Section 515(10)(c) Criminal Code:
At the Intersection of the Media, Judicial Legitimacy and the Rule of Law

Anastasia Berwald

Faculty of Law

McGill University, Montreal

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"You force people to stop asking questions, and before you know it they have auctioned off the question mark, or sold it for scrap. No boldness. No good ideas for fixing what's broken in the land. Because if you happen to mention it's broken, you are automatically disqualified."

-Barbara Kingsolver, *The Lacuna*

ABSTRACT

This thesis examines the interpretation of section 515(10)(c) of the Canadian *Criminal Code*. Particularly, it seeks to explain and justify the paradoxical interpretation of the "public." The first Chapter details the contemporary media context and the role of judicial legitimacy. I conclude that judges are sensitive to public opinion and that this may be problematic because public opinion is greatly influenced by sensationalist media coverage. Chapter 2 traces the emergence of the current interpretation of 515(10)(c) *Criminal Code*. Specifically, I explain how judicial legitimacy considerations lead the Supreme Court of Canada to reject the provision's constitutional challenge, but that their actual discomfort with the provision and the contemporary media context lead the courts to create a paradoxical definition of the "public." In the final Chapter, I justify this apparent paradox in terms of the judiciary's need to balance judicial legitimacy and its role as the ultimate protector of individual liberty. Indeed, the current paradoxical interpretation benefits judicial legitimacy because it appears to give the public a right to determine judicial interim release, which tends to reassure the public. However, in truth, the definition of public is impossibly high, which serves to protect individuals from pre-trial incarceration.

RÉSUMÉ

Cette thèse examine l'interprétation judiciaire de l'alinéa 515(10)(c) du *Code criminel* canadien. En particulier, elle vise à démontrer et justifier l'interprétation paradoxale du « public ». Le premier chapitre détaille de contexte contemporain des médias et le rôle de la légitimité judiciaire. J'y conclus que les juges sont sensibles à l'opinion du public, mais cela peut être problématique étant donné que cette opinion est grandement influencée par une couverture médiatique sensationnaliste. Dans mon deuxième chapitre, je retrace l'émergence de l'interprétation actuelle de l'alinéa 515(10)(c) *Code criminel*. Plus précisément, j'y expose comment des considérations de légitimité judiciaire ont mené la Cour suprême du Canada à rejeter la contestation constitutionnelle de cet alinéa, alors que, inconfortables avec sa teneur, les tribunaux créèrent une définition paradoxale du « public ». Dans mon dernier Chapitre, j'explique et justifie ce paradoxe à la lumière de la nécessité pour le pouvoir judiciaire d'équilibrer la légitimité judiciaire et son rôle en tant que protecteur ultime de la liberté individuelle. En effet, l'interprétation paradoxale qui existe présentement sert la légitimité judiciaire puisqu'elle semble donner au public le droit de se prononcer sur les remises en liberté avant procès, ce qui rassure le public. Par contre, en réalité, la définition donnée à l'expression « public » est très restrictive, ce qui protège les individus de l'incarcération avant leur procès.

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Introduction

Content Warning: Mentions of child abuse and violence against children

In 1995, police in British Columbia arrested Robin Sharpe and charged him with possession of child pornography[1] after seizing various stories he had authored, such as "The Spanking" and "Suck it: A Devotee's Lament."[2] Sharpe claimed the *Criminal Code* provisions violated his freedom of speech and brought a constitutional challenge. The media had a field day, especially considering the accused, "a sixty-seven-year-old retired municipal worker from Vancouver … was unrepentant."[3] However, Shaw J, the trial judge, agreed with Sharpe and faced media and public outrage, including a radio-talk show host nicknaming him "Justice Bonehead" and a caricaturist drawing him in a garbage can. Justice Shaw's vilification culminated in a death threat.[4]

At the Appellate level, Justice Mary Southin vehemently stated that the outraged commentators "[must have known] *nothing whatever* of the text of s 163.1 [of the *Criminal Code*]. What, in their *ignorance*, they conjured up in their mind was the spectre of a judge giving judicial approval to sexual exploitation of the prepubescent, whether of the male or the female sex, contrary to the will of Parliament."[5] Justice Shaw expressed great concern at a media outlet that

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[1] Among other charges.
[2] Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court* (Québec: Presses de l'Université Laval, 2006) at 173.
[3] *Ibid*.
[4] *Ibid.* See also Justice Duncan J Shaw, "Child Pornography and the Media: *R.* v. *Sharpe*" in Canadian Institute for the Administration of Justice, ed, *Dialogues About Justice The Public, Legislators, Courts and the Media* (Montréal : Éditions Thémis, 2003) 99.
[5] *R v Sharpe,* 1999 BCCA 416 at para 5, 1999 CarswellBC 1491(WL Can) [emphasis added].

had altered a sentence from the judgment, making it seem like he did not believe child pornography harmed children.[6]

This case illustrates the tensions that often arise between the public and the courts in controversial cases. It also demonstrates how the public is informed by, and expresses itself through, the media. These interactions occasionally, like in the *Sharpe* case, put judges in difficult and complicated situations. Though the judicial system cannot function without the public's trust, giving in to the clamour of a public that is incorrectly informed by sensationalist media is contrary to its role within Canadian democracy.

This issue is particularly apparent in the interpretation of section 515(10)(c) of the *Criminal Code*.[7] This particular paragraph mandates pre-trial detention of an accused, if her/his release would undermine public confidence in the administration of justice. This puts judges in a difficult position where they are forced to determine public opinion and then decide whether or not to deprive an individual of her/his freedom based on such a determination.

An analysis of decisions based on this provision reveals something of a paradox: the courts insist they are sensitive to public sentiment, as the legislator intended, but also seem to often ignore these sentiments, especially in highly mediatized cases. Throughout this thesis, I will argue that this paradoxical interpretation is understandable and is the result of the complicated relationship between the context of contemporary media, the importance of judicial legitimacy and the judge's role regarding the rule of law.

Chapter 1 will begin with a brief explanation of the core subject of this thesis, paragraph 515(10)(c) of the Canadian *Criminal Code*. I will detail why it is an interesting provision to

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[6] The sentence in the motives reads: "There is no evidence that demonstrates a significant increase in the danger to children *related to the confirmation of cognitive distortion* caused by pornography" whereas the medium cited it as "There is no evidence that demonstrates a significant increase in the danger to children caused by pornography." Shaw, *supra* note 4 at 102 [emphasis in original].

[7] RSC 1985, c-46 (hereafter "*Cr C*").

study and through which to examine the judiciary's relationship with the public. Because it is impossible to discuss public opinion without a discussion of the media's role in shaping it, I will then expose the realities of the contemporary media context. Doing so is important to understand what moulds public opinion, particularly in criminal cases. Finally, I will begin to address why public opinion is important for the courts. I will explain the importance of judicial legitimacy and explore the various means by which courts maintain this legitimacy.

Chapter 2 will focus on the history of section 515(10)(c) *Cr C*. I will argue that the interpretation of this section exposes the judiciary's desire to protect its legitimacy, but also its sensitivity to the media's contemporary state and public knowledge levels of the courts. Indeed, from the provision's very first constitutional challenge, to the latest Supreme Court decision on its interpretation, the courts' paradoxical rhetoric becomes increasingly apparent. Though the courts insist they respect the public's opinion, the legal definition of "public" is subtly, though greatly, restricted.

In Chapter 3, I will discuss the interpretation of 515(10)(c) *Cr C* in light of the role of judges in Canadian society. The judicial system is an integral part of our democracy and in applying the law, this independent branch must ensure the legislative and executive branches do not unduly restrict the freedom of Canadians. I will analyze the interpretation of 515(10)(c) *Cr C*, which allows for the restriction of liberty through detention, in light of this duty. I will demonstrate how the current interpretation strikes a balance between the need to maintain public trust in the justice system and the judge's duty to protect individual freedoms.

Chapter One Mass Media Informed Perceptions and Judicial Legitimacy

This Chapter will examine why and how judges mediate their relationship with the public. Part A will detail the pertinence of choosing 515(10)(c) *Cr C* for this examination. No discussion of the public is complete without a discussion of the media[8] because they "have become the most important source of information for most people in advanced societies around the world."[9] Part B will exhibit the media's contemporary context, including what it means for the media to exist in a competitive capitalist market. Many aspects of this context are responsible for quality issues in the coverage of judicial affairs. In Part C, I will come back to the judiciary and discuss the importance of their relationship with the Canadian public. In light of the previous discussion, I will explain how the media creates challenges for this relationship. These challenges partly explain 515(10)(c) *Cr C*'s paradoxical interpretation.

A.The Challenge of Section 515(10)(c) Criminal Code

This Part will briefly expose the various aspects of 515(10)(c) *Cr C* that I will unpack throughout this thesis. As mentioned, this section is particularly useful to study how Canadian judges interact with the public they rule over as the third branch of government. Although some studies demonstrate the media's influence on public opinion and others demonstrate public opinion's

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[8]Quebec, Centre d'études sur les médias, *Réflexions et mise en contexte sur la situation créée par l'élection de M. Pierre Karl Péladeau,* (Ste-Foy : Centre d'études sur les médias, 2015) [CEM Report] at 29-31. The definition of media is currently shifting. Increased access to Internet means almost everyone can become a diffuser of information. In this thesis, media designates traditional, established, mass media companies: newspapers, radio, television and magazines as well as their websites. I am aware of the limits of this definition and agree that further research is necessary to determine where social media and alternative media fit in the picture, especially with regards to the younger generation. On this subject, see Virginie Hébert, Gabrielle Sirois & Émilie Tremblay-Potvin, *Les effets des médias à l'ère 2.0, Recension des écrits sur l'influence de la médiatisation dans la formation des opinions politiques à l'heure de médias médias sociaux, Rapport de recherche présenté au Centre d'études sur les médias* (Québec : Groupe de recherche en communication politique, 2015).

[9] Jesper Strömbäck, "Four Phases of Mediatization: An analysis of the Mediatization of Politics" (2008) 13:3 Intl J Press-Politics 228 (Sage Journals) at 229.

influence on judicial decision-making,[10] the exact mechanisms of this interplay are hard to define. As a study subject, the members of the judiciary present a particular challenge.[11] This is especially true in Canada, where rules of conduct oblige judges to remain relatively quiet on public and political affairs.[12] In addition, when asked about the media's role in their decision-making, some judges are reluctant to give them any weight. In the course of Sauvageau's study, McLachlin CJ stated that media rarely come up in their discussions. Justice Binnie stated: "We never say, well, we're going to get skewered or we're going to get praised. We are aware of what is in the media, as everyone else is, but in my experience it has zero effect in that sense."[13] Although a morally praiseworthy statement, this is somewhat inconsistent with research results.[14] Throughout this thesis I will discuss the evidence of various extraneous factors that influence judicial decision-making and I will also explain why I believe the media plays a role in these influences.

There are other instances in Canadian criminal law that shed light on this interaction between the courts and the public. For example, a judge must order the exclusion of unconstitutionally obtained evidence if its admission "would bring the administration of justice into disrepute."[15] Similarly, when examining a joint submission on sentencing a judge should only impose a harsher sentence if "the proposed sentence would bring the administration of justice into

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[10] Kevin T McGuire & James A Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences" (2004) 66:4 J Politics 1018 (JSTOR), Ruth Klinkhammer & David Taras, "Mercy or Murder: Media Coverage of the Robert Latimer Trial" (2001) 64 Sask L Rev 573 (WL Can), Robert M Entman & Kimberley A Gross, "Race to Judgment : Stereotyping Media and Criminal Defendantts" (2008) 71 Law & Contemp Probs 93 (HeinOnline), W R Dolmage, "Lies, Damned Lies and Statistics : The Media's Treatment of Youth Violence" (1999-2000) 10 Educ & LJ 1 (WL Can).

[11] Jason L Pierce, "Interviewing Australia's Senior Judiciary" (2002) 37:1 Austl J Pol Sci 131 (Tandfonline).

[12] John Sopinka, "Must a Judge be a Monk – Revisited" (1996) 45 UNBLJ 167 (EBSCO), Canadian Institute for the Administration of Justice, *supra* note 4.

[13] Sauvageau, Schneiderman & Taras, *supra* note 2 at 204.

[14] See *Section C* – ii. – d. *The Marshall Cases* and iii. The Media's Impact on the Courts' Legitimacy, below.

[15] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(2).

disrepute or is otherwise contrary to public interest."[16] However, for reasons the author can only hypothesize about, both these provisions have birthed their own separate jurisprudence that judges seldom address in judicial interim cases. A comparison of these collections of case law would be interesting, but is unfortunately beyond the ambit of this thesis. Section 515(10)(c) *Cr C* is interesting in and of itself because of the unique expression "public confidence" it contains. In addition, contrary to joint submissions, that happen after a guilty plea, it applies at the pre-trial stage, during which the presumption of innocence still applies.

Section 515(10) *Cr C* reads as follows:

> **515(10)** For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> **(a)** where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> **(b)** where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> **(c)** if the detention is necessary to maintain <u>confidence</u>[17] in the administration of justice, having regard to all the circumstances, including
>
> **(i)** the apparent strength of the prosecution's case,
> **(ii)** the gravity of the offence,
> **(iii)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> **(iv)** the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

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[16] Lisa Kerr "Judging a Joint Submission: Comparing the U.S. and Canada on Judicial Role in Plea Bargaining" (2016) 36:7 CR Articles 22 (WL Canada) at 22.
[17] Emphasis added.

On the first ground, the judge can order detention if s/he believes the accused may attempt to flee. On the second ground, the judge can order detention if s/he believes the accused may attempt to interfere with the justice system, for example, by intimidating witnesses or committing additional infractions.[18] As the expression "tertiary ground suggests,"515(10)(c) *Cr C* offers a third ground upon which a judge can order the detention of an accused person: if s/he believes doing so is necessary to maintain confidence in the administration of justice.

Although I will detail the founding principles of Canadian bail law in Chapter 2, it is worth noting at this point that the French version of the section refers to "confiance du public" and that the SCC has thus ruled that adjudicators should read "public" into the English version. Consequently, judicial interpretation of the provision offers a unique opportunity to examine how judges deal with the public's confidence and the potential role of the media in this assessment. Indeed, this is a case where attention to the "public's feelings" is legally mandated. Theoretically, judges are expected to pay attention to all indicators of public opinion, including the media. By analyzing cases, we may get a glimpse into how they assess it. In other words, one of the barriers that normally exists when trying to comprehend how judges deal with popular clamour is eliminated in this case. While analyzing the cases, it will be important to constantly bear in mind the media context detailed in this Chapter.

Crime naturally worries the public. Members of society tend to be concerned about the release of presumed criminals, especially when they consider them dangerous or their crimes abhorrent.[19] As I will highlight, the media's focus on violent crimes and their use of frames that favour the prosecution can exacerbate these concerns.

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[18] Gary T Trotter, *The Law of Bail in Canada,* 3rd ed, (Toronto, Carswell, 2010) (loose leaf updated 2015, release 1) [Trotter 3rd ed] at 3-4 to 3-25.

[19] *R c Lamothe,* (1990) 58 CCC (3d) 530, 1990 CarswellQue 1911 (WL Can) (QCA). See Chapter 3 – *Section B* – ii. Crime and the Public, below.

These concerns can also translate into demands for pre-trial detentions. For instance, in Quebec, Guy Turcotte's[20] release awaiting his second trial led to public protests.[21] Popular Montreal journalist Patrick Lagacé even went so far as to state that 515(10)(c) *Cr C* should have prevented his release and that the decision voided any effect of the provision. In his words: "[o]n a l'impression d'un juge qui veut tellement s'éloigner de la perception des hommes qu'il en oublie complètement que l'alinéa c) du paragraphe 10 de l'article 515 dit justement qu'il ne faut pas mépriser cette perception, dans certains cas."[22]

Readers shared the article over a thousand times on Facebook. Of particular interest in this case was the Crown's unsuccessful attempt to use media coverage as evidence of public outrage over Turcotte's release.[23]

The clear reference to "public" however makes it impossible for judges to completely overlook the general public. This creates constitutional issues that I will detail later in this thesis.[24]

Section 515(10)(c) *Cr C* is at the core of judicial legitimacy issues.[25] The use of "public confidence" puts a spotlight on the consideration judges are willing to give members of the Canadian population in their decision-making. As I will argue, it is dangerous to openly deny the public a voice in judicial interim release cases and the public's general fear of criminals creates additional pressure.

There are limits to my approach in this thesis. The number of cases decided explicitly on the basis of the provision is limited. Some of the arguments may thus seem anecdotal. However,

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[20] Guy Turcotte violently murdered his children.
[21] La Presse Canadienne, "Manifestation contre la liberation de Guy Turcotte" *La Presse* (27 September 2014), online: <www.lapresse.ca>.
[22] Patrick Lagacé, "Tout au contraire, Monsieur le Juge" *La presse* (13 September 2014), online : <www.lapresse.ca>.
[23] See Chapter 2 – *Section D – The Media* below.
[24] See Chapter 2 – Section A – Legislative and Judicial History – From Confederation to Morales and Section B – From the "New" Tertiary Ground to Hall, below.
[25] See Section C – The Media Informed Public and Judicial Decision-Making, below

section 515(10)(c) *Cr C* does offer a unique window into judges' relationship with the public and the media and remains at the intersection of the judiciary, the public and the media.

B. Media in a Capitalist Market

Understanding the contemporary media context helps explain the paradoxical interpretation of 515(10)(c) *Cr C*. Because the provision refers to public confidence and because no discussion of the public is complete without a discussion of the media's role in informing its perceptions, I believe examining this context is important. Scholarship tends to address this link only briefly, though generally with negative criticism of media coverage. I believe it is relevant to expose the deep roots of the issues that plague media coverage of judicial affairs to fully comprehend the context in which judges interpreting 515(10)(c) *Cr C* operate.

Historical scholars generally regard the end of the 19th century as the era when newsmen[26] in Canada and the United States, emancipated themselves from political funding by turning to advertisers. Before this, they were openly affiliated to and funded by political parties and took strong editorial positions.[27] Seeking advertisements as a main source of revenue allowed them to become non-partisan, but also subjected them to the rules of the capitalist market. In short, in Canada and the United States and many other capitalist states, media became a profit-oriented business much like all others.[28] This reality has serious impacts, many of which are negative for the coverage of judicial affairs.[29]

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[26] They were and still are mostly men. How this influences the production of mass media can unfortunately not be addressed in this thesis, but is worth bearing in mind. For an good analysis of this situation see: Suzanne Franks, *Women and Journalism* (New York : Palgrave MacMillan, 2013).

[27] Paul Rutherford, A Victorian Authority: The Daily Press in Late Nineteenth-Century Canada (Toronto: University of Toronto Press, 1982) at 51-52, Minko De Sotiron, From Politics to Profit, the Commercialization of Canadian Daily Newspapers (Montreal: McGill-Queen's University Press, 1997) at 10.

