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The Pragmatic Limits of Access to Justice

Hart Schwartz & Anthony Robert Sangiuliano*

I. INTRODUCTION

The Supreme Court of Canada's Charter[1] jurisprudence often resembles a seesaw. The Court will tilt toward a robust approach that favours individual rights and freedoms only to adjust a short time later when the broader social or economic costs of its expansive jurisprudence become evident. Expansion is followed by contraction. Whether this pattern is best described in terms of "trimming its sails",[2] taking corrective measures, or simply clarifying doctrinal scope, the Court has teetered to one side and tottered back again on a number of occasions.

The concept of "access to justice" is one example. In 2014 it had been constitutionalized as a basic principle of the rule of law that can invalidate legislation. 2015 brought a corrective contraction. The Court demonstrated an awareness of the broader detrimental impact caused by too great an expansion. In *R. v. Kokopenace*[3] and *Henry v. British Columbia (Attorney General)*,[4] it recalibrated, taking a pragmatic, realistic and practical approach.

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1 *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 [hereinafter "Charter"].

2 See, *e.g.*, Thomson Irvine, "Changing Course or Trimming Sails? The Supreme Court Reconsiders" in David A. Wright & Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), at 9.

3 [2015] S.C.J. No. 28, 2015 SCC 28 (S.C.C.), revg [2013] O.J. No. 2752 (Ont. C.A.) [hereinafter "*Kokopenace*"].

4 [2015] S.C.J. No. 24, 2015 SCC 24 (S.C.C.), revg [2014] B.C.J. No. 71 (B.C.C.A.) [hereinafter "*Henry*"].

In contemporary legal discourse, access to justice is equated with using the law as an instrument to achieve desirable social goals (such as ameliorating the estrangement of disadvantaged groups from the justice system or compensating those whose Charter rights have been violated). "Justice", under this conception, is defined by reference to the moral ends to be achieved through the tool of law; and the law is evaluated as just to the extent that it achieves these ends. By contrast, *Kokopenace* and *Henry* demonstrate the Court's commitment to a subtler and more nuanced conception of access to justice. Its focus is not just on the moral goals to be achieved, but on the pragmatic and realistic capacity of the actors that operate the legal system on a day-to-day basis to ensure that the justice system, in the first place, can actually function to achieve any goals at all. Ultimately, it is a uniquely Canadian commitment because it recognizes the potential difficulties associated with sacrificing the law's workability for the Canadian populace as a whole in order to achieve social justice for one particular cohort of citizens.

Those who interpret access to justice in terms of using law to achieve social justice may criticize *Kokopenace* and *Henry* as missed opportunities.[5] However even on an instrumental conception of law, there is still much to endorse in these decisions. In Part II, we analyze the expansion of access to justice in the Court's recent jurisprudence. In Part III, we unpack the concept of access to justice. We argue that a prevalent conception of access to justice is one that views the legal system as a tool to achieve social justice. Furthermore, an instrumental conception of access to justice must preserve those practical elements that allow the legal system to actually function in the first place. These elements must be preserved to ensure the system's efficacy as a tool to achieve any ends at all for Canadian society as a whole. In Part IV, we argue that the Court's reasons in *Kokopenace* and *Henry* embrace such a commitment in the course of retracting the expansion of access to justice that can be discerned in its past decisions. We resist the conclusion that *Kokopenace* and *Henry* are flawed because they fail to promote access to social justice.

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[5] See *e.g.*, Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61 Crim. L.Q. 465, at 475-77; Myles Frederick McLennan, "Innocence Compensation: the Private, Public and Prerogative Remedies" (2014) 45 Ottawa L. Rev. 59, at 78-84.

II. THE EXPANSION OF ACCESS TO JUSTICE IN 2013 AND 2014

In its 2013 decision in *AIC Limited v. Fischer*[6] the Court emphasized that the determination of when class actions are preferable must be assessed from the point of view of providing access to justice.[7] Justice Cromwell defined this concept as follows:

> … It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.[8]

In *Fischer*, the Court did not appear to have intended to construct something like a basic right of access to justice that can supersede statutes or other government measures. Even the substantive dimension of access to justice was invoked only for the procedural purpose of concluding that the class action in *Fischer* should be certified because it potentially offered "just compensation for the class members' individual economic claims should they be established".[9] Yet, one can imagine how a litigant's interest in accessing a just and effective remedy might enable him or her to challenge barriers that deny her such a remedy, such as high legal thresholds for establishing state liability or the composition of the decision-making body adjudicating her claim.

Hryniak v. Mauldin[10] dealt with the proper interpretation of statutory rules governing summary judgment. The Court stated that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[11] But its articulation of access to justice was primarily procedural; it focused on fair and just processes of adjudication and emphasized the efficient use of court resources, affordability and expeditiousness. Justice Karakatsanis encouraged a "shift in culture" away from the trial process as the traditional method of dispute resolution. She wrote that litigants have as their goal partaking in "a fair process that results in a just adjudication

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6 [2013] S.C.J. No. 69, 2013 SCC 69 (S.C.C.) [hereinafter "*Fischer*"].
7 *Id.*, at para. 3.
8 *Id.*, at para. 24.
9 *Id.*, at para. 50.
10 [2014] S.C.J. No. 7, 2014 SCC 7 (S.C.C.).
11 *Id.*, at para. 1.

of disputes" but that this process is "illusory unless it is also accessible".[12] Again, despite these acclamatory remarks, no power to override legislative provision appears to have been contemplated.

In 2014, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[13] represented the most dramatic development in the Court's understanding of access to justice. The Court elaborated a very strong conception of access to justice that closely resembles a constitutional right by drawing on the unwritten constitutional principle of the rule of law and the core powers of provincial superior courts under section 96 of the *Constitution Act, 1867*.[14] At issue were court hearing fees, payable by the party that brought the proceeding, imposed by the province of British Columbia. The trial court could waive them where the litigant was on social assistance or "otherwise impoverished".

