

# THE MAGIC GUN: SETTLER LEGALITY, FORENSIC SCIENCE, AND THE STANLEY TRIAL

Emma Cunliffe\*

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*This article assesses the RCMP's forensic investigation into the death of Colten Boushie, the physical evidence at Gerald Stanley's trial, and the differential treatment of Indigenous and settler Canadian witnesses throughout the process. The Stanley trial played out against a backdrop of concerns about systemic racism and anti-Indigenous bias within the Canadian legal system. Research also documents that forensic science is vulnerable to cognitive and contextual biases. This article documents how these currents combined in Stanley, such that serious questions arise about the quality of police work in this case; and why well-established legal safeguards against wrongful verdicts were not engaged.*

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*Dans cet article, l'auteure évalue l'enquête médico-légale menée par la GRC sur la mort de Colten Boushie, les éléments de preuve matériels produits au procès de Gerald Stanley ainsi que le traitement différencié des témoins autochtones et allochtones tout au long des procédures. Le procès Stanley s'est déroulé sur un fond de préoccupations marquées par le racisme systémique et des préjugés anti-autochtones au sein du système juridique canadien. La recherche documente en outre le fait que la science médico-légale est vulnérable aux préjugés cognitifs et contextuels. L'auteure de cet article montre la manière dont ces tendances se sont cumulées dans l'affaire Stanley, jetant un doute important sur la qualité du travail policier dans ce dossier, et où des mesures de protection législative bien établies contre des verdicts erronés n'ont pas été appliquées.*

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\* Professor, Allard School of Law, UBC; Senior Visiting Fellow, School of Law, University of New South Wales, member of the Evidence Based Forensics Initiative. This manuscript reproduces passages from an article published as Emma Cunliffe, "[The Forensic Failures of the Stanley trial](#)" (27 September 2018), online: Policy Options <[policyoptions.irpp.org/](http://policyoptions.irpp.org/)>. Winona Wheeler, Jeffery Hewitt, Harry LaForme, and Constance Backhouse heard early versions of this work and asked me questions that made this piece better. I am tremendously grateful to them. I am also grateful to Kaye Ballantyne, Kent Roach and two anonymous reviewers for very helpful input. This manuscript was produced as part of Project Fact(a), a group led by Signa Daum-Shanks, whose leadership has inspired this project. I gratefully acknowledge the University of Windsor Law School, who obtained the transcripts on which this article is based; and Patricia Barkaskas and the students in my 2020 summer seminar, who helped me find ways to articulate my profound discomfort with this case. Any errors that remain are, of course, mine. This work is funded by a SSHRC Insight Grant on expert evidence and violence towards Indigenous people.

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Settler colonialism is the management of those who have been made killable, once and future ghosts—those that had been destroyed, but also those that are generated in every generation ... Haunting, by contrast, is the relentless remembering and reminding that will not be appeased by settler society’s assurances of innocence and reconciliation.<sup>1</sup>

### 1. Introduction

The legal record does not establish exactly what happened in the moments before a bullet from Gerald Stanley’s gun killed Colten Boushie.

I am haunted by the grammar of my first sentence. At Stanley’s trial, the relentless cause-and-effect of trigger pull, hammer strike, primer explosion, propellant ignition, bullet propulsion became entangled within, and fragmented by, colonial law’s relentless logic of proof and doubt. I would prefer to say: the moments before Gerald Stanley shot Colten Boushie in the head. But when he testified, Gerald Stanley denied intention or even awareness of this act; by his account, the gun was never pointed, nor the trigger pulled, in Colten Boushie’s vicinity. Perhaps Stanley’s account was enough to raise a reasonable doubt in the minds of the jury. Perhaps the acquittal has other, deeper origins. Certainly, I acknowledge my responsibility to choose my words carefully. I also acknowledge the ways in which my careful language effaces moral agency and responsibility for the death of a young Indigenous man.<sup>2</sup>

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<sup>1</sup> Eve Tuck & C Ree, “A Glossary of Haunting” in Stacy Holman Jones, Tony E Adams & Carolyn Ellis, eds, *Handbook of Autoethnography* (Walnut Creek, CA: Left Coast Press, 2013) at 642.

<sup>2</sup> Patricia Williams, “[Language is part of the machinery of oppression—just look at how black deaths are described](#)” (10 June 2020), online: *The Guardian* <[www.theguardian.com/commentisfree](http://www.theguardian.com/commentisfree)>.

At Stanley's trial, the prosecution argued that Stanley deliberately pointed the gun and pulled the trigger, intending to kill Boushie.<sup>3</sup> Stanley testified that he believed his gun was empty when he approached Boushie, and that the lethal bullet had discharged spontaneously without any proximate trigger pull.<sup>4</sup> Stanley's lawyer, Scott Spencer, put forward the theory, and some supporting evidence,<sup>5</sup> that the bullet that killed Boushie discharged as a result of a phenomenon called hang fire, entailing a perceptible delay between trigger pull and bullet discharge.<sup>6</sup> The evidence about whether a hang fire of several seconds is even possible was very mixed.<sup>7</sup>