[28] Even public broadcasters are not immune to the challenges of the market, as recent years at the Canadian Broadcasting Corporation have shown. See Frédérick C Bastien, "Écouter la différence ? Les nouvelles, la publicité et le service public en radio-diffusion" (2004) 37:1 Revue canadienne de science politique 73 (JSTOR), Marc-François Bernier, *Journalistes au pays de la convergence : sérénité, malaise et détresse dans la profession*,

i. At the Top: Competition and Concentration

Media today are large businesses that operate in specific ways to ensure profitability. Two situations are worth detailing: the importance of advertising revenues and the ownership concentration of media companies.

a. Profits and Advertisers

First, as journalism became a business, a shift in ownership patterns occurred. Indeed, in the very beginning, a single editor often owned a newspaper, which contained a great amount of editorial content. A newspaper was a way for the editor to inform his generally small community about issues he considered crucial and his related opinion. Profitability was not the initial objective.[30] Today, media corporations no longer belong to journalists, but to businesspeople or shareholders who are at least as interested in a return on their investment than they are in being "the people's watchdog." Some media entities are part of larger corporations that own non-media-related businesses.[31] Even those who may wish to maintain the noble intention of informing the public cannot escape the reality that all media must remain economically viable.[32] Concretely, this means finding and retaining advertisers.[33]

(Québec : Presse de l'Université Laval, 2008). It is beyond the ambit of this thesis to discuss how political affiliation still influences coverage in some countries, though a the comparison is certainly worthwhile. On this subject, *see* Daniel C Hallin & Paolo Mancini, *Comparing Media Systems : Three Models of Media and Politics* (New York: Cambridge University Press, 2004).

[29] The Honourable Guy Gagnon "Les juges et les médias" (Paper delivered at Journées des juges, 19 August 2008) Quebec, Cour du Québec, Publication gouvernementales du Québec en ligne, online <http://www.tribunaux.qc.ca/c-quebec/CommuniquesDocumentation/GGagnonJuges_medias19aout08fran%C3%A7ais.pdf>.

[30] Rutherford, *supra* note 27.

[31] This can influence reporting. For instance, journalists at Quebecor say they feel uneasy criticizing member businesses of the conglomerate. Bernier, *supra* note 28 at 112-16, 127, 135. See also Marvin L Kalb & Amy Sullivan, "Editorial: Media Mergers: Bigger Isn't Necessarily Better" (2000) 5:2 Harvard Intl J Press-Politics 1 (Muse).

[32] *Ibid* at 11.

[33] Fabrizio Germano & Martin Meier, "Concentration and self-censorship in commercial media" (2013) 97 J Public Economics 117.

Partly because of Internet's increasing importance, media corporations are currently struggling in this regard.[34] For more than a decade, consumers have been turning toward free sources of information and advertisers are following suit to reach wider audiences. Traditional media need to make a series of strategic choices to maintain audiences of attractive sizes for advertisers.[35] For example, McManus argues that editors chose stories to attract wealthier demographic groups, leaving minorities with a lack of coverage.[36] In Quebec, to avoid antagonizing audiences, Quebecor decided to stop publishing editorial content.[37] Competing networks, especially in the current context, often cover the same successful stories, to avoid losing viewership. In both these cases, variety and diversity suffers.[38] In Canada, international coverage is currently lacking.[39] Even Canada's public broadcaster is feeling the market's pressure and is increasingly turning to entertainment programming to stimulate viewership.[40]

b. Ownership Concentration

Second, media outlets increasingly belong to a small number of large companies. A handful of corporations control most of the English media across Canada. The situation is mirrored in Quebec, where Quebecor and Gesca dominate the newspaper market, with the independent *Le Devoir* struggling more than ever.[41] However, various actors in the field have raised concerns

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[34] Hébert, Sirois & Tremblay-Potvin, *supra* note 8 at 18, 28-29.
[35] Matthew Ellman & Fabrizio Germano, "What do the Papers Sell? A Model of Advertising and Media Bias" (2009) 119 Economic J 680 (Wiley Online).
[36] Bastien, *supra* note 28 at 74, David Strömberg, "Mass Media Competition, Political Competition, and Public Policy" (2004) 71:1 Rev Economic Studies 265 (JSTOR).
[37] Quebec, National Assembly, Commission de la Culture, *Mandat d'intiative portant sur* La concentration de la presse (November 2001) [Commission de la Culture Report] at 11.
[38] Scholars generally agree that diversity and representation of minorities and marginalized groups is an important part of media's role in society, see Bastien, *supra* note 28 at 76.
[39] *Ibid* at 79.
[40] *Ibid* at 78.
[41] Centre d'études sur les médias, "Concentration des médias" (2008) *Centre d'études sur les médias*, online : <www.cem.ulaval.ca/concentration_medias/>, Centre d'études sur les médias, *La concentration de la presse à l'ère de la convergence, Dossier remis à la Commission de la culture de l'Assemblée nationale du Québec dans le cadre*

regarding the lack of diversity in information sources. Notably, in 2012 the Canadian Radio-television and Telecommunications Commission (CRTC) refused a transaction through which Bell Media would acquire all of Astral Media's shares.[42]

This criticism has not gone unnoticed by media owners, who generally argue that concentration actually benefits public information because large corporations have the means to finance good journalism and to maintain smaller, less profitable outlets.[43] However, empirical data tend to show the opposite. For the most part, concentration negatively affects diversity in coverage.[44] For instance, to reduce costs, newspapers in the Gesca group share research, articles and sources. Landry found that this led to homogenization of reporting and generally more "Montreal-centric" coverage, even in the regional papers. As a result, Gesca's newspapers generally ignore regional issues.[45]

In sum, at the top levels of Canadian media are a few companies (and one public broadcaster) that are fighting an increasingly difficult battle for consumers' attention. This sometimes results in both subtle and overt pressures on the reporting chain, often all the way down to the journalists.

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du mandat portant sur Les impacts des mouvements de propriété dans l'industrie des médias (2015), online <www.cem.ulaval.ca/pdf/CONCassnat.pdf> [CEM Concentration Report]

[42] CEM Concentration Report, *supra* note 41 at 20. The CRTC accepted a modified transaction later.

[43] *Ibid,* Commission de la Culture Report, *supra* note 37 at 14-16.

[44] Germano & Meier, *supra* note 33, Kalb & Sullivan, *supra* note 31.

[45] Olivier Landry, "Concentration de la propriété des médias et diversité des contenus dans les quotidiens du groupe Gesca" (2001) 52:2 Recherches sociographiques 233 (Érudit).

ii. At the Bottom: Sensationalism and Speed

For the media, cutting ties with political parties eventually led to more "neutral" reporting. In time, objectivity became the symbol of good journalism.[46] For instance, the Canadian Broadcasting Corporation states that "balance" and "impartiality" are part of its core values:

> ***Balance***
> We contribute to informed debate on issues that matter to Canadians by reflecting a diversity of opinion. Our content on all platforms presents a wide range of subject matter and views.
> On issues of controversy, we ensure that divergent views are reflected respectfully, taking into account their relevance to the debate and how widely held these views are. We also ensure that they are represented over a reasonable period of time.
>
> ***Impartiality***
> We provide professional judgment based on facts and expertise. We do not promote any particular point of view on matters of public debate.[47]

However, as the pressures of profitability replaced those of political affiliation, journalists started feeling the negative consequences as well.[48] For instance, Bernier highlights Quebecor journalists' "distress." Indeed, many of them feel they are implicitly prohibited from being critical of their employer or members of its conglomerate in their reporting.[49] In this Section, I will detail the impact the market context has on the way journalists cover the courts, specifically through framing, time and space constraints as well as the choice of stories.

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[46] Scholars have of course debated the very meaning of "objectivity", but for the purposes of this thesis, suffice it to say that journalists are required to put an adequate effort into getting "both sides" of every story. This explains mentions such as "X's office was contacted, but refused to comment". In addition, the actual value and benefits of objectivity are also frequently under fire. See Yves Agnès, *Manuel de journalisme: Écrire pour le journal* (Paris: Éditions La Découverte, 2008) at 67-68.

[47] Canadian Broadcasting Corporation, "Journalistic Standards and Practices" online : <www.cbc.radio-canada.ca./en/reporting-to-canadians/acts-and-policies/programming/journalism>.

[48] CEM Report, *supra* note 8 at 11-14, Germano & Meier, *supra* note 33.

[49] Bernier, *supra* note 31. This is particularly worrisome when one considers the size of these conglomerates and their place in the Canadian and Québécois economy. In addition, groups like Power Corporation have interests in non-media enterprises and there is a risk they will escape criticism. See Bernier, *supra* note 31 at 69-70, 113 and Kalb & Sullivan, *supra* note 31.

a. Framing

"A frame can be thought of as an idea or angle that the journalist uses, consciously or unconsciously, to organize information."[50] Though framing is a necessary part of journalism, it can have impacts on audiences. In criminal cases, framing can influence how the public feels about a particular defendant, notably about the probability of their guilt. Many Canadians will remember Robert Latimer, a father accused of murder for the "mercy killing" of his daughter Tracy. Tracy had a "severe form of cerebral palsy"[51] and was in near constant pain, with little hope for treatment. As Klinkhammer and Taras demonstrate, in this case many stories portrayed—consciously or unconsciously—the accused as a common man, one that many Canadian parents could relate to. The media chose words and images that made Latimer relatable, as opposed to a violent, anti-social criminal. He was portrayed as a parent faced with a difficult choice and the decision to take his daughter's life was not portrayed as completely unreasonable nor unforgivable. Thus, when the Supreme Court of Canada (hereafter "SCC" or "Supreme Court") confirmed that Latimer was guilty, many were unsatisfied. The convicted criminal did not face the revulsion and exclusion that society normally generates towards child killers.[52]

In addition, a notable tendency is "horse race" framing, which political communication scholars have amply examined.[53] Court coverage tends to be similar. Stories focus on a case's "winning" and "losing" parties. However, many cases are about important legal interpretation questions and are not truly a competition between two parties.[54] For instance, when the Supreme Court rendered its decision on physician-assisted death in *Carter*, many headlines resembled this:

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[50] Klinkhammer & Taras, *supra* note 10 at 575. See also Hébert, Sirois & Tremblay-Potvin, *supra*, note 8 at 13-15.
[51] *R v Latimer,* 2001 SCC 1 at para 6, 1997 CarswellSask 2 (WL Can).
[52] Klinkhammer & Taras, *supra* note 10 at 573-75.
[53] Thomas E Patterson, *Out of Order* (New York : Vintage, 1994) at 53-93.
[54] Sauvageau, Schneiderman & Taras, *supra* note 2 at 228-29.

"Supreme Court says yes to assisted suicide," when it had in fact found that the current regime on assisted death was unconstitutional.[55] As Sauvageau and his colleagues noted, this type of strategic reporting is very common: "The reporting of Charter cases […] usually fails to explain how rights come to be defined by the court and how they can be limited by government."[56] Surely, this is important information for Canadian citizens. Moreover, "the rush to declare winners and losers is so great and so pronounced that in some cases—*Marshall, Hudson*, and *Little Sisters*, for instance—the press clearly g[ets] it wrong."[57]

b.Time and Space Constraints

Other sources of pressure that affect journalists are the constraints on time and space their editor imposes. This is the result of consumer demands for information they can quickly absorb.[58] Journalists and their superiors are aware that many readers only glance at the title and an increasing number of people are getting their news almost exclusively on Twitter.[59] Practically, this means a journalist has to choose what part of a court decision to fit into 140 characters. The easiest fact to quickly transmit is often the outcome.[60] The situation is equivalent for television reporters, who rarely have more than two minutes to cover the most important cases.[61] Journalists also have a limited amount of time to read and analyze judgments. When a court renders a decision, a race instantly begins to get the information out. At the Supreme Court, where decisions often cover a hundred pages, the situation is no different. The SCC has an

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[55]Hugo de Grandpré, "L'aide médicale à mourir approuvée par la Cour Suprême" *La Presse* (6 February 2015), online: <lapresse.ca>, Sean Fine "Supreme Court rule Canadians have right to doctor-assisted suicide" *The Globe and Mail*, (6 February 2015), online: <theglobeandmail.ca>.
[56] Sauvageau, Schneiderman & Taras, *supra* note 2 at 231.
[57] *Ibid*.
[58] Sébastien Charlton, Daniel Giroux & Michel Lemieux, *Les Québécois et l'information à l'ère du numérique* (Ste-Foy : Centre d'études sur les médias, 2016).
[59] *Ibid*, Regina G Lawrence et al, "Tweeting Conventions" (2013) 15:6 Journalism Studies 789 (tandfonline), John H Parmelee, "The agenda-building function of political tweets" (2014) 16:3 New Media & Society 434 (Sage Journals).
[60] In addition, as exposed directly above, outcomes are the most important part when using a political frame.
[61] Sauvageau, Schneiderman & Taras, *supra* note 2 at 5.

Executive Legal Officer (ELO) whose role is to brief the media and guide them through key parts of the decision, but even they feel time is too limited to ensure journalists grasp the important issues and nuances.[62] Unfortunately, coverage is often incomplete and inadequate.

All this relates to the coverage of decisions. The media only covers trials and pre-trial procedures if they believe they are noteworthy.[63] This coverage also has its flaws. Importantly, for my purposes it is worth noting that

> "pretrial journalism … tends to treat the presumption of innocence as a formality, largely limited to using the word *alleged,* without actually covering the story in a balanced fashion that makes clear the possibility that district attorneys (D.A.s), police and judges (and juries) can make mistakes or have bureaucratic, psychological, or political motives."[64]

Journalists rely importantly on sources from the prosecution and the justice system and fail to give the defence equivalent coverage.[65] Consequently, due to the quality of media coverage, the public tends to believe that if an individual is arrested and prosecuted, there is a high likelihood that s/he is guilty.[66] In the case of violent crimes, those that worry the public and tend to receive more media attention, this may risk influencing popular opinion to favour pre-trial detention.

c. Choosing Stories

Story choices may have a significant impact on public opinion.[67] In legal affairs, journalists generally choose to cover out of the ordinary trials, which is understandable, but in doing so they

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[62] *Ibid* at 2-3, 13.
[63] See Section C – ii. c. *Choosing Stories,* below.
[64] Entman & Gross, *supra* note 10 at 95.
[65] Michael Welch, Melissa Fenwick & Meredith Roberts "Primary Definitions of Crime and Moral Panic: A Content Analysis of Expert Quotes in Feature Newspaper Articles on Crime" (1997) 34:4 J Research Crime & Delinquency 474 (Sage Journals) at 488.
[66] *Ibid* at 95-96.
[67] An alarming demonstration of this is the "reasonable accommodation crisis" Quebec underwent in recent years. Indeed, the coverage of anecdotal instances of new immigrants, particularly Muslims, seeking certain "accommodations" in order to respect their religious beliefs made it seem like a grave problem was brewing. As the Bouchard-Taylor commission exposed, the coverage did not counterbalance these stories with stories about the struggles new residents face nor to their willingness to adapt to many aspects of Canadian life. This sparked unparalleled outrage and xenophobia in the population that only a full-blown public inquiry appeased: Maryse Potvin & al, *Crises des accommodements raisonnables: Une fiction médiatique?* (Outremont : Éditions Athena, 2008). Quebec, Commission de consultation sur les pratiques d'accommodements reliées aux différences culturelles,

tend to over-represent violent and sensational crimes.[68] It is worth noting that an increase in coverage of crime, particularly violent ones, marked the transition to "profitable" journalism.[69] Crime sells and does not cost a lot to cover.[70] It is normal for the public to have a general aversion to crime and violence, but the media risks exacerbating it beyond what is reasonable by focusing only on the worst cases.[71] In general, acquittals tend to receive more sensationalist coverage than convictions. Additionally, coverage widely overlooks the multitudes of guilty plea convictions that take place on a daily basis.[72] Many authors have dedicated extensive research to the problems that plague the public's perception of the criminal courts[73] and how the media influence such perceptions. For example, Dolmage demonstrated that media representation of youth violence, particularly in schools, caused people to believe that youth crime was on an uncontrollable rise. However, a proper look at the statistics revealed no such trend.[74]

Various scholars have exposed how the media have shaped people's opinion of the defence of mental disorder. The focus on sensational and out of the ordinary cases lead audiences to believe it is a loophole in the criminal justice system, one that allows the release of guilty and dangerous criminals. The media also frequently overlook the subsequent process, which often results in long detentions in mental health institutions.[75] Further, Bradimore and Brauder demonstrated that

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Fonder l'avenir, Le temps de la conciliation (Québec : Gouvernement du Québec, 2008) (Gérard Bouchard & Charles Taylor) at 74.

[68] Julian V Roberts & al, *Penal Populism and Public Opinion : Lessons from Five Countries* (New York : Oxford University Press, 2004) at 159,165.

[69] J S Ryu, "Public affairs and sensationalism in local TV news programs" (1982) 59:1 Journalism Q 74 (Sage Journals).

[70] Richard V Eriscon, Patricia M Baranek & Janet B L Chan, *Negotiating Control: A Study of News Sources* (Toronto: University of Toronto Press, 1989) at 35.

[71] Valerie P Hans, "Law and the Media: An Overview and an Introduction" 1990 14:5 L & Human Behaviour 399 (SpringerLink).

[72] Bill Blum et Gina Lovaco, "Covering the Courts" (1986) 6:10 *California Lawyer* 44 at 48.

[73] Michelle D St-Amand & Edward Zamble, "Impact of Information about Sentencing Decisions on Public Attitudes toward the Criminal Justice System" (2001) 25:5 L & Human Behaviour 515 (JSTOR).

[74] Dolmage, *supra* note 10.

[75] Tarika Daftary Kapur & al, "Measuring Knowledge of the Insanity Defense: Scale Construction and Validation" (2011) 29 Behav Sci L 40 (Wiley Online), Valerie P Hans and Dan Slater, "Plain Crazy: Lay Definitions of Legal

Canadian media focused on criminality and terrorism when covering stories of Tamil refugee migration.[76] This resulted in unjustified worry, exclusion, and xenophobia from Canadians towards this migrant group.[77]

In sum, looking at the media in its current context allows us to see how the market economy creates the flaws we observe. These flaws are serious and negatively impact coverage of criminal affairs. This allows for a realistic image of who, generally speaking, the public "is." Because judges are in some ways at a remove from the population, it is this public they must interact with through their decisions and it is this public's confidence it must keep in mind when applying 515(10)(c) *Cr C*.

C.The Media Informed Public and Judicial Decision Making

Though the tertiary ground is one of few legal provisions that specifically mandate attention to public opinion, we can place its interpretation within a broader discussion of judicial legitimacy. Members of the judiciary operate within the mediatized society described in Part B. Judges are generally aware that the public receive their information from the media and that their level of knowledge is not always very high. Indeed, judges, like most people read and watch news and commentary and are capable, at least to some extent, of perceiving general agreement or discord.[78] At first glance, one may be tempted to say that this is of little importance because the

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Insanity" (1984) Cornell L Faculty Publications 333 (Scholarship@CornellLaw), Henry J Steadman and Joseph J Cocozza, "Selective Reporting and the Public's Misconception of the Criminally Insane" (1977-78) 41:4 Public Opinion Q 523 (JSTOR), M C Angermeyer and Beate Schulze, "Reinforcing stereotypes: How the focus on forensic cases in news reporting may influence public attitudes towards the mentally ill" (2001) 24 Intl JL & Psychiatry 469 (Elsevier).

[76] Ashley Bradimore and Harald Bauder, "Mystery Ships and Risky Boat People: Tamil Refugee Migration in the Newsprint Media" Metropolis British Columbia (January 2011) online: Metropolis <riim.metropolis.net>.

[77] Sailaja Krishnamurt, "Queue jumpers, terrorists and breeders: representation of Tamil migrants in Canadian popular media" (2013) 5:1 South Asian Diaspora 139 (tanfonline).

