Capturing Proceeds from Criminal Notoriety: A Case Study

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Since the 1970's, North American legislatures have been concerned with criminals profiting from the notoriety of their crimes through writing and publishing books in which they recount their criminal activities. The preferred regulatory devices which have been adopted mandate the seizure of publishing royalties. While some provinces have followed this trend, Canada's Parliament has refused to do so because of the Senate's concerns that such laws would result in an unjustifiable impairment of free speech. Notwithstanding Parliament's concerns, in 2009 Saskatchewan adopted similar legislation to Ontario, Manitoba, Alberta and Nova Scotia in enacting The Profits of Criminal Notoriety Act. *Saskatchewan's legislation was prompted by news that former Saskatchewan cabinet minister Colin Thatcher intended to write about the investigation of his ex-wife's murder and the circumstances of the trial at which he was convicted. When, the Saskatchewan Government applied under its new law, to recover the payments that Thatcher received from his book's publication, Thatcher challenged both the application and the constitutionality of the Act. The resulting Thatcher decision is the only Canadian case dealing with the interpretation and validity of these laws. This article examines the details of the law's enactment, the history of similar laws in North America, and the argument and judgment in the Saskatchewan case that upheld both the law and Thatcher's liability under it. The authors question both the bona fides of Saskatchewan's* Profits of Criminal Notoriety Act *and whether it can withstand constitutional aspect analysis. They also question the interpretive and constitutional reasoning employed by the Court, especially with respect to the potential impairment of individuals'* Charter *rights.*

Depuis les années 1970, les législatures nord-américaines s'intéressent aux criminels qui tirent profit de la notoriété de leurs crimes grâce à l'écriture et la publication de livres dans lesquels ils racontent leurs activités criminelles. Les mécanismes réglementaires de choix qui ont été adoptés rendent obligatoire la saisie des droits d'auteur. Bien que certaines provinces aient suivi cette tendance, le Parlement du Canada a refusé d'en faire autant en raison des préoccupations du Sénat selon lesquelles de telles lois entraîneraient une perte injustifiable de liberté de parole. En 2009, en dépit des préoccupations du Parlement, la Saskatchewan adopta une loi semblable à celles de l'Ontario, du Manitoba, de l'Alberta et de la Nouvelle-Écosse en promulguant la Profits of Criminal Notoriety Act *(loi sur les profits découlant de la notoriété en matière criminelle). La nouvelle que l'ancien membre du cabinet de la Saskatchewan, Colin Thatcher, avait l'intention d'écrire un livre sur l'enquête liée au meurtre de son ex-femme et les circonstances du procès où il fut condamné avait provoqué la promulgation de cette loi en Saskatchewan. Lorsque le gouvernement de la Saskatchewan fit la demande, en vertu de sa nouvelle loi, de récupérer les paiements reçus par Thatcher pour la publication de son livre, il contesta l'application et la constitutionnalité de la loi. Le jugement de la cause Thatcher est le seul cas canadien traitant de l'interprétation et la validité de ces lois. Dans cet article, les auteurs examinent les détails de la promulgation de cette loi, l'histoire de lois similaires en Amérique du Nord, ainsi que l'argumentation et le jugement dans la cause saskatchewanaise qui maintint la loi et la responsabilité de Thatcher selon cette loi. Les auteurs mettent en question la bonne foi de la* Profits of Criminal Notoriety Act *de la Saskatchewan et doutent qu'elle puisse résister à une analyse constitutionnelle. Ils mettent également en doute le raisonnement interprétatif et constitutionnel employé par la cour, notamment en ce qui concerne la perte potentielle de droits individuels en vertu de la* Charte.

* J.D. The opinions expressed herein are those of the authors alone.

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I. Introduction

In this article, we examine the particular and disquieting context of the enactment and application of Saskatchewan's *Profits of Criminal Notoriety Act*.[1] Although the rationale for this type of legislation is to prevent convicted criminals from gaining financially from the recounting of their crimes, we wonder to what extent the legislation is also aimed at suppressing the content of writing that can engender critical perspectives and offer insights into the human context of inflicting harms through crime. Further, we explore the possibility of a specific course of events surrounding a criminal act influencing the nature of the legislation, its application to a particular publication and the court proceedings that challenged government decisions, as well as the constitutionality of the legislation itself.

After reviewing the history of this legislative innovation, we will examine the circumstances surrounding the enacting of *The Profits of Criminal Notoriety Act* and its application to Colin Thatcher's book, *Final Appeal: Anatomy of a Frame*.[2] We then examine the only Canadian case to apply legislation prohibiting the recovery of proceeds from the recounting of crimes—the *Saskatchewan (Minister of Justice) v Thatcher* case.[3] In the course of this examination we review the court's reasoning and find it lacking with respect to basic federalism and constitutional analyses. We conclude that the rule of law and the *Charter*[4] which protects Canadian rights and liberties are not foolproof in protecting the rights and liberties of all persons, including those whose behaviour is as reviled as that of Colin Thatcher. In a liberal democratic state it is incumbent on legislatures and courts to be vigilant with respect to the risks inherent in cases of this nature.

II. Legislative History

a) American Legislation

The first instance of a legislative attempt to stop criminals from writing about and profiting from their criminal activity occurred in New York in 1977. That year, New York City had been terrorized by David Berkowitz, the notori-

1 *The Profits of Criminal Notoriety Act*, SS c P-28.1, 2009 [*Notoriety Act*].
2 Colin Thatcher, *Final Appeal: Anatomy of a Frame* (Toronto: ECW Press, 2009) [*Final Appeal*].
3 *Saskatchewan (Minister of Justice) v Thatcher*, 2010 SKQB 109, 316 DLR (4th) 516 [*Thatcher*].
4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

ous "Son of Sam" killer.[5] Rumours arose that some publishers, even before Berkowitz was arrested or tried, were attempting to obtain exclusive rights to print the killer's account of his crimes.[6] Public outcry against this opportunistic scheme led New York State Senator Emanuel Gold to sponsor a bill prohibiting criminals from profiting from their crime through recounting for reward the details of crimes they committed. The Gold Bill was enacted that year.[7] Its validity, however, was not then tested since Berkowitz voluntarily surrendered to the State the payments he received from his publisher.[8]

In the few years following the enactment of the New York law, the federal government and all but three American states enacted similar legislation,[9] in some cases in response to specific notorious criminal acts within their jurisdictions.[10] Prior to the decision of the Supreme Court of the United States in *Simon & Schuster* on the constitutionality of this type of legislation, there were two challenges to the validity of these acts. In both cases, the legislation was upheld.[11] In 1991, the Supreme Court in *Simon & Schuster v Fischetti* addressed the issue of constitutionality of this type of legislation in a case concerning the publication of a book by Nicholas Pileggi on the criminal experiences of Henry Hill, a "foot-soldier" in New York organized crime.[12] The

5 The legislative background is recounted in *Simon & Schuster Inc v Members of the New York State Crime Victims Board*, 502 US 105 (1991) at 108, 112 S Ct 501 [*Simon & Schuster*].

6 Kelly Franks, "'Son of Sam' Laws after *Simon & Schuster v New York Crime Victims Board*: Free Speech Versus Victims' Rights" (1991–1992) 14 Hastings Comm & Ent LJ 595 at 597; Sean J Kealy, "A Proposal for a New Massachusetts Notoriety-For-Profit Law: The Grandson of Sam" (2000) 22 W New Eng L Rev 1 at 4.

7 Franks, *ibid.*

8 *Ibid* at 600. Because Berkowitz was never convicted of the crimes as a result of his incapacity to stand trial, the New York statute would not have applied as it could only be enforced against convicted criminals, see Kealy, *supra* note 6 at 5.

9 See First Amendment Center at Vanderbilt University, "'Son of Sam' statutes: federal and state summary" (23 March 2012), online: First Amendment Center <http://www.firstamendmentcenter.org/son-of-sam-statutes-federal-and-state-summary>.

10 Franks, *supra* note 6 at 598; Sue S Okuda, "Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality" (1988) 76 Cal L Rev 1353 at 1355. For example: California's Son of Sam law was enacted in 1983, the year that Dan White was paroled from prison for assassinating San Francisco Mayor George Moscone and Supervisor Harvey Milk; Massachusetts's law was enacted in 1987 after Gerald W. Clemente, a police captain convicted of bank robbery, wrote *The Cops Are Robbers*; Kansas enacted anti-profit legislation after Reverend Thomas Bird's murder of both his wife and his mistress's husband generated great media interest; Virginia passed its statute after Montie Rissell published his autobiography describing his conviction for the murders of five Virginia women.

11 Franks, *supra* note 6 at 600; *Children of Bedford v Petromelis*, 573 NE (2d) 541 (NY 1991); *Fasching v Kallinger*, 510 A (2d) 694 (NJ 1979), rev'd on other grounds 546 A (2d) 1094 (NJ 1988).

