
47. *R. c. Boies*, 2006 QCCA 520, [2006] J.Q. no 3473 (Qc. C.A.).
48. *Boucher c. R.*, 2006 QCCA 668, 225 C.C.C. (3d) 45 (Qc. C.A.).
49. *R. c. Bouillon*, 2006 QCCA 889, [2006] J.Q. no 6287 (Qc. C.A.).
50. *R. c. Boyer*, 2006 QCCA 1091, [2006] J.Q. no 9386 (Qc. C.A.).
51. *R. c. Cloutier*, 2006 QCCA 277, [2006] J.Q. no 1811 (Qc. C.A.).

52. *Dupuis c. R.*, 2006 QCCA 805, [2006] J.Q. no 5441 (Qc. C.A.).
53. *M.G. c. R.*, 2006 QCCA 1212, [2006] J.Q. no 10852 (Qc. C.A.).
54. *R. c. LSJPA – 0652 X*, 2006 QCCA 1393, [2006] J.Q. no 13600 (Qc. C.A.).
55. *R. c. Mora*, 2006 QCCA 9, [2006] J.Q. no 70 (Qc. C.A.).
56. *R. c. Quimper*, [2006] J.Q. no 3472, 2006 QCCA 527 (Qc. C.A.) appeal dismissed [2006] C.S.C.R. no 218 (S.C.C.).
57. *R. c. Robillard*, 2006 QCCA 688, [2006] J.Q. no 4581 (Qc. C.A.).
58. *R. c. Roy*, 2006 QCCA 1589, 75 W.C.B. (2d) 159 (Qc. C.A.), see related fresh evidence application, *R. c. Roy*, [2004] J.Q. no 12545 (Qc. C.A.).
59. *R. c. St.-Arnaud*, 2006 QCCA 76, [2006] J.Q. no 434 (Qc. C.A.).
60. *Sulano c. R.*, 2006 QCCA 505, [2006] J.Q. no 3362 (Qc. C.A.).
61. *W.T. c. R.*, 2006 QCCA 1778, [2006] Q.J. No. 23372 (Qc. C.A.).
62. *R. v. Aubee*, 2006, 378 W.A.C. 218 (sub nom. *R. v. J.P.J.A.*) 2006 SKCA 107, (Sask. C.A.).
63. *R. v. Drury*, 2006 SKCA 55, [2006] S.J. No. 306 (Sask. C.A.).
64. *R. v. Nguyen*, 2006 SKCA 83, 211 C.C.C. (3d) 337 (Sask. C.A.).
65. *R. v. C.P.S.*, 2006 SKCA 78, [2006] S.J. No. 418 (Sask. C.A.).
66. *R. v. F.S.V.*, 2006 SKCA 133 (Sask. C.A.).
67. *Lau v. Australia (Commonwealth)*, [2006] B.C.J. No. 2824 (B.C.C.A.).
68. *Mazzei. v. British Columbia (Director of Adult Forensic Services)*, [2006] B.C.J. No. 1410 (B.C.C.A.).
69. *Thailand v. Saxena*, 2006 BCCA 98, [2006] B.C.J. No. 446 (B.C.C.A.).
70. *Penetanguishene Mental Health Centre v. Magee*, [2006] O.J. No. 1926 (Ont. C.A.).
71. *Providence Continuing Care Centre, Mental Health Services v. Edgar*, (2006) 218 O.A.C. 55, (sub nom. *McDonnell v. Edgar*), 216 C.C.C. (3d) 563 (Ont. C.A.) leave to appeal refused [2007] S.C.C.A. No. 228 (S.C.C.).

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1. *R. v. A.R.F.*, 2007 ABCA 64, 412 A.R. 185 (Alta. C.A.).
2. *R. v. Douglas*, 2007 ABCA 321, 417 A.R. 236 (Alta. C.A.) leave to appeal dismissed [2008] S.C.C.A. 511 (S.C.C.).
3. *R. v. Gibbon*, 2007 ABCA 300, 417 A.R. 37 (Alta. C.A.).
4. *R. v. Karas*, 2007 ABCA 362, 422 A.R. 344 (Alta. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 22 (S.C.C.).
5. *R. v. Ritter*, [2007] 2007 ABCA 395, 422 A.R. 1 (Alta. C.A.).
6. *R. v. Sprayson*, 2007 ABCA 56, 404 A.R. 38 (Alta. C.A.).
7. *R. v. Seefried*, 2007 ABCA 368, [2007] A.J. No. 1269 (Alta. C.A.).
8. *R. v. Siik*, 2007 ABCA 304, [2007] A.J. No. 1052 (Alta. C.A.).
9. *R. v. Bamdad*, 2007 BCCA 99, 73 W.C.B. (2d) 18 (B.C.C.A.) leave to appeal dismissed [2007] S.C.C.A. No. 122 (S.C.C.).
10. *R. v. Berikoff*, 2007 BCCA 31, 72 W.C.B. (2d) 243 (B.C. C.A.).
11. *R. v. Chaffey*, [2007] B.C.J. No. 516, 2007 BCCA 135 (B.C.C.A.).
12. *R. v. Char*, 2007 BCCA 346, 74 W.C.B. (2d) 198 (B.C.C.A.).
13. *R. v. Kergan*, 2007 BCCA 54, 72 W.C.B. (2d) 165 (B.C.C.A.).
14. *R. v. Kim*, 2007 BCCA 25, 235 B.C.A.C. 191 (B.C.C.A.).