[78] Roberts & al, *supra* note 68, at 175. Jean-Maurice Brisson and Donna Greschner with the Canadian Institute for the Administration of Justice, eds, *Public Perceptions of the Administration of Justice* (Montréal : Les Éditions Thémis, 1996) [Brisson & Greschner]. During this conference, The Honourable Chief Justice Michaud stated:

government appoints Canadian judges to tenured positions i.e. they do not need public approval to remain in office. However, in order for them to maintain their authority, and consequently function appropriately as the third branch of government, the public must consider that their power is legitimate. In this Part, I will discuss why judicial legitimacy is important, explore the various theories that authors have developed to explain how an unelected judiciary maintains its legitimacy, and explain the role the media plays within these dynamics.

i. The Importance of Judicial Legitimacy

In this thesis, I will define judicial legitimacy as follows: "the notion of diffuse support, which refers to the presence of durable, general attachments to courts among the public that persist in spite of specific court decisions that may run counter to the preferences of members of the public."[79] I will explain how scholars believe this legitimacy operates and why it is important for the Canadian democratic system in its entirety. As I will detail later in this thesis, I believe this importance explains the interpretation and even the existence of the tertiary ground for detention. As mentioned, Canadian judges, do not require public approval to acquire or maintain their position. Nonetheless, they possess great power and authority over the Canadian population. To effectively exercise this power, the public must perceive it as legitimate. "Legitimacy means

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"l'ampleur et le caractère trop souvent sensationnel de la couverture médiatique accordée à certains procès criminels et aux garanties juridiques reconnues aux accusés contribuent, sans doute, à répandre la fausse impression que la justice est d'abord au service des criminels plutôt qu'au service de la société." at 30, while The Honourable Judge Donna Martison stated: "there is a public perception that judges' interpretation of the *Canadian Charter of Rights and Freedoms* have given unfair advantages to people accused of crimes" and that "judges are not tough enough when sentencing criminals" at 41-42. Similarly, The Honourable Allan Rock claimed that "many Canadians are very upset by the perceived laxness in the system" and that "attention is drawn in newspapers and on television to violent, even gruesome crimes" at 186-187. Though they do not provide empirical evidence for their assertions, it is critical to note that they do pay attention to media reports and that they are aware of how it influences public perceptions of the justice system, in particular, the criminal justice system.

[79] Vuk Radmilovic, "A Strategic Approach to Judicial Legitimacy: Supreme Court of Canada and the *Marshall* case" (2010-2011) 15 Rev Const Stud 77 (HeinOnline) at 86.

being willing to grant the authority to an institution to make decisions."[80] Since members of Parliament are cyclically elected, they constantly renew their legitimacy to make decisions.[81] Judges, on the other hand, must use methods other than elections to justify their great political power to the public sphere. In Justice Sandra Day O'Connor's words: "We don't have standing armies to enforce opinions. […] We rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and attitudes toward our system of justice, and it is why we must try to keep and build that trust."[82]

This idea, that the third branch has "nor the purse nor the sword," can be traced back to Enlightenment liberal philosophers, notably Montesquieu.[83] If the public views judicial power as illegitimate, they may not be willing to obey their decisions. More so, if members of the elected branches sense that the public disagrees, they may refuse to use their powers to enforce the decisions. In sum,

> "[the] relationship between the Supreme Court and the public provides the Court with its most daunting obstacles. A disgruntled public may not only refuse to cooperate with a Supreme Court decision, but may also pressure elected officials to resist implementation of judicial order. As such, despite the Supreme Court's nominal insulation from the American people, the Court's justices have strong incentives to be concerned with their public standing."[84]

This is true for Canadian courts as well. For instance, in *R v Sharpe*, the Supreme Court examined the constitutionality of criminal provisions prohibiting child pornography. Public

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[80] James L Gibson, "Judging the Politics of Judging" in Charles Gardner Geyh (ed), *What's law got to do with it?: what judges do, why they do it, and what's at stake* (Stanford : Stanford Law and Politics, 2011) 281 at 283.
[81] Radmilovic, *supra* note 79 at 86.
[82] Linda Greenhouse, *The U.S. Supreme Court: A Very Short Introduction* (Oxford: Oxford University Press, 2012) at 72. This is another formulation of Justice Frankfurter of Supreme Court of the United States that "The Court's authority—possessed of neither the purse nor the sword— ultimately rests on sustained public confidence in its moral sanction" *Baker v Carr* 369 US 186 (1962).
[83] Montesquieu, *De l'esprit des lois*, vol I, cited in *Federalist Papers #78,* online: <http://avalon.law.yale.edu/18th_century/fed01.asp>.
[84] Jeffrey J Mondak & Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court" (1997) 59:4 J Politics 1114 (JSTOR) at 1114.

outcries reached such a high level that Parliament announced that it would use the "notwithstanding" clause to contradict the Supreme Court if it struck down child pornography crimes.[85] This is a clear example of other branches of government refusing to enforce and comply with a court's decision because the public does not approve of it.

In general, public disagreement with specific decisions can threaten the judiciary's authority. As Abella J has stated, "if the gap between [the public and justice] begins to feel overwhelmingly wide to the public, the justice system's credibility is at serious risk."[86] The aforementioned *Latimer* case is one such example. Media coverage favoured the accused so much that it may have "undermin[ed] the court's decision."[87] This momentarily shook the public's confidence in the courts.

The aftermath of *R v Marshall*, which I will discuss in detail below, is another example.[88] Judicial legitimacy is important for the entire democratic system. For instance, as Bybee argues:

> public suspicion of the courts is … worth paying attention to because it threatens judicial capacities. Litigants may not respect court orders if they feel a judge is advancing a political agenda. Indeed, citizens may be led to doubt the authority of government as a whole if they suspect a powerful institution is misrepresenting its manner of operation.[89]

Bybee is referring to the risks associated with judges advancing their political interests through decisions, while shrouding their actions in legal rhetoric. However, I believe that constantly deciding against public opinion can have similar negative effects on "judicial capacities" and the "authority of government as a whole."[90] In other words, upsetting the public may affect the judiciary's legitimacy. In turn, this can affect the proper functioning of Canadian democracy.

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[85] Sauvageau, Schneiderman & Taras, *supra* note 2 at 3, 37.
[86] Brisson & Greshner, *supra* note 78 at 11.
[87] Klinkhammer & Taras, *supra* note 10, abstract.
[88] See Section C – ii. d. The Marshall Cases, below.
[89] Keith J Bybee. *All Judges Are Political Except When They Are Not* (Stanford: Stanford University Press, 2010) at 5.
[90] See Michael Kirby, "Attacks on Judges: A Universal Phenomenon" (1997-1998) 81 Judicature 238 (HeinOnline).

The next Section will evidence this while detailing the current state of theoretical and empirical knowledge on this relationship.

ii. Judicial Legitimacy Theories

Because judicial legitimacy is important, courts will employ various strategies to protect it. Cultivating legitimacy while respecting the rule of law is not always an easy feat. First, even for social scientists, it remains unclear exactly what reinforces (or weakens) legitimacy.[91] In their studies, both Simon and Scurich and Gibson and Caldeira found that "agreement with outcome" is the primacy factor to influence perceptions of legitimacy. On the other hand, Braman and Easter found that rigour in reasoning can increase such perceptions even when one does not agree with the outcome.[92] However, they also found that initial feelings of legitimacy result from agreeing with the outcome.[93]

How do these realities affect judges? In the United States, scholars have demonstrated that courts adapt and respond to social and political changes and that higher court decisions tend to be in line with public opinion.[94] In Canada, Abella J has stated that "the justice system listens and selectively responds."[95] However, research on how judges assess public opinion and the role the media might play in this assessment is lacking. Scholars have developed theories about judicial legitimacy. In Canada, these theories have yet to be empirically tested. However, some case

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[91] For an overview of the many studies conducted in the United States, see Mondak & Smithey, *supra* note 84.
[92] I will discuss the media's role in this in more detail below. For the moment, suffice it to keep in mind that the media rarely pays attention to reasoning in the coverage. Therefore, even if this reasoning can increase trust in the courts, for the most part the quality of coverage forces people to form their opinions based on outcomes.
[93] Eileen Braman & Beth Easter, "Normative Legitimacy: Rules of Appropriateness in Citizens' Assessments of Individual Judicial Decisions" (2014) 35:3 Justice System J 295 (HeinOnline).
[94] Doni Gewirtzman, "Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture" (2004-2005) 93 Geo LJ 897 at 922 (HeinOnline).
[95] The Honourable Madam Justice Rosalie S Abella, "Introduction to Panel Discussion on 'Who is the Public and How Are Perceptions Created" in Brisson & Greschner, *supra* note 78 11 at 11.

studies do offer interesting analyses. At a later point in this thesis, I will demonstrate how 515(10)(c) *Cr C* hypothetically exemplifies these theories.

a. Principled Reasoning

Choudry and Howse argue that courts rely on "principled reasoning" to maintain legitimacy.[96] They contend that as long as adjudicators base their decisions on fair principles, the public will deem them legitimate because that is how they expect a court to function. According to Bybee: "public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle."[97] This is consistent with the results of Braman and Easter's aforementioned study:

> Findings demonstrate that decision-making rules matter in important ways in assessments of appropriate exercise of judicial authority. Not only does the basis of decision matter most powerfully in participants' legitimacy ratings, but other factors that are quite reasonably hypothesized to influence assessments (popular support, personal preferences) are differentially triggered depending on whether or not motivations behind particular decisions were viewed as appropriate for judges or clearly suspect.[98]

Another way legal reasoning may help to maintain judicial legitimacy is its apparent distinction with political motivations. Gibson and Caldeira found that the public tends to trust the courts because they perceive them as separate "from the fray of regular politics and that, compared to legislatures and executives, courts are apolitical institutions whose decision-making derives from principled and impartial reasoning that is devoid of ordinary political calculations."[99] In sum, the public views the courts as apolitical spaces that function impartially and neutrally, instilling a

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[96] Radmilovic, *supra* note 79 at 82, Sujit Choudhry and Robert Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000) 13 Can JL & Jur 143 (HeinOnline).
[97] Bybee, *supra* note 89 at 5.
[98] Braman & Easter, *supra* note 93 at 313.
[99] Radmilovic, *supra* note 79 at 86-87.

form of trust.[100] Thus, as long as judges appear to base their decisions in principled reasoning, the judiciary will maintain its legitimacy.

As Radmilovic remarks though, this is assuming that people are aware of judicial reasoning, which is rarely the case.[101] Indeed, in their study, Braman and Easter required participants to read cases and the researchers ensured they had an adequate understanding of the court's reasoning.[102] It is safe to assume that only a small portion of the population reads judgments in full. As mentioned, the media does not provide a solution to this situation, as they mostly limit their coverage to outcomes. In addition, the public has a tendency to view decisions they do not agree with as illegitimate, even if the deciders base them in rigorous legal reasoning.[103] This is especially true when, in the higher courts, a decision is not unanimous because a legal motivation for the public's preferred outcome may be available.[104] In short, though a judge must always appear to base her/his decisions in legal reasoning, I believe they cannot hope to rely solely on such reasoning to maintain their legitimacy in the eyes of the public.

b. Dialogue Theory

In Canada, constitutional cases can prove particularly critical for judicial legitimacy, because these cases force non-elected judges to decide whether to uphold or invalidate legislation enacted by an elected legislature. The years following the enactment of the *Canadian Charter of Rights*

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[100] Vanessa A Baird & Amy Gangl, "Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness" (2006) 27:4 Political Psychology 597 (JSTOR), James L Gibson & Gregory A Caldeira, "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court" (2011) 45 Law and Soc'y Rev 195 (HeinOnline).

[101] See *Section B* – ii. *c. Framing*, above.

[102] Braman & Easter, *supra* note 93. It is also important to understand that this study opposed legal reasoning to decisions made on the basis of political calculations or bribes. Thus, when participants were informed that a judge reached a decision because of a bribe, the sentiments of legitimacy decreased. The study did not oppose decisions based in legal reasoning.

[103] See Mondak & Smithey, *supra* note 84.

[104] See d. The Marshall Cases, below.

and Freedoms[105] witnessed vivid debates about this "counter-majoritarian" power.[106] Courts must be sensitive to this issue as the public tends to be wary of judges that seem to usurp Parliament's power to dictate policy. This tendency is sometimes referred to as judicial activism and the public usually meets it with suspicion and disapprobation.

The first reason for this is specifically the counter-majoritarian issue. In a democracy such as Canada, where the power to write laws rests solely with the elected body that is Parliament, policy-making by an unelected body such as the judiciary raises issues.[107] As will be discussed later in this thesis, democracy can and does exist with non-elected judges, but the public may come to question a judiciary that too often contradicts Parliament and appears to implement its own rules.

Secondly, as mentioned above, studies demonstrate that the public trusts the judiciary in part because of a belief that their decisions are legally motivated, as opposed to politically motivated. In other words, the public seems to believe politicians make decisions to advance their own agenda and thus distrust them. Judicial activism, however, gives the courts a political image. "Judicial deference, on the other hand, renders the public less likely to view the Court through the lens of their political preferences, which is, legitimacy-wise, a more prudent position for the institution to adopt."[108] In other words, when judges show deference, the public is less likely to see them as political actors in the same way they view members of Parliament, for example with suspicion.[109]

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[105] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (hereafter "*Charter"*).
[106] A Wayne MacKay, "In Defence of the Courts: A Balanced Judicial Role in Canada's Constitutional Democracy" (2006) 21 Nat'l J Const L 183 (WL Can).
[107] *Ibid*.
[108] Radmilovic, *supra* note 79 at 87.
[109] *Ibid*, Baird & Gangl *supra* note 100, Lori Hausegger & Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37 Canadian J Political Science 23 (JSTOR).

In their now famous article, Hogg and Bushell posited that Parliament and the courts engage in a form of dialogue, where courts express through their motives the constitutional issues affecting contested legislation. Parliament receives these messages and adapts the legislation in consequence. Thus, the Supreme Court does not really impose a totalitarian authority on the legislature. I believe the courts will attempt to maintain this image of dialogue, as it enhances impressions of deference to Parliament. Additionally, the existence of the "notwithstanding clause" ensures that in any dialogue, Parliament may have the last word.[110] This serves to reassure the public that their elected representatives are truly in charge and indirectly protects the legitimacy of the court's power.

Building on this theory, Dixon claims that for the dialogue to remain effective and legitimate, courts must pay particular attention and deference to "legislative sequels." In other words, where Parliament enacts a new version of an invalidated law, the courts must "listen" to the choice the legislature has made, by showing deference.[111] As I will argue below, I believe this is indeed crucial to legitimacy and that courts are sensitive to legislative sequels.

c. Strategic Legitimacy Cultivation

Strategic legitimacy cultivation theory posits that judges will try to cultivate support for specific decisions, chosen strategically. In other words, judges will not *always* attempt to foster support for the court through their decisions. Rather, in certain circumstances, they will feel that a case

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[110] "The legislative override is the most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of *Charter* rights. Section 33 allows the competent legislative body to re-enact the original law without interference from the courts." Peter W Hogg and Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35:1 Osgoode Hall LJ 75 at 83 (WL Can).

[111] Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue, and Deference" (2009) 47 Osgoode Hall LJ 235 (WL Can).

may have an impact on public perceptions[112] and will, as Abella J has claimed, "selectively respond." In these cases, "jurisprudence will tend to be informed by the extant political environment."[113]

In addition, according to Radmilovic, judges will strategically choose highly visible cases to cultivate their legitimacy, which makes sense considering that public perception is at the root of judicial legitimacy. In other words, if the public never receives any information about a case, it is unlikely that it will have any effect on the courts' legitimacy.[114] The main way a case gains visibility is through the media. Thus, a relationship likely exists between the media and the judiciary in this situation: if the media draws the public's attention to the case and the case is controversial, judges may have an increased desire to protect their legitimacy.[115]

d. The Marshall *Cases*

As a case study, Radmilovic applied strategic legitimacy cultivation theory to the *Marshall* cases.[116] Because the case study is extensive, it is useful for my purposes. I will summarize it below and highlight the most relevant arguments. I will also briefly discuss the cases in light of the principled reasoning and dialogue theories. It serves as a useful example of the challenges judges face to maintain judicial legitimacy and how the theories above unfold in practice.

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[112] Radmilovic, *supra* note 79 at 87: "The factors which can exert important effects on the level of diffuse support are: (1) specific support; (2) a perception on the part of the public that courts are "different" kinds of institutions whose work remains above the frame of regular politics; and (3) the character of judicial decision making: overt judicial activism risks politicization of the courts and suggests to the public that courts are not different from other political institutions."

[113] Dixon, *supra* note 111.

[114] Radmilovic, *supra* note 81 at 87.

[115] See iii. The Media's Role in the Court's Legitimacy, below.

[116] *R v Marshall,* [1999] 3 SCR 456, 1999 CarswellNS 262 (WL Can) (hereafter "*Marshall 1*"), *R v Marshall,* [1999] 3 SCR 533, 1999 CarswellNS 349 (WL Can) (hereafter "*Marshall 2*") (hereafter referred to together as "the *Marshall* cases").

In *Marshall 1,* the SCC decided in favour of indigenous fishing rights. The victorious indigenous fishers consequently "rushed"[117] to the waters to exploit their rights. This angered non-indigenous fishermen, in part because it threatened their revenues. They attempted to physically prevent indigenous people from fishing, by blocking roads, vandalizing indigenous-owned boats and destroying their lobster traps. The indigenous fishers also responded violently. During the hearings, the case had attracted very little media attention.[118] As one would expect, the violence, which went on to include vandalizing a school and torching a car, received extensive media coverage.

The coverage vastly favoured non-indigenous fishermen and public support for this group progressively grew. Parliament reacted slowly and made little public commentary.[119] Attention eventually turned to the decision that had caused the crisis: "Excerpts from the decision were published, while columnists devoted considerable energies to scrutinizing the Court's reasoning."[120] Expert opinions in the media were critical of the SCC's motives.[121]

After weeks of violence and outrage, the SCC, in refusing a rehearing, revisited the case and "clarified" its reasons. Scholars agree, however, that in truth the SCC used *Marshall 2* to modify the first decision. Some went so far as to say that the SCC "had bowed to public pressure."[122] I agree that many of the "explanations" in *Marshall 2* are simply incompatible with *Marshall 1*.[123]

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[117] Radmilovic, *supra* note 79 at 98.
[118] James O'Reilly, the ELO at the time stated: "There were only three or four people in the room for *Marshall.* There was only one person that actually knew what that case was about… The other people in the room came over because they saw Donald Marshall's name on something and they wanted to know what it was about. They had no idea what the case was about. And you know, when I said it was a case about catching eels, I think they turned around and left the room." Sauvageau, Schneiderman & Taras, *supra* note 54 at 145.
[119] *Ibid* at 137, Radmilovic, *supra* note 79 at 98-99.
[120] Radmilovic, *supra* note 79 at 100.
[121] *Ibid*.
[122] Sauvageau, Schneiderman & Taras, *supra* note 2 at 138.
[123] Radmilovic, *supra* note 79 at 102-106.

Indeed, in many ways the SCC restricted the right they had defined in *Marshall 1*. They added details concerning "the character of the rights itself," "the resources included under the right," "the beneficiaries of the right" and "geographic scope of the right"[124] that were not part of the reasoning in the first decision. Most notably, Marshall himself probably fell outside of the two latter categories of restrictions. The SCC "clarified" that the right must be exercised "by authority of local government," but there was no evidence that Marshall had any type of governmental permission. Additionally, in *Marshall 1*, makes clear references to an individual, rather than a communal, right.[125] With regards to the geographic restriction, it is worth noting that "Marshall himself was fishing well outside of his community's local grounds,"[126] but the SCC did not convict him in *Marshall 1*.

