

**STRIKE *STRICKLAND*: A MADE-IN-CANADA APPROACH
TO INEFFECTIVE COUNSEL CLAIMS**

By

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A thesis submitted to the Faculty of Graduate Studies of
The University of Manitoba
In partial fulfillment of the requirements of the degree of

MASTER OF LAWS

Faculty of Law

University of Manitoba

Winnipeg

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To Ineffective Counsel Claims

Master of Laws 2019

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Abstract

The right to effective counsel is a right guaranteed under the American Constitution and sections 7 and 11(d) of the *Charter of Rights and Freedoms*. A US Supreme Court decided a case called *Strickland v Washington* in 1980, establishing a two prong approach to ineffective defence counsel claims. The two prongs focused on the Performance and Prejudice Components. Notwithstanding the flaws of this approach, it was adopted into Canadian Jurisprudence by the Canadian Supreme Court in *R v B (GD)* in 2000, without commentary or analysis. This thesis submits that the *Strickland* test is too restrictive and unfairly requires a proof of prejudice to the rights of the accused. Included herein is an empirical study that examines the Canadian case law since 2000, the date *B (GD)* resulted in the adoption of the American test. This study reveals that the argument of ineffective counsel is seldom made: 316 cases in over 13,000 criminal appeals with success in only 50 cases. This translates into an average of less than 3 successful appeals

per year for all of Canada. It is submitted that the low success rate has had a chilling effect on counsels' ability to argue that an appeal has merit and has limited the number of times an appeal alleging ineffective counsel is made. This thesis submits a new approach, one based on Canada's Constitution and, in particular, the *Charter of Rights and Freedoms*. The presumption of competence would be abolished and no particular deference would be afforded to counsel's decisions. This test would still require the appellate to prove, to a balance of probabilities, that counsel's conduct or errors, considered cumulatively, failed to pass the threshold of professional conduct. After that onus is discharged, the court must consider whether counsel's conduct or errors led to the accused having an unfair trial. If that is the decision of the court, then a new trial should be ordered. In this way, *ubi jus, ibi remedium* – where there is a right there must be a remedy – will be fulfilled.

For Mark

With Acknowledgements to: Dr. Richard Jochelson (advisor), Professor David Ireland and Dr. Melanie Murchison.

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CHAPTER ONE

I. INTRODUCTION

Every person accused of a criminal offence has the right to effective counsel. Both the American Constitution¹ and the *Charter of Rights and Freedoms*² confirm this. But what is the consequence when that right is not fulfilled? While it is one thing for the Courts to recognize the right, it is quite another thing to ensure there is a remedy when an accused has not been effectively represented. In fact, it can be said that the right is illusory when the remedy, a new trial, is rarely given.

The right to effective counsel is paramount to an adversarial system, which is essential to the common-law traditions of the United States and Canada. In *R v Joannis* Justice Doherty stated:

The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by “partisan advocacy on both sides of the case”: *United States v Cronin*, 104 S.Ct 1039 (1984), per Stevens J. at p. 2045. Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness of the process in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in it provides to an accused a champion who has the same skills as the

¹ US Const. Sixth Amendment and Fourteenth Amendment.

² *Canadian Charter of Rights and Freedoms*, Para 1 of the *Constitution Act*, being Schedule B to the *Canada Act* 1982, c11. S 7 “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. S 11 (d) 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.” Hereinafter referred to as the *Charter*.

prosecutor and who can use those skills to ensure that the accused receives benefit of the panoply of procedural protections available to an accused.³

The problem is that the courts have taken the right to effective counsel and developed a test, in *Strickland v Washington*,⁴ to determine whether counsel has provided effective assistance, a test which is very difficult to meet. The case that developed this test is an American Supreme Court case from 1980. The court established a two-pronged test, consisting of Performance and Prejudice prongs, which eliminated an equal, fair and level playing field in evaluating whether the accused received effective assistance of counsel. The Performance Component asks whether counsel meets the standard of a reasonable professional.⁵ There is a strong presumption of competency and great deference is given to the counsel's decisions and conduct. The "evaluation is from counsel's perspective at the time."⁶ There is no room for hindsight. The Prejudice Component is meant to indicate whether counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."⁷ A convicted accused making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."⁸ The accused must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."⁹

This test is problematic in three ways: first, it unnecessarily introduces a strong presumption of competence and subjectivity to the lawyer's conduct; secondly, it requires the

³ 85 OAC 186 at III (iv) (b).

⁴ *Supra* note 4.

⁵ *Ibid* at 690.

⁶ *Ibid* at 687.

⁷ *Ibid* at 687

⁸ *Ibid* at 690.

⁹ *Ibid* at 694.

accused to identify specific examples of acts or omissions of counsel, referred to as prejudice; and thirdly, its focus on reliability downplays the importance of whether the accused received a fair trial, rather than one that might be unfair, but “acceptable”.

To compound this problem, the Canadian Supreme Court, in *R v B (GD)*,¹⁰ while confirming that the right to effective counsel is a right enshrined in the *Charter*,¹¹ chose, without any discussion or even offering any reason, to adopt the *Strickland v Washington*¹² test into Canadian jurisprudence. This thesis submits that the adoption of an American test, based on the US Constitution,¹³ has been unnecessary and, in fact, foolhardy, with the Court’s acceptance of the *Strickland*¹⁴ test predictably leading to Canadian verdicts that are as unfair as the verdicts which were confirmed in the United States.

Thus, while courts both in the United States and Canada laud the right to effective counsel for each person charged with a criminal offence, they fail to offer a meaningful remedy when that right is denied. The only meaningful remedy is a new trial, this time with effective counsel. The accused may still be found guilty, but at least we know that the outcome, as far as the representation goes, has been fair. Fairness is at the heart of our legal system and is essential to the continued respect for our administration of justice.

In Chapter One of this thesis, I will first examine the maxim *ubi jus, ibi remedium* (for every right there must be a remedy)¹⁵ and establish that this maxim is still a key component of

¹⁰ *B (GD)* 20000 SCC 22.

¹¹ *Supra* note 2.

¹² *Supra* note 4.

¹³ *Supra* note 1.

¹⁴ *Supra* note 4.

¹⁵ “Latin: where there is a right there is a remedy. The principle that where one’s right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss. Further, where one’s right is denied the law affords the remedy of an action for its enforcement. This right to a remedy therefore includes more than is usually meant in

our jurisprudence. I will use this ancient maxim to justify the obligation of the legal society to remedy a situation where a right has not been actualized. The right in question is the right for the accused to the effective assistance of counsel, as guaranteed under s. 7 and 11 (d) of the *Charter*.¹⁶ After that, I will touch briefly on whether the law societies' duty to ensure that lawyers are competent is of assistance in tying the denial of a right to effective counsel to a meaningful consequence for the accused. Finding nothing in administrative law, I will then turn my attention to case law to see if the courts ensure the proper remedy is ordered when the right to effective counsel is denied. I will first examine the American experience, discussing the *Strickland*¹⁷ case, and its backstory, and see how its test was applied and how it has subsequently led to unexpected and unjust results in four subsequent American cases that are particularly illustrative of the flaws inherent in the test: namely the presumption of competency and of deference, the need to establish specific actions of counsel that led to prejudice and the need for reliability of the verdict.

In the Second Chapter, I will discuss the Canadian experience, starting with three pre- *B (GD)*¹⁸ appellate cases. These cases are harbingers to the Supreme Court finding that the right to effective counsel is guaranteed as a principle of fundamental justice under section 7 of the *Charter*.¹⁹ I will also discuss how The Supreme Court came to definitively adopt the *Strickland*²⁰ test into Canadian jurisprudence.

English law by the term “remedy,” as it includes a right of action. Wherever, therefore, a right exists there is also a remedy.” Online < www.oxfordreference.com/view/10,1093/oi/authority.20110803220448446>.

¹⁶ *Supra* note 2.

¹⁷ *Supra* note 4.

¹⁸ *Supra* note 10.

¹⁹ *Supra* note 2.

²⁰ *Supra* note 4.

I will continue with a discussion of the *B (GD)*²¹ case and how it adopted the *Strickland*²² test without any discussion or explanation. Given the flaws in the *Strickland*²³ test and the fact that it was based on the US Constitution,²⁴ instead of our own, the Supreme Court ought to explain why the test was appropriate and why, presumably, it was preferable to a test based on the *Charter*²⁵. After that, I will discuss three post- *B G(D)*²⁶ cases that illustrate how the *Strickland*²⁷ test, as applied in Canada, have led to the same unjust results as in the American cases. These three examples demonstrate how ineffective representation, at the present time, is neither recognized nor remedied on a consistent basis. The first problem is the strong presumption of competency which is unnecessary and unfair. It is unfair for the appellant in that they already have the onus to prove that the counsel acted below the standard of a reasonable professional. The second component, the prejudice component, requires the appellant to point to specific examples of incompetence that affected the verdict. I concluded that this too is unfair. In Chapter Three, after reviewing the history and the utility of empirical research studies, I present empirical test results that confirm the hypothesis that by applying this *Strickland*²⁸ test, it is very difficult to have a Canadian court recognize and remedy the problem of ineffective of counsel. In fact, for the eighteen years between 2000, the year of *B (GD)*²⁹ and 2018, the date of this thesis, there was only a net³⁰ number of 181 Canadian cases that judicially considered *B (GD)*³¹ (as

²¹ *Supra* note 10.

²² *Supra* note 4.

²³ *Ibid.*

²⁴ *Supra* note 1.

²⁵ *Supra* note 2.

²⁶ *Supra* note 10.

²⁷ *Supra* note 4.

²⁸ *Ibid.*

²⁹ *Supra* note 10.

³⁰ I excluded cases that were irrelevant to the task at hand. For a further discussion of this process, see Chapter III.

³¹ *Supra* note 10.

reported in Westlaw and Quicklaw) and 135 cases that cited “ineffective counsel”³² Of the cases that judicially considered *B (GD)*³³ only 30 “ineffective & counsel” appeals were allowed; of the cases that cited “ineffective & counsel” there were only 20 appeals that were successful. Put another way, in the last 18 years, only 50 cases, less than 3 appeals per year, were successful. I will also argue that this high failure rate and the resulting reluctance of counsel to appeal on the grounds of ineffective counsel has had a chilling effect on the number of times ineffective representation has been argued, supporting the judicially articulated fear that recognizing the reality of ineffectiveness will open the floodgates to such a claim.³⁴ In fact, my study revealed that the 316 cases argued were a fraction of the over 13,000 criminal appeals³⁵ in the same 18 year time frame.

In Chapter Four, I will argue for the abandonment of the *Strickland*³⁶ test for several reasons. I address the advantages of relying on the *Charter*,³⁷ both as the Supreme Law of Canada and a “made -in- Canada” solution, to addressing the problem of ineffective counsel through the application of s 24 (1) of the *Charter*,³⁸ thus liberating the bench to provide remedies for accused who have received ineffective counsel, such as imposing costs, as in *R v Dunedin*³⁹. I will propose that the presumption of competence be discarded as unfair and unnecessary. Also, in the performance component, I will argue that counsels’ errors be treated cumulatively rather than analyzing each mistake on its own. Thus, while one error by counsel could lead to a finding

³² I used Boolean operator and/& between “ineffective” and “counsel”. “Boolean operators form the basis of mathematical sets and database logic. [Using] AND in a search narrows [the] results [and] tells the database that all search terms must be present in the resulting records.” Online <http://libguides.mit.edu/c.php?g=175963&p=11589-115885594>

³³ *Supra* note 10

³⁴ *Supra* note 4 at 690.

³⁵ I counted the number of criminal appeals during the 18 years in each of the provinces using Westlaw.

³⁶ *Supra* note 4.

³⁷ *Supra* note 2.

³⁸ *Ibid.*

³⁹ 2001 SCC 81

that the accused received ineffective counsel, multiple errors, which may not stand alone to justify a finding of ineffective counsel, taken together could also lead to a finding of ineffective representation. In terms of the prejudice component, I propose that the question the courts ask is whether the accused received a fair trial or had the appearance of a fair trial. This determination is the key to matching what the courts do with what the *Charter*⁴⁰ guarantees: the right to a fair trial. This is the right guaranteed to all people and it is up to the court to ensure the right be actualized.

I also reject the court's querying as part of the prejudice component, whether, notwithstanding the malfeasance of counsel, the verdict is still reliable. This exercise places the emphasis on the guilt or innocence of the accused when our system guarantees a fair trial regardless of whether the accused is guilty. To continue to ask whether the verdict possibly or probably⁴¹ would have been different will lead to the conclusion that ineffectiveness of counsel will be tolerated if the accused is probably guilty anyways. The system is predicated on the fairness of the process, and cutting corners into guaranteed rights is unacceptable. In other words, our legal system should not tolerate one accused having the right to a fair trial, but another accused having only a watered down right to have a less fair trial.

By changing the *Strickland*⁴²/*B (GD)*⁴³ test in these ways, the criminal justice system would be fairer and more just. It would also breathe life into the rights that the *Charter*⁴⁴ gives to everyone charged with a criminal offence. Rights are only meaningful if there are consequences

⁴⁰ *Supra* note 2.

⁴¹ *Supra* note 4. The question is whether the verdict would probably be different; in *B (GD)*, *supra* note 10, the question is whether the verdict would possibly be different; in *R v Joannis*, *supra* note 3, at III(iv)(1) Doherty JA described the test in this way: "A reasonable probability lies somewhere between a mere possibility and a likelihood." In the cases reviewed, the terms, possibility, probably or Doherty's description are used interchangeably. In other words, no case commented on the possible distinctions between the terms.

⁴² *Supra* note 4.

⁴³ *Supra* note 10.

⁴⁴ *Supra* note 2.

to their denial. That consequence is to have their trial done over, but this time with the accused represented by effective counsel.

II. CAN THERE BE A RIGHT WITHOUT A REMEDY: *UBI JUS, IBI REMEDIUM*?⁴⁵

Failing to remedy an accused's denial of a right to effective assistance of counsel left accuseds in a situation described in the article, "*Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*,"⁴⁶ by Tracy Thomas. In this article, Thomas discusses how the American courts have had a great deal of difficulty in giving a meaningful remedy to a right denied. She commences her discussion by arguing that the impact of *Brown v Board of Education*,⁴⁷ which endorses affirmative remedial action to enforce constitutional rights, has been limited by significant enforcement disputes. These disputes include delay and defiance of court orders and "by adopt[ing] a standard for ordering injunctive relief that significantly defers to defendant wrongdoers at the plaintiffs' expense."⁴⁸ Thomas succinctly puts it this way: "Winning the case has not been the same as winning the remedy."⁴⁹

In particular, she describes how, "[c]ourts can declare rights, but then default in the remedy to avoid a politically unpopular result."⁵⁰ Can the same be said about the current legal system, where courts, both Canadian and American, declare that accuseds have a constitutional right to effective counsel, but when the accused is denied this right, nothing much happens to the accused or the counsel? Is the protection of accuseds' rights the "politically unpopular result,"

⁴⁵ *Supra* note 14.

⁴⁶ 41 San Diego Law Review 1633 (2004).

⁴⁷ 347 US 483 (1954).

⁴⁸ *Supra* note 46 at 1634.

⁴⁹ *Supra* note 46, citing Molly McUsic, "The Failure of *Brown v Board of Education: Economic Integration of the Public Schools*," 117 Harv. L. Rev. 1334 at 1335.

⁵⁰ *Supra* note 46.

especially when the power to rectify a denial of this right lies with the two bodies that may have a reason to protect an incompetent lawyer: the judiciary and the disciplinary bodies?

The term “*ubi jus, ibi remedium*”⁵¹ in Thomas’s article title refers to the ancient right, stemming from Lord Coke’s⁵² interpretation of the *Magna Carta*.⁵³ The *Magna Carta*,⁵⁴ “The Great Charter,” was forced from King John by the English barons which was sealed at Runnymede on June 15, 1215. The *Magna Carta*⁵⁵ contained 63 clauses that limited King John’s power, making it the first example of royal authority becoming subject to the law.

Its meaning is best explained by the Chief Justice of the King’s Bench in *Ashby v White*⁵⁶ when he stated:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; both want of right and want of remedy are reciprocal.⁵⁷

Thomas also notes that in the United States Supreme Court in 1803, Justice Marshall, in *Marbury v Madison*,⁵⁸ recognized that:

It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded...for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy and every injury its proper redress.⁵⁹

⁵¹ *Supra* note 14.

⁵² Sir Edward Coke was an English barrister, judge and politician who is considered to be the greatest jurist of the Elizabethan and Jacobean era. He was born on February 1, 1552 and died September 3, 1634.

⁵³ “*Magna Carta*, 1297. Widely viewed as one of the most important legal documents in the history of democracy” online < <https://www.archives.gov/exhibits/featured-documents/magna-carta>>.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ 92 Eng. Rep 126 (KD 1703).

⁵⁷ *Ibid* at 137-139.

⁵⁸ 5 US (1 Cranch) 137 (1803.)

⁵⁹ *Ibid* at 163 citing Blackstone Commentaries, at 23.

Thomas further cites Justice Holmes, who stated: “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp.”⁶⁰

This maxim, *ubi jus, ibi remedium*,⁶¹ means that there is no right without a remedy, and is relevant to the right to effective counsel. If an accused is represented by ineffective counsel, which leads to an unfair trial, both of which are guaranteed rights under the *Charter*,⁶² the rights mean nothing if the court remains silent in their absence. This maxim has a long history, but is it still relevant today? And is it still relevant in Canada?

A. Case Law That Affirms “There is No Right Without a Remedy” is Relevant in Canada

1. *R v Dunedin*

Is *ubi jus, ibi remedium*⁶³ still relevant to Canadian Courts? Yes. The Supreme Court of Canada confirms that doctrine in *R v Dunedin*⁶⁴ which held that “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.”⁶⁵

In *R v 974649 Ontario Inc. cob as Dunedin Construction*⁶⁶ the appellant was charged under the Ontario *Occupational Health and Safety Act*⁶⁷ with failing to comply with safety requirements on a construction project. The appellant requested disclosure, including a copy of the “Prosecution approval form”⁶⁸. The Crown refused twice, citing solicitor-client privilege. A

⁶⁰ *Ex parte, United States*, 257 US 419, 433 (1922) as cited by *supra* note 46 at 1639.

⁶¹ *Supra* note 14.

⁶² *Supra* note 2.

⁶³ *Supra* note 14.

⁶⁴ *Supra* note 39.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ RSO 1990, c. O-1, sets out the rights and duties of all parties in the workplace, as well as the procedures for dealing with workplace hazards.

⁶⁸ This form is routinely prepared by the Ministry of Labour inspectors when deciding whether to lay charges under *The Occupational Health and Safety Act*.

Justice of the Peace, as the trial judge, not only ordered the production of same but said the appellant had the right to it under the *Charter of Rights and Freedoms*⁶⁹ and ordered costs of the motion for disclosure.

The Crown appealed, arguing that the Justice of the Peace hearing was not a court of competent jurisdiction, a requirement for a remedy under section 24 (1) of the *Charter*⁷⁰, and could not make such an order. The Court of Appeal disagreed. The matter was remanded back to the Ontario Court (General Division) to determine whether the Justice of the Peace erred in granting costs.

The matter was appealed to the Supreme Court of Canada, which dismissed the appeal. It held that the government, if it were to breach a *Charter*⁷¹ right, must be reminded of the remedy section, s. 24(1), and give a “full, effective and meaningful remedy...as the foundation stone for the effective enforcement of *Charter* rights”⁷² citing Justice Lamer in *R v Mills*.⁷³

*Dunedin*⁷⁴ is an important case because the Court took a *Charter*⁷⁵ right, the right to full disclosure, and responded to the denial of the right with an effective remedy (the costs of the motion) under section 24 (1). By extension, I submit that the same attitude of providing remedies following rights denied applies to the *Charter*⁷⁶ right of effective counsel. The right to effective counsel flows from the confluence of section 7, which guarantees the right to counsel as a principal of fundamental judgement and ss. 11(d) that guarantees the right of a fair trial. Since

⁶⁹*Supra* note 2.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Supra* note 39 at para 19.

⁷³ [1986] 1 SCR 863 at 881-882; 58 OR (2d) 543; 29 DLR (4th) 161; 67 NR 241; 16 OAC 81; 26 CCC (3d) 481; 52 CR (3d) 1; 21 CRR 76; JE 86-709; [1986] SCJ No 39 (QL); 17 WCB 41; [1986] ACS no 39.

⁷⁴ *Supra* note 39.

⁷⁵ *Supra* note 2.

⁷⁶ *Ibid.*

there is no fair trial without effective counsel, the right is crystalized. In other words, in *Dunedin*,⁷⁷ the government failed to uphold a *Charter*⁷⁸ right to disclosure which was recognized and affirmed with a remedy, whereas here, in the test created by *Strickland*⁷⁹ and adopted in *B (GD)*,⁸⁰ when there is a breach of the accused's right to effective counsel, there ought to be a remedy such as an order of a new trial. To further prove that *ubi jus, ibi remedium*⁸¹ is still relevant to Canadian law, one has only to look at the Supreme Court's judgement in the 2015 case in *Henry v British Columbia (Attorney General)*.⁸²

2. *Henry v British Columbia (Attorney General)*⁸³

The Supreme Court uses the phrase *ubi jus, ibi remedium*⁸⁴ itself in *Henry v British Columbia (Attorney General)*⁸⁵ where the appellant was convicted of ten sexual offences and was declared a dangerous offender⁸⁶ and spent 27 years in prison.

⁷⁷ *Supra* note 39.

⁷⁸ *Supra* note 2.

⁷⁹ *Supra* note 4.

⁸⁰ *Supra* note 10.

⁸¹ *Supra* note 14.

⁸² 2015 SCC 24.

⁸³ *Ibid.*

⁸⁴ *Supra* note 14.

⁸⁵ *Supra* note 82.

⁸⁶ *Criminal Code* RSC 1985 c. C-46 at ss 753 (1) "On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if is satisfied (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour, (ii) a pattern of persistent aggressive behaviours by the offender of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender and reasonably foreseeable consequences to other persons of his or her behaviour, or (iii) and behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to

It was later discovered that there was significant and exonerating disclosure that was not given to defence counsel at the time of trial. The issue before the Court was that the evidence failed to prove malice on the part of prosecution, but the Court found that the crown's conduct represented a marked and unacceptable departure from the reasonable standard expectation of prosecutors and that a court could therefore award damage awards under the *Charter*⁸⁷ section 24 (1). The Court of Appeal disagreed and ordered that the accused was not entitled to a *Charter* s 24 (1)⁸⁸ remedy, since the crown had acted without malicious acts and omissions.

The appellant appealed to the Supreme Court, which held damages could be ordered under the *Charter* s 24(1)⁸⁹, despite prosecutorial misconduct that fell short of malicious intent. Justice Moldaver adopted the following from *Doucet-Boudreau v Nova Scotia (Minister of Education)*⁹⁰: the ancient maxim *ubi jus, ibi remedium*,⁹¹ translated a “where there is a right, there must be a remedy.”

Thus, the spirit of *ubi jus, ibi remedium*,⁹² recognized and adopted by the Supreme Court in 2015, is good law and should therefore apply equally to providing a remedy, namely a new trial, when the rights of effective counsel are violated. It is necessary to acknowledge that the *Charter*⁹³ right of effective counsel is real, by virtue of it being a principle of fundamental justice in s. 7 and part of ss.11 (d), i.e. the guarantee of a fair trial, of the *Charter*⁹⁴ and disregarding it

control his or her sexual impulses...(4.1) The court shall impose a sentence of detention in a penitentiary of an indeterminate period...”

⁸⁷ *Supra* note 2.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ 2003 SCC 62.

⁹¹ *Supra* note 14.

⁹² *Ibid.*

⁹³ *Supra* note 2.

⁹⁴ *Ibid.*

should be remedied. Honouring the rights established by the *Charter*⁹⁵ by remedying their breach is the best way for the public to respect the *Charter*,⁹⁶ and consequently the legal system upon which it is based.

As indicated, the main remedy for being represented by ineffective counsel is the ordering of a new trial, but this time with the accused represented by effective counsel. But what about broader consequences that impact not only the accused but the wider community – should counsel not face some kind of consequence for their shoddy work? An obvious place to look might be instances when the counsel faces disciplinary proceedings conducted by the local law society⁹⁷: The law society protects the public from incompetent conduct.⁹⁸ In fact, in *B (GD)*,⁹⁹ Justice Major suggests that counsel’s conduct and whether it complies with the standards of the profession in that province should be best left to counsel’s law society.¹⁰⁰

III. THE LAW SOCIETY

The answer as to whether the law society protects the public from ineffective lawyers is technically yes, but in reality, no. *The Legal Profession Act*,¹⁰¹ establishes the Law Society of Manitoba.¹⁰² I have chosen to focus on the Manitoba Law Society since it represents the mean of all of the Canadian Law Societies,¹⁰³ and also the Manitoba Law Society established “The Code

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *The Legal Profession Act*, S.M. 2002 c.44.

⁹⁸ *Ibid* s. 3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

⁹⁹ *Supra note 10.*

¹⁰⁰ *Ibid* at para 34.

¹⁰¹ *Supra note 97.*

¹⁰² *Ibid*, Part 2.

¹⁰³ Licensed lawyers in Provincial bars: Ontario 42,359; Quebec 25,766; British Columbia 11,656; Alberta 9,720; Saskatchewan 2,58; **Manitoba 2,064**; Nova Scotia 2,017; New Brunswick 1,326; Newfoundland 753; Nunavut 397; Norwest Territories 316; Prince Edward Island 244.

of Professional Conduct,”¹⁰⁴ which, like all other Law Societies in the country, is based on the Canadian Federation of Law Societies’¹⁰⁵ “Model Code of Professional Conduct.”¹⁰⁶ The two sections outlining “Competency” and “Quality of Service” are reproduced in Appendix A.

When a member of the public complains about their lawyer, the matter is referred to the complaints investigation committee, which investigates the complaint.¹⁰⁷ The complaint is related to a particular paragraph of the Code of Professional Conduct.¹⁰⁸ So, for example, if a lawyer breaches an undertaking to another lawyer, it is described as a violation of paragraph 5.1-6.¹⁰⁹

The complaints investigation committee may issue a formal caution or direct that a charge be laid and have the matter referred to the discipline committee.¹¹⁰ Once a charge is received by the discipline committee, a disciplinary hearing is held before a panel of committee members: usually this is composed of three lawyers or two lawyers and a lay member of the public. If found guilty, the discipline committee may order the lawyer to be reprimanded, to pay a fine, be suspended or disbarred. Additionally, the lawyer usually pays all or part of the costs of the process.¹¹¹ The lawyer may also be prohibited from practising in a particular area of law for a certain period of time,¹¹² work under a supervisor, undergo additional education or cease practice altogether.

¹⁰⁴ www.lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct. See Appendix A.

¹⁰⁵ “The Federation of Law Societies is the national coordinating body of Canada’s 14 provincial and territorial law societies, which regulate more than 120,000 lawyers and 3,800 Quebec notaries and Ontario’s 9,000 licensed paralegals in the public interest.” Online < <https://flsc.ca/about-us/our-members-canadas-law-societies/>>

¹⁰⁶ *Supra* note 104.

¹⁰⁷ *Supra* note 97, s 66.

¹⁰⁸ *Ibid* at s 68.

¹⁰⁹ *Supra* note 97.

¹¹⁰ *Ibid* at s 68, 72.

¹¹¹ *Ibid* s 72 (1) (e), 72(2) (e).

¹¹² *Ibid* 72 (1) (c) (i), 72 (2) (c).

None of this benefits the accused, however, who almost inevitably remains in gaol regardless of whether his or her lawyer has been disciplined or not.

At first blush, an accused who received ineffective assistance of counsel may believe that a complaint can be made to the Law Society alleging negligence.¹¹³ But the “Section for the Public” on the Law Society¹¹⁴ website states: “The Complaints Resolution Department of the Law does not usually investigate complaints of lawyer negligence, since negligence (an error or omission) is not usually considered to be a disciplinary matter.”¹¹⁵ The section continues, “If you can prove a mistake was made by the lawyer which caused them to suffer *quantifiable* damages, you may make a claim against your lawyer...In most situations you will need to speak to a new lawyer about making your claim.”¹¹⁶ [Emphasis added.]

There are a few problems with this system. First is the requirement to prove “quantifiable damages.” In other words, the accused would have to prove specific losses that he or she suffered, or what the law calls special damages.¹¹⁷ Thus, if the accused suffered general damages,¹¹⁸ such as for pain and suffering, or punitive damages,¹¹⁹ they are therefore available.

¹¹³ “Conduct that falls below the standards of behaviour established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances...If a person engages in an activity requiring special skills, education, training, or experience who is a qualified member of the group authorized to engage in that activity...Anyone who performs these special skills, whether qualified or not is held to the standard by which his conduct of a reasonably skilled, competent, and experienced person who is a qualified member of the group authorized to engage in that activity... <https://legal-dictionary.thefreedictionary.com/Negligence>.

¹¹⁴ lawsociety.mb.ca

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*.

¹¹⁷ “Damages capable of precise calculation such as out-of-pocket expenses and loss of earnings.”

Online<[www.duhaime.org/LegalDictionary/S/Special damages.aspx](http://www.duhaime.org/LegalDictionary/S/Special%20damages.aspx)

¹¹⁸ “General damages amount to financial compensation that is issued by a court to compensate for injuries suffered, for which no real dollar value can be calculated. Examples of general damages can include financial compensation for pain and suffering ...”Online < <http://legal-dictionary.net/general-damages/>>

¹¹⁹ *Ibid*. “The legal term punitive damages refers to a monetary award ordered by the court to be paid by a defendant to the plaintiff in a civil law suit. While it is common for a plaintiff to be awarded money to pay for a wrong committed by the defendant, such as money to pay medical bills, or for property damage, punitive damages are awarded only for the purpose of punishing the defendant for his conduct. A punitive damage awarded is paid to the plaintiff by the defendant...Punitive damages are awarded to the plaintiff, but the main goal is deterrence of the

Thus, the only quantifiable loss an accused would be able to claim is the lost fees paid to the lawyer. The second problem is for the accused to prove the lawyer made a “mistake.” Courts rarely find the lawyer was incompetent, so proving “a mistake” on the part of the lawyer may be very difficult. Plus, the courts have frowned on “the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to re-litigate an issue already tried, [which is therefore] an abuse of the process of the Court.”¹²⁰

The third problem in an accused suing his lawyer for malpractice is that the accused needs to hire a lawyer. Malpractice litigation can be lengthy, extremely expensive and positive results are far from certain.¹²¹ So, realistically, how likely is an accused, who is probably still in gaol, to launch a civil action against the lawyer represented by a large and powerful insurance company, notwithstanding they feel they received ineffective assistance? Even if successful, the only appropriate remedy for an accused is not damages but a proper adjudication of the allegations against him or her, this time represented by effective counsel.

behaviour that brought about the lawsuit. A judge will award punitive damages if he wishes to make an example of the defendant.” It is this author’s opinion that punitive damages in the case of lawyer negligence would rarely if ever be ordered.

¹²⁰ *Demeter v British Pacific Life Insurance Co.* 48 OR (2d) 266; 13 DLR (4th) 318; 8 CCLI 286; 8 CCLT 286; 5 CPC (2d) 166; [1984] OJ No 3363 (QL); [1985] ILR 1; 30 MVR 67 (Ont CA) at 266. As cited by Paul Calarco, “The Ontario Court of Appeal Gives a Green Light to Re-Litigate Criminal Convictions by Suing Your Lawyer” 2000 31 (CR) 5th 129 at 129.