12 Karen M Ecker & Margot J O'Brien, "*Simon & Schuster Inc v Fischetti*: Can New York's Son of Sam Law Survive First Amendment Challenge?" (1990–1991) 66 Notre Dame L Review 1075 at 1079.

book, *Wiseguy: Life in a Mafia Family*,[13] was published by Simon & Schuster in 1986[14] and that year the New York State Crime Victims Board directed Simon & Schuster to provide them with copies of all contracts involving Mr. Hill, to suspend payments to him or his agents, and to remit all payments made to him to be held in escrow for the victims of his crimes.[15] Simon & Schuster claimed the New York legislation violated the United States Constitution's First and Fourteenth Amendments, namely the constitutional protection of freedom of speech and the right to due process of law.[16] The Federal District Court held that this legislation did not violate freedom of speech.[17] On appeal, the Second Circuit Court of Appeals also upheld the legislation on the ground there was a compelling state interest behind this statutory taking. It did, however, find that there was a burden on free speech, albeit a narrow one.[18]

In its decision in this case, the Supreme Court of the United States unanimously held that the New York legislation was unconstitutional.[19] The Court wrote "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[20] The Court drew on the distinction between content neutrality (state regulation that is not directed to the content of restricted speech, but has only an incidental effect of restricting speech) and content regulation (restrictions directed at certain identified speech content). It noted that content regulation is subject to strict scrutiny and that it requires that such regulation be the most narrowly tailored restriction possible and that it should be directed towards compelling state needs. As the Court found the infringement to be content-based, it applied a strict scrutiny test and held that the statute could not be justified since it was overbroad in its application.[21] The bases for the finding of overbreadth were the inclusion of persons who had admitted to committing a crime without being convicted of such offence and the definition of "recounting a crime" to include the authors' thoughts and recollections. The Court noted that this degree of statutory overreaching could

13 Nicholas Pileggi, *Wiseguy: Life in a Mafia Family* (New York: Simon & Schuster, 1986).
14 Pileggi, *ibid*, provided the source material for Martin Scorcese's 1990 film *Goodfellas* (see Ecker & O'Brien, *supra* note 12 at 1080).
15 Pileggi, *ibid.*
16 *Ibid*. US Const amend I; US Const amend V; US Const amend XIV.
17 Ecker & O'Brien, *supra* note 12 at 1081.
18 *Ibid*; *Simon & Schuster Inc v Fischetti*, 916 F (2d) 777 at 783 (2d Cir 1990).
19 Kealy, *supra* note 6 at 9.
20 *Simon & Schuster*, *supra* note 5 at 116.
21 Kealy, *supra* note 6 at 10.

result in many important literary works being made subject to the financial penalty created by the law.[22] It concluded,

> " … in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective… [T]he statute is inconsistent with the First Amendment."[23]

Significantly, the Court found that restrictions on financial benefits, while not a direct infringement of the right, effectively prohibited expression. The ruling stated, "In the context of financial regulation, it bears repeating … that the government's ability to impose content based burdens on speech raises the specter that *the government may effectively drive certain ideas or viewpoints from the marketplace.*"[24]

Following the Supreme Court's decision in *Simon & Schuster*, nine states repealed and replaced Son of Sam statutes, five states repealed and did not replace their statutes and Rhode Island retained similar legislation despite its being struck down.[25]

b) Canadian Legislation

The first criminal notoriety legislation in Canada was enacted in Ontario following rumours that Karla Homolka, a woman who was convicted of the sexual molestation and murder of two teen-aged girls, was planning to publish an account of her crimes.[26] No such work had ever been published. The *Victims' Right to Proceeds of Crime Act, 1994*,[27] was enacted. However, in the

22 "These … provisions combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure" (*Simon & Schuster*, *supra* note 5 at 121).

23 *Ibid* at 123.

24 *Ibid* at 116 [emphasis added].

25 California (replaced 2002); Maryland (replaced 2003); Nevada (replaced 2005); New Jersey (replaced 2003); New York (replaced 1992); Pennsylvania (replaced 1995); Tennessee (replaced 1994); Texas (replaced 2005); Utah (replaced 1996); Illinois (replaced 2011); Louisiana, Massachusetts, Missouri, South Carolina (repealed and did not replace) and Rhode Island's statute was struck down by *Bouchard v Price*, 694 A (2d) 670 (Sup Ct RI 1997).

26 Robert Gaucher & Liz Elliott, "'Sister of Sam': The Rise and Fall of Bill C-205/220" (2001) 19 Windsor YB Access Just 72 at 74.

27 *Victims' Right to Proceeds of Crime Act, 1994*, SO 1994, c 39. This act was repealed on July 1, 2003: see *Prohibiting Profiting from Recounting Crimes Act*, SO 2002, c 2, ss 17, 20.

four years following its enactment, only eleven dollars were collected pursuant to that legislation. [28]

In 1996, an attempt was made to amend the *Copyright Act* and the *Criminal Code* to create a comparable federal law through Bill C-205.[29] This Bill quickly passed through all stages of the House of Commons,[30] but it was rejected by the Senate, in part because of legal opinions it received stating that this proposed legislation created a *prima facie* infringement of the *Charter*'s section 2(b) rights.[31] The Senate noted that it failed to give protection to the "… tradition of prisoner or convict literature [that] has contributed to society's understanding of the causes and effects of crime, punishment, and other significant social issues" and to the publication of works that are "… universally considered an important part of the literary, social and political lexicon."[32]

In 2002, despite concerns over the freedom of speech implications raised at the federal level, the Ontario legislature repealed its *Victims' Right to Proceeds of Crime Act* and enacted the *Prohibiting Profiting from Recounting Crimes Act*.[33] Manitoba followed in 2004,[34] Alberta in 2005,[35] and Nova Scotia in 2006.[36] While the Bills were under consideration, neither Manitoba's nor Nova Scotia's provincial legislatures acknowledged any *Charter of Rights* implications of this legislation.[37]

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28 *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 36th Parl 1st Sess, No 17 (25 February 1998), online: Parliament of Canada < http://www.parl.gc.ca/SenCommitteeBusiness/ >.

29 Gaucher & Elliott, *supra* note 26 at 74.

30 *Ibid* at 77.

31 Standing Senate Committee on Legal and Constitutional Affairs, "Eleventh Report" in *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No 29 (10 June 1998), online: Parliament of Canada <http://www.parl.gc.ca/SenCommitteeBusiness/> [Senate Committee Report].

32 *Ibid*; see also *Simon & Schuster*, *supra* note 5 at 121-22 (there is a similar list of socially and politically important literature written by convicted persons).

33 *Prohibiting Profiting from Recounting Crimes Act*, SO 2002, c 2.

34 *The Profits of Criminal Notoriety Act*, CCSM, c P141.

35 *Criminal Notoriety Act*, SA 2005, c C-32.5.

36 *Criminal Notoriety Act*, SNS 2006, c 14.

37 Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, 38th Leg, 2nd Sess, No 19A (11 March 2004) at 798; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, No 21B (15 April 2004) at 936-48; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, No 33 (5 May 2004) at 1637-41; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, No 44 (26 May 2004) at 2629-33; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, No 51 (8 June 2004) at 3097-98, 3102-104; Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 59th Leg, 2nd Sess, No 06-2 (5 May 2006) at 51; Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 59th Leg, 2nd Sess, No 06-7 (12 May 2006) at 622-24; Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 60th Leg, 2nd Sess, No 06-3 (30

III. Saskatchewan's *The Profits of Criminal Notoriety Act* and Colin Thatcher's Book

a) Background/History of the Thatcher Case

The *Profits of Criminal Notoriety Act*[38] (the "*Notoriety Act*") is Saskatchewan's version of criminal proceeds of crime legislation designed to capture criminals' profits from publishing accounts of their criminal activities. This legislation was enacted in 2009 in response to the announcement that Colin Thatcher, who had been convicted of murder, was planning to write a book about the police investigation and the trial and appeals which led to his conviction and incarceration. In Saskatchewan—and, indeed, in Canada—Colin Thatcher is infamous. The son of a former Saskatchewan premier and himself a former Saskatchewan cabinet member, his infamy is grounded in the thoroughly chronicled behaviour surrounding his acrimonious divorce proceedings and his later conviction for the murder of his former wife.[39] He unsuccessfully appealed his conviction to the Saskatchewan Court of Appeal and the Supreme Court of Canada[40] and subsequently served 22 years in prison before being released on day parole. All of these events were widely reported in national media and were the subject of books and a dramatization.

During the entirety of his trial, incarceration, and following his release, Thatcher maintained that his conviction was obtained through police and prosecutorial misconduct, and was driven by ineptness and deep personal animosity against him on the part of the chief police investigator and the prosecutor in his trial. He added allegations of erroneous judicial decisions from all three levels of court. Soon after his release, Thatcher announced his intention

June 2006) at 33; Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 60th Leg, 2nd Sess, No 06-13 (30 October 2006) at 708-27; Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 60th Leg, 2nd Sess, No 06-26 (17 November 2006) at 2007.

38 *Supra* note 1.

39 These events have been thoroughly chronicled: see e.g. Heather Bird, *Not Above the Law: The Tragic Story of JoAnn Wilson and Colin Thatcher* (Toronto: Key Porter Books, 1985); Maggie Siggins, *A Canadian Tragedy, JoAnn & Colin Thatcher: A Story of Love and Hate* (Toronto: MacMillian, 1985); Garrett Wilson & Lesley Wilson, *Deny, Deny, Deny: The Rise and Fall of Colin Thatcher* (Toronto: James Lorimer & Company, 1985). The murder of JoAnn Wilson has also been the subject of a made-for-television movie: Mankiewicz, Francis, director. *Love and Hate: The Story of Colin and JoAnn Thatcher* (Canadian Broadcasting Corporation, 1989).