This case tested the court's relationship with the public. Radmilovic argues that the SCC felt the need to protect its legitimacy: it felt threatened by both legal critics and public outrage. Indeed, the media generally blamed the Court—and the "unreasonableness"[127] of *Marshall 1*—for the upheaval. They also accused the SCC of being "at a remove from the realities of everyday life."[128]

Notably, the media discussed the judiciary's power and its "undemocratic nature," claiming the SCC was illegitimately legislating.[129] The *L'Acadie Nouvelle* entitled one article "Supreme Anarchy."[130] A columnist wrote: "This powerlessness of the public which doesn't elect the judges and equally that of the government … [that] has no right to discipline them … contrasts

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[124] *Ibid* at 103-104.
[125] *Ibid* at 104.
[126] *Ibid* at 103.
[127] Sauvageau, Schneiderman & Taras, *supra* note 2 at 160. For instance, the *Journal de Montréal* entitled an article "Supreme Court ignites the fire."
[128] Ibid.
[129] *Ibid* at 159-61.
[130] *Ibid* at 158 [footnote omitted].

with the extraordinary power of the Supreme Court judges."[131] Others, including members of the Ontarian and Albertan governments, started calling for a revision of the appointments process as an indirect way to attack the majority Justices.[132] All this hints that the Supreme Court was losing the public's confidence.

> There is also direct evidence that the *Marshall 1* decision resulted in the loss of public support for the Court. While the Atlantic region generally manifests the highest levels of support for the courts in Canada, an Angus Reid poll conducted on November 4th and 14th of 1999**,** and therefore right during the interlude between the two *Marshall* decisions, shows Atlantic Canadians (56%) together with Albertans (57%) as being the most unhappy with the power of the Canadian judiciary. According to Fletcher and Howe, this "apparent upswing" in public opposition to courts in Atlantic Canada is most likely due to the general dissatisfaction with the *Marshall 1* decision.[133]

The decision also exposed the courts' lack of enforcement powers. Because provincial and federal governments were slow to react, non-indigenous fishermen effectively barred the decision from being applied and the SCC was powerless against this reaction. This demonstrates that the third branch may truly be ineffective if it does not have sufficient public support.

For all these reasons, it is very possible the SCC felt pressure to "to dampen the public anger that resulted from *Marshall 1***,** and to redeem the Court in the eyes of the public,"[134] by writing a decision more in line with public opinion. It is indeed important to note that *Marshall 2* generally pleased the public, with the notable exception of indigenous people.[135] In sum, the SCC appears to have strategically used these cases to protect its legitimacy.

Since this is not a constitutional case, dialogue theory is not directly applicable. However, it is worth noting that the judiciary may be the subject of criticism for its undemocratic nature, even

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[131] Richart Gwyn, "The Supreme Court: Power without responsibility" (10 October 1999) *Chronicle Herald* cited in Sauvageau, Schneiderman & Taras, *supra* note 2 at 159.
[132] Sauvageau, Schneiderman, & Taras, *supra* note 2 at 160, Radmilovic, *supra* note 79 at 101.
[133] Radmilovic, *supra* note 79 at 106-107 [footnotes omitted].
[134] *Ibid* at 107.
[135] *Ibid* at 109.

in non-constitutional cases as illustrated by the *Marshall* controversy. Thus, there remain reasons to believe that courts will indeed seek to avoid the appearance that they are usurping Parliament's sovereignty.

Finally, this case demonstrates that principled reasoning is not always sufficient to protect the courts from criticism. It is impossible to argue that the decision was completely void of impartial legal reasoning. Even so, the decision had such radical consequences on the community that they questioned its legitimacy.[136] In addition, even if we suppose that the majority sufficiently based their decision in principle and reason, "commentators … used [the] dissent to demonstrate the unreasonableness of the majority decision."[137] Dissenting opinions tend to "imply that a single conclusive settlement of an issue does not exist."[138] In other words, in this case the public was aware that the Court could have reached a different, legally justifiable outcome. In short, principled reasoning is important, but when judges can use it to justify two different outcomes, I would argue that the public will nevertheless find ways to delegitimize the reasoning they disagree with.

In sum, it remains uncertain exactly how the public forms its perceptions of legitimacy. It follows that we cannot fully understand how judges perceive their levels of legitimacy nor what methods they employ to protect it; notwithstanding, I believe the above discussion demonstrates that they must perceive their legitimacy and that they do attempt to protect it. I touched briefly upon the role the media plays in mediating the relationship between judges and their public. In the next Section, I will explore this more fully.

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[136]I must stress a caveat. It may well be that because *Marshall 1* attracted little media attention, the SCC put relatively less effort into explaining its motives, as opposed, for instance, to the *Quebec Secession Re*, in which the court made a point to detail its reasoning as much as possible. This is plausibly due to the importance of the *Quebec Secession Re* and the predictable scrutiny to which the media would subject its reasons. Choudhry & Howse, *supra* note 96.

[137] Sauvageau, Schneiderman & Taras, *supra* note 2 at 160.

[138] Radmilovic, *supra* note 79 at 102.

iii. The Media's Impact on Judicial Legitimacy

The previous sections demonstrate judges' sensitivity to the public's opinion. Because the Canadian public is primarily informed the media,[139] they become a type of mediator between the judiciary and the public. As Klinkhammer and Taras state: "[f]or judges to fully exercise their authority, the power of the courts has to be supported by the power of the media."[140] The existence of the ELO at the Supreme Court, to ease communication with the journalists, indicates the Court's sensitivity to the media's influence. In addition, former Chief Justice Lamer once "expressed concern about attacks that he believes 'went beyond acceptable criticism' and 'threatened to undermine public confidence in the justice system.'"[141] I would highlight that Lamer J was Chief Justice during the *Marshall* trials and was directly criticized by the media. In the course of Sauvageau's study, Justice Iacobucci admitted that "the legitimacy of the court, and indeed the democratic process, is dependent, at least to some degree on the court's ability to get its message out."[142] Later in this thesis, I will offer a hypothesis of how this reality affects the interpretation of 515(10)(c) *Cr C*.

The *Marshall* cases are a good example of the connection between the media and judicial legitimacy. By drawing the public's attention to the violence taking place in the Maritimes and widely blaming the SCC, and even the appointment process, for a bad decision, the media put pressure on the Supreme Court. They increased this pressure when they began to highlight the undemocratic nature of the courts' power. We cannot overlook the plausibility that *Marshall 2* resulted from the widespread mediatization and criticism of *Marshall 1*.

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[139] Strömbäck, *supra* note 9 at 229.
[140] Klinkhammer & Taras, *supra* note 10 at 574.
[141] Sauvageau, Schneiderman & Taras, *supra* note 2 at 9.
[142] *Ibid*.

In addition, I would argue that the media's current habits in covering judicial affairs limit the possibility for the public to base their respect for the courts in principled reasoning. Indeed, the media mostly cover outcomes. These have an important impact on perceptions of legitimacy.[143] Respect for principles of impartiality and reasonableness may affect these perceptions, but only if evidence of their use is provided to the public. Since media reports generally ignore reasons, and few people read judgments in full, the public must base their perceptions of legitimacy on the outcomes of specific cases. This may increase the temptation to render decisions in line with public opinion in controversial cases, because judges know that in all likelihood only the outcome will receive media attention. As the *Marshall* cases demonstrated, well-principled reasons can still receive criticism, especially when opposed to a well-principled dissent.

Lastly, I will mention the *Sharpe* case once again and the media's misquoting of the motives that implied that the trial judge believed pornography did not harm children.[144] Of course, this greatly upset the public and threatened their trust in the judiciary. Parliament, being ever so sensitive to public opinion, reacted by stating it was prepared to use the "notwithstanding clause," further undermining the judiciary's authority.

To conclude, political and legal theory has long recognized the importance of judicial legitimacy. Various theories and studies have attempted to explain its sources. The judiciary's relationship with the public remains complex. However, I would argue that the media today almost always mediates this relationship. Consequently, I believe it is important to keep in mind the contemporary realities of media companies when discussing public opinion. This makes the dynamics of judicial legitimacy even more complex. As mentioned above, section 515(10)(c) *Cr C* is at the centre of these dynamics because of its specific reference to public confidence. In

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[143] See ii. Judicial Legitimacy Theories, above

[144] See *supra* note 6, Sauvageau, Schneiderman, & Taras, *supra* note 2 at 174-75, Shaw, *supra* note 4 at 102.

addition, because its subject matter, the pre-trial release of accused people can occasionally ignite public passion, it is prone to receiving media attention. Thus, it is truly a useful tool to examine how the judges interact with the public through the media. To fully understand the particularities of this section, an overview of its inception and its history is now necessary.

Chapter Two The Story of 515(10)(c) *Criminal Code*

Since the inception of the tertiary ground, judges have struggles with the proper interpretation to give the expression "public." In this chapter, I will demonstrate that Canadian courts have manufactured a restrictive and idealized definition of the public, one that does now correspond with actual knowledge levels or reaction to cases, in order to cope with the breadth of the discretion that section 515(10)(c) *Cr C* grants them. This is true in spite of the SCC's constant stating that courts should take into account a realistic "public." The provision as it exists today reads:

> **515(10)** For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
> …
> **(c)** if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> > **(i)** the apparent strength of the prosecution's case,
> > **(ii)** the gravity of the offence,
> > **(iii)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> > **(iv)** the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

However, it has undergone some evolution since its inception. Part A will detail the foundations of Canadian bail law as well as its evolution with regards to fundamental rights. I will focus on the emergence of the tertiary ground and the first *Charter* challenge it faced. Part B will trace the story of its re-enactment by Parliament and how it survived its second constitutional challenge. I will highlight some of the constitutional difficulties that remain. Part C will focus on the emergence of the SCC's paradoxical rhetoric. In Part D, I will come back to the media and their

role in informing the public. I will demonstrate that despite their role in spreading information, the courts are reluctant to give them weight in judicial interim release hearings. This will further highlight the paradox in the SCC's argument to consider the public when applying the tertiary ground. Thus, in Part E, I will begin to expose how judges created this rhetoric as a way to protect their legitimacy in light of the theories explained in the previous Chapter.

A. Legislative and Judicial History—From Confederation to Morales

Since its somewhat unexpected appearance in Canadian bail law, the tertiary ground has caused controversy and confusion among members of the judiciary. The foundation for its existence is hard to trace historically. Though its appearance demonstrates the judiciary's sensitivity to its public image and its legitimacy, its invalidation in *Morales* demonstrates that there must be limits to this sensitivity.

Canada's "first criminal legislation package" came with "unfettered" discretion to grant bail.[1] Inspired by British law, ensuring the accused's presence at her/his trial was the only official concern.[2] However, the factors used to assess the risk of flight hinted at the emergence of new reasons to deny bail: "the seriousness of the offence, the severity of the penalty, the strength of the evidence against the accused, as well as the accused's character and standing in the community."[3] In 1947, the English Court of Appeals created a new motive for pre-trial detention: "the need to protect the public from repeat offenders."[4] Some Canadian judges resisted this addition at first, though the idea was not entirely novel. For instance, in *Re N*, the accused refused treatment for a venereal disease and was detained awaiting trial because he could

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[1] Gary T Trotter, *The Law of Bail in Canada,* 1st ed (Scarborough : Carswell, 1992) [Trotter 1st ed] at 7.
[2] Magistrates in England actually started releasing people on bail in the 12th and 13th centuries because of the horrible conditions in prisons. Many inmates died before ever making it to trial. *Ibid* at 3.
[3] *Ibid*.
[4] *Ibid* at 9.

endanger the public.[5] Regardless, this second motive rapidly became part of Canadian bail law. Courts progressively extended its interpretation to cover all risks of intervention with the judicial process, such as interference with witnesses or victims. Little to no data are available on how judges used their discretion. However, inspired by other countries, in the 1960s, Canada examined its bail system and uncovered various issues. Most troubling was Friedland's study that linked pre-trial detention to a higher likelihood of conviction and harsher sentences. The *Report of the Canadian Committee on Corrections* (the Ouimet Report) emphasized the poor living conditions in detention centres. It also highlighted the serious damaging effects detention can have, such as job loss, stigma, dislocation from friends and family[6] and a general sense for the accused that "there is no place for him in the normal community."[7] The Ouimet Report was one of several inquiries across the country that investigated civil liberties in the criminal context. Although the Ouimet Report was probably the most influential, all committees came to the conclusion that "it is self-evident from the standpoint of human rights that an accused should not be incarcerated pending trial unless it is required for the protection of the public."[8]

Consequently, in 1970, the Canadian government introduced Bill C-218, the *Bail Reform Act*, designed to vastly reform bail law. The stated goal of this "revolutionary legislation"[9] was to increase the protection of individual rights in the criminal justice system.[10] In most respects it did so by codifying bail law and increasing possibilities for release at various stages in a trial.

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[5] Ibid.
[6] Canada, Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa : Queen's Printer, 1969) (Roger Ouimet) [Ouimet Report] at 102, see also Ontario, Royal Commission Inquiry Into Civil Rights*, Report Number One, Vol 2* (Toronto, Queen's Printer : 1968) (The Honourable James Chalmer McRuer).
[7] Ibid.
[8] Ouimet Report, *supra* note 6 at 31, 102.
[9] Trotter 1st ed, *supra* note 1 at 13.
[10] *Ibid* at 12.

However, the *Bail Reform Act* also, possibly inadvertently, introduced the "tertiary ground." The section, as it existed at the time, reads as follows:

> (10) For the purpose of this section, the detention of an accused in custody is justified only on either of the following grounds:
>
> …
>
> (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (*a*) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice.[11]

Courts separated "public interest" from public safety and the tertiary ground was born. However, as Trotter argues, "it is questionable whether Parliament ever intended to create two separate criteria" even though the use of "or" does seem to create two distinct grounds. First, both criteria were under the secondary ground heading. In addition, committee reports and legislative debates make no mention of such an intention.[12] Indeed, the Ouimet report, on which Parliament based much of the *Bail Reform Act,* stated:

> Pre-trial detention, in the view of the Committee, can only be justified where it is *necessary* in the public interest:
>
> (i) To ensure the appearance of the accused at his trial.
> (ii) To protect the public pending the trial of the accused.[13]

"Public interest" could have meant the public's interest in its protection and in avoiding repeat offences.[14] This interpretation is consistent with bail law in other common law jurisdictions.[15]

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[11] *Criminal* Code, RSC 1985, c-46, s 515(10) b) as it appeared on January 3 1972 [emphasis added], Gary T Trotter, *The Law of Bail in Canada,* 3rd ed, (Toronto, Carswell, 2010) (loose-leaf updated 2015, release 1) [Trotter 3rd ed] at 1-212.
[12] Trotter 3rd ed, *supra* note 11 at 3-27.
[13] Ouimet Report, *supra* note 6 at 99 [emphasis added].

Thereafter, to give "public interest" its own, free-standing meaning, some courts began to equate public interest with the justice system's public image. In *Re Powers and R,* Lerner J stated: "Public interest involves many considerations, not least of which is the 'public image' of the *Criminal Code* [and] the *Bail Reform Act* amendments…"[16] Lerner J also argued that protecting public interest "can only be achieved by recognizing the plain lessons of the citizens' ordinary experiences in life and translating them into realistic as well as humane enlightened application of these procedures."[17] Trotter qualifies this approach as "expansive."[18] *R v Demyen* is another example of this approach, in which the court went so far as to interpret it as an "unfettered discretion" to decide what public interest requires.

At the same time, others were attempting to define "public interest" rather than equate with discretion. In the oft-cited case of *R c Lamothe,* Baudouin JA highlighted that "the public often adopts a visceral and negative reaction to crime and criminals."[19] The public sees imprisonment as a way to protect itself and consequently tends to favour it. However, Baudouin JA stated: "the perception of the public must be situated at another level, that of the public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion… In other words, the criterion of the public perception must not be that of the lowest common denominator."[20] *Lamothe* is cited to this day and is one of the clearest articulations of the

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[14] Gary T Trotter, *The Law of Bail in Canada,* 2nd ed, (Toronto, Carswell, 1999) [Trotter 2nd ed] at 147-148.
[15] *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309 (SCC Judgments Lexum) [*Hall*] Iacobucci, Major, Arbour & Lebel JJ, dissenting, David MacAlister, "*St-Cloud*: Expanding Tertiary Grounds for Denying Judicial Interim Release" (2015) 19 CR (7th) ART 344 (WL Can).
[16] *Re Powers and R*, (1972) 9 CCC (2d) 533 (Ont HC) cited in Trotter 3rd ed, *supra* note 11 at 3-29.
[17] *Ibid*.
[18] Trotter 3rd ed, *supra* note 11 at 3-30.
[19] Trotter 3rd ed, *supra* note 11 at 3-30-31.
[20] *R c Lamothe,* (1990) 58 CCC (3d) 530 p 541, 1990 CarswellQue 1911 (WL Can) (QCA) translated in Trotter 3rd ed, *supra* note 11 at 3-31. I would highlight, as Baudouin JA also did in this case, that it was decided post-*Charter*. With the presumption of innocence elevated to constitutional guarantee, more caution was necessary in applying the tertiary ground.

judiciary's "idealized" interpretation of "public."[21]By idealized, I refer to a public much more well versed in legal principles than the average Canadian. To be sure, even judges who adopted an "expansive" approach refused to simply comply with public will or feeling.

Still, the "nebulous"[22] character of the phrase "public interest" caused interpretation struggles for twenty years. For the first few years after the *Charter*'s enactment, most judges seem to assume the bail system was constitutionally sound.[23] However, two cases in Quebec challenged this assumption: *Pearson* and *Morales*. Both these cases made it to the Supreme Court.

In *Pearson*, the SCC analyzed in detail paragraphs 11(d) and (e) of the *Charter*. To the Court, the presumption of innocence found in paragraph (d) *Charter* is more than a procedural right. It is the starting point of all questions in criminal law. It follows that section 11(e) *Charter* embodies the presumption of innocence at the judicial interim release stage.[24] Further, the SCC explained what constitutes a "just cause": reasons to detain should exist only in a "narrow set of circumstances" and should be "necessary for the proper functioning of the justice system."[25]

In *Morales*, rendered the same day as *Pearson*, the SCC applied these principles to the tertiary ground. The SCC struck down the provision's "public interest" component for vagueness. Going all the way back to *Re Powers* and *Demyen,* the Court illustrated the various imprecise definitions "public interest" had received:

> In my view, these authorities do not establish any "workable meaning" for the term "public interest." On the contrary, these authorities demonstrate the open-ended nature of the term. *Demyen*, *Kingwatsiak* and *Morenstein* expressly recognized that "public interest" imports a standard which is completely discretionary. *Powers* and *Dakin* relied on an imprecise notion that the public interest justifies denying bail

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[21] Fredrick Schumann, "The Appearance of Justice: Public Justification on the Legal Relation" (2008) 66 UT Fac L Rev 189 (WL Can).
[22] Daniel Kiselbach, "Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1988-89) 31 Crim LQ 169 at 173 (HeinOnline).
[23] Trotter 3rd ed, *supra* note 11 at 1-18.
[24] *R v Pearson,* [1992] 3 SCR 665, 1992 CarswellQue 120 (WL Can) at 683.
[25] *R v Morales*, [1992] 3 SCR 711, 1992 CarswellQue 18 (WL Can) [*Morales* cited to SCR].