Forensic evidence suggested that Boushie was shot in the head while sitting in the driver's seat of a vehicle that had been disabled by a previous collision. However, the trial record also shows that the crime scene investigation was very poorly managed, and that forensic evidence which one would expect to be available in a case such as this had been lost or was never secured by the RCMP. In this paper, I argue that poor forensic practices on the part of the RCMP facilitated Stanley's acquittal and that these problems were exacerbated by the mishandling of the forensic evidence that was given at trial. These poor practices included a failure to protect the crime scene and the RCMP's sole reliance on eyewitness accounts provided by the Stanley family when searching for forensic evidence even though Indigenous eyewitnesses had provided statements that suggested events had played out differently. My appraisal of the RCMP's forensic investigation in this case adds substance to concerns about the operation of systemic racism within police investigations of the violent deaths of Indigenous people.<sup>8</sup>

In June 2020, RCMP Deputy Commissioner Curtis Zablocki and Commissioner Brenda Lucki opined, in separate statements, that the

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<sup>3</sup> *R v Stanley*, Trial transcript at 856 [*Stanley Trial Transcript*] (Crown closing address to the jury).

<sup>4</sup> *Ibid* at 694–95 (Gerald Stanley, evidence in chief), 750–51 (Gerald Stanley, cross-examination).

<sup>5</sup> *Ibid* at 579–85, 589–91 (John Ervin, evidence in chief); *Ibid* at 615–18 (Wayne Popowich, evidence in chief); *Ibid* at 618–23 (Wayne Popowich, cross-examination); *Ibid* at 625–29 (Nathan Voinorosky, evidence in chief).

<sup>6</sup> *Ibid* at 853–54 (Defence closing address to the jury).

<sup>7</sup> See Part 4, below, for more on this topic.

<sup>8</sup> With respect to police investigation of cases of murdered and missing Indigenous women, girls, trans and two-spirit people, see [Reclaiming Power and Place: Final Report of the National Inquiry into Murdered and Missing Indigenous Women and Girls](#), vol 1b (2019) at 183–84, 191–92, online (pdf): <[www.mmiwg-ffada.ca](http://www.mmiwg-ffada.ca)> [*Reclaiming Power and Place*].

RCMP is not systemically racist.<sup>9</sup> After widespread condemnation, both leaders acknowledged the existence and operation of systemic racism within the RCMP, identified that they have more to learn, and vowed that they will help to address and overcome systemic racism.<sup>10</sup> Zablocki was Assistant Commissioner in the RCMP and Commanding Officer for Saskatchewan during the Stanley investigation and trial. He has a history of rejecting concerns about the RCMP's dealings with Indigenous people.<sup>11</sup> Lucki has been in possession of an interim report and recommendations prepared by the Civilian Cases Review Commission ("CCRC") regarding the RCMP's work on Boushie's death since January 2020. The questions considered by the CCRC included:

Whether RCMP members or other persons appointed or employed under Part I of the RCMP Act involved in this matter conducted a reasonable investigation into the death of Mr. Boushie; ...

Whether the conduct of RCMP members or other persons appointed or employed under Part I of the RCMP Act involved in this matter amounted to discrimination on the basis of race or perceived race.<sup>12</sup>

As seems to have become standard, the CCRC's investigation and reporting process has stalled because the RCMP has not supplied its statutorily mandated response.<sup>13</sup> The RCMP stated in February 2020, "that some of

<sup>9</sup> Carolyn Dunn, "[Alberta RCMP Deputy Commissioner denies systemic racism in policing in Canada](#)" (09 June 2020), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>; Daniel LeBlanc & Kristy Kirkup, "[RCMP Commissioner 'struggles' with definition of systemic racism, but denies its presence in organization](#)" (10 June 2020), online: *Globe and Mail* <[www.theglobeandmail.com/](http://www.theglobeandmail.com/)>.

<sup>10</sup> Brenda Lucki, "[Statement by Commissioner Brenda Lucki](#)" (12 June 2020), online: *Royal Canadian Mounted Police* <[www.rcmp-grc.gc.ca/en/news](http://www.rcmp-grc.gc.ca/en/news)>; Curtis Zablocki, "[A Statement from Deputy Commissioner Curtis Zablocki, Commanding Officer of the Alberta RCMP](#)" (12 June 2020), online: *Royal Canadian Mounted Police* <[www.rcmp-grc.gc.ca/en/news](http://www.rcmp-grc.gc.ca/en/news)>.

<sup>11</sup> "[RCMP rejects Colten Boushie family lawyer's allegations of racial bias](#)" (11 August 2018), online: *Regina Leader Post* <[www.leaderpost.com/news](http://www.leaderpost.com/news)>; Steve Lambert, "[Indigenous women in Saskatchewan subject to police mistreatment: report](#)" (19 June 2017), online: *CTV News* <[www.ctvnews.ca](http://www.ctvnews.ca)>.

<sup>12</sup> Civilian Review and Complaints Commission for the RCMP, *Chair-Initiated Complaint and Public Interest Investigation into the RCMP's investigation of the death of Colten Boushie*, (Press Release), (06 March 2018), online: <[www.crcc-ccetp.gc.ca/](http://www.crcc-ccetp.gc.ca/)>.