40 *R v Thatcher*, [1987] 1 SCR 652, 39 DLR (4th) 275; *R v Thatcher* (1986), 46 Sask R 241, 24 CCC (3d) 449 (CA). One of the grounds of appeal was that the trial judge directed the jury that it could convict Mr. Thatcher of first degree murder if it was satisfied beyond a reasonable doubt that he had either been the principal offender or a party to the offence of murder. The Court held that the jury verdict of guilty need not be based on a unanimous finding with respect to one or the other alternative means of committing the offence.

to write a book that would identify the biases and failures of the administration of justice that had led to his conviction and the failure of his appeals.

b) Legislative Enactment

Following Thatcher's announcement and prior to the publication of his book, *Final Appeal: Anatomy of a Frame*,[41] the Saskatchewan government introduced *The Profits of Criminal Notoriety Act*.[42] The Act requires that parties to a contract relating to such a publication provide the appropriate minister with a copy of the contract, and prohibits both the payment and receipt of any consideration payable under such a contract.[43] The Act also allows the government to commence an application to have any consideration already paid in contravention of the Act to be remitted to the government.[44]

In November, 2009, the Minister of Justice sought an order from the Saskatchewan Court of Queen's Bench under section 19 of the Act requiring that all the publisher's payments either made to Thatcher, or due to him, with respect to the publication of his book be remitted to the government. Thatcher, appearing without counsel, claimed that under the terms of the Act, the recovery of payments provisions did not apply to his book and, further, that the Act was unconstitutional due to its violation of his freedom of expression protected under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter)*.[45] The chambers judge held the Act did apply to Thatcher's book, that it was constitutionally valid[46] and that, therefore, the order sought by the Minister of Justice should be issued.[47] Thatcher did not appeal this decision. As the only case of its kind in Canada, this decision has determined the constitutionality of, and the scope of free speech protection under, legislation that governs convicted persons' accounts of their crimes.

c) Concerns about the Rule of Law

In our view, insufficient attention was given to the requirement of neutrality under the rule of law in this case.[48] Persons in conflict with the State have an

41 *Final Appeal*, *supra* note 2.
42 *Supra* note 1.
43 *Ibid* ss 5(1), 6(1), 7(1).
44 *Ibid* s 19(1).
45 *Charter*, *supra* note 4.
46 *Thatcher*, *supra* note 3 at para 98.
47 *Ibid* at para 100.
48 It is not our claim that Thatcher was dealt with in clear breach of the rules of the legal process but only that scrupulous care was not taken to ensure that the basic principles that underlie the constitutional order were followed to guide the processes to which he was made subject.

uncompromisable claim for fair and equal treatment. The dispute between Thatcher and the Government of Saskatchewan was filled with social context and social meaning and this was no doubt part of any decision about whether Thatcher's book represented exploitation of his criminal activity. On a close look at the processes leading to the taking of his proceeds from the book, the dominant features of Thatcher's situation—that he was a former MLA and minister of the Crown, was found responsible for committing a brutal murder, was reviled within Saskatchewan and elsewhere for his earlier indifference to legal orders and was considered by many to be delusional and fixated—possibly led participants in legislative and legal processes to give inadequate attention to the requirements of full and fair proceedings.

d) The Saskatchewan Legislation—*The Profits of Criminal Notoriety Act*

While certainly not unique to Saskatchewan, the enactment of the *Notoriety Act* caused concern precisely because it was done so quickly, without due consideration for potential constitutional considerations; because it was targeted specifically to ensure that Thatcher's book would be captured by the Act's provisions, including expressly making the *Notoriety Act's* application retroactive; and because all of this occurred before anyone in the Government or elsewhere had seen the book's content. That the *Notoriety Act* may have been targeted specifically to capture Thatcher's book seems especially significant since, written into the *Notoriety Act* are two sections that were not applied by the Government. These two sections allow exceptions to the Act's application when the content falls within certain statutory definitions. Section 4(2) states that the Act will not apply where the text is written for a law enforcement purpose, or is in support of crime prevention or victim services[49] and section 9 provides that a court can exercise discretion to order that only part, or none, of the profits can be seized when the court considers that the work provides value to society.[50]

49 *Notoriety Act*, *supra* note 1, s 4(2): (2) This Act does not apply to any contract for the recounting of a crime entered into:
(a) for law enforcement purposes;
(b) in support of crime prevention; or
(c) in support of victim services programs.

50 *Ibid*, s 9(1)-(2): 9(1) The court may make an order directing that some or all of the consideration paid or payable under a contract for the recounting of a crime be paid in accordance with the contract only if the applicant satisfies the court that, after taking into account the importance to society of not allowing persons convicted of, or charged with, a designated crime to financially exploit the notoriety of their crimes, the value to society of the recounting justifies some or all of the consideration being paid in accordance with the contract.

In introducing the Saskatchewan legislation, Minister of Justice Don Morgan made it clear that he was doing so in response to the announcement of Thatcher's proposed book. He said, "Mr. Speaker, the recent news that Colin Thatcher planned to write a book prompted much public discussion … We appreciate and understand the concerns raised in recent weeks, and we are responding with this Bill."[51] After describing the purpose of the proposed legislation, Morgan stated, "None of us must ever forget that JoAnn Wilson was a daughter, a wife, and a mother. To allow the man convicted of her murder to earn money from the crime would disrespect her memory and would reflect very poorly on this government."[52] The legislative purpose expressed in the Minister's statement went well beyond the purpose stated by the Bill's actual terms and underscored the Bill's *ad personam* motivation. A legislative purpose that lay beyond the government's capturing publication rents was recognized by the chambers judge:

> In this case, there appears to be little controversy with respect to the underlying facts and circumstances which prompted the Saskatchewan government to pass this *Act*, which they did. The notoriety of the "Thatcher case" and the indignation of the public's reaction to word that Mr. Thatcher was intending to publish a book about the circumstances surrounding the murder of JoAnn Wilson including the investigation, the first degree murder charge brought against him, his trial and appeals of the jury's guilty verdict are well reflected in and outlined by the affidavit and supplementary affidavit of Laur'lei Silzer [communication officer of the Saskatchewan Ministry of Justice and Attorney General] filed upon this application.[53]

Of considerable concern is that Morgan declared in the Legislative Assembly that the effect of the proposed Act would be to ensure, prior to having any knowledge of the book's actual content, that Thatcher should earn no money from his publication. Although the general legislative project was not unique

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(2) In determining the value to society of the recounting, the court shall take into account:
- (a) the purpose of the recounting;
- (b) the details of the crime, including the violent or sexual nature of the crime;
- (c) whether, and to what degree, victims of the crime or their family members may suffer further harm from the recounting; and
- (d) if the recounting has been, or is about to be, made known to the public as a result of the contract:
  - (i) the extent to which the publication, broadcast, public appearance or other means of dissemination deals with the recounting; and
  - (ii) whether the recounting, or the dissemination of it, exploits or sensationalizes the crime.

51 Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 26th Leg, 2nd Sess, No 59A (6 May 2009) at 2970 (Hon Don Morgan) [Second Reading].

52 *Ibid.*

53 *Thatcher*, *supra* note 3 at para 77.

to Saskatchewan and reflected similar legislation in four other Canadian provinces,[54] the Minister's speech at the Second Reading of the Bill made it clear that Saskatchewan's legislative purpose was directed to Thatcher specifically and was designed to impose a financial penalty on his project of writing a book that dealt with his prosecution for murder.[55] In the same vein, *The Profits of Criminal Notoriety Act,* which became law on May 14, 2009, was given retroactive effect to June 1, 2007,[56] seemingly to ensure that its provisions would catch any publication agreement that Thatcher may have entered into prior to the Act coming into force.[57]

At the legislative committee hearing, members of the Opposition raised concern about inevitably subjective determinations by the Justice Department about whether a published work fell within the Bill's broad definition of "recounting a crime."[58] The Minister of Justice replied, "I think that's something that we'll want to spend some time and decide whether it's something we want to encompass in regulations, or we have a policy decision. … But in the Thatcher situation, you know, there is no determination as to where those monies might go to yet."[59] While this somewhat confusing statement reveals the intention to adopt greater objectivity in future decisions over the *Notoriety Act's* application, with respect to Thatcher's proposed book, the government had already decided it would fall under the *Notoriety Act* and that profits from it would be seized.

As for the *Notoriety Act* itself, it is an opaque piece of legislation. Its opacity arises from its definitions of works for which consideration may not be paid

54 *Supra* notes 33-36.

55 Second Reading, *supra* note 51.

56 *Supra* note 1, ss 5(2), 7(3).

57 There is, of course, a constitutional distinction to be made between legislation that is retroactively directed at a specific context and enacted for the purpose of establishing rules that are very likely to create liability (see e.g., *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473) and legislation that directly prescribes liability or guilt (see *Liyanage v The Queen*, [1967] 1 AC 259, [1966] 1 All ER 650 (PC)) which clearly violates the constitutional principle of the separation of powers. The former class of legislation, while not normally seen as a constitutional breach, is nevertheless an unattractive instance of legislative action and creates doubt about whether the legislature's legitimate role of establishing general ordering principles has been conflated with the actual application of the general rules to specific contexts. This doubt increases the more the legislation is crafted to capture the specifics of the context for which liability is created. Retroactivity, for instance, is one of those elements that suggests unseemly conflation between the law and a specific determination to establish liability.