> whenever the public image of the criminal justice system would be compromised by granting bail. The cases in the Quebec Superior Court relied on an imprecise notion that drug traffickers with no apparent defence should be denied bail.[26] In my view, these authorities demonstrate that the term "public interest" has not been given a constant or settled meaning by the courts. The term provides no guidance for legal debate. The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit.[27]

Thus, the provision did not apply to a narrow set of circumstances. However, crucially, nowhere does the Court deny the importance of the justice system's image.[28] The SCC limits its discussion to the text and its lack of precision in identifying what circumstances could negatively affect public interest or public image. In other words, the SCC did not deny that the "public interest" could justify denial of bail in cases not included in the first two grounds. It simply stated that the legislature needed to be clearer about what this public interest was.

One would assume that this assuaged concerns within the judicial community as Canada once again had a bail system coherent with its history and without a complicated tertiary ground; this would not last.

B. They did it again—From the "New" Tertiary Ground to Hall

In 1997, the government enacted *The Criminal Law Improvement Act* and reinstated the tertiary ground for detention, this time in its own paragraph. Faced once again with a very similar constitutional question, the SCC would this time uphold the provision. As I will discuss in detail in the next section, I believe that in *R v Hall* the need to protect judicial legitimacy by upholding the tertiary ground trumped the protection of individual rights. However, it is my contention that

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[26] "The intervener Association des Avocats de la défense de Montréal note[d] that until *Perron* and *Lamothe,* a number of judges in the Quebec Superior Court used the "public interest" criterion as a justification for a highly subjective denial of bail to certain persons accused of narcotics offenses." *Ibid* at 731 [citations omitted].
[27] *Morales, supra* note 25 at 731-32.
[28] Trotter 3rd ed, *supra* note 11 at 1-24.

the SCC created an unrealistic standard for the interpretation of "public" as a means to protect these rights. This is especially true when considering the contemporary media context.

The 1997 version of the provision reads as follows:

> (10) *Justification for detention in custody*—For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
> …
> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.[29]

As is quite obvious, the new wording resembles its predecessor. In addition, it appears that Parliament tried to solve the lack of "legal debate" by using the *Charter*'s "just cause" expression. It also attempted to add precision to the provision by enumerating circumstances that could affect confidence in the administration of justice "even though [the body of case law the circumstances mimic] was held to be incapable of injecting sufficient certainty into the provision, from a constitutional perspective." [30] Legislators claimed they acted on "representations made by a number of jurisdictions"[31] to reinstate the tertiary ground, but it remains unclear what need they sought to address.[32] As Trotter and Strezos argue, after *Morales*, Canada did not face any turmoil or crises linked to the inoperability of the tertiary ground.[33] The two other grounds are broad enough to ensure safety and order, as is the case in other Common Law jurisdictions.[34] However, it is clear that this time around, Parliament sought to create a

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[29] *Criminal* Code, RSC 1985, c-46, s 515(10) c) as it appeared on June 16, 1997.
[30] Trotter 3rd ed, *supra* note 11 at 3-39.
[31] *Hall*, *supra* note 15 at para 18.
[32] Trotter 3rd ed, *supra* note 11 at 3-39.
[33] *Ibid*, at 1-42, 3-39, Louis P Strezos, "Section 515(10)(c) of the Criminal Code: Resurrecting the Unconstitutional Denial of Bail" (1998) 11 CR 5th ART 43.
[34] *Hall, supra* note 15, Iacobucci, Major, Arbour & Lebel JJ, dissenting.

ground for detention "based upon the public's reaction to the decision to release, free from any concern about the accused person absconding, reoffending or interfering with the administration of justice."[35] It may be that Parliament saw an opportunity to please the public by taking its perceptions into account.[36] In any case, the new provision quickly attracted "constitutional scrutiny" and faced "sharp criticism" from commentators.[37]

Courts faced a renewed challenge in interpreting the new section in a manner consistent with *Morales* and the *Charter*. Since they felt the provision might actually be unconstitutional, "most courts applying the provision leaned towards a conservative approach…"[38] Unsurprisingly, again, the SCC accepted to hear a constitutional challenge. The facts and circumstances surrounding the case are worth detailing.

In *R v Hall*, the prosecution accused Hall of stabbing a woman to death. The victim sustained 37 wounds and evidence showed the assailant had tried to cut her head off. Hall was a distant relative of the victim and "compelling evidence linked him to the crime."[39] The crime occurred in the small community of Sault-Ste-Marie. Most interestingly, the SCC, quoting the trial judge, stated: "the murder received much media attention and caused significant public concern."[40] The community, it seemed, feared the idea of a presumed[41] killer being free.

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[35] Trotter 3rd ed, *supra* note 11 at 3-25-26.
[36] See Chapter 3 – *Section B*- ii. Crime and the Public, below.
[37] Trotter 3rd ed, *supra* note 11 at 1-31, 3-42, Strezos, *supra* note 33.
[38] *Ibid* at 3-42. See *R v Blind,* (1999) 139 CCC (3d) 87, 1999 CarswellSask 602 (WL Can) (Sask CA), *R v Alexander,* [1999] NJ No 19, 1999 CarswellNfld 19 (WL Can) (Nfld CA), *R v Li,* [1999] BCJ No 2443, 1999 CarswellBC 2371 (WL Can) (BCCA), *R v MacDougal,* 1999 BCCA 509, 1999 CarswellBC 3017 (WL Can), *R v O'Grady,* [1997] BCJ No 1399, 1997 CarswellBC 1409 (WL Can). See *contra R v M(S),* [2000] 46 WCB (2d) 553, 2000 CarswellOnt 2233 (WL Can) (Ont Sup Ct J).
[39] *Hall, supra* note 15 at para 2.
[40] *Ibid* at para 3.
[41] Though at this stage in the proceedings Hall could be no more than a presumed killer, it does seem like the community was certain of his guilt, perhaps due to the media coverage mentioned by the court. In addition, though it is impossible to know what influence this may have had on the outcome, the Supreme Court heard the appeal on judicial interim release a year after Hall was convicted of murder by a jury. As of 2014, Hall was still in detention and continued to deny the murder.

The majority ruled that "any other just cause" was too vague, just like its "public interest" predecessor. However, they found the rest of the provision, with its added criteria, rendered it sufficiently precise to fill the *Charter's* "just cause" requirement for denial of bail. "[T]he Chief Justice found that detention to preserve public confidence was not extraneous to the proper functioning of the bail system."[42]

However, it is somewhat difficult to reconcile the tertiary ground, even in its contemporary state, with *Charter* rights. Iacobucci J's poignant dissent, with which Arbour, Major and Lebel JJ concurred, illustrates these issues:

> [The] listed factors, by themselves, point to a denial of bail on the mere two-fold basis of a serious crime and a strong *prima facie* case; however, it does not promote the proper functioning of the bail system to detain an accused on this basis alone, when the accused is not a flight risk and does not pose a threat to public safety. Section 515(10)c) essentially revives the old "public interest" ground and invoke similarly vague notions of the public image of the criminal justice system. It is ripe for misuse and allows irrational public fears to be elevated above an accused's *Charter* rights… The problem with s. 515(10)c) is that it allows the subjective fears of the public and ill-informed emotional impulses extraneous to the bail system to form a sole basis for denying bail.[43]

Academic commentators were also critical of the decision.[44] I will discuss in more detail the theoretical and philosophical issues with denying bail based on public fear and impulse in the next Chapter.

In the years following *Hall*, the lower courts seemed as divided as the SCC about the validity of the ground, regardless of the SCC's decision. As Trotter puts it: "some judges grudgingly acknowledge[d] the obvious authority of the majority judgment in *Hall*, but [wrote] in a manner

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[42] Trotter 3rd ed, *supra* note 11 at 1-33.
[43] *Hall, supra* note 15 at 313 (summary).
[44] Trotter 3rd ed, *supra* note 11 at 3-35, Don Stuart, "Zigzags On Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Deference, and Charter Values" (2003) 20:2 SCLR 267 (Digital Commons Osgoode).

that [made] it clear that they prefer[red] the dissenting reasons of Justice Iacobucci."[45] In addition, buried in a long explanation of the tertiary ground's function, the Chief Justice mentioned that it would be "relatively rare"[46] for section 515(10)(c) *Cr C* to see be needed. As Trotter argues, this passage should not be taken on its own, but judges and commentators used it as a motive to argue for a restrictive interpretation of the provision.

Although some lower court judges adopted a more expansive interpretation,[47] the majority of them sought ways to limit the scope of the provision.[48] They continued to interpret "public" as a "fair-minded, reasonable member of the public" that has good knowledge of the principles underlying criminal and constitutional law. In other words, their "public" possessed much more legal knowledge than the average Canadian. In addition, adjudicators used the circumstances surrounding the crime in *Hall* as a point to reference in terms of the gravity and atrocity necessary to detain an accused on the tertiary ground.[49] It was possible for the courts to adopt this "stringent approach"[50] because "there is little in the majority judgment that assists with the application of the provision on a day-to-day basis."[51] When the SCC finally sought to provide this assistance, the paradox in the interpretation of 515(10)(c) *Cr C* began to appear.

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[45] Trotter 3rd ed, *supra* note 11 at 3-45.
[46] *Ibid* at 3-44.
[47] *Ibid* at 3-49.
[48] *Ibid* at 3-45. *R v E(H),* [2003] NJ No 299, 2003 CarswellNfld 263 (WL Can) (Nfld Prov Ct), *R v Everette-Dorland,* 2004 MBQB 137, 2004 CarswellMan 256 (WL Can), *R v Lysyk,* 2003 ABQB 256, 2002 CarswellAlta 1803 (WL Can), *R v Macedo,* (2002) 57 WCB (2d) 555, 2002 CarswellOnt 5172 (WL Can) (Ont Ct J), *R v Patko,* 2003 BCCA 262*,* 2003 CarswellBC 1058 (WL Can), *R v Qaiser,* [2003] OJ No 3668, 2003 CarswellOnt 9105 (WL Can) (Ont Sup Ct J), *R v Adiwal,* 2003 BCSC 740, 2003 CarswellBC 3787 (WL Can), *R v Masniuk,* 2003 MBQB 139, 2003 CarswellMan 237 (WL Can).
[49] *R v St-Cloud*, 2015 SCC 27 [*St-Cloud*] at para 4.
[50] Trotter 3rd ed, *supra* note 11 at 3-47.
[51] *Ibid* at 3-43.

C. R v St-Cloud*: Paradoxical Claims*

The SCC eventually thought it necessary to clarify the interpretation of the provision, especially considering the dominant restrictive trend inspired by the dissent in *Hall*. From an individual rights perspective, as will be discussed in the next Chapter, I believe it would have been justifiable for the SCC to condone the restrictive approach. Instead, in *R v St-Cloud*, the SCC admonished the lower courts and stated that the tertiary ground:

> has been unduly restricted by the courts in some cases; this provision must not be interpreted narrowly or applied sparingly. The application of this ground for detention is not limited to exceptional circumstances, to unexplainable crimes, to the most heinous of crimes or to certain classes of crimes. The fact that detention may be justified only in rare cases is but a consequence of the application of s. 515(10)(*c*), and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision. Section 515(10)(*c*) is worded clearly, and it does not require exceptional or rare circumstances.[52]

The SCC also confirmed, on paper at least, that the third ground truly aims to adopt the public's perspective.[53] Nonetheless, the SCC defines public as "reasonable, well-informed members of the community, but not legal experts with in-depth knowledge of our criminal justice system."[54] The SCC admonished some of the courts that had adopted the restrictive approach for stripping "public" of all meaning even though the wording expresses a clear legislative choice.[55] I agree with the SCC, though as mentioned, we have little information on why the legislator did not deem the other two grounds sufficient, it is evident to me that Parliament wanted to give the

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[52] *St-Cloud, supra* note 49 at para 5. As Stuart states: "It is hard to find a recent interpretation that even hints at the views expressed on the public confidence ground by the Supreme Court". Don Stuart, "*St-Cloud*: Widening the Public Confidence Ground to Deny Bail Will Worsen Deplorable Detention Realities" (2015) 16 CR (7th) ART 337 (WL Can) at 341.
[53] *St-Cloud, supra* note 49 at para 5.
[54] *Ibid*. See also *R v Hunt,* 2015 ONCJ 732, 2015 CarswellOnt 19485 (WL Can).
[55] *St-Cloud, supra* note 49 at para 77.

general public a voice in pre-trial detentions. As *R v Hall* demonstrated, in some cases the third ground is indeed a useful way to appease a worried public.[56]

The SCC then goes on to concede: "It is of course not easy for judges to strike an appropriate balance between the unrealistic expectations they might have for the public, on the one hand, and the need to refuse to yield to public reactions driven solely by emotion on the other."[57] I would argue that courts, including the SCC, tend toward the side of unrealistic expectations. In other words, although the SCC defends the right of the public to have a voice in the determination of judicial interim release, the "public" it is prepared to consider does not correspond to the average Canadian's level of legal knowledge.

The guidance the Court provided for the interpretation of the provision further illustrates this point: "The justice must assess each of these circumstances—or factors—and consider their combined effect."[58] The SCC then detailed how a judge should perform this assessment. For the first criteria, "the apparent strength of the prosecution's case," the court stated that a judge should attempt to estimate this strength, keeping in mind the particularities of judicial interim release cases.[59] The "gravity of the offence," the second criteria, should receive an objective evaluation, "in comparison with the other offences in the *Criminal Code*."[60] For the assessment of the "circumstances surrounding the offence," the SCC listed a series of non-exhaustive criteria that militate in favour of detention.[61] Finally, the Court differentiated the second and the last

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[56] Whether or not this Parliamentary intention is constitutional is a different question. I do feel compelled to state that I believe it is not.
[57] *St-Cloud, supra* note 49 at paras 81-84.
[58] *Ibid* at para 55.
[59] For instance, "[a]s Justice Trotter notes, […] 'The expeditious and sometimes informal nature of a bail hearing may reflect an unrealistically strong case for the Crown'" *Ibid* at para 57 [footnote omitted].
[60] *Ibid* at para 60.
[61] "The fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person (for example, a child, an elderly person or a person with a disability). If the offence was committed by several people, the extent to which the accused participated in it may be relevant." *Ibid* at para 61.

criteria, the "potential for a lengthy term of imprisonment." It stated that the latter is a subjective criterion that judges should evaluate based on all the circumstances of the case.[62] Once the judge has evaluated all the factors, s/he must weigh them against each other, and any other relevant circumstances. In the SCC's words "it is a balancing exercise that will enable the judge to determine whether detention is justified."[63]

In short, the Court detailed how to analyze the different criteria listed in the provision. The SCC additionally specified that these circumstances are not exhaustive and that the "ultimate question the justice must answer" is whether, in light of all the relevant circumstances, detention is necessary to protect confidence in the administration of justice.[64]

As far as it is currently possible to tell, lower courts are mimicking the SCC and applying this "test" quite mechanically.[65] The reasoning seems to be that the test demonstrates how a reasonable member of the public should analyze the circumstances and thus must guide the judge in applying the tertiary ground.[66] However, the "abstract" nature of this test actually puts the analysis at a further remove from true public perception. In addition, it is hard to argue that the general public actually reasons. Rather, it more closely resembles how a legal expert would address the question.

In sum, almost fifty years after it first appeared, the tertiary ground is still controversial. Today, there seems to be a paradox in its interpretation. I will discuss this in more detail below. I have focused in this section on the history of 515(10)(c) *Cr C* and the legal interpretation of "public."

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[62] *Ibid* at para 65.
[63] *Ibid* at para 55.
[64] *Ibid* at para 69.
[65] In addition, I highlight two recent cases *R v D(T),* 2016 BCPC 210, 2016 CarswellBC 1955 (WL Can) and *R v Middleton,* 2016 BCPC 106, 2016 CarswellBC 1146 (WL Can) in which the trial judges continue to cite Iacobucci J's dissent in *Hall*.
[66] *R v McLean,* 2016 ABQB 330, 2016 CarswellAlta 2840 (WL Can), *R v Louie,* 2017 BCPC 54, 2017 CarswellBC 533 (WL Can), *R v Mills,* (2016) 135 WCB (2d) 380, 2016 CarswellNfld 496 (WL Can) (Nfld Prov Ct), *R v Purcell,* 2016 NLTD(G) 9, 2015 CarswellNfld 529 (WL Can) [*Purcell*], *R v Payne,* [2015] NJ No 197, 2015 CarswellNfld 191 (WL Can) (Nfld Prov Ct) [*Payne*].

However, I believe it is also important when addressing these questions to bear in mind a pragmatic and realistic vision of who the public really is.

D.The Media

At this point in my thesis, it is necessary to circle back to the media's role in informing Canadians and shaping their perceptions of trials and pre-trial procedures. Even in the first interpretations of the tertiary ground, members of the judiciary understood that the public's perceptions and the media are necessarily linked. However, the tendency within the judicial branch was to reject the media as a relevant indicator of public opinion. In *R v Moore*, Gratton DCJ openly refuted Lerner J's reasons in *Re Powers* as he categorically refused to consider quotes from the media "for then the judge would almost inevitably be faced with the onerous if not impossible task of weighing conflicting views between different newspapers and of ascertaining whether a given newspaper's policy is to reflect public opinion or to mould it."[67]

One might argue that *Hall* is an exception to this tendency of rejecting views expressed through the media, because the reasons seem to implicitly acknowledge that the "significant concern" in the community stemmed from the media attention the case attracted. However, this link between the media and the public is somewhat lost in the following discussion. Indeed, the court then refers to testimony the trial judge heard concerning feelings in the community. A look at the case history demonstrates that the trial judge placed most of the emphasis on testimony from a police officer and the victim's family. The former testified that the community was frightened and that some of its members had even placed phone calls to express their worry. The victim's father testified that his wife and three other daughters were very afraid. This appears to have swayed

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[67] *R v Moore*, (1973) 16 CCC (2d) 286 (Ont Dist Ct) at 289. However, Gratton DCJ also held that "[i]t would be naïve to contend that Judges do not and ought not to read editorial comments […]." *Ibid.*

the judges. Most importantly, the judge does not discuss how the media may have created or enhanced community's fear.[68]

In *R v Marcoux,* the judge mentions receiving phone calls after a local paper publicized a bail hearing. However, he admonishes the members of the public who took it upon themselves to call him. The court ordered detention on the second and third grounds. As in *Hall*, however, on the third ground, the judge refers to testimony from members of the community rather than the media coverage. This appears to be an implicit rejection of the media's role in public confidence.[69]

The facts in *R c Guay* received extensive media coverage, but the judge makes no reference thereto in his decision to detain the accused on the second and third grounds.[70] In *R v Dopwell*, the court clearly states that it "shouldn't be swayed by what might be in the papers…"[71] and in *R v Hilderman*, the court categorically stated that "the notoriety of the circumstances of the alleged offences in the media, and punishment for these offences at this stage of the proceedings, are not grounds for ordering detention on the tertiary ground."[72]

Because of this obvious interaction, in *R v St-Cloud*, the SCC also addressed the place of media in informing the public:

> Canadians may in fact think they are very well informed, but that is unfortunately not always the case. Moreover, people can also make their reactions known much more quickly, more effectively and on a wider scale than in the past, in particular through the social media mentioned above, which are conducive to chain reactions. The courts must therefore be careful not to yield to purely emotional public reactions or reactions that may be based on inadequate knowledge of the real circumstances of a case.