<sup>13</sup> Catharine Tunney, "[RCMP watchdog's misconduct reports caught in limbo, stalling their release](#)" (07 June 2020), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>.

the commission's findings are 'complex' and any of them could have far-reaching implications for the organization."<sup>14</sup>

Indigenous commentators and government reports have documented that Indigenous people's deaths are under-investigated, and that Indigenous deaths in suspicious circumstances receive less official attention than the deaths of settler Canadians.<sup>15</sup> Sherene Razack has also researched these patterns and concluded that police, health care authorities and the legal system exhibit "a killing indifference"<sup>16</sup> to the lives and dignity of Indigenous people in Canada. Razack suggests that this indifference is apparent in moments where "almost no one devotes their full professional energies" to investigating violent Indigenous death.<sup>17</sup>

The operation of systemic racism towards Indigenous people has been documented in the Canadian legal system,<sup>18</sup> police services,<sup>19</sup> health system,<sup>20</sup> and coronial processes.<sup>21</sup> The Chief Forensic Pathologist for Saskatchewan—who conducted the autopsy on Boushie but did not testify at trial—has been accused of making racist comments in the course of his work.<sup>22</sup> He denies this allegation. A recent review of the Saskatchewan

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<sup>14</sup> Guy Quenneville, "[Police watchdog's investigative file, recommendations on Colten Boushie case now in hands of RCMP](#)" (27 February 2020), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>.

<sup>15</sup> See e.g. Tanya Talaga, *Seven Fallen Feathers: Racism, Death and Hard Truths in a Northern City* (Toronto: House of Anansi Press, 2017); *Reclaiming Power and Place*, *supra* note 8; Alvin Hamilton & Murray Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) [*Report of the Aboriginal Justice Inquiry of Manitoba*].

<sup>16</sup> Talaga, *supra* note 15 at 136.

<sup>17</sup> *Ibid* at 166.

<sup>18</sup> *R v Williams*, [1998] 1 SCR 1028, 159 DLR (4th) 493 [Williams]; *R v Ipeelee*, 2012 SCC 13.

<sup>19</sup> *Report of the Aboriginal Justice Inquiry of Manitoba*, *supra* note 15 at vol 1, ch 16; René Dussault et al, *Royal Commission on Aboriginal Peoples: Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Government of Canada, 1996) at 34–39, online (pdf): <[data2.archives.ca/rcap/pdf/rcap-464.pdf](http://data2.archives.ca/rcap/pdf/rcap-464.pdf)>.

<sup>20</sup> Brenda Gunn, "[Ignored to Death: Systemic Racism in the Canadian Healthcare System](#)" Submission to the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") The Study on Health, online (pdf): *Office of the High Commissioner for Human Rights* <[www.ohchr.org](http://www.ohchr.org)>.

<sup>21</sup> Talaga, *supra* note 15.

<sup>22</sup> "[Sask. man awarded \\$5M in lawsuit against coroner's office over assessment](#)" (09 November 2017), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>. This jury verdict and damages award was overturned on appeal, and a new trial ordered: *Saskatchewan v Racette*, 2020 SKCA 2.

Office of the Chief Coroner, which was prompted in part by concerns about how the office investigates Indigenous people's deaths, concluded that staff should develop strategies to address the lack of trust felt by many Indigenous people but, remarkably, does not mention racism.<sup>23</sup> The quality of the investigation into Boushie's death and the conduct of Stanley's trial must be assessed in light of this well-documented body of concerns about the operation of systemic racism within Saskatchewan's and Canada's criminal legal systems.

I believe that the RCMP's investigation of Colten Boushie's death was bungled from the outset. The transcripts disclose lost opportunities to collect, analyze and present independent evidence against which Stanley's testimony, the testimony of eyewitnesses, and the hang fire theory could have been assessed. The collection of such evidence is routine in homicide cases, including those in rural areas policed by the RCMP.<sup>24</sup> Considering these failures in light of early media statements and documents that provide a glimpse of the RCMP's thinking about this case, gives heft to the concern that the RCMP's approach to this case was tainted by systemic racism and tunnel vision, manifesting the systemic indifference towards Indigenous lives and death that others have documented. The transcripts also contain gaps—silences—that hint that police witnesses may have been choosing carefully what information they would share in open court, and what to gloss over. At trial, the state's failure to preserve, analyze and draw the jury's attention to forensic evidence that could have supplied objective information about the trajectory of the bullet created significant gaps in the case for conviction.

When the case came to trial, Spencer characterized Boushie and his friends as lawless, threatening and dishonest while expressly inviting the entirely non-Indigenous jury<sup>25</sup> to empathize with Stanley ("I'm going to ask you to put yourself in Gerry's boots."<sup>26</sup>) Spencer characterized Stanley's responses to the threat presented by Boushie and his friends as proportionate and reasonable, and the supposed hang fire as an unforeseeable but admittedly tragic sequelae to a volatile situation that was wholly of the Indigenous youths' making. Via this strategy, Spencer

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<sup>23</sup> Saskatchewan, *A Review of the Office of the Chief Coroner*, by Clive Weighill (20 June 2018), online (pdf): <<https://www.saskatchewan.ca/government/>>.

<sup>24</sup> See e.g. *R v Wolff*, 2018 SKQB 220; *R v Sheepway*, 2018 YKSC 4; *R v Garnier*, 2018 NSSC 196; *R v McDonald*, 2015 BCSC 2088; *R v Mildenerger*, 2015 SKQB 27.

<sup>25</sup> Media reports suggest that the defence used peremptory challenges to exclude five visibly Indigenous jury candidates. See e.g. Joe Friesen, "[Government proposes changes to jury selection after the Colten Boushie case](#)" (29 March 2018), online: *The Globe and Mail* <[www.theglobeandmail.com/](http://www.theglobeandmail.com/)>.