In finding that the fees were unconstitutional, the majority used language that, while not directly establishing a constitutional "right" of access to justice, comes awfully close. Building on the proposition that the rule of law protects access to the courts, the majority stated:

> … As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide *some degree of constitutional protection for access to justice*.[15]

The advent of "some degree of constitutional protection" was met with alarm in Rothstein J.'s dissent. His Honour decried the possible impact of creating a new entrenched right from the unwritten principle of the rule of law and permitting it to invalidate legislation. He approved of the claim that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."[16] He stated that to permit "this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law."[17]

Trial Lawyers represents the high-water mark, to date, in recognizing access to justice as a constitutionally protected interest. Using access to justice to strike down legislation has far-reaching implications. This new

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12 *Id.*, at para. 28.
13 [2014] S.C.J. No 59, 2014 SCC 59 (S.C.C.) [hereinafter "*Trial Lawyers*"].
14 (U.K.), 30 & 31 Vict., c. 3.
15 *Id.*, at para. 39 (emphasis added).
16 *Id.*, at para. 102.
17 *Id.*

power could be relied on to inform, and potentially expand, individual rights.[18] For example, the high threshold in tort law for establishing prosecutorial misconduct had long been viewed as hindering access to justice for individuals seeking compensation for violations of their Charter rights. Official conduct in remote communities resulting in no Aboriginal persons sitting on juries of Aboriginal offenders had also been characterized as engaging access to justice for members of that community. Here, too, there was new potential for challenging what had, in the main, been a somewhat "hands off" approach to the fragile issue of jury selection.

Each of these issues arose in 2015. Yet, despite the constitutional recognition of access to justice as part of the rule of law, the pendulum swung in the other direction. Instead of a continual expansion, the Court embraced realism and practicality. In doing so, it reflected a commitment to a pragmatic and uniquely Canadian understanding of "access to justice". We turn to that discussion next.

III. The Idea of Access to Justice

1. The Instrumental Conception of Access to Justice

Although it is common to speak of the need to promote "access to justice", the meaning of this thought is not always clear. The Court offered guidance in *Hryniak* and *Trial Lawyers*, defining it in terms of access to fair and just processes of adjudication of civil disputes.

But participants in contemporary legal discourse often have in mind a more robust conception. This was identified in *Fischer* as the substantive dimension of access to justice. It is based on the extent to which there is improvement in social conditions. It demands "access to social justice". As put by Trevor Farrow,

> … access to justice is for the most part understood as access to the kind of life — and the kinds of communities in which — people would like to live. It is about accessing equality, understanding, education, food, housing, security, happiness, et cetera. *It is about the good life; that is*

[18] See *e.g.*, C. Tess Sheldon, Karen R. Spector & Mercedez Perez, "Re-Centering Equality: The Interplay between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention" (2016) 35 N.J.C.L. 193, at 218-23.

> *ultimately the point … Good laws, rules, judges, educators, lawyers, and courtrooms are all important. However, these are not ends in themselves, but rather steps along the path to justice and access to it*.[19]

An instrumental conception of access to social justice — although not without its detractors[20] — has deep roots in legal theory. It parallels Bentham's utilitarian account of the nature of law, according to which all government acts ought to promote maximum happiness for members of the social community over which the government has influence.[21] For Bentham, law is a tool that operates by getting people to do what is good. The good is specified independently of law because it is possible, in principle, for it to be realized without law. It is simply that government should use law to bring the good about. This account also parallels legal realist theories, which maintain that judges do, and should, adjudicate by rendering the decision that best achieves the most desirable social policy.[22]

Instrumentalism also figures in prevalent views about law reform. Patricia Hughes argues that law reform commissions' recommendations will improve the law and enhance access to justice if they incorporate non-legal perspectives on justice, that is, "external bodies of knowledge and methods of analysis … that recognize that law is 'in the world'".[23] Access to justice requires us to make it easier for people to participate in the legal system by eliminating impediments to legal justice that are imposed by social and economic disadvantage.[24] The commissions must "enter the non-legal realm, which is the place where justice can be realized", so that their recommendations reflect "experiential and academic knowledge from outside the world of law".[25]

Finally, a prominent ambition of legal education is to instruct students on how to use their newly acquired skills to make the world a better place upon graduation. The dean of Cornell Law School once observed that it was part of "the ordinary religion of the law school classroom"

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[19] Trevor C.W. Farrow, "What is Access to Justice?" (2014) 51 Osgoode Hall L.J. 957, at 983 (emphasis added). See also Alice Woolley & Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges" (2016) 3 Tex. A&M L. Rev. 549, at 555-556.

[20] See, *e.g.*, Brian Z. Tamanaha, "How an Instrumental View of Law Corrodes the Rule of Law" (2007) 56 DePaul L. Rev. 569.

[21] See David Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law*, revised ed. (Oxford: Oxford University Press, 1991), at 27-33.

[22] See Hanoch Dagan, "The Realist Conception of Law" (2007) 57 U.T.L.J. 607, at 631-37.

[23] Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall L.J. 773, at 776.

[24] *Id.*, at 777-81.

[25] *Id.*, at 782.

that "law is an instrument for achieving social goals … a means to an end … to be appraised only in light of the ends it achieves."[26] The pedagogical spirit of Osgoode Hall Law School has been described as "committed to exploring law as an instrument of social change and social justice".[27]

The instrumental conception of law thus provides a satisfactory starting point for expressing the meaning of access to justice. What are its implications for critiquing legal rules and judicial decisions? Joseph Raz explored this question in developing his theory of the rule of law.[28] Raz views law as a tool to achieve desirable ends. It "is not just a fact of life", and, although it can and has been used to serve evil purposes, it "is a form of social organization which should be used properly and for the proper ends".[29] It achieves its purposes by guiding the conduct of those subject to it and directing subjects to behave in ways that bring about law's purposes.[30] Raz argues that there must be an inherent virtue to law: It must be *capable* of guiding its subjects. If the law is not capable of guiding its subjects, it cannot direct them to behave in the ways needed to achieve its ends, no matter what its ends may be, and it will be a defective tool for achieving its purposes, just as a dull knife is defective because it is not suited to achieve its goals. The ability to effectively guide subjects is the "specific excellence of law" and is "a necessary condition for the law to be serving directly any good purpose at all".[31] The law must be prospective, public and clear, and judicial and executive officials must implement it consistently. If it is retrospective, clandestine, vague and applied arbitrarily, it will be difficult for citizens to look to it for guidance when deciding how to act.[32]

But Raz's explanation of law's internal virtues on an instrumental conception leaves out one important requirement — a requirement of pragmatism, efficiency, and operability. If law is to function as an excellent tool for achieving its purposes, not only must legal rules guide subjects, but also the actors and institutions that drive the everyday

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[26] Roger C. Cramton, "The Ordinary Religion of the Law School Classroom" (1978) 29 J. Legal Educ. 29, at 250.