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[68] *R v Hall,* [2000] 35 CR (5th) 201, 2000 CarswellOnt 3063 (WL Can) (Ont CA) at para 14.
[69] [1997] BE 2000BE-579, AZ-00026270 (Azimut) (Q Sup Ct). See also *R c Ortiz-Macias,* 2006 QCCQ 15810, 2006 CarswellQue 12996 (WL Can) in which a detective's testimony seems to be the determining factor in the judge's decision to detain the accused.
[70] *R c Guay,* 2006 QCCQ 608, 2006 CarswellQue 602 (WL Can).
[71] *R v Dopwell,* [2003] MJ No 269, 2003 CarswellMan 328 (WL Can) (Man Prov Ct).
[72] *R v Hilderman,* 2003 ABPC 159 at para 7, 2003 CarswellAlta 1249 (WL Can).

> However, the courts must also be sensitive to the perceptions of people who are reasonable and well informed. This enables the courts to act both as watchdogs against mob justice and as guardians of public confidence in our justice system. It would therefore be dangerous, inappropriate and wrong for judges to base their decisions on media reports that are in no way representative of a well-informed public… I wish to point out that this does not mean the courts must automatically disregard evidence that comes from the news media. It must be recognized that the media are part of life in society and that they reflect the opinions of certain segments of the Canadian public. In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 475, this Court noted: "The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being." Such opinion evidence can therefore be considered by the courts when it is admissible and relevant. This will be the case where it corresponds to the opinion of the reasonable person I described above.[73]

I find it hard to see when the situation described *in fine* will arise. Indeed, the Newfoundland and Labrador Provincial Court has admitted it is "hard to understand."[74] It is simply not an available option for today's media. As demonstrated in Chapter 1, most mass media are not in a position to inform the public in the way the SCC desires, particularly about court cases. Their reporters are not legal specialists, nor do they often cover court cases, they lack time and space to discuss legal principles and their main motivation is now monetary. This further demonstrates that though the SCC claims to be respectful of legislative intent (and admonished lower courts for failing to do so), the practical result is an unattainable standard of knowledge for the Canadian public.

R v Malley is one of the few post-*St-Cloud* cases to reference the media. The Alberta Court of Appeals stated: "If left undefined and vague, following public feelings would trouble me. For example, a person should not be denied bail pending appeal just because the media have given

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[73] *St-Cloud, supra* note 49 at paras 81-84 [emphasis added].
[74] See *Payne, supra* note 66 at para 58: "The Supreme Court does not suggest how news media evidence would be put before a bail court or what consideration should be given to it."

his case much publicity and portrayed him in a harsh light."[75] However, we know that when the media chose to cover a criminal trial, they rarely portray the accused in a favourable light.[76]

R c Turcotte is a very relevant illustration of the media's role in shaping opinions about criminal cases. It is also a good example of the judiciary's restrictive interpretation of "public." Finally, it also serves to illustrate how the courts view the media with suspicion.

Before turning to the facts of the case, I must highlight that in *St-Cloud* the SCC stated that if the following criteria were present "pre-trial detention will usually be ordered":[77]

- if the crime is serious or very violent;
- if there is overwhelming evidence against the accused;
- and if the victim or victims were vulnerable.[78]

In other words, these are the circumstances in which a release order would undermine the public's trust in the courts.

In 2009, Turcotte, a cardiologist, violently stabbed his two children to death in the context of his separation from his wife. The media extensively covered his first trial and its gruesome details. Turcotte admitted killing his children, but raised a defence of mental disorder and a jury found him non-responsible.[79] However, the Quebec Court of Appeals overturned the decision and ordered a second trial. Through the media and public protests, the public demanded his detention

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[75] *R v Malley*, 2015 ABCA 213, 2015 CarswellAlta 1117 (WL Can) at para 44. See also *Purcell*, *supra* note 66 in which the crown provided media material as evidence, but the judge makes no mention of it in his reasons, though he orders detention of the accused on the secondary and tertiary grounds.

[76] *Latimer* is an obvious exception, but it serves to demonstrate how the media's portrayal of an accused can mould public opinion.

[77] *St-Cloud, supra* note 49 at para 88.

[78] *Ibid*.

[79] The use of the defence was even more controversial than usual, because Turcotte was diagnosed with an adjustment disorder whereas the public usually associates this defence with dissociative diseases, such as schizophrenia and dissociative identity disorders.

awaiting the new trial.[80] Turcotte was, however, conditionally released. This is somewhat surprising considering the SCC statement in *St-Cloud,* quoted above. The crime was serious and very violent, the accused had admitted to committing it and children are among the most vulnerable victims. In other words, everything pointed toward a detention based on the tertiary ground.

In addition, to demonstrate how a pre-trial release could affect public confidence, the prosecution actually used media reports. The Appeal's Court, however, did not appreciate this:

> The appellant submitted a press review of 21 articles published after the trial judge's decision… It contains various opinions that are more or less nuanced, more or less objective, more or less measured, more or less superficial. Many expose inexact facts or leave out those that are essential. Most silence the essential legal principles in bail matters. Some opinions foster anger and denature the debate. Few loyally report the facts and recall the applicable principles.[81]

In this short passage, the Court of Appeals summarized many of the issues and grievances affecting the media today, as detailed in Chapter 1. The SCC refused to hear the Crown's appeal. In addition, in *St-Cloud* the Supreme Court, while claiming to admonish lower courts for excessively restricting the third ground's scope, actually cited the Quebec Appellate Court's reasons in *Turcotte*.[82] Thus, the paradoxical interpretation of the tertiary ground becomes apparent.

To be sure, I do not disagree with the decision to release Turcotte, especially on the first two grounds. Nonetheless, as mentioned, Parliament clearly intended to respond to *actual* public opinion and the SCC agreed to maintain this intention in our legal landscape. The courts,

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[80] *R c Turcotte,* 2013 QCCA 1916, 2013 CarswellQue 11438 (WL Can), *R c Turcotte*, 2014 QCCA 2190, 2014 CarswellQue 12103 (WL Can) [*Turcotte* 2014], La Presse Canadienne, "Manifestation contre la libération de Guy Turcotte" *La Presse* (27 September 2014), online: <www.lapresse.ca>.
[81] *Turcotte* 2014, *supra* note 80 at 18-19 [translated by author].
[82] *St-Cloud, supra* note 49 at para 83.

however, seem intent on demanding a higher standard; one that I believe cannot be achieved in the current media context.

In sum,

E. Dialogue and Strategic Legitimacy Cultivation in Hall *and* St-Cloud

My contention is that the SCC essentially disagreed with Parliament's desire to re-enact the tertiary ground. However, I believe the Supreme Court saw a second declaration of unconstitutionality as too threatening to the judiciary's legitimacy. Of the theories discussed above, it would seem that Hogg's dialogue theory, as well as strategic legitimacy cultivation theory best apply to this case.

In revisiting dialogue theory, Hogg cites *Hall* as an illustration of the dialogue between the courts and Parliament. Indeed, it does appear that Parliament seriously considered the SCC's motives for striking down the ground in *Morales.* In *Hall*, McLachlin CJ, writing for the majority, also acknowledges that the new provision is an "excellent example of constitutional dialogue."[83] However, she is only referencing the Parliament's role in the "discussion", i.e. its taking into account of *Morales* in its second formulation of the tertiary ground. What the majority fails to add is that the SCC also "heard" Parliament's insistence on maintaining this ground. In other words, at this point in the "conversation" the SCC concluded that its role was to show deference to Parliament's intention.[84]

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[83] *Hall, supra* note 15 at para 43, Peter W Hogg, Allison A Bushell Thorton & Wade K Wright, "Charter Dialogue Revisited - Or Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ 1 at 22 (WL Can).

[84] The dissent goes even farther and qualifies the majority's decision as "abdication." *Hall, supra* note 15 at para 127.

I believe this deference was the result of a strategic choice to protect the courts' legitimacy. In *Hall*, the SCC restated that public confidence is necessary to the functioning of the justice system[85] and confirmed that the aim of the ground is to protect this image:

> To allow an accused to be released into the community on bail in the face of a heinous crime and overwhelming evidence may erode the public's confidence in the administration of justice. Where justice is not seen to be done by the public, confidence in the bail system and, more general in the entire justice system may falter. When the public's confidence has reasonably been called into question, dangers such as public unrest and vigilantism may arise.[86]

In this passage, the SCC is explaining that, as a motive for detention, public confidence is not extraneous to the goals of the justice system. From a theoretical standpoint, this is not a completely unworthy argument.[87] In addition, it would have been strategically hard to argue the opposite.

First, striking down the provision presented a risk because it was a legislative sequel case as I mentioned previously. Parliament—the elected representative of the public—expressed "determined legislative intention"[88] by re-enacting the tertiary ground. Second, to strike down the provision would have meant openly denying the public's right to a say in judicial interim releases. This is indeed exactly what the dissent advocated. However, as cases such as *Turcotte* demonstrate, the public can be extremely concerned with the release of accused people. Consequently, in terms of public confidence and legitimacy, openly stating that the public's opinion is not worthy of consideration may have been risky. Finally, we must add to this that, as the SCC acknowledges, the case was attracting a fair amount of media attention.

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[85] See Chapter 1 – *Section C* – i. The importance of Judicial Legitimacy, above.
[86] *Hall, supra* note 15 at para 26.
[87] See Chapter 1 – *Section C* – i. The importance of Judicial Legitimacy, above.
[88] *R v Murray,* [2000] AWLD 235, 1999 CarswellAlta 1302 (WL Can) at para 32.

In sum, I would argue that the following factors lead the Supreme Court to uphold the tertiary ground to protect judicial legitimacy in *Hall*: (1) the media was attracting attention to the case; (2) the public fears criminals and instinctively prefer detention; (3) this was a case about whether or not judges can consider the public's opinions on detentions; (4) this was the second time Parliament was attempting to grant them the right to this consideration; and (5) the public views judicial activism, as opposed to deference, as suspicious.

However, the crucial issue of constitutionality remained. Denying an accused his freedom based on popular feeling is questionable[89] at best, especially considering the Court's interpretation of "just cause" and the presumption of innocence. I believe this dilemma pushed the SCC to promote a standard above the general public's knowledge level for the interpretation of "public," all the while claiming to respect Parliament's intentions. This explains why even in cases like *Turcotte,* courts will not always order pre-trial detention.

To conclude, the history of this provision demonstrates that courts are indeed sensitive to the image of the criminal justice system. However, judges are uncomfortable with the idea of denying judicial interim release to accused people based on popular clamour and fear. For these reasons, they prefer a restrictive interpretation of the tertiary ground, though they try to mask this preference as much as possible. This restrictive approach notably leaves little to no place for consideration of the media.

The resulting interpretation of 515(10)(c) *Cr C* may seem dishonest, at the very least paradoxical. In the next chapter, I will set aside the constitutional questions (as, for the time being, the SCC has settled them) and I will discuss broader considerations of democracy, the rule of law and fundamental rights.

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[89] *Hall, supra* note 15, Iacobucci, Major, Arbour & Lebel JJ, dissenting. See Chapter 3, below.

Chapter Three A Warranted Paradox

Chapter 1 detailed the Canadian media context and its role in informing the public and judges. I also explored the role of judicial legitimacy and the various theories developed by scholars to explain how judges seek to maintain their legitimacy, especially in light of their great political power. In Chapter 2, I detailed the odd history and interpretation of section 515(10)(c) *Cr C* and demonstrated how judges have set a high standard for the interpretation of "public," a standard I believe currently qualifies as impossibly high, when taking into consideration the media informed perceptions of the Canadian public. This Chapter will explore the benefit of such an interpretation. Indeed, I will argue in favour of supporting the current interpretation of the provision as any other interpretation would be problematic from an individual rights perspective. Notwithstanding, I must first recall an important caveat mentioned briefly in the first Chapter: this thesis is based largely on specific cases found by conducting extensive searches in online legal databases and much of the argument on the rhetoric of the SCC and appellate courts. This is to say that it contains no quantitative evidence that courts use the tertiary ground as restrictively as would theoretically result from the SCC's guidelines. Stuart and Harris attempted such a study, but revealed nothing of statistical significance.[1] Across Canada, judges hear many judicial interim release demands every day. They render many of their decisions on the bench, which results in short reasons that are often not published. Studies have demonstrated an over-representation of certain populations such as indigenous people or black people in detention

[1] Don Stuart and Joanna Harris, "Is the Public Confidence Ground to Deny Bail Used Sparingly" (2004) 21 CR (6th) ART 232 (WL Can). In addition, their study did not control for decisions based on the tertiary ground and one of the other two, making it even harder to shed light on the actual influence of the public on the decision to grant or not grant judicial interim release. Gary T Trotter, *The Law of Bail in Canada,* 3rd ed, (Toronto, Carswell, 2010) (loose-leaf update 2015, release 1) [Trotter 3rd ed] at 3-53, footnote 221.

centres.[2] The role played by the tertiary ground in this situation would be worth exploring. In sum, though the theoretical questions raised by this thesis are interesting, I would urge the use of empirical methods to assess the actual frequency of the tertiary ground's usage.[3] The provision still allows a certain level of discretion and it is important to ensure that courts do not employ it in favour of racial or any other types of biases.

Second, I mention again that I will not directly address the constitutional question in this Chapter, as the SCC has settled it. For the time being, the tertiary ground is here to stay. In addition to its odd existence, it also has an odd interpretation that this Chapter will seek to demystify and justify.

The remaining question concerns the proper relationship between the judges and the public and how Canadian judges should act in the face of popular demands. To answer this, I will first examine, in Part A, the central concept of the rule of law and the judge's role therein. I will seek to describe its articulation in the Canadian political context. In Part B, I will focus on criminal law and its relationship to the rule of law as well as the public. I will also discuss the complex phenomenon that is the fear of crime. It will be necessary once again to address the media's role in this context. Finally, in Part C I will come back to section 515(10)(c) *Cr C* and explain why, in light of all the considerations highlighted in this thesis, the subtly restrictive interpretation of the tertiary ground is warranted.

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[2] David MacAlister, "*St-Cloud*: Expanding Tertiary Grounds for Denying Judicial Interim Release" (2015) 19 CR (7th) 344 (WL Can), Don Stuart, "*St-Cloud*: Widening the to Deny Bail Will Worsen Deplorable Detention Realities" (2015) 16 CR (7th) ART 337 (WL Can), Julian V Roberts, Julian & al. *Penal Populism and Public Opinion : Lessons from Five Countries* (New York : Oxford University Press, 2004) at 26-27.

[3] Particularly, as I will discuss in more detail below, there seems to be an alarming tendency to put a great amount of weight on the strength of the prosecution's case at the time of the hearing. This is worrisome with regards to the presumption of innocence. In addition, at this stage, the defense normally has not yet had access to discovery nor prepared a defense strategy, which can make the prosecution's case look disproportionately strong.

A. Judges in Canadian Democracy

To understand the appropriate relationship between the judiciary and the public, one must understand the judge's broader role within Canadian society. For the purpose of this thesis, I will define Canadian society as a liberal democracy governed by the rule of law. In this context, as the third branch of government, the judiciary provides a check on the rule of the majority. It also protects individuals from excessive encroachments on their freedoms. This is why the tertiary ground seems so hard to accept for many judges. This section will highlight some particularities of the Canadian justice system through comparison with the United States and its partially elected judiciary.[4] I will then discuss the judge's role through the concepts of populism and elitism and argue that Canadian judges form an elite group whose educated opinions are worth respecting. However, I will nuance this assertion with a short commentary on the lack of diversity on the Canadian bench. This discussion is obviously incomplete without mentioning the Realists' contribution, for they brought important nuances to judicial decision-making theories.

i. The Judge and the Rule of Law

It is beyond the ambit of this thesis to discuss the entire history of the rule of law.[5] I will also not attempt to define it as it "is an exceedingly elusive notion."[6] I will rather use the aspects of it that are part of Canadian political theory.

> The broadest understanding of the rule of law, a thread that has run for over 2,000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law. The immediate inspiration underlying this idea was not the preservation of individual liberty, but restraint of government tyranny.[7]

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[4] Although there is notably more scholarship on the rule of law in the United States, given its close proximity to Canada and the fact that it also operates under the common law, the comparison is worthwhile.
[5] For an excellent critical analysis see: Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004).
[6] *Ibid* at 3.
[7] *Ibid* at 114-15.

Indeed, even the earliest thinkers of the rule of law, Aristotle and Plato, were greatly concerned about the tyranny of the majority "in a populist democracy."[8] In such democracies, the absolute rule of the majority comes with the risk that it will abuse its power. Thus, in a democratic state, such as Canada, where we consider the people to be the sovereign,[9] we admit a necessity to bind their power by law. The judge's role is central to this. Binding the sovereign by law means little to nothing if nobody has the power to call upon it to obey.

> This solution to the puzzle involves dividing up and partitioning the state apparatus, giving one part, the judiciary, the capacity to hold the other parts answerable on legal grounds. The autonomy and findings of the judiciary must be respected if this is to work. Notwithstanding skepticism about the prospects of this being successful, it can indeed function effectively, as is proven daily in many societies around the world.[10]

In the Federalist Papers, Hamilton, citing Montesquieu emphasized, this idea: "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[11] This adds another dimension: the protection of individual liberty[12] from state tyranny. This theme continues to animate liberal democracies such as Canada.[13]

Simply put, it is unwise to leave the power to interpret the law in the hands of the legislative or executive bodies, for the risk of them using this power to their advantage is too great. What is interesting here is the underlying premise that personal interests, to the contrary, will not influence judges.[14] Rather, they will interpret laws simply on the basis of legal principles. It is beyond the ambit of this thesis to discuss principles and methods of interpretation, though they

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[8] *Ibid* at 8-9.
[9] By constitutional convention.
[10] Tamanaha, *supra* note 5 at 117-18.
[11] Montesquieu, *De l'esprit des lois*, vol I, cited in *Federalist Papers #78,* online: <http://avalon.law.yale.edu/18th_century/fed01.asp>.
[12] Liberty is also notoriously hard to define. I refer to it here in the only sense that makes some consensus: the individual's capacity to act on her/his desires. Susan Hoffman Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (New York: New York University Press, 2005) at 41-42.
[13] Tamanaha, *supra* note 5 at 32.
[14] See *Section A* – iii. Legal Realism for the now famous challenge to this assumption, below.

are undoubtedly varied and controversial. However, despite these variations, the main theme animating judicial interpretation is fidelity to legislative intent and respect for the rule of law, independent from personal preference or interests.[15]

In citing Montesquieu, Hamilton was also arguing in favour of an independent, life-tenured judiciary. It is reasonable to assume that he perceived the risk of electing the third branch: a judge seeking election or re-election may be overly sensitive to the will of the majority rather than maintain a strict commitment to the rule of law. In Canada, judges are appointed to tenured positions. Interestingly, in the United States, many states elect at least part of their judges. Contrasting these two systems helps to define the Canadian conception of the judge's role. To do so, I have reduced the elected and non-elected judiciary to two very simplified and non-exhaustive ways of viewing the judiciary's role.