<sup>26</sup> *Stanley Trial Transcript*, *supra* note 3 at 840 (Defence closing address to the jury). See also at 842.

offered a narrative that likely ameliorated the moral burden of acquitting a man who, on any view of the evidence, pointed a gun at Boushie's head. The errors made in the forensic investigation hobbled the prosecution, enabling this defence narrative to gain strength.

In Part 2 of this article, I draw on media releases and court records to trace the RCMP's investigation into Boushie's death from its earliest hours through to trial. I point to the ways in which early mistakes and early assumptions set the course for this case within 24 hours of Boushie's death, and that these errors demonstrate that there is reason to be concerned about the operation of anti-Indigenous bias in the police investigation in this case. In Part 3, I turn to international trends in forensics and suggest that the Canadian and RCMP's approach to the forensic sciences has fallen behind best practices in peer jurisdictions. I argue that this state of affairs not only gives rise to concerns about the risk of wrongful convictions, but that the *Stanley* example also illustrates that we should be concerned about the possibility that poor-quality forensic practice also facilitates wrongful acquittals, particularly in cases involving the violent deaths of Indigenous people. In Part 4, I turn to the hang fire defence offered by Stanley at trial. I explore the evidence offered in support of that theory, and argue that evidence offered by lay witnesses about hang fire should never have been received. I also explain that the prosecution failed to remind the jury that other independent evidence in the case provided information against which Stanley's testimony could be tested. In Part 5, I consider the trial judge's responsibilities with respect to jury instructions, particularly in light of submissions made by defence counsel about Boushie's and his companions' activities on the day of Boushie's death. The article concludes by endorsing calls made by Boushie's family for an inquiry into the investigation and conduct of this case.

## 2. A "Complex Investigation"

The RCMP issued a press release within 24 hours of Boushie's death. At that time, the RCMP was still waiting for a judicial warrant to return to the Stanley farm to conduct its crime scene investigation, including to search for trace evidence. The press release offers some insight into the early working theory of the RCMP investigators:

Initial investigation has revealed five individuals entered into private property by vehicle in the rural area and were confronted by property owners who were outside and witnessed their arrival.

The occupants of the vehicle were not known to the property owners. A verbal exchange occurred in an attempt to get the vehicle to leave the yard and ultimately a firearm was discharged, striking an occupant in the vehicle ... [O]ne adult male (who arrived in the vehicle) was suffering from an apparent gunshot wound and was declared deceased at the scene. An autopsy will be conducted later this week to confirm the deceased's identity.

One adult male associated to the property was arrested by police at the scene without incident. Three occupants from the vehicle, including two females (one being a youth) and one adult male were taken into custody as part of a related theft investigation. Another male youth is being sought, his identity is still being confirmed at this time.

...

We are at the early stages of this complex investigation.<sup>27</sup>

The RCMP's media release resonated with discriminatory stereotypes about the threat presented by Cree youth to law and order in rural Saskatchewan.<sup>28</sup> The Federation of Sovereign Indigenous Nations ("FSIN") observed that this press release "provided just enough prejudicial information for the average reader to draw their own conclusions that the shooting was somehow justified."<sup>29</sup> As the FSIN identified, the press release is premised upon the Stanley family's account of the events leading up to Boushie's death and it appears to provide support for that account, framing events as beginning with an incursion onto private property and stating that the occupants of the vehicle had been arrested for theft.<sup>30</sup>

This press release provides an illuminating glimpse of the RCMP's orientation to this investigation in its earliest hours. For example, the stated purpose of the anticipated autopsy is to ascertain the deceased man's identity—not to gather more information about the manner of his death. This stated purpose is particularly striking in light of media

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<sup>27</sup> ["Major Crime Unit North: Ongoing Investigation in the Biggar Area"](#) (10 August 2016), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)> [RCMP statement at end of article].

<sup>28</sup> See *Williams, supra* note 18 at para 58 citing Michael Jackson, *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988).

<sup>29</sup> Joe Friesen, ["The Night Colten Boushie died: What family and police files say about his last day, and what came after"](#) (20 October 2016), online: *Globe and Mail* <[www.theglobeandmail.com/](http://www.theglobeandmail.com/)> [Friesen, *The night Colten Boushie Died*]; See also ["RCMP Respond to FSIN Statement on Fatally Shot Indigenous Man"](#) (12 August 2016), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>.

<sup>30</sup> See further, Estair Van Wagner & Alexandra Flynn, "A Colonial Castle: Defence of Property in *R v Stanley*" (2020) 98:2 *Can Bar Rev.*



reports that the RCMP had already informed Boushie's mother Debbie Baptiste in the most callous imaginable way that her son Colten had died. Seven armed officers went to Baptiste's home to inform her of her son's death and to search for Cassidy Cross, who had fled the Stanley farm after Stanley fired shots. Baptiste alleges that an RCMP member told her to "get it together" when she collapsed on the floor after learning of her son's death, and another asked her if she had been drinking.<sup>31</sup> These allegations are within the scope of the CCRC investigation and also form the basis of a lawsuit filed by the Baptiste family against the RCMP officers involved.<sup>32</sup>

Also on 10 August 2016, the RCMP filed an application for a search warrant, seeking judicial permission to re-enter the Stanley's farm to conduct further investigation. CBC obtained a copy of the RCMP's information to obtain ("ITO") this warrant. CBC reported that the ITO states that the purpose of the search was:

[T]o search Gerald Stanley's property ... for blood of Colten Boushie, the Tokarev semi-automatic handgun and ammunition magazine, spent shell casings and ammunition used to shoot Colten Boushie, a grey 2003 Ford Escape, and the paint samples from a blue 2012 Ford Escape.<sup>33</sup>

CBC's report about the ITO suggests that, from the earliest stages of the investigation, the RCMP relied heavily on the eyewitness account of Gerald Stanley's son Sheldon to help them piece together what had happened in the lead up to Boushie's death. Police interviews with Gerald Stanley and with the surviving members of Boushie's party are also summarized within the ITO. The ITO notes that "Gerald Stanley agreed with Const. Gullacher when Const. Gullacher told him that Gerald Stanley went up to the driver's side window and shot the male driver once in the head and killed him."<sup>34</sup> The preliminary hearing transcripts suggest that by the time they filed the ITO, the RCMP had also interviewed the Indigenous eyewitnesses, and that they had provided statements that contradicted the Stanley family's account in crucial respects.<sup>35</sup> These facts were not

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<sup>31</sup> See the account supplied in: Friesen, *The night Colton Boushie Died*, *supra* note 29.

<sup>32</sup> *Baptiste et al v Canada (AG) et al*, (Statement of Claim, Court of Queen's Bench for Saskatchewan, File 1245 of 2018).

<sup>33</sup> Dan Zakreski, "[RCMP search warrant application shows early findings and theory in Colten Boushie shooting](#)" (25 October 2016), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>.

<sup>34</sup> *Ibid.*

<sup>35</sup> *R v Stanley*, Preliminary Hearing Transcripts at 124 [*Stanley Preliminary Hearing Transcript*] (Eric Meechance, cross-examination, 3 April 2017); *Ibid* at 202 (Cassidy Cross, cross-examination, 3 April 2017); *Ibid* at 283 (Kiora Wuttunee, cross-examination, 4 April 2017); *Ibid* at 312 (Belinda Jackson, cross-examination, 4 April 2017).

documented within the ITO, and the testimony subsequently given by police witnesses suggests that the RCMP paid little to no regard to the accounts given by the Indigenous eyewitnesses in their search for forensic evidence.

According to CBC, the ITO sets out the RCMP's working theory of the case as follows:

I believe that the group then went to Gerald Stanley's property [in an attempt 'to steal property and vehicles'] and were interrupted by Gerald and his son Sheldon Stanley. The group attempted to flee and struck Leesa Stanley's blue Ford Escape damaging it, as well as disabling the grey 2003 Ford Escape ...

I believe that during this incident, [Colten] Boushie was in the driver's seat of the grey 2003 Ford Escape and was shot and killed by Gerald Stanley.<sup>36</sup>

It emerges from this report that the RCMP believed that Boushie was shot by Stanley as he sat in the driver's seat of the vehicle in which he had entered Stanley's farm. Accordingly, the RCMP wanted permission to seek trace evidence such as blood spatter evidence and spent cartridges.

Corporal Terry Heroux testified at Stanley's trial that the RCMP crime scene investigation began at 12:30 a.m. on 10 August 2016. This was approximately seven hours after Boushie was killed. The investigation continued—through the night and therefore largely in the dark—until 6:00 a.m. that day. However according to Heroux, when Boushie's body was removed from the scene, the RCMP was required to withdraw from the farm and await the warrant to recommence its investigation.<sup>37</sup> Heroux testified that when he left the scene, he anticipated being able to return within "a couple of hours". He said that a delay in obtaining the warrant—the cause of which was never explained at trial or during the preliminary hearing—meant that he was unable to return to the scene until the morning of 11 August, more than 36 hours after Boushie's death.<sup>38</sup>

Heroux and his colleagues failed to take any steps to protect the scene before they left the Stanley farm on the morning of 10 August. For example, they did not arrange to have the immediate area of the shooting covered using a tarpaulin or tent. They left open the driver's door of the Ford Escape in which Boushie was shot.<sup>39</sup> The glass in the passenger

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<sup>36</sup> *Supra* note 33.

<sup>37</sup> *Stanley Trial Transcript, supra* note 3 at 113–14 (Corporal Terry Heroux, examination in chief).

<sup>38</sup> *Ibid* at 120.

<sup>39</sup> *Ibid.*

side window had shattered, and this side of the car was therefore also left open to the elements. As it transpired, more than 40 mm of rain fell before Heroux returned.<sup>40</sup> A comparison between photographs taken on the night of Boushie's death and those taken 36 hours later suggests that the rain had a profound effect on the trace evidence. Differences are evident even to an untrained eye; for example, blood patterns that could previously be seen on the driver's door and nearby were essentially washed away. Heroux testified that the car was "sopping wet," such that even after towing it to an RCMP forensic facility, he had to allow it to dry out before he could process it further.<sup>41</sup>

The transcript does not indicate precisely when the RCMP decided that there was no value in asking a blood spatter analyst to view the car and crime scene. However, the evidence given at trial suggests that the crime scene investigator first contacted the blood spatter expert after the Ford Escape had been towed to the RCMP forensic facility—and therefore, after it had been left in the rain.<sup>42</sup> In cross-examination, Heroux said that when they spoke neither he as crime scene investigator, nor the expert with whom he consulted, RCMP Sergeant Jennifer Barnes, could "see the need" for her work.<sup>43</sup> Both witnesses indicated that this case was not at that time regarded as a complex crime scene,<sup>44</sup> and that they were working on the belief that there was no serious question about Boushie's position at the time he was shot. For example, Heroux had the following exchange with defence counsel:

Q. ... So—so you didn't know with any degree of certainty which direction the bullet or the projectile even went through the vehicle?