[27] Marilyn L. Pilkington, "Parkdale Community Legal Services: An Investment in Legal Education" (1997) 35 Osgoode Hall L.J. 420, at 421.

[28] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), c. 11.

[29] *Id.*, at 225-26.

[30] *Id.*, at 213-14, 224-25.

[31] *Id.*, at 225.

[32] *Id.*, at 214-19.

machinery of the legal system must be able to effectively do so. Inefficiencies can cause the legal system to grind to a halt altogether. The law then becomes defective because it is rendered incapable of fulfilling any purpose at all.

Thus, the key actors that keep the legal system moving — lawyers, judges, prosecutors, police officers, juries and administrative agents — must not have their abilities to do their jobs hampered to the point that the system is disabled from functioning. By analogy, if an assembly line worker is not given the required part to install, the line's operation cannot succeed. The line also cannot move so fast as to give the worker inadequate time to install the correct part properly. The effect will be the collapse of the line as a tool designed to achieve a particular goal.

An instrumental conception of law may offer a perspective from which to appraise a legal rule based on the degree to which it achieves a given laudable social goal. Yet, it must also countenance a rule that safeguards the capacity for the actors in a legal system to function pragmatically on a day-to-day basis.

2. Collective Values in Canadian Political and Constitutional Culture

It might be argued that some ends that law can be designed to achieve are so socially desirable that in order to realize them, even drastic reductions in efficiency are tolerable. But it is important to also bear in mind the nature of law's inherent virtue of efficiency. A virtuous legal system speaks "in the name of the whole society and address matters of concern to society as such".[33] Pragmatic operability is a systemic virtue of law on an instrumental conception. It makes the law an excellent tool to realize the social goals of its community as a unified people, rather than just the interests of singular individuals. Inefficiency is a systemic vice. It makes a legal system deficient when it comes to effectively serving both individual citizens and the community as a whole. Hence, any reduction in a legal system's operability, even one that achieves a morally worthy social end for a particular disadvantaged social cohort, is accompanied by a reduction in the law's virtue as a communal tool designed to achieve important collective goals. And such a trade-off is

[33] Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James E. Fleming, ed., *Getting to the Rule of Law* (New York: New York University Press, 2011) 3, at 31.

often intolerable if the law is to remain an excellent instrument to achieve justice for the community.

This view of the relationship between individual and communal interests is a uniquely Canadian one. A venerable tradition in political science and sociological scholarship discerns a "collectivity-oriented"[34] ethos in Canadian political culture that contrasts with the individualistic ethos of American political culture. Canadian political culture has been described as exhibiting a "corporate-organic-collectivist"[35] ideology that regards Canadians as more willing than Americans to "justify the restraint of the individual in the interests of the community as a whole".[36] The American ethos perceives of social life in terms of an "agglomeration of atomistic individuals",[37] each employing his or her industriousness to compete for achievement and social status from initial positions of equal opportunity. It rejects a posture of deference to social order by the citizenry and sees minimal state regulation of the market as necessary to protect individual freedom.[38] Canadians, on the other hand, are more likely to identify their own interests with transcendent interests of the community in social order and good government out of a sense of civic attachment or belonging to the community. They endorse greater state intervention in controlling economic conditions to bring about collective ends, such as equality of condition, even at the expense of individual freedoms.[39]

The distinctively Canadian view of the relationship between individual and communal values is discernible in our nation's constitutional culture as well. Perhaps most importantly, section 1 of the Charter exemplifies the importance in Canadian constitutional discourse of collective values. A persistent theme of the Charter jurisprudence interpreting this provision is a firm recognition that collective values can narrow the scope of individual rights.

In the foundational section 1 case of *Oakes*, Dickson C.J.C. expressed this point powerfully, writing that "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be

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[34] Seymour Martin Lipset, "Historical Traditions and National Characteristics: A Comparative Analysis of Canada and the United States" (1986) 11 Can. J. Soc. 113, at 114 [hereinafter "Lipset"].

[35] G. Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation" (1966) 32 Can. J. Econ. & Pol. Sci. 143, at 144.

[36] Nelson Wiseman, *In Search of Canadian Political Culture* (Vancouver: University of British Columbia Press, 2007), at 21 [hereinafter "Wiseman"].

[37] *Id.*, at 22.

[38] Lipset, *supra*, note 34, at 114.

[39] See Wiseman, *supra*, note 36, at 23.

inimical to the *realization of collective goals of fundamental importance*."[40] He reiterated it in his subsequent opinion in *R. v. Edwards Books and Art Ltd.*[41] In upholding Ontario's Sunday closing legislation on the ground that it provided a community-wide "pause day", he paid heed to a "collective goal of fundamental importance" by adopting the following remarks of the Ontario Law Reform Commission:

> Thus while our productive capacity and economic standard of living continue to increase in Ontario, our *collective opportunity for the more intangible benefits of participation* in leisure activities together with family, friends and others in society continues to decrease. It is in the light of this continuing erosion of statutory holidays and evening hours that we consider it absolutely essential that the government now attempt to preserve at least one uniform day each week as a pause day, before it is too late.[42]

The "collective opportunity for more intangible benefits" of participation in the community exemplifies Canada's collectivity-oriented ethos. Chief Justice Dickson emphasized the importance of developing the self's authenticity through group participation:

> … A family visit to an uncle or a grandmother, the attendance of a parent at a child's sports tournament, a picnic, a swim, or a hike in the park on a summer day, or a family expedition to a zoo, circus, or exhibition — these, and hundreds of other leisure activities with family and friends are amongst the simplest but *most profound joys* that any of us can know. The aim of protecting workers, families and communities from a diminution of opportunity to experience the fulfilment offered by these activities, *and from the alienation of the individual from his or her closest social bonds*, is not one which I regard as unimportant or trivial. In the context of the "fast-growing trend toward wide-scale store openings", I am satisfied that the Act is aimed at a pressing and substantial concern. It therefore survives the first part of the inquiry under s. 1.[43]

R. v. Keegstra[44] also illustrates the orientation towards communal belonging in Canadian constitutional culture. The Court held that hate speech is harmful and in need of suppression because of the way in

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[40] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.), affg [1983] O.J. No. 2501 (Ont. C.A.) (emphasis added).