On the one hand, the proponents of judicial elections argue that a duty to uphold democracy circumscribes the judge's duty to protect the rule of law.[16] It follows that they are comfortable with judges demonstrating sensitivity to the majority's will, as this is "democracy enhancing." Bonneau and Hall argue that particularly in states that hold judicial elections, it is part of the judge's duty to democracy to take into account popular opinion when deciding "hard" or ambiguous cases. They argue that the simple existence of judicial elections demonstrates commitment to popular sovereignty, even in the third branch. So long as interpretation remains within the law's textual limits, the judge is preserving the rule of law.[17] The argument here is that judicial elections strike a balance. Elected judges, though having a vested interest in re-election or advancement to higher courts, remain limited by the text of the law as well as various

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[15] Tamanaha, *supra* note 5 at 123.
[16] David Pozen, "Are Judicial Elections Democracy Enhancing?" in Charles Gardner Geyh, ed, *What's law got to do with it?: what judges do, why they do it, and what's at stake* (Stanford: Stanford Law and Politics, 2011) 248, David Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991) 1 CR (4th) ART 367 at 3 (WL Can).
[17] Pozen, *supra* note 16.

principles of legal interpretation, such as precedent. Simply put, no matter a judge's political or personal preferences, s/he cannot apply clear laws in any way s/he pleases.

On the other hand, others find judges have a duty to the fundamental value of individual liberty.[18] In this case, judges may find it good to be wary of the majority's desires and popular opinion, as their role is to act as a safeguard against undue restrictions on individual liberty. This includes minorities and other groups of vulnerable people, including people accused of crimes. I would argue that legal philosophy in Canada, at least since the entrenchment of the *Charter*, adheres to this conception.[19] As Michaud J stated: "the judiciary is an anomaly in the spectrum of democratic institutions; its primary function is not to be representative but rather to be impartial in the face of often conflicting representations and interests."[20]

This passage from the dissent in *Hall* is also notable:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[21]

In other words, while the legislative and the executive bodies write and apply the laws as the majority's representatives, judges act a safeguard when such actions violate the fundamental freedoms guaranteed to every citizen. It follows that the opinion of the majority should not have any weight if it unjustifiably favours such violations. Of course, situations will arise when it will

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[18] Dyzenhaus, *supra* note 16.

[19] A Wayne Mackay, "In Defence of the Courts: A Balanced Judicial Role in Canada's Constitutional Democracy" (2006) 21 Nat'l J Const L 183 (WL Can).

[20] L'honorable juge en Chef Pierre A Michaud, "L'administration de la justice et les tribunaux : quelques réflexions sur la perception du public" in Jean-Maurice Brisson and Donna Greschner with the Canadian Institute for the Administration of Justice, eds, *Public Perceptions of the Administration of Justice* (Montréal: Les Éditions Thémis, 1996) [Brisson & Greschner] 27 at 31. See also The Right Honourable Beverly McLachlin, "The Supreme Court and Public Interest" (2001) 64 Sask L Rev 309 (WL Can).

[21] *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309 (SCC Judgments Lexum) [*Hall*] at para 47.

be necessary to limit freedom.[22] However, the judiciary should ignore popular clamour in deciding the extent of these limitations.

To be sure, the Canadian philosophy also relies on a balance between democracy and individual freedom. The "notwithstanding" clause symbolically protects democracy and parliamentary sovereignty. The need to maintain the legitimacy of the third branch that I have discussed throughout this thesis also indicates that judges will attempt to leave policy making in the hands of the legislative and executive branches (or at least appear to do so).

In sum, it is consistent with democracy or the rule of law for constituencies to elect judges and for these judges to take public feeling into account when using their discretion or interpreting ambiguous law. However, this is not the judge's admitted role in Canadian society. Rather, as a protector of individual freedom, we expect judges to interpret the law independently from popular opinion. The issues with 515(10)(c) become apparent here. If judges equate "public confidence" with the majority's opinion, they are failing to fulfill their duty. Being the protectors of liberty surely means upholding the procedural rights entrenched in the *Charter*, including the presumption of innocence and the right to fair bail, independent of popular will. However, parliamentary sovereignty must also be respected. In the last Sections of this Chapter, I will discuss how judges reconcile these duties as well as their need to protect their legitimacy, in the case of 515(10)(c) *Cr C*. The following Section will examine normative questions surrounding these two conceptions of the judge's role.

ii. Populism v Elitism

To be sure, pre-trial detention is sometimes warranted. Another way to frame the question is to ask whether the public should have the ultimate say (the populist view) or if the public should

[22] Imprisonment of criminals is one such situation, see *Section B* – ii. The Rule of Law and Imprisonment, below

rather entrust this decision to an educated elite such as the judiciary (the elitist view). Indeed, while the previous discussion involved important political theory, this frame allows us to consider some of the contemporary realities discussed herein. I have provided evidence that the public lacks understanding of legal matters generally and criminal justice principles specifically.[23] Judges, on the other hand, are experts in this field. The unresolved question here is which solution yields the most desirable results.[24] Zaller believed that "policy elites and substantive experts usually make better choices than does the relatively ignorant and mostly uninterested mass public."[25] In addition, he was unconvinced that "people have a right to be involved in governance" or that "political participation is a value in itself."[26] These statements might seem shocking, but at a high level of abstraction,[27] they do have some theoretical value. The problem, of course, as Hochschild demonstrates, is that elites, though knowledgeable and capable of making the right decisions, can "go astray" and make policy choices that do not benefit the public.[28] Zaller admitted this as well, acknowledging that the public can provide "a necessary check on government."[29] Thus, Hochschild attempts to create a formula to determine when the mass public should follow elite opinion:

> In principle, the answer is easy: the mass public should join the elite consensus when leaders' assertions are empirically supported and morally justified. Conversely, the

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[23] See Doni Gewirtzman, "Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture" (2004-2005) 93 Geo LJ 897 (HeinOnline), on the relevance of considering who the "people" really are.
[24] What constitutes a "desirable" end is a complex question that is beyond the scope of this thesis. Generally speaking, Canada is committed to protecting the individual rights and freedoms entrenched in the *Charter*. These rights include the fundamental procedural rights that flow from the presumption of innocence. Thus, in light of theses objectives, I will discuss "desirable" results going forward.
[25] Jennifer L Hochschild, "Should the Mass Public Follow Elite Opinion? It Depends…" (2012) 24:4 Critical Rev 527 (tandfonline) at 528 [emphasis added]. There is some statistical evidence that the public has no desire to be involved in political decisions and are satisfied with leaving such decisions in the hands of members of government, including judges: Gewirtzman, *supra* note 23 at 913.
[26] *Ibid*.
[27] See *Section B* – iv. Caveat on the Diversity of the Canadian Bench, below.
[28] Hochschild, *supra* note 25 at 532-534, 536-538.
[29] *Ibid* at 528.

> public should not fall in line when leaders' assertions are either empirically unsupported, or morally unjustified, or both.[30]

This frame does not always provide easy answers.[31] Nonetheless, it can help justify delegating to an independent judiciary the role of applying the law in ways that run contrary to popular opinion, in cases when their knowledge and expertise exceeds that of the mass public. I will apply this framework to the case of Canadian criminal law in more detail below. Of course, we must not overlook the risk of the judiciary as an elite going astray. The Realists took on the task of exposing this risk.

iii. Legal Realism

No discussion of the judge's role would be complete without addressing the Realists' contribution. The previous discussion would seem to justify leaving legal interpretation unchecked in the hands of judges. Indeed, they are generally more educated and knowledgeable about legal issues than the public. In addition, because they must always operate to some extent within limits imposed by legal texts and principles, one could argue that they are not likely to manipulate situations to their advantage. The Realist movement famously called into question the judiciary's impartial and exclusive commitment to the rule of law, claiming they rather made choices based on personal political preferences. Later theories claimed that they decided strategically in order to ensure the other branches implement their policy preferences.[32] It is beyond the ambit of this thesis to delve deeply into the Realist movement, its contributions and its critiques. However, we must bear in mind that the Realists and other scholars have demonstrated the influence of extralegal factors (biases, policy preferences, politics, etc.) on

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[30] *Ibid* at 538.
[31] Hochschild herself admits that empirical and moral support is far from always evident. *Ibid* at 539-540.
[32] Jeffrey A Segal, "What's Law Got to Do with It: Thoughts from "the Realm of Political Science" in Geyh, *supra* note 16 17.

judicial decision-making, especially in "hard" cases.[33] Occasionally, the text of law is ambiguous enough to admit multiple solutions. These are the cases where it may be open to judges to attempt to further their interests. Though the Realists very usefully demonstrated how and when this happens, they rarely offered solutions for avoiding the abuse they highlighted. In the end, as Tamanahah rightly points out: "All legal systems rely upon judges possessing the integrity not to exploit the latent indeterminacy in language and legal rules."[34] Of course, judges will claim that they possess such integrity. Seldom will a judge openly state that s/he is interpreting the law based on personal preference for the outcome.[35] This was specifically the Realists' concern: that hidden in legalese and legal reasoning would be attempts of advancing a specific political agenda. This does appear to happen in some cases.

iv. Legitimacy, Legal Realism and Judicial Interim Release

Judge's political preferences are more or less hard to define with one notable exception: they openly admit the need to protect the third branch's legitimacy. As judges themselves argue, they will mainly do so by basing their decisions in legal reasoning. However, because legitimacy is at least partially dependent on the public's agreement with outcomes, I believe, as the Realists did, that judges may be greatly tempted to render decisions in line with public opinion and to rely on legal principle *ex-post* to justify the outcome. The subject and text of 515(10)(c) *Cr C* amplify this temptation and I believe this is why the ground was upheld on its second constitutional challenge. Notably, in *R v Hall*, McLachlin CJ stated that "to sustain the rule of law, a core value

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[33] *Ibid*, Ryan C Black & Ryan J Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence" (2009) 71:3 J Politics 1062 (JSTOR).
[34] Tamanaha, *supra* note 5 at 89.
[35] See Frank Sullivan, Nancy Vaidik & Sarah Evans Barker, "Three Views from the Bench" Geyh *supra* note 16 328, in which three American judges vigorously defend their commitment to the rule of law and expresse disarray at the other authors in the collection who claim politics influences their jobs. See also Brisson & Greschner, *supra* note 20, in which the participating Canadian judges all claim that their role is to uphold the law and ignore political implications.

of our society, it is necessary to maintain public respect for the law and for the courts."[36] McLachlin CJ does not go on to explain how to maintain this confidence. In judicial interim release cases, I would hypothesize that judges do so by claiming to respect the public's feeling, while using an interpretation of public that does not correspond to the average citizen, but rather to a group well versed in legal principles.

The last Section of this Chapter will detail how the current interpretation of the tertiary ground exemplifies the tensions described above. All in all, Canadian political philosophy mandates judges with protecting the freedom of its citizens against the tyranny of the State and/or the majority. Judicial independence serves to isolate the judiciary from any undue influence from the other branches or sources of political power. In addition, the hope is that they are committed to upholding the rule of law and will therefore not let personal interests or outcome preferences interfere with their judgment. Thanks to the Realist movement, we now know this ideal is not always materialized. One interest that can influence judges is their desire—and indeed the need—to protect the institution's legitimacy, by being aware of public feeling. In the next Section, I will discuss the issues that arise in criminal law.

B. Criminal Law and the Public

We can situate the tertiary ground within a broader discussion of the public's relationship with crime and criminal justice. I have argued in this thesis that, for the most part, the public is ill-informed about judicial processes in general, and criminal law specifically, due to the current context of the media. Based on this, I will now examine the role of the Canadian judge in the criminal justice system.

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[36] *Hall, supra* note 21 at paras 26-27.

i. Freedom and Imprisonment

In a liberal society, law exists mainly to prevent citizens from adopting behaviours that are damaging to other citizens and/or the society in general. This idea flows from the "social contract tradition" defined during the Enlightenment by Locke and his contemporaries.[37] In a way, all law constrains individual liberty. "Liberals counter that if everyone is absolutely free, then no one is truly free, owing to the threat that we pose to one another."[38] Thus, law exists to mitigate this threat. Criminal law exists to discourage and punish those who wish or choose to adopt behaviours that are particularly damaging to society. In states such as Canada that does not punish crimes by death, imprisonment is among the harshest forms of reprimand. In addition, still today, many of the worrisome consequences highlighted by the Ouimet Report exist. As MacAlister lists:

- Detained persons are at risk of losing their jobs, with attendant negative effects on family, the community, and their ability to pay a fine if convicted;
- It is more difficult to retain the services of a lawyer and to actively participate in the preparation of a defence;
- The likelihood of conviction is higher among those denied bail;
- The likelihood of receiving a sentence of incarceration is higher among those who are incarcerated prior to trial;
- The direct economic costs to the state associated with pre-trial detention are staggering, with over 50% of provincial custody costs currently being associated with inmates on remand;
- The proportion of Aboriginals on remand is disproportionate to their makeup in the general population;
- Female accused are hampered in their ability to care for their children;
- Conditions in pre-trial remand facilities are often deplorable, frequently exhibiting overcrowding, and such facilities are devoid of any meaningful programming for detainees;

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[37] Tamanaha, *supra* note 5 at 32.
[38] *Ibid*.

- Cash bail appears to be making a resurgence, with its attendant negative impact on those in the lower socioeconomic strata of society.[39]

Theoretically then, the need to protect order in society is the only justification for constraining a citizen's liberty by a measure as draconian as detention.

As mentioned previously, the empirical evidence concerning the harms of imprisonment added weight to the argument that detention requires ample justification. These considerations permeated the reform of bail law in 1970. Recall the statements of the Ouimet committee on the justification of pre-trial detention: "it is self-evident from the standpoint of human rights that an accused should not be incarcerated pending trial unless it is required for the protection of the public."[40] The enactment of the *Charter* further solidified this commitment to freedom and the protection of procedural rights. In addition, as I argued above, Canadian judges conceive their role in terms of protecting individual liberties.

In sum, applied to criminal law and imprisonment, the judge's role in Canadian society includes restricting the use of imprisonment to cases where it is necessary to maintain order and security. This explains why judges seem to lean to a restrictive interpretation of the tertiary ground as a means to limit its application.

ii. Crime and the Public

I have argued in this thesis that, in the cases I have found, courts apply the tertiary ground restrictively, based on a very high standard of the "public". I will try to evidence here why, in light of the public's relationship and reactions to crime, this may be a necessary safeguard of liberty and the rule of law.

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[39] MacAlister, *supra* note 2 at 346-347. See Chapter 2 – *Section A - From Confederation to* Morales, above.
[40] Canada, Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) (Roger Ouimet) [Ouimet Report] at 31, 102.

First, recall the previous discussion of the public's main information source: the media. As amply exposed previously, the media, currently and in the foreseeable future, are not in a position to inform the public about the substance of court decisions, criminal law or due process considerations. In addition, they tend to focus on sensational stories that involve violent offenders and their occasional acquittals or release. Scholarship has demonstrated how the media's crime reporting habits creates distorted views of its prevalence and sometimes leads to a perceived leniency towards criminals.[41]

Second, it is worth looking at how citizens react to crime and criminals. Judges argue that people have a "visceral" reaction to criminals and do not comprehend the intricacies of criminal justice.[42] The experience of judges tends to indicate that this is true. For instance, Justice Rock has mentioned receiving thousands of letters from unhappy or worried citizens, demanding harsher sentences.[43] However, if a judge's role is to uphold the rule of law by restraining liberty only in cases when it is necessary for the protection of the public, it may be wrong for her/him to yield to these demands.

Lastly, though human beings justifiably abhor crime, especially violent ones, simply by survival instinct, fear of crime is in truth a more complicated issue. Scholars have attempted to identify the sources of fear of crime at different times in history and in different contexts, with a variety of results.[44] Notably, "politicians appeal to the fear of crime in order to justify, attack, or defend policies."[45] However, at least in some cases, this fear does not exist or at least did not before

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[41] See Chapter 1 Mass Media Informed Perception and Judicial Legitimacy, above.
[42] Brisson & Greschner, *supra* note 20.
[43] The Honourable Allan Rock, "Crime, punishment, and public expectations" in Brisson & Greschner, *supra* note 20. 185 at 186.
[44] Stephen Farrall & Murray Lee, eds. *Fear of Crime: Critical Voices in an Age of Anxiety* (New York: Routledge-Cavendish, 2009). See also Julian V Roberts, "Public Confidence in Criminal Justice in Canada: A Comparative and Textual Analysis" (2007) 49:2 Can J Corr 153 (Muse).
[45] Robbie M Sutton and Stephen Farrall, "Untangling the Web" in Farrall & Lee, *supra* note 44 108 at 108.

politicians, aided in many cases by the media, suggested it to citizens.[46] Some have gone so far as to argue that politicians do this to *create* the fear, allowing them to propose solutions in their platforms and win elections or re-election.[47] As Lee and Farall highlight:

> [The Government h]aving commissioned crime surveys, samples of the population are surveyed and over time, the information gained from such surveys fed back to the media and the wider population itself […] The surveyed population reports varying levels of crime fears […]. Such fears become a discourse among the wider population for making sense of events or for expressing other anxieties, and also creates a pressure for government of the day to 'do something' about crime.[48]

In any case, the mechanics are hard to identify.

In sum, there exists at best an uncertainty concerning the source of fear of crime and at worst an alarming possibility that the media and politicians may be unduly manipulating public opinion and enhancing this fear. On the democratic conception of the judge's role, described above, taking these fears into account would not necessarily be wrong. However, if their role is rather to shield liberty from tyrannical and unnecessary encroachments, as I have argued it is in Canada, yielding to public fear when its source and foundation are uncertain would constitute a failure to fulfill their duties.

iii. Obscenity and the "Community Standard"

The criminal prohibition of obscenity has caused debates similar to those discussed in this thesis. The arguments raised in these debates are in many transferable to the debate about the interpretation of the tertiary ground. The *Criminal Code* defines obscene material as follows:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[49]

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[46] Dennis Loo "The Moral Panic that Wasn't" in Farrall & Lee *supra* note 44 12.
[47] *Ibid*.
[48] Farrall & Lee *supra* note 44 at 5.
[49] RSC 1970, c C-34, s 163(8) [emphasis added].

Most of the controversy has surrounded the interpretation of "undue," which the SCC has stated refers to a "community standard for harm": "What matters is not what Canadians think it is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."[50] To be clear, though the community standard refers to harm, it does not require evidence of the harm obscene material can have on society, but rather evidence that Canadians *consider* the material to be harmful. The issue here is slightly different than that of the tertiary ground because the question concerns the appropriate source of morality standards in society. However, parallels exist between the debate surrounding this standard and the interpretation of "public" in the tertiary ground. Indeed, both provisions allow the public a voice in decisions that gravely affect the liberty of other individuals. The community standard for harm lets the majority of Canadians judge whether a material is obscene. This has grave consequences because this judgment can lead to a conviction and to imprisonment.[51] However, as Summer argues:

> The idea that important individual rights can be circumscribed by the tolerance level of the majority is misconceived from the outset, since one of the principal functions of rights (and of their constitutional entrenchment in the *Charter*) is to safeguard minorities against the majoritarian decision-making represented by the legislature.[52]

This argument is applicable to pre-trial detention. Indeed, the tertiary ground, if interpreted to mean popular opinion, ultimately results in the majority deciding whether or not an individual will lose key components of her/his freedom while s/he awaits her trial. In a free and democratic society such as Canada, where constitutional law protects fundamental rights that judges have the responsibility to protect, restricting liberty simply because it is the will of the majority is

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[50] *Towne Cinema Theatres Ltd v R,* [1985] 1 SCR 494, 1985 CarswellAlta 671 (WL Can) [emphasis added].
[51] RSC 1970, c C-34, s 163(8), 169.
[52] L W Summer, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004) at 122-123.

problematic. Democracy guarantees that the majority, through the legislature, shapes the legal landscape. However, the existence of the *Charter* represents the recognition that the majority rule can turn to tyranny. Therefore, we place in the hand of an independent judiciary the role of interpreting the law, sometimes disregarding the majority's preference to protect individual rights.[53] I will not delve further into the prohibition of obscenity. Simply, it is a good illustration that in general, Canadian legal philosophy does not easily permit radical violations of liberty based solely on the desires of the majority. Again, such limitations must serve a useful purpose for the safety and survival of society. Thus, in both these cases, judges fulfill their duties by resisting popular demands.

iv. Caveat on Diversity of the Canadian Bench

The judge's role I have described in the previous section is theoretical and idealized. For the most part, I believe judges are committed to and bound by the law, though its interpretation may vary slightly. However, it is impossible to ignore the biases that may arise from the lack of diversity on the Canadian bench.[54] Judges may in theory be an effective safeguard against the tyranny of the majority. However, members of minority groups need judges they can trust to protect their rights specifically.