15. *R. v. McDonald*, 2007 BCCA 224, 75 W.C.B. (2d) 101 (B.C.C.A.).
16. *R. v. Meigs*, 2007 BCCA 394, 245 B.C.A.C. 102 (B.C.C.A.).
17. *R. v. Semeniuk*, 2007 BCCA 399, 224 C.C.C. (3d) 71 (B.C.C.A.).
18. *R. v. Takhar*, 2007 BCCA 505, 247 B.C.A.C. 251(B.C.C.A.). See related case, 2007 BCCA 423, 226 C.C.C. (3d) 410 (B.C.C.A.).
19. *R. v. Taylor*, 2007 BCCA 565, 248 B.C.A.C. 250 (B.C.C.A.).
20. *R. v. Tran*, 2007 BCCA 405, 245 B.C.A.C. 171 (B.C.C.A.).
21. *R. v. Bone*, 2007 MBCA 95, 225 C.C.C. (3d) 171 (Man. C.A.).
22. *R. v. Tanasichuk*, 2007 NBCA 76, 227 C.C.C. (3d) 446 (N.B.C.A.) leave to appeal dismissed [2009] S.C.C.A. No. 18 (S.C.C.).
23. *R. v. Madsen*, [2007] N.W.T.J. No. 30, 2007 NWTCA 4 (N.T.C.A.).
24. *R. v. Marsman*, 2007 NSCA 65, 220 C.C.C. (3d) 254 (N.S.C.A.).
25. *R. v. McKenna*, 2007 NSCA 40, 253 N.S.R. (2d) 173 (N.S.C.A.).
26. *R. v. Smith and R. v. James*, 2007 NSCA 19, 216 C.C.C. (3d) 490 (N.S.C.A.) appeal dismissed 2009 SCC 5, 238 C.C.C. (3d) 481 (S.C.C.).
27. *R. v. Steeves*, 2007 NSCA 130, 261 N.S.R. (2d) 76 (N.S.C.A.).
28. *R. v. Sweet*, 2007 NSCA 31, 252 N.S.R. (2d) 261 (N.S.C.A.).
29. *R. v. R.E.W.*, 2007 NSCA 50, 221 C.C.C. (3d) 32 (N.S.C.A.).
30. *R. v. Abraham*, 2007 ONCA 401, 224 O.A.C. 139 (Ont. C.A.).
31. *R. v. Alexander Street Lofts Development Corp.* 2007 ONCA 309, [2007] O.J. No. 1569 (Ont. C.A.) leave to appeal dismissed [2007] S.C.C.A. No. 378 (S.C.C.).
32. *R. v. Brundia*, 2007 ONCA 725, [2007] O.J. No. 4051 (Ont. C.A.).
33. *R. v. Burnett*, [2007] O.J. No. 2610, 2007 ONCA 478 (Ont. C.A.).
34. *R. v. N.P.C.*, 2007 ONCA 457, 222 C.C.C. (3d) 559 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 144 (S.C.C.).
35. *R. v. Culham*, [2007] O.J. No. 4379, 2007 ONCA 775 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 107 (S.C.C.).
36. *R. v. Dunbar*, 2007 ONCA 840, [2007] O.J. No. 4710 (Ont. C.A.).
37. *R. v. Grayer*, 2007 ONCA 13, 215 C.C.C. (3d) 505 (Ont. C.A.).
38. *R. v. Henderson*, [2007] O.J. No. 917 (Ont. C.A.).
39. *R. v. Ijam* (2007), 87 O.R. (3d) 81 (Ont. C.A.).
40. *R. v. Li*, 2007 ONCA 308, 218 C.C.C. (3d) 346 (Ont. C.A.).
41. *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516 (Ont. C.A.) leave to appeal refused [2007] S.C.C.A. No. 258 (S.C.C.).
42. *R. v. Mallory, R. v. Stewart*, 2007 ONCA 46, 217 C.C.C. (3d) 266 (Ont. C.A.).
43. *R. v. McKenzie*, 2007 ONCA 470, [2007] O.J. No. 3222 (Ont. C.A.).
44. *R. v. McNeil*, 2007 ONCA 646, [2007] OJ No. 3576 (Ont. C.A.) reversed 2009 SCC 33, 238 C.C.C. (3d) 353 (S.C.C.).
45. *R. v. Mullins-Johnson*, 2007 ONCA 720, 228 C.C.C. (3d) 505 (Ont. C.A.).
46. *R. v. Nguyen*, 2007 ONCA 645, 227 C.C.C. (3d) 262 (Ont. C.A.).
47. *R. v. Pillay*, [2007] O.J. No. 4008 (Ont. C.A.).
48. *R. v. Pivonka*, 2007 ONCA 572, 228 O.A.C. 227 (Ont. C.A.).
49. *R. v. Rashidi-Alavije*, 2007 ONCA 712, 229 O.A.C. 365 (Ont. C.A.).
50. *R. v. Robertson*, 2007 ONCA 463, 225 O.A.C. 153 (Ont. C.A.).
51. *R. v. Swanson*, [2007] O.J. No. 4313 (Ont. C.A.).