58 Saskatchewan, Legislative Assembly, *Standing Committee on Intergovernmental Affairs and Justice (Hansard Verbatim Report)*, 26th Leg, No 19 (11 May 2009) at 370 (Frank Quennel & Hon Don Morgan).

59 *Ibid*.

by a publisher to an author or, if it is paid, may be recovered from the author. The definition is based on the "recounting of the designated crime." The recounting may, however, occur "directly or indirectly"[60] and, as stated in another definitional clause, it "includes … an expression of thoughts or feelings about a designated crime …."[61] In another section, the court may direct that some or all of the consideration be paid to an author if "… the value to society of the recounting justifies this."[62] There is a list of things that may be considered by the judge in making this determination, including "the purpose of the recounting."[63] These sections create definitional layers and an indeterminate scope that serve to frustrate a clear understanding of which writings will actually fall within the *Notoriety Act's* expropriating provisions. The cumulative broad reach of the legislation ensured that Thatcher's work, regardless of its actual content would fall within its terms.[64] As Jeremy Waldron has pointed out, legislation, no less than judicial decisions for which there are significant normative limits, must be maintained as a "dignified form of governance and a respectable form of law."[65] The evidence of legislative targeting in this instance was disturbingly undignified.

e) Applying the Notoriety Act to the Thatcher book

The expansions of the concept of "recounting" served to include Thatcher's book within the ambit of the Act. In attempting to demonstrate investigative, prosecutorial and judicial errors, Thatcher reproduced evidence that was tendered in court and this can be considered a form of indirect accounting. In recording his frustrations and outrage over the legal process that led to his conviction, he expressed his feelings about what had, on conviction, become a designated crime. While Thatcher's book contains information concerning

60 *Notoriety Act*, *supra* note 1, s 2(1)(a): **"contract for the recounting of a crime"** means a contract entered into before, on or after the coming into force of this Act under which: (i) a person convicted of, or charged with, a designated crime provides or agrees to provide a recounting of the designated crime, either directly or indirectly; and (ii) consideration is payable to, or at the direction of, the convicted or accused person or the person's agent;

61 *Ibid*, s 2(1)(f): **"recounting"** includes the recollection and retelling of circumstances relating to a designated crime, an expression of thoughts or feelings about a designated crime and a re-enactment of a designated crime.

62 *Ibid*, s 9(1).

63 *Ibid*, s (9)(2)(a).

64 John Rawls, in describing the law-making process, states: "The flow of information is determined at each stage by what is required in order to apply … principles intelligently …, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against each other one another is ruled out." (John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of HUP, 1971) at 200).

65 Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) at 2.

the killing of his former wife, it does not directly relate details of her attack and murder. The evident purpose behind his book was neither to recount, nor to exploit through a personal rendition of events, his former wife's murder but to examine the police investigation and prosecution, and to analyze critically both the evidence and the theory on which his conviction was based. The description of the crime in this book was indirect, derivative, and subsidiary to the book's purposes. Thatcher reported only what is publicly known about the murder in order, he hoped, to demonstrate how improbable it is that he committed the crime.

From the perspective of ordinary language, neither of these forms of representing the crime is a recounting of a crime in the sense of presenting the narrative of the intentions and actions that constitute the crime. The *Notoriety Act's* purpose is to prevent an accused person, or a convicted offender, from gaining profits from exploiting his or her involvement in the crime. In other words, convicted persons are not to profit from trading on the appeal of the immediacy of a first-person account of criminal acts. Thatcher's book records what is in the public record and does not fall within the statutory purpose of impeding publications that exploit a convicted person's involvement in a crime. A purposive interpretation of the *Notoriety Act* would seem to preclude its application in this case.

IV. The *Thatcher* decision

After the Act came into force, the Saskatchewan government moved quickly to bring an application under the Act to seize the proceeds Thatcher received from publishing *Final Appeal*. The decision in *Saskatchewan (Minister of Justice) v Thatcher*[66] appears to be an exercise in trying to validate the Government's conclusions regarding the applicability of the Act to *Final Appeal*. We contend that this decision, like that of the Saskatchewan government about the Thatcher book, was distorted by the circumstances surrounding Thatcher and his notoriety. It is not a carefully reasoned judgment and it is far from scrupulous in its application of legal doctrine. The chambers judge held that *The Profits of Criminal Notoriety Act* was constitutionally valid both as a matter of the federal division of powers and as a matter of compliance with the free expression guarantee of the *Canadian Charter of Rights and Freedoms.* He also held that this book fell within the definition of "recounting a crime" and that, therefore, Thatcher was required to forfeit to the government the proceeds arising from his authorship. The decision adopted the government's

66 *Thatcher*, *supra* note 3.

arguments without reservation or significant critical evaluation. The decision, much like the view of Thatcher's book held by the Government, may have been influenced by the circumstances of Thatcher's history and his notoriety.

With respect to the primary issue of whether the book falls within the terms of the Act, the chambers judge concluded:

> [P]assages from the book … lead me unhesitatingly to conclude that the book recounts circumstances relating to the murder of JoAnn Wilson. The book is replete with the recollections and retelling of those circumstances by Mr. Thatcher himself or through his accounts of the people and witnesses whose evidence and conversations he recounts throughout.[67]

The chambers judge sought to demonstrate the applicability of the legislation to *Final Appeal* through reproducing many extracts from the book. However, the conclusion that he comes to neither reflects a sensible literary understanding of the passages he draws on, nor results from a considered reading of the book's content and purpose, as explicitly required by the terms of the *Notoriety Act*. The reproduced passages are simply analyses of the inferences that were drawn from the direct factual evidence (and are claimed to be wrong inferences) or are expressions of Thatcher's feelings about his experience as a person being tried for a murder he claims he did not commit and through a process that he considered unfair and biased. The quoted passages do not express feelings about the killing of his former wife.

Another significant concern about the decision arises from the chambers judge's failure to consider provisions in the *Notoriety Act,* identified above, that allow retelling of a crime without the province seeking to recover royalties or other payments, *viz*., when recounting is for law enforcement purposes or provides social value.[68] There is no suggestion that these exemptions are available only to law enforcement professionals as opposed to private persons who seek to show the limitations of law enforcement. *Final Appeal* was written precisely to adumbrate the faults of law enforcement and, thereby, to produce, first, outrage over a claimed injustice to Thatcher and second, to lead to improvements in law enforcement. Furthermore, elaborated and explained claims of miscarriages of justice are of undoubted social benefit. The criminal justice system is sufficiently subject to procedural and judgmental frailties that challenges to convictions (or acquittals) are never without social value. They are an essential check against error, misjudgment and injustice. A society that

67 *Ibid* at para 45.

68 See text, *supra* at notes 49 and 50.

seeks to restrain or penalize criticism of its criminal justice system is likely to lose its ability to keep the state's coercive powers within safe limits. We are not asserting that *Final Appeal* necessarily falls within the scope of these statutory exceptions, but only that the failure of the chambers judge to consider this possibility precluded assessment of the constitutional significance of the fact that the *Notoriety Act* excludes some instances of recounting of crime from its speech-impairing effects. Clearly, the constitutional purpose of ensuring that works that are "universally considered an important part of the literary, social and political lexicon"[69] are not restricted lie behind these exceptions. It is unfortunate that the chambers judge in *Thatcher* did not consider the social benefit of publishing before seizing profits from the publication.[70]

V. Division of Powers Considerations

The chambers judge came to the conclusion that because the *Notoriety Act* places a limit on contractual activity, the legislation is valid provincial law and is not in relation to federal criminal law. He said:

> The *Act* … does not purport to heap civil consequences to criminal acts in any direct way. It is intended to … address the financial exploitation by a criminal of the notoriety of their crimes, i.e., "that criminals ought not to profit from their crimes." Redirecting these exploitation funds from the criminal to the victim(s) of crime in pith and substance is … legislation in respect of contractual, property and civil rights.[71]

There are two problems with this conclusion. The first is that the *Notoriety Act* does not have a contract law (or property law) aspect simply because it pursues its purposes through the instrumentality of statutory modification of one class of contracts. The *Notoriety Act* could be found valid on the basis that it created new law relating to a class of contracts that are against public policy and

69 Senate Committee Report, *supra* note 31.

70 *Thatcher*, *supra* note 3 at paras 21-45. Thatcher did not make an application under section 8(1), no doubt because his position was that the *Notoriety Act's* core provisions requiring payment of royalties to the minister were unconstitutional. This raises the question of whether the standard of section 9(1) and the criteria listed in section 9(2) that ameliorate the suppression of politically significant speech can only come into play once an author accepts the minister's initial entitlement to all royalty payments received as a result of his or her writings. In other words, the attempted constitutional safeguard appears in the *Notoriety Act's* text, but may be made unavailable if an author challenges the *Notoriety Act's* validity or its application. The authors of this article believe that Thatcher's challenge to the *Notoriety Act's* constitutionality should automatically have engaged the elements of section 9(2) since, in part, they relate to the issue of tolerable suppression of free speech. The failure to consider this provision in the context of a claim of constitutional invalidity contributed to the chambers judge's conclusion that the *Notoriety Act* applied to Thatcher's book.