In defending her commitment to the rule of law, American Justice Sarah Evans Barker[55] stated that at the lower level, the daily case volume makes political manoeuvring practically impossible. She additionally argued that precedent, often applied by judges and their staff such as clerks and other personnel, plays an important role in decision-making.[56] However, we may

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[53] I once again refer the reader to my caveat about the lack of diversity on the Canadian bench, below.
[54] Andrew Griffith, "Diversity among federal and provincial judges" *Policy Choices* (4 May 2016) online: < http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/>.
[55] US District Court for the Southern District of California.
[56] Frank Sullivan, Nancy Vaidik & Sarah Evans Barker, "Three Views from the Bench" in Geyh *supra* note 16 328 at 339-40.

also see the risk in this situation: judges and their staff, dealing with a high volume of cases may not take the adequate time to evaluate if/how their political or personal slants are interfering with their decisions. This is even truer if precedents are seldom critically examined. The sheer amount of bail hearings that take place every day exposes these decisions to this risk. In short, while the public or the majority thereof may not be the ideal protectors of individual rights of minorities, I believe that neither is the current Canadian bench.[57]

To conclude, in Canada the people's majority, represented by the legislature, is sovereign. To avoid tyranny and oppression by this majority, we have entrusted the protection of our individual freedoms to an independent judiciary. Though we may discuss and uncover political motivations for some decisions, ultimately our system relies on the belief and the trust that judges will uphold the law and protect our liberties. As mentioned, a more diverse bench would better serve this goal. However, we must not forget the judiciary's need to protect their institutional legitimacy. As will I will detail below, in the face of an ill-informed public expressing a desire that more people be "put behind bars" and the existence of 515(10)(c) *Cr C*, judges find themselves in a complex situation.

C. The Necessary Paradox in Interpreting 515(10)(c) Criminal Code

In light the discussion above, I believe that if it was not for the legislature's insistence that section 515(10)(c) *Cr C* remain in the Canadian legal landscape, judges would have good reason to ignore public opinion in cases of judicial interim release. Most common law jurisdictions do.[58] However, the very text of the provision creates a conundrum for the judiciary. Its members found it was necessary to give meaning to the tertiary ground, while respecting their duty in Canadian

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[57] Peter H Russell & Kate Malleson, Appointing judges in an age of judicial power: critical perspectives from around the world (Toronto: University of Toronto Press, 2006) at 7-9.
[58] MacAlister, *supra* note 2 at 354-357.

society to safeguard freedom. This explains, I believe, the current interpretation found in case law.[59] In this section, I will apply the previous discussions to this specific case.

i. Overlooking Popular Opinion

I will summarize here, the theoretical and practical reasons to give little weight to public opinion in pre-trial detention cases. At the theoretical level, I have established that Canadian legal philosophy conceives the judge as the ultimate protector of individual liberties. S/he has a duty to uphold these liberties, often regardless of the majority's will. According to contemporary mainstream political theory, liberty must only be restricted to prevent harm. Detention is a harsh restriction of liberty and had grave negative consequences on a person's life. Thus, if an accused presents no risk of harming society if released pending her/his trial, detention is hard to justify. Indeed, let us not forgot that at this point the accused is still presumed innocent and that the SCC has stated that the presumption of innocence is the basis of our criminal law philosophy. Thus, beyond protecting society, detention is difficult to justify.

I will now combine these ideas with practical considerations. First, the media vastly informs the public about judicial affairs. For reasons exposed in detail above, they do a relatively inadequate job. In criminal affairs particularly, they play an important role in creating the public's impression that courts are overly lenient.[60] This may cause the public to request harsher sentences and more detentions. As I have also mentioned, politicians also utilize fear of crime in a way that may lead citizens to desire more detentions. Thus, the problem goes beyond restricting liberty when it is unnecessary to protect society, simply to comply with the public's

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[59] See my previous discussion on the statistical limits of this thesis, above at 57.

[60] Michelle St-Amand & Edward Zamble, "Impact of Information about Sentencing Decisions on Public Attitudes toward the Criminal Justice System" (2001) 25:5 L & Human Behaviour 515 (JSTOR) at 517.

wishes. There exists here a serious risk that detention will be ordered based on the *erroneous* opinion of the public.

Second, imprisonment has serious negative effects on the accused and on society. It is hard for detainees to keep their jobs and be productive members of families, communities and societies. The living conditions in detention centres are often deplorable. The over-representation of indigenous people and other people of colour is also worrisome.[61] While this extends slightly past the discussion of public opinion, it remains worth noting. Indeed, it provides additional justification for limiting detention to cases where it is truly necessary. In light of the importance of freedom in Canadian society, the current media informed public should not be the arbiter of judicial interim release. Judges are better suited for this role, though the Canadian bench needs more diversity.[62]

I also want to address the "strength of the prosecution's case" criterion. In terms of public opinion, it is reasonable to assume that this criterion exists because the public wants to see guilty criminals punished and/or removed from society.[63] Thus, releasing an accused that "looks guilty" could undermine public trust.[64] However, at this stage, the public may get an unrealistic account of the strength of the prosecution's case. Indeed,

> [i]n bail courts, particularly in large cities, many arrestees are unrepresented. It is often left to overworked duty counsel, Crown and justices of the peace to scramble to get through the docket and reduce overcrowding in grim holding cells to a more manageable dimension. There is little evidence presented other than Crowns reading out hastily prepared police notes. The arresting officer is seldom there for cross-examination.[65]

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[61] Stuart, *supra* note 2 at 339, MacAlister, *supra* note 2 at 347, Ouimet Report, *supra* note 40, Roberts, *supra* note 2. See Chapter 2 – *Section A – From Confederation to* Morales, above.
[62] This is somewhat evidenced by the overrepresentation of Indigenous people in detention centers as well as evidence of racial bias in cases of drug infractions, for example. *Ibid,* MacAlister, *supra* note 14 at 347.
[63] Trotter 3rd ed, *supra* note 1 at 3-33-35.
[64] As Trotter highlights, this is obviously controversial in light of the presumption of innocence. *Ibid.*
[65] Stuart, *supra* note 2 at 341.

In addition,

> in the overwhelming majority of cases, the Crown will simply rely upon police notes, which commonly provide an unrealistically optimistic (and often self-serving) picture of the strength of the Crown's case. Furthermore, in most cases, the accused will not have received disclosure (which is often made at the first appearance) or have had the opportunity to retain a lawyer. Consequently, the accused is, as a practical matter, put in a very disadvantageous position when it comes to responding to an application to detain based upon the tertiary ground.[66]

Consequently, reporters covering the case will also have access to this slanted view. It is doubtful that they will inform the public of theses particularities, including the possible exaggeration of the strength of the prosecution's case. In the eyes of the public then, the accused may "look guilty" and/or dangerous and this may incite demands for incarceration when it is not warranted. In short, this means public opinion may be overly inclined to desire the incarceration of citizens that a court will later find innocent. This is surely inconsistent with the objectives of the Canadian criminal justice system.

In sum, for theoretical and practical reasons, I believe judges should avoid giving too much weight to the opinion of the mass public. I will mention that this is not to say that an adequately informed public would not produce reasonable opinions on pre-trial detentions. However, I believe I have amply demonstrated that the public is not currently so informed.

ii. The Inherent Conundrum in the Tertiary Ground

To state the obvious, however, the tertiary ground exists, independently of the population's knowledge of criminal procedures. I believe that ideally the SCC would have struck down the tertiary ground in *Hall*. I have explained above some of the reasons I believe the provision was upheld. I will now detail the interactions between democracy, the rule of law and judicial legitimacy I believe lead to the current interpretation.

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[66] Micah B Rankin, "*R. v. St-Cloud*: Searching for a Silver Lining" (2015) 16 CR (7th) ART 359 (WL Can).

First, facing "second try" legislation puts the judiciary in a delicate position. Judges understand and admit that their role must be counter-majoritarian in some cases, in order to protect liberty. However, they also respect the fact that they are not elected representatives and must operate within a democracy. As detailed in the discussion on legitimacy, the judiciary must exercise caution when going against the will of the majority expressed in Parliament's legislation. In other words, as O'Connor J rightly stated, it comes down to being "sensitive" to public feeling, but not overly so. As Dixon advocated, one way to express this sensitivity is by showing deference in "legislative sequel" cases such as *Hall*.[67] In this case, the SCC acknowledged that Parliament had done "their part" by taking into account as much of the reasons in *Pearson* and *Morales* as possible, but also that it ultimately felt that the Canadian bail system needed the tertiary ground. This consideration alone put the SCC in a difficult position because, as this thesis has demonstrated, the tertiary ground is quite problematic. The 5-4 split decision and the dissent's vehemence also illustrate this.

The explicit mention of the "public" in the provision further complicated the SCC's work. Striking down the provision would have been doubly risky. Indeed, it would have appeared that the court was overtly refusing the public the right to weigh in on judicial interim releases, when their elected representatives had expressly reserved their right to do so.

This is an example of both dialogue and strategic legitimacy cultivation theory. As mentioned, both Hogg and the SCC noted how the dialogue was operating in this case.[68] Parliament "listened" to the Court's issues with the previous provision. The SCC then respected Parliament's desire to maintain the tertiary ground in Canadian criminal law and showed

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[67] Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue, and Deference" (2009) 47 Osgoode Hall LJ 235 (WL Can).

[68] *Hall, supra* note 21 at para 43, Peter W Hogg, Allison A Bushell Thorton & Wade K Wright, "Charter Dialogue Revisited - Or Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ 1 (WL Can) at 22.

deference by maintaining the provision. This deference helps the judiciary maintain its legitimacy by limiting its appearance of activism.

I believe the SCC also strategically chose *R v Hall* to cultivate legitimacy by exercising such deference. Indeed, as explained in detail above, the use of the expression "public" is a crucial case for the courts' legitimacy as it directly addresses its relationship with the public. In addition, the case had attracted some media coverage, which made the court more sensitive to the consequences of both outcomes. This gave the SCC the necessary motivation to show deference to Parliament and maintain the provision to strategically maintain its legitimacy.

Finally, I would imagine that the Court estimated that principled reasoning would not have been sufficient to strike down the provision and maintain legitimacy, especially since the indicators were present that this decision would not be unanimous. In other words, though the dissent makes legally valid arguments, they may not have sufficed to appease the public's disagreement with an invalidation of the tertiary ground.

In sum, the SCC needed to strike a balance between protecting its institutional legitimacy and protecting the freedom guaranteed by the *Charter* and by liberal democracy writ large. In this case, it appears it judged that the risks of invalidating the provision were too high and the considerations in favour of freedom did not offer sufficient counterweight.

Nonetheless, it was still possible for the SCC and the lower courts to attempt to interpret 515(10)(c) *Cr C* consistently with Canadian legal philosophy. The use of "public" also created a challenge here. Expressly stating that the public would not be the actual or real public could have been dangerous for the courts' legitimacy. Indeed, such an answer would have been equivalent to refusing all sensitivity to public feeling. I would argue that had the legislator used an expression such as "reasonable" or "diligent," the judiciary may have found it easier to create a high and

demanding standard, as is traditionally the case. To the contrary, the specific use of public hinted at the intention of aiming for a more general public. Thus, it is understandable that at least on paper, the judiciary would claim to consider a public that is not composed of "legal experts with in-depth knowledge of our criminal justice system."[69] However, the superseding duty to protect Canadians' freedom from unjust and unjustified impediments also required creating a standard that is higher than the current knowledge level and understanding of the Canadian public.

Indeed, people are in most cases not even aware of bail hearings simply due to their daily volume. When they are, it is generally in specific, somewhat extraordinary cases that the media have chosen to cover. As previously explained, these are normally cases that involve violent or otherwise abhorrent crimes.[70] Scholarship has amply proven this and I believe any discussion involving the public must remain cognizant of this fact. The public's general fear of crime, the frames used by the media as well as the imbalance in evidence at the bail hearing stage seriously risk resulting in popular clamour for imprisonment in most cases. However, yielding to such clamour, especially in a case that involves such a blatant violation of individual freedom i.e. imprisonment, the most draconian limitation of liberty, is inconsistent with Canada's commitment to fundamental rights.

To summarize, the SCC felt obliged to maintain the tertiary ground to preserve its image as a legitimate, though sometimes counter-majoritarian, branch of the Canadian democratic system. However, in interpreting and in applying this provision judges use a theoretical—and as I have argued, impossible—definition of the "public." This way, the court maintains its legitimacy in the eyes of the Canadian population all the while respecting its duty to safeguard freedom.

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[69] *R v St-Cloud*, 2015 SCC 27, [2015] 2 SCR 328 (SCC Judgments Lexum) [*St-Cloud*].
[70] See Chapter 1 – *Section B* – ii. c. *Choosing Stories*, above.

As I have previously stated, *Turcotte* is a good example of the inherent conundrum in the tertiary ground. For simplicity, I will quickly recall the facts: in a highly mediatized case, Dr. Turcotte admitted violently murdering his two children. A jury accepted his defence of mental disorder, but the Quebec Appeal's Court found an error in the judge's instruction and ordered a second trial. The Quebec Superior Court ordered Turcotte's release pending his second trial, which greatly upset the public. It is worth mentioning that the media scrutinized every aspect of this judicial saga. Section 515(10)(c) *Cr C* specifically received media attention during this case.[71] Naturally, the media and public's reading was that their opinion should have significant weight, even if they were founding it on emotion and not on legal considerations:

> Mais l'article 515, paragraphe 10, alinéa c), suggère justement qu'on ne peut pas complètement ignorer les perceptions des hommes, l'état d'esprit d'une communauté quand vient le temps de décider si, oui ou non, un accusé peut être remis en liberté provisoire en attendant son procès. Ce sont ces perceptions qui forment la confiance du public dans l'administration de la justice.
>
> […]
>
> On peine à imaginer une affaire plus épouvantable que celle d'un père qui assassine ses enfants à coups de couteau, alors que ceux-ci le supplient d'arrêter.[72]

The public's opinion on this case was easy to grasp. Small protests even occurred after Turcotte's release.[73] The Quebec Appeals Court recognized that it should consider a "non-expert" public for its decision. To illustrate the public's position, the Crown used news clippings as evidence. The Court completely dismissed the value of the evidence and harshly criticized its

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[71] Patrick Lagacé, "Tout au contraire, Monsieur le Juge" *La presse* (13 September 2014), online: <www.lapresse.ca>.
[72] *Ibid*.
[73] La Presse Canadienne, "Manifestation contre la liberation de Guy Turcotte" *La Presse* (27 September 2014), online: <www.lapresse.ca>.

content. In addition, the court claimed that the decision to release Turcotte should in fact reinforce the trust of an adequately informed public.[74]

Even more interesting is the fact that in *St-Cloud*, in which the SCC squarely admonished lower courts for restrictively interpreting the third ground, the Supreme Court cited perhaps the most scalding passage on the media from the *Turcotte* Quebec Court of Appeal decision.[75] The SCC then clarified that the media should not always be dismissed. In short, the way the courts claim to apply 515(10)(c) *Cr C* is truly paradoxical. This paradox appears to be more of a lack of candour from judges in a complex interpretation situation than an inconsistency. Indeed, I believe the judiciary is attempting to strike a compromise between the need to protect its legitimacy—to be functional as a branch of government and to uphold the political system as a whole—and its commitment to protecting freedom against tyranny of the majority.

We should of course remain wary of judges claiming to do one thing while creating criteria that make it impossible. We should also be suspicious of political considerations unduly infiltrating judicial reasoning. Nonetheless, I think, for the most part, that the restrictive interpretation of 515(10)(c) *Cr C* results from a necessary balancing and that the results it yields, are acceptable. We cannot overlook the media's context and allow the public it inadequately informs, to greatly influence a judge's decision to detain an individual that has not yet been tried. The practical considerations surrounding the real consequences of pre-trial detention further reinforce my position.

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[74] *R c Turcotte*, 2014 QCCA 2190, 2014 CarswellQue 12103 (WL Can).
[75] *St-Cloud*, *supra* note 69 at 83.

Conclusion

For Canadian democracy to function, the public must respect the authority of the government's three branches. For the unelected members of the judicial branch, this presents a particular challenge. As appointed members, they cannot rely on elections to legitimize their great political power. They are, in addition, tasked with protecting the fundamental value of individual freedoms against abuses from the other branches. In other words, this will sometimes mean going against the majority's will. This can threaten their legitimacy. Thus, judges are always attempting to strike a balance between their duties with regards to individual freedom and their need to retain the public's trust.

The history and interpretation of the tertiary ground is an example of this balancing act. On the one hand, the SCC upheld the decision to protect its legitimacy. Since the initial version of the ground was too grave an impediment on the liberty of accused people, the SCC struck it down. When Parliament sought to reinstate it, the SCC chose to protect its legitimacy and uphold the new law. Though, as the soundness of the dissent in *Hall* demonstrates, the Court could have relied on principled reasoning to invalidate the provision, it rather opted for a strategic use of deference. This strategy falls into what Hogg and Bushell have qualified as the dialogue between Parliament and the judiciary. As Dixon argues, legislative sequels are an important component of dialogue theory. In *Hall*, the SCC opted to protect the legitimacy of its power by letting Parliament have the last word on the existence of the tertiary ground. In terms of strategically maintaining judicial legitimacy, it is always in the courts' interest to defer to Parliament, especially in legislative sequel cases. As mentioned, deference enhances public trust in the judicial system because it gives the impression the courts are apolitical and that, as an unelected body, they respect Parliament's sovereignty. Strategically, to maintain public confidence in the

courts, it was also wise to maintain a ground that refers specifically to the importance of public confidence. Deciding otherwise could have antagonized the public, as it would have implied the courts should ignore the public, especially considering how strongly the population feels about crime. In *St-Cloud*, the SCC sought to reassure the public and further cultivate its legitimacy by restating that judges should consider the public's views, including views from the media, when deciding judicial interim release cases. By these methods, the SCC did what was necessary to protect its legitimacy.

On the other hand, the SCC and the lower courts sought to limit the provision's scope, somewhat paradoxically. Indeed, the definition courts, including the SCC, give of the public is paradoxical because it does not in truth correspond to the current Canadian public. Mass media vastly inform this public. Consequently, it has limited and inadequate knowledge of criminal procedures in general, and procedural guarantees specifically. In addition, the SCC claims courts must not overlook media reports when applying 515(10)(c) *Cr C*, but also provides an unrealistic standard for media worthy of consideration. Indeed, as I detailed in length in Chapter 1, the media operates in a context that makes it extremely difficult to cover judicial affairs in the manner desired by the judiciary. These paradoxes, though lacking in candour, allow the courts to fulfill their duty of protecting excessive encroachments on liberty.

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