52. *R. v. Trotta*, 2007 SCC 49, 225 C.C.C. (3d) 97 (S.C.C.) reversing [2004] O.J. No. 2439, 23 C.R. (6th) 261 (Ont. C.A.).
53. *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321 (Ont. C.A.) see related cases in *Truscott (Re)*, [2006] O.J. No. 2050; *R. v. Truscott*, [2006] O.J. No. 4171, 213 C.C.C. (3d) 183; *R. v. Truscott*, (2006), 83 O.R. (3d) 272, 213 C.C.C. (3d) 201; *R. v. Truscott* (2006), 81 O.R. (3d) 689, 210 C.C.C. (3d) 91 (Ont. C.A.); *Truscott (Re)*, [2005] O.J. No. 2667 (Ont. C.A.) and *R. v. Truscott*, [2004] O.J. No. 5052 (Ont. C.A.).
54. *R. v. Tuck*, 2007 ONCA 495 (Ont. C.A.).
55. *R. v. Vattiata*, 2007 ONCA 251, [2007] O.J. No. 1722 (Ont. C.A.).
56. *R. v. Wolf*, [2007] O.J. No. 1666 (Ont. C.A.).
57. *R. v. Young*, 2007 ONCA 714, 230 O.A.C. 24 (Ont. C.A.).
58. *R. v. Cody*, 2007 PESCAD 7, 220 C.C.C. (3d) 103 (P.E.I.C.A.).
59. *R. c. Alcuis*, 2007 QCCA 213, [2007] J.Q. no 1153 (Qc. C.A.).
60. *R. c. Beaulieu*, 2007 QCCA 402, 228 C.C.C. (3d) 545 (Qc. C.A.), affirmed, 2008 SCC 1 (S.C.C.).
61. *Brennan c. R.*, 2007 QCCA 1207, [2007] J.Q. no 10672 (Qc. C.A.).
62. *R. c. Canada*, 2007 QCCA 260, [2007] J.Q. no 1249 (Qc. C.A.).
63. *Chartrand c. R.*, *R. c. Lambert*, 2007 QCCA 1422, [2007] J.Q. no 11798 (Qc. C.A.).
64. *Côté c. R.*, 2007 QCCA 1638, [2007] J.Q. no 13346 (Qc. C.A.).
65. *Couture c. R.*, 2007 QCCA 1609 (Qc. C.A.) leave to appeal refused [2008] S.C.C.A. No. 58 (S.C.C.). Same case *R. c. Beauchamp*, 2005 QCCA 580, 203 C.C.C. (3d) 551 (Qc. C.A.) leave to appeal refused [2005] C.S.C.R. no 355 (S.C.C.); *Beauchamp c. R.*, [2005] J.Q. no 7164 (Qc. C.A.); *R. c. Beauchamp*, [2003] J.Q. no 13499 (Qc. C.A.); *Bordeleau c. R.*, 2007 QCCA 1611, [2007] J.Q. no 13093 (Qc. C.A.) leave to appeal refused 2008 S.C.C.A. No. 59 (S.C.C.); *Lefebvre c. R.*, 2007 QCCA 1610, [2007] J.Q. no 13092 (Qc. C.A.) leave to appeal refused 2008 S.C.C.A. No. 60 (S.C.C.); *R. v. Mayrand*, [2008] S.C.C.A. No. 57 (S.C.C.); and *Moreau c. R.*, [2007] J.Q. no 13095, 2007 QCCA 1613 (Qc. C.A.) leave to appeal refused [2008] S.C.C.A. No. 59 (S.C.C.).
66. *Craig c. R.*, 2007 QCCA 987, [2007] J.Q. no 7209 (Qc. C.A.).
67. *J.É. c. R.*, [2007] J.Q. no 3668 (Qc. C.A.).
68. *Grégoire c. R.*, 2007 QCCA 824, 77 W.C.B. (2d) 587 (Qc. C.A.).
69. *R. c. M.D.*, 2007 QCCA 532, [2007] J.Q. no 2930 (Qc. C.A.).
70. *Dhaliwal c. R.*, 2007 QCCA 1236, [2007] J.Q. no 10871 (Qc. C.A.).
71. *Fournier c. R.*, 2007 QCCA 1612, [2007] J.Q. no 13094 (Qc. C.A.) leave to appeal refused [2008] C.S.C.R. no 80 (S.C.C.).
72. *R. c. Gagnon*, 2007 QCCA 1632, [2007] J.Q. no 13311 (Qc. C.A.).
73. *Gagnon c. R.*, 2007 QCCA 1621, [2007] J.Q. no 13245 (Qc. C.A.).
74. *Gilbert c. R.*, 2007 QCCA 1548, [2007] J.Q. no 12632 (Qc. C.A.).
75. *Gosselin c. R.*, 2007 QCCA 101, [2007] J.Q. no 395 (Qc. C.A.).
76. *R. c. M. (G.)*, 2007 QCCA 699, [2007] J.Q. no 4867 (Qc. C.A.).
77. *Maherchand c. R.*, 2007 QCCA 1000, [2007] J.Q. no 7460 (Qc. C.A.).
78. *R. c. A.P.*, 2007 QCCA 1245, [2007] J.Q. no 10864 (Qc. C.A.).