¹²¹ According to a survey of lawyer fees in Canada the average civil litigator, who has practiced from 6 – 20 years has an average hourly rate of \$304 – 358 per hour. Online <canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_18_LegalfeesSurvey.pdf>. The average length of time a legal malpractice suit takes is three to four years according to online: <<https://legal-malpractice.com/long-take-litigate-lawsuit-star-finish-take-1-year-3-years-28-years-48-years-716-years-amazingly-the-answer-is-yes.has-in-s-to-be-yes>>. LawPro, the professional liability insurer for Ontario lawyers, cites that “it has managed, in each year of the last decade, to close over 40 per cent of claims without payment of defence or indemnity costs. Traditionally, another 40 per cent of so of claims generate defence costs only. The means that an indemnity is paid, on average, in just one of every six claims (16 per cent, in 2014). Online <<https://www.practicepro.ca/2015/05/advocating-for-lawyer-while-controlling-claims-costs/>> In a personal email, (May 29, 2019) Tana Christianson of the Law Society of Manitoba, Professional Liability Claims Funds, “In Manitoba, the law society is self-insured up to a set retention level and a subscriber in a reciprocal insurance exchange called the Canadian Lawyer Insurance Association (CLIA) together with 9 law societies for claims over retention. I cannot tell you how many suits are commenced, settled or litigated within in Canada or even within CLIA. That is not the way claims are tracked.”

The remedy for the denial of the right to effective counsel is not found in the accused receiving monetary damages or by stigmatizing the lawyer through the law society. At the heart of the matter and what the *Charter*¹²² guarantees is that an accused is to be tried fairly: *B (GD)*¹²³ found this right to be part of “Fundamental Justice” is section 7¹²⁴ and the “Right to a Fair Trial” under section 11 (d).¹²⁵ If the value of the adversarial system is accepted, and our Canadian legal system is based upon it, an accused cannot be tried fairly without an advocate. But not just any advocate. In the words of Doherty JA in *R v Joannis*,¹²⁶ an “accused’s counsel must be a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.”¹²⁷

Given the unsatisfactory results of reporting an ineffective counsel to the law society, the remedy that is most meaningful is a retrial. This leads back to the powers of the court to address the violation of the accused’s right to be effectively represented. Given that Canada’s approach to ineffective counsel appeals has developed from an American case, an analysis of the American jurisprudence is now appropriate.

¹²² *Supra* note 2 .

¹²³ *Supra* note 10.

¹²⁴ *Supra* note 2.

¹²⁵ *Ibid.*

¹²⁶ *Supra* note 3.

¹²⁷ *Ibid.*

IV. THE AMERICAN EXPERIENCE

A. The American Constitution Provisions for Counsel and Effective Counsel

The right to counsel was recognized in the United States in the Sixth Amendment to their Constitution.¹²⁸

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have *the assistance of Counsel* for his defense. [Emphasis added.]

As well, the Fourteenth Amendment to their Constitution uses the words “due process.”¹²⁹

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

The American Supreme Court has interpreted that the sixth amendment reference to “counsel for his defense” means the right to the presence of counsel *per se*:¹³⁰ in other words, the accused has the right to the literal presence of counsel and says nothing about whether counsel is effective or not. The right to effective counsel is “read- in”¹³¹ as a function of “due process,” a right established by the Fourteenth Amendment. The case that read in this right to effective counsel was *Strickland v Washington*,¹³² a decision from 1982.

¹²⁸ *Supra* 1.

¹²⁹ *Ibid.*

¹³⁰ [Latin, in itself.] *Per se*: Simply as such; in its own nature without reference to its relation.” Online at <[https://legal-dictionary. freeditonary.com/per+se](https://legal-dictionary.freeditonary.com/per+se)>

¹³¹ “Where a court adds something to a statute to make it conform to the constitution.” Online at <https://www.irwinlaw.com/cold/reading_in>.

¹³² *Supra* note 4.

B. *Strickland v Washington*¹³³

The case of *Strickland v Washington*¹³⁴ was arrived at in the middle of a political maelstrom, with two courts, the Warren Court and the Burger Court, battling for their specific ideologies. The Warren court pulled the court in what one could identify as a progressive or liberal direction, one that expanded civil rights and was also credited with ending racial segregation and prayer in public schools. On the other hand, the Burger Court, during whose tenure *Strickland*¹³⁵ was decided, attempted to pull the Court back in the other direction, one which restricted the rights of the accused. Brian Galini¹³⁶ believes that Justice O’Conner’s judgement in *Strickland*¹³⁷ was a backlash to the Warren Court. Chief Justice Warren was appointed Chief Justice in 1953 and retired in 1969. During the Warren Court’s tenure, the court dramatically expanded the “right to counsel” case line, by particularly relying on the right to due process and the Equal Protection Clause found in the Fourteenth Amendment.¹³⁸ This amendment provides that all persons are equal before the law and their right to life, liberty, or property, which cannot be taken away without due process of law. Chief Justice Warren expanded this right to include an equal opportunity for accuseds to access justice. For example, in *Griffin v Illinois*¹³⁹ in 1956, the Court guaranteed the right for indigent accuseds charged with a felony a free copy of their trial transcript, often at great expense, for the purposes of determining whether an appeal was possible. Previous to the *Griffin*¹⁴⁰ decision, transcripts were only provided to accuseds convicted

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Brian R. Gallini, “*The Historical Case for Abandoning Strickland*,” 94 Neb. L. Rev. 302 (2015).

¹³⁷ *Supra* note 4.

¹³⁸ *Supra* note 1.

¹³⁹ 351 US 12 (1956).

¹⁴⁰ *Ibid.*

of a capital offence or to obtain a judicial review of constitutional questions. *Griffin*¹⁴¹ expanded this right with the immediate effect of widening the right to appellate court access.

This case was largely overlooked, but the Court attracted much more attention with its landmark ruling in *Mapp v Ohio*,¹⁴² which held that the Fourth Amendment's rules of exclusion of evidence obtained by violating the right against unreasonable search and seizure applied to the states as well as federal criminal courts. Unlike the decision in *Griffin*,¹⁴³ the case stirred up much controversy. In fact, there were calls for impeachment of the Chief Justice and a number of Associate Justices. There were also accusations that the Court was composed of communists.¹⁴⁴

After *Mapp*¹⁴⁵ came the dramatic decision of *Gideon v Wainwright*.¹⁴⁶ This case further expanded the rights of counsel to the poor by mandating the appointment of a state-funded attorney to every indigent accused charged with a felony. Justice Black, writing for the majority, summed up the decision in this way: “[T]he right of one charged with crime to counsel may not be deemed fundamental and essential to a fair trial in some countries, but it is in ours.”¹⁴⁷ The public defender system in the United States was born as a result of this decision.

On the same day, the right to counsel was further expanded when the Court held, in *Douglas v California*,¹⁴⁸ that the indigent was also guaranteed a government paid attorney for the accused's first appeal.

Then came the case of *Miranda v Arizona*¹⁴⁹ in 1966. This momentous case held that accuseds were to be given “procedural safeguards” – the familiar “Miranda” warning, which

¹⁴¹ *Ibid.*

¹⁴² 367 US 643 (1961).

¹⁴³ *Supra* note 139.

¹⁴⁴ *Supra* note 136 at 305

¹⁴⁵ *Ibid.*

¹⁴⁶ 372 US 335 (1963).

¹⁴⁷ *Ibid* at 344.

¹⁴⁸ 372 US 353 (1963).

includes telling each accused at the time of arrest that the accused had the right to remain silent, and were entitled to consult counsel, which would be appointed for them, including during interrogation, if they were not able to afford an attorney.

Not surprisingly, the case was very controversial, interpreted by some as being “pro-criminal” and an unacceptable demonstration of an activist judiciary. As Gallini¹⁵⁰ noted:

The New York Times characterized the Miranda decision as providing “immunity from punishment for crime on a wholesale basis.” Shortly after Miranda, Truman Capote¹⁵¹ testified before a Senate subcommittee and asked, “Why do they seem to totally ignore the rights of the victims or the potential victims?”¹⁵²

Even President Elect Richard Nixon made his criticism well known on the campaign trail during the 1968 presidential election, and vowed when elected to only appoint judges who would be “strict constructionists” who would exercise judicial restraint.¹⁵³

As a result of significant criticism, Congress tried to overrule *Miranda*¹⁵⁴ with legislation called the *Omnibus Crime Control and Safe Streets Act of 1968*.¹⁵⁵ The particular section that placed restrictions on the *Miranda*¹⁵⁶ ruling required judges to admit statements of accuseds if they were made voluntarily, without regard to whether the accused was provided their

¹⁴⁹ 384 US 436 (1966).

¹⁵⁰ *Supra* note 136.

¹⁵¹ “Truman Capote (b. 1924- d. 1984) [was] one of the most famous and controversial writers in contemporary American literature. He is best known for *In Cold Blood*, a nonfiction novel about the murder of an American family.” <http://www.notablebiographies.com/Ca-Ch/Capote-Truman.html>.

¹⁵² *Supra* note 136 at 309.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra* note 149.

¹⁵⁵ 18 USC § 3501.

¹⁵⁶ *Supra* note 149.

*Miranda*¹⁵⁷ rights. This section was eventually struck down as unconstitutional by the Supreme Court in *Dickerson v United States*.¹⁵⁸

Contrary to the times and the government, the Warren Court advanced the rights of an accused person enormously. In fact, President Eisenhower was rumoured to have said his decision to appoint Chief Justice Warren was “one of the two biggest mistakes I made in my administration.”¹⁵⁹

Chief Justice Warren Burger replaced Chief Justice Warren in 1969. Gradually, the court pushed back against the decisions of the Warren Court. For example, six years into his term, in *Faretta v California*,¹⁶⁰ Burger’s court examined the Sixth Amendment¹⁶¹ and held that although it granted the accused the right to counsel, it also granted the right to self-representation: in other words, the right not to have counsel. Four years after that, the Court held in *Kirby v Illinois*¹⁶² that the right to counsel existed only after the formal charge. In particular, the Court held that notwithstanding the Sixth Amendment,¹⁶³ there was no right to counsel during pre-charge identification because it did not have the “prosecutorial forces of organized society.”¹⁶⁴ Similarly, the Burger court cut back the *Miranda*¹⁶⁵ case as not applying to uncounseled statements, that is, statements spontaneously made by an accused upon his arrest.

¹⁵⁷ *Ibid.*

¹⁵⁸ 530 US 428 (2000).

¹⁵⁹ *Supra* note 131 at 310. There is no indication what the other mistake was.

¹⁶⁰ 422 US 806 (1975).

¹⁶¹ *Supra* note 1.

¹⁶² 406 US 682 (1972).

¹⁶³ *Supra* note 1.

¹⁶⁴ *Supra* note 162 at 690.

¹⁶⁵ *Supra* note 149.

*Miranda*¹⁶⁶ was further cut back in *Michigan v Tucker*,¹⁶⁷ where the accused attempted to provide an alibi when arrested for rape. The police later contacted the alibi witness who failed to confirm the alibi and the accused was convicted. The Supreme Court upheld the conviction even though the accused had not been given his full *Miranda*¹⁶⁸ rights prior to his attempt to establish his alibi: in other words, the court was entitled to rely on the fruit of the poisoned tree. The Court reasoned that the officers' failure to provide the accused with his rights was an "inadvertent disregard of the procedural rules later established by *Miranda*,¹⁶⁹" and therefore there were no consequences flowing from their omission.

Despite the courts' consideration of "right to counsel" cases, the quality of assistance was not canvassed until *Strickland*.¹⁷⁰ Justice O'Connor, as a member of the Burger court, continued the trend to reduce access to justice by creating the restrictive two prong test. The test would make it difficult for an accused to prove they received ineffective assistance of counsel, so the Court, while paying lip service to the accused's right to effective counsel, created a test that was difficult to meet.

In *Strickland v Washington*,¹⁷¹ the accused was arrested and charged with offences from three separate crime sprees, which included three counts of capital murder as well as charges of torture, kidnapping, aggravated assaults, attempted murder, and attempted extortion. After he was arrested, the accused provided a lengthy confession to the third group of crimes. He was appointed an experienced criminal lawyer, who pursued pre-trial motions and sought discovery on behalf of the accused. Then counsel discovered that the accused had made confessions to the

¹⁶⁶ *Ibid.*

¹⁶⁷ 417 US 433 (1974).

¹⁶⁸ *Supra* note 149.

¹⁶⁹ *Ibid* at 445.

¹⁷⁰ *Supra* note 4.

¹⁷¹ *Ibid.*

first and second groups of crimes. Against the advice of counsel, the accused pled guilty to all three sets of charges. Counsel advised the accused to exercise his right to an advisory jury¹⁷², but again the accused chose not to take counsel's advice. He chose to be sentenced by the sentencing judge. The issue before the court was whether the accused should be executed or given a life sentence.

In the so-called preparation for the sentencing hearing, counsel failed to gather any character letters. Although he had approached family members, including his wife and mother and arranged a meeting, when the meeting did not take place, counsel failed to follow up. Counsel also failed to request a psychiatric assessment or a pre-sentencing report,¹⁷³ thinking that it might possibly show that the accused had a significant criminal record, which counsel had successfully convinced the prosecutor not to refer to.

Counsel also believed that relying on the plea colloquy,¹⁷⁴ to set out the accused's background and his assertion that he was under extreme stress over not being able to support his family, was going to be enough to spare the accused from a death sentence. In the end, counsel

¹⁷² An advisory jury is "A jury impaneled at the discretion of a trial judge to assist the judge in deciding a case. Note: Advisory juries are allowed in cases in which there is no right to a jury or in which the right to a jury has been waived. The judge may follow or disregard the advisory jury's verdict." Online <[https://www.merriam-webster.com/legal/advisory% jury](https://www.merriam-webster.com/legal/advisory%20jury)>.

¹⁷³ Chief Judge Kaye of the Court of Appeals of the State of New York in *People v Hicks* 98 NY 2d 185 (2202) states that, "The investigation supporting the present[pre-sentence] report includes the gathering of a wide variety of information including a criminal, social, employment, family, economic, educational and personal history of the defendant; information with respect to the circumstances attending the commission of the offense; and other information that the court directs to be included or is otherwise deemed relevant to the questions of sentence. The presentence report may well be the single most important document at both the sentencing and correction levels of the criminal process..." At 189.[references omitted]

¹⁷⁴ The Legal Information Institute defines a plea colloquy as "intended to ensure that the defendant is making the plea knowingly, intelligently and voluntarily...during the plea colloquy, the judge, or to another judicial official, usually addresses the defendant directly in) making the plea knowingly, intelligently and voluntarily." Online at <[https:// w.w.w.law.cornell.edu/lii](https://w.w.w.law.cornell.edu/lii)>.With regard to the Strickland case, the accused advised the judge that "although he had committed a string of burglaries, he had no significant prior criminal record and that, at the time of his criminal spree, he was under extreme stress caused by his inability to support his family." Taken from the syllabus, *supra* at note 4.

With regard to the *Strickland* case, the accused advised the judge that "although he had committed a string of burglaries, he had no significant prior criminal record and that, at the time of his criminal spree, he was under extreme stress caused by his inability to support his family." Taken from the syllabus, *supra* at note 1.

called no evidence of any mitigating factors. The prosecutor did call witnesses who described the aggravating and gruesome details of the accused's crimes. The defense counsel chose not to cross-examine the medical experts.

Thus, all that counsel could argue was that the accused showed remorse in pleading guilty and that the accused had no significant criminal record. That was not enough. The sentencing judge found numerous aggravating factors and no mitigating facts, so the judge affirmed the District Court verdict and declined to issue a writ of *habeas corpus*¹⁷⁵ with the result that Washington was sentenced to death.¹⁷⁶

The accused sought collateral relief¹⁷⁷ in the Florida Supreme Court, arguing that counsel for the accused had provided ineffective assistance in six respects: first, counsel failed to ask for an adjournment to prepare for the sentencing; secondly, counsel failed to order a psychiatric report; thirdly, counsel did not investigate whether the accused had any character witnesses;

¹⁷⁵ “(Latin, You have the body): a writ (court order) that commands an individual or a government official [in this case “Strickland”] who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner’s release. A writ of *habeas corpus* directs a person, usually a prison warden, to produce the prisoner and justify the prisoner’s detention. If the prisoner argues successfully that the incarceration is in violation of a constitutional right, the court may order the prisoner’s release....[T]he *habeas corpus* concept was first expressed in the Magna Carta ... a constitutional document...declared that ‘no free man shall be seized or imprisoned, or disseised, or outlawed, or exiled, or injured in any way, nor will we enter on him or send against him except by the lawful judgment of his peers, or by the law of the land.’ This principle evolved to mean that no person should be deprived of freedom without due process of law.” Online at < <https://legal-dictionary.thefreedictionary.com/habeas+corpus>>.

¹⁷⁶ *Strickland*, 362 So. 2d 658 (Fla 1978) at 666. This is the first appeal by Washington; the trial decision is seemingly unreported.

¹⁷⁷ “Collateral relief is a vital part of the American criminal justice system. By filing post-conviction petitions after the close of a direct appeal, defendants can raise claims based on evidence outside the record that was not known or available at the time of trial. One common use of post-conviction relief is to file a claim related to a previously unknown constitutional violation that occurred at trial, such as ineffective counsel. If a defendant’s trial attorney performed ineffectively by failing to call, for instance, an alibi witness, then that omission is unlikely to be reflected in the trial record – but in post- conviction proceedings, the defendant may seek to expand the record to include evidence of such ineffectiveness. If a court, sitting in post-conviction, hears that evidence and sides with the defendant, the usual remedy is to grant a new trial. Without access to the opportunities to supplement the record that are afforded by these collateral proceedings, however, a defendant who suffers ineffective assistance of counsel often has no opportunity for relief.” Joshua A. Tepfler & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, online at <<https://cpbs-us-w2.wpmucdn.com/wpsites.maine.edu/dist/d/46/files/2012/09/14-Tepfr-Neirier.pdf>>At 554.

fourthly, counsel erred in not ordering a pre-sentence report; fifthly, the counsel had failed to present meaningful arguments on mitigation factors; and sixthly, counsel failed to investigate the medical examiner's reports or cross-examine the medical experts.

The court dismissed outright four of the claimed examples of ineffective assistance. First, the court concluded that since the court considered there was no basis for asking for a continuance it could not fault the counsel in their failure to request one. Similarly, counsel's failure to order a pre-sentence order was not an example of counsel's ineffective assistance since it was within a judge's discretion to grant one. Also, the court found that counsel's decision not to cross-examine the medical witnesses was not evidence of incompetence since the accused had already admitted to the police the victims died the way the experts described.

The court also considered the failure to get a psychiatric report. In the plea colloquy,¹⁷⁸ the accused had stated that at the time of the crime spree, he was suffering extreme stress about being unable to support his family. In fact, at the initial arraignment the medical evidence contradicted the accused's claim of extreme stress and noted that he was simply chronically frustrated and depressed, which were not recognized as mitigating factors. Thus, counsel doubtless preferred that the judge consider the assertion of "extreme stress" set out in colloquy¹⁷⁹ rather than the evidence of his emotional state at the time of the first arraignment. Finally, the court ruled against the argument that counsel had not provided effective assistance by failing to investigate whether there were any character witnesses. The Judge decided that the failure to seek out character letters had no impact on his decision. The Court, in dismissing all of the

¹⁷⁸ *Supra* note 174.

¹⁷⁹ *Ibid.*

grounds of appeal agreed with the trial court, citing with approval these words from *Knight v State*:¹⁸⁰

[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that appellate alleged counsel had failed to do] at the time of sentencing there is not the remotest outcome would have been different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming¹⁸¹

And further, the State Supreme Court concluded that:

The respondent failed to make out a prima facie case of either “substantial deficiency [failing to provide professional assistance according to reasonable standard] or possible prejudice” [failing to prove that any professional breaches of the duty to provide effective representation would have affected the end verdict] and indeed had “failed to such a degree that we believe to the point of a moral certainty, that he is entitled to no relief.” Indeed, [the appellant’s] claims were conclusively to be without merit so as to obviate the need for an evidentiary hearing.¹⁸²

The accused filed a petition for writ of *habeas corpus*¹⁸³ in the United States District for the Southern District of Florida.¹⁸⁴ The court was persuaded to hold an evidentiary hearing to investigate whether the accused received effective assistance when counsel failed to present any mitigating evidence. At this evidentiary hearing, counsel filed fourteen character reference letters and, remarkably, the court also asked the trial judge to testify. Nonetheless, the court concluded that although trial counsel had made errors, no prejudice resulted; in other words, even if counsel had done what he was supposed to do to effectively represent the accused, the

¹⁸⁰ 394 So.2d 997 (1981).

¹⁸¹ *Ibid* at 677-678.

¹⁸² *Ibid* at 678.

¹⁸³ *Supra* note 175.

¹⁸⁴ *Washington v State* 441 U.S. 937 (1979).

judge's decision would have been the same. Thus, the court denied the accused's request for writ of *habeas corpus*.¹⁸⁵

The accused next appealed to a panel of the United States of Appeals for the Fifth Circuit,¹⁸⁶ the last court which could have granted a prerogative writ,¹⁸⁷ and then to the United States of Appeals for the Fifth Circuit *en banc*¹⁸⁸ which sent the appeal back to the District Court to reconsider the decision. Instead, neither the State nor Washington sought a rehearing by the District Court and instead appealed the matter to the United States Supreme Court.

1. The *Strickland*¹⁸⁹ Test

Finally, the case appeared before the Supreme Court of the United States which clearly established its own test, hereafter referred to the "*Strickland*¹⁹⁰ test."

The Supreme Court, citing *McMann v Richardson*,¹⁹¹ held that "the right to counsel is the right to the effective counsel."¹⁹² To evaluate "the claim of ineffective counsel", the court set out the test of review as being two pronged. The first prong is the "performance component."¹⁹³ It

¹⁸⁵ *Supra* note 175.

¹⁸⁶ 673 F 2d. 879 (5th Circuit 1982)

¹⁸⁷ "Formally a court order issued under certain circumstances on the authority of the extraordinary powers of the monarch. The prerogative writs were *procendendo*, *mandamus*, *prohibition*, *quo warranto*, *habeas corpus* and *certiorari*. Today these forms of relief are also called extraordinary remedies and are issued on the strength of the inherent powers of the court to do justice. The paper granting a petition for an extraordinary remedy is still called a writ. For example a writ of certiorari grants the petitioner an opportunity to appeal the decision of a lower court in a case where he does not have a right to appeal." at <https://legal-dictionary.thefreedictionary.com/Prerogative+Writ>.

¹⁸⁸ "[Latin. French. In the bench.] *Full bench*. Refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum. In other countries, it is common for a court to have more members than are usually necessary to hear an appeal. In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for the important cases may expand the bench to a larger number, where the judges are said to be sitting *en banc*..." Online at <<https://legal-dictionary.thefreedictionary.com/en+banc>>.

¹⁸⁹ *Supra* note 4.

¹⁹⁰ *Ibid*.

¹⁹¹ 397 US 759 at 771.

¹⁹² *Supra* note 4 at 686.

¹⁹³ *Ibid* at 687.

presumes that counsel has rendered “reasonable effective assistance,”¹⁹⁴ and the onus is on the accused to prove specific examples of ineffectiveness. The court stated that counsel’s performance must be treated in a highly deferential way and without the benefit of hindsight.¹⁹⁵

The second component, the “prejudice component,”¹⁹⁶ addresses the issue of prejudice to the accused on account of counsel’s errors – assuming that errors were found. With the burden being again on the accused, it proves to be difficult because the “prejudice” prong of the test is that the accused must show that “there is a reasonable *probability* that, but for counsel’s unprofessional errors, the result of the proceeding *would have been different*.”¹⁹⁷

Justice O’Connor, speaking for the majority, found that before the test is applied the accused must provide a factual basis for alleging incompetence. This is often accomplished by the accused filing an affidavit “identify[ing] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement.”¹⁹⁸ The trial counsel may also file an affidavit, provided the accused first waives the solicitor client privilege.¹⁹⁹ In the absence of affidavit evidence, the accused may try, usually unsuccessfully, referring to the record. Assuming that factual evidence is proffered, the court provisionally accepts it for the purpose of examining the accused’s claim. Oftentimes, the accused’s failure to provide a factual foundation is grounds for refusing to consider the accused’s claim.

If the factual foundation has been accepted, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is,

¹⁹⁴ *Ibid* at 683.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* at 687.

¹⁹⁷ *Ibid* at 694.

¹⁹⁸ *Ibid* at 690.

¹⁹⁹ For example in *R v PR* 2017 SKCA 83 the accused refused to waive solicitor-client privilege so the trial lawyer was not in a position to explain his decisions: the court concluded “In short, the evidence falls far, far, short of displacing the presumption of trial counsel competence.” At 6.

the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound strategy.’²⁰⁰ This is the performance component. After overcoming this hurdle, the accused has the onus to prove that, but for counsel’s incompetence, there is “reasonable probability that the court’s verdict would be different.”²⁰¹ In other words, the court asks whether the verdict is “reliable.”²⁰²

This two-pronged test renders the right to effective counsel very difficult to prove. This is because the accused must first overcome the court’s strong presumption that counsel provided effective counsel and that deference is afforded to their strategic decisions, made without the benefit of hindsight. Thus, an uneven playing field is constructed. Even assuming that the accused can prove that counsel did not provide assistance according to a reasonable standard of care, the accused must then prove the prejudice prong of the test. So even if the accused wins the battle by proving that their lawyer was incompetent, they may lose the war by failing to prove that the incompetence affected the verdict.

Justice O’Conner’s justification for her two-pronged test is to avoid the “proliferation of ineffectiveness challenges.”²⁰³ She also warns that if there was “an intrusive post-inquiry into attorney performance... Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”²⁰⁴ Note, however, a fear of proliferation might suggest that there is more unfairness in the system than we are aware of or

²⁰⁰ *Supra* note 4 at 689, citing *Michel v Louisiana* 350 US 91 at 101 (1955).

²⁰¹ *Ibid* at 694.

²⁰² *Ibid* at 687.

²⁰³ *Ibid* at 690.

²⁰⁴ *Ibid*.

that we have to act on. Plus, counsel's ardor need not be dampened if counsel can justify, in a professional way, why the choice or strategy was made. Counsel that are afraid of serving or accepting cases that are beyond their confidence level or ability should not be defending cases. Effective counsel, on the other hand, need not be afraid.

Also, the practice of ordering retrials in cases where the accused was ineffectively represented impacts on the desirability of finality in legal cases. As Doherty JA stated, "such claims [of ineffective assistance of counsel] can be easily made. It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subject to legitimate criticism. 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."²⁰⁵ But, this misstates the purpose of the post-trial examination: the purpose is not to tweeze out mistakes that counsel makes; rather it is an examination as to whether the trial, as a whole, has been fair. It is agreed that in every case where the court finds that the accused has received a fair trial may contain mistakes or errors of counsel, but not to the extent that proper representation has been compromised. It is impossible to have a perfectly defended case, but every case should at least be fair.

2. Justice Brennan's Decision

Justice Brennan provided a fairly brief judgement: six pages.²⁰⁶ In it, he indicates that he agrees with the Court's conclusions, but dissents from its final judgement.

He confirmed Justice O'Connor's two-prong test of performance and prejudice and agreed that "a particular set of detailed ruled for counsel's conduct"²⁰⁷ would be inappropriate.

²⁰⁵ *Supra* note 3.

²⁰⁶ *Supra* note 4 at 701.

Justice Brennan warns that performance standards “should be applied with concern or the special consideration that must attend review of counsel’s performance in a capital sentencing proceeding...the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater.”²⁰⁸

3. Justice Marshall’s Dissent

Justice Marshall of the Supreme Court writes a compelling dissent.²⁰⁹ He criticizes the suggestion of dealing with the prejudice component first, instead of addressing what errors the ineffective counsel made, which he says will inform lawyers and courts of what is and what is not reasonable. He also asks, “Who is the reasonably competent attorney?” Is it the attorney that is hired by a wealthy accused who can pay the fees to properly investigate and properly prepare? Or is it the attorney who represents an indigent accused who must rely on a court appointed lawyer, who has limited time or resources to properly prepare the case? Also, should the reasonably competent attorney vary according to what state where the standards vary, noting that various standards of lawyers exist throughout the country?²¹⁰

Justice Marshall disagrees with the rest of the bench about the utility of specific standards²¹¹ such as those set out in the *American Bar Association Rules Criminal Justice Standards for the Defence Function*,²¹² noting that these standards will act as a guide but will still allow the court to be able to take into account the variation of legitimate defences made by the lawyer in the best interests of the accused. For example, defences A, B, C, and D may all be good strategies, but the strategies W, X, Y and Z would fall below the standard of a reasonable

²⁰⁷ *Supra* note 4 at 703, citing O’Connor J. at 688.

²⁰⁸ *Ibid* at 703.

²⁰⁹ *Ibid* at 707.

²¹⁰ *Ibid*. Paraphrased from 709

²¹¹ *Supra* note 4 at 708.

²¹² Online at <https://www.americanbar.org/groups/criminal_justice/standards/DefenceFunctionFourthEdition/>.

counsel. Justice Marshall agrees that “wide latitude”²¹³ must be given to counsel’s strategies, but notes that there is a baseline definition of competent counsel that would benefit from a standard set of responsibilities.

Justice Marshall also notes that ineffectiveness does not just mean what counsel did, but what he failed to do, thus leaving what he called a “cold record:”²¹⁴ one that does not reflect everything counsel did or did not do. How can the court know whether counsel failed to consider possible defences? After all, the accused does not know what legal defences may yield fruit. The court is only able to examine what the counsel did, but not what the counsel failed to do.

Additionally, Justice Marshall notes that the majority of the bench held that:

[T]he assumption of which the Court’s holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not received meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.²¹⁵

He also disagrees with the “strong presumption”²¹⁶ that a lawyer is competent and that the court should “appl[y] a heavy measure of deference to counsels’ judgements.”²¹⁷ Justice Marshall agrees that if the word “presumption” simply means the onus of proof is on the accused, he is satisfied, but by deleting the strong presumption, he suggests that lower courts would unhappily require a substantial re-assessment of the cases that came before – cases in

²¹³ *Supra* note 4 at 709.

²¹⁴ *Ibid* at 710.

²¹⁵ *Ibid* at 711.

²¹⁶ *Ibid* at 689.

²¹⁷ *Ibid* at 712.

which the chief findings had been made pursuant to the presumption of competence. Justice Marshall also notes that especially in capital cases, the standard for the reasonable professional should be very carefully considered, and given the severity of punishment, the accused ought not to have to prove prejudice.²¹⁸

Returning to the facts of the *Strickland*²¹⁹ case, Justice Marshall found that the failure of counsel to investigate any mitigating evidence was not reasonable. Justice Marshall noted that if relying on the guilty plea as a sign of remorse and the accused taking responsibility was part of a strategic decision to present no other evidence, such a strategy cannot be a real one because counsel failed to seek out any other sources of mitigation. In other words, only if counsel looked and found nothing else to say, would saying nothing be described as “part of a strategy”, a very poor strategy, but an informed one at least. The court postulated that counsel’s failure to investigate any other mitigation was the result of counsel having given up hope that he would be able to save the accused’s life.

I recommend Justice Marshall’s dissent over the other majority decisions, in particular, his two suggestions: first, to discard the presumption of competence in evaluating the performance component; and secondly, to release the accused from the burden of proving prejudice after incompetency has been proven. Proving a denial of a Constitutional right should be enough to order a new trial, but not only because of being denied the right to effective counsel, since the appearance of a fair trial is as important as having a fair trial. A familiar example is where the judge is in an apparent conflict of appearance, with perhaps one of his family members appearing in front of him as representing a litigant. The judge will recuse

²¹⁸ *Ibid* at 717.