[41] [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.), varg [1984] O.J. No. 3379 (Ont. C.A.).

[42] *Id.*, at para. 120 (emphasis added, original emphasis removed).

[43] *Id.*, at para. 121 (emphasis added).

[44] [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.), revg [1988] A.J. No. 501 (Alta. C.A.).

which it severs the targeted individual's attachment to the community and thereby interferes with the development of his or her self-respect:

> *A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs* (see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), 118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, *perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority*.[45]

These comments reveal that, in Canadian constitutional culture, there is a basic concern that citizens not become alienated, or not subjected to a situation in which they are detached from the very social group or community that gives their lives meaning and definition.[46] The legal system's efficient operation enables it to function as an effective instrument to achieve desirable goals for the whole community that it is meant to serve. Next, we will explain how this idea animated the 2015 decisions in *Kokopenace* and *Henry*.

IV. ACCESS TO JUSTICE IN *KOKOPENACE* AND *HENRY*

1. *R. v. Kokopenace*

Justice Moldaver's majority opinion in *Kokopenace* demonstrates a pragmatic understanding of the effect of too broad an expansion of section 11 Charter rights on the actual workings of the criminal justice system. To require the state to do more to increase the representation on the jury roll of members of marginalized Aboriginal groups would have imposed something close to a positive obligation to address long-standing social and historical conditions that have led to poverty and alienation. While this remedial obligation may have advanced social justice, it also would have had negative practical consequences. It would impair the ability of

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[45] *Id*., at 746-47 (emphasis added).

[46] *Cf*. Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), at 148-50; Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25, at 31-34.

the Crown to proceed with serious criminal prosecutions. It would disproportionately reallocate scarce resources throughout the court system. The dissent reflects a more idealistic approach to the use of law to achieve social justice. The declaration proposed by the dissent would have imposed significant novel — and somewhat undefined — obligations on the Crown to address the disengagement from the criminal justice system that is widespread amongst Aboriginal peoples.

Mr. Kokopenace was charged with second-degree murder following a fight in which his friend was stabbed to death. His trial was held before a judge and jury in Kenora, Ontario. Kenora is a small town in the southwest corner of the province, but the District of Kenora is enormous and contains a large number of reserves, which are associated with approximately 46 different First Nations. The on-reserve adult population makes up between 21 to 32 per cent of the total adult population. No challenge was brought at the outset of the trial to the jury. However, after conviction for manslaughter, but before sentencing, Mr. Kokopenace's counsel learned of problems with the inclusion on the jury roll of Aboriginal persons that reside on reserves. He sought a mistrial, which was denied. This issue was raised on appeal and a divided Ontario Court of Appeal granted the appeal and ordered a new trial.

Jury selection in Ontario involves a series of steps. It begins with reliance on a "source list" which, it is hoped, should contain the names of all persons in Ontario that might be available for jury duty. While some provinces use health card information (because almost every resident has one), and while some American jurisdictions use voting lists, Ontario has relied on the information in municipal property tax rolls, which is supposed to enumerate the name and address of residents. However, because property on a reserve is not individually owned and no municipal tax is paid, Ontario legislation permits the sheriff to obtain the names of inhabitants of the reserve "from any record available".

Names from that source list are then randomly selected based on the number of jury notices that it is anticipated will be needed for the next sitting of the trial court. Those selected then have a jury questionnaire sent to them. If the questionnaire is returned, and the person is eligible, then he or she is placed on the jury roll for that sitting.

When a jury trial is about to commence, a second round of random selection occurs. This time, names from the jury roll are randomly picked. Those chosen receive a jury notice requiring their attendance in the courtroom. These individuals make up the array or jury panel.

A third round of random selection then occurs in the courtroom itself. The names of those sitting on the array are drawn and the individual comes forward to the front of the court. If the person is not rejected by counsel, the judge, or through the challenge-for-cause process, he or she will be one of the 12-member petit jury that actually serves on a particular trial.

The Court of Appeal's main findings demonstrated that on-reserve Aboriginal residents were not even making it on to the source list, let alone the jury roll, jury panel, or the petit jury. One reason for this outcome was a strong reluctance on the part of the Aboriginal bands or members of reserve communities to provide a list of names of residents. Even when such a list was provided and the jury questionnaire was mailed out, these questionnaires would not be returned. And, even if returned, and a resident subsequently received a jury notice very often he or she would not attend court. All members of the Supreme Court recognized that a reason for this poor response were well-known historical, cultural, and social factors that resulted in Aboriginal peoples' general disengagement from the mainstream justice system.

The divergent opinions in the Supreme Court ruling reflect differing views on the practical limits of an instrumental conception of access to justice. The need to use the law to advance social justice is evident throughout the minority's opinion. Justice Cromwell would have imposed an obligation on the part of the state to make "reasonable efforts" to address the poor return rate for prospective Aboriginal jurors. This obligation would have included active monitoring of the return rates from the reserves and strongly encouraging responses.[47] But even more remarkably, Cromwell J. also held that the province had to also take steps to reduce the prevalent Aboriginal disengagement, including addressing the presence and prevalence of deep-rooted, systemic racial discrimination against Aboriginal persons in society.[48]

Justice Cromwell did not prescribe what precise steps the state would have been obligated to take to address deeply entrenched systemic problems. However, solve them it must. In a passage that invited trenchant criticism from the majority, he wrote that the outcome that the Crown must achieve for both source lists and jury rolls is one where

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47 *Kokopenace*, *supra*, note 3, at para. 274.