79. *R. c. Poulin-Chénard*, 2007 QCCA 342, [2007] J.Q. no 1738 (Qc. C.A.).
80. *R. c. S.N.S.*, 2007 QCCA 249, [2007] J.Q. no 1221 (Qc. C.A.).
81. *Shakhtur c. R.*, [2007] J.Q. no 3213, 2007 QCCA 555 (Qc. C.A.).
82. *R. v. Stuart*, 2007 QCCA 924, 226 C.C.C. (3d) 158 (Qc. C.A.).
83. *R. v. Smith*, 2007 SKCA 71, 223 C.C.C. (3d) 114 (Sask. C.A.).
84. *R. v. Taylor*, 2007 SKCA 108, [2007] S.J. No. 542 (Sask. C.A.).
85. *R. v. Daunt*, 2007 YKCA 14, [2007] Y.J. No. 63 (Y.C.A.).
86. *Republic of India v. Singh*, 2007 BCCA 157, 219 C.C.C. (3d) 377 (B.C. C. A.).
87. *Scarpitti v. United States of America*, 2007 BCCA 498, [2007] B.C.J. No. 2268 (B.C.C.A.).
88. *France v. Liang*, [2007] O.J. No. 4171 (Ont. C.A.).
89. *Italy (Republic) v. Caruana*, 2007 ONCA 488, 157 C.R.R. (2d) 1 (Ont. C.A.) leave to appeal refused 160 C.R.R. (2d) 375 (note) (S.C.C.).
90. *Schreiber v. Germany*, 2007 ONCA 354, (sub nom. *Schreiber v. Germany (Federal Republic)*) 220 C.C.C. (3d) 48 (Ont. C.A.) leave to appeal refused [2007] S.C.C.A. No. 334, 160 C.R.R. (2d) 374 (note) (S.C.C.).
91. *Audet c. Québec*, [2007] J.Q. no 12407 (Qc. C.A.).
92. *Brunton-Guerard c. Canada (Procureur general)*, [2007] Q.J. No. 5881 (Qc. C.A.).
93. *Deland c. Canada (Procureur general)*, [2007] Q.J. No. 5879 (Qc. C.A.).
94. *Deland c. Canada (Procureur general)*, [2007] Q.J. No. 5880 (Qc. C.A.).
95. *Medina c. Canada*, [2007] J.Q. no 11545 and 11546 (Qc. C.A.).
96. *Smida c. Canada (Procureur general)*, [2007] Q.J. No. 5882 (Qc. C.A.).
97. *Turchin c. Etats-Unis d’Amerique*, [2007] J.Q. no 695, 2007 QCCA 136 (Qc. C.A.).

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1. *R. v. Melnychuk*, 2008 ABCA 189, 432 A.R. 290 (Alta. C.A.).
2. *R. v. L.G.P.*, [2008] A.J. No. 1488, 2009 ABCA 1 (Alta. C.A.).
3. *R. v. B (H.S.)*, 2008 SCC 52, 235 C.C.C. (3d) 312 (S.C.C.) reversing 2007 BCCA 181, 219 C.C.C. (3d) 492 (B.C.C.A.).
4. *R. v. Bowering*, 2008 BCCA 347, 235 C.C.C. (3d) 20 (B.C.C.A.).
5. *R. v. S.S.C.*, 2008 BCCA 262, 234 C.C.C. (3d) 365 (B.C.C.A.).
6. *R. v. Chan*, 2008 BCCA 200, 255 B.C.A.C. 35 (B.C.C.A.).
7. *R. v. Chan*, 2008 BCCA 528, 263 B.C.A.C. 201 (B.C.C.A.).
8. *R. v. Falkner*, 2008 BCCA 277, 235 C.C.C. (3d) 72 (B.C.C.A.).
9. *R. v. Illes*, 2008 SCC 57, 236 C.C.C. (3d) 129 (S.C.C.) reversing 2007 BCCA 125, 217 C.C.C. (3d) 529 (B.C.C.A.).
10. *R. v. Kuypers*, 2008 BCCA 324, 258 B.C.A.C. 139 (B.C.C.A.).
11. *R. v. Lee*, 2008 BCCA 240, 256 B.C.A.C. 241 (B.C.C.A.).
12. *R. v. Oliynyk*, 2008 BCCA 132, 232 C.C.C. (3d) 411 (B.C.C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 252 (S.C.C.).
13. *R. v. Purdy*, [2008] B.C.J. No. 401, 2008 BCCA 95 (B.C.C.A.).
14. *R. v. D.W.S.*, 2008 BCCA 453, 262 B.C.A.C. 42 (B.C.C.A.).
15. *R. v. Schwartz*, 2008 BCCA 17, 250 B.C.A.C. 158 (B.C.C.A.) leave to appeal dismissed [2009] S.C.C.A. No. 157 (S.C.C.).

