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Unpacking *R v Barton*

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R v Barton is a bold and intrepid decision. It is not so much a lengthy decision as it is densely packed and nuanced, examining and uncovering layers of issues. It is a case that identifies errors and then offers solutions. It is a decision that exudes the modern principled approach, now a staple in an appellate Court's analysis of a variety of legal issues from the admission of evidence to the interpretation of statutes. Admittedly, the decision can give the reader a sense of discomfort, the kind of unsettling feeling one gets when being challenged to think differently. The kind of feeling one can have when reading something unexpected. But that does not mean the feeling is unwelcome. In this post, together we will "unpack" or identify some of the salient features of the decision. I will also try to respond to this feeling of discomfort. I caution however that the decision requires much contemplation and measured thought. What I am attempting to do here is to articulate my impressions upon reviewing the decision. I will leave to a later date in a further article an analysis of the myriad of legal issues raised in this decision through a review of precedent and legal principles.

The facts are startling, sad, and familiar. Cindy Gladue, a young Aboriginal woman, was paid sixty dollars by Mr. Barton to perform sex acts. Two interactions occurred over two days and on the second evening, Ms. Gladue died in the bathtub of Mr. Barton's hotel room. She bled to death from a perforated vaginal wall. At trial, Mr. Barton admitted he had sexual contact with the deceased that evening. He admitted he repeatedly pumped his fist into Ms. Gladue's vagina at which point she started to bleed. He maintained that he did not intend to harm her and that he was unaware of her condition until he awoke in the morning and found her immobile in the bathtub. In his evidence, he called the incident an "accident". After finding her in an injurious state, Barton tried to mop up the blood, fled the scene, and discarded the bloody towel, only to return to the hotel room soon thereafter at which point he called 911. His statements after the incident, to both friends and the police, suggested Ms. Gladue came to his hotel room and asked to shower in his washroom, where he found her dead the next morning. At the time, he denied any physical interaction with the deceased. At trial, medical evidence was called on behalf of the Crown and the defence. The Crown's expert contended the perforation was caused by a sharp object, while the defence expert disagreed and opined that weakness in the vaginal structure was the operating cause of the injury.

The trial was heard before a judge and jury in the early part of 2015 and Mr. Barton was ultimately acquitted. An application was made by the Crown, during the trial, to admit "real" evidence in the form of the vaginal tissue of Ms. Gladue to assist in understanding the evidence of the medical expert who examined the tissue (*R v Barton*, 2015 ABQB 159 (CanLII)). Real evidence is directly observable by the trier of fact. Like direct testimonial evidence of a witness who has personally observed an event, it does not require the trier of fact to draw an inference

from the evidence, should it be accepted. Unlike direct testimonial evidence of a witness, the trier of fact becomes the direct observer, acting, in some sense, as the witness to the event. This act of "direct self-perception" or "autoptic proference" as Wigmore described it (John Henry Wigmore, *Evidence in Trials at Common Law*, revised by John T. McNaughton (Boston: Little, Brown and Company, 1961) vol. 4 at 1150), occurs with all real evidence such as photographs, audio and visual recordings, electronic and hard copy communications or the spent cartridges of a firearm. Similarly, application can be made pursuant to section 652 of the *Criminal Code*, RSC 1985, c C-46 during the course of a jury trial, up until the verdict is rendered, for a "view" of "person, place or thing" located outside of the Courtroom. These direct observations made by the trier of fact become part of the evidence assessed at trial. Often, real evidence or direct observations by the trier can "speak for itself", such as those spent cartridges but real evidence, in terms of how it fits into the narrative puzzle, is subject to interpretation. Either way, real evidence is admissible at trial if it is relevant and material to the case. Relevancy depends on authenticity. An item that does not reflect its true nature at the time of the incident is worthless and has no probative value. Applications to admit such evidence are usually, therefore, framed in authenticity terms: Is the item unaltered and unchanged? The application, in this instance, was opposed by the defence, not because the tissue was irrelevant or not authentic but because the prejudicial effect of such evidence before the jury would outweigh the probative value. This exclusionary discretion or gatekeeper function of the trial judge is an important safeguard in ensuring a fair trial while ensuring the truth-seeking function of the trial is not inappropriately compromised. This discretion is an example of the balancing done over the course of a trial. In the area of expert evidence, for instance, the trial judge has an ongoing duty to ensure such evidence stays within its scope to ensure trial fairness (*White Burgess v Haliburton*, 2015 SCC 23 (CanLII) (para 54) and in *R v Sekhon*, 2014 SCC 15 (CanLII) (para 46)). In this instance, the trial judge admitted the evidence, recognizing the probative value outweighed the prejudicial effect. It was, in the Court's opinion, evidence to assist the jury in their consideration of the case. The trial judge also reminded the jury to decide the case fairly and dispassionately and not to base the verdict on an emotional response to the evidence. Although, as noted by the Court at paras 127 and 128, standardized cautions to the jury without contextualizing the instruction to the facts of the case are meaningless.