48 *Id*., at paras. 281, 286.

on-reserve Aboriginal representation is "substantially similar" to the distribution of that group in the District of Kenora.[49]

The majority's response reflected a pragmatic and realistic approach to access to justice and took into account the needs of the broader community. Justice Moldaver was writing in a context, following the Court of Appeal's decision in *Kokopenace*, in which at least one jury trial of an Aboriginal offender was suspended by the trial judge and could not be held until the province of Ontario took reasonable steps to create a representative jury roll.[50] The social cost alone of having the administration of criminal justice grind to a hold and being unable to try offenders is high. Furthermore, the requirement to take positive steps to address broad social problems also exacts a high cost and takes scarce judicial resources away from other parts of the criminal justice system. Finally, the criminal justice system is a blunt instrument to try to right historical wrongs visited on Aboriginal persons and communities. As Moldaver J. wrote:

> … I cannot accept Cromwell J.'s suggestion that the state must actively encourage responses or that, to this end, the state is obliged to address the distressing history of estrangement and discrimination suffered by Aboriginal peoples. There are good reasons why the state's representativeness obligation does not rise to this level and only requires a fair opportunity for participation. Efforts to address historical and systemic wrongs against Aboriginal peoples — although socially laudable — are by definition an attempt to target a particular group for inclusion on the jury roll. Requiring the state to target a particular group for inclusion would be a radical departure from the way the Canadian jury selection process has always been understood.
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> In coming to this conclusion, I am in no way suggesting that the state should not take action on this pressing social problem. However, an accused's representativeness right is not the appropriate vehicle for this task. This right is held by the accused, not by societal groups. And, because the focus of representativeness is on the process, not the results, the state's constitutional obligation is satisfied by providing a fair opportunity to participate — even if part of the population declines to do so.[51]

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49 *Id.*, at paras. 246-247.

50 *R. v. B.* (*S.*), [2014] O.J. No. 2469, 2014 ONSC 2394 (Ont. S.C.J.).

51 *Kokopenace*, *supra*, note 3, at paras. 64-65.

In addition, the dissent's attempt to advance the social justice objective of having source lists and jury rolls achieve "substantially similar" representativeness of Aboriginal peoples would have radically altered the Canadian criminal justice system. To find out if a potential juror is Aboriginal, inquiries must be made as to their race. This significantly erodes juror privacy. In the United States, such information is routinely required. It has been regarded as anathema in Canada. Rather, there has been a powerful theme of respecting juror privacy as much as possible.[52]

The social justice goal of mandating proportionate representation has at its core a presumption that a non-Aboriginal juror has a bias, perhaps an unconscious or subtle bias of which he or she is unaware, but a bias nonetheless.[53] But, to adopt the assumption of unconscious bias would be to turn the Canadian approach to jury selection on its head. We would need to adopt an American approach where "every candidate for jury duty may be challenged and questioned as to preconceptions and prejudices."[54] That approach "treats all members of the jury pool as presumptively suspect".[55] But the Canadian system has always operated under the opposite assumption, *i.e.*, that Canadian jurors are impartial. That presumption can only be displaced where it is "clear and obvious" that the person is partial or where there exists a "realistic potential" for juror partiality.[56]

The dissent's approach in *Kokopenace*, at the end of the day, adopts an unconscious, but no less invidious, form of stereotyping. To assume that a person who is part of a distinct group brings a particular perspective leaves little room for individual autonomy, the power of rationality, and the ability to change one's perspective through the jury's deliberative process. As the English Court of Appeal recognized "there is no principle that a jury should be racially balanced", for this "would depend on an underlying premise that jurors of a particular racial origin

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[52] *R. v. Yumnu*, [2012] S.C.J. No. 73, 2012 SCC 73, at paras. 41-42 (S.C.C.), affg [2010] O.J. No. 4163 (Ont. C.A.). See also *R. v. Find*, [2001] S.C.J. No. 34, 2001 SCC 32, at para. 26 (S.C.C.), affg [1999] O.J. No. 3295 (Ont. C.A.) [hereinafter "*Find*"]. For this section, we're indebted to the Crown's February 27, 2014 *Kokopenace* factum by Gillian Roberts and Deborah Calderwood.

[53] In *Kokopenace*, Justice Moldaver correctly noted that "there is no empirical data to support the proposition that jurors of the same race as the accused are necessary to evaluate the evidence in a fair and impartial manner." *Kokopenace*, *supra*, note 3, at para. 52.

[54] *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at paras. 12-13 (S.C.C.), revg [1996] B.C.J. No. 926 (B.C.C.A.) [hereinafter "*Williams*"].

[55] *Find*, *supra*, note 52, at para. 26.

[56] *Id.*, at paras. 26, 30-34. See also *Williams*, *supra*, note 54, at para. 57.

or holding particular religious beliefs are incapable of giving an impartial verdict in accordance with the evidence".[57]

2. *Henry v. British Columbia (Attorney General)*

In a perfect world, the prosecutor in a criminal trial would not make mistakes, get tired, cut corners, or make dumb decisions. The Supreme Court's decision in *Henry*[58] turned on two very different views of the everyday, real-life work of an Assistant Crown Attorney. Once again, the majority adopted a pragmatic approach and refused to impose a low threshold for establishing liability for misconduct, which would have seriously hindered Crown counsel in carrying out his or her duties. By contrast, the dissent would have imposed no misconduct threshold at all. A plaintiff need only establish causation, *i.e.*, that prosecutorial conduct resulted in a breach, in order to become entitled to damages. Here, too, although the dissent's approach would have markedly advanced access to social justice for claimants, particularly those alleging wrongful conviction due to prosecutorial misconduct, it would have had a negative impact on the criminal justice system as a whole.

In tort law, the policy rationale underlying the need to protect non-malicious prosecutorial conduct from private or public damage claims was set out in *Nelles v. Ontario*.[59] It was necessary to require a high threshold of misconduct in order to: ensure that Crown Attorneys are not hindered in the proper execution of their important public duties; deter any inhibiting effect on the discharge by a Crown Attorney of his or her central function of prosecuting crime; avoid damage to the public trust of the prosecutor's office; avoid a defensive approach by prosecutors to their multifarious duties to protect themselves from potential damage claims; and eliminate the need for prosecutors to become diverted from the pressing duty of enforcing the criminal law by spending valuable time and using scarce resources to prevent or respond to lawsuits.[60]

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[57] *R. v. Ford*, [1989] Crim. L.R. 828, 3 All E.R. 445, at 448-50 (C.A.). For a summary of commonwealth approaches to representativeness, see *R. v. Ellis*, [2011] N.Z.C.A. 90, [2011] B.C.L. 327, at paras. 42-60 (N.Z.C.A.).