16. *R. v. Edgett*, 2008 NBCA 65, 67 M.V.R. (5th) 14 (N.B.C.A.).
17. *R. v. Polches, R. v. Brooks, R. v. Polches*, [2008] N.B.J. No. 4, 2008 NBCA 1 (N.B.C.A.).
18. *Walsh v. New Brunswick*, 2008 NBCA 33, 238 C.C.C. (3d) 289 (N.B.C.A.).
19. *R. v. Morgan*, 2008 NWTCA 12, 239 C.C.C. (3d) 187 (N.T.C.A.).
20. *R. v. Aldhelm-White et al.*, 2008 NSCA 86, 238 C.C.C. (3d) 544 (N.S.C.A.).
21. *R. v. Weagle*, 2008 NSCA 122, 240 C.C.C. (3d) 311 (N.S.C.A.).
22. *R. v. Koaha*, [2008] Nu.J. No. 10, 2008 NUCA 1 (N.U.C.A.).
23. *R. v. B.A.*, 2008 ONCA 556, 238 O.A.C. 198 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 415 (S.C.C.).
24. *R. v. Arabia*, 2008 ONCA 565, 235 C.C.C. (3d) 354 (Ont. C.A.).
25. *R. v. L.B.*, 2008 ONCA 333, [2008] O.J. No. 1685 (Ont. C.A.).
26. *R. v. Baksh*, [2008] O.J. No. 538, 2008 ONCA 116 (Ont. C.A.).
27. *R. v. Chickekoo*, 2008 ONCA 488, [2008] O.J. No. 2435 (Ont. C.A.).
28. *R. v. Curto*, 2008 ONCA 161, 230 C.C.C. (3d) 145 (Ont. C.A.).
29. *R. v. Davies*, 2008 ONCA 209, 234 O.A.C. 291 (Ont. C.A.).
30. *R. v. Fretz*, [2008] O.J. No. 2502 (Ont. C.A.).
31. *R. v. Garland*, 2008 ONCA 134, [2008] O.J. No. 868 (Ont. C.A.).
32. *R. v. Ghadban*, [2008] O.J. No. 4860 (Ont. C.A.).
33. *R. v. Hanemaayer*, 2008 ONCA 580, 234 C.C.C. (3d) 3 (Ont. C.A.).
34. *R. v. Horvat*, [2008] O.J. No. 358 (Ont. C.A.).
35. *R. v. Kreiger*, [2008] O.J. No. 1656 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 342 (S.C.C.).
36. *R. v. Li*, [2008] O.J. No. 714 (Ont. C.A.).
37. *R. v. Marfo*, [2008] O.J. No. 5629 (Ont. C.A.).
38. *R. v. McColm*, [2008] O.J. No. 5215 (Ont. C.A.).
39. *R. v. Peciukaitis*, [2008] O.J. No. 3834 (Ont. C.A.).
40. *R. v. Phillips*, 2008 ONCA 726, 242 O.A.C. 63 (Ont. C.A.).
41. *R. v. Pietrangelo*, 2008 ONCA 449, 233 C.C.C. (3d) 338 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 309 (S.C.C.).
42. *R. v. Prebtani*, 2008 ONCA 735, 240 C.C.C. (3d) 237 (Ont. C.A.).
43. *R. v. Preston*, [2008] O.J. No. 5136 (Ont. C.A.).
44. *R. v. Reeve*, 2008 ONCA 340, 233 C.C.C. (3d) 104 (Ont. C.A.).
45. *R. v. Ryazanov, R. v. Ross*, 2008 ONCA 667, 237 C.C.C. (3d) 19 (Ont. C.A.).
46. *R. v. Rybak*, 2008 ONCA 354, 233 C.C.C. (3d) 58 (Ont. C.A.) leave to appeal dismissed [2008] S.C.C.A. No. 311 (S.C.C.).
47. *R. v. S.S., R. v. A.R.*, 2008 ONCA 140, 232 C.C.C. (3d) 158 (Ont. C.A.).
48. *R. v. Sipos*, 2008 ONCA 325, 235 O.A.C. 277 (Ont. C.A.).
49. *R. v. Tiffin, R. v. Holterman*, 2008 ONCA 306, 232 C.C.C. (3d) 303 (Ont. C.A.).
50. *R. v. D.W.*, [2008] O.J. No. 1356 (Ont. C.A.).
51. *R. v. M.A.W.*, 2008 ONCA 555, 237 C.C.C. (3d) 560 (Ont. C.A.).
52. *R. v. Wolf*, [2008] O.J. No. 1713 (Ont. C.A.).
53. *R. v. Whiskeyjack*, 2008 ONCA 800, 239 C.C.C. (3d) 47 (Ont. C.A.).
54. *R. v. Wilson*, 2008 ONCA 510, 236 C.C.C. (3d) 285 (Ont. C.A.).
55. *R. v. Wood*, 2008 PESCTD 34, 78 W.C.B. (2d) 725 (P.E.C.A.).
56. *Chevreuil c. R.*, 2008 QCCA 82, [2008] J.Q. no 212 (Qc. C.A.).