This narrative of the admissibility of the tissue evidence highlights the balancing required throughout the trial in both the admissibility of evidence and the instructions to the jury. But this story of admissibility goes even further than the bounded space of the Courtroom. Ms. Gladue's family was devastated with the decision to admit the tissue evidence. To the family, it was a decision that required their input and consent to protect Ms. Gladue's dignity as an Aboriginal woman. To the friends and family of Cindy Gladue, she was "more than a statistic, more than an addict and more than a piece of tissue" (*Death and Life of Cindy Gladue* by Kathryn Blaze Carlson, May 15, 2015, The Globe and Mail). In the interview for the Globe article, Ms. Gladue's mother emphasized that Cindy is "still human, she still has a name, not just 'prostitute'." This evidentiary application highlights the concern the Court of Appeal has in *Barton* with the approach this case represents: We in the justice system are attuned to categories of legal issues to which we must respond such as the admissibility of real evidence, the inadmissibility of bad character evidence, the proper use of circumstantial evidence and the correct legal articulation of the substantive law. We are not trained to be mindful of the larger view of the case which involves a self-assessment of how the case, in totality, presents. We are not recognizing that important societal values, some of which are *Charter* values, must also be reflected in the justice system. This includes the way we refer to a witness as a "prostitute" rather

than a "sex worker" or even why that kind of labelling, done throughout the trial by all participants in the case (para 116) is required. We need to constantly ask ourselves when we prepare and present a case, "why"? Why do we need the witness to be called a "prostitute"? How does it advance the case? Is there another way of making our point that does not fall into stereotypes or is the notion simply not required as its sole purpose is just prejudicial and irrelevant? These basic questions are part of the Court of Appeal's "re-setting" to the modern approach to the contextual appreciation of a case.

The facts of this case do not serve merely as the framework upon which the legal issues are placed but are the essence of this decision. Woven in between these facts are the legal issues, which, to extend the metaphor, become the fabric of our discussion in this post or the "unpacking" of the case. Typically, this term "unpacking" refers to an analytical unfolding of issues that are difficult to ascertain without some sort of roadmap or guide. In essence, "unpacking" suggests an opening up of the folded map or triptych to reveal the whole route. It requires us to also extend ourselves and to examine the big picture. In seeing the whole, we can then consider how these various packets of legal issues fit together to provide the final outcome. But "unpacking" can also mean what it says – that a journey has ended and it's time to clean out the baggage. We are done but not finished as when we "unpack" we might re-fold in a different or better way or we may clean and re-start again. We may even discard. After reading *Barton* and after reflecting on it, this post is about both types of "unpacking". As I have already suggested, we need to ask broader and deeper questions such as: What is the long view of this decision? Where does it lead us? What will it impel us to do?