[58] *Henry*, *supra*, note 4.

[59] [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170 (S.C.C.), varg [1985] O.J. No. 2599 (Ont. C.A.) [hereinafter "*Nelles*"].

[60] *Id.*, at 183, 199. See also *Proulx v. Quebec (Attorney General)*, [2001] S.C.J. No. 65, [2001] 3 S.C.R. 9, at para. 4 (S.C.C.), revg [1999] J.Q. no 373 (Que. C.A.); *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51, [2009] 3 S.C.R. 339, at paras. 56, 81 (S.C.C.), revg [2007] S.J. No. 247 (Sask. C.A.) [hereinafter "*Miazga*"]; *Elguzouli-Daf v. Commission of Police of the Metropolis*, [1995] 1 All

Even in tort, however, the Crown does not enjoy absolute immunity. Immunity from civil suit could be displaced where, *inter alia*, the prosecution was motivated by malice or a primary purpose other than that of carrying the law into effect.[61] The presence of malice displaced the "qualified" immunity otherwise enjoyed by Crown Attorneys. This high threshold prevented Crown Attorneys from becoming "enmeshed in an avalanche of interlocutory civil proceedings and civil trials. That is a spectre that would bode ill for the efficiency … and the quality of our justice system."[62]

In *Vancouver (City) v. Ward*, the Court acknowledged that a distinct and autonomous remedy could be sought for public law or constitutional damages. But it also recognized that claims for constitutional damages operate concurrently with, and do not replace, the general law. As such, private law thresholds would offer guidance for Charter remedies. As an example, the Court expressly noted that malicious prosecution "requires that 'malice' be proven because of the highly discretionary and quasi-judicial role of prosecutors".[63]

The *Ward* approach was consistent with academic writings on this issue, which have been critical of the idea that claims for constitutional damages should be wholly divorced from the principles and thresholds established in private law.[64] Nor has such an approach generally been adopted in common law jurisdictions that have embraced public law

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E.R. 833, [1995] Q.B. 335, at 349 (C.A.) [hereinafter, "*Elguzouli-Daf*"]; *A. v. New South Wales* (2007), 230 C.L.R. 500, at paras. 46, 54 (H.C.A.); *Commerical Union Assurance Co. of New Zealand v. Lamont*, [1989] 3 N.Z.L.R. 187, at 199 (C.A.); *Imbler v. Patchman*, 424 U.S. 409, at 424-29, 96 S. Ct. 984 (1976); *Van de Kamp v. Goldstein*, 555 U.S. 335, at 340-42, 129 S. Ct. 855 (2009); *Carter v. Burch*, 34 F.3d 257, at 261 (4th Cir. 1994).

[61] For a summary of these elements, see *Miazga*, *id.*, at para. 3.

[62] *Elguzouli-Daf*, *supra*, note 60, at 349.

[63] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at para. 43 (S.C.C.), varg [2009] B.C.J. No. 91 (B.C.C.A.) [hereinafter "*Ward*"]. See also *id*., at para. 22. Paragraph 43 also referred to the "distinct and autonomous" thresholds for Charter liability being informed by the "practical wisdom" of the private law.

[64] See *e.g.*, Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford: Oxford University Press, 2003), at 80; Robert E. Charney & Josh Hunter, "Tort Lite? — *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements" (2011) 54 S.C.L.R. (2d) 393, at 424-25; Keith Stanton *et al*., *Statutory Torts* (London: Sweet & Maxwell, 2003), at 14.024; Geoff McLay, "Constitutional Rights: A Matter of Tort?" in Daniel Nolan & Andrew Robertson, eds., *Rights and Private Law* (Oxford: Hart, 2011); Geoff McLay, "Damages for Breaches of the New Zealand Bill of Rights — Why Aren't They Sufficient Remedy?" (2008) N.Z.L. Rev. 333. See also The Law Commission & The Scottish Law Commission, *Damages Under the Human Rights Act, 1998: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com. No. 266/Scot. Law. Com. No. 180) (2000).

damages.[65] A convergence of liability standards for private and public law damages is not surprising, given that compensation, vindication and deterrence are goals of both the private law of tort[66] and Charter damage claims.[67] The two areas of the law share common underlying functions and protect similar fundamental interests. For example, the torts of false imprisonment and wrongful arrest and the Charter rights to liberty and security of the person protect similar interests in liberty and freedom of movement. Further, the law of tort damages provided a developed, coherent and generally consistent body of principles and precedent and a robust methodology to draw on.

In his majority decision, Moldaver J., while not adopting the high malice threshold in tort, was also careful to not throw the baby out with the bath water. He limited the new threshold to disclosure violations that impaired the accused's right to make full answer and defence:

> … [A] cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when *it knows, or would reasonably be expected to know*, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.[68]

Justice Moldaver emphasized that this new threshold was not based on negligence or gross negligence, stating that "a negligence-type

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[65] *Attorney General v. Chapman*, [2011] N.Z.S.C. 10, [2012] 1 N.Z.L.R. 462 (N.Z.S.C.); *Smith v. Chief Constable of Sussex Police*, [2008] EWCA Civ 39, at 45, 56 (C.A.), affd, [2008] UKHL 50, at 58 (H.L.), *per* Lord Bingham; *D. v. East Berkshire Community Health N.H.S. Trust*, [2005] UKHL 23, at 50, [2005] 2 A.C. 373 (H.L.).

[66] With respect to deterrence and compensation, see *Norberg v. Wynrib*, [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226, at 267-69 (S.C.C.), revg [1990] B.C.J. No. 490 (B.C.C.A.); *B. (K.L.) v. British Columbia*, [2003] S.C.J. No. 51, 2003 SCC 51, at paras. 20, 26 (S.C.C.), affg [2001] B.C.J. No. 584 (B.C.C.A.); Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), at 3. Vindication has long been a goal of those torts that are actionable *per se*, such as trespass, false imprisonment and defamation. See *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, 2008 SCC 40, at para. 15 (S.C.C.), revg [2006] B.C.J. No. 1315 (B.C.C.A.); *Éditions Écosociété Inc. v. Banro Corp.*, [2012] S.C.J. No 18, 2012 SCC 18, at para. 30 (S.C.C.), affg [2010] O.J. No. 2389 (Ont. C.A.). See also Jason N.E. Varuhas, "The Concept of Vindication in the Law of Torts: Rights, Interest and Damages" (2014) 34 Oxford J. Legal Stud. 253, at 254, 267; T.R. Hickman, "Tort Law, Public Authorities, and the *Human Rights Act 1998*" in Duncan Fairgrieve, Mads Andenas & John Bell, eds., *Tort Liability of Public Authorities in Comparative Perspective* (London: British Institute of International and Comparative Law, 2002), at 17-22.