57. *Lavigne c. R.*, 2008 QCCA 239, [2008] J.Q. no 680 (Qc. C.A.).
58. *Leblanc c. R.*, 2008 QCCA 230, [2008] J.Q. no 659 (Qc. C.A.).
59. *R. c. LSJPA – 0813 X*, 2008 QCCA 609, [2008] J.Q. no 2581 (Qc. C.A.), voir "Requête demandant la permission de présenter une nouvelle preuve devant la Cour d'appel", *R. c. LSJPA – 0814 X*, 2008 QCCA 610, [2008] J.Q. no 2583 (Qc. C.A.).
60. *Marleau c. R.*, 2008 QCCA 1804, [2008] J.Q. no 9370 (Qc. C.A.).
61. *Normandin c. R.*, 2008 QCCA 129, [2008] J.Q. no 307 (Qc. C.A.).
62. *Timm c. R.*, 2008 QCCA 2339, [2008] J.Q. no 12886 (Qc. C.A.), appel rejeté [1999] 3 R.C.S. 666, 140 C.C.C. (3d) 225 (C.S.C.).
63. *R. v. Moosomin*, 2008 SKCA 168, 239 C.C.C. (3d) 326 (Sask. C.A.).
64. *R. v. L.S.R.*, 2008 SKCA 77, [2008] S.J. No. 376 (Sask. C.A.).
65. *R. v. S.G.T.*, 2008 SKCA 119, 237 C.C.C. (3d) 55 (Sask. C.A.), leave to appeal dismissed [2008] S.C.C.A. No. 509 (S.C.C.).
66. *R. v. Weinkauf*, 2008 SKCA 118, [2008] S.J. No. 571 (Sask. C.A.).
67. *R. v. T.D.M.*, 2008 YKCA 16, 236 C.C.C. (3d) 458 (Y.C.A.).
68. *Lin v. British Columbia (Adult Forensic Psychiatric Services)*, [2008] B.C.J. No. 2419 (B.C.C.A.).
69. *Ross v. Riverbend Institution (Warden)*, [2008] S.J. No. 96 (Sask. C.A.).
70. *Tenenbaum v. United States*, 2008 ABCA 396 (Alta. C.A.).
71. *United States of America v. Kissel*, [2008] O.J. No. 1127 (Ont. C.A.).

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1. *R. v. Gregory*, 2009 BCCA 26, [2009] B.C.J. No. 240 (B.C.C.A.).
2. *R. v. Henry*, 2009 BCCA 12, 264 B.C.A.C. 244 (B.C.C.A.).
3. *R. v. Loring*, 2009 BCCA 166, 269 B.C.A.C. 175 (B.C.C.A.).
4. *R. v. Moretto*, [2009] B.C.J. No. 834, 2009 BCCA 139 (B.C.C.A.).
5. *R. v. Grant*, 2009 MBCA 9, 240 C.C.C. (3d) 462 (Man. C.A.) leave to appeal dismissed [2009] S.C.C.A. No. 94 (S.C.C.).
6. *R. v. Morais*, [2009] N.B.J. No. 34, 2009 NBCA 11 (N.B.C.A.).
7. *R. v. Laffin*, 2009 NSCA 19, 275 N.S.R. (2d) 244 (N.S.C.A.).
8. *R. v. Etuangat*, [2009] Nu.J. No. 9, 2009 NUCA 1 (N.U.C.A.).
9. *R. v. Ahmad [Toronto Star Newspapers Ltd. V. Canada]*, 2009 ONCA 59, 239 C.C.C. (3d) 437 (Ont. C.A.).
10. *R. v. Batisse*, 2009 ONCA 114, 241 C.C.C. (3d) 490 (Ont. C.A.).
11. *R. v. Chalmers*, 2009 ONCA 268, 243 C.C.C. (3d) 338 (Ont. C.A.).
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20. *R. v. Ratnasingham*, [2009] O.J. No. 208 (Ont. C.A.).

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2010
TBD

Questionnaire

Entrevue auprès de la Cour d'appel du Québec
les 10 et 31 octobre 2007

NB : Signez les 3 formulaires de consentement

Grandes thèmes :

I Pensées sur la Vérité

1. Comment vous faites pour avoir une idée de la vérité de la nouvelle preuve?
2. Que faites vous pour s'assurer que la nouvelle preuve vous dites la vérité et toute la vérité?
3. Quels sont les critères utilisez-vous lors de l'audience?
4. Et en délibéré?
5. Dans tous les procès, la vérité n'est pas absolue, quel chemin empruntez-vous lorsqu'il faut modifier vos appréciations devant la nouvelle preuve?
6. Avez-vous l'impression de sacrifier la vérité pour d'autres valeurs, telles que l'administration de la justice ou l'intérêt de la justice et du publique?