Admittedly, all of this may seem too existential for a legal blog but as a practitioner and academic, I am enjoying the pure joy of reading a decision which challenges me to set aside a legal response and instead to think about the kind of justice system which appropriately reflects who we are as a society and who we want to be. It sparks a badly needed conversation about our approach to the law and whether it is approachable for all those impacted by it. I can't say with certainty that I know what the justice system should look like or can look like but I can say that this is something that we all need to be engaged in because change requires hard work and dedication. It also requires all of us to step out of our comfort zone, which cases such as *R v Jordan*, 2016 SCC 27 (CanLII), and now *Barton* push us to do. However, change does not mean we give up what is essential to us as a country committed to *Charter* values. It simply requires us to be mindful of those values in fashioning our justice system. We should not be pressured into cutting corners or rights in the name of expediency. Rather, we should be scrupulous in our desire to see justice done. Complacency or leaving the status quo, be it trial delay or conviction of the innocent, is a dead end to nowhere. Only thought that leads to action makes a difference.

As I first suggested, the *Barton* decision is nuanced, providing layers of discussion: I suggest at least seven layers which interconnect. Looking at the first layer of the unpacking of issues, there is an overarching theme, which in my mind extends far beyond the case at hand, relating to instructing the jury in a clear, robust and frank manner. We in the legal profession too often rely on the probity of legal nomenclature to get us to where we are going (model jury instructions can be found on the National Judicial Institute website). *Barton* reminds us that justice is not only for those in the know but is also for those who really don't care to know until they are face to face with questions of justice. Clarity of thought, simplicity of explanation, and frank conversation go a long way to inform the non-legal partners in our justice system. To be truthful, this approach goes a long way for those legal minds who are in the know as well. I will call this approach to

jury instructions, in legal language, the modern principled approach, which embodies the contextual approach approved of and utilized by the Supreme Court of Canada in other areas of law such as in statutory interpretation (para 21 of *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)) and in the admissibility of hearsay (see *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC), and *R v KGB*, [1993] 1 SCR 740, 1993 CanLII 116 (SCC) as the foundational cases). This approach is open to doing law differently, within the bounds of legal principles and within the context of the case at hand. To do otherwise would be to detach the decision-making from the unique narrative offered by each case.

A modern approach to jury instructions sounds grand but in the context of *Barton* it finds meaning. This is where the Alberta Court of Appeal provides us with guidance and helpful exemplars for the fulfillment of the modern approach. A jury instruction must provide meaningful assistance to the jury by simplifying the complex law on sexual assault while recognizing no two cases are alike. The trial judge's role is to also "unpack" by unfolding the trial narrative with the concomitant legal issues as they are relevant in the particular case. The trier must ask, is this a case involving consent or no consent? Or is it an issue where consent is given but vitiated? If so, on what basis is there such a vitiation? This deep dive into the facts, this modern contextual approach, requires the trial judge to specifically identify the essential nature of the offence. As discussed throughout *Barton*, the emphasis in the charge was askew. For example, the focus should not have been on the "application of force" as required for the "assault" element of the offence but on the "sexual activity in question" per s 273.1 of the *Criminal Code*, which defines consent for the purpose of sexual offences. As recognized in the decision, sex, which is in and of itself a legal activity, is by nature a touching. This case is not one where the accused denied the sexual conduct so the emphasis in the instructions on a finding of an "application of force" was confusing and unhelpful for the jury (para 189). Instead, the focus for the jury should have been on the amount of force used as an aspect of the sexual activity (paras 193, 194).