A. Well, and that's—I did have opportunity to speak with Major Crimes, and I know that they had witness statements putting—putting the accused at the driver's side window shortly after a gunshot was heard. So the driver's side was certainly a possibility.

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<sup>40</sup> *Ibid* at 122–23. It is unclear from the transcript how much of this rain fell between the evening of 10 August, when the warrant was issued and the morning of 11 August, when Heroux returned to the scene. It is possible that the RCMP missed another opportunity to preserve the scene in that time.

<sup>41</sup> *Ibid* at 135.

<sup>42</sup> *Ibid* at 202–03 (Sergeant Jennifer Barnes, evidence in chief).

<sup>43</sup> *Ibid* at 172 (Corporal Terry Heroux, cross-examination). See also *Stanley Preliminary Hearing Transcript*, *supra* note 35 at 44 (Corporal Terry Heroux, cross-examination, where the witness asserts, "I've taken blood spatter pattern analysis courses ... and I also understand what the limitations of a blood pattern ... analysis are, and what they can offer at a scene").

<sup>44</sup> *Stanley Trial Transcript*, *supra* note 3 at 212 (Sergeant Jennifer Barnes, cross-examination).

Q. Okay. And were you aware there was a witness saying the exact opposite?

A. No.<sup>45</sup>

At the earliest stages of the investigation, Corporal Heroux, the RCMP officer who was assigned responsibility for the physical evidence, appears to have operated on the premise that there was little question about the manner in which Boushie's death occurred. His working understanding was that Gerald Stanley approached the driver's side window with a gun, Boushie was sitting in the driver's seat and, by one means or another, the shooting occurred while the two remained in those positions.

As Spencer's question highlights, Heroux failed to investigate alternative possibilities arising from witness statements provided by Boushie's companions—for example, the proposition that Boushie was in the front passenger seat and that Stanley had approached the passenger side of the vehicle. While both Heroux and Barnes testified that they had considered this version of events unlikely, their evidence was hamstrung by the inadequate preservation and analysis of the crime scene. The investigation's nearly sole reliance upon Sheldon Stanley's version of events meant that the RCMP did not collect independent evidence that could have assisted the jury to determine precisely how the bullet that killed Boushie travelled, and exactly where Boushie was positioned within the car at the time he was shot. The failure to search for independent evidence raises the inference that, from the outset, the police were making assessments about the credibility of eyewitnesses that structured what evidence they looked for. These early decisions would prove crucial at the trial.

Like all human decision-makers, forensic practitioners are susceptible to bias. Bias in this context includes something subtler than corruption or deliberate partiality. The most insidious forms of bias are unconscious<sup>46</sup>—i.e. the forensic practitioner herself is unaware of the effects of bias on her reasoning—and systemic<sup>47</sup>—i.e. perpetuated through apparently neutral institutional practices. An example of unconscious bias that has

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<sup>45</sup> *Ibid* at 168 (Corporal Terry Heroux, cross-examination).

<sup>46</sup> See Itiel E Dror, "Practical Solutions to Cognitive and Human Factor Challenges in Forensic Science" (2013) 4:3/4 *Forensic Science, Policy & Management: An Intl J* 105; "[Guidance: Cognitive Bias Effects Relevant to Forensic Science Examinations](#)" (2015), online (pdf): *Forensic Science Regulator* <assets.publishing.service.gov.uk/>.

<sup>47</sup> Justin D Levinson & Robert J Smith, "[Systemic Implicit Bias](#)" (2017) 126 *Yale LJ Forum* 406, online: <[www.yalelawjournal.org/forum/systemic-implicit-bias](http://www.yalelawjournal.org/forum/systemic-implicit-bias)>.

been documented in forensic science and medicine is tunnel vision.<sup>48</sup> Tunnel vision arises when police and forensic scientists settle early in the investigation on a single and overly narrow theory of what happened, and do not adequately investigate the possibility of alternative explanations. The focus of the RCMP investigation in the hours immediately after Boushie was shot give rise to concerns about tunnel vision, suggesting that the RCMP largely accepted the Stanley family's account and failed to investigate whether physical and forensic evidence might exist pursuant to conflicting information provided by Boushie's companions.

Other examples of unconscious bias are contextual bias and confirmation bias,<sup>49</sup> in which the independence of the forensic practitioner's judgment is imperceptibly affected by information that is not integral to the task she must perform. As a hypothetical example of confirmation bias, a fingerprint examiner may be told that senior colleagues have already decided that two fingerprints do not match before being asked to make her own comparison. Even if she faithfully follows procedure to conduct her own analysis, research shows that her judgment is likely to be affected by an implicit expectation that is instilled by the information about her colleagues' conclusions.<sup>50</sup> Contextual bias arises where the forensic practitioner is exposed to other information which is irrelevant to her task but which suggests a correct answer. For example, a forensic practitioner may be told that a suspect whose fingerprints she is comparing to those found at the crime scene has already admitted to having been present at the scene. The operation of unconscious bias is almost impossible to identify with certainty, because by definition the forensic practitioner is unaware that it is affecting her judgment. It is best avoided by carefully limiting the information to which a forensic practitioner is exposed and by requiring forensic practitioners to follow operating procedures that minimize bias.<sup>51</sup> After the fact, its potential

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<sup>48</sup> Public Prosecution Service of Canada, *Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions: The Path to Justice: Preventing Wrongful Convictions*, ch 4, online: <www.ppsc-sppc.gc.ca>.