[67] *Ward*, *supra*, note 63, at para. 25.

[68] *Henry*, *supra*, note 4, at para. 32 (emphasis added).

standard poses considerable problems, and ought to be rejected".[69] Certainly the first part of the threshold, that a prosecutor "knows" information is material bespeaks a higher standard than one based on inadvertence. However, the "or would reasonably be expected to know" threshold looks, at first blush, like the reasonable person test used to establish the standard of care in negligence. It would appear that, instead, Moldaver J. was injecting a different objective standard, one arising out of the criminal jurisprudence particular to disclosure. The material intentionally withheld must be so obviously relevant that it falls into the category of information that "*any* prosecutor, acting reasonably, should have disclosed".[70]

This high threshold recognizes the practical, on the ground and day-to-day realities faced by busy prosecutors in Canadian courthouses. By imposing liability only in a situation where "any" reasonable prosecutor would disclose, Moldaver J. was effectively reserving damages to the clearest, or most obvious, cases. In the vast majority of cases, where the prosecutor made an ordinary judgment call to not disclose, even one that turned out to be mistaken, damages would not lie.

The majority's decision is inherently practical. It recognizes that disclosure decisions are difficult. They are rarely straightforward, automatic or obvious.[71] Disclosure decisions include a legal determination as to what is required by the common law, statutory provisions and the Charter itself (as part of the supreme *law* of Canada). The particular context or stage of the proceeding is also germane to the information disclosed (*e.g.*, bail hearing, *Garifoli* applications, trial, and sentencing). A complex body of case law and even conflicting decisions and legal principles must be reviewed. These difficult prosecutorial decisions are quasi-judicial in the sense that they apply legal standards to evidence and are subject to, and frequently are, judicially reviewed by the trial court.[72]

"Relevance" in particular is often a moving target. Absent defence disclosure, the prosecutor cannot know the defence's theory of the case. A prosecutor may be unaware, for example, that an accused intends to raise an issue of racial profiling or police misconduct. Indeed, the

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[69] *Id.*, at para. 74.

[70] *Id.*, at para. 88 (emphasis added).

[71] *R. v. Anderson*, [2014] S.C.J. No. 41, 2014 SCC 41, at para. 45 (S.C.C.), varg [2013] N.J. No. 13 (N.L.C.A.); *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, 2002 SCC 65, [2002] 3 S.C.R. 372 (S.C.C.), revg [2000] A.J. No. 1129 (Alta. C.A.).

[72] *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41, 2007 SCC 41, at paras. 49-50 (S.C.C.), affg [2005] O.J. No. 4045 (Ont. C.A.); *Owsley v. Ontario*¸ [1983] O.J. No. 2128, 34 C.P.C. 96, at para. 15 (Ont. H.C.J.).

accused may not choose to pursue such arguments after the Crown's case is completed.[73] In their *Report of the Review of Large and Complex Criminal Case Procedures*, Justices Patrick LeSage and Michael Code note that there is considerable disagreement and difficulty even on the issue of what constitutes "relevance":

> … [T]he most common problems with disclosure practices and procedures all tend to revolve around requests for materials that are not part of the investigation and that are at the outer edges of relevance. The *Stinchcombe* test — "not … clearly irrelevant" — has been "set quite low" and, therefore, "includes material which may have only marginal value to the ultimate issues at trial." Defence requests for "marginal" *materials are very difficult for the Crown to evaluate*, especially if the defence fails to particularize and explain the request. These requests may also raise third party privacy interests when they seek files outside of the particular investigation.[74]

In addition, the Crown Attorney is under a continuing obligation[75] to reassess the issue of disclosure, often against a changing background. Decisions made months, or even years before, will need to be revisited, such as where the accused's theory of the case begins to emerge. This continuing obligation continues post-trial and throughout the appeal process.[76] Often, requests for disclosure are for material that is outside of the investigative file. These requests can involve evidence that would be inadmissible at the trial itself. While inadmissibility is not necessarily synonymous with irrelevance, nevertheless the decisions as to whether a prosecutor is constitutionally obligated to disclose this type of material are far from obvious and often will require judicial intervention to resolve. Accordingly, to suggest that these types of decisions are straightforward, or unqualified, is to deny reality.[77]

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[73] See *R. v. Horan*, [2008] O.J. No. 3167, 2008 ONCA 589, at paras. 26-27 (Ont. C.A.).

[74] Hon. Patrick J. LeSage & Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen's Printer for Ontario, 2008), at 22.

[75] *R. v. Girimonte*, [1997] O.J. No. 4961, 121 C.C.C. (3d) 3, at paras. 41-42 (Ont. C.A.) [hereinafter "*Girimonte*"].

[76] *R. v. Trotta*, [2004] O.J. No. 2439, 23 C.R. (6th), at para. 25 (Ont. C.A.), revd on other grounds, [2007] S.C.J. No. 49, 2007 SCC 49 (S.C.C.).