Creating a jury charge that fits the case is not the only function of this modern jury instruction approach. A modern principled approach requires balance in the instructions to the jury. But balance does not mean the traditional evidential and procedural safeguards are no longer necessary. Instructions on the presumption of innocence and on impermissible inferences must be part of the discourse between trial judge and jury. However, the trial judge, who must remain balanced in thought and impartial in aspect throughout the trial, has a duty to present all evidence in a fair manner. The accused is to be judged on the evidence and not on improper inferences arising from it. In the *Barton* case, the trial judge admonished the jury to not engage in "reasoning prejudice" or "moral prejudice" that occurs when a trier draws an inference that the accused was a bad person and worthy of conviction because he consorted with an "unsavoury" person, in this case a "Native girl" who was a "prostitute" (para 130). This classic limiting instruction is given to ensure any potential "bad character" evidence, which is presumptively inadmissible, is not used for that impermissible purpose (see *R v Mack*, [2014] 3 SCR 3; 2014 SCC 58 (CanLII) at para 57). But in this case, the concern to protect the potential "bad character" of the accused was not informed by the gate keeper function of a trial judge that aims to provide balance and fairness into the trial. Here, again, is the problem with the silo approach to law where case approach is embodied by a check-list of issues. By this one-sided appreciation of "prejudice" in this case, as only the accused person's prejudice, the full meaning of trial fairness, as functionalized by the gate keeper function of the trial judge, was missing.

The missing instruction, according to the *Barton* Court, was the lack of instruction cautioning the jury to refrain from entering into similar reasoning or moral prejudice in assessing the status of the deceased as a female, Indigenous sex worker. Similar to the instruction regarding the accused, the jury should have been told not to draw the impermissible inference that because the deceased was a "prostitute", she implicitly consented to all forms of sexual interaction by virtue of her profession (*Barton* paras 116-132). This connects to the further error, discussed later in this post, relating to the lack of a section 276 application regarding sexual history evidence. The jury would also have benefited from a direction that Ms. Gladue was not less "worthy" as a person because of how she was "labeled" or defined by society as a female, as an indigenous person, and as a sex worker. Defence counsel and Crown counsel in this case should welcome such instruction as it would completely neutralize any suggestion of "bad personhood" on the part of Barton. It would also humanize the case, placing it in real terms. As eloquently referenced in para 128 of the *Barton* decision, the case is about relationships between race, gender and status. It is also about the trial judge's relationship with the jury, the relationships between all parties in the case and the relationships between the justice system and the community. These relationships are at the core of the criminal justice system. They are based on trust and confidence. In these relationships we expect a "fair" trial not a "fixed" one as emphasized by the Court of Appeal in *Barton* (at para 262).

This kind of instruction, I suggest, is also consistent with the Supreme Court of Canada's position on the editing or excising of an accused person's criminal record in *R v Corbett*, [1988] 1 SCR 670, 1988 CanLII 80 (SCC). There, the Court considered the prejudicial effect of placing an accused's criminal record before the jury in a situation where the accused will testify, and the resultant moral and reasoning prejudice which may arise from the accused person's prior criminal convictions. The concern is two-fold; that the jury will find that the accused is a bad person who has a propensity to commit crimes, and therefore likely committed the present crime and is therefore worthy of punishment and that such a prior record could distract the jury from their duty to determine guilt or innocence on the basis of the evidence before them. Although the *Corbett* Court recognized the discretion of the trial judge to edit or excise a criminal record to ensure trial fairness, Chief Justice Dickson cautioned that such application must not result in a "serious imbalance" where the Crown witnesses may also have previous convictions and where, as a result, their credibility is attacked (*Corbett* para 34). This requires the judge to look at the context of the case or the long view of the facts which would be before the jury to ensure the case was not reimagined unfairly and that the truth-seeking function of the Court remained intact. This application is an example of the exclusionary discretion or gatekeeper function of the trial judge I mentioned earlier in this post in which the focus is on trial fairness. The Alberta Court of Appeal in *Barton* was applying the same reasoning in calling for a more balanced and contextual approach in the jury charge.