<sup>49</sup> Gary Edmond et al, "[Contextual bias and cross-contamination in the forensic sciences: the corrosive implications for investigations, plea bargains, trials and appeals](#)" (2015) 14:1 L Probability & Risk, online: <academic.oup.com/lpr/article/14/1/1/1820089>.

<sup>50</sup> Itiel E Dror, David Charlton & Alisa E Péron, "Contextual information renders experts vulnerable to making erroneous identifications" (2006) 156:1 *Forensic Science Intl* 74.

<sup>51</sup> Reinoud D Stoul et al, "Minimizing contextual bias in casework" in Kevin J Strom & Matthew J Hickman, *Forensic Science and the Administration of Justice: Critical Issues and Directions* (Thousand Oaks, CA: Sage Publications, 2014); Saul Kassin, Itiel E Dror & Jeff Kuckucka, "The forensic confirmation bias: Problems, perspectives, and proposed solutions" (2013) 2:1 *J Applied Research in Memory & Cognition* 42; Itiel E Dror et al, "The Bias Snowball and the Bias Cascade Effects: Two Distinct Biases that May Impact Forensic Decision Making" (2017) 62 *J Forensic Sciences* 832.

operation is best flagged by carefully assessing what information was available to a forensic practitioner when she performed her task.<sup>52</sup>

In *Stanley*, there is good reason to be concerned about the operation of unconscious bias within the forensic investigation. The testimony given by police witnesses, including forensic officers, suggests that a great deal of information was being shared between the investigators and forensic officers. These discussions appear to have been premised on the assumption that this was a straightforward case in which matters such as Boushie's position at the time he was shot were clear. Spencer demonstrated to the jury that Heroux's search for physical evidence was shaped by the investigators' early orientation to the case. However, there is also good reason to be concerned about the operation of more explicit anti-Indigenous bias. In addition to the allegations made by Baptiste about how the RCMP interacted with Boushie's family, Indigenous eyewitness Belinda Jackson spoke directly to this concern in her testimony at the preliminary hearing. The context in which this exchange arose is as follows: Jackson's friend had been shot and killed in front of her. She was then arrested by police on suspicion of theft and for assaulting Gerald Stanley's wife, Leesa.<sup>53</sup> Jackson testified that after Boushie was shot, Leesa Stanley had said, "That's what you get for trespassing." In response to that statement, Jackson hit Leesa Stanley.<sup>54</sup> After being handcuffed, Jackson was taken by the RCMP on a high-speed pursuit before being taken to the police lockup. It was only after being held in the police lockup that she was asked to make a statement about Boushie's death. The statement she made at that time differed in material respects to the account she provided at the preliminary hearing. In response to Spencer's suggestion that her testimony was therefore unreliable, Jackson sought to explain:

A. You can't really expect me to be truthful with these police that are like racist and thinking that I was on that farm to steal. I'm just saying what I remember.

Q. Okay. Were you aware that—

A. After I was being treated badly, it's —

Q. Okay.

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<sup>52</sup> The President's Council of Advisors on Science & Technology, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Washington: President's Council of Advisors on Science and Technology, 2016) online (pdf): <obamawhitehouse.archives.gov> at 31–32 [*PCAST Report*].

<sup>53</sup> Lisa Stanley's name is variously spelled Lisa or Leesa in the transcripts.

<sup>54</sup> *Stanley Preliminary Hearing Transcript, supra* note 35 at 308 (Belinda Jackson, examination in chief, 4 April 2017).

A. —that was me at the time.

Q. So you're saying you lied to the police?

A. I wouldn't say lie, it was just I really didn't know what to say. I didn't know how—how to say it. I didn't—

Q. So—

A. I was scared. I was in shock.<sup>55</sup>

...

Q. Well, they investigated, and they didn't charge you with theft?

A. Well, they put me in handcuffs, and I asked, Why am I being put in handcuffs, I just watched somebody die? And he said, Well, you're being arrested for theft.<sup>56</sup>

...

Q. So you were charged with assault though?

A. Yeah, I know, I was aware of that, but I was just—I'm aware of when I left. He gave me a paper and said that I was charged from Lisa Stanley with theft and—I mean, with assault, and then it got dropped after a while.

Q. So what part of it is unreasonable and racist to take you into custody and charge you with assault when you assaulted somebody, and then ask you for a statement in relation to a death? What part of that do you consider unfair?

A. I would—did I say it was unfair?

Q. Yeah. You said it was unfair. It was racist. You were so—

A. I didn't care that I was charged for assault, but for theft. When I—I asked,

Why am I being handcuffed? Like, can't you just put me in the back seat of the vehicle while he gets handcuffed?

Q. While who gets handcuffed?

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<sup>55</sup> *Ibid* at 329 (Belinda Jackson, cross-examination, 4 April 2017).

<sup>56</sup> *Ibid* at 331.