II L'approche de la formation civiliste

7. Décrivez-moi votre formation en droit civil et votre parcours de civiliste?
8. En tant que spécialiste du droit criminel, comment votre parcours a pu intégrer ce qui est du domaine du Common Law?
9. Avez-vous des échanges avec vos homologues de l'Ontario?
10. Selon vous, est-ce que la formation civiliste a des influences sur la pratique du droit criminelle?
11. Comment cela manifeste-il en nouvelle preuve?
12. Concrètement comment vous faites?
13. Quels sont les contributions des changements de 2006 à la procédure criminelle au Québec à la nouvelle preuve, e.g. les Règles 26 et 54?
14. Quelle est l'historique de ce changement? (optional)

III L'arrêt A.P.

15. Lorsque la nouvelle preuve est refusée pour manque de diligence, les juges n'ont pas l'impression que la vérité est compromise? Voir paragraphe 16 de la décision.
16. C'était une décision d'un juge de première instance, y-a-t-il des différences dans la nouvelle preuve (l'incidence e.g.) lorsqu'il s'agit d'une décision de juge et jury?
17. Avez-vous des statistiques dans le nombre de décisions concernant la nouvelle preuve qui soient issues du jury ou de juge seul? (Ce serait intéressant de savoir ces chiffres s'il en existe.)
18. Puis-je voir vos notes manuscrites lors de l'audience dans l'affaire A.P.? (Cite l'exemple de John Langbein dans « Historical Foundations of the Law of Evidence a view from the Ryder sources)
19. Rôle des avocats: c'est un bon avocat, est-ce que cela change quelque chose?
20. Avez-vous d'autres commentaires?

ANALYSIS OF FRESH EVIDENCE CASES IN NUNAVUT

APPENDIX III

V= Verdict; S= Sentence; A= Accused; C= Crown

CASE	SOURCE (A/C) & TYPE (V/S)	CHARGE/ SENTENCE	DECISION	GROUNDS
NUNAVUT				
<p>R. v. Etuangat, [2009] Nu.J. No. 9, 2009 NUCA 1(N.U.C.A.).</p>	<ul style="list-style-type: none"> • C • S 	<ul style="list-style-type: none"> • guilty pleas to one count of spousal assault, one count of possession of marijuana, and four counts of breach of undertaking • suspended sentence and two years probation. • 	<ul style="list-style-type: none"> • Denied • Sentence not unfit in all the circumstances 	<p>2 Included in the factum of the respondent was a notice under s. 683(1)(d) of the Criminal Code (Code) to "bring to the Court's attention a couple of facts not contained in the record." The Crown requested directions from the clerk of the Court on the preferred procedure. The registrar sent an email to counsel for the respondent suggesting he should file an application to introduce fresh evidence supported by an appropriate affidavit. Unfortunately the counsel for the respondent did not receive the email and did not file the motion. After hearing argument I indicated I would consider the additional facts requested by the respondent.</p> <p>3 Those new facts are that there were 53 people on the Pangnirtung docket where the sentencing took place. Further, that after the sentencing the police charged the accused with three different sets of criminal charges.</p> <p>4 The Crown forcefully argues the suspended sentence and two years probation sentence imposed by the trial judge was demonstrably unfit. She argues that the trial judge overemphasized rehabilitation while underemphasizing the factors of deterrence and denunciation. As a result the sentence was disproportionate to the circumstances of both the offence and the offender, and the Crown requests this Court impose a sentence of four months.</p> <p>8 When the complainant moved to pick up her wallet the respondent started to punch her in the head. She tried to</p>

CASE	SOURCE (A/C) & TYPE (V/S)	CHARGE/ SENTENCE	DECISION	GROUNDS
				<ul style="list-style-type: none"> • move away to protect the baby on her back as the respondent continued to punch her in the head and face.
<p>R. v. Koaha, [2008] Nu.J. No. 10, 2008 NUCA 1 (N.U.C.A.).</p>	<ul style="list-style-type: none"> • A • S 	<ul style="list-style-type: none"> • assaulting his wife and • breach of probation • sentence of six months in jail to be followed by probation for one year 	<p>9 Mr. Koaha pleaded guilty to the charges and this was a mitigating factor. But considering the totality of the circumstances, the sentence imposed was not demonstrably unfit</p> <p>The</p>	<ul style="list-style-type: none"> • 1 Mr. Koaha appeals from a sentence he received on April 28, 2005, for an assault on his wife and a breach of Probation dating back to August of 2004. At the sentencing hearing the Crown sought a jail term of 30 to 90 days; Mr. Koaha's counsel argued that if jail was imposed, it should be a much shorter term. The Sentencing Judge imposed a jail term of six months, followed by Probation for one year. 2 Mr. Koaha was granted bail pending appeal on May 31, 2005, having at that point served just over a month of his sentence. By the time his appeal was heard, he had been out on bail for two years and nine months. The Crown acknowledges that during this period of time, he complied with his release terms and was not charged with any further offenses. 3 Mr. Koaha does not forcefully argue that the sentence imposed was demonstrably unfit, although he asks this Court to find that the Sentencing Judge misunderstood the Crown's position at the hearing. His main ground of appeal is that his rights under section 14 of the <i>Canadian Charter of Rights and Freedoms</i> were breached because of problems with the interpretation services provided when he testified at the sentencing hearing. As a remedy for this breach, he seeks a reduction in sentence to the time he has already served, or, in the alternative, a fresh hearing. • Mr. Koaha was being sentenced for two offenses, one punishable by a maximum of 6 months in jail and the other punishable by a maximum of 18 months in jail. In my view, the