²¹⁹ *Ibid*.

himself, not because there would be an actual unfair trial, but because it might have the appearance of an unfair trial.

4. The Back Story of *Strickland v Washington*

There is something curious and unnerving about the back story of this case that is not reflected in the judgement, but is outlined in “*The Historical Case for Abandoning Strickland*” by Brian Gallini.²²⁰ The author looks behind the incomplete circumstances set out by the Court and reveals blatant examples of the lawyer’s incompetence.

Gallini criticizes Justice O’Connor’s decision to deviate from the practise of remanding such a case to a lower court for application of the majority’s opinion. This was the path Justice O’Connor’s colleagues requested, but instead Justice O’Connor proceeded to apply its new standard to the facts of the Washington’s case. She concluded that the actions of the original trial lawyer, Mr. Tunkey, were constitutionally reasonable and if she was wrong, they could not have prejudiced the outcome of the sentencing hearing.²²¹ To support her decision, Justice O’Connor noted that Mr. Tunkey’s made a “strategic choice”²²² to argue from the colloquy that he was acting under extreme emotional distress and that Washington pleading guilty, thus accepting responsibility for his crimes, was a mitigating factor.

Justice O’Connor found that although Mr. Tunkey had a sense of hopelessness, which the District Court found as a fact, there no was evidence that it affected his professional judgement. Secondly, she concluded that Mr. Tunkey’s failure to obtain either character references or to have a psychological report would have not have affected the final decision. She added that by

²²⁰ *Supra* note 136.

²²¹ *Supra* note 4 at 698-699

²²² *Supra* note 136 at 320.

making these decisions, Mr. Tunkey protected his client by not revealing any information about Washington's criminal history.²²³

Gallini notes that Justice O'Connor's decision to apply the standards to Washington's case instead of remanding the matter down to a lower court exposed how little Mr. Tunkey truly did in representing Washington and correspondingly what the Supreme Court omitted from the *Strickland*²²⁴ opinion about Mr. Tunkey's performance. That, in turn, showcases why the majority's conclusion about Mr. Tunkey's conduct "'effectively' doomed the *Strickland*²²⁵ standard before lower courts could even apply it for the first time."²²⁶ Gallini states that Justice O'Connor failed to include all of the factual details because she was at the peak of a private war between Chief Justice Burger's and the past Chief Justice Warren's court that had significantly expanded the right to counsel cases in general.

a. Washington's Counsel Errors

Mr. Tunkey abandoned his own suppression motions, which were arguably meritorious. In particular, while Washington was in custody, two officers attended and obtained exculpatory statements, but he was also observed to "gri[n] a little bit and said that Johnnie Mills was lying to [sic] and that Johnnie Mills was there also in that he took part in the [first] homicide."²²⁷ There was no evidence that Washington waived his *Miranda* rights²²⁸ before his first conversation with

²²³ *Supra* note 4 at 699.

²²⁴ *Supra* note 4.

²²⁵ *Ibid.*

²²⁶ *Supra* note 136 at 321.

²²⁷ *Ibid* at 324.

²²⁸ An "Explanation of rights that must be given before any custodial interrogation, stemming largely from the Fifth Amendment, Privilege against self-incrimination. The person detained and interrogated must be made aware of the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent. Without a *Miranda* warning or a valid waiver, statements might be inadmissible at trial under the exclusionary rule (e.g., they cannot be used as substantive evidence of guilt in criminal proceedings.)" See *Miranda v Arizona*, *supra* note 149. Online at <https://www.law.cornell.edu/wex/miranda_warning>.

the detectives. After this first interaction, the officers returned and then obtained a written waiver but continued interrogating Washington for one to two and half hours, during which he made incriminating statements.²²⁹ Mr. Tunkey's decision to abandon the suppression motions was arguably an example of ineffective assistance, and no mention of this decision was made in the written decision.

What was also omitted from the decision was that prior to sentencing, Mr. Tunkey filed a brief of only five pages that cited no cases.²³⁰ He conceded two aggravating circumstances and conceded the absence of four mitigating circumstances. In essence he relied on the fact that the accused had no record (recalling that Mr. Tunkey had negotiated with the prosecutor to exclude any mention of it), that he admitted guilt and that he was willing to testify against his co-accused.

The prosecutor, on the other hand, in his bid to argue in favour of a death sentence, introduced evidence that amounted to over 200 pages, which included the evidence of ten witnesses, including surviving witnesses and nineteen different exhibits.²³¹

In the face of this overwhelming presentation of evidence, Mr. Tunkey only cross-examined one of the officers to prove that Washington had waived his *Miranda* rights²³² and, additionally, that Washington did not act alone.²³³ Beyond a few objections during the prosecutor's case, that was the extent of Mr. Tunkey's participation in the hearing. He specifically declined to put in a case and said he was only going to refer to the testimony at the plea hearing and his five page memorandum. Mr. Tunkey essentially asked the court to refrain from ordering execution and his comments were not related to any of the governing statute's lists

²²⁹ *Supra* note 136 at 324.

²³⁰ *Ibid* at 325.

²³¹ *Ibid* at 326.

²³² *Supra* note 149.

²³³ *Supra* 136 at 327.

of mitigating factors.²³⁴ Justice O'Connor said little about Mr. Tunkey's performance, or lack thereof, his shoddy sentencing memorandum and final argument, and his abandonment of suppression motions.

Furthermore, Mr. Tunkey never had Washington undergo a psychiatric assessment, besides the brief evaluation by the state examiner when he first went into custody. But in subsequent hearings, Washington was examined extensively by a psychiatrist and conversations with Washington's friends and family members revealed so much more about the accused. They revealed that he was the oldest of seven children and that he was passed between his mother and grandmother. He was subject to severe beatings by his stepfather who was also sexually abusing Washington's sister.²³⁵ One of the psychiatrists concluded: "[H]is childhood of emotional deprivation, severe physical abuse and extreme violence laid the groundwork for the resentment and rage which was triggered by factors in his adult life over which he felt he had no control."²³⁶

There were positive things in Washington's background as well. He had participated in the school band and the church choir. He was, in his earlier times, successfully employed, being described by one of his supervisors as being a "very good worker,"²³⁷ although he was subsequently laid off a number of times. When he was 25 years old, he was married with one child and receiving unemployment benefits, which expired before his crime sprees. He slipped into a depression. His utilities were shut off and his wife left him. His desperation peaked during the month he committed his crimes, when his wife had their second child.

²³⁴ *Ibid* at 327.

²³⁵ *Ibid* at 330.

²³⁶ *Ibid* at 330.

²³⁷ *Ibid* at 330.

Florida State law mandated that the sentencing judge on a capital case consider the mitigating and aggravating factors in Washington's life to determine whether the accused should be executed or be sentenced to life. But the judge wasn't able to do this because he failed to learn anything about Washington from Mr. Tunkey. Mr. Tunkey later admitted that although he did do some preparation for the trial, he did not prepare for the sentencing.²³⁸

b. Counsel's Explanation of Errors

Gallini asks, "Why did [Mr.] Tunkey do so little for Washington?"²³⁹ During a subsequent *habeas corpus*²⁴⁰ hearing, Mr. Shapiro, Washington's new lawyer, called Mr. Tunkey as his first witness. Mr. Tunkey testified that "he did not think about a strategy."²⁴¹ Regarding his failure to order a pre-sentence report, Mr. Tunkey stated, "it was perhaps lack of forethought...I cannot say now, with hindsight that [it] was a matter of trial strategy."²⁴² Regarding the failure to request a psychiatric report, Mr. Tunkey explained that Washington had been found sane when he was first arrested. When he was queried about the difference between Washington's mental state at trial, versus what could be a mitigating factor in sentencing he said, "I see where you are going. Maybe I should have because [Washington] said he had been out of work for six months and he had impressed me as being sincerely concerned for the welfare of his wife and child...I did not think of that."²⁴³

Justice Brennan became privately concerned about not sending the case down to lower court for its adjudication. He wrote to Justice O'Connor on the day she released her first draft, saying, "It is hazardous for us to apply the new standards to a cold record and determine for

²³⁸ *Ibid* at 331.

²³⁹ *Ibid* at 331.

²⁴⁰ *Supra* note 175.

²⁴¹ *Supra* note 136 at 331-332.

²⁴² *Ibid* at 331- 32.

²⁴³ *Ibid* at 332.

ourselves the real basis for Mr. Tunkey's decisions."²⁴⁴ Justice O'Connor persisted in writing that she found that Mr. Tunkey's actions could not be found to be unreasonable, and that in any event, such conduct could not be seen as prejudicial to the result.²⁴⁵ The majority of the court did not address Washington's history of physical abuse or Mr. Tunkey's failure to discover this. The sentencing court did not see a psychological examination that revealed that "Washington, at the time of the crimes, suffered extreme emotional and mental distress which resulted in a violent hysterical dissociative reaction."²⁴⁶

c. The So-Called "Rap-Sheet"

Throughout the proceedings, the Court presumed that Washington had a "rap sheet," in other words, a criminal record, and in fact it became relevant to various court hearings before this case ended up in the Supreme Court. For the most part, its existence was presumed. The existence of a rap sheet was emphasized by Justice O'Connor four times in her majority decision.²⁴⁷

Justice O'Connor first indicated that Mr. Tunkey had successfully moved to exclude Washington's rap sheet, presumably complimenting Mr. Tunkey for his able assistance. Secondly, she therefore found that it was reasonable to not order a press-sentence report, the character references and psychological reports which all might have revealed the rap sheet. Except there was no rap sheet: Washington had no criminal record. How could Mr. Tunkey not know this about his client? Gallini cynically observes, "The idea that one of the most famous cases in the Supreme Court's history was in part built on a lawyer's effort to exclude a document

²⁴⁴ *Ibid* at 333.

²⁴⁵ *Ibid* at 333.

²⁴⁶ *Ibid* at 335.

²⁴⁷ *Ibid* at 338.

that never existed is, in a word, disheartening.”²⁴⁸ David Washington, aged 34, was executed in Florida on July 13, 1984.

d. A Flawed Precedent

It is curious that the *Strickland v Washington*²⁴⁹ written decision omitted so many examples where counsel provided incompetent assistance. Without reference to these, it is hardly a surprise that the Court found that Mr. Tunkey’s conduct was reasonable, or in any event, would not have affected the final decision. The case established a test that a commentator referred to as a test that “permits the worst lawyering to pass muster.”²⁵⁰ Both the test and the background supporting the test were built on sand, and the resulting case law has not surprisingly lowered the expectations of what reasonable lawyering should be.

Thus, all of the cases that referred to the *Strickland*²⁵¹ test were based on a written decision that omitted so much essential information. What were clearly actions of an ineffective counsel were “tidied” up by Justice O’Connor, thus leaving a definition of effective counsel that was clearly unsatisfactory. Why were the facts of the *Strickland*²⁵² case so incomplete? Perhaps, as Gallini concluded, it was Justice O’Connor’s attempt to pull back the precedents left by Chief Justice Warren’s Court, or was it an example of the judiciary protecting the rights of lawyers against the rights of the accused?

²⁴⁸ *Ibid* at 339.

²⁴⁹ *Supra* note 4.

²⁵⁰ *Supra* note 131 at 319 citing William S. Geimer, “*A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*,” 4 Wm. & Mary Bill Rts. J. 91 at 160 (1995).

²⁵¹ *Supra* note 4.

²⁵² *Ibid*.

Professor Bibas, as he then was,²⁵³ describes how in the past ordinary citizens participated in the criminal justice system, but then lawyers became increasingly involved, which “excluded victims, silenced defendants, and bypassed jurors.”²⁵⁴ He attributes this “professionalization” of the justice system to the reality and prevalence of plea-bargaining. Plea-bargaining, has become like a machine, run by professionals and made efficient at the expense of bypassing the public. Thus, he says, the lawyers and judges, for example, have become the “insiders,” whereas non-lawyers, victims, members of the public and even accuseds are the “outsiders.”²⁵⁵ One of the results of this gulf between insiders and outsiders is that the legal system has become less transparent and the insiders less accountable. Anyone who has anything to do the justice system, Bibas stated, has found it “opaque, technical, and amoral.”²⁵⁶

Is the *Strickland*²⁵⁷ case, and the ineffective counsel jurisprudence, in fact examples of insiders (judges) protecting other insiders (lawyers)? It is impossible to know. What is known, however, is that the unsatisfactory definition of ineffective counsel spills forward in the cases that subsequently relied on the *Strickland v Washington*²⁵⁸ test. The following are four American cases that applied the flawed *Strickland* test.²⁵⁹ Each case highlights how *Strickland*²⁶⁰ has lowered the standard of effective counsel.

²⁵³ Stephanos Bibas was appointed by President Trump to be a judge of the United States Court of Appeals for the Third Circuit on November 20, 2017.

²⁵⁴ Stephanos Bibas, “*The Machinery of Criminal Justice*” (2012) Faculty Scholarship Paper 395.

²⁵⁵ *Ibid* at xx.

²⁵⁶ *Ibid*.

²⁵⁷ *Supra* note 4.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid*

C. Post –*Strickland*²⁶¹ Case Law

1. *Smith v Eddie Ylst, Superintendent*²⁶²

Smith v Eddie Ylst, Superintendent,²⁶³ 1987, demonstrates how the application of the *Strickland*²⁶⁴ test can leave an accused represented by an incompetent, psychologically incompetent lawyer, without a remedy of a new trial because the accused could not point to specific errors in counsel's representation.²⁶⁵ Thus, the court found that the accused had failed to prove the prejudice prong. Even if the accused was unable to point to specific errors made by his counsel, the accused ought to have been ordered retried because the trial lacked, at least, the appearance of a fair trial.

The accused was charged with the first degree murder of his ex-wife two days after their divorce. He was convicted by a judge sitting without a jury. Ten days later, the accused argued for a substitution of his counsel, which was granted. The new counsel moved for a new trial on the basis that the accused had not received effective assistance from his previous lawyer, whose mental health was compromised during the trial. In support of his motion, counsel filed declarations from the previous counsel's associate, a private investigator hired to work on behalf of the accused, a real estate agent who sold the victim's home, his legal secretary, a cell mate and the accused himself.²⁶⁶ All of these declarations supported the contention that the accused's lawyer was acting more than strangely.

Apparently, the previous counsel feared for his own safety and that of his client's because he believed his client was the target of a murder conspiracy involving the victim's relatives and

²⁶¹ *Ibid.*

²⁶² 826 F.2d 872 (9th Circuit 1987)

²⁶³ *Supra* note 4.

²⁶⁴ *Ibid.*

²⁶⁵ *Supra* note 262.

²⁶⁶ *Ibid* at approx. 873

lover. Counsel advised the court of his concerns and even referred to the murder conspiracy in his opening statement.²⁶⁷ One can only imagine the judge's reaction to such a revelation. There was never any evidence of a conspiracy. The private investigator counsel had hired stated that the two of them had smoked marijuana one night during the trial and he describe counsel's reaction was one of wild fluctuations between laughter and stupor.

Furthermore, counsel's secretary stated that he told her he was crazy and wanted to enter an insane asylum. He also accused his associate of being part of the conspiracy and of trying to take over his practice. Counsel continued to assert that there was a conspiracy to kill him and came to believe the original murderer was involved in drug smuggling involving the victim's relatives and her lover.²⁶⁸ The new counsel for the accused filed two psychiatric reports to support the motion for a new trial. Based only on the declarations, the psychiatrists both concluded that during the trial counsel was exhibiting a paranoid psychotic reaction

The court denied counsel's motion for a new trial citing the *Strickland*²⁶⁹ test, since, although counsel's actions had been erratic at times, they could not find any specific acts or omissions that fell below a reasonable standard of professional assistance or which would have prejudiced the proceedings against the accused. The accused's lawyer unsuccessfully appealed the conviction to the California Court of Appeal, which affirmed the conviction and held the trial judge was correct in requiring, "specific acts or omissions with a prejudicial impact on the reliability of the trial."²⁷⁰

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Supra* note 4.

²⁷⁰ *Supra* note 262 at para 6

A writ of *certiorari*²⁷¹ was denied by the California Supreme Court. The accused's lawyer then filed *habeas corpus*²⁷² to the United States District Court which denied his petition.²⁷³ The lawyer finally asked the United States Court of Appeal, 9th Circuit for a *de novo*²⁷⁴ hearing of the denial of *habeas corpus*.²⁷⁵

The United States Court of Appeal approved the *Strickland*²⁷⁶ test, reiterating that the accused in claiming a denial of effective counsel must show:

1) specific acts and omissions of counsel that fall below a standard of professional reasonableness, and 2) that these acts prejudice the defendant because there is a reasonable probability that absent the errors the factfinder would have had a reasonable doubt respecting guilt ... The Supreme Court has emphasized that there is a strong presumption that a lawyer is competent and that presumption must be overcome with concrete evidence.²⁷⁷

The court held that this is not the kind of case where lack of representation per se was alleged. In a per se argument, the accused alleges that he has been left unrepresented because of the absence, figuratively or literally, of counsel. This violates the accused's Sixth Amendment right to counsel.²⁷⁸ In those kind of cases, there is no need to find prejudice; it is just assumed. For example, a per se reversal was once granted because counsel slept throughout a substantial part of the trial.²⁷⁹ Other examples of a per se argument succeeding occurred when the judge did

²⁷¹ "A writ of superior court to call up the records of an inferior court of a body acting in a quasi-judicial capacity." Online <<https://www.merriam-webster.com/dictionary/certiorari>>.

²⁷² *Supra* note 175.

²⁷³ *Supra* note 262 at para 7.

²⁷⁴ "[Latin, Anew.] \`A second time; afresh. A trial or a hearing that is ordered by an appellate court that has reviewed the record of a hearing in a lower court and the matter back to the original court for a new trial, as it had not be previously heard or decided." Online < <https://legal-dictionary.thefreedictionary.com/de+novo>>

²⁷⁵ *Supra* note 175.

²⁷⁶ *Supra* note 4.

²⁷⁷ *Ibid*.

²⁷⁸ *Supra* note 1. The Sixth Amendment guarantees the right of counsel. *Strickland* relied on this right, but then conflated the right to *effective* counsel by referring to the right to due process in the Fourteenth Amendment.

²⁷⁹ *Javor v United States* 724 F.2d 831 (9th Cir. 1984).

not allow counsel to impeach a witness²⁸⁰ or allow an adjournment for counsel who had just been appointed days before the trial.²⁸¹

In this case, the accused's counsel argued that the original counsel's apparent mental illness was analogous to the aforementioned examples, that counsel was figuratively "absent" and thus the accused should be granted a per se²⁸² reversal. But the court found that in this case the term "mental illness" was too vague, and thus the accused still had the burden to point out specific acts of prejudicial error. Thus, the court rejected extending the per se²⁸³ rule to cover this case and therefore relied on the traditional *Strickland*²⁸⁴ test. Finding no prejudicial error, the appeal was denied.²⁸⁵

Counsel for the accused moved for an evidentiary hearing to inquire as to counsel's competency, which the court denied because even if there was evidence that the original counsel acted erratically, there was no demonstrated prejudice to the accused: "His conduct had no impact on the trial and that even if [the original trial lawyer] were having some kind of breakdown the trial was not distorted and his effectiveness as defence counsel was not impaired."²⁸⁶ The United States Court of Appeals, Ninth Circuit found that a hearing should have been conducted, but held there was no prejudice to the accused from the failure to conduct a hearing. While agreeing with the result of the District Court's denial of an evidentiary hearing, the Court stated:

We hold that when there is a question about a defence attorney's mental competence, a hearing is required where there is substantial evidence that an attorney is not competent

²⁸⁰ *Davis v Alaska* 415 US 308 (1974).

²⁸¹ *Powell v Alabama* 287 US 335 (1980).

²⁸² *Supra* note 130.

²⁸³ *Ibid.*

²⁸⁴ *Supra* note 4.

²⁸⁵ *Supra* note 262 at approx. 878.

²⁸⁶ *Ibid* at para 21.

to conduct an effective defence... we conclude that the decision not to conduct a hearing was not erroneous. Although there was evidence that created a doubt as to [the original trial counsel's] mental stability, there was other evidence precluding doubt.²⁸⁷

The trial judge found the various affiants lacked credibility, although he did not comment on his reasons for this finding, and consequently dismissed the psychiatrists' evaluation because they were based on the affidavits, not on interviewing the defence counsel. Also the trial judge reviewed his recollection of the trial and concluded the conduct of counsel did not raise a substantial doubt about his competency, thus making the hearing unnecessary.

2. *The People v Garrison*²⁸⁸

In the case of *The People v Garrison*²⁸⁹ 1989, there is yet another example where a lawyer, apparently inebriated every day of the trial, was judged to have provided effective counsel because there were no specific errors that the accused could point to proving that the verdict would have been different had they not occurred.²⁹⁰ This case, like the *Smith*²⁹¹ case, produced an unfair verdict because of the *Strickland*²⁹² test prejudice component: Garrison should have been retried because his lawyer's inebriation gave the appearance that the accused had an unfair trial.

On November 14, 1979, the victim, Wanda Bennett, was found buried under debris near Yucca Valley, San Bernardino County. The police officers went to her house to advise her husband of her murder, but when they went into the house, they found the body of Victor

²⁸⁷ 47 Cal.3d 746 (1989)

²⁸⁸ 47 Cal.3d 746 (1989)

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Supra* note 262.

²⁹² *Supra* note 4.

Bennett shot in his bed. Valuables had been stolen from the house.²⁹³ The officers later found the victim's automobile partially visible behind some shrubbery. Near the car, the officers found Mrs. Bennett's purse wrapped in a bag and buried. Later, a gun was found between the Bennetts' home and the place where Mrs. Bennet was buried. It was the kind of gun that killed the Bennetts, but the gun had been wiped clean of fingerprints.²⁹⁴

Two weeks later, the Sherriff's office received a tip implicating the accused in the two murders. A number of people said they had seen the accused in possession of some of the jewelry taken from the Bennett household. The officers also learned that the accused left town with a man named Roelle.²⁹⁵

Roelle's car was found near his girlfriend's house. Warrants were issued. When the officers attended the girlfriend's house, Garrison appeared in the doorway armed with a pistol. He was arrested. The officers searched the house and found more of the Bennetts' stolen property. Roelle was also arrested. He later provided a statement to the police placing the blame on the accused.²⁹⁶

Roelle said he knew Wanda Bennett as they both scavenged at the dump. He was out that night and picked up the accused at a friend's house. Driving by the dump, he saw Mrs. Bennett scavenging, but he went around the back of the dump to look for something. While there, he heard a shot, ran around where he had been and found Mrs. Bennett's body with the accused standing over her. On direction from the accused, Roelle dragged her body to the back of the dump and the two went to the Bennetts' residence in the Bennetts' car. Roelle waited in the car

²⁹³ *Supra* note 288 at 762.

²⁹⁴ *Ibid* at 763.

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid*.

while the accused went into house, but then came out to ask Roelle to help bring property out of the house. He noted that Mr. Bennett had already been shot. The two of them stripped the house of jewelry, guns and coins. The gun was wiped clean and the car was hidden. The accused then ordered the friend by gunpoint (the gun the accused pointed at the police when they came to arrest him) to drive to the location where Roelle had first gone and picked him up at the beginning of the evening.²⁹⁷ While there, the accused displayed the stolen property, giving the friend some guns and hiding the jewelry and coins in the shed out back. Roelle eventually drove him to his trailer. Roelle agreed to testify against the accused in return for a guilty plea to charges of accessory to the two murders and of receiving stolen property.

The accused, Garrison, claimed he had an alibi and that either Roelle (or Roelle and the friend whose house he was at when Roelle picked him up that night) had committed the murders. His evidence was corroborated by four witnesses.²⁹⁸ Laurie Brown, who described herself as a good friend of the accused, testified that she had spent the night at Garrison's friend's house and that the accused had slept throughout the night on the couch. She later testified that Roelle came by the house, bringing jewelry and, after getting some drugs and cash from the friend, the accused agreed to sell some of the jewelry for Roelle. The accused testified at his own trial.²⁹⁹

The jury found Garrison guilty of the robbery, burglary and two counts of first degree murder. The jury found that Roelle was guilty of four counts of possessing a weapon but were unable to find which accused personally used the firearms in the four offences. Garrison's alibi – he was sleeping on the couch throughout the night – was rejected by the jury. The accused appealed on several grounds, including that he had received ineffective counsel. He claimed,

²⁹⁷ *Ibid.* at 762

²⁹⁸ *Ibid* at 765.

²⁹⁹ *Ibid.*

inter alia, that his counsel failed to have the judge suppress evidence found in the New York residence where the two accused were arrested. Secondly, his counsel failed to move for a new trial on the ground that the verdict was against the weight of the evidence.³⁰⁰

The Appeal Court rejected the first two grounds of appeal. The accused then petitioned for *habeas corpus*,³⁰¹ raising additional questions regarding the effectiveness of counsel. In particular, the accused argued that he was denied counsel per se and/or effective assistance of counsel because his lawyer was deficient due to his alcoholism.³⁰²

Mr. Garrison's counsel drank large amounts of alcohol each day of the trial: in the morning, during court recesses and in the evening. In fact, on the second day of jury selection, counsel was arrested for driving to the court house with a .27 percent blood alcohol reading.³⁰³ The next day, the trial judge inquired whether the accused wanted to be represented by someone else, but the accused said he was happy to have counsel continue with the case. The judge added that he had found no reason why counsel should not have continued because he said, "I personally can assure you that you probably have one of the finest defence counsel in this country."³⁰⁴

As part of the accused's petition for writ of *habeas corpus*³⁰⁵, the accused relied on the medical opinion of Dr. Clark, who declared that a chronic alcoholic loses the ability to think through problems and often makes poor judgement calls. The doctor concluded that attorneys

³⁰⁰ *Ibid* at 784

³⁰¹ *Supra* note 175.

³⁰² *Supra* note 288 at 786.

³⁰³ *Ibid* at (42b).

³⁰⁴ *Ibid*.

³⁰⁵ *Supra* note 175.

who are chronic alcoholics would be ineffective as a matter of law. In spite of that medical evidence, the appeal court held that specific errors leading to prejudice must still be found.³⁰⁶

First, however, the court addressed the claim that the accused was denied per se the assistance of counsel. The accused claimed that since his lawyer was an alcoholic and drank throughout the trial, it was as if the accused had no counsel at all – effective or ineffective. The court rejected this argument, saying that:

A per se rule would create a presumption against the competence of attorneys with drinking problems and would invite defendants to challenge their convictions on the basis of speculation about the drinking habits of their attorneys, rather than on the basis of the attorney's actual performance in court. Furthermore, any bright-line definition of alcoholism itself would be arbitrary and impractical to administer. We therefore decline to adopt a per se rule of deficiency on the mere showing of alcohol abuse.³⁰⁷

Rejecting the per se rule meant that specific errors of counsel must be found. Thus, the court considered the performance prong of the *Strickland* test.³⁰⁸ At this stage, counsel was presumed to be competent and the accused had to point out specific errors and argue his lawyer fell below the standard of reasonable professional assistance, keeping in mind that hindsight has no bearing on examining any so-called errors. The court, having already rejected the specific allegations against the accused's counsel, declined to find the accused was denied effective assistance without having to consider the prejudice prong.

An accused or a member of the public would surely never consider this case a fair one. Neither would they agree that an inebriated lawyer, who drank every day of the trial, could be competent, especially when defending a double homicide. This is definitely an example of the

³⁰⁶ *Supra* note 288 at 787.

³⁰⁷ *Ibid* at 42c.

³⁰⁸ *Supra* note 4.

court choosing to protect the counsel rather than the accused's right to counsel. Such a decision raises the possibility of an "insider protecting another insider."³⁰⁹

3. *State of Louisiana v Wille*³¹⁰

The third case also demonstrates how far the *Strickland*³¹¹ test can stretch by insisting on a specific act of incompetence which would have changed the verdict; the appearance of general incompetence is not enough. In *State of Louisiana v Wille*,³¹² 1992, the accused was convicted of murder and was sentenced to death.³¹³ He appealed and the Appeal Court conditionally affirmed the decision but remanded the case back to District Court for an evidentiary hearing into the accused's claim that he had ineffective counsel. The District Court found no merit in the allegation, so the case was remanded back to the Supreme Court of Louisiana. There, the decision to affirm the trial court's decision was confirmed unconditionally.³¹⁴

The accused claimed two errors: First, the trial judge failed to find the accused was without effective counsel when it was discovered that his appointed counsel was recently a notorious convicted federal felon, whose probation included the proviso that he perform pro bono legal work. At the time of his appointment, counsel did not want to accept the case, but the trial judge insisted. The accused said that neither his counsel nor the trial judge advised him of the facts. As a result, the accused complained that the counsel was in a conflict of interest: the conflict between him, the accused, having an impartial jury and the counsel perhaps not asking potential jurors questions that which might reveal that he was a convicted felon. The lawyer's conviction at the time was highly publicized and counsel ultimately saw that he may not have

³⁰⁹ *Supra* note 255.

³¹⁰ 595 So. 2d 1149 (1992).

³¹¹ *Supra* note 4.

³¹² *Supra* note 310.

³¹³ *Ibid.*

³¹⁴ *Ibid* at 1149.

been in a position to ask the jury what they knew about himself and his own legal difficulties.³¹⁵

The accused also claimed that the failure of the court or his counsel in revealing this conflict denied him the right to have new counsel appointed or to represent himself.

The matter was remanded for an evidentiary hearing, which found that there was no conflict of interest and that any feelings counsel had about being a felon played no part in the defence of the accused's case. Also, the failure of the accused not being informed of the status of his lawyer did not affect the effectiveness of counsel.³¹⁶

The court considered the case law regarding conflict of interest. If the conflict is known before the trial, the judge has the obligation to investigate it and grant the appropriate remedy. If the conflict was discovered after the trial, as it was in the present case, then the record has to be examined to ascertain if the conflict adversely affected counsel's effectiveness. None was found, the court concluded, and in any event none had prejudiced the accused's representation.³¹⁷ In support of its opinion, the court referred to *United States v Mouzin*³¹⁸ where no conflict was found, even though during the course of the trial, counsel was disbarred. The court held there must be specific conduct which prejudiced the accused's representation to substantiate a claim of ineffectiveness.

The second error the accused claimed was that the trial judge was a witness at the evidentiary hearing where the conflict was discussed. Again, the court held that although it was

³¹⁵ *Ibid* at 1151.

³¹⁶ *Ibid* at 1151.

³¹⁷ *Ibid* at 1153

³¹⁸ 785 F.2d 682 (9th Cir. 1986)

an error for the judge to testify at an evidentiary hearing over a matter where he presided, there was no prejudice to the accused. So in the final analysis, the appeal was denied.³¹⁹

4. *Bellamy v Cogdell*³²⁰

Finally, in 1992, *Bellamy v Cogdell* was decided.³²¹ This is yet another case where the court seemed insistent to protect counsel, who, by rights, ought to have been suspended from representing someone in court, and all of that without the knowledge or consent of the accused. Given the disability and dishonesty of the trial counsel, it is hard to argue that the accused received a fair trial – or at least the appearance of a fair trial.