A. Gerald, when I know he was the one that shot him, but he—they threw me in the back seat of the vehicle.<sup>57</sup>

Jackson's testimony at the preliminary hearing provides the clearest account supplied by any witness of what occurred in the earliest moments of the police investigation. Her account suggests that the police focused on the Indigenous eyewitness as the immediate source of threat, and therefore resonates with Baptiste's account of the aggressive police incursion into her property. Jackson also seeks to explain why, in the context of her shock—compounded by her sense that the police were wholly failing to recognise the relative gravity of various wrongdoings—she reached the conclusion that she was experiencing direct racism. The police behaviour she described—much of which was uncontested—certainly was not likely to produce a trusting and cooperative approach from young Indigenous witnesses who had just watched their friend die before allegedly being taunted about his death. And yet, it was seemingly not in any party's interest to surface allegations of police racism at trial. Both Crown and defence appeared to take care to avoid asking Belinda Jackson any questions that would elicit similar evidence before the jury. After Spencer thoroughly challenged Jackson's credibility, Crown prosecutor William Burge submitted in his closing address that "you might conclude that she didn't always tell the truth ... I—I don't intend to be relying upon what she told you."<sup>58</sup> Burge made no attempt to contextualise Jackson's testimony within the context of her experience, first of her friend's death, and then at the hands of the RCMP.

At trial, because of contradictions among the eyewitnesses and Stanley, and because of the hang fire theory, determining the relative body positions of the accused and victim became crucial. While cross-examining the blood spatter expert, Sergeant Barnes—who had not viewed the scene in person—Spencer expressed frustration with the quality of the information gathering in this case:

Q. But if we're looking—if we're trying to figure out what the position of the deceased was at the point of the projectile hit them, all that you've said has nothing—none of what you've said has anything to do with helping us of the position of the deceased at the point of the—being hit by the projectile, does it? Nothing? Anything?

A. No.

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<sup>57</sup> *Ibid* at 332.

<sup>58</sup> *Stanley* Trial Transcript, *supra* note 3 at 856 (Crown closing address).



Q. No? So if that's what we need to find out, again, I – where—where he's bleeding doesn't matter to me. I want to know what his position was. If you'd have attended and been able to determine whether there was any forward spatter on the far door, that might have assisted us determining a trajectory, correct?

A. Possibly.

...

Q. If you don't do any investigation, you can't form an opinion. Is that fair?

A. I formed my opinion and analysis based on the information that I had from the investigator at the scene and when I was consulted about it.

...

Q. I'm sorry for being frustrated, but as the expert, that's what we're looking for is that opinion, and if you don't gather the information, you can't give an opinion. Is that fair?

MR BURGE [Crown Prosecutor]: It might not be legally fair, My Lord.

THE COURT: Well, she already answered the question once. Do you want a second answer?

MR SPENCER: No, that's fine, My Lord.<sup>59</sup>

As Spencer pointed out, if the blood spatter analyst had viewed the blood stain patterns in person while the scene was intact, much more information may have been available to the jury.

Compounding this oversight, forensic pathologist Ladham, who could also have shed light on body positions, was not called to testify and Barnes did not consult with him. The autopsy report, which was entered by consent, “definitively states that Mr. Boushie died from a single gunshot to the head, and that the trajectory of the bullet was rightward, downward, and slightly forward.”<sup>60</sup> An entry and exit wound were identified, meaning that the bullet travelled through Boushie's head completely. While the trajectory described in the post-mortem report establishes the path taken by the bullet through Boushie's head it cannot directly shed light on his position in the car when he was shot. The bullet that killed Boushie was never found, although Heroux testified that he had looked carefully for

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<sup>59</sup> *Ibid* at 213–16 (Sergeant Jennifer Barnes, cross-examination).

<sup>60</sup> *Ibid* at 891–92 (Chief Justice Popescul, jury instructions).

that bullet both inside the vehicle and outside it. It was apparent from Heroux's testimony that his search was predicated on the presumption that Stanley was standing at the driver's side of the car when he shot Boushie despite the fact that some Indigenous witnesses suggested otherwise.<sup>61</sup>

Firearms expert Gregory Williams conducted tests on Boushie's clothing and determined that damage to the hood on Boushie's jacket and a baseball cap he had been wearing was consistent with gunshot damage from a shot that originated at least 24 inches away.<sup>62</sup> Barnes, by contrast, appears not to have viewed the clothing or assessed the pattern of blood stains on it. Spencer pressed Barnes on the proposition that her failure to personally view the scene and associated objects deprived the court of information that could have allowed her to work with the pathologist to reconstruct the precise location and trajectory of the shooting:

Q. ... So the pathologist would give you that information. And then you would know. You could do your tests, right?

A. When the pathologist—at the autopsy, if they're able to determine which was forward and which was back, which was an entrance and which was an exit, then during my analysis of the—the blood stains, I might be able to say, yes, that corresponds to forward spatter. But that would be after the fact during my analysis ... So I make my observations at the scene and then do my analysis after, after I get the information.

Q. Okay. But in this case, you didn't make any observations at the scene. So then when the pathologist fills in that blank of the direction, you don't have any information. But if you'd have attended at the scene and gathered your information, you could have done an actual analysis.

A. If there was any information to gather. If there wasn't any there, then I wouldn't be able to say any more than I am now. I can't say that for sure because it's—

Q. It's gone.

A. —it is what it is. It's—this is the analysis that I've done, and from the questions that—that I asked the investigator—and I can't testify to his knowledge or training, but they are our eyes at the scene. And if they—they take a good look and they say there isn't anything else, then I take that as part of my assessment as to whether