71 *Ibid* at para 97.

that honouring them would taint the legal project of enforcing contracts, or if it created new property law based on the idea that such property was earned disreputably and giving it legal protection would discredit property law. The second problem is that even if there were a convincing contract law aspect (or property law aspect) to this law, the conclusion reached by the chambers judge would be correct only if those aspects represented the dominant constitutional characteristics of the *Notoriety Act*; that is, only if they were aspects weightier than the imposition of a punitive civil burden on persons for having committed certain crimes.

An alternative provincial aspect of the legislation could be the capturing of pools of money that can be dedicated to alleviating the suffering of victims and their families. Again, the competing federal constitutional characterization of the legislation is that in imposing a legal disability on convicted persons out of distaste for their crime, or out of a sense that they should not be allowed to receive gain from their criminal activity, the province has enacted a law that properly lies within federal criminal law jurisdiction. As in most determinations of constitutional validity under the division of legislative powers, the central question is what is the dominant constitutional aspect of the challenged legislation. This question is simply not identified, nor addressed, in the *Thatcher* decision.

The assignment to Parliament of jurisdiction over criminal law does not exclude provinces from creating offences or pursuing crime-suppression policies. Nor does it prevent provinces from imposing restrictions on persons who have been convicted of a crime. Section 92(15) of the *Constitution Act, 1867*[72] gives provinces the authority to create offences that support provinces' regulatory aims under their heads of jurisdiction. Other heads of authority under section 92 give provinces jurisdiction to regulate activity that has been made criminal under federal law if that activity impairs interests subject to provincial jurisdiction (such as ensuring that investment traders are honest, or that property owners use their property in ways that do not damage public interests).[73] The test for provincial jurisdiction is not based on the means of

72 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92(15).

73 See *Canada (AG) v Montreal (City of)*, [1978] 2 SCR 770, 84 DLR (3d) 420, in which a municipal ordinance that prevented street demonstrations was upheld as regulation of "conditions conducive to breaches of the peace …" at 791. See also, *Bedard v Dawson*, [1923] SCR 681, [1923] 4 DLR 293 [*Bedard*], in which Quebec's imposition of civil liabilities on property owners keeping a "disorderly house" was upheld. The Court did not see this provincial regulation as provincial compounding of a criminal penalty and therefore intruding on federal sentencing jurisdiction, but as suppressing crime through controlling conditions likely to produce crime. *Bedard* also serves as an example of this line of cases (*ibid*). The provincial regulation in this case was designed to preserve the quality

imposing restrictions or penalties, but on legislative purpose. One purpose that is clearly excluded from provincial power is further punishing those who have committed a crime.

The *Notoriety Act* imposes on a person convicted of a criminal offence the civil liability of the removal of access to a specific civil relationship—the relationship between writer and publisher formed through contract to provide payment for published writings. The primary purpose of this legislated disability is directed at convicted persons to further condemn their crimes.[74] As we have seen, the legislative record shows that the *Notoriety Act's* political goal was the expression of repugnance for the crime and the person convicted for committing it. However, the constitutional character of legislation is not determined only through the legislative record but also on the basis of its actual text. Section 3 of the *Notoriety Act* states that the legislative purpose is to prevent persons from benefiting from their criminal notoriety. That criminals ought not to benefit from their crimes may be a reasonable precept of criminal justice policy, but it is just that—a principle that imposes penalties for committing a crime. It is not a principle that, in itself, relates to property and civil rights in the province. A constitutional fault occurs when the purpose behind the legislation lacks an actual provincial interest and, instead, creates punishment or some other form of interference with a federal matter.[75]

The *Notoriety Act's* other stated purpose of compensating "… victims of those crimes or their family members; and … [supporting] victims of crime"[76] could be a matter under general provincial jurisdiction over social care. However, this purpose seems far more strategic than real.[77] Although there

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of residential neighbourhoods and was thus characterized as property use. A further example is an administrator under *The Securities Act*, SS 1988, c S-42.2, s 28(1)(a) could decline to register as broker or underwriter, a person convicted of a crime of dishonesty.

74 See *Westendorp v The Queen*, [1983] 1 SCR 43, 144 DLR (3d) 259, in which a Calgary bylaw prohibiting soliciting for prostitution was struck down as merely compounding the criminalization of prostitution found in the *Criminal Code*, RSC 1985, c C-46. It is noteworthy that although there was a strong local interest in preserving a comfortable commercial environment, the Court held that under a "pith and substance" analysis, the bylaw's real character was the regulation of solicitation for sexual services which was a matter falling within federal jurisdiction (at para 96).

75 See e.g. *Reference re Alberta Legislation: The Bank Taxation Act*, [1938] SCR 100, [1938] 2 DLR 81; *R v Morgentaler,* [1993] 3 SCR 463, 107 DLR (4th) 537 [*Morgentaler*].

76 *Notoriety Act*, supra note 1, s 3.

77 This distinction was one of the bases of the Supreme Court of Canada's decision in *Switzman v Elbling*, [1957] SCR 285, 7 DLR (2d) 337, in which Quebec's legislation mandating the cancellation of leases on properties in which communist propagation is conducted was struck down as violating the federal criminal law jurisdiction. Notwithstanding the apparent purpose of preserving property interests the Court held that "the real object of the Act here under consideration is to prevent propagation of communism within the Province" (at 288). It was also the conclusion in *Morgentaler*,

could be cases in which royalties flow in an amount that would provide meaningful compensation to crime victims, in the actual course of events royalties from such works make negligible contributions to a province's victims' fund. It is unconvincing to see the primary aspect, or the actual motive, behind this legislation as the raising of revenues for victim compensation.

In deciding that the *Notoriety Act* in the *Thatcher* case was *intra vires*[78], the chambers judge relied on the Supreme Court of Canada's decision in *Chatterjee v Ontario (Attorney General)*.[79] *Chatterjee* considered Ontario legislation that prevented people from holding property that was acquired as a result of organized crime and other unlawful activities. That legislation relates to any property that, independent of the application of any other Ontario or federal law, was acquired in a circumstance that is wrongful and, thereby, corrupts a claim for recognition of property under a legal regime. The legislation adopts the concept of tainted property and strips away ownership of property acquired through criminal and other unlawful activity. This is a common and well established property law concept—when the ownership of property is illegitimate, it impairs the province's property regime to protect it. It is significant that under the legislation in *Chatterjee*, tainted property can be seized even when there is no conviction with respect its acquisition, or if the criminal activity by which it was acquired took place outside Canada. These legislative features demonstrate that the Ontario legislation is not supplemental to the criminal justice process, but reflects a free-standing property law interest through identifying classes of property for which it is inappropriate to validate and enforce property interests. The Ontario law in *Chatterjee* relates to property's character while the Saskatchewan law, although directed at contracts,

supra note 75. The Court held that Nova Scotia regulations made under its *Medical Services Act*, RSNS 1989, c 281 requiring that abortions (and some other medical procedures) be performed only in approved hospitals was, notwithstanding provincial jurisdiction over hospitals and health care, a matter of criminal law since the purpose and effect of the legislation was to reverse the effects of the decriminalization of abortion. As with Saskatchewan's *Notoriety Act*, Nova Scotia had no jurisdiction to institute civil laws for criminal justice purposes.

78 *Supra* note 3 at para 97 (the chambers judge referred to two other cases to support the idea that if criminal justice purposes are attached to a head of provincial jurisdiction there is no invalid encroachment on the federal criminal law jurisdiction); see also *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board),* [1987] 2 SCR 59, 44 DLR (4th) 663; *605715 Saskatchewan Ltd (cob "Showgirls") v Saskatchewan Liquor and Gaming Commission*, 2000 SKCA 97, 192 DLR (4th) 150 [*Showgirls*]. These decisions upheld provincial tavern regulations relating to nudity and indecent performances. It is clearly established that regulations relating to liquor consumption and places of liquor consumption fall within provincial jurisdiction (see *Hodge v The Queen* (1883), 9 App Cas 117 (PC)) and that regulations that touch on behaviours and practices in such places are an integral part of regulating those businesses. This is true even when the same conduct may also be subject to criminal law treatment this regulation does not lose its provincial characterization.

79 2009 SCC 19, [2009] 1 SCR 624 [*Chatterjee*].

imposes punitive restrictions on a convicted person and was not enacted to preserve the integrity of contractual relations. In *Chatterjee*, Binnie J stated, "… there is no bar to a province's enacting civil consequences to criminal acts *provided the province does so for its own purposes in relation to provincial heads of legislative power*."[80] The restriction on forming effective royalty contracts does not have a purpose relating to property or contract law. While a province could consider that some contracts should not be recognized and enforced by its laws because they pursue socially damaging ends, such as contracts to trade in persons, contracts for recounting crime are not *per se* bad contracts. They are neither proscribed nor unenforceable.

As noted above, even if the *Notoriety Act* did have a contractual aspect, it would then be necessary to engage aspect analysis in order to determine the dominant feature of the law. Is the leading aspect of the legislation a punitive restriction on persons convicted of crime, or is it to prevent the province's contract regime from serving bad ends? While the chambers judge declared the *Notoriety Act* valid on the ground that "it purports to regulate contracts entered into between individuals who recount or recollect their works in written works,"[81] this conclusion is based only on form, not aspect analysis. The *Notoriety Act's* dominant purpose is to add to the punitive consequences of criminal acts.