Trial counsel was 71 years old and retired from the bar he had served at for 50 years. He came out of retirement to defend a previous client charged with murder. Two months before the trial, he was the subject to disciplinary proceedings that were initiated prior to his retirement. The trial counsel's lawyer wrote to adjourn the proceedings on the grounds that his client was "not mentally capable of preparing for the hearing"; in support of his (the trial counsel's) claim of incapacity, his doctor claimed he had been treating the trial counsel for the previous six weeks and because of "physical and emotional stress" the trial counsel was virtually incapacitated and that he expected that his patient would remain so for three to six months.³²²

On November 21st, the Disciplinary Committee sought to suspend the trial counsel immediately and indefinitely. The trial counsel swore an affidavit wherein he admitted his

³¹⁹ *Supra* note 310 at 1156.

³²⁰ 974 F.2d 302 (USCA 2nd Cir. 1992).

³²¹ *Ibid.*

³²² *Ibid* 304.

medical problems, but indicated he would be retaining senior counsel and that he would attend the murder trial only to assist.³²³

The trial was scheduled to start in January. The trial counsel advised the trial judge that he was feeling better and had secured Mr. S. to assist. As is noted in the court's dissent, in fact Mr. S. had not been contacted until the night before the trial,³²⁴ and not surprisingly, Mr. S. said he could not act because he was involved in another case. The trial counsel made the decision to represent his client alone and to not advise his client about the disciplinary charges and his ill health. The trial proceeded and Bellamy was convicted.³²⁵

Two months later, after conviction but before sentencing, the trial counsel was suspended, without a hearing. It was only then that Bellamy found out his trial counsel's situation. He subsequently appealed on the basis of ineffective counsel. His appeal was dismissed on the basis that the trial counsel had "[done] an excellent job in trying the case."³²⁶ The court declined to find a per se denial of the appellant's sixth amendment to the right of counsel and then applied the *Strickland* test³²⁷ and found no specific errors made by the trial counsel so the appeal was dismissed.

These four cases demonstrate what can happen when the *Strickland*³²⁸ two-pronged test is applied. An accused who is represented by a lawyer who drank alcohol every day during the trial, such as was the case in the *People v Garrison*,³²⁹ cannot have received at least the appearance of a fair trial. The same is true of an accused represented by a lawyer apparently

³²³ *Ibid*

³²⁴ *Ibid* at 312.

³²⁵ *Ibid* at 308.

³²⁶ *Ibid* at 17.

³²⁷ *Supra* note 4.

³²⁸ *Ibid*.

³²⁹ *Supra* note 288.

suffering from a psychotic breakdown, as seen in *Smith v. Ylst.*³³⁰ The unfairness is also obvious in the case of *State of Louisiana v Willie*³³¹ in which the accused was tried by counsel who was, unbeknownst to the accused, a felon working off community service hours on a capital case he did not want to defend, whether it was because of his perceived lack of confidence or more likely a lack of experience representing capital trials. Finally, in the case of *Bellamy v Cogdell*,³³² fairness is absent because the accused did not know that his lawyer was recently too disabled to defend himself before the law society and was practising contrary to the instructions of the Discipline Committee.

These four American cases have been chosen as examples where the courts have applied the *Strickland*³³³ test and failed to order a new trial even in the face of manifestly ineffective representation. In my opinion, the reason why this happened is that the *Strickland* test³³⁴ sets the standard of competent counsel too low and as a result the accused's right to have counsel who provides skillful and professional assistance is denied. This failure to ensure that the accused had the right to effective counsel, a constitutional right, is unacceptable.

Has the experience in the United States courts in applying the *Strickland*³³⁵ test been repeated in Canadian courts? Yes, which is not surprising because the *Strickland*³³⁶ test, with all of its flaws, was transplanted into Canada first by a few appellate courts and then by the Supreme Court into Canadian jurisprudence. The adoption of the *Strickland*³³⁷ test into Canadian law occurred without any court analysing the wisdom or the consequences of this case. The three

³³⁰ *Supra* note 262.

³³¹ *Supra* note 310.

³³² *Supra* note 320.

³³³ *Supra* note 4.

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Ibid.*

appellate cases, *Garofoli*,³³⁸ *Silvini*³³⁹ and *Joanisse*,³⁴⁰ and most significantly, the Supreme Court's case of *B (GD)*,³⁴¹ accept the *Strickland*³⁴² test as a *fait accompli*, which is remarkable since it is an American case that obviously does not bind the Canadian courts. Whatever persuasive quality the case might have (which might justify its adoption) was never discussed or even considered. This topic is dealt with in the next Chapter.

³³⁸ 27 OAC 1, 1988 CanLII 3270; 41 CCC (3d) 97; 64 CR (3d) 193; 43 CRR 252; [1988] OJ No 365 (QL) reversed on other grounds [1990] 2 SCR 1421; 50 OR (2d) 321; 7 OAC 201; 18 CCC (3d) 356; 44 CR (3d) 351; 14 CRR

³³⁹ 5 OR (3d) 545; 50 OAC 376; 68 CCC (3d) 251; 9 CR (4th) 233; [1991] OJ No 1931 (QL).

³⁴⁰ *Supra* note 3.

³⁴¹ *Supra* note 10.

³⁴² *Ibid.*

CHAPTER TWO

V. THE CANADIAN EXPERIENCE

The *Strickland*³⁴³ test was gradually incorporated into Canadian law by several appellate cases, and they are important in that they foreshadow the application of the *Charter*³⁴⁴ in cases of ineffective counsel. In *Garofoli*,³⁴⁵ the Court accepts the *Charter*³⁴⁶ for the purposes of the case. In *Silvini*,³⁴⁷ the Court found that the right to make full answer and defence was a component of “fundamental justice” and finally, in *Joanisse*,³⁴⁸ the Court accepts the applicability of the *Charter*.³⁴⁹ These three appellate cases pre-date *R v B (GD)*.³⁵⁰

A. Pre-*R v B (GD)*³⁵¹ Appellate Cases

1. *R v Garofoli*³⁵²

One of the first cases that pre-dates *R v B (GD)*³⁵³ is *R v Garofoli*,³⁵⁴ a decision of the Ontario Court of Appeal. In this case, Garofoli was charged with Scibetta as well as three others, with conspiracy to import cocaine into Canada. At the heart of the case was the admissibility of private communications pursuant to a warrant. After ruling that they were admissible, Garofoli failed to appear the next day and the Court ruled that Garofoli had absconded and that the trial was ordered to continue in his absence. The three other co-defendants entered guilty pleas to a

³⁴³ *Supra* note 4.

³⁴⁴ *Supra* note 2.

³⁴⁵ *Supra* note 338.

³⁴⁶ *Supra* note 2.

³⁴⁷ *Supra* note 338.

³⁴⁸ *Supra* note 3.

³⁴⁹ *Supra* note 2.

³⁵⁰ *Supra* note 10.

³⁵¹ *Ibid.*

³⁵² *Supra* note 338.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

conspiracy to import and they received twelve years, eight years and six years respectively. Scibetta was sentenced to nine years and Garofoli was sentenced to fifteen years. All five accused appealed their sentences and Garofoli and Scapetti appealed their convictions.³⁵⁵

The facts of the case were that Garofoli was in Hamilton and arranged, by telephone, with three of his co-accuseds as well as a police agent, to smuggle three kilograms of cocaine in a Florida rental car's spare tire. The co-accuseds decided that two of the men would drive the car over the border into Hamilton, and they succeeded. The various co-accused stayed in Hamilton trying to get payment for much of the cocaine.³⁵⁶

There were various grounds of appeal, but Scibetta was the only one who raised an appeal that he received ineffective counsel. Scibetta claimed that his counsel failed to object on proper grounds to the admissibility of prior consistent statements³⁵⁷ made by police agents Smith and Biebuyck. The trial Court held the previous prior statements made by Smith were admissible to rebut evidence of recent fabrication. On the other hand, the Court held that Biebuyck's evidence was inadmissible, but became admissible to rebut the claim of recent fabrication of his evidence. Thus, the Court found no prejudice in admitting evidence of prior consistent statements.³⁵⁸ The appellant Scibetta alleged that his counsel lacked sufficient skill in cross-examination and, as a result, one of the FBI agent's credibility was enhanced. He argued that his counsel's failure to object to certain comments of the trial judge demonstrated a lack of

³⁵⁵ *Ibid* at para 4.

³⁵⁶ *Ibid* at para 7.

³⁵⁷ "As a general rule, prior consistent statements ... are inadmissible. There are three primary justifications for this rule: a) they are self-serving and lack probative value; b) when adduced for the truth of their contents, they constitute hearsay; and c) given that they are a repetition of evidence adduced at trial through oral testimony, they are superfluous and redundant, and therefore ought to be excluded on the basis of trial efficiency..." Marianne Salih. Online: <roylelaw.ca/wp-content/uploads/2017/05/The-Law-on-Prior-Consistent-Statements-Final.pdf.>

³⁵⁸ *Supra* 338 at 131.

knowledge of the law. The Court noted that the accused had other claims against counsel, which he dismissed without comment.

The Court discussed the American governing *Strickland*³⁵⁹ test, and concluded that:

the principles set forth in *Strickland v Washington*...can usefully be applied in this jurisdiction ... I should add that, apart altogether from constitutional considerations [that the right to effective counsel is guaranteed by se.7 and 11(d)] if, in any case, the court considered that there was a real possibility that a miscarriage of justice had occurred due to the flagrant incompetency of counsel we would be entitled to intervene under s 686 (1)(a)(iii)...that is not the case here.³⁶⁰

Scibetta's appeal on this ground was dismissed.

How can the accused or society be satisfied in the result when the allegation was, *inter alia*, that the lawyer's cross examination improved the witness's credibility and that he demonstrated a lack of knowledge of the law? How can we say that the accused's trial had the appearance of a fair trial? Surely, at a minimum, we should be able to expect that a lawyer would know the law. Or at least not make the prosecution evidence stronger. Counsel did not help the accused, he hurt him.

Thus, this case demonstrates how a Canadian appellate court applied the *Strickland*³⁶¹ test, but fell short of finding the right to effective counsel as part of the *Charter*.³⁶² However, it set the stage for a future court to find that the right to effective counsel is encompassed by the right to make full answer and defence.

³⁵⁹ *Supra* note 4.

³⁶⁰ *Supra* note 338 at 150-51.

³⁶¹ *Supra* note 4.

³⁶² *Supra* note 2.

2. *R v Silvini*³⁶³

*R v Silvini*³⁶⁴ a decision of the Ontario Court of Appeal, also pre- *R v B (GD)*,³⁶⁵ was one of the first cases that confirmed the principle that “In order to ensure that the adversarial system produces a fair trial an accused is entitled to receive the assistance of counsel in making full answer and defence”³⁶⁶ With this statement, Justice Lacourciere added the observation made by Justice Martin³⁶⁷ in *R v Williams*: “The right to make full answer and defence is one of the established principles encompassed in the term ‘fundamental justice’ secured by s. 7 of the *Charter*.”³⁶⁸ But the case left the *Charter*³⁶⁹ reference alone and like all of the other cases before and after proceeded to apply the *Strickland*³⁷⁰ test, with no comment or analysis.³⁷¹

In this case, trial counsel’s effectiveness was seriously impaired by a conflict of interest, since the lawyer represented two accuseds in one trial. At the opening of the trial, trial counsel indicated that he had just been discharged by one of the accused and the trial had to be adjourned to allow that accused a chance to retain new counsel. After a brief adjournment, counsel continued to represent both clients. The Court found no problem in finding the factual basis for a claim of ineffective counsel, due to the obvious conflict of interest. For this and the ground of actual ineffectiveness by failing to request severance by counsel the Court found that a new trial was the only remedy.³⁷²

³⁶³ *Supra* note 339.

³⁶⁴ *Ibid*.

³⁶⁵ *Supra* note 10.

³⁶⁶ *Supra* at 339 at 10.

³⁶⁷ In *R v Williams* (1985), 50 OR (2d) 321; 7 OAC 201; 18 CCC (3d) 356; 44 CR (3d) 351; 14 CRR 251

³⁶⁸ *Ibid* at 336.

³⁶⁹ *Supra* note 2.

³⁷⁰ *Supra* note 4.

³⁷¹ *Supra* note 339 at 44.

³⁷² *Ibid* at 45.

It is not surprising that the Court found that a new trial was necessary given that the American jurisprudence so clearly held that when it comes to conflicts of interest, an exception is made from the application of the *Strickland*³⁷³ test and the accused does not need to prove prejudice. O’Conner J stated, “Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts...it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest...Prejudice is presumed only if the defence demonstrates that counsel ‘actively represented conflicting of interests’ and ‘an actual conflict of interests adversely affected his lawyer’s performance’”³⁷⁴

It is interesting that O’Connor J makes this exception for proving prejudice in cases where actual conflicts of interests are present. The theory is that an accused has the right to the loyalty and singular interest by counsel, in other words the right to effective counsel, and the court assumes that the situation makes it unnecessary to prove prejudice, either because the trial is obviously unfair or gives the appearance of unfairness. But the theory must also work in a case where the appellant, through the errors or omissions of counsel, is denied the right to effective counsel, leading to the finding that the trial was unfair or gives the appearance of unfairness. In each case, it ought to be unnecessary to prove prejudice, since the focus is on the right to effective counsel and the right of a fair trial.

³⁷³ *Supra* note 4.

³⁷⁴ *Ibid* at 692.

3. *R v Joannis*³⁷⁵

Prejudice was also considered by the Court in *R v Joannis*,³⁷⁶ another pre-*R v B (GD)*³⁷⁷ case and the only appellate case referred to by the Supreme Court in *R v B (GD)*.³⁷⁸ It will be recalled that prejudice is the second component in *Strickland*'s³⁷⁹ two-prong test. Prejudice is described as:

A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether specified errors result in the required prejudice, a court should presume, absent challenge to the judgment on ground of evidentiary insufficiency, that the judge or jury acted according to law.³⁸⁰

The accused claimed that he was highly impaired on prescription drugs during much of the trial and was in no condition to consider testifying, little less being able to. Unfortunately for the accused, there was no evidence supporting what he had to say about being impaired, and it was apparent that it was a fiction that came rather late in the day.³⁸¹

One would have expected that the appeal would be dismissed out of hand, but appellate counsel still argued that trial counsel provided ineffective assistance in two ways. First, the accused argued that trial counsel should have sought an adjournment to give counsel more time to reason with his client: he had told his client that it was essential that he testify to have any

³⁷⁵ *Supra* note 3.

³⁷⁶ *Ibid.*

³⁷⁷ *Supra* note 10.

³⁷⁸ *Ibid.*

³⁷⁹ *Supra* note 4.

³⁸⁰ *Ibid* at 694.

³⁸¹ *Supra* note 3 at 55.

chance of acquittal. Secondly, trial counsel erred by indicating to the jury that the defence would be calling evidence, before the accused definitively refused to testify.³⁸²

Justice Doherty, of the Ontario Court of Appeal, concluded that trial counsel's decision not to ask for an adjournment was conduct that did fall below a reasonable standard. Having found that, however, the Court concluded that had there been an adjournment, and there was not a realistic chance that the accused would have changed his mind about not testifying. The appeal was dismissed for lack of prejudice.

B. *R v B (GD)*³⁸³

The case that led to the importation of *Strickland*³⁸⁴ into Canada law is *R v B (GD)*,³⁸⁵ a 2000 Supreme Court of Canada decision. The accused was charged with three counts of sexually assaulting his adopted daughter in 1984 when she was 12 years old. The assaults ultimately resulted in non-consensual intercourse. The complainant left home the day that it occurred and did not complain of the sexual assault until 1994.

There was a secret audiotaped conversation, made a few days after the forced intercourse, between the complainant and the mother, wherein the complainant denied that she had been sexually molested. At trial, the complainant denied that she had any contact with her mother at that time. The mother contradicted the complainant's evidence. Notwithstanding the tape proving the contact, the defence counsel declined to adduce it into evidence. The Court of Appeal

³⁸² *Ibid* at 61.

³⁸³ *Supra* note 10.

³⁸⁴ *Supra* note 4.

³⁸⁵ *Supra* note 10.

appointed a commissioner³⁸⁶ to conduct an inquiry into whether the “fresh evidence,”³⁸⁷ the tape, related to guilt or innocence and whether the claim of incompetence of the accused’s lawyer was credible.³⁸⁸

In dismissing the appeal, the Court noted the four criteria established by the Supreme Court in *Palmer v The Queen*,³⁸⁹ an appeal involving the reception of fresh evidence. These are:

- (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. [Footnote omitted]
- (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.³⁹⁰

The commissioner informed the Court that the first criteria, of due diligence, was not met but the Supreme Court confirmed that the strict requirement of due diligence as set out by *Palmer v The Queen*³⁹¹ was not necessarily relevant in a criminal case and that it must yield in the face of a miscarriage of justice. In fact, *B (GD)*³⁹² is often cited, not only as a case setting out the

³⁸⁶ *Supra* note 86 “s 683 For the purposes under this Part, the court of appeal may, where it considers it is in the interest of justice....(e) order that any questions arising on the appeal that (i) involves prolonged examination of writings or accounts, or scientific of local investigation, and (ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal, be referred for inquiry and report, in the manner provided by rules of court to a special commissioner appointed by the court of appeal.”

³⁸⁷ “Evidence that existed at the time of the trial, but for various reasons could not be put before the court. A term used in the context of appeals to limit the acceptance of evidence not referred to during the hearing or trial of which the appeal is from.” Online <www.duhaime.org/LegalDictionary/FreshEvidence.aspx>

³⁸⁸ *Supra* note 10 at 13.

³⁸⁹ [1980] 1 SCR 759; 106 DLR (3d) 212; 30 NR 181; 14 CR (3d) 22; 50 CCC (2d) 193; [1979] CarswellBC 533; [1979] SCJ No 126 (QL); [1979] ACS no 126; 4 WCB 171.

³⁹⁰ *Ibid* at 775

³⁹¹ *Ibid*.

³⁹² *Supra* note 10.

test for ineffective counsel, but as a precedent that due diligence is not necessarily required in criminal cases.

The Court clearly affirmed that the right to effective counsel extends to all accuseds. The Court concluded that a right to effective counsel was provided for in the “fundamental justice” clause in section 7 of the *Charter of Rights and Freedoms*³⁹³ which provides that, “Everyone has the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice.”

The Supreme Court also concluded the right to effective counsel is also found in ss. 11(d) of the *Charter*³⁹⁴ which provides, “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent tribunal.” The key is the right to a *fair* trial which can only be achieved when the accused is represented by effective counsel

But in this case the appeal was denied. Justice Major, writing for the Court, said, “I conclude, for the reasons that follow, that in the absence of a miscarriage of justice, the question of competence of counsel is usually a matter of professional ethics and is not a question for the appellate courts to consider. In the result, the appeal fails.”³⁹⁵

The Court then went on to adopt the two component *Strickland*³⁹⁶ test of the United States’ Supreme Court, that when faced with a claim of ineffective counsel the court must consider a performance component and a prejudice component. In this case, the Court found any

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Supra* note 10.

³⁹⁶ *Supra* note 4.

mistakes that counsel made were not so egregious that they prejudiced the accused's right to a fair trial. The Supreme Court applied this test and concluded:

Miscarriages of justice may take many forms in this context. In some instances counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised. In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or profession conduct. That latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred that is the course to follow.³⁹⁷

Incorporating the *Strickland*³⁹⁸ test into Canadian jurisprudence has resulted in importing some of its flaws, just as what was seen in the American post-*Strickland*³⁹⁹ cases. It was so unnecessary to adopt the *Strickland*⁴⁰⁰ test rather than fashion a test in accordance with the *Charter*.⁴⁰¹ In that way, the heart of the case is the right to effective counsel as guaranteed by s. 7 and 11 (d) and not whether prejudice resulted from ineffective counsel. In the following section of this Chapter, three cases are considered where Canadian courts failed to create a *Charter*⁴⁰² test but instead applied the *Strickland test*⁴⁰³ and ineffective representation was not recognized, little less remedied. Thus, in these cases, we see the flawed legacy of the *Strickland test*⁴⁰⁴ play out in Canada.⁴⁰⁵

³⁹⁷ *Ibid* at 28-29.

³⁹⁸ *Ibid*.

³⁹⁹ *Ibid*,

⁴⁰⁰ *Ibid*.

⁴⁰¹ *Supra* note 2.

⁴⁰² *Ibid*.

⁴⁰³ *Supra* note 4

⁴⁰⁴ *Ibid*.

⁴⁰⁵ The Supreme Court has since cited *B (GD)*, in one paragraph each, in a number of cases since 2000. These are briefly summarized in Appendix B.

C. Post-*B (GD)*⁴⁰⁶ Cases Applying the Strickland⁴⁰⁷ Test Yielding Unjust Verdicts

1. *R v Prebtani*⁴⁰⁸

R v Prebtani,⁴⁰⁹ a decision from the Ontario Court of Appeal in 2008, is another case where the application of the *Strickland*⁴¹⁰ test led to the Court dismissing the appeal claiming ineffective counsel. This was a domestic trial involving charges of assault, assault with a knife and uttering a death threat.

The Court in paragraph three of the judgement details the *Strickland*⁴¹¹ test. First, the appellant argued that the trial counsel's understanding of the law was woefully deficient and made numerous mistakes throughout the trial. Trial counsel himself agreed that he had no knowledge of the law of recent fabrication⁴¹² and the rule of collateral evidence.⁴¹³ Appellate counsel argued:

The appellant submits that the appearance of fairness was also affected by the trial counsel's profoundly deficient knowledge of the law and obvious lack of credibility with the trial court. The deficient knowledge of the law focuses on several areas: the

⁴⁰⁶ *Supra* note 10.

⁴⁰⁷ *Supra* note 4.

⁴⁰⁸ 2008 ONCA 735.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Supra* note 4.

⁴¹¹ *Ibid.*

⁴¹² As described in *Stirling v R*, 2008 SCC 10 "It is well established that prior consistent statements are generally inadmissible (*R. v. Evans*, 1993 CanLII 102 (SCC), [1993] 2 S.C.R. 629; *R. v. Simpson*, 1988 CanLII 89 (SCC), [1988] 1 S.C.R. 3; *R. v. Béland*, 1987 CanLII 27 (SCC), [1987] 2 S.C.R. 398). This is because such statements are usually viewed as lacking probative value and being self-serving (*Evans*, at p. 643). There are, however, several exceptions to this general exclusionary rule, and one of these exceptions is that prior consistent statements can be admitted where it has been suggested that a witness has recently fabricated portions of his or her evidence (*Evans*, at p. 643; *Simpson*, at pp. 22-23). Admission on the basis of this exception does not require that an allegation of recent fabrication be expressly made — it is sufficient that the circumstances

⁴¹³ "A collateral fact is a 'fact not directly connected' or not relevant to the 'issue in dispute.' The collateral fact rule prohibits the admission of any evidence that would tend to contradict any previously admitted collateral evidence. Any extrinsic contradictory evidence that brings a witness's credibility into question may not be considered where the contradictory evidence [sic] not relevant to an issue at trial. When a witness speaks to a fact, the veracity of the testimony can only be brought into question where material to a trial issued is sufficient. Otherwise, it will fall up against the collateral fact rule that prohibits the calling of contradictory evidence on immaterial facts." Online < criminalnoteook.ca/index.php/Collateral_Fact_Rule>.

rules of evidence concerning recent fabrication, character evidence and collateral facts; the limited jurisdiction of the preliminary inquiry judge; the use of the deed to 55 Chapletown; and cross-examination on prior testimony. Lack of credibility with the trial court relates to an admonition from the trial judge about cross-examination on the preliminary inquiry transcript, and the handing up of the character letters prior to sentencing.⁴¹⁴[Footnotes omitted.]

Because of this ineffectiveness, inadmissible evidence was accepted and admissible evidence was not led. For example, inadmissible evidence that became part of the record was the landlord describing how other tenants were complaining about the noise from the couple's suite and the daughter's conversation with her father. Admissible evidence that was left out of the record was the bill for the bed purchase and the deed showing the ownership of the father's house.

In addition to difficulties with the admissibility or not of evidence, at the time of the trial, trial counsel was ordered not to practise because of his suspension by the Law Society of Upper Canada for failing to maintain records in accordance with the Law Society regulations. In fact because of his suspension, the appellate Court held that if the trial Court or the Crown were aware of the trial counsel's status they would not have proceeded with the trial and ordered an adjournment for the appellant to seek out other counsel. But the court overlooked this, notwithstanding the appellant wasn't aware that his counsel was prohibited from representing him.

The Court addressed each complaint separately. First, the complainant testified that when she and the appellant moved into their condominium, there was no furniture and she slept on an air mattress for 6-8 weeks. In trial counsel's file, however, was a receipt for purchase of a bed

⁴¹⁴ *Supra* note 408 at 136. Remarkably, counsel attempted to file character letters *prior* to the judge's verdict. These letters are inadmissible during the trial and are only relevant after conviction and are part of the defense's sentencing remarks. This alone indicates that the counsel had no knowledge of the trial procedures.

bought 16 days after the move and paid for 23 days after that. Counsel acknowledged that it was his oversight not to have challenged the complainant with the receipt. Neither was the appellant questioned about the furniture in the condominium. Both would have impacted the complainant's credibility.

The complainant testified that there was an argument about the appellant changing ownership of the parent's home. An argument ensued and the accused was alleged to have assaulted the complainant and in the course of the assault had dented the wall and left bruises on her neck, although she showed no one the bruises. In fact, a witness who testified for the crown said he saw no bruises on the complainant after the argument, but did agree that the condominium was in disarray, as the complainant had testified. The accused, on the other hand, testified that the complainant had damaged the condominium⁴¹⁵

The trial counsel did not confront the complainant about the deed of his parent's house because he said that the appellant had never provided same to him, although a copy of the deed was in his file. When confronted he said he believed he could only show the original to the complainant and not a copy. There were other lost opportunities including not objecting to prior consistent statements made by the complainant and not objecting to hearsay evidence. Trial counsel also failed to examine the accused on important details of the incidents, and in the result the trial judge also omitted certain evidence, including where the complainant contacted the accused, their wanting to get back together and the fact that the two went on a peaceful trip together. Trial counsel failed to highlight evidence in his summation, evidence that would have

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helped the accused. He also omitted to use the preliminary transcript to contradict witness's testimony, instead reading in evidence that supported the witness's evidence at the trial.⁴¹⁶

The appellate judge dealt, one by one, with the allegations of ineffectiveness. He concluded that none of them affected the reliability of the verdict. It is apparent that the Court did not look at the cumulative effect of the errors, which were collectively indicative of ineffectiveness. The errors of counsel were numerous. The Court never indicated that the errors should have been considered collectively. If they had, counsel's conduct amounted to ineffective counsel in many ways.

The Court considered the appellant's argument that counsel's ineffectiveness effected the appearance of an unfair trial. But the Court seems to have considered only whether the trial counsel's inefficiencies affected the fairness of the trial, not the important allegation that the accused's trial had the appearance of an unfair trial. In fact, besides reciting the appellate counsel argument that the errors affected the appearance of a fair trial, the Court analysed counsel's objections only as to trial fairness, and failed to discriminate between the fair trial and the appearance of a fair trial.⁴¹⁷

All in all, the judgment in this case was unjust in that there were significant deficiencies in the trial counsel's abilities and his knowledge of the law. Two illuminative examples are how counsel misused the preliminary transcript evidence and filed the character letters with the Court before the Court found the accused guilty. These mistakes indicate that counsel did not know the basics of trial work. The Court made no finding that counsel's conduct was substandard; perhaps the Court did not want to articulate same, although it was clearly apparent. One would expect

⁴¹⁶ *Supra* note 408.

⁴¹⁷ *Ibid* at 128.

that a lawyer would at least know the law. The Court focussed its attention to the reliability of the verdict, the second prong of the *Strickland*⁴¹⁸ test. By focusing on the reliability of the verdict the attention is drawn away from the question of whether the accused, because of their counsel's ineffectiveness, had an unfair trial or the appearance of an unfair trial. These are the rights that are guaranteed by the *Charter*.⁴¹⁹ To focus on the reliability of the verdict is in essence to tolerate ineffectiveness and the denial of the accused's constitutional rights. Reliability means that even though the accused had an unfair trial, since the result would probably be the same if the trial was repeated, there was no reason to order a new trial. Reliability is another way of saying that regardless of the errors of counsel and their general ineffectiveness because we think the accused committed the offences, concerns of the fairness or the appearance of fairness are disregarded.

2. *R v Davies*⁴²⁰

Similarly, in *R v Davies*,⁴²¹ the appellant in a case of criminal negligence cause death and bodily harm, and impaired driving cause death and bodily harm (both of which were stayed at the time of sentencing) alleged that he was ineffectively represented. The Ontario Court of Appeal in 2013 rejected the appellant's claim on the basis that counsel's errors did not affect the reliability of the verdict.

There were chiefly two areas of concern about counsel's conduct. The gist of the case was whether the accused was impaired at the time of a motor vehicle accident, where the other driver was killed and his passenger injured. There was evidence of erratic driving before the accident from three witnesses, which was denied by the accused. There was also evidence that a

⁴¹⁸ *Supra* note 4.

⁴¹⁹ *Supra* note 2.

⁴²⁰ 2008 ONCA 209.

⁴²¹ *Ibid.*

blood sample of the accused, taken at the hospital three hours after the accident, showed that the accused's blood alcohol content was 80 mg of alcohol per 100 ml of blood. The crown's expert witness extrapolated backwards saying at the time of the accident, the accused's blood content would have been 100 mg of alcohol per 100 ml of blood. The trial judge convicted the accused, saying that his conduct, driving while impaired, elevated his conduct of dangerous driving to that of criminal negligence.⁴²²

Appellant's counsel argued that a new trial should be ordered due to the ineffective assistance of the accused's trial counsel. In particular, it was alleged that the trial counsel could have made inroads into the testimony of the civilian witnesses had he prepared more. For example, there were inconsistencies among the witness's testimony and prior statements and evidence at the preliminary hearing.⁴²³ It was also alleged, but not addressed by the Court, that the trial counsel failed to adequately communicate with the appellant both before and during the trial. The accused also argued that he was surprised to be called to testify and was not prepared by his counsel.⁴²⁴

Perhaps the biggest error of trial counsel was that he called a toxicologist who confirmed the crown's toxicology expert. This error corroborates the appellant's argument that his counsel was unprepared. Also, although it was a pivotal issue, the trial counsel never attempted to explore whether the accused's comments on how much he had to drink were admissible and/or whether the sample taken at the hospital was improper. Although the appellate Court found that such arguments are speculative, they indicate the absence of a trial strategy rather than a poor but acceptable strategy.

⁴²² *Ibid* at 22.

⁴²³ *Ibid* at 57.

⁴²⁴ *Ibid*.

In the end, the Court found that as “poor though his counsel’s conduct may have been, it did not approximate the level of ‘non-performance’ required to establish a miscarriage of justice due to an unfair trial.”⁴²⁵ That, of course, is not the test, even relying on *B (GD)*.⁴²⁶ In order to prove ineffective representation of counsel, according to the *Strickland*⁴²⁷/*B (GD)*,⁴²⁸ the Court only has to be satisfied that counsel’s conduct was not that of a reasonable professional. Notwithstanding the trial judge articulated the wrong test, the Court considered the second prong, the prejudice prong, by finding that counsel’s conduct did not affect the reliability of the verdict or the accused’s right to a fair trial. The Court was silent on the issue whether the trial also had the appearance of a fair trial. Given the several indicia that counsel was completely unprepared, especially by calling an expert witness that corroborated the Crown’s evidence, the appellant did not have a trial that appeared fair. On the issue of reliability, the Court said, “In order to determine whether trial counsel’s conduct undermined the reliability of the verdict, it is important to understand the strong evidentiary basis upon which the appellant was convicted.”⁴²⁹ It is submitted that by focusing on the strength of the crown’s case, it takes attention away from the real question at hand: did the accused have a fair trial or a trial that appeared fair, not whether there was evidence, even strong evidence, to show the accused must have committed the offence. To consider reliability is to overlook whether the accused’s counsel’s conduct was effective and ensured the accused had his constitutional right satisfied. Whether the accused is convicted or not at a second trial should not be a matter of concern for the Court.