CASE	SOURCE (A/C) & TYPE (V/S)	CHARGE/ SENTENCE	DECISION	GROUNDS
			<p>appeal would be dismissed, and Mr. Koaha would have to serve the remaining portion of his sentence. But the prospect of him going back to jail now, almost three years after his sentencing hearing</p>	<p>Sentencing Judge showed restraint.</p> <p>14 To decide whether this standard was met, I have the benefit of a transcript of the proceedings at the sentencing hearing. In addition, as I granted Mr. Koaha's application to adduce fresh evidence on this appeal, I have the benefit of his Affidavit, a transcript of his cross-examination on that Affidavit, and Affidavits from his wife Susie Koaha and Adam Egotik, who were in the courtroom during the sentencing hearing. I note that when Mr. Koaha was cross-examined on his Affidavit, the interpreter who assisted him was a different interpreter from the one who assisted him at the sentencing hearing.</p> <p>15 As I have already stated, the issue is not whether Mr. Koaha needed the assistance of an interpreter. The transcript of the hearing shows that early on in his evidence, he said he needed his lawyer's questions translated. From that point on, the court interpreter began assisting Mr. Koaha. The questions, asked in English by Mr. Koaha's lawyer, were translated into Inuinnaqtun by the interpreter. Mr. Koaha's answers in Inuinnaqtun were translated into English.</p> <p>16 Mr. Koaha argues that the transcript of the sentencing hearing and the transcript of his cross-examination on his Affidavit show that the interpretation in this case was deficient and did not meet the standards mandated by the <i>Charter</i>. He relies on the following excerpts of the transcript of the sentencing hearing:</p> <p>22 I now turn to the fresh evidence adduced on the appeal. The affidavits include certain things that are inadmissible, and I have disregarded those portions. For example, evidence from Ms. Koaha and Mr. Egotik about Frank Analok's view of the</p>

CASE	SOURCE (A/C) & TYPE (V/S)	CHARGE/ SENTENCE	DECISION	GROUNDS
			<p>and almost 4 years after the commission of these summary conviction offenses, raises some issues.</p> <p>46 The sentence will be varied to time served. Mr. K on Probation for a period of three years commencing today.</p>	<p>quality of the interpretation is not admissible. What Mr. Koaha may have told others about his lack of understanding of the proceedings is not admissible either; it amounts to oath helping. I also find that other people's views and impressions about Mr.Koaha's level of understanding carry very little weight, especially where, as in this case, they provide no specific examples or details to explain how they reached their conclusions.</p> <p>23 The evidence that is most relevant and most probative of Mr. Koaha's level of understanding during the sentencing hearing is his own. He is the one who is in the position to provide the best evidence about what he understood and what he did not understand when his lawyer was asking him questions. Interestingly enough, his Affidavit on those points is somewhat ambiguous. In particular, Paragraphs 5 and 6 of his Affidavit read as follows:</p> <p>28 In my view, these comments are also relevant to the assessment of a person's claim that the interpretation services provided to them were inadequate. If the issue is not raised at the time of the proceedings, that is a factor that may weigh against making a finding that there was in fact a breach.</p> <p>29 It is true that Mr. Koaha was not in a position to know, at the time of the proceedings, whether his answers were being translated properly into English. But he certainly was in a position to know whether he understood the questions as translated for him by the interpreter, in the same way as he was able to speak up when he could not understand the questions put to him in English.</p> <p>38 In conclusion, in the circumstances of this case, I find that Mr. Koaha has not established that the interpretation fell</p>

CASE	SOURCE (A/C) & TYPE (V/S)	CHARGE/ SENTENCE	DECISION	GROUNDS
				<p>short of the standards guaranteed by section 14 of the <i>Charter</i>. As soon as he requested the assistance of an interpreter, that assistance was provided to him. He did not raise any issue about his ability to understand questions, or the proceedings generally, from that point on. The record of the proceedings shows that he answered a number of questions thoughtfully and coherently. The assertions in his Affidavit that "he <i>thought</i> he understood some of the questions" and tried to answer them, that "it <i>seems</i> now that he may have been guessing at some of the answers" and that "he <i>may</i> have not understood some of the questions", are simply not sufficient, in the face of the record of the proceedings, to establish a breach of his section 14 rights on a balance of probabilities.</p> <p>39 I find, therefore, that this ground of appeal must fail.</p> <ul style="list-style-type: none"> •

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