This element of the chambers judge's decision is a direct reflection of the written submission of Crown counsel, which states: "[*Chatterjee*]… settled that provinces may enact civil forfeiture regimes … and such regimes do not trespass onto exclusive federal power …. *Chatterjee* operates as a complete answer to the … claim that the Act is *ultra vires* the Saskatchewan legislature."[82] This overstates the *Chatterjee* decision. That decision certainly did not override standard pith and substance analysis in favour of a simple instrumentality-based property (or contract) classification; its conclusion was based on the Ontario law relating to specific provincial interests defining legitimate property ownership. The chambers judge is wrong in suggesting that *Chatterjee* recognized blanket provincial jurisdiction over property forfeiture or contract foreclosure. The *Notoriety Act* could have been found valid if its credible[83] purpose was the creation of a fund for victims' compensation or if it created

80 *Ibid* at para 40 [emphasis added].

81 *Thatcher, supra* note 3 at para 26.

82 Saskatchewan (Minister of Justice) v Thatcher, 2010 SKQB 109 (Memorandum of Law on the Constitutional Issues Submitted by the Attorney General) at para 27.

83 See *Morgentaler*, *supra* note 75 at 503, in which the Court determined the constitutional aspect through identifying the "central concern of the members of the legislature who spoke."

new contract law relating to contracts against public policy—and, then only if it were concluded that these purposes conferred an aspect that is of greater importance than the punitive aspect. This latter question is not addressed in the *Thatcher* decision nor, directly, in Crown counsel's written submission.[84]

VI. Constitutional validity considerations: Freedom of expression

The freedom of expression issue at the core of the *Thatcher* decision is: when does an impairment or burden on the exercise of speech, as opposed to a direct restriction of speech, amount to violation of the *Charter*'s guarantee of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"?[85] When does an economic penalty or civil disability that is imposed in a context in which there is no proscription of the communication that is subject to the penalty amount to an infringement of this constitutional right? The Court in *Thatcher* addressed the question of constitutional validity by asking whether the impairment of freedom of expression attracted a higher level of protection because it was directed to specific content and was not merely incidental to social regulation of broader purpose. The freedom of speech issue that was argued in the

84 Thatcher did not challenge this aspect of the province's case. He was unrepresented in this litigation and, no doubt, was not prepared to engage in submissions based on federalism, particularly in the complex and subtle area of aspect analysis. This part of the *Thatcher* litigation gives rise to the difficult question of the duty of Crown counsel when facing a self-represented litigant who is attempting to protect his or her constitutional rights. Should Crown counsel be scrupulous in ensuring that the legal complexities and uncertainties in the arguments they make are brought to the attention of the other party or the court, especially when there is no reasonable expectation that they will be identified by the self-represented party? As Professor Dodek has written:"[G]overnment lawyers … operate at the intersection of public law and legal ethics. They all have a special responsibility to uphold the rule of law as lawyers, public servants and agents of the Attorney General. Unlike other lawyers, government lawyers are involved in the making and interpretation of the law. This unique responsibility translates into a higher ethical duty for government lawyers. They cannot contort the law and *they must take affirmative measures to protect other important elements of the rule of law*" (Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as the Custodians of Rule of Law" (2010) 33:1 Dal LJ 1 at 53) [emphasis added]. See also Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 Queen's LJ 598, which argues that the Attorney General should not be seen as just the lawyer for the government but as playing a crucial role in preserving the rule of law *within* government.

85 *Supra* note 4, s 2(b). The phrasing in the opening clause is interesting. Although no case has sought to define "expression" narrowly through the application of *ejusdem generis* the wording does suggest a connection between protected speech and intellectual conviction. Under this reading of section 2(b), though never expressed in *Charter* jurisprudence, the historical record of Thatcher's book its preparation, and its evident purpose, would elevate the protection to which he is entitled and would underscore the importance of the *Notoriety Act's* saving clause. Namely, section 9(2)(a) of that act.

Crown's "Memorandum of Law on the Constitutional Issues" and that was addressed in the decision of the chambers judge, is whether the speech value of Thatcher's book was of less significance, and was therefore less deserving of protection, because it fell within the category of commercial speech.

The Supreme Court in *Irwin Toy Ltd. v Quebec (AG)*[86] provided the two-step test for establishing an infringement of section 2(b).[87] That test was reiterated in the majority Supreme Court of Canada opinion in *Baier v Alberta*:

> The first step [of the analysis] asks whether the activity is within the protected sphere of free expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Once it is established that the activity is protected, the second step asks if the impugned legislation infringes that protection, either in purpose or effect.[88]

With respect to *Final Appeal*, the Saskatchewan government conceded that "the exercise of recounting or recollecting a crime involves a form of expression."[89] However, the Crown did not concede the second step of the *Irwin Toy* test. Instead, counsel for the government argued that the *Chatterjee* decision[90] supports looking at the legislative record to discern the purpose behind challenged legislation (a decisional strategy more relevant to federalism cases, as *Chatterjee* is, than to *Charter* cases, where the central question is simply whether the law has a restrictive or discriminating effect). Counsel maintained that the purposes of the legislation were restricting profits and preventing exploitation of criminal notoriety and not, as the Minister had also said, "limiting publication."[91] The Minister had clearly implied that the *Notoriety Act's* first purpose was to deny Thatcher any financial benefit from writing a book.[92] While the chambers judge's decision identified the purposes of the Act as they are set out in section 3, he also referenced Mr. Morgan's further expansion of those purposes in the legislative record. His decision, though, does not acknowledge the intention to impede Thatcher's efforts to write and publish his work through stripping away all financial compensation.[93] The chambers judge accepts that the *Notoriety Act*'s trumping purposes are to stop exploitation and to obtain revenues for distribution to victims of

86 [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR].
87 *Ibid* at 968-69.
88 2007 SCC 31 at para 19, [2007] 2 SCR 673.
89 *Thatcher*, *supra* note 3 at para 57.
90 *Supra* note 79.
91 *Thatcher*, *supra* note 3 at para 61, Zarzeczny J citing Saskatchewan, Legislative Assembly, *Official Reports of Debates (Hansard)*, 26th Leg, 2nd Sess, No 19 (6 May 2009) at 2970 (Hon Don Morgan).
92 Second Reading, *supra* note 51.
93 *Thatcher*, *supra* note 3 at para 61; *c.f. ibid.*

crime. More to the point, broader social purposes behind the impairment of certain specific speech content cannot excuse a violation of section 2(b). The expressly stated goal of limiting publication, made by the Minister himself, should have been acknowledged by the court as a violation of section 2(b).

Government counsel also argued that when the legislation deprived those engaged in speech of their "profits," it did not impose a content based restriction on speech. In making this argument, counsel relied on the Saskatchewan Court of Appeal's *Showgirls* decision.[94] The Saskatchewan Court of Appeal in *Showgirls* noted the distinction in *Irwin* Toy between state activity that restricts expression by purpose and activities that restrict only by effect.[95] The Court in *Irwin Toy* provided the following to assist in determining whether it was the purpose of government action to infringe section 2(b)'s protection of expression:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.[96]

The chambers judge in the *Thatcher* case quoted this passage,[97] but not the clarification that was adopted by the Supreme Court in the same case. This clarification was drawn from the writing of American constitutional lawyer, Archibald Cox, who wrote:

> The bold line ... between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.[98]

94 *Thatcher*, *ibid* at para 58.
95 *Showgirls, supra* note 78 at para 23.
96 *Irwin Toy*, *supra* note 86 at 974.
97 *Thatcher*, *supra* note 3 at para 59.
98 *Irwin Toy*, *supra* note 86 at 974, quoting Archibald Cox, *Freedom of Expression* (Cambridge, Mass: Harvard University Press, 1981) at 59-60.

In *Showgirls*, the Saskatchewan Court of Appeal held the right to earn extra profits by selling alcohol during expressive striptease performances did not infringe section 2(b) because the prohibition related only to the manner of when such performances could occur and was not dependent upon the content of each performance.[99] Of course, the distinction between content-based restrictions on speech and time and place restrictions (in order, for example, to maintain a peaceful neighbourhood environment or seemly public space) is not always clear. For instance, in *Showgirls* it may be possible that the restriction on nudity in bars was, in this regulatory context, not so much a restriction on nudity as much as it reflected a belief in the social undesirability of nudity in the *milieu* of alcoholic consumption and, therefore, perhaps, concern over potential unruly reactions. While the specific restriction in question was not a general restriction on the features of bars that could lead to unruliness, it nevertheless reflected a general concern over appropriate control of behaviour in bars. *Showgirls* is not, therefore, a case that authorizes the state to impose restrictions on classes of speech and expression that the state considers harmful. It is a decision that regulates a specific context to ensure that it is fitting for its purposes and, in the context of that regulation, it controls expressive activity that is potentially disruptive. The *Notoriety Act* applied in *Thatcher*, however, is unconcerned about the social context—neighbourhood, bar, meeting place or park. The *Notoriety Act* addresses only speech content—the recounting of a crime by the person convicted. The only context for this restriction is that the recounting must attract payment. The *Notoriety Act* provides that profits will be seized if the content of the published material meets the definition of "recounting a crime" and does not fall within the section 9(2)—a work of "value to society."[100] While *Showgirls* is not the clearest possible case on the distinction between content regulation and "time and place" (or context) regulation, the decision in that case was clearly based on this distinction—a distinction with no bearing on the restrictions on speech under consideration in the *Thatcher* decision.