⁴²⁵ *Ibid* at 57.

⁴²⁶ *Supra* note 10.

⁴²⁷ *Supra* at 4.

⁴²⁸ *Supra* note 420 at 57.

⁴²⁹ *Ibid* at 57.

3. *R v LHE*⁴³⁰

In *R v LHE*,⁴³¹ also a decision of the Ontario Court of Appeal, the appellant claimed that his counsel had him sign a blank piece of paper in anticipation of a bail review. Counsel then filled in the document, without reviewing with her client the contents of the “affidavit,” and attached the appellant’s signed blank piece of paper. Thus, counsel’s conduct essentially sabotaged the accused’s testimony and credibility.

At trial, the appellant was cross-examined on the facts of the affidavit that his counsel had not shown him. He was completely unaware of its contents, so much so that his inaccuracies were such that they were cited by the trial judge as one reason for disbelieving his evidence. The accused was clearly not prepared to testify.

The Appeal Court found that because the prosecution evidence against the accused was weighty, the appellant suffered no prejudice because of his lawyer’s unlawful and unprofessional conduct. Even if the evidence was weighty, credibility was still part of the decision making. The trial judge commented that the accused’s inconsistencies during cross-examination negatively affected his assessment of the accused’s credibility. How can the judge assess how much impact the accused’s testimony would have had on his finding of credibility had the accused known the contents of the affidavit?

The appellate Court dismissed the appeal in less than one paragraph saying, “This is not a case where the incompetence amounted to actual or constructive denial of the assistance of counsel at trial or where the adversarial dynamic of the trial was lost.”⁴³² But this, again, is not the test. The appellant needs only to show that counsel’s conduct was below the standard of a

⁴³⁰ 2018 ONCA 362.

⁴³¹ *Ibid.*

⁴³² *Ibid* at 11.

reasonable professional. The filing of an illegal affidavit cannot be seen as part of any strategy. In essence, it and failing to prepare the accused to testify almost set the accused up to fail in establishing credibility. The appellate Court found, or rather, speculated, that “even if the inconsistencies were removed, the trial judge would have not have accepted that the appellant was a credible witness, especially in light of his complete rejection of the appellant’s explanation for his departure from Canada within hours of learning about the police investigation.” But the latter finding, which is not described in the judgment, is itself a credibility finding. It is speculative to say, “I believe that this witness is not credible here, based upon my finding him incredible during his cross-examination on his affidavit.”⁴³³ Maybe, the trial judge would have found the accused gave a credible reason for leaving Canada if he had testified credibly about the affidavit. It is agreed that the answer is speculative, but isn’t the finding that the trial judge would have decided the case in the way he did, notwithstanding his poor testimony, speculative?

The Court also deemphasized the importance of what the trial counsel did by referring to is as “specific actions by his counsel prior to trial and did not detract from the fairness of the adjudicative verdict.”⁴³⁴ But the Court says nothing about whether the accused had a trial that appeared fair. While the lawyer would no doubt be vulnerable to a discipline complaint, that addresses only what the counsel did and says nothing about the consequences of her conduct.

D. Academic Commentary

There is support for this thesis’s central theme – the right to effective counsel is, in essence, the right to a fair trial – in academic commentary. For example in “*Charting the Constitutional*

⁴³³ *Ibid* at 9.

⁴³⁴ *Ibid* at 11.

Right of Effective Assistance of Counsel in Canada,⁴³⁵ David Tanovich states, “The constitutional guarantee of ‘effective assistance’ of counsel is a guarantee with a purpose to assure that our adversary system of justice really is adversarial and really does justice.”⁴³⁶ He then notes that:

The hallmark of our criminal justice is the guarantee of a fair trial. An important safeguard of that guarantee is the right to counsel. The right to counsel ensures, at a time when the powerful forces and blunt instrument of the state are marshalled against the accused, that they will have the necessary legal advice and assistance (i) on detention and arrest to make an informed choice about how to exercise their right to silence, and (ii) thereafter to ensure that prosecution’s case has been put to its proof and to enable the accused to make full answer and defence. However, our adversarial system’s ability to produce just results requires not merely some minimal level of assistance, but instead the competent and effective assistance of counsel. [Footnotes omitted]⁴³⁷

Regarding the second prong, the prejudice component, Tanovich addresses the difficulty courts face when having to consider the second prong of the *Strickland* test.⁴³⁸ He argues that the *Strickland* test⁴³⁹ and the *Silvini*⁴⁴⁰ standard are too high a threshold for an appellant to reach. First he comments, “How can anyone show, with any degree of certainty, that the result at a trial may have been different, especially in the case of a jury trial? This is especially true when incompetent counsel has left an ‘empty record.’”⁴⁴¹

⁴³⁵ 1994 36 CLQ 404.

⁴³⁶ *Ibid* at 1, citing David Bazelon, “*The Defective Assistance of Counsel*” (1973), 42 U.Cinn. L. Rev. 1 at 1-2.

⁴³⁷ *Ibid* at 1.

⁴³⁸ *Supra* note 4.

⁴³⁹ *Ibid*.

⁴⁴⁰ *Supra* note 339.

⁴⁴¹ *Supra* note 435.

Tanovich, citing Richard Klein,⁴⁴² suggests that a solution to developing a test for effective assistance is by developing:

Particularized standards which guide lawyers through every stage of the criminal proceedings, [which] might actually diminish the number of inadequate representation claims. Such standards detailing the steps that ought to be taken in preparing a case would assist and guide that attorney in the preparation of the defence in a criminal trial...and would be especially useful to the novice attorney or the lawyer whose speciality is in another area of law, who recently has taken on a criminal case.

Particularized requirements would also enable defendants to understand what is involved in the defence of a case and might well enable them to more actively participate in the process that so vitally affects them. Through such standards, the trial would be able to monitor more effectively the quality of representation the defence was receiving. Moreover, the lack of specific standards makes it more difficult to evaluate the competency of the representation provided. This in turn diminishes the likelihood of obtaining appellate relief for a defendant who has ineffective counsel at trial. [Footnotes omitted in the original.]⁴⁴³

In conclusion, the author suggests that the prejudice component of the *Strickland* test⁴⁴⁴ be abandoned. This thesis supports this conclusion. He notes that the courts have held the police to an exacting standard in their interactions with accused. Why should the courts not be equally or more demanding of defence counsel?

Charles Davidson, in his article “*Importing Strickland: Some Concerns in Light of the Supreme Court’s Adoption of the American Test for Ineffective Counsel*”⁴⁴⁵ raises the same concern regarding the court’s requirement that the accused show prejudice. He reiterates Justice Marshall’s observations in *Strickland*⁴⁴⁶ that “counsel’s incompetence might in fact be the very reason prejudice could not be demonstrated upon appellate review.”⁴⁴⁷ He also observes that at

⁴⁴² Richard Klein, “*The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*” (1986) 13 Hastings Const. L. Q. 625 at p 655.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Supra* note 4.

⁴⁴⁵ 2000 32 CR (5th) 220

⁴⁴⁶ *Supra* note 4.

⁴⁴⁷ *Supra* note 445 at approximately 226, citing Marshal J at *supra* note 4, para 120.

the Supreme Court, while trial fairness is of the utmost importance,⁴⁴⁸ there are instances where procedural fairness has not been enough to justify the finding that a miscarriage of justice had occurred.⁴⁴⁹ He observes that, therefore, “small” aspects of unfairness may be tolerated. But this is different than saying that “small” errors may be tolerated; the accused has the right to a fair trial, not an almost fair trial.

Davison asks since *Strickland*⁴⁵⁰ was, at the time of his writing, 16 years old and as we have seen the jurisprudence that has applied the Strickland test has led to unjust results, did the Court in *B (GD)*⁴⁵¹ adopt the *Strickland*⁴⁵² test, in isolation, or the *Strickland*⁴⁵³ test as it has been applied over the years? The Supreme Court is silent on this. Since the Supreme Court doesn't mention how the *Strickland* test⁴⁵⁴ was applied in the subsequent cases, are we to assume the Court did not know about such cases as *Bellamy*,⁴⁵⁵ *Willie*,⁴⁵⁶ *Smith*⁴⁵⁷ and/or *Garrison*⁴⁵⁸? Can it be assumed that appellate counsel did not present the Court with examples of how the *Strickland*⁴⁵⁹ test has subsequently applied? If the Court had these cases before then, would it have adopted the *Strickland*⁴⁶⁰ test? It is impossible to know, but given the legacy of

⁴⁴⁸ See, for example, *R v Stillman* (1997) 5 CR (5th) 1 SCC at 34.

⁴⁴⁹ See, for example, *R v E (AW)* 1993 23 CR (4th) 357 SCC at 368 and the comments of McLachlan J (as she then was) in *R v Harrer* (1995) 42 CR (4th) 269 SCC at 288 repeated in *R v G (SG)* (1997) 8 CR (5th) 198 at 237 to the effect that an accused is only entitled to a “fundamentally fair trial, not a perfect trial.”

⁴⁵⁰ *Supra* note 4.

⁴⁵¹ *Supra* note 10.

⁴⁵² *Supra* note 4.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Supra* note 320.

⁴⁵⁶ *Supra* note 310.

⁴⁵⁷ *Supra* note 262.

⁴⁵⁸ *Supra* note 288.

⁴⁵⁹ *Supra* note 4.

⁴⁶⁰ *Ibid.*

*Strickland*⁴⁶¹ it is hard to believe that the Court would, without comment at least, adopt the *Strickland*⁴⁶² test.

In the next chapter, after discussing the utility of empirical research, I will report on my empirical data that demonstrates that appellants seldom argue that they have been denied effective representation claims, and when they do, remedies are far and few between. I will examine why this is so. First, the low success rate has had a chilling effect on appellant counsel who, at least in a case where the accused is applying for legal aid, has to ensure before receiving a certificate that the appellant's case has merit⁴⁶³. Every counsel who alleges ineffective counsel must, according to most provincial protocols, have to independently assess whether the appeal has merit, apart from the appellant's instructions alone. Because of the low success rate and unsupportive precedents, appellant counsel may choose not to attest to independently assess the appeal due to time and expense.

There are also social factors that prevent counsel from alleging that another colleague at the bar was ineffective. These I will address more fully in Chapter Three.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *The Legal Aid Act* CCSM c L105, Regulation 225/91 s 11 (3).

CHAPTER THREE

VI. EMPIRICAL STUDY

A. Introduction

In my first and second Chapters, I was highly critical of the so-called *Strickland*⁴⁶⁴ test established by Justice O'Connor of the United States Supreme Court in 1990. The first problem is the strong presumption of competency which is unnecessary and unfair. It is unfair that the appellant already has the onus to prove that the counsel acted below the standard of a reasonable professional. The second component, the prejudice component, requires the appellate to point to specific example of incompetence that affected the verdict. I concluded that the two-prong test was too restrictive, since guilty verdicts where counsel failed to provide effective assistance were seldom reversed. Examples of this restrictive approach appear in four cases where verdicts were upheld after the courts applied the *Strickland*⁴⁶⁵ test: *Smith*,⁴⁶⁶ *Garrison*,⁴⁶⁷ *Wille*⁴⁶⁸ and *Bellamy*.⁴⁶⁹ In these four examples, the accuseds' right to the effective assistance of counsel were denied and the right was essentially rendered illusory. The results of these four examples could have been predicted after examining the *Strickland*⁴⁷⁰ test. In each of these cases, the court failed to find specific flaws of counsel, including the drunkenness of counsel and the psychotic break of another counsel. The flaws of the *Strickland*⁴⁷¹ test were built in from the start. In other words, no one should have been surprised that the rotten tree yielded rotten fruit. In the second chapter, I

⁴⁶⁴ *Supra* note 4.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Supra* note 262.

⁴⁶⁷ *Supra* note 288.

⁴⁶⁸ *Supra* note 310.

⁴⁶⁹ *Supra* note 320.

⁴⁷⁰ *Supra* note 4.

⁴⁷¹ *Ibid.*

reviewed three cases, *R v Prebtani*,⁴⁷² *R v Davies*⁴⁷³ and *R v LHE*,⁴⁷⁴ and argued that they are similar to the American cases that upheld guilty verdicts even in the face of ineffective assistance. I chose to detail these cases as evidence that the *Strickland* test,⁴⁷⁵ as adopted in *B (GD)*,⁴⁷⁶ led to many of the same unjust results as those American cases that applied the *Strickland* test.⁴⁷⁷ This drew an analogy between the many American cases that applied the *Strickland* test,⁴⁷⁸ some of whose verdicts were unjust, and the many Canadian cases that essentially applied the *Strickland*⁴⁷⁹ test, although now under the guise of *B (GD)*⁴⁸⁰. Thus, my conclusion is that the *Strickland*⁴⁸¹ test both in the United States and in Canada yields unjust results and reinforces my argument that in order to restore the balance of the *Strickland*⁴⁸² test it must be changed.

Because the Canadian Supreme Court adopted the *Strickland*⁴⁸³ test in *B(GD)*,⁴⁸⁴ the same phenomenon, maintaining unjust trial verdicts despite the accused being ineffectively represented, have occurred in Canadian cases. So, just as in the United States, while Canadian courts recognize the constitutional right to the effective assistance of counsel, when that right is denied, the remedy is rarely granted. Which leads back to the predominant theme of the first chapter – *ubi jus, ibi remedium*⁴⁸⁵: where there is a legal right, there should be a remedy if such a right is denied. Something must be done to bring life back to this basic tenet. The “something” is

⁴⁷² *Supra* note 408.

⁴⁷³ *Supra* note 420.

⁴⁷⁴ *Supra* note 430.

⁴⁷⁵ *Supra* note 4.

⁴⁷⁶ *Supra* note 10.

⁴⁷⁷ *Supra* note 4.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Supra* note 10.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Supra* note 4.

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ *Supra* note 10.

⁴⁸⁵ *Supra* note 14.

the re-vamping of the *Strickland*⁴⁸⁶ test, which is proposed in the final chapter of this thesis. One of my central arguments is that the strong presumption of competence of defence counsel should be abolished. This does not affect the onus or burden that the accused still has to carry in order to prove ineffectiveness to the balance of probabilities: if the accused does not discharge the burden then the verdict will be maintained. Instead, it establishes a level playing field between counsel and the accused. Secondly, I will argue that any counsel errors should be considered cumulatively, since each is a symptom of ineffectiveness. Thirdly, I will argue that not every counsel error should result in the ordering of a new trial: that would be to insist on the perfection of the imperfect art of advocacy, not to mention producing chaos in the court house. Rather, the emphasis should be on whether the accused has received a fair trial, which includes the appearance of a fair trial.

In this chapter, I will briefly review the history and utility of empiricism and then will review the results of my own empirical study. I conducted this study to verify my hypothesis that the *Strickland*⁴⁸⁷ test, as adopted in *B (GD)*,⁴⁸⁸ is too restrictive and makes it very difficult for an accused to prove that their counsel was ineffective.

B. Empiricism Research Overview

1. Introduction to the Historical Roots of Empirical Legal Studies

Empiricism refers to the idea that understanding truth should be based on experiments, with the word “empirical” referring to evidence about the world based on observation of experience.

Thus, the truth is what can be shown and experienced; it is not just a theory.

⁴⁸⁶ *Supra* note 4.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Supra* note 10.

Empiricism has to do with the epistemological problem of the nature of knowledge. It seeks to answer these philosophical questions: What is knowledge, what are the sources of knowledge, and how are they acquired? As a theory, it is as old as philosophy itself.⁴⁸⁹

To quote Felicity Bell,⁴⁹⁰ “empiricism includes quantitative analysis that usually involves statistics. Empirical methods may be archival, such as analyzing court files or records.”

Empirical Legal Studies (ELS) is a refined version of empiricism, dealing with questions of law and the ability to know what law is. It is best described by Oliver Wendell Holmes:

You will find some text writers telling that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man, we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁴⁹¹

Thus, legal empiricism grew into a discipline of its own. But not entirely alone.

Empirical legal scholarship (ELS) had its beginning in the social sciences, economics and statistics. These disciplines have a long experience with data collection and interpretation with most of the early legal scholarship being conducted by non-legal academics. In fact, the first five conferences on ELS were run by social scientists, including academics from such diverse disciplines as psychology and history.⁴⁹²

⁴⁸⁹ “Epistemology is the philosophical study of the nature, origins, and limits of human knowledge. The term is derived from the Greek episteme (“knowledge”) and logos (“reason”), and accordingly the field is sometimes referred to as the theory of knowledge. Epistemology has a long history within Western philosophy, beginning with the ancient Greeks and continuing to the present.” Avrum Stroll, A.P. Martinich. Online <<https://www.briannica.com/topic/epistemology>>

⁴⁹⁰ Felicity Bell “Empirical Research in law” (2016) 25 (2) Griffith Law Review 262.

⁴⁹¹ “Path of Law” 10 Harvard Law Review (1897) 457 at approx. 461.

⁴⁹² Theodore Eisenberg, “*The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*” (2011) Cornell Law Faculty Publications 1713 at 1719-20.

The legitimacy of empirical legal studies is accepted, more or less, for “a core of principles that seems indisputable; it is better to have more systematic knowledge of how the legal system works rather than less, regardless of the normative implications of that knowledge.”⁴⁹³ Furthermore, as Eisenberg says, “The pursuit of systematic knowledge is, I think, what makes ELS studies so often attractive to the interest of policy makers and the media.”⁴⁹⁴ It is easier to advocate changing the “old way” into the “new way” without knowing what the “old way” is in fact, and not in theory. To do otherwise would result in our reformers and law makers thrashing around in the dark trying to guess what needs changing and what does not. Empirical data is, more often than not, illuminative of what is working and what is not in our legal system; this information can only help its evolution.

Empirical legal studies also act as a bridge between the academy and legal profession. Statistics reveal what the court is doing in fact, rather than what they are saying they are doing, and this information is easily accessible to the bar and the judiciary. Oftentimes, articles about theory or jurisprudence are dense and difficult to read, which has led one scholar to observe that arguably the “law faculty now [writes] for other law faculty rather than for the judiciary and practising bar.”⁴⁹⁵

As Christina Boyd, in “*In Defense of Empirical Legal Studies*” writes, “ELS scholarship holds great potential for influencing the legal world. Empirical methods are not the only way to study and research the law, but they do provide an invaluable way.”⁴⁹⁶ Also, Craig Nard observes, “Empirical scholarship speaks directly to those who are most profoundly involved in our legal institutions, by furnishing the profession with a compass in our sometimes foggy legal

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Robert M Lawless, “*What Empirical Legal Scholars Do Best*”, 2015 87 Temple Law Review 711 at 714.

⁴⁹⁶ 63 Buffalo Law Review 363 at 377

waters.”⁴⁹⁷ It is important that the profession be empowered with this information, since law is not only created by the executive branch.

An excellent example of an empirical study revealing that what really happens in court room is often different than what we think should be happening is found in “*Judicial Review of Refugee Determination: The Luck of The Draw*.”⁴⁹⁸ Sean Rehaag, after completing his data analysis, concluded:

The most remarkable finding of the study is the enormous variation in the leave grant rates of judges in perfected applications brought by refugee claimants...For example, Campbell J granted leave in 77.97% of the applications he decided, whereas Crampton J (now the Chief Justice) granted leave only 1.36% of the time.⁴⁹⁹

This dramatic study provides the bar and the bench with information that would otherwise be unattainable. The pattern of judge’s propensities may have been suspected by experienced members of the bar that practise in this area of law, but Rehaag’s study confirms that these are not just anecdotes. The law cannot change on the basis of the bar’s “feelings” any more than, for example, medical practices can. Both need “the science” to justify the maintenance or the change of a system. Rehaag’s study provides hard evidence that the practice of judicial reviews of refugee claims must be changed. Without the empirical study, the claim cannot be made so forcefully.

Another example of an empirical legal study is that of James Stribopoulos⁵⁰⁰ and Moin A. Yahya: “*Does a Judge’s Party of Appointment or Gender Matter to Case Outcomes?: An*

⁴⁹⁷ “*Empirical Legal Scholarship: Restablishing a Dialogue Between the Academy and Profession*” (1995) Faculty Publications Paper 341 at 349.

⁴⁹⁸ Sean Rehaag, 2012 38 *Queens’s Law Journal* 1. See the follow up paper, online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249723>

⁴⁹⁹ *Ibid* at 12.

⁵⁰⁰ He was appointed to the Ontario Court of Justice on September 23, 2013.

*Empirical Study of the Court of Appeal For Ontario.*⁵⁰¹ The authors studied Ontario Court of Appeal decisions from 1990 to 2003: a total of 4,906 cases. The cases were sorted into criminal and non-criminal categories. The authors made a number of conclusions regarding a variety of public and private cases and, not surprisingly, given the title, considered whether verdicts were influenced by gender or political appointment. One of the most interesting conclusions concerns the *Charter*⁵⁰² claims where the accused was successful and the charge or charges were dismissed:

All-male mixed party of appointment panels affirmed the decisions 73 % of the time, whereas the presence of a female judge on a mixed-party of appointment panel raised the rate of affirmation to 80%. In cases where the remedy granted at trial was a stay of proceedings, mixed gender panels affirmed the result 26 % of the time, whereas all-male panels did so only 12 % of the time. These results suggest that female judges are more receptive to Charter claims⁵⁰³

After considering these observations, and others, the authors advocate that greater attention be given to balancing the gender composition of the appeal panels.⁵⁰⁴ Again, this is another example where empiricism reveals the unexpected. The authors in this study explain the value of empirical studies best when they conclude:

Empirical legal research in Canada is in its relative infancy. Arguably, the most important lesson that emerges from this study is that long-standing assumptions that currently undergird our legal system are in need of empirical evaluation. It is the job of researchers to infuse legal and policy debates in Canada with the empirical knowledge that is required if our institutions are to evolve and mature. Gaining that knowledge and effecting change is essential if we are to have a legal system of which all Canadians can be proud.⁵⁰⁵

⁵⁰¹ 45 Osgoode Hall LJ 315 (2007)

⁵⁰² *Supra* note 2.

⁵⁰³ *Supra* note 501 at 352.

⁵⁰⁴ *Ibid* at 363.

⁵⁰⁵ *Ibid*.

3. Paucity of Empirical Research

Notwithstanding the apparent efficacy of empiricism, there is still a minimum amount of scholarship. There are many reasons why this is so. Professor Michael Heise in his article, “*The Importance of Being Empirical*” provides a number of reasons.⁵⁰⁶

a. It is hard work

Although empirical study is much less onerous now, its history reveals that it required “access to resources, such as data, specialized computer systems and software, as well as reintegration with like-minded colleagues who are usually found in other university schools and departments,” resources which were simply unavailable in the past. To put it another way, although there may have been a will to do empirical studies, there was not an easy way to do them.

For example, in the Rehaag example above,⁵⁰⁷ the study of refugee determination rates, the author describes the arduous process he undertook creating a computer program that collected all of the cases, sorted by categories, from the dates of 2005 to 2010, producing a database of 40,334 cases. They were further sorted according to whether they were refugee determinations, whittling the database down to 23,047, which were then manually sorted by research assistants.⁵⁰⁸ The process was exhausting and depended on the contributions of many assistants. In fact, the study took about two years and the help of twelve research assistants and

⁵⁰⁶ Michael Heise, “*The Importance of Being Empirical*” 26:4 *Pepperdine Law Review* 808 at 816-824.

⁵⁰⁷ *Supra* note 498.

⁵⁰⁸ *Ibid* at approx. 16.

volunteer law students. The former at a cost of \$3,000 and the latter, if paid, would have cost \$10,000-15,000.⁵⁰⁹

b. There is a lack of training in empirical studies in university law schools.

Perhaps most important is that most law professors do not possess the requisite training or background that most sophisticated statistical work requires. As Heise observes:

Fewer still possess the inclination and energy to acquire, update, or re-tool their research skills or analytical repertoire....If today only a small number of law schools offer a single course in statistics or research design – required staples in many graduate social science programs – even fewer did so years ago when many of today’s law professors were law students....To offset this gap in expertise, law professors could collaborate with other scholars who possess experience and expertise in empirical research. Collaboration is a well-established norm in most academic disciplines, especially in the social and hard sciences. Curiously, however, norms surrounding many legal scholars – in stark contrast to other academic research...do not emphasize collaboration. Despite a tradition of scholarly collaboration in many other academic disciplines, law professors typically conduct their legal scholarship themselves.⁵¹⁰[Footnotes omitted.]

Additionally, there are relatively few law professors in Canada who feel qualified to supervise graduate work using empirical methods. It also takes more time than (a majority of) other types of research.⁵¹¹

Hopefully, this trend for legal scholars to conduct scholarship themselves is going by the wayside. In one relatively recent empirical study,⁵¹² the authors admit that they consulted with a graduate student (presumably in statistics, but it is not clear) to test that their data was not the result of random chance.

⁵⁰⁹ Personal email with Professor Rehaag, May 15, 2019.

⁵¹⁰ *Supra* note 506 at 817.

⁵¹¹ *Supra* note 509.

⁵¹² Craig Jones, Micah B. Rankin, “*Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada*” (2014) Osgoode Legal Studies Research Paper Series 81. At 17.

c. There is the possibility of falsification through replication.

Creating empirical research is a vulnerable enterprise. Since empirical research can be proven to be wrong, say by some error in data set miscalculation, it is a riskier form of scholarship. By contrast, although theoretical scholarship can be criticized, it can never be definitively proven wrong. Such is not the case with an empirical study, since the data can be proven incorrect. Thus, the empiricist takes a risk with their research, a risk that is not present when writing about theory.

Although there are today easier ways to generate data, there are still obstacles to be met. Since researchers sometimes manipulate data (as a small example, the rounding up or down of numbers), or make discretionary judgements, or just commit plain human errors, mistakes will happen, notwithstanding the researchers' caution. Again, there isn't this risk in writing about theory.

d. Empirical scholars lack prestige.

Because there has not been a tradition of empirical studies, partly because of inexperience and lack of training, theoretical and dogmatic studies are seemingly more highly valued in law schools. The theoretical scholars have become legal role models, not the empirical scholars, perpetuating the devaluation of empirical studies. Furthermore, there is the old, or obsolete as some may argue, idea that "in order to get the richest rewards available with the modern legal academic community a professor has to do theory."⁵¹³

⁵¹³ *Supra* note 506 at 811, citing Richard A. Posner, "Against Constitutional Theory" 73 NYUL Rev 1 at 10.

For example, Nard performed an empirical study⁵¹⁴ to demonstrate other reasons why there has been a shortage of empirical research work. Thirty five percent of tenured professors said such scholarship was not viewed favorably for tenure, whereas twenty five percent of the non-tenured professors agreed.⁵¹⁵ This puts a different light on the paucity of empirical studies; it will not help you get tenure. So the most senior professors, who often lack the tradition and training to perform empirical research themselves, are biased against the ones doing empirical research. Why, then, would anyone devote themselves to performing empirical research?

Despite the traditional bias against empirical research, it seems indisputable to me that such research is invaluable in the analysis of certain legal issues. I will now put that idea to the test with my own.

VII. METHODOGY

A. The Lists

I conducted an empirical study, the first of its kind, to test my hypotheses: that the test elucidated in *Strickland*⁵¹⁶ and *B (GD)*⁵¹⁷ sets the bar to prove ineffective assistance too high. Thus, appeals based on these claims would be rare and their successful rate would be rarer still. My time frame was 2000, the year *B (GD)*⁵¹⁸ was decided, to the end of 2018, the endpoint selected for this thesis. I utilized two search engines: WestlawNext Canada (WL) and LexisNexis Canada (Quicklaw or QL).

⁵¹⁴ *Supra* note 497.

⁵¹⁵ *Ibid* at 363.

⁵¹⁶ *Supra* note 4.

⁵¹⁷ *Supra* note 10.

⁵¹⁸ *Ibid*.

Thomson Reuters WestlawNext Canada, or Westlaw, describes itself as an online legal research service for lawyers and legal professionals that provides access to 33,000 classifications under 55 legal topics from the Canadian Abridgment. It is a subscription service. LexisNexis Quicklaw Canada, which is the competitor of WestlawNext Canada, is known as Quicklaw. It is also an online research subscription service. While they each purport comprehensiveness, I found there was an imperfect overlap: one service had one list of cases, which mostly, but only mostly, reproduced the list of the other.

Because the overlap between these two search engines was imperfect, I chose to search both sites and cross-reference the generated lists so that every given case was counted, but only counted once. Not surprisingly, there were many cases that appeared in both of the two sites, but a few appeared on only one site.

I restricted my search to Canadian appellate cases from April 2000, the month the *B (GD)*⁵¹⁹ reasons were delivered, to December 31, 2018. I determined that appellate cases were cases that made law, and were thus more important than provincial or superior court cases. Because I was only studying *Charter*⁵²⁰ cases, I restricted my search to criminal law cases: the *Charter*⁵²¹ is not typically applicable in non-criminal cases. Consequently, I did not search for any Federal Law cases, since their jurisdiction is restricted to non-criminal cases.⁵²² These were my only starting parameters.

⁵¹⁹ *Supra* note 10.

⁵²⁰ *Supra* note 2.

⁵²¹ *Ibid.*

⁵²² Section 17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. *Federal Court Act* RSC 1985 c F-7.

I read all of the Canadian criminal appellate cases in the two services that judicially considered *B (GD)*.⁵²³ Again, I cross-referenced the two searches, the first on Westlaw, the second on Quicklaw, so as to get a complete list with no redundancies, but with each case counted. Some of the cases that cited *B (GD)*⁵²⁴ were irrelevant for my purposes. See Appendix C for the list of excluded categories and the cases within each category. For example, in *R v Blais*,⁵²⁵ the Court addressed law surrounding the appellant's application to extend the time to file a notice of appeal. That was the thrust of the case: *B (GD)*⁵²⁶ was mentioned in a single statement with no discussion or finding. Thus, this case was excluded since the case added nothing to the jurisprudence.

Similarly, I excluded *R v McPherson*⁵²⁷ where the appeal court considered the appellant's application for judicial interim release. One of the considerations in whether the Court should consider granting bail is if the accused has raised an arguable ground of appeal. The Court concluded that the appellant had met the threshold for judicial interim release pending appeal by finding, but not at all considering whether the appellant had raised ineffectiveness of counsel as being an arguable case. Again, this case was excluded because the Court did not rule on whether the claim of ineffective counsel was or was not established.

The most common kind of case I excluded was one in which the appellant seeks to introduce fresh evidence. *Strickland*⁵²⁸ requires that a factual basis for allegations of an ineffective counsel claim be made. While it is possible for the court to proceed only on the record, usually the court insists that the factual basis be commenced by an application for fresh

⁵²³ *Supra* note 10.

⁵²⁴ *Ibid.*

⁵²⁵ 2016 ABCA 284

⁵²⁶ *Supra* note 10.

⁵²⁷ 2012 ABCA 246.