[77] See *e.g.*, *R. v. Chaplin*, [1994] S.C.J. No. 89, [1995] 1 S.C.R. 727, at paras. 21-22 (S.C.C.), affg [1993] A.J. No. 813 (Alta. C.A.) (request for any wiretap authorizations in which the accused was named even if it was unrelated to investigation of current criminal charges); *R. v. Toms*, [2003] O.J. No. 952, 174 C.C.C. (3d) 87 (Ont. C.A.), varg [2001] O.J. No. 4844 (Ont. S.C.J.) (request for investigative files relating to the work of an undercover police agent over the previous 21 years); *Girimonte*, *supra*, note 75 (request for all disciplinary records, internal discipline records and personnel files of "each police officer and government agent"); *R. v. Ngo*, [2006] M.J. No. 348,

Even greater complexity arises in the disclosure of information relating to confidential informers. This privilege imposes a strict duty on the Crown to *not* disclose material that *is relevant* but which might identify the informant (or lead the accused to narrow the range of people who could be the informant). Here, the consequences of getting it wrong could be catastrophic as the life of the informant can be put in jeopardy.[78] The privilege is "nearly absolute" and will be lifted by judicial order only when the innocence of the accused is demonstrably at stake. The privilege itself is "a matter beyond the discretion of a trial judge."[79] The determination of whether the privilege exists involves a judicial hearing in which the trial judge must be satisfied on a balance of probabilities.[80]

Similarly, the issue of whether solicitor-client privilege is applicable to a disclosure request, and whether that privilege is subject to an innocence-at-stake exception, also involves the exercise of difficult judgment calls by prosecutors which may be reviewed, and set aside, on judicial review. Indeed, the Court has confirmed that in such applications the trial court exercises a residual discretion to relax strict rules of evidence in favour of the accused when necessary to prevent a miscarriage of justice.[81]

Now imagine that for any one of these decisions the prosecutor makes the wrong call. The trial court, or later an appeal court, concludes that the prosecutor ought to have disclosed a document that he or she did not. Faced with the prospect of Charter damages flowing from that error, and the resulting damage to one's reputation and good-standing, many disclosure decisions would end up involving layers of review, reconsideration and levels of approval by actors higher up in the Crown apparatus. Some trials could be ground to a halt as prosecutors themselves, out of an abundance of caution, seek judicial oversight of their disclosure

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2006 MBQB 143, 9 C.R. (6th) 183 (Man. Q.B.) (records sought relating to over 200 motor vehicle stops carried out by the arresting officer over the past two years); *R. v. Dykstra*, [2007] O.J. No. 5132 (Ont. S.C.J.) (request for all police records relating to any investigations of drug smuggling by airport employees); *R. v. Gateway Industries Ltd.*, [2003] M.J. No. 155, 2003 MBQB 97, [2004] 6 W.W.R. 329 (Man. Q.B.) (request for prior drafts of the information to obtain the search warrant, offers made during plea bargaining negotiations and notes of discussions with a Minister of the Crown).

[78] See *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, 2007 SCC 43, at paras. 4, 101 (S.C.C.), revg [2006] B.C.J. No. 3122 (B.C.S.C.).

[79] *Id.*, at para. 19.

[80] *R. v. Basi*, [2009] S.C.J. No. 52, 2009 SCC 52, at paras. 4, 39 (S.C.C.).

[81] *R. v. Brown*, [2002] S.C.J. No. 35, 2002 SCC 32, at paras. 5, 116 (S.C.C.), revg [2001] O.J. No. 3408 and 3409 (Ont. S.C.J.); *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, at paras. 51-60 (S.C.C.).

decisions in order to have the benefit (and a stronger defence) of a judge's prior approval should there be a subsequent civil claim.

This underscores that Moldaver J. got it right when he set the threshold high for a claim for Charter damages for non-disclosure. To subject Crown Attorneys to a mere causation threshold (as the dissent suggested) or to a negligence threshold (as some of the interveners advocated) would have influenced the day-to-day decision-making of prosecutors and make them more defensive in their approach. Threats of civil liability build distrust, rather than cooperation between the Crown and defence bar. As the majority summarized:

> The public interest is not well served when Crown counsel are motivated by fear of civil liability, rather than their sworn duty to fairly and effectively prosecute crime. By the same token, the Attorneys General suggest that a low threshold would open up the floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties.[82]

Justice Moldaver categorically rejected the dissent's claim that Crown counsel would not be diverted from their duties, noting that with a low threshold for liability "a detailed examination of prosecutors' conduct is inevitable".[83] He recognized that disclosure decisions "are invariably difficult judgment calls" and that:

> … Those difficult decisions should be motivated by legal principle, not the fear of incurring civil liability. Furthermore, the fact that damages claims lie against the state and not individual prosecutors does not mitigate this concern. Like all lawyers, Crown counsel are professionals who jealously guard their reputations and whose actions are motivated by more than personal financial consequences.[84]

Justice Moldaver's practical acknowledgment of the importance of a lawyer's reputation was recognized in *Hill v. Church of Scientology of Toronto*:

> … The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent

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82 *Henry*, *supra*, note 4, at para. 40.
83 *Id*., at para. 79.
84 *Id*., at para. 80.

> and indefatigable diligence, a lawyer cannot survive without a good reputation.[85]

Henry reflects the uniquely Canadian conception of access to justice developed above. The establishment of a new threshold for Charter damages in a non-disclosure case reflected the countervailing need to preserve community goals of an effective criminal justice system in which a critical actor, the state's representative, is not derailed from his or her duties as a Minister of Justice.

V. CONCLUSION

We have attempted to situate *Kokopenace* and *Henry* in terms of a broader narrative concerning how the Supreme Court of Canada has approached the concept of access to justice. In previous years, culminating in *Trial Lawyers*, the Court expanded this concept to the extent that it effectively created a constitutional right of access to justice in the superior courts that is capable of invalidating legislation. However, in 2015 it narrowed its understanding of access to justice. Some might thus see fit to regard *Kokopenace* and *Henry* as missed opportunities to use the law as an instrument to achieve social justice for many Canadians, especially Aboriginal persons and others whose constitutional rights have been infringed.

In our view, the Court's retreat from its position in previous cases such as *Trial Lawyers* is nevertheless based on a defensible conception of access to social justice. This conception is realistic and pragmatic. It recognizes that law can be used as a tool to achieve social justice but, at the same time, that the legal system's systemic virtue of workability must be preserved. If the law is to function as an excellent tool to achieve any purposes at all, state actors responsible must not have their abilities to do their jobs hampered by onerous positive obligations or low liability thresholds. *Kokopenace* and *Henry* preserve the law's systemic virtue of operability to the benefit of the community, and they reflect a distinctively Canadian approach to the relationship between individual and communal values. A "made in Canada" approach to access to justice recognizes that using the law as an instrument to achieve socially just ends for aggrieved individuals must sometimes be limited by the law's capability to serve socially just ends for the Canadian community as a whole.

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[85] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 118 (S.C.C.), affg [1994] O.J. No. 961 (Ont. C.A.).