The chambers judge also considered the claim made by counsel that the restriction on earning book royalties is allowable because the impairment of speech relates only to commercial speech and such speech is normally thought to attract weaker *Charter* protection. The chambers judge wrote:

> The *Act* does not prohibit or appear on its face to interfere with Mr. Thatcher's right to write and publish the book which he has done. What it does do is confiscate the

99 *Showgirls, supra* note 78 at para 29.

100 *Supra* note 1, ss 2(1)(a), 4(1)-(2), 9(2).

> profits which he has negotiated for in his contract with his publisher. Is his entitlement to receive the profits of his exercise of his freedom of expression an integral component of that right or so necessarily incidental to his exercise of the right so as to constitute an interference with it a violation of his freedom of expression?
>
> Cases dealing with statutorily imposed limits on commercial or profit motivated freedom of expression are few. Even those that exist tend to focus on the content limits imposed and not the consequential interference with commerce or profits.[101]

This passage evidences the chambers judge's error that restrictions on profit from expressive content are akin to commercial expression. In reaching this erroneous conclusion, he went on to hold:

> Although commercial expression and its exercise to secure profits does not fall outside of the ambit of s 2(b) guaranteed rights, the protection granted to commercial speech is limited. If the impugned legislation does not regulate its contents or the manner or media chosen for communication of the expression, the interference with the right to achieve and receive profit falls outside of the freedom guaranteed. [102]

However, the exchange of expressive content for consideration cannot be equated with commercial expression. Peter Hogg, in summarizing Canadian jurisprudence on commercial expression, defined it as, "expression that is designed to promote the sale of goods and services."[103] In this case, the infringed expression is itself the good being sold and not an attempt to influence marketplace choices in order to induce the purchase of a product or service. To assert that Thatcher's book is commercial expression is analogous to saying that newspaper editorials are commercial expression because they are written, in part, in order to sell papers and they are generally not read unless newspapers are purchased, or that satirical revues are commercial speech because there is a charge for admission to them. If a government were to enact legislation that said newspapers could not receive any subscription or sales remuneration if they published editorials that exploited poor governmental judgment, this would clearly be seen as a content-based restriction on expressive rights.

The primary purpose of the *Notoriety Act* need not be to prohibit the conveyed expression in order to infringe the *Charter* right. The Supreme Court of Canada in *Irwin Toy* made it clear that it is sufficient to demonstrate infringement if the effect of regulation is to restrict such expression.[104] There are two

101 *Thatcher*, *supra* note 3 at paras 62-63.

102 *Ibid* at para 70.

103 Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 25 January 2013), 5th ed (Scarborough, ON: Thomson Carswell, 2007), ch 43 at 22.

104 This point was made in *Irwin Toy*: "Even if the government's purpose was not to control or restrict

elements to this elaboration of what it means to limit free expression. First, the Supreme Court used the word "restrict," not "prohibit." Second, it endorsed the notion that if the effect of regulation is to restrict or impair, there is a violation of section 2(b) of the *Charter*.[105] Even if the purpose of the *Notoriety Act* is not to restrict expression, the *Irwin Toy* framework mandates the finding of an infringement of the right, where the effect of the government action is that expression is restricted. In the instance of a restrictive effect, it falls on the *Charter* claimant to show that the speech that is restricted is speech that satisfies the purposes and values that underlie the *Charter* protection.[106] These values were identified as (i) the pursuit of truth; (ii) political and social participation; and (iii) self-fulfillment and human flourishing.[107]

One aspect of the underlying value of free expression relating to criminal justice was stated by the United States Supreme Court in *Simon & Schuster*. While the Canadian Supreme Court has cautioned against treating American case law as determinative in Canadian cases, it has consistently referenced American jurisprudence, particularly when addressing early interpretations of *Charter* protections in the absence of relevant Canadian precedents.[108] The *Thatcher* decision is the first and only time the issue of restricting speech through capturing publication proceeds has been litigated in Canada and the American precedent is a directly relevant interpretive source.[109] In his deci-

attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression" (*supra* note 86 at 976).

105 The Court in *Irwin Toy* adopted the analytic framework adopted by the majority of the Court in in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 [cited to SCR]. Dickson J, speaking for the majority, stated:

> "In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible (*ibid* at 331).

106 *Irwin Toy*, *supra* note 86. The majority opinion in *Irwin Toy* states, "In order so to demonstrate [the effect of restricting a protected right], a plaintiff must state her claim with reference to the principles and values underlying the freedom."

107 *Ibid.*

108 See e.g. *Rocket v Royal College of Dental Surgeons (Ontario)*, [1990] 2 SCR 232 at 242-44, 71 DLR (4th) 68 [*Rocket*]; *Edwards Books & Art Ltd v R*, [1986] 2 SCR 713 at 754-58, 35 DLR (4th) 1. In both cases, the Supreme Court gave extensive consideration to United States Supreme Court decisions which considered the appropriate reach of constitutional protections that were highly similar to the constitutional protection expressed in the *Charter*. In *Rocket*, McLachlin J. for the Court noted that the American jurisprudence "exemplifies one way of dealing with the task of weighing the conflicting values involved" (at 244).

109 The legislation considered in *Simon & Schuster*, (*supra* note 5) is not identical to *The Profits of Criminal Notoriety* (*supra* note 1) in that the class of crimes for which "recounting" results in

sion, the chambers judge justified his decision not to consider American precedents in "Son of Sam" laws on the ground that they are conflicted. This was notwithstanding that there is only one American Supreme Court case on the constitutionality of imposing a monetary punishment for the recounting of criminal acts and its outcome, and reasons for it, are clear.[110] Further, that decision specifically addresses both the issue of the constitutionality of imposing financial penalties on speech activity and the dangers to free expression arising from broad definitions of the speech that is impaired—broadening definitions that are precisely tracked in the Saskatchewan legislation. Despite the chambers judge's disinclination to look at American jurisprudence, the decision in *Simon & Schuster* stated that, where governmental financial regulation resulted in content based restrictions on speech, this has the effect of removing certain ideas or viewpoints from the marketplace,[111] thereby creating a burden, rather than an outright prohibition, on free expression and this, nonetheless, infringes the right.[112] In this case, Thatcher wrote his book to promulgate *his* sense of the truth surrounding the murder of JoAnn Wilson and in doing so *his* purpose was to participate in political and social commentary on the administration of justice and the actions of police in his case.

The *Thatcher* decision failed to address the effects of the *Notoriety Act* as it relates to infringement of the freedom.[113] Consequently, whether the *Notoriety Act's* effect placed a burden on Thatcher's expression rights that, while less than an outright prohibition, was still capable of restricting and, thereby, violating his protected *Charter* right, was not canvassed. The lack of analysis made it possible for the chambers judge to conclude that the *Notoriety Act* did not infringe Thatcher's freedom of expression. Thatcher's right of expression was restricted and the societal goals behind the constitutional commitment to free expression were defeated through allowing effective discouragement of this class of critical writing.

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forfeiture of royalty payments is narrower in the Saskatchewan legislation.

110 He admitted that the very issues raised with respect to the validity of Saskatchewan's *Act* had been canvassed in United States courts. He described this jurisprudence as "lively debate and disparate court rulings in the United States" (*Thatcher*, *supra* note 3 at para 20).

111 *Supra* note 5 at 116.

112 It seems unlikely that Thatcher's motivation for writing *Final Appeal* was financial. The text suggests that the writing was driven by his sense of injustice. Nevertheless, there are few artistic or written works of any sort that are not the product of multiple motives including recognition and reward. If state authority required that works be published anonymously, that may have the effect of suppressing freedom of expression even if there were no other restriction on publishing? Stripping away authors' moral rights of any sort is tantamount to limiting speech rights.

113 *Supra* note 3 at paras 51-73.

VII. Justification of *Charter* impairment under section 1

Notwithstanding the finding that *The Profits of Criminal Notoriety Act* does not infringe the *Charter's* protection of freedom of expression, the chambers judge did consider whether, if the *Notoriety Act* violated the *Charter*, it could be sustained as a valid law on the ground that the violation was a reasonable limit on rights as permitted under section 1 of the *Charter.* The Supreme Court of Canada's decision in *R v Oakes*[114] established an approach to determining whether legislative limits on rights are reasonable and, therefore, permissible.[115]

In applying the *Oakes* test, there are two further considerations to be taken into account by courts. The first is the burden on the enacting jurisdiction to prove, on a balance of probabilities and based on evidence (or, at least, a very widely accepted social understanding) that the legislature would have relied on, that there is a pressing and substantial reason for limiting rights.[116] The second is to pay a high degree of attention to the specific context in which the legislation is passed with respect both to the reason for the legislation and the social and political value of the freedom that is being impaired.[117]

a) Pressing and Substantial Purpose

With respect to proving the existence of a pressing and substantial purpose, the evidence of legislative purpose consisted of legislative history and an affidavit sworn by the Director of the Communications Branch in the Ministry of Justice and Attorney General. Both establish that the legislation was passed in response to "the indignation of the public's reaction to the word that Mr. Thatcher was intending to publish a book about the circumstances surrounding the murder of JoAnn Wilson including the investigation."[118] While this is clear evidence of the reason for the legislation, it is not evidence that there is a compelling social need to prevent him from gaining payment from the publication of his book.[119] Public indignation or repugnance over the idea of

114 [1986] 1 SCR 103, 26 DLR (4th) 200 [cited to SCR].