⁵²⁸ *Supra* note 4.

evidence. The appeal court has the jurisdiction to receive evidence under s. 683 of the *Criminal Code*.⁵²⁹ Ordinarily, for the applicant to introduce fresh evidence at the appellate level, four criteria must be proven: (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 as strict in a criminal cases as in civil cases; (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.⁵³⁰

In *Palmer*,⁵³¹ the Court clearly confirmed that the first criteria, that the evidence was not found despite the due diligence of counsel, is not as strictly required in criminal cases as it is in civil cases. This is especially true in cases where the accused is alleging ineffective counsel. By its very nature, evidence of wrong-doing on the part of counsel is not something that is discoverable at trial. *B (GD)*⁵³² confirmed *Palmer*⁵³³ and thus became a precedent for cases where an appellant wishes to proffer fresh evidence in cases where ineffective counsel is not being alleged. In other words, *B (GD)*⁵³⁴ is cited as a precedent in two situations: First, as a case where the claim of ineffective counsel is analysed; and, secondly, as a Supreme Court of Canada case that confirms *Palmer*.⁵³⁵

Thus, in my searches, I found two kinds of cases: the majority of references to *B(GD)*⁵³⁶ for what it says about ineffective counsel claims and the minority of references to

⁵²⁹ *Supra* note 86.

⁵³⁰ *Supra* note 10 at 16

⁵³¹ *Supra* note 389.

⁵³² *Supra* note 10.

⁵³³ *Supra* note 389.

⁵³⁴ *Supra* not2 10.

⁵³⁵ *Supra* note 389.

⁵³⁶ *Supra* note 10.

*B(GD)*⁵³⁷ for the proposition that the ordinary first requirement of due diligence is not strictly required in criminal cases. I discarded these latter cases.

Other cases that cited *B (GD)*⁵³⁸ were also culled from my master list. For example, some of the cases citing *B (GD)*⁵³⁹ distinguished section of 10(b) of the *Charter*⁵⁴⁰ from subsection 11(d), such as *R v Edmonton*.⁵⁴¹ Section 10 (b) of the *Charter*⁵⁴² stipulates that “Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right” and section 11 (d) maintains 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 an impartial tribunal.”⁵⁴³

In *R v Edmonton*,⁵⁴⁴ the Court dealt with the situation where a person under arrest is allowed the opportunity to contact counsel. The Court implicitly found that Section 10 (b)⁵⁴⁵ of the *Charter* is more limited than section 11(d)⁵⁴⁶ in that it says nothing about the quality of the legal information an arrested person has. The police have to provide the opportunity to contact counsel, but the police do not and cannot inquire about the correctness of the advice. The only thing that matters is the opportunity and whether the arrested person is satisfied with the advice. There are additional cases citing *B (GD)*⁵⁴⁷ that confirm the “right to counsel,” but clearly these

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Supra* note 2.

⁵⁴¹ 2013 ABCA 318.

⁵⁴² *Supra* note 2.

⁵⁴³ *Supra* note 4.

⁵⁴⁴ *Supra* note 541.

⁵⁴⁵ *Supra* note 2.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Supra* note 10.

cases are more about the rights under s. 10 (b)⁵⁴⁸ than whether counsel has provided effective assistance before and during the trial of an accused.

Some cases that cite *B (GD)*⁵⁴⁹ do not deal with effectiveness of counsel; rather the case is cited in “Right to Legal Aid”⁵⁵⁰ or to a *Rowbotham*⁵⁵¹ application. Not surprisingly, *B (GD)*⁵⁵² is cited in these instances for its more general description of “right to counsel.” This thesis does not address the difficult subject of whether an accused has a “right to counsel.” Although it sounds like the two subjects – right to counsel and right to effective counsel – are related, the history, philosophy, case law and jurisprudence are separate and very much different. This is why I eliminated cases citing *B (GD)*⁵⁵³ as a general proposition that an accused has a right to counsel.

I also created a master list of cases that cited “ineffective” & “counsel”.⁵⁵⁴ These were cases where both the word “ineffective” and “counsel” were present. Not surprisingly, there were numerous false positives. For example, cases that dealt with “ineffective counselling” were

⁵⁴⁸ *Supra* note 2.

⁵⁴⁹ *Supra* note 10.

⁵⁵⁰ Erika Heinrich, “*Canadian Jurisprudence Regarding the Right to Legal Aid Report*.” (2013) Online <<https://www.lrwc.org/canadian-jurisprudence-regarding-the-right-to-legal-aid-report/>> Ms. Heinrich’s conclusion is that “Canadian courts have rejected arguments that there is a general constitutional right to legal aid.”

⁵⁵¹ 25 OAC 321; 41 CCC (3d) 1; 63 CR (3d) 113; 35 CRR 207; [1988] CarswellOnt 48; [1988] OJ No 271 (QL); 4 WCB (2d) 30. In *R v Rowbotham*, Laura Kononow appealed her conviction on a charge of conspiracy to traffic in hashish. She was denied legal aid, but found herself unable to personally fund counsel for the 12 month trial. In the end, the court stated: “To sum up: where the trial judge finds that representation of an accused by counsel is essential to a fair trial, the accused, as previously indicated, has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ one. Where the trial judge is satisfied that an accused lacks the means to employ counsel, and that counsel is necessary to ensure a fair trial for the accused, a stay of the proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the Charter where the prosecution insists on proceeding with the trial in breach of the accused’s Charter right to a fair trial. It is unnecessary in this case to decide whether the trial judge in those circumstances would also be empowered to direct that Legal Aid or the appropriate Attorney-General pay the fees of counsel.” at 170.

⁵⁵² *Supra* note 10.

⁵⁵³ *Ibid.*

⁵⁵⁴ *Supra* note 30.

caught in my search. Consequently, I read all of the cases and discarded the false positives.

Because of their number and type, I created only a list of cases that were relevant to my search.

From my master list of my two different searches, from QL and WL, cases that cited *B (GD)*⁵⁵⁵ and “ineffective” & “counsel”,⁵⁵⁶ I recorded cases in which the court had found that counsel was ineffective and ordered a new trial. (Of course, recording positive cases also reveals the number of cases where counsel was found effective.) Specifically, the accused had first overcome the performance prong; that is, the accused had rebutted the presumption of counsel’s competence and overcome the deference afforded to counsel’s decisions, showing that counsel had failed to provide assistance that was consistent with that of a reasonable professional. Secondly, the accused had proven the prejudice prong: that is, assuming that the incompetence was proven, the verdict would have been different had the incompetence really occurred. If the accused had been able pass both prongs of the *Strickland* test,⁵⁵⁷ the appeal court would order a new trial. The order of a new trial was the only remedy: there was no order of costs of reduction of sentences.

B. A Word of Caution

One of the major criticisms of empiricism is that the observations are only as good as the data. In counting cases, I am cognizant that the only cases I counted are the only ones that were reported. Thus, I am dependent on the cases that the two services saw fit to print or rather were submitted to be included in the data base. Plus, my search excluded all of the Superior Court decisions, which are trial court decisions or the appeals of trials that are dealt with in the provincial courts. I

⁵⁵⁵ *Supra* note 10.

⁵⁵⁶ *Supra* note 30.

⁵⁵⁷ *Supra* note 4.

also did not include any non-criminal appeals, since for the most part the *Charter*⁵⁵⁸ does not apply to them.

Also, the reported cases are the appeals that were filed; it is unknown how many cases, potentially successful or not, there are where the appellant was not able to afford an appeal. One of the biggest costs (besides the counsel's fees), is the transcript, which is the typed copy of all of the evidence heard in the trial,⁵⁵⁹ and is necessary for every appeal. These transcripts, depending on the length of the trial, can easily run weeks and cost hundreds, if not thousands, of dollars. For the accused with means that shouldn't be a problem, but for an accused who has failed to obtain a legal aid certificate the cost is prohibitive. Thus, the cases I counted were the only ones in which the appellant had the private means to bring the matter to court or were granted a Legal Aid Certificate, which provides funding for counsel and the cost of the transcripts. There is no way to know how many accused failed to get Legal Aid: presumably, compelling cases would pass the merit⁵⁶⁰ test and the appeal would be funded, but this caution must be kept in mind in considering my results.

These are three lists that summarize my empirical findings. I have counted only those cases where the court ruled on whether counsel was ineffective or not. In other words, cases that cited *B (GD)*⁵⁶¹ as a precedent for fresh evidence for example (and the other cases listed in Appendix C) were excluded.

⁵⁵⁸ *Supra* note 2.

⁵⁵⁹ During a trial, a microphone is placed at both counsel's desks, the judge's desk and in the witness box and everything said during the trial is recorded. This is why lawyers are occasionally heard to say, "For the record, the witness is reading her police statement." It is also why the court is called a "court of record." Transcripts are prepared only when ordered. They are produced by a transcriptionist who types what the computer recording has recorded.

⁵⁶⁰ *Supra* note 463.

⁵⁶¹ *Supra* note 4.

C. Results

These are the three lists that summarize my empirical findings. I have counted only those cases where the court ruled on whether counsel was ineffective or not. In other words, cases that cited *B (GD)*⁵⁶² as a precedent for fresh evidence (and the other cases listed in Appendix C) were excluded.

Table 1 shows the number of criminal appeals heard in each province from April 2000, to December 31, 2018: 23,694. It also shows the number of cases on Quicklaw and Westlaw that judicially considered *B (GD)*⁵⁶³ and were not excluded, as set out in Appendix C. As can be seen, the number of cases that considered *B (GD)*⁵⁶⁴ is slightly over one percent of the total number of criminal appeals. Smaller still is the number of successful appeals.

In Table 2, the number of cases from the same time frame that cited both ineffective & counsel was 135, again about one per cent of the total criminal appeals. The number of successful appeals was 20.

In Table 3, the number of cases of that considered *B (GD)*⁵⁶⁵ and ineffective counsel was 315, with a total successful appeals of 50. This works out to slightly less than 3 cases per year for the whole country.

⁵⁶² *Supra* note 10.

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

1. Table 1⁵⁶⁶

Province	# Criminal appeals	QL & WL cases that considered B (GD)	Success
Alta	1,691	10	1
BC	2,337	24	2
Mb	790	7	2
NB	820	18	3
NFL	330	7	2
NWT	56	1	0
NS	617	25	3
NUN	27	0	0
ON	5,119	43	7
PEI	52	31	8
QUE	1,081	31	8
SK	701	14	2
YK	73	0	0
TOTALS	13,694	181	30

⁵⁶⁶ Table prepared by Jill Duncan May 2019.

2. Table 2⁵⁶⁷

Province	# Criminal appeals	QL & WL cases that cited ineffective & counsel	Success
Alta	1,691	7	1
BC	2,337	17	2
Mb	790	5	1
NB	820	18	3
NFL	330	0	0
NWT	56	1	0
NS	617	7	1
NUN	27	0	0
ON	5,119	57	9
PEI	52	0	0
QUE	1,081	33	6
SASK	701	4	1
YK	13	1	0
TOTALS	13,694	135	20

⁵⁶⁷ *Ibid.*

3. Table 3⁵⁶⁸

# Criminal Appeals	QL/WL B (GD)	QL/WL INEFFECTIVE COUNSEL	TOTAL SUCCESS
13,694	181	135	50

This data stands in opposition to the principle of *ubi jus, ibi remedium*.⁵⁶⁹ How can it be said that every person has the constitutional right to effective counsel but then offer only a remedy to an average of less than three people a year for the whole country? What explains this paltry result? One explanation is that criminal lawyers are just better than we think they must be. But does this make intuitive sense? If only the three examples of the post-*B (GD)*⁵⁷⁰ cases of *Prebanti*,⁵⁷¹ *Davies*,⁵⁷² and *LHE*,⁵⁷³ are considered, these are three cases where I argue that counsel was clearly ineffective, and yet their performance was found acceptable, suggesting that there is something wrong with how ineffectiveness is determined.

There are three possible explanations: accuseds are discouraged by their appellate counsels to proceed with a claim because success is rarely achieved. This no doubt has affected the number of appeals filed. Given the low success rate, an accused must invest the money in an appeal or apply for legal aid. Although the accused is usually incarcerated after an unsuccessful trial, they qualify financially for legal aid. However, there is a merit requirement⁵⁷⁴ before legal aid agrees to pay counsel; given the low number of success it is unlikely that legal aid will fund every appeal.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Supra* note 14.

⁵⁷⁰ *Supra* note 10.

⁵⁷¹ *Supra* note 408

⁵⁷² *Supra* note 420.

⁵⁷³ *Supra* note 430.

⁵⁷⁴ *Supra* note 463.

The second explanation for why there are so few successful appeals is that the *Strickland*⁵⁷⁵ test is too restrictive. In other words, there are cases in which counsel failed their accused, but the court, cleaving to the *Strickland*⁵⁷⁶ test, declined to allow the appeal.

Is there another explanation, namely, that the courts prefer the status quo and are reluctant to remedy a denied *Charter*⁵⁷⁷ right? Is the right to effective counsel treated the same as other *Charter*⁵⁷⁸ rights? For example, in *R v Therens*⁵⁷⁹ the accused lost control of his car and collided with a tree. An attending officer demanded breath samples for analysis to determine if the accused was driving with blood alcohol over .08 %. The accused accompanied the officer and provided the samples which revealed he was over the legal limit. On appeal, counsel argued that the accused had been denied his right to be informed of the right to retain and instruct counsel, pursuant to s. 10 (b) of the *Charter*.⁵⁸⁰ The Supreme Court concluded that since the accused's rights were denied, all evidence that flowed from that denial was ruled inadmissible pursuant to s. 24 (2).⁵⁸¹ Thus, the certificate of the breath analysis, which was proof of the offence, was excluded and the accused was therefore acquitted, because to do otherwise would bring the administration of justice into disrepute. Also, the court concluded that if an accused is denied the right under s. 10 (b) to contact counsel upon arrest and makes inculpatory comments, it would be to: "Invite police officers to disregard Charter rights of the citizens and to do so with assurance of impunity. If s. 10 (b) of the Charter can be offended without any statutory authority for the police conduct here in question and without the loss of admissibility of evidence obtained by such a breach then s. 10 (b) would be stripped of any meaning and would have no place in

⁵⁷⁵ *Supra* note 4.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ [1985] 1 SCR 613

⁵⁸⁰ *Supra* note 4.

⁵⁸¹ *Ibid.*

the catalogue of ‘legal rights’ found in the Charter.”⁵⁸² The Court’s analysis that to include the evidence in violation of s. 10 (b) would strip the meaning of that section of the *Charter*⁵⁸³ is consistent with *ubi jus, ibi remedium*.⁵⁸⁴ The same analysis should apply to the right to effective counsel as guaranteed by s. 7 and s 11(b), or in other words the right to a fair trial: without a remedy the right “would be stripped of any meaning and would have no place in the catalogue of ‘legal rights’” found in the *Charter*.⁵⁸⁵ The Court does not go through the process of considering whether the verdict would still be reliable.

Similarly, when there has been an unlawful search under s 8 of the *Charter*,⁵⁸⁶ the court will exclude the evidence, if the admission of the evidence would bring the administration of justice into disrepute, and order a new trial or acquit the accused if there is nothing remaining in the crown’s case. This occurred in a case called *R v Reeves*⁵⁸⁷ where the Supreme Court excluded evidence of child pornography possession on a computer shared by two spouses because the computer was seized without a warrant.

D. Bias of the Judiciary?

There may be a hint of truth to the suggestion that the judiciary is biased against ineffective counsel appeals when we consider Justice Kelly’s comments in *R v Elliott*:⁵⁸⁸

I consider it most unfortunate that any counsel, carried away by his enthusiastic support of his client’s cause, should permit himself, by reason of his client’s instructions, to make allegations inferring unjust conduct on the part of the Court, or unprofessional conduct on the part of brother solicitors without first satisfying himself by personal investigations or inquiries that some foundation, apart from his client’s instructions, existed for making

⁵⁸² *Ibid* at 11.

⁵⁸³ *Supra* note 4.

⁵⁸⁴ *Supra* note 14.

⁵⁸⁵ *Supra* note 2.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ 2018 SCC 56.

⁵⁸⁸ (1975) 28 CCC (2d) 547.

such allegations. His duty to his client does not absolve a solicitor from heeding his duty to the Court and to his fellow solicitors.⁵⁸⁹

This thought is countered by Asher D. Grunis in “*Incompetence of Defence Counsel in Criminal Cases.*”⁵⁹⁰

The real problem seems to be the reluctance of those involved in the criminal process to expose the ineffective performance of counsel. Lawyers and judges suffer from a variety of inhibitions which affect their readiness to expose the mistakes of counsel, and unless there is some change in the attitude of the Bar and the judiciary, the issue would remain in low visibility. It is quite ironic that judges recognize that they [i.e. the lower court judges] themselves are fallible, as evidenced by the fact that a convict can win an appeal, but they still consider the members of the Bar as superhuman, incapable of committing mistakes.⁵⁹¹

One counsel in British Columbia, a Mr. Goldberg, challenged this “cautious approach,” typified by Judge Kelly’s statement, saying that the twin approaches of “the deference afforded to the decisions of JB [trial counsel] and the presumption in favor of competence are inconsistent with the public interest in ensuring that accused persons receive effective assistance of counsel.”⁵⁹² Furthermore he argued, “[T]hat there was a conspiracy between the bar, the Law Society of British Columbia and the courts to cover-up misconduct such as he alleges against [the trial counsel].”⁵⁹³

Counsel was reported to the Law Society of British Columbia for these comments, , and they reiterated their his concern that counsel stated “there is among the Courts, the Law Society and the ‘elite of the legal profession’ a conspiracy to protect lawyers.”⁵⁹⁴ The Law Society noted that the lawyer now took exception to the use of the word “conspiracy” and preferred “to

⁵⁸⁹ *Ibid* at 549.

⁵⁹⁰ 1973-74 16 CLQ 288.

⁵⁹¹ *Ibid* at approx. 318.

⁵⁹² *R v Dunbar et al*, 2003 BCCA 667; 191 BCAC 223; [2003] BCJ No 2767.

⁵⁹³ *Ibid* at 30.

⁵⁹⁴ *Goldberg (Re)* 2007 LSBC 40.

describe the relationship among the Law Society, the legal profession and the Courts as being that of a ‘Mutual Admiration Society.’”⁵⁹⁵

In conclusion, the adoption of the *Strickland*⁵⁹⁶ test before and after *B (GD)*⁵⁹⁷ is too restrictive and sets up roadblocks for the accused which are not fair. In this chapter, I have reviewed the history and utility of empirical research and noted that there is no known research on the issue of ineffective assistance of counsel. I have outlined my hypothesis and methodology. I also included a caution that my results must be tempered by the data reported plus the numbers of appeals that were perhaps not included due to the costs that may have skewed the data.

In the next Chapter, I will review the path which establishes that the right to the effective assistance of counsel is a *Charter*⁵⁹⁸ right. I will then argue that the courts should abolish the *Strickland*⁵⁹⁹ test and treat the right to effective counsel according to Canada’s constitutional jurisprudence, including the right for the aggrieved accused to seek a remedy under section 24(1).⁶⁰⁰ I will argue that our courts, instead of relying on a case that was based on the American Constitution,⁶⁰¹ should treat these cases as *Charter*⁶⁰² cases for two reasons: one, the *Charter*⁶⁰³ is Canada’s Supreme Law and represents the Canadian ethos and two, because the *Charter*⁶⁰⁴ is held in high regard worldwide. If the court chooses to follow a constitution-based approach, then

⁵⁹⁵ *Ibid* at 26.

⁵⁹⁶ *Supra* note 4.

⁵⁹⁷ *Supra* note 10.

⁵⁹⁸ *Supra* note 2.

⁵⁹⁹ *Supra* note 4.

⁶⁰⁰ *Supra* note 2.

⁶⁰¹ *Supra* note 1.

⁶⁰² *Ibid*.

⁶⁰³ *Ibid*.

⁶⁰⁴ *Ibid*.

it should choose the Canadian Constitution. I will propose an alternative to the *Strickland*⁶⁰⁵/*B (GD)*⁶⁰⁶ approach to ineffective assistance of counsel claims. After that discussion, I will make some suggestions regarding the Law Society's role in protecting the public from ineffective counsel.

⁶⁰⁵ *Supra* note 4.

⁶⁰⁶ *Supra* note 10.

CHAPTER FOUR

VIII. INTRODUCTION

In this Chapter, I will argue for the rejection of the *Strickland*⁶⁰⁷ test for several reasons: *Strickland*⁶⁰⁸ was decided in a partisan context and constitutional rights ought not to be; the factual record in *Strickland*⁶⁰⁹ is incomplete, skewing the verdict towards finding counsel competent when he wasn't; Justice O'Conner arbitrarily imposed a competence presumption and the requirement that appellate counsel identify specific examples of prejudice occasioned by specific acts of incompetence; it introduced a vagueness of the reasonableness standard by which effective counsel are compared; and it created a legacy of *Strickland*⁶¹⁰ by which its faults are highlighted. I argue, instead, that the courts should apply an approach based on the *Charter*,⁶¹¹ which reflects Canadian values and which represents the highest law in this country. It is a *Charter*⁶¹² that has found respect around the world for its emphasis on human rights. It also has a built-in remedy section, section 24 (1),⁶¹³ which can guide the court in addressing a remedy when the right to a fair trial is violated.

This new test would involve a performance component and a trial fairness component. First, the court would consider the evidence that counsel failed to meet the standard of a reasonable professional. This would be objectively determined. The strong presumption in favour of competence would be abolished as unnecessary. The appellant would bear the onus and

⁶⁰⁷ *Supra* note 4.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Supra* note 2.

⁶¹² *Ibid.*

⁶¹³ *Ibid.*

burden of proof to a balance of probabilities. Having proven this, the court will consider the trial fairness component. What this would entail is the court, after considering the deficiencies, deciding whether they are such that the trial can no longer be fair or have the appearance of fairness. The latter is important because it follows the maxim that “justice must not only be done but be seen to be done.”⁶¹⁴ This will reinforce the public respect for the judicial system since it would address a scenario where, for example counsel is drinking all during the trial. The accused would not be bound to tweeze through the evidence and point to individual questions or lack thereof that can be related to counsel’s inebriation. This is the same situation when a judge is seen to be in a conflict of interest; it is unnecessary to study the transcript to show specific examples of conflict, since the judge must be impartial and must appear impartial.

Thus, I propose a new test to replace the *Strickland*⁶¹⁵ test and suggest that one of the components of a remedy is the court having the option to provide the law societies with judgments when the counsel has been found ineffective. So far, the law societies can only respond to claims of ineffective counsel when they are reported to them. I conclude the thesis with reference to my first chapter, in particular affirming the right of every accused to effective counsel, arguing that the right, if denied, requires a remedy to ensure that the right is a real one.

IX. GENERAL CRITICISM OF THE *STRICKLAND*⁶¹⁶ TEST.

While I have criticized the application of the *Strickland*⁶¹⁷ test in subsequent American cases, Justice O’Connor correctly explained what a fair trial is:

[O]ne in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to

⁶¹⁴ [1924] 1KB 256 at 259; [1923] All ER Rep 233.

⁶¹⁵ *Supra* note 4.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.⁶¹⁸ [references omitted]

So her goal was sound, but the way she formulated the test is wrong because it allows ineffective counsel to pass the two pronged test she created. Thus, while Justice O'Connor pays lip service to the meaning of a fair trial, her test creates situations that are often inconsistent with what she says is her goal.

X SPECIFIC CRITICISMS OF THE STRICKLAND TEST⁶¹⁹

A. The Strong Presumption of Competence.

First, O'Connor eliminates the equal playing field between the accused and the counsel by adding in the strong presumption of counsel's competence. Because of this presumption, the accused already has an uphill battle which is not fair or necessary. The presumption of competence is also unique to lawyers; in other professional malpractice suits, the plaintiff only has to prove the four elements of negligence: duty, breach, causation and harm. Malpractice claims against other professionals do not have such a presumption of competence.⁶²⁰ In the case of an appeal based on an allegation of ineffective counsel, the appellant is still obliged to prove that his lawyer did not live up to the standard of a reasonable professional to a balance of probabilities. Whether the lawyer lives up to the standard it should be judged objectively. Once that burden has been met, the appellant has the further requirement to prove that by reasons of his lawyer's ineffectiveness, his trial was unfair, or in other words, the ineffectiveness caused the trial to be unfair or have the appearance of an unfair trial. The latter is true because one of the

⁶¹⁸ *Ibid* at 466.

⁶¹⁹ *Ibid*.

⁶²⁰

legal system's maxims is established in 1924 in *The King v Sussex Justices. Ex Parte McCarthy*: that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."⁶²¹ For example, an impaired lawyer conducting a criminal trial, whether or not there are specific errors committed, does not create the appearance that justice has been done.

Courts must always be concerned about instilling respect for the administration of justice. For example, where the lawyer does not know the law, but the court overlooks that and upholds the guilty verdict, how can the public respect the lawyer, little less the court? Surely the first expectation of a lawyer is that they know the law: how can they provide effective assistance without that? One of the reasons why an accused chooses to be represented by counsel is the belief that the lawyer knows the law and the accused does not. The *Strickland*⁶²² test is too narrow and it requires the accused to prove specific acts of incompetence to cause specific prejudices. In some cases, this requirement is too linear: it should be enough to prove that counsel was drunk during the trial, without having to tweeze through the evidence, looking for questions the lawyer may (or may not) have asked if sober. In other cases where the condition of the lawyer seems unremarkable, specific errors will be identified, but it should be unnecessary to draw a line between that mistake and a specific prejudice. This is especially so when there are multiple errors, and they are considered cumulatively, as proposed herein. When the *Strickland*⁶²³ test is applied, the risk is that a case where counsel is incapacitated or commits multiple errors will be result in unfair verdicts simply because specific errors are not matched up with specific prejudices. For example, in *R v Davies*⁶²⁴ counsel appeared grossly unprepared. But how do you take each error and match it with a specific prejudice? It would require a

⁶²¹ [1924] 1KB 256 at 259; [1923] All ER Rep 233.

⁶²² *Supra* note 4.

⁶²³ *Ibid.*

⁶²⁴ *Supra* note 420.

reconstruction of the whole case: this error affected this decision, that error did not, and so on. Under such a system, a right guaranteed under the *Charter*⁶²⁵ is denied.

B. *Strickland* was decided as part of a political struggle.

The rights of an accused person are too important to be part of a political struggle, as discussed in Chapter One. The right to effective counsel should not be dependent on the compositions of the court of the day, little less an American court of the day. By reducing the accused's right to political fodder, the focus moves away from the importance of the right every citizen is entitled to. *Strickland*⁶²⁶ was decided in a political maelstrom, pitting one partisan court against another. This is one of the reasons Canada should not have adopted the *Strickland* test.⁶²⁷ That battle was not Canada's: Canada has a unique history and political system and should not "piggy back" on the American judiciary squabble. Canada has tried hard not to politicize its judgements; for example the way Canada's Supreme Court members are selected, and the courts should not enter another country's fray.

Constitutional rights ought to be immutable and should survive any political posturing. One of the reasons Canada's Constitution is supreme above all other legislation is that it insists that the rights are more substantial and significant than the laws that come and go depending on the composition of the legislature or the parliament. This is one of the reasons why amending the Constitution is so difficult: section 38 of the *Charter*⁶²⁸ dictates that it takes a resolution from Parliament and the Senate and two thirds of the provinces, representing 50 per cent of the

⁶²⁵ *Supra* note 4.

⁶²⁶ *Ibid.*

⁶²⁷ *Ibid.*

⁶²⁸ *Supra* note 2.

national population, to amend a section of the *Charter*.⁶²⁹ There are three other amending formulae. First, there is section 33,⁶³⁰ the notwithstanding clause, which can also be used to modify the *Charter*,⁶³¹ but it has not been used federally. Secondly, if a Constitutional amendment affects only one province, the amendment can be changed by Parliament and of that province's legislature, according to section 43. Finally, section 41 provides that some parts of the Constitution, including for example, the amendment procedure, can only be changed by all provinces and the two houses of Parliament.

The Canadian Supreme Court is significantly less partisan than the United States Supreme Court. The Court has nine judges all appointed by the Governor-in-Counsel with three judges from Quebec, and traditionally, three from Ontario, two from the Western provinces or Northern Canada and one for the Atlantic provinces. The Minister of Justice, with input from the law societies, assists the Prime Minister in compiling a short list. Neither the provinces nor Parliament have a formal role in the appointment of the judges. There is no official political element to nominations.

In the United States, the President nominates a candidate, inevitably a political ally. The candidate appears before the Senate, all politically elected, and undergoes extensive and public hearings. The candidate is questioned on past decisions and writings and on a number of political

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.* “33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision including in section 2 or sections 7-15 of the Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

⁶³¹ *Ibid.*

and legal issues. As seen in the recent Kavanaugh appointment hearings,⁶³² the procedures can be dramatic, involved and lengthy.

Adam Goldenberg, a lawyer and adjunct professor at the University of Toronto, stated during an interview that a Canadian court is a “lot less political and...the culture of the Canadian Supreme Court of Canada is profoundly different, I’d suggest than the culture of the US Supreme Court...You don’t see the partisanship around judicial appointments here that you do there.”⁶³³ And further, “In the US you would expect highly polarized political issues like that to be decided on 5-4 votes, almost on party line votes like a legislative body. In Canada, it’s much harder to call how an individual judge will vote based on which party put them on the court.”⁶³⁴ For example, Professor Goldenberg observed, “the last government, the conservative government led by Prime Minister Stephen Harper, by the end of his time in office, had appointed seven of the nine judges on the Supreme Court of Canada, and nobody really could tell the difference. The government was still losing appeals on...significant part[s] of the former government’s platform.”⁶³⁵

Thus, the chances are that Canadian cases determining *Charter*⁶³⁶ rights are less political and presumably more consistent with prevailing precedents of earlier courts. Ideally, *Charter*⁶³⁷ cases should not swing back and forth between conservative and liberal. Thus, our system is less partisan than the United States Supreme Court decisions. There is less of a chance as in the

⁶³² Judge Kavanaugh was officially nominated by President Trump on July 9, 2018. After several hearings in front of the Senate Confirmation Committee, including allegations of sexual assault on Christine Blasey Ford, he was finally confirmed on October 6th by the Senate which voted 50- 48.

⁶³³ <https://www.wbur.org/hereandnow/2018/09/14/how-canada-supreme-court-justices>.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

⁶³⁶ *Supra* note 2.

⁶³⁷ *Ibid.*

United States where one bench will pull its judgments to the left or the right, changing the law to reflect who the governing party is.

B. The Factual Record in *Strickland*⁶³⁸ was incomplete.

As discussed in Chapter One, Gallini⁶³⁹ observed that O'Connor J presented an incomplete recitation of the facts in the *Strickland*⁶⁴⁰ case – for example, missing was Tunkey's failure to look for character references, order a pre-sentence or psychiatric report, and his failure to submit an appropriate brief or make effective final submissions. Her finding that he provided effective counsel was not altogether surprising. Why did Justice O'Connor deliberately omit these facts? Is it too cynical to suggest that she did so she could skew the decision to achieve the desired result, in other words to push back against the Warren court's expansion of the rights of the accused? Or more likely, did she simply share her political beliefs with the Burger Court? It is impossible to know which explanation may be the right one, or another one altogether, but the result is that counsel who seemingly had no strategy was found to have none at all and certainly not one which was up to the standard of a reasonable professional. In fact, Mr. Tunkey not only failed to provide effective assistance to Washington, but he essentially failed to provide him with any assistance at all.

D. The Reasonableness Standard is too Vague.

Essentially, Justice O'Conner's performance component can be broken down into three parts: First, there is the strong presumption that counsel was competent. This aspect of the test is illogical and unfair, since it creates an uneven playing field between the trial counsel and the accused. For what reason? Is it to protect the lawyer from allegations of incompetence? It seems

⁶³⁸ *Supra* note 4.

⁶³⁹ *Supra* note 136.