The second layer of issues in the case, which flow from the general concern with the jury instructions, are the numerous specific "traditional" legal errors in the charge identified by the Court. I am labeling these issues as "traditional" as they are the kind of legal errors in instructing a jury one regularly argues on a murder appeal. Here too, I would suggest, the errors are connected. For instance, as I will explain further, the misdirection and non-direction to the jury on the use to be made of the post-offence conduct is related to the misdirection on the "defence" of accident. In turn, these errors are compounded by the misdirection in the charge on unlawful act manslaughter and the inadequate charge on the two potential pathways (standard and *Jobidon* related as I will discuss later in the post) to manslaughter. I caution again that the purpose of this

post is not to thoroughly discuss the legal niceties of these errors. These errors, however, serve to highlight the entanglement of issues found in this case.

Post-offence conduct must be approached by the trier of fact with caution to ensure such potentially damning evidence is considered in its proper context (see *R v White*, [1998] 2 SCR 72, 1998 CanLII 789 (SCC)). There are instances where an accused person's actions after the incident "look suspicious" but are in fact consistent with an innocent explanation. Of course, it is within the purview of the trier of fact to accept or reject evidence and to determine the weight, if any, to place on evidence. However, as with impermissible character evidence, the trier of fact should not be concerned with evidence that has no probative value and merely distracts the jury from its duty to fairly and objectively assess the evidence. The concern with post offence conduct is the potential illogical "leap in logic" which can occur should the trier unreasonably infer guilt from evidence that merely "looks bad". This does not mean that such evidence is presumptively inadmissible. On the contrary, post-offence conduct can be useful circumstantial evidence of guilt, of motive and of credibility, as noted by the Alberta Court of Appeal in *Barton* (paras 57-75). The misdirection and non-direction on the use of such evidence in *Barton* impacted the jury instructions on Mr. Barton's position that what happened was an accident, as his "innocent explanation" seemed to negate a proper instruction on the use to be made of the post-offence conduct (paras 63-69).

The Court in *Barton* raises the "elephant in the room" concern, which is whether "accident" is a positive defence the jury will be specifically instructed to consider like self defence or duress (paras 184-293). Of course, such an instruction would only be given if the defence has an "air of reality". This test requires the trial judge to determine "whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit." (*R v Cinous*, 2002 SCC 29 (CanLII) paras 47 to 57) Without entering into a thorough discussion here on that issue, put simply, the *Barton* Court finds that there is no self-contained "defence" of accident as such a position merely negates the essential elements of a crime, be it *actus reus* or *mens rea*. Further, the characterization of the defence as "pure accident" in the charge (para 287) was inconsistent with Mr. Barton's admission at trial that he repeatedly and forcibly entered Ms. Gladue's vagina with his fist. I would add that even if "accident" is a "defence", it is arguable whether, on the evidence, the defence had any "air of reality" such that it was properly placed for consideration before the jury. Further, this emphasis on "accident", as it is mentioned enhances the error in misdirecting the jury on post offence conduct and on the *mens rea* for unlawful act manslaughter, which is based on an objective foresight of bodily harm per *R v DeSousa*, [1992] 2 SCR 944, 1992 CanLII 80 (SCC), and *R v Creighton*, [1993] 3 SCR 3, 1993 CanLII 61 (SCC). Additionally, the lack of direction on the objective dangerousness of Barton's actions in the context of a manslaughter charge is in and of itself worthy of appellate intervention.

These "traditional" errors also led to the third layer of legal errors to be unpacked relating to the law of sexual assault, now so sadly prevalent in the appellate courts. These errors impact the substantive instructions on the law of murder and manslaughter, as the element of sexual assault causing bodily harm is integral to a proper understanding of the homicide instruction. This layer takes us back to the beginning as it reveals the fragility of the model jury instructions, the weaknesses inherent in a categorical "check list" approach rather than the modern contextual holistic approach, and the lack of a "humanity litmus test", which reminds us that this case is about real people, whose voices (or lack thereof in Ms. Gladue's case) are being heard by real people. This set of errors impacts how we generally and traditionally approach the law of sexual

assault but also reminds us of the need to step back and look at the case we are presenting and ask ourselves those "why" questions. For the Crown and the defence those "why" questions should be in the context of their theme/theory, strategic decisions including the thought processes on how to present the best and most effective case before the jury that promotes trial fairness. The Court in *Barton* identified legal errors in the instructions on the law of sexual assault but also in the manner in which the law of sexual assault was presented as part of a "boiler plate" or "fossilized" (para 8) instruction (paras 173-258).