115 *Ibid* at 138-39.

116 "In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place" (*Irwin Toy*, *supra* note 86 at 984).

117 *Ibid.*

118 *Thatcher*, *supra* note 3 at para 77; Zarzeczny J later states "There is no question that the *Notoriety Act* was passed in direct response to the announcement by Mr. Thatcher that he intended to publish the book" (*ibid* at para 79).

119 This feature of the legislative history again raises the question of legislative propriety. It is, we think, fair to say that marshaling the forces of a legislature to stop or limit the activities of a single person

a particular author and his project, especially when it is indignation that the government has simply deemed to be present, can hardly be a pressing and substantial basis for regulation and the imposition of a financial penalty. The qualities of "pressing" and "substantial" arise from the underlying legislative purpose, and the purpose stated in the legislative process connected to personal identity is not a general social goal. This purpose is not only not compelling, it is not seemly. Furthermore, it is not a purpose that lifts the legislation away from speech suppression, which is the reason why this test can be used in excusing the regulation of speech, but only affirms the speech restricting motive of the legislation. The trumping of constitutional rights through such a justification creates a circular test and leaves only a hollow concept of rights.

b) Proportionality

i. *Rational Connection and Minimum Impairment*

With respect to the actual context of this legislation and its likely impact on freedom of expression, the chambers judge considered the impairment on free expression to be slight. The *Notoriety Act,* he said, "applies to very narrow range of individuals and does not prohibit the exercise of their freedom of expression but limits only the right to financially benefit from that exercise."[120] As general propositions about the contextual factors that determine the weight that courts should give to the free speech value in applying section 1 of the *Charter* these are disturbing propositions. The number of speakers suppressed by regulation must be immaterial. Typically unpopular speech—the speech that needs protection—will be expressed by very small numbers of persons with special interests, passions or knowledge. The wide currency of speech content or vast numbers who support it cannot sensibly be the criteria for protected speech. With respect to the limited nature of speech impairment that flows from financial penalties on speech, as has already been noted, legislation that strips away payment for expressive activity of any sort—art, theatre, polemics, criticism, analysis, self-justification, advocacy, adjudication and so forth—will produce a great deal of speech suppression. Most expression, especially commentary on public issues, takes considerable time, effort and re-

while not a unique legislative strategy, violates the precept that state regulation should be couched in general terms and be applied generally. While, as a matter of statutory form, neither condition is lacking in this instance, the legislature's focus on a single event sends a chill to all citizens; it demonstrates that the forces of the state may be mustered against specific individuals. Admittedly, this is not a perspective that constitutional law specifically embraces.

120 *Thatcher, supra* note 3 at para 92. These contextual factors are identified by Zarzeczny J as demonstrating that the legislation minimally impairs rights and any impairment is a proportional response to the pressing need that is met by the legislation.

search. It is socially misguided to believe that preventing income from speech will not impact significantly on many people's choice to write or engage otherwise in expression, even if it might not have been a factor for Thatcher.

In fact, in applying section 1, the chambers judge did not base his analysis on the evidence, drawn from the legislative record, of outrage over a Colin Thatcher book[121] or on the context of the speech activity that is regulated. Instead, he relied on the view that the *Notoriety Act* is justifiable under section 1 as a measure to prevent criminals from profiting from their crimes and, therefore, serves as an important crime prevention initiative. He saw the *Notoriety Act* as an aspect of the long-held societal value that crime does not pay—or should not pay.[122] The judge also connected that social precept to the goal of "promoting a 'law abiding' citizenry through the imposition of criminal sanctions … [and of] confiscating profits sought to be derived by perpetrators of serious crimes from the exploitation of the notoriety of their crimes."[123] The point to be made about this justification is that any number of post-conviction and post-incarceration limitations imposed on criminals could serve as general disincentives to criminal activity or could be seen as making a connection between a criminal's present social conditions and his or her criminal act.[124] The question is whether these strategies of imposing post-conviction impairments can satisfy the constitutional standard of reasonable limitations on protected liberties. This, in turn, raises the issue, identified in *Oakes,* of whether the impairment of a right is "proportional" to the social good that the impairment may produce.

ii. Benefits achieved outweigh harms resulting from the violation of rights

This consideration was not a difficult matter for the chambers judge in this case since, in his view, "the *Act* does not interfere with the right of Mr. Thatcher … to recount his crime … it merely confiscates any profits derived from the

121 This outrage, which clearly existed politically, could be related to the idea of a convicted person gaining payment from telling his story, but it seems equally possible to be the reaction to a person who has been found guilty of a brutal crime and is pleading at length, and repeatedly, the case for his innocence.

122 "It has long been a public policy reflected in the law that individuals should not realize profits from their crime or acts of criminality" (*Thatcher*, *supra* note 3 at para 81); "There is another important social value fundamental to a free and democratic society and it is captured in society's long held view that 'crime does not pay'" (*ibid* at para 85).

123 *Ibid* at para 85.

124 Of course, another implication of this justification for impairing speech is that it wholeheartedly endorses the view that the *Notoriety Act* is designed to punish persons for criminal acts. This purpose is not available to the province under the federal division of powers.

recounting."[125] Whether the *Notoriety Act* actually helps to establish the moral precept of persons not gaining from crime that the chambers judge claims lies behind it, and whether continuous impairment of criminals is proportionate to the loss of liberties, are not questions he explored. The answers are assumed. Resort to very general social precepts that support rights limitation is far from the process of justification that was prescribed in the *Oakes* decision.

The chambers judge also offered an alternative justification for this impairment of a *Charter* right, "providing a fund for the compensation [crime] victims."[126] State seizure of monies for any purpose does, indeed, generate a fund for that purpose, but does this benefit outweigh the loss of the *Charter* right? It might, of course, if the right were to be only trivially impaired but, generally, the stripping away of the benefits that flow from creating works of expression, particularly political expression, would not be considered a trivial interference with the right to free speech.

In short, the decision in Thatcher, that the province's purposes justify the loss of Mr. Thatcher's *Charter* protections, strikes us as conclusory. This deficiency in judicial justification arises from the chambers judge's view that there is no *Charter* violation to worry about and this conclusion rests on two misconceptions—first, that the book that Thatcher wrote lacked significant social value, was only commercial speech and had no serious political or public administrative purpose and, second, that the capturing authors' royalties does not significantly interfere with the constitutional right to freedom of expression, "including freedom of the press and other media of communication."

VIII. Conclusion

When a nation decides to place the protection of basic rights and liberties under its constitutional order, it does so in recognition that its legislature (or, as in the case of Canada, its legislatures) may need to be checked against the enactment of legislation that is insufficiently attentive to those basic rights. But it is not just the liberties and rights contained in the *Charter* that offers this protection against legislative and administrative indifference to the rights of citizens and others. The rule of law also stands for similar ideas of equal

125 *Thatcher, supra* note 3 at para 89. Of course, it is doctrinally confused to answer the issue of the proportionality between the social goal and the *Charter* restriction by revisiting the question of *Charter* violation and concluding that "the Act does not interfere with the right of Mr. Thatcher or any other criminal to recount his crime" (*ibid*).

126 *Ibid* at para 88.

respect and dignity.[127] Under the rule of law, the laws of a nation must have general application and they must be applied equally, and with equal care and diligence, to all persons. Determinations of law must ultimately be accountable before an independent body and, perhaps most important of all, these determinations must accord with the terms of established legal order.[128]

The perennial risk to the rule of law and to constitutionally recognized rights is that there will sometimes be people, or classes of people, or groups, who fall out of the moral realm in which everyone is granted equal concern and enjoys equal care in the making and applying of law. In the case of Colin Thatcher's book, it appears that the unpopularity and opprobrium that attached to his murder of JoAnn Wilson, and the notoriety of his life as a politician turned murderer, made him and his book ineligible for the legal respect that we are constitutionally foreclosed from denying to any person. In the legislature, politicians expressed affront over this book far more vehemently than they tried to advance any general and principled distributive policy. In the court application for the recovering royalty payments, there was insufficient attention paid to the need of both Thatcher, and the public, to have questions of constitutional validity and application canvassed and adjudicated as scrupulously and carefully as they should have been—as we have every right to expect them to be.

This episode in the administration of justice in Saskatchewan presents the law's sad potential for indifference to those whose worth we have come to discount, and to whom, it seems, we believe we owe only an attenuated version of our legal process—in other words, to those who have fallen from the grace of equal respect and dignity.

127 The close connection between constitutionalism (including the constitutional protection of rights) and the rule of law was made by the Supreme Court of Canada in *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR]. The Court stated, "The principles of constitutionalism and the rule of law lie at the root of our system of government" (*ibid* at para 70).

128 In the *Secession Reference*, *ibid*, the Court adopted the description of the rule of law given in the *Patriation Reference (Re Resolution to Amend the Constitution)*, [1981] 1 SCR 753, 125 DLR (3d) 1 [cited to SCR]: "[t]he 'rule of law' is a highly textured expression, importing many things … but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*ibid* at 805-6). In the *Secession Reference* the Court added, "At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action" (*supra* note 127at para 70).