⁶⁴⁰ *Ibid.*

as though it is, since the presumption applies even before an analysis of counsel's decisions has taken place.

The second element is that great deference is to be given to the trial counsel's decisions. This is essentially a restatement of the presumption of competency. Why should great deference be given? The court extends this privilege without knowing anything about the counsel and pre-emptively accepts his or her decisions made in the case as correct. The court should make a finding of competence on the basis of the evidence presented by the appellant, tempered with input from the trial counsel.

Almost every province⁶⁴¹ in Canada has a protocol⁶⁴² whereby trial counsel is to be notified by appellant's counsel, informally, that an allegation of ineffective counsel is being made and the general nature thereof. This is generally subsequent to the requirement that appeal counsel shall be satisfied by the lawyer's investigation or inquiries that some factual foundation exists for the claim of ineffective assistance apart from the instructions of the appellant.⁶⁴³ The trial counsel must provide appellant's counsel with his or her file. A case manager is often put in charge of the appeal, matters of solicitor/client privilege are determined and the trial counsel is invited to provide a response in the form of an affidavit. Cross-examination on the affidavit may take place.

⁶⁴¹ With the exception of Newfoundland and Labrador; Saskatchewan; Alberta; Northwest Territories; Nunavut

⁶⁴² Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario (March 1, 2017); British Columbia Court of Appeal Practice Directive (Criminal Practice Directive 12, November 2013) Nova Scotia Court of Appeal Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel (2012); New Brunswick Court of Appeal Protocol for Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance (February 2014); Prince Edward Island Court of Appeal Protocol for motion for fresh evidence on appeal involving an allegation of ineffective or incompetent trial counsel; Quebec Court of Appeal Form for the Management of an Appeal Alleging Incompetence of Trial Counsel (October 2014); Manitoba Court of Appeal Directive Regarding Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance (January 15, 2016); Yukon Court of Appeal Directive 6: Ineffective Assistance of Trial Counsel (June 1, 2017)

⁶⁴³ In my opinion, this requirement invites the breaching of solicitor-client privilege and arguably interferes with the independence of the bar.

Thus, the court can determine the reasonableness of counsel's representation on the basis of what the appellant alleges and the responses and explanation of trial counsel.

The third feature of the performance component is that the "proper measure of attorney performance remains simple reasonableness under prevailing professional norms."⁶⁴⁴ This is too vague. Justice O'Conner rejected specific guidelines: "No particular set of detailed rules for counsel's conduct can satisfactorily take."⁶⁴⁵ This is unfortunate since guidelines would assist the Court and both trial and appellate counsel. Precedents will help, and the pool will grow as I am advocating that the court determine the Performance Component first. Continuing education programs offered by the Law Society would be of assistance to counsel as well. For example, there should be an educational opportunity for lawyers to learn how to prepare for a criminal trial, to investigate potential witnesses, to educate themselves on the legal issues that will arise in the trial, including immigration issues and to learn which decisions are the accuseds and which belong to the counsel. For example, the case law is clear that the accused alone decides whether to plead guilty or not guilty and also decides, with counsel's advice, whether to testify or not. Another habit to acquire is learning how to document the file: what was discussed, what advice was given and the accused's clear instructions. This educational opportunity should be part of the Bar Examination Program and subsequently as a refresher for counsel practising in the criminal courts. By offering this information, errors by counsel will be reduced.

F. The Legacy of *Strickland*.⁶⁴⁶

The American case law that applied the *Strickland*⁶⁴⁷ test, as discussed in chapter one, demonstrates the errors inherent in the Court's decision in *Strickland*.⁶⁴⁸ The phrase "a bad tree

⁶⁴⁴ *Supra* note 4 at 688.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

cannot bear good fruit,”⁶⁴⁹ well describes the legacy of the *Strickland*⁶⁵⁰ test. Relying on the *Strickland*⁶⁵¹ test, how is it possible that a drunk attorney could provide the constitutionally protected right to effective counsel as we saw in *The People v Garrison*?⁶⁵² Or, as we saw in *Smith v Ylst*,⁶⁵³ a lawyer undergoing a psychiatric break in the middle of the trial was found to have provided effective counsel using the *Strickland*⁶⁵⁴ test.

An average person on the street would be shocked that a medically incompetent lawyer, who was in violation of his undertaking to the Law Society not to act as senior counsel on a murder case, was found to have provided effective assistance of counsel.⁶⁵⁵ Or, that a trial counsel, unwilling to defend a murder trial, but having to fulfill his probation requirements of community service hours by providing pro bono representation to an unknowing accused, could provide competent assistance.⁶⁵⁶

These cases demonstrate how flawed the *Strickland*⁶⁵⁷ test is. How the Canadian Supreme Court could ignore these American precedents in evaluating the correctness of the *Strickland*⁶⁵⁸ test is baffling. I am assuming that the Court ignored or wasn't aware of the American precedents since no mention, little less analysis, of them is made by the Court.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Mathew 7:18 English Standard Version. [The Holy Bible](https://biblehub.com/matthew/7-18.htm). <https://biblehub.com/matthew/7-18.htm>.

⁶⁵⁰ *Supra* note 4.

⁶⁵¹ *Ibid.*

⁶⁵² *Supra* note 288.

⁶⁵³ *Supra* note 262.

⁶⁵⁴ *Supra* note 4.

⁶⁵⁵ *Supra* note 320.

⁶⁵⁶ *Supra* note 310.

⁶⁵⁷ *Supra* note 4.

⁶⁵⁸ *Ibid.*

G. Errors Should Be Considered Cumulatively

In the *Strickland*⁶⁵⁹ case, and the others that came after, specific acts of incompetence had to be shown. After that, the specific acts had to have caused specific prejudices. What results is a situation in which a case can be littered with acts of incompetence, but because the court does not consider the global effect of the multiple errors, competence is based on one error at a time.

This trend is reflected in the Canadian case of *R v Le (TD)*⁶⁶⁰ case. Here the Manitoba Court of Appeal considered the appeal of Le, who was convicted of first degree murder. A variety of errors were alleged to have been made during the trial, one of which was that the accused was ineffectively represented by counsel. The court listed a series of eight specific allegations against counsel and considered whether each occasioned prejudice. The court dealt with each error, in isolation, and determined that none of the individual errors amounted to ineffectiveness. Since none did, the Court concluded there was no prejudice demonstrated by the accused. Again, this is a situation where justice has not only failed to have been done, but even more so, failed to have to have the appearance of being done.

The better approach is one in which the error or errors are considered cumulatively and where counsel's conduct is considered in a global context. This approach was taken in *R v JB*,⁶⁶¹ where trial counsel was alleged to be incompetent in that she "failed to properly execute an effective cross-examination, including the abandonment of alternative routes to effective cross-examination."⁶⁶² She also failed to cross-examine the complainant on prior inconsistent statements. Trial counsel described her decisions regarding her choice of cross-examination

⁶⁵⁹ *Supra* note 4.

⁶⁶⁰ 2011 MBCA 83.

⁶⁶¹ 2011 ONCA 404.

⁶⁶² *Ibid* at para 3.

questions as supporting her prime strategy: that the complainant's evidence was inconsistent with her actions, by focussing on her "financial independence, her freedom of movement and her lack of fear of the [appellant]." ⁶⁶³ Yet she failed to make any submissions related to her prime strategy. The Court looked at the cumulative effect of counsel's errors and found the reliability in the verdict was questionable and thus resulted in a miscarriage of justice.

The Manitoba Court of Appeal took a similar approach in *R v Zamrykut*, ⁶⁶⁴ a case of sexual assault. Counsel formulated a strategy that led him to a series of decisions on how he presented the defence. For example, trial counsel did not cross-examine the complainant on any inconsistencies between her police statement, preliminary hearing evidence and her trial testimony. He also decided not to cross-examine the complainant on her relationship with her boyfriend and why she insisted that he be present when she gave her police statement. Counsel spoke with the apartment owner, who was present in the apartment with his girlfriend and baby, but failed to call him as a witness even though the friend said he heard nothing during the night, contrary to the complainant's testimony that she was very loud in protesting the accused's actions. Furthermore, although the trial judge and counsel all agreed that *W (D)* ⁶⁶⁵ was at play, defence counsel's remarks seem inconsistent with that case, such as his comment that "frankly you might even believe her." ⁶⁶⁶

Trial counsel filed an affidavit saying that his strategy was to avoid any inconsistencies between the accused and complainant, thinking that the accused would appear more credible if his evidence was as close to the complainant's evidence as it could be. By choosing to do so, he missed the opportunity to highlight conflicting evidence about whether she was wearing a dress

⁶⁶³ *Ibid.* at para 4.

⁶⁶⁴ 2017 MBCA 24.

⁶⁶⁵ [1991] 1 SCR 742

⁶⁶⁶ *Supra* note 664 at 17 as argued by defence counsel.

or whether there was oral sex. He also said that he did not call the apartment friend because inexplicably he was afraid that his witness would say something that would hurt the defence. He also expressed his view that it was inappropriate to cross-examine the complainant about her ex-boyfriend. Given counsel's strategy to avoid inconsistencies, he was left with the judge concluding that the complainant gave her evidence clearly and unequivocally, with only inconsequential inconsistencies.

The Court of Appeal considered the strategy and not the individual errors made by trial counsel and, concluding that it was a "strategy doomed to fail from the start,"⁶⁶⁷ found that the accused was ineffectively represented given that his lawyer's conduct did not fall within the range of reasonable professional assistance and a new trial was ordered. To support their judgement the court relied on the *J (B)*⁶⁶⁸ case which stated that the "cumulative effect of the failures of counsel undermined the reliability of the verdict and resulted in a miscarriage of justice,"⁶⁶⁹ They also found that the appearance of a fair trial was also undermined.

Interestingly, the court did not specifically discuss the prejudice component in *Zamrykut*,⁶⁷⁰ only the performance component, so we do not know whether they concluded that verdict was unreliable, the trial was unfair or had the appearance of an unfair trial – or all, some or none of these. Although Justice Beard, writing for the Court, made the final observation that, "even the best counsel can, over the course of a career, fall into error in particular case, such that he or she has provided ineffective assistance in that case that undermined the reliability of the

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Supra* note 661.

⁶⁶⁹ *Ibid* at 82.

⁶⁷⁰ *Supra* note 664.

verdict and resulted in a miscarriage of justice.”⁶⁷¹ This sounds like the Court looked to the reliability of the verdict without saying so explicitly.

This case is important to this thesis in that it found that errors or counsel should be considered cumulatively, which makes sense since, as Mr. Greenspan argued, “errors are indicia of ineffectiveness.”⁶⁷² But what it, and other cases, seems to do is focus on the reliability of the verdict. Asking if the verdict is reliable is the wrong question. The only question after finding the counsel has failed to rise to the standard of a reasonable professional is whether the result is an unfair trial. That should be the only question and if the answer is in the affirmative, then a new trial should be ordered. Asking whether the original verdict is reliable suggests that the court has found the case to be unfair, but if the same result would occur on a retrial, no new trial will be ordered. Besides being highly speculative, what a subsequent court would do had the accused been tried with effective counsel ought not to be a concern for the appellate court. It is not in other cases where, for example, the appellate court orders a new trial because similar fact evidence was inadmissible or the accused’s statement was ruled inadmissible because of a *Charter*⁶⁷³ breach. For example in *R v Tran*,⁶⁷⁴ the Court determined that the accused only partially heard the evidence because of an inept translator. The Court said that they need no prejudice in order to order a new trial.

XII. THE MADE-IN-CANADA APPROACH TO INEFFECTIVE COUNSEL

For the reasons discussed above, including the partisan component of *Strickland*,⁶⁷⁵ the incomplete factual record, the vague standard, the legacy of *Strickland* and the failure to consider

⁶⁷¹ *Ibid* at 20.

⁶⁷² *Supra* at note 3.

⁶⁷³ *Supra* note 2.

⁶⁷⁴ [1994] 2 SCR 951; 117 DLR (4th); 170 NR 81.

⁶⁷⁵ *Supra* note 4.

errors cumulatively, the Supreme Court should revisit *B (GD)*⁶⁷⁶ and the application of the *Strickland* test.⁶⁷⁷

This time, however, the Court should consider replacing the *Strickland* test⁶⁷⁸ with one based on our *Charter*.⁶⁷⁹ What would be needed is a case where the appellant raises ineffective assistance of counsel as the ground of an appeal and the Court overrules itself on its utilization of the *Strickland*⁶⁸⁰ test.

There is precedent for the Court to overrule itself: “A recent search identified over 500 Supreme Court of Canada decisions that had been overruled by subsequent panels of the court of which 55 over-rulings came in the last 10 years.”⁶⁸¹ While this appears inconsistent with the comments that the Constitution rights should not be subject to political fodder, the following examples are arguably the result of changing societal views; a change in the ethos.

The case of *R v Morin*⁶⁸² was heard in 1992. In this case, the accused’s impaired driving trial was set 14 and a half months after the offence. She was convicted after trial of the charge of driving over the legal limit and the court stayed the impaired driving charge. On appeal to the summary conviction Appeal Court, the Court stayed the drive over charge on the grounds that her right to a trial within a reasonable time, section s 11 (b),⁶⁸³ was infringed.

The Crown appealed to the Court of Appeal which allowed the appeal and restored the charge of driving with blood alcohol over the legal limit. That finding was appealed to the

⁶⁷⁶ *Supra* note 2.

⁶⁷⁷ *Supra* note 4.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Supra* note 2.

⁶⁸⁰ *Supra* note 4.

⁶⁸¹ Peter Bowal and Rebiah Syed, “*The Evolution of Five Legal Doctrines in the Supreme Court of Canada.*” Online <https://www.lawnow.org/the-evolution-of-five-legal-doctrines-in-the-supreme-court-of-canada/>

⁶⁸² [1992] 1 SCR 771; 134 NR 321; 53 OAC 241; 12 CR (4th) 1.

⁶⁸³ *Supra* note 2.

Supreme Court, which, dismissed the appeal. Justice Sopinka spoke for the majority of the Court, with Justice Lamer dissenting that as a result of their decision in *R v Askov*⁶⁸⁴ 47,000 charges were stayed or withdrawn in Ontario alone.⁶⁸⁵ In the present case, Justice Sopinka noted that the whole delay was the result of institutional delay⁶⁸⁶ and nothing else. He found, in particular, there was no evidence of prejudice to the accused as a result of the delay, so he concluded that the accused's rights under the *Charter*⁶⁸⁷ s 11 (b) to a trial within a reasonable time was not infringed.⁶⁸⁸

Twenty five years after *Morin*,⁶⁸⁹ the Supreme Court unanimously overruled its decision in *Morin*⁶⁹⁰ in *R v Jordan*.⁶⁹¹ In this case, the accused was convicted of a drug offence 49.5 months after charge. At trial, the British Columbia Supreme Court applied the *Morin*⁶⁹² framework and concluded that 19 months at the Provincial Court level and 13.5 months at the BC Supreme Court could be attributed to institutional delay,⁶⁹³ but was well outside the *Morin*⁶⁹⁴ recommendations. However, because the accused was serving a conditional sentence order⁶⁹⁵ on other charges and had other pending charges, his liberty was not significantly prejudiced by the delay.⁶⁹⁶ Also, because the Crown's case was not dependent on the witnesses' memory, the

⁶⁸⁴ [1990] 2 SCR 1199.

⁶⁸⁵ *Ibid* at para 7.

⁶⁸⁶ *Ibid* at para 73

⁶⁸⁷ *Supra* note 2.

⁶⁸⁸ *Supra* note 682 at para79.

⁶⁸⁹ *Supra* note 682.

⁶⁹⁰ *Ibid*.

⁶⁹¹ 2016 SCC 27.

⁶⁹² *Supra* note 682

⁶⁹³ *Supra* note 691 at 15.

⁶⁹⁴ *Supra* note 682.

⁶⁹⁵ *Supra* note 691.

⁶⁹⁶ *Ibid*.

accused's right to make full answer and defence⁶⁹⁷ was not compromised. This judgement was upheld by the British Columbia Court of Appeal, who dismissed the accused's appeal.

Justice Moldaver criticized the *Morin*⁶⁹⁸ framework, finding that it was highly unpredictable,⁶⁹⁹ confusing,⁷⁰⁰ hard to prove,⁷⁰¹ highly subjective⁷⁰² and complex.⁷⁰³ Thus, the Court overruled *Morin*⁷⁰⁴ and replaced its framework with a new and current one.⁷⁰⁵ That case was *R v Jordan*.⁷⁰⁶

Another example involves assisted suicide. Section 241 (b) of the *Criminal Code*⁷⁰⁷ criminalizes the giving of assistance to anyone committing suicide. In *Rodriguez v British Columbia (Attorney General)*⁷⁰⁸ in 1993, the Court held in a 5 – 4 split that section 241 (b) violated Rodriguez's rights under section 7 of the *Charter*⁷⁰⁹ to have the assistance of a physician who would arrange a means for Rodriguez to terminate her own life. Justice Sopinka writing for the majority found that s 241 (b) of the *Criminal Code*⁷¹⁰ did not engage the rights guaranteed under section 7 of the *Charter*,⁷¹¹ since the security of the person does not protect the right to terminate one's life since by definition "security of the person is intrinsically concerned with the well-being of the living person."⁷¹² Twenty three years later, *Rodriguez*⁷¹³ was overturned by a

⁶⁹⁷ *Supra* note 86."Ss 650 (3) The accused is entitled, after the close of the case for the prosecution to make full answer and defence personally or by counsel."

⁶⁹⁸ *Supra* note 682.

⁶⁹⁹ *Ibid* at 32

⁷⁰⁰ *Ibid* at 33

⁷⁰¹ *Ibid*

⁷⁰² *Ibid* at 33.

⁷⁰³ *Ibid* at 38.

⁷⁰⁴ *Supra* note 682.

⁷⁰⁵ *Supra* note 691 at 46 – 91.

⁷⁰⁶ *Ibid*.

⁷⁰⁷ *Supra* note 86.

⁷⁰⁸ [1993] 3 SCR 519; 107 DLR (4th) 342; 158 NR 1.

⁷⁰⁹ *Supra* note 2.

⁷¹⁰ *Supra* note 82

⁷¹¹ *Supra* note 2.

⁷¹² *Supra* note 691 at 129.

unanimous Court in *Carter v Canada (Attorney General)*.⁷¹⁴ At trial, the judge found that s 241 (b) of the *Criminal Code*⁷¹⁵ did violate section 7⁷¹⁶ and this infringement could not be justified under section 1. The Court of Appeal, however, overturned the decision on the basis that the trial court was bound by the Court's ruling in *Rodriguez*.⁷¹⁷ The Supreme Court of Canada allowed the appeal, overturning the original ruling that section 7 was not engaged,⁷¹⁸ and found that:

Section 241 (b) and s. 14 of the Criminal Code unjustifiably infringes s. 7 of the Charter and are of no force of effect to the extent that they provide physician-assisted death for a competent adult person who (clearly consents to the termination of life and (2) has a grievous and remediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.⁷¹⁹

These two cases show that it is an option for the Supreme Court of Canada to revisit a prior precedent and reverse or modify its approach. Thus, it would be possible for a case to be brought before the court, where the *Strickland*⁷²⁰ test has been applied and have the court reconsider its decision in *B (GD)*⁷²¹ which adopted the *Strickland*⁷²² test and propose a new test in its approach to ineffective counsel claims. In addition to the criticisms of the test recounted at the beginning of this Chapter, there are three reasons why the Court should revisit the case and create a made-Canada-approach.

⁷¹³ *Ibid.*

⁷¹⁴ 2015 SCC 5

⁷¹⁵ *Supra* note 86.

⁷¹⁶ *Supra* note 2.

⁷¹⁷ *Supra* at 708.

⁷¹⁸ *Ibid.*

⁷¹⁹ *Ibid* at 147

⁷²⁰ *Supra* note 4.

⁷²¹ *Supra* note 10.

⁷²² *Supra* note 4.

A. Reasons for Creating an Approach to Ineffective Counsel by Relying on the *Charter*⁷²³

1. The *Charter*⁷²⁴ is Canada's Constitution.

Why did the Supreme Court choose to rely on a test that was based on another country's constitution? It was unnecessary: all that is required by the Court to formulate its own test for evaluating counsel incompetence is found in the *Charter*.⁷²⁵

The *Charter*⁷²⁶ was created by Canadians and thus represents Canadian values. Before it was drafted, Parliament created a special all-party committee to obtain significant input from its citizenry regarding their thoughts on a proposed *Charter*.⁷²⁷ The committee considered 300 televised submissions by minorities and others and also 1200 written submissions. After considering both, 123 recommendations were made, and over half of these found their way into the final version of the *Charter*.⁷²⁸ Thus, it can be argued that the *Charter*,⁷²⁹ created in 1982, represents the priorities and values of Canadian people, both from the public's recommendations and from those of the elected politicians.

The former Chief Justice of the Supreme Court of Canada, Beverley McLachlan, stated the following:

Hand-in-hand with this new independence came the *Charter*. It reflected the kind of society Canadians wished to build for themselves and for generations to come. While patriation symbolized the raw fact of self-determination, the *Charter* made a statement about the ideal to which Canada should dedicate itself. Every nation needs a basic statement of what it stands for. For Canada, the *Charter* was that statement...The *Charter*

⁷²³ *Supra* note 2.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

was a made-in-Canada document, the culmination of years of debate and negotiation. The result truly reflects the ethos of Canada.⁷³⁰

The American Constitution,⁷³¹ created in 1789, does not reflect the Canadian ethos, which might be somewhat similar, but Canada is still distinct. Arguably, there is debate whether the American Constitution⁷³² even represents the values of American citizens today. For example, the Originalists⁷³³ say that the Constitution⁷³⁴ should be interpreted as it was written in the 18th century. Thus, for example, proponents of this approach strictly interpret the Second Amendment:⁷³⁵ the right to bear arms. Some citizens, however, argue against the Originalists,⁷³⁶ by saying that the original drafters never imagined that the Second Amendment⁷³⁷ would protect the rights of its citizens to possess semi-automatic weapons, bump stocks⁷³⁸ and the like: these were arms that were never contemplated by the original founders. Thus, a significant amount of

⁷³⁰ <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-02-05-eng.aspx?pediable=true>.

⁷³¹ *Supra* note 1.

⁷³² *Ibid.*

⁷³³ “Originalism is a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that constitution ought to be given the original public meaning that it would have had at the time that it became law.” <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation>.

⁷³⁴ *Supra* note 1.

⁷³⁵ *Ibid.*: “A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”

⁷³⁶ *Supra* note 733.

⁷³⁷ “One in five Americans wants the Second Amendment to be repealed, national survey finds...Forty-six percent said they favored modifying the Second amendment to allow for stricter regulations.”

<https://www.washingtonpost.com/news/wonl/wp/2018/03/-27/one-in-five-americans-want-the-second-amendment-to-be-repealed-national-survey-says>.

⁷³⁸ “In 1986, the federal government banned the sales of new fully automatic weapons, but automatic weapons which pre-dated 1986 are still legal for civilians to own. At least 40 states have further outlawed automatic weapons in some manner. AR-15’s are semi-automatic rifles, which means that one trigger pull is equivalent to the firing of only one round. Automatic guns allow shooters to continue shooting until the magazine is empty by holding down the trigger.” AR-15’s can be “equipped by bump stocks. Bump stocks harness a gun’s natural recoil, thereby essentially converting semi-automatic guns into automatic ones, allowing shooters to fire dozens of rounds in seconds.” [ncjolt.org/bump-stocks-second-amendment/](https://www.ncjolt.org/bump-stocks-second-amendment/). “Every federal appeals court that’s ruled on assault rifle and large-capacity magazine bans has concluded that they comply with the Constitution.”

<https://www.brennancenter.org/blog/are-recently-proposed-gun-regulations-constitutional>. “The Justice Department issued a regulation Tuesday [December ,2018] banning bump-fire stocks, devices that can essentially transform semiautomatic weapons, such as an AT – 15, into automatic rifles that fire at a rate of between 400 and 800 rounds per minute...Only hours after the Trump administration released its final regulation, Gun Owners of American announced it would file a lawsuit.” <https://www.washingtonpost.com/opinions/2018/12/20/dianne-feinstein-dont-celebrate-the-trump-administrations-bump-stock-ban-too-quickly>.

tension has resulted from those wanting the Constitution⁷³⁹ to be relevant today and those who argue it should be interpreted by the originalists.⁷⁴⁰ This kind of tension is largely missing in interpreting the *Charter Rights and Freedoms*.⁷⁴¹

2. The *Charter* is a “Global Powerhouse Constitution.”⁷⁴²

Besides the obvious, that a country’s highest court should rely on that country’s “supreme law,”⁷⁴³ the *Charter*⁷⁴⁴ has other advantages over the American Constitution,⁷⁴⁵ insofar as it is a document that seeks to capture the Canadian ethos.

But the *Charter*⁷⁴⁶ has another advantage over the American Constitution⁷⁴⁷: “Canada has become a global powerhouse and a household name in comparative constitutional law.”⁷⁴⁸ In fact, famously, the United States Supreme Court Justice Ruth Bader Ginsburg appeared on Egyptian television on January 30th, 2012 and made suggestions as to how the country should draft a new constitution, making reference to the Canadian example. First, she noted that she could not “speak about what the Egyptian experience should be” since she was a judge “operating under a rather old constitution ... [and] would not look to the US Constitution if [she] were drafting a constitution in the year 2012.”⁷⁴⁹ Secondly, she suggested that the country should

⁷³⁹ *Supra* note 1.

⁷⁴⁰ *Supra* note 733.

⁷⁴¹ *Supra* note 2.

⁷⁴² Ran Hirschl, “*Going Global? Canada as Importer and Exporter of Constitution Thought*” at <https://poseidon01.ssrn.com/delivery.php>? At 16.

⁷⁴³ *Supra* note 1 at s 55.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Supra* note 1.

⁷⁴⁶ *Supra* note 1.

⁷⁴⁷ *Supra* note 1.

⁷⁴⁸ *Supra* note 742.

⁷⁴⁹ <https://www.memri.org/reports/us-suprem-court-justice-ruth-bader-ginsburg-egyptians-look-constitutions-south-africa>.

look to the examples of the *South African Constitution of 1996*,⁷⁵⁰ the *European Convention of Human Rights*⁷⁵¹ and the *Canadian Charter of Rights and Freedoms* of 1982.⁷⁵²

In fact, the *Charter*⁷⁵³ is regarded as the leading influence in the drafting of the *South African Bill of Rights*,⁷⁵⁴ the *Israeli Basic Laws*,⁷⁵⁵ the *New Zealand Bill of Rights*⁷⁵⁶ and the *Hong Kong Bill of Rights*,⁷⁵⁷ amongst others.

One of the possible reasons why the *Charter*⁷⁵⁸ has inspired other world constitutions was that the *Charter*⁷⁵⁹ was drafted in the context of heightened attention and value for human rights and freedoms that came after the conclusion of World War II. More specifically, it was inspired by the *Universal Declaration of Human Rights, 1948*.⁷⁶⁰ This was a document created by the United Nations, spearheaded by Eleanor Roosevelt, which gathered diverse legal and cultural representatives from all of the regions of the world to participate in developing a declaration of universal human rights. The *Declaration*⁷⁶¹ has been translated into 500 languages.

For example, several of the rights guaranteed in the *Charter*⁷⁶² are specifically listed in the *Universal Declaration of Human Rights*.⁷⁶³ Of special relevance to this thesis: Article 3 states “Everyone has the right to life, liberty and security of person...”; Article 10 states “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in

⁷⁵⁰ www.justice.gov.za/legislation/constitution/SACconstitution-web-eng.pdf.

⁷⁵¹ https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁷⁵² *Supra* note 2.

⁷⁵³ *Ibid.*

⁷⁵⁴ www.justice.gov.za

⁷⁵⁵ https://www.constituteproject.org/constitution/Israel_2013.pdf?lang=en.

⁷⁵⁶ www.legislation.govt.nz/act/public/1990/0109/latest/whole.html.

⁷⁵⁷ https://www.hab.gov.hk/file_manager/en/documents/references/papers_reports_other/human_rights/CAT2_Annex2_e.pdf.

⁷⁵⁸ *Supra* note 2.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ <https://www.un.org/en/universal-declaration-human-rights/>.

⁷⁶¹ *Ibid.*

⁷⁶² *Supra* note 2.

⁷⁶³ *Supra* note 760.

the determination of his rights and obligations and of any criminal charge against him”; and, Article 4 states “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental right granted him by the constitution or by law.”

Thus, the *Charter*⁷⁶⁴ was created in a world which valued human rights and its approach to same has been lauded throughout the world. Canadians have the privilege of possessing the *Charter*⁷⁶⁵ as our Supreme Law, and there should be no apology in relying on it in such an important principle of fundamental justice as the right to effective counsel

Admittedly, the drafting of the *Charter*⁷⁶⁶ was heavily influenced by the American Constitution,⁷⁶⁷ especially the United States Bill of Rights.⁷⁶⁸ This is why as the courts began interpreting the *Charter*, they often relied on American jurisprudence.

In the first few years [of the adoption of the *Charter*] the absence of relevant case law from Canada naturally encouraged the courts to look at some foreign precedents respecting such rights as freedom of speech and freedom of association. However, foreign precedents came to be cited less often as Canadian jurisprudence under the *Charter* grew at a far more rapid rate than was widely foreseen in 1982. Professor McCormick describes this development as the process of “constitutional routinization setting in.”⁷⁶⁹

But even then, concerns were expressed about *Charter*⁷⁷⁰ jurisprudence relying on American jurisprudence. For example, Justice Brooke of the Ontario Court of Appeal in *R v Carter*⁷⁷¹ stated, “[N]o doubt the decisions of [American] courts may be persuasive references in some

⁷⁶⁴ *Supra* note 2.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Supra* note 1.

⁷⁶⁸ *Ibid.*

⁷⁶⁹“The Impact of Foreign Law on Domestic Judgments: Canada.” <https://www.loc.gov/law/help/domestic-judgements-canada.php>.

⁷⁷⁰ *Supra* note 2.

⁷⁷¹ (1982) 39 OR (2d) 439 at 441.

case ... but it is important that we seek to develop our own model in response to present cases ... rather than adopting the law of another country forged in response to past events.”

Peter McCormick completed a study entitled “*American Citations and the McLachlan Court: An Empirical Study*,”⁷⁷² which seems to confirm that the Court is relying less on the American precedents than at the beginning of the Court’s interpretation of the *Charter*.⁷⁷³ He found that under the Chief Justice McLachlan’s tenure, the Supreme Court cited American cases about 3.5% of the time. This was down from the high point of 7.2 % under Chief Justice Dickson, who led the court from April 18, 1984 to Jun 30, 1990, which coincided with the advent of *Charter*⁷⁷⁴ jurisprudence.

Bijon Roy published another study, “*An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*”⁷⁷⁵ that distinguished the type of reference the court was making when it cited American jurisprudence. For example, he set out a table of all the Supreme Court of Canada cases which cited Foreign Jurisprudence from 1998-2003 and sorted these references as to whether the Court surveyed the American case/s, whether they found support, followed or distinguished themselves from the American precedent/s.⁷⁷⁶ He found that the Court considered 402 *Charter*⁷⁷⁷ cases and 34 considered foreign jurisprudence, with 87 individual references. Over half of the references were to American jurisprudence with 41 cases categorized as supportive, 29 were surveys, and 16 explicitly distinguished foreign jurisprudence from that of the Canadian model.⁷⁷⁸ The Court was described as following American case law

⁷⁷² 47 Osgood Hall LJ 83 (2009) at 91, 92.