This misdirection in the charge was preceded by and imbued with the missing procedure under s 276 of the *Criminal Code* or what is known as the "rape shield" law (paras 85-153 of *Barton* and for further discussion see *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 1991 CanLII 76 (SCC)). Again, this fourth layer of error relates to the admissibility of evidence that may lead to impermissible, prejudicial, and illogical inferences. Section 276 prohibits evidence whose sole purpose is to perpetuate the "twin myths" (para 89) relating to sexual assault complainants that prior sexual conduct, including being a "prostitute," means consent was present at the time of the offence and that prior sexuality is a form of "bad personhood" making such a person of "loose morals" less credible. This prohibition is to ensure trial fairness and balance. The same balance that requires the instructing judge to remind the jury that Ms. Gladue, like all people in the justice system—the accused, the lawyers, the witnesses—must be treated with dignity and respect. A person is not to be "judged" by race, sexual orientation, gender or profession.

An application to use prior sexual history evidence for purposes other than the prohibited twin myths relating to consent and credibility is required whenever the accused is tried on a sexual assault charge. However, s 276 does not specifically reference homicide, which requires, according to s 222(5), an unlawful act. Such an unlawful act can be sexual assault or as in this case, sexual assault causing bodily harm. The *Barton* Court interprets the s 276 requirement that the application is engaged "in proceedings in respect of an offence" as including a homicide, where the underlying act is a sexual offence. This interpretation, using the modern approach as defined by *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), is consistent with the purpose and objective of the section. To interpret it otherwise would present an absurdity and would be contrary to Parliamentary intention in creating the protection under s 276. The section provides a mechanism whereby the accused can apply to have such evidence admitted if it is connected to a relevant matter that goes beyond the realm of myth and is needed for fair trial purposes and to fulfill the accused's right to full answer and defence under s 7 of the *Charter*.

The fifth area to unpack is the *obiter* comments found in the reasons. There are three areas of concern involving, as already discussed, whether there is a recognized stand-alone "defence" of accident (paras 284-293), the use of public policy in defining or confining consent pursuant to *Jobidon*, and a call for clarification of the "reasonable steps" requirement for mistaken belief in consent under s 273.2(b). All three of these concerns are valid and worth investigating, particularly the continuing struggle to reconcile *R v Jobidon*, [1991] 2 SCR 714, 1991 CanLII 77 (SCC), with the much-changed legal landscape on the matter of consent since its release 26 years ago (paras 301-310 and for further discussion see my previous post on *Jobidon*). Again, these discussions require a detailed response for a later date, however, I would like to acknowledge the pressing issue of the clarification of the "reasonable steps" requirement as raised in *Barton* (paras 294-300). Section 273.2 enumerates situations where the accused in a sexual assault case cannot rely on the defence of mistake of fact in consent. Under subsection (b) the mistaken belief in

consent defence is unavailable where the accused does not take reasonable steps to ascertain consent. Soon after the release of *Barton*, the Supreme Court of Canada released *R v George*, 2017 CanLII 24267 (SCC), involving a charge of sexual interference under s 151 where the accused was 35 years of age and the complainant was 14 and a half years old. Section 150.1(4) of the *Criminal Code* prohibits a mistake of age defence unless the accused took "all reasonable steps". In the *George* case, the Court found that where there is an air of reality to the defence of mistake of fact, the burden is on the Crown to prove beyond a reasonable doubt that either the accused did not honestly believe the complainant was at least 16 or the accused did not take all reasonable steps to ascertain the age of the complainant. Considering the similarity in wording with s 273.2, as recognized by the *Barton* Court, this *obiter* issue, which was not raised in the *Barton* appeal, becomes even more pressing to consider (para 294).

The sixth unpacking involves the notion of appellate review of an acquittal. Section 676(1) of the *Criminal Code* confines an appeal against acquittal by the Attorney General to a question of law alone. This limitation arises from the core values of our justice system. As articulated by Justice Wilson in the majority decision of *R v B(G)* [1990] 2 SCR 57, 1990 CanLII 115 (SCC) at 66, the restricted appellate review "reflects the fundamental principle that an accused is presumed to be innocent until proved guilty by proof beyond a reasonable doubt". In *B(G),* Justice Wilson reviewed what the term "question of law" entails. Although factual errors alone, as in an unreasonable verdict or sufficiency of the evidence, would not amount to a question of law, a misapprehension of fact could be if it amounted to a misdirection on the law (pages 70-72). Throughout *Barton,* the Court is careful to characterize the errors as irreversible misdirections and non-directions of law.

As raised earlier in this post, the recent Supreme Court of Canada *George* decision may have an impact on the *obiter* legal issues raised by the Court in *Barton* on the clarification of the "reasonable steps" requirement for a defence of an honest belief in consent under s 273.2(b) of the *Criminal Code*. *George* was a case of an appeal against acquittal and it is the comments on the jurisdiction of appellate review of an acquittal, which may pose further discussion points in the review of the *Barton* decision. For the appellate Court to intervene in an appeal against an acquittal, there must be an error in law and that error must materially impact the not guilty verdict. The threshold for such materiality is quite high. There must be at least an error that with a "reasonable degree of certainty" has a material effect (*George* para 27). In paras 6 and 52 of the *Barton* decision, the Court suggests the identified legal errors "might reasonably" have a material bearing on the outcome, which could suggest too low of a threshold. However, later in the reasons the Court clearly finds the specific legal errors did have a material bearing on the acquittal. In any event, although it might seem like semantics, I could see an argument made on a further appeal that the threshold they used was too low. Additionally, the Court in *George* discussed the concern with conflating what are factual issues with legal issues, whereby the "legal" errors are actually factual ones (*George* para 17). Again, it would be difficult to suggest the *Barton* Court entered into the same error.

A final comment to make, the seventh unpacking, is a connection I see with some of the research I have been doing on the evolving role of the trial judge in a criminal case as the trier of fact, the arbiter of the law, and the gate keeper and guardian of the courts, and the impact the sense of community or societal values is having on this "enhanced" version of the trial judge. I jokingly refer to the new and improved vision of the trial judge as "gate keeper on steroids" but really a trial judge does not sit alone but sits in the heart of the community of justice. It is the relationship

or connection between all individuals in the criminal justice system which interests me and which I believe profoundly impacts the way the courts impart justice. It also, in my view, explains why we are now struggling, in an existential way, with our conceptions of what the justice system should be. Cases like *Barton*, *Jordan* and even older cases such as *R v Anthony-Cook*, [2016] 2 SCR 204, 2016 SCC 43 (CanLII), *R v St-Cloud*, [2015] 2 SCR 328, 2015 SCC 27 (CanLII), and *R v Lacasse*, [2015] 3 SCR 1089, 2015 SCC 64 (CanLII), signal a new modern approach to criminal law. If this is so, then we need to be prepared to answer the issues raised in those cases, to be modern in our aspect and approach while continually ensuring the fundamental values embodied in our presumption of innocence and fair trial principles are not diminished and remain central to that modern approach.

The *Barton* decision is fresh and challenging. It will impact, not only the re-trial of this case but also future cases and has already been cited in a recent Alberta Court of Appeal decision (*R v ARD*, 2017 ABCA 237 (CanLII) at para 57). We are put off balance by the intricacies offered by the decision but then only until we re-adjust to a new balance. The unpacking we have just undertaken is a step toward discussion and review of what has been done in the past and whether the past can be a jumping off point that, as the Court recommends in *Barton*, allows for a "re-setting" to the modern approach.

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