⁷⁷³ *Supra* note 2.

⁷⁷⁴ *Ibid*.

⁷⁷⁵ 62 U Toronto Fac. L. Rev 99 (2004)

⁷⁷⁶ *Ibid* at 60.

⁷⁷⁷ *Supra* note 2.

⁷⁷⁸ *Ibid*, Figure 3. “*Use of Foreign Materials by Supreme Court of Canada in Charter decisions by category 1998-2003.*”

only once: *United Food and Commercial Workers, Local 1218 (UFCW) v Kmart Canada Ltd.*⁷⁷⁹

The author described what he meant by the word “followed”: it is where “the Court refers to foreign jurisprudence as the basis for its own position, rather than as corroboration or support for reasoning flowing naturally from existing domestic jurisprudence.”⁷⁸⁰ This is what happened when the Supreme Court adopted the *Strickland* test⁷⁸¹ without any comment or analysis. Why they did it is a mystery, since all the Court needed could be found in the *Charter*.⁷⁸² For example, the right to effective counsel was recognized by the confluence of section 7 and 11 (d): the right to counsel is a principle of fundamental justice and the right to a fair trial is only possible with the right to effective counsel.⁷⁸³

3. The *Charter*⁷⁸⁴ has a “built in” Remedy Section.

The remedy section of the *Charter*, section 24 (1),⁷⁸⁵ is very important since it mirrors Article 4 of the *Declaration of Human Rights*⁷⁸⁶ and *ubi jus, ibi remedium*⁷⁸⁷; it seeks to redress, in a meaningful way, a breach of constitutional rights. The American constitution⁷⁸⁸ has nothing equivalent to section 24 (1).⁷⁸⁹ Admittedly, the United States judiciary has ordered a new trial when they have found a case in which an accused was denied effective counsel, but section 24⁷⁹⁰ allows courts the creativity to fashion additional remedies appropriate to the circumstances. This would include, of course, the ordering of a new trial, but the court could go further. For example,

⁷⁷⁹ [1999] 2 SCR 1083 at 51-52.

⁷⁸⁰ *Supra* note 778 at 51-52.

⁷⁸¹ *Supra* note 14.

⁷⁸² *Supra* note 1.

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Supra* note 760.

⁷⁸⁷ *Supra* note 14.

⁷⁸⁸ *Supra* note 1.

⁷⁸⁹ *Supra* note 2.

⁷⁹⁰ *Ibid.*

conceivably a court could assess costs against the trial counsel. Is it not logical that a lawyer who has failed in their duty to their client should receive less than full payment? Also, why should the accused have to retain appellant counsel to seek a remedy for a denial of their right to a fair trial?

XI. A PROPOSED NEW APPROACH TO INEFFECTIVE COUNSEL CLAIMS.

I propose a new two prong test, but a very different one than that established by Justice O’Conner. First, there is the performance component and secondly, the trial fairness component. I propose that the performance component be considered first by the court for two reasons: one, it will offer instruction to defence counsel and the lower courts on what effective counsel does and what an ineffective counsel fails to do. Also, it would provide the context for whether a fair trial has occurred.

Using the performance component, the court will consider whether the trial counsel conducted themselves in a reasonably effective manner. Textbooks and handbook guides can be useful in determining what the reasonable standard of counsel should be. In addition to referring to an extra-judicial documents, as time goes on, case law will further develop and create precedents that will fine-tune what the standard of reasonably effective counsel is. This is one of the advantages of addressing the performance component first.

The accused and the alleged ineffective counsel would be on a level playing field: there would be neither a strong presumption in favour or against the counsel. No particular deference should be made to counsel’s decisions. It is unnecessary to presume a professional competent, since the appellant already has the burden and onus to prove that the lawyer was not. It also sends the message to the appellant, and to all people, that lawyers have a special privilege in the courtroom. Why should a lawyer have a special privilege in the courtroom? Does this represent

an example of “insiders protecting insiders”?⁷⁹¹ How can it appear otherwise to a reasonable person when the jurisprudence in essence presumes that the appellant’s argument that they received ineffective assistance fails before it is even made? In no other malpractice case is there a presumption of competence.⁷⁹² Thus, in cases where a plaintiff is suing a doctor, engineer and others, the playing field is level between the two parties: the scales of justice are equal, as it were. In ineffective counsel cases, however, the scales are tipped towards the lawyer from the beginning.

The appellant will ordinarily set out his claims by affidavit as a fresh evidence motion. As is presently done, the court considers the admissibility of the affidavit, checking for relevancy, credibility and impact fullness and if appropriate the court provisionally accepts it. At this point, the trial counsel will present their affidavit or *viva voce* evidence and the court will consider whether the appellant has proven, on a balance of probabilities, that their counsel provided ineffective counsel, and the court will have to consider the fair trial component. In the fair trial component, the court needs to examine the case as a whole and consider any multiple errors cumulatively. Then the court considers whether the appellant received a fair trial in terms of the “indicia of ineffectiveness”⁷⁹³ Reference can be made to the description of effective counsel set out in *Joanisse*,⁷⁹⁴ a “champion to the accused, who has the same skills as the it, who can marshal a defence and ensure that the appellant receives the full benefit of the panoply of

⁷⁹¹ *Supra* note 255.

⁷⁹² In ineffective counsel cases the “standard of care” is presumed, whereas, in other professional malpractice/negligence cases the plaintiff cannot rely on the presumed standard, but must call expert evidence. “Where evidence is required of the prevailing standards of other professions such as architecture, accountancy, medicine or engineering, expert evidence is vital because of the ignorance of the court...In other cases expert evidence will be useful in giving the court information about standard practices of the profession. While it might not be definitive, it will be construed as a factor within the appraisal of the particular standard of care in the circumstances.” David Partlett, *Professional Negligence* (The Law Book Company, Melbourne) 1995.

⁷⁹³ *Supra* note 3

⁷⁹⁴ *Ibid.*

procedures protections available to an accused.”⁷⁹⁵ Additionally, the court must consider whether the trial appeared fair.

Reference to reliability should not be made because it invites the appearance that the court is allowing an unfair verdict to stand because the court implicitly concludes that the accused is probably guilty. This is reflected any time a court comments on the strength of the crown’s case. But if the trial is unfair, that is enough to order a new trial. Perhaps the accused will be convicted after a second trial, or perhaps not; it is speculative either way. The court should focus on the rights of the accused in the same unqualified way as the rights do. For example, the right to the presumption of innocence or the right to an impartial hearing are unqualified. In the fair trial component, the court needs to examine the case as a whole and consider any multiple errors cumulatively. Then the court considers whether the appellate received a fair trial in light of the “indicia of ineffectiveness.”⁷⁹⁶

Assuming the appellate court finds the accused did not receive a fair trial, a remedy under section 24 (1)⁷⁹⁷ could be sought. First, the court should order the accused a new trial. Secondly, the court should consider whether costs should be assessed against the ineffective counsel. Finally, the court should consider sending a copy of the judgement to the law society with the information that the lawyer was found to be incompetent or failed to provide quality of service and should be dealt with accordingly. This would not help the appellant, but it would serve other interests. Public interests. For example, it would be a deterrent against some counsels’ ineffective assistance, and it will also help address these problems through the requirement to take

⁷⁹⁵ *Ibid.*

⁷⁹⁶ *Supra* note 3.

⁷⁹⁷ *Ibid.*

continuing education hours in particular areas, practise under supervision, address any physical or addiction issues, or failing that, prohibit counsel from practising criminal law.

One of the main reasons why the court should have the discretion to send a copy of the judgement is that the law society can only investigate what it hears about; if the society does not receive a complaint, nothing can be done to address the situation. Maybe this failure is a result of the public failing to report a lawyer for incompetence for a variety of reasons: lack of knowledge of the reporting system; unawareness that their lawyer was incompetent; embarrassment; not wanting to cause trouble; and/or the desire to avoid a process or, worse, a hearing.

For these same reasons, fellow lawyers do not report the incompetent amongst them. But they have additional reasons: not wanting a reputation for “bad-mouthing” a colleague; being labeled by the bar and the bench as a “trouble-maker”; fear of retaliation; insecurity about their own competency; friendship and a wish for a collegial bar. These explanations are commonsensical and help explain why at the Manitoba Bar there have been discipline cases for only six criminal defence lawyers in the last 18 years. For example, in the only successful appeal in Manitoba, *R v Zamrykut*,⁷⁹⁸ there is no evidence that the trial lawyer that failed to provide effective assistance of counsel to the accused was reported to the Law Society. He certainly was never sanctioned.

Judges as well can report incompetent lawyers – and they do, but not perhaps as often as they should, probably for all of the reasons listed above. Lawyers are permitted to report themselves, but rarely do for obvious reasons. Occasionally, a court will threaten to report counsel to the law society or to have counsel report themselves, but rarely does either happen.

⁷⁹⁸ *Supra* note 666.

Even though the word “competence” appears in the Model Code,⁷⁹⁹ and consequently all other provincial law societies’ Codes of Conduct, the Manitoba Law Society, to take one example, seems reluctant to cite any members with a breach of competence. Perhaps what Professor Bibas⁸⁰⁰ said about “insiders protecting insiders”⁸⁰¹ has some relevance here. The alternative explanation is that criminal defence lawyers very rarely make mistakes. This flies in the face of common sense. In Chapter Three, it was noted that in the 18 past years there were a total of over 13,694 criminal appeals and only 50 were successful.

In Manitoba, the median province of provincial law society membership, there were 168 lawyers sanctioned between 2000 and 2017.⁸⁰² After reading all of these digests, the word “incompetence” is used only twice. One referred to a lawyer in 2000⁸⁰³ on a Wills and Estate matter, and another in 2017,⁸⁰⁴ who was sanctioned for failure to provide “Quality of Service,” alleging that he was “incompetent” in handling his files. There was no further information about what files they were and how they were mishandled.

Sometimes, the Law Society defines incompetent conduct not as incompetent per se, but as a failure to provide Quality of Service.⁸⁰⁵ But these cases are rare and when then are reported, the facts are often vague. Is that on purpose? For example, in a 2001⁸⁰⁶ ruling the Manitoba Law Society Discipline Committee described as a failure to provide Quality of Service what was clearly incompetence. This lawyer was sanctioned in a child custody case for calling an expert who she knew was going to give damning evidence against her client. At the end of the hearing,

⁷⁹⁹ *Supra* note 104.

⁸⁰⁰ *Supra* note 255.

⁸⁰¹ *Ibid.*

⁸⁰² www.lawsociety.mb.ca/lawyer-regulation/discipline-case-digests/.

⁸⁰³ *Ibid* case 00-01.

⁸⁰⁴ *Ibid* case 17-07.

⁸⁰⁵ See Appendix C.

⁸⁰⁶ *Ibid* case 01-06.

the court awarded a permanent wardship to the child welfare agency, without calling on the agency for submissions. The lawyer was reprimanded and placed on a supervision order.

There have been only six criminal defence counsel disciplined in Manitoba over the past 18 years. All of their conduct was characterized as a failure to provide “Quality of Service.” First, a lawyer was sanctioned in 2002⁸⁰⁷ for “Failure to Serve” by failing to file a factum in a timely way. In 2010,⁸⁰⁸ a lawyer was sanctioned for “failing to attend” a criminal trial. In 2014,⁸⁰⁹ one lawyer was sanctioned for four counts of Professional Misconduct “in the context of [the lawyer’s] criminal law practise, and all four counts concerned failures to meet deadlines and commitments ... which, for the most part were court imposed. No accused was affected by the lawyer who was sanctioned for wasting the court and opposing counsel’s time and resources.”⁸¹⁰ No other details were provided in any of the above judgements.

Another lawyer was sanctioned in 2015⁸¹¹ when he was found to have “mishandled court matters.” Again, no details were provided. In a quasi-criminal matter, a lawyer was sanctioned in 2015⁸¹² for failing to meet and prepare his client for examination relating to an Indian Residential Schools Assessment Process hearing; neither did he advise his client when submissions would be made nor consult his client before those submissions. The lawyer was reprimanded.

In the eighteen years I canvassed, I found one example in which the lawyer, although sanctioned for failing to provide Quality of Service, could have, because of her record, been

⁸⁰⁷ *Ibid* case 02-08.

⁸⁰⁸ *Ibid* case 10-11.

⁸⁰⁹ *Ibid* case 14-05.

⁸¹⁰ *Ibid*.

⁸¹¹ *Ibid* case 15-13.

⁸¹² *Ibid* case 15-15.

characterized as incompetent. Disturbingly, this is the same lawyer who was reprimanded for calling the expert witness who testified against her client's interest.

The lawyer⁸¹³ represented a young person, within the meaning of the *Youth Criminal Justice Act*,⁸¹⁴ who had significant cognitive deficiencies. Counsel was aware of this fact. While the youth was serving a sentence, he was charged with other criminal offences on which the Crown proceeded by indictment, giving notice that they would be seeking an adult sentence. Pursuant to a plea bargain, the lawyer indicated that her client was agreeing to the adult sentence, as the accused youth wished to serve the rest of his sentence at the provincial gaol. As a result of the accused's guilty plea, his outstanding sentence of three years automatically converted to an adult sentence of three years, which was too long of a sentence to be served at a provincial facility. Consequently, the *Act's*⁸¹⁵ presumption was triggered and the accused was required to serve his sentence in a youth facility.

The lawyer failed to appreciate the difference between an adult sentence and the issue of placement. Also, the lawyer failed to clearly and thoroughly explain to her client his options and potential consequences of his instructions, which were on their face unreasonable and not in his best interest. The circumstances were aggravated by the lawyer being aware of the youth's significant intellectual limitations.⁸¹⁶

The lawyer was sanctioned for failure to provide "Quality of Service" and, even though she had a related record (she was sanctioned in 1999, in 2000 and 2001 as described as above), she was again reprimanded and placed on a supervision order.

⁸¹³ *Ibid* case 12-06.

⁸¹⁴ SC 2002 c-1.

⁸¹⁵ *Ibid*.

⁸¹⁶ *Ibid*.

Incidentally, this same lawyer⁸¹⁷ was recently sanctioned by the Manitoba Law Society for representing a youth, who had been diagnosed with Fetal Alcohol Spectrum disorder and was a ward of the state, on a guilty plea on a charge of robbery. In her submissions, she disagreed with what were supposed to be agreed facts of the offence and also failed to consult the child care agency before the plea bargain was made. As a result, the youth was permitted to withdraw his plea, but ultimately pleaded guilty on his own facts. This lawyer was fined only \$1,500, but was ordered to undertake not to practice youth law.

Giving the court discretion to report ineffective or incompetent counsel will alert the society that there may be a problem with the counsel's competence or some disability, either mental or physical. By making the court responsible (but not exclusively so) it will reduce the burden on the accused or, more than likely, other counsel to bring attention to the problem.

Communicating the court's concerns about counsel will make lawyers more accountable, inform the profession of the types of conduct that have been found to be ineffective, provide deterrence to practising lawyers and inform the public about the quality of representation a lawyer has provided in the past. While the concern may be that reporting ineffective counsel may affect the lawyer's practice and reputation, so be it: the Law Society must remember their first obligation is not to protect lawyers and their pecuniary interests, but to protect the public from lawyers who do not live up to their professional responsibilities.

XII. CONCLUSION

In conclusion, there is no doubt that the right to effective counsel is constitutionally guaranteed by section 7 and 11 (d) of the *Charter*.⁸¹⁸ Yet, inexplicably, when the Supreme Court

⁸¹⁷ *Ibid* case date 2018-11-05.

⁸¹⁸ *Supra* note 2.

had the opportunity to craft an approach to claims of the ineffective assistance of counsel that was rooted in our *Charter*,⁸¹⁹ the Court, in *B (GD)*,⁸²⁰ chose instead to adopt, completely, the *Strickland v Washington*⁸²¹ test, a test rooted in the American Constitution.⁸²² There is no comment or explanation why the Court chose this unexpected, unusual and unnecessary approach. This is more than curious in that the *Strickland*⁸²³ test is so flawed. It is deficient because of its partisan nature, its incomplete factual record and because the parts of the two components are deficient. In the performance component, the primary flaw is the strong presumption of competence and the automatic deference to counsel's strategy, even if there was no apparent strategy, as was the case in *Strickland*⁸²⁴ itself. In the second component, the prejudice prong, its chief error is requiring the accused to connect specific acts of ineffectiveness with specific acts of prejudice. Thus, even if your lawyer is drunk or suffering a psychotic break during the trial, if the accused cannot point to one question asked, or unasked, that occurred as a result of counsel's impairment, the lawyer is deemed to have been effective. Note: not just neutral, but "effective," which is the heart of the matter. Counsel has the obligation to provide effective assistance, not neutral assistance or none at all. The other problem with the *Strickland*⁸²⁵ test is the emphasis on the reliability of the verdict. Focusing on the reliability of the verdict or referring to the strength of the crown's case suggests that ineffectiveness will be tolerated provided that the court believes that in a second trial the accused is likely to be convicted. This querying into the reliability of the verdict misses the point: the issue is not whether the verdict would have been the same, notwithstanding the ineffectiveness; it is whether

⁸¹⁹ *Ibid.*

⁸²⁰ *Supra* note 10.

⁸²¹ *Supra* note 4.

⁸²² *Supra* note 1.

⁸²³ *Supra* note 4.

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

the accused received effective assistance of counsel or, in other words, a fair trial. After all, the whole point of having the right to effective counsel, the constitutionally protected right, is that the accused has a fair trial. Anything less than effective is not fulfilling the unconditional right. This leads to the maxim of *ubi jus, ibi remedium*,⁸²⁶ which dictates that if there is a right there must be a remedy or, in other words, if there isn't a remedy than the right is not real but illusory.

The empirical evidence shows that the *Strickland*⁸²⁷ test is too narrow; consequently, ineffective counsel practise without facing any consequences and the accused languish in prison. Out of over 13,000 criminal appeals across Canada in the last 18 years, less than one per cent of the courts considered *B (GD)*⁸²⁸ or “ineffective counsel.” The total number is 316 and the total successful appeals was 50: less than an average of three a year. These are shocking numbers and the only other explanation for why they are what they are is that criminal lawyers simply do not make mistakes, which runs counter to common sense.

I have proposed a new made-in-Canada test, based on the *Charter*⁸²⁹ which will remove the illogical aspects of the *Strickland*⁸³⁰ test and make it easier for Canadian courts to find ineffective counsel as such. First, the court must consider the performance component, using new precedents that will develop over time. There will be no strong presumption of competence or deference given to the trial counsel's decisions and strategy. This does not negate the obligation of the accused to prove, on a balance of probabilities, that counsel or his or her conduct failed to rise to the standard. If there is no conduct that rises to that level then the enquiry stops there. The second component involves asking whether the trial fairness has been compromised. There will

⁸²⁶ *Supra* note 14.

⁸²⁷ *Supra* note 4.

⁸²⁸ *Supra* note 10.

⁸²⁹ *Supra* note 2.

⁸³⁰ *Supra* note 4.

be no need to prove specific occasions of prejudice. The question will be, given counsel has failed to meet the standard of a reasonable professional, whether the appellant received a fair trial or a trial that appeared fair. This second part of the test, the fairness component, is essential since not every error that counsel makes renders the trial unfair. This test will encourage potential appellate counsel to bring more appeals and may achieve more successful claims of incompetence.

The courts will be able to seek meaningful remedies under the *Charter*'s⁸³¹ remedy section, section 24 (1),⁸³² including the ordering of a new trial, ordering costs in favour of the accused, and/or offering courts the option to report the ineffective lawyer to the Law Society by providing a copy of the judgement. Through the first two remedies, the right to effective counsel is affirmed. Through the third remedy, counsel is made more accountable to the public.

By affirming the right to effective counsel in a real way, the doctrine of every right must have a remedy – *ubi jus, ibi remedium*⁸³³ – will be fulfilled.

⁸³¹ *Supra* note 2.

⁸³² *Ibid.*

⁸³³ *Supra* note 14.

APPENDIX A

MANITOBA CODE OF PROFESSIONAL CODE

3.1 COMPETENCE

Definitions 3.1-1

In this section, “competent lawyer” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

- (a) Knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
- (b) Investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
- (c) Implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
 - i. legal research;
 - ii. Analysis;
 - iii. Application of the law to the relevant facts;
 - iv. Writing and drafting; v. negotiation;
 - vi. Alternative dispute resolution;
 - vii. Advocacy; and
 - viii. Problem solving;
- (d) Communicating at all relevant stages of a matter in a timely and effective manner;
- (e) Performing all functions conscientiously, diligently and in a timely and cost effective manner;
- (f) Applying intellectual capacity, judgment and deliberation to all functions;

- (g) Complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;
- (h) Recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;
- (i) Managing one's practice effectively;
- (j) Pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
- k) Otherwise adapting to changing professional requirements, standards, techniques and practices.

COMPETENCE 3.1-2

A lawyer must perform all legal services undertaken on the client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

- (a) The complexity and specialized nature of the matter;
- (b) The lawyer's general experience;
- (c) The lawyer's training and experience in the field;
- (d) The preparation and study the lawyer is able to give the matter; and
- (e) Whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[4] In some circumstances expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. The lawyer

who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer should recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) Decline to act;

(b) Obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) Obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] A lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1A.

[7B] In providing short-term summary legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

[9] A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social implications involved in the question or the course the client should choose. In many instances the lawyer's

experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[10A] When it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

[11] Intentionally left blank.

[12] The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[13] A lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

3.2 QUALITY OF SERVICE

Quality of Service 3.2-1

A lawyer has a duty to provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil. Commentary

[1] This rule should be read and applied in conjunction with Section 3.1 regarding competence.

[2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client, and the need for the client to make fully informed decisions and provide instructions.

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel. Examples of expected practices

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (A) keeping a client reasonably informed;
- (b) Answering reasonable requests from a client for information;
- (c) Responding to a client's telephone calls;
- (d) Keeping appointments with a client, or providing a timely explanation or apology in circumstances when unable to keep such an appointment;
- (e) Taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so;
- (f) Ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- (g) Answering within a reasonable time any communication that requires a reply;
- (h) Ensuring that work is done in a timely manner so that its value to the client is maintained;
- (i) Providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (j) Maintaining office staff, facilities and equipment adequate to the lawyer's practice;
- (k) Informing a client of a proposal of settlement, and explaining the proposal properly;
- (l) Providing a client with relevant information about a matter and never withholding information from a client or misleading the client about the position of a matter in order to cover up neglect or a mistake;
- (m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report where one might reasonably be expected;
- (n) Avoiding the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;
- (o) Being civil.

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent reasonably expected by the client.

[7] In providing short-term limited legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term limited legal services may be required or are advisable, and encourage the client to seek such further assistance.

Limited Scope Retainers 3.2-1A

Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client.

[3] Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (See rule 7.2-6A)

[5] This rule does not apply to situations in which a lawyer is providing summary advice, for example over a telephone hotline or as duty counsel, or to initial consultations that may result in the client retaining the lawyer.

Honesty and Candour 3.2-2

When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

[1] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.

[2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

[3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's

perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

Language Rights 3.2-2A

A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice. 3.2-2B. Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

[1] The lawyer should advise the client of the client's language rights as soon as possible.

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s.19(1) and Part XVII of the Criminal Code regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

[3] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related Commentary.

Advising Clients 3.2-2C

A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.

Commentary

[1] Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed. There may not be a need for the lawyer to obtain explicit instructions for every single step on a matter. Before taking steps, a lawyer should consider whether and to what extent the client should be consulted or informed. Fundamental decisions such as how to plead and what witnesses to call almost always require prior consultations. The same may not be so with less fundamental decisions. When in doubt, the lawyer should consult with the client. A lawyer should obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.

[2] A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based. If it is apparent that the client has misunderstood or misconceived the lawyer's advice, matters concerning the position taken or what is really involved in the matter, the lawyer should explain the matter further to the client to a sufficient degree so that the client does understand.

[3] A lawyer should not provide advice if the lawyer's personal views of the client, others involved or the issue will affect the lawyer's independence on the matter. For example, a lawyer's relationship (personal, financial, or previously strained with the client, opposing counsel or the opposing party) could affect the lawyer's ability to objectively assess a matter.

[4] When a lawyer is requested to provide independent legal advice or independent representation, the lawyer should treat the client as if he or she were the lawyer's own client for those purposes. The client is not the referring party. The lawyer should not treat the task as one that can be taken lightly.

[5] If requested by a client to do so, a lawyer should assist the client in obtaining a second opinion by cooperating with the second lawyer. A lawyer is not obliged, however, to assist a client who is really attempting to coerce the formulation of a favourable opinion or is acting unreasonably in some other respect.

[6] If a lawyer ought difficulty to contacting a client to obtain instructions, the lawyer to take reasonable steps to locate the client. If those efforts fail, the lawyer should consider withdrawing in accordance with section 3.7 (Withdrawal from Representation).

When the Client is an Organization 3.2-3

Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

[2] In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (section 3.4).

Encouraging Compromise or Settlement 3.2-4

A lawyer must advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] The lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal or Regulatory Proceedings 3.2-5 A lawyer must not, in an attempt to gain a benefit for the client, threaten, or advise a client to threaten:

- (a) To initiate or proceed with a criminal or quasi-criminal charge; or
- (b) To make a complaint to a regulatory authority.

Commentary

[1] It is an abuse of the court or regulatory authority's process to threaten to bring action in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

[2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

Inducement for Withdrawal of Criminal or Regulatory Proceedings 3.2-6

A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
- (b) accept or offer to accept, or advise a person to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
- (c) Wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding. Commentary [1] "Regulatory authority" includes professional and other regulatory bodies.

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing

the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority

[3] A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

[4] Where the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client or Others 3.2-7

A lawyer must never:

- (a) Knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
- (b) Do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others; or
- (c) Instruct a client or others on how to violate the law and avoid punishment.

Commentary

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] If a lawyer has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client or others and, in the case of a client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

[4] A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization 3.2-8

A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed wrongful conduct to be stopped, advise progressively the next highest persons or groups including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) If the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. This sub rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (section 3.3).

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission.

[3] Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

[4] In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization’s and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization’s responsibilities to its constituents and to the public.

Clients with Diminished Capacity 3.2-9.

When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client’s ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on

behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, a lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those Page 27 interests. This may require reporting the misconduct to a person or institution such as a family member, the Public Trustee or another appropriate agency.

[5] Where a lawyer takes protective action on behalf of a person or client lacking in capacity the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel become involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

APPENDIX B

SUPREME COURT OF CANADA REFERENCES TO *B (GD)*

R v B (GD) was cited in *R v Khan* 2001 SCC 86 by Lebel J, in dissent. In this case, he held that defence counsel saw no unfairness resulting from a certain irregularity at trial and said that the court cannot second guess what may have been a tactical decision. [At para 86]

R v B (GD) was cited in *R v Regan* 2002 SCC 12 by Binnie J, in dissent. This was a prosecution misconduct case and Binnie compared that the standard expected of prosecutors should be no less than outlined in *B (GD)*. [At para 157]

In *Lavellee et al v Canada (Attorney General)*; *White et al v Canada (Attorney General)* and *R v Fink* 2002 SCC 61 the court considered solicitor-client privilege when a law office was raided by the police. Lebel J, in dissent, cites *B (GD)* in extending the right to effective counsel to all persons. [At para 65]

R v B (GD) was also cited in *R v Willier* 2010 SCC 37 by McLachlan CJ for the majority. This was a s 10 (b) case where the accused sought the advice of counsel upon arrest. McLachlan CJ held that the police were under no duty to inquire into the content of the advice provided, but even if they did, “there is a wide range of reasonable professional assistance”, and as such what is considered reasonable, sufficient, or adequate is ill defined and highly variable.” [At para 41]

R v Sinclair 2010 SCC 35 was also a s 10(b) case that held that the accused did not have the right to have counsel present during an interrogation. Lebel J, in dissent, affirmed that *B (GD)* held that the right to counsel is the right to effective counsel pursuant to s 7 and s 11(b).[At para 168]

B (GD) was cited in *R v SGT* 2010 SCC 20 by the majority of the court. Here, an inculpatory email went into evidence without objection of counsel. The question was whether the trial judge ought to raise the issue on his own motion. The majority held that there was a strong presumption that defence counsel are competent in advancing of their clients. [At para 36]

In *R v Hay* 2013 SCC 61, Rothstein J, in a concurring judgement, relied on *R v B (GD)* regarding a motion for fresh evidence. [At para 64]

In *R v St-Cloud* 2015 SCC 27 the Court relied on *R v B (GD)* as a precedent on a fresh evidence motion. [At para 130]

In *R v Meer* 2016 SCC5 , the Chief Justice, for the court, dismissed the accused's appeal of right, concluding that the dissenting judge of the Alberta Court of Appeal failed to show counsel's incompetence had occasioned a miscarriage of justice. [At para 2]

In *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin* 2017 SCC, 26 costs were assessed against defence counsel for filing a series of motions in court that were found to be abusive and manifestly unfair to a party to the litigation. Gascon J, in a concurring opinion, quoted *B (GD)* that counsel had the obligation to defend his client zealously and should they fail, the fairness of the trial might be jeopardized. [At para 21]

The accused in *R v Wong* 2018 SCC 25, pled guilty to a trafficking charge that resulted in his deportation. He complained that his guilty plea should be withdrawn because his counsel did not advise him of the full consequences of his plea. The majority of the court upheld the plea and cited *B (GD)* in holding that defence counsel are ethically required to seek their client's direct instructions. [At para 11]

In *R v Calnen* 2019 SCC 6, no allegation was made that counsel was ineffective, notwithstanding counsel failed to ask for a limiting instruction on his client's discreditable conduct. The majority of the court declined to pass judgement on the merits of the defence counsel's tactical decision, especially in the absence of an allegation of ineffectiveness. [At para 67] Martin J, in a concurring decision, cited *R v B(GD)* on how the court balanced the desire for finality with the lack of requiring due diligence on a motion for fresh evidence. [At para 216]

APPENDIX C**Irrelevant Cases excluded from *B (GD)* Master List**Leave not granted

R v Lofstrom 2018 ABCA 5 (*B (GD)* cited at para 28)

R v Smith 2017 SKCA 81 (50)

Extend time to appeal

R v Blais 2016 ABCA 284 (14)

Bail

R v McPherson 2012 ABCA 246 (14)

Section 10 (b)

R v Edmonton 2014 ABCA 486 (7)

R v Richard 2013 MBCA 132 (105)

R v Willier 2008 ABCA 126 (35)

Fresh Evidence

R v Appleton 2001 ONCA 15 (15)

R v Assoun 2006 NSCA 47 (300)

R v Bailey 2017 NSCA 48 (25)

R v Campbell 2005 NBCA 35 (7)

R v Carroll 2001 NFCA 59 (10)

R v CFJ 2001 NFCA 148 (23)

R v Chalmers 2009 ONCA 268 (88)

R v Cruikshank 2002 ABCA 168 (9)

R v Falconer 2008 BCCA 277 (17)
R v Farler 2005 NSCA 105 (31)
R v Grant 2013 MBCA 95 (85)
R v Guthro 2010 ABCA 10 (118)
R v Harg 2013 MBCA 144 (19)
R v Harris 2009 SKCA 96 (18)
R v Henderson 2012 MBCA 93 (28)
R v Jones 2014 NSCA 136 (14)
R v Manssieri 2016 ONCA 703 (219)
R v Moyse 2013 MBCA 71 (28)
R v Pietrangelo 2008 ONCA 449 (5)
R v Reeve 2008 ONCA 340 (64)
R v SGT 2011 SKCA 4 (45)
R v Singh 2014 BCCA 373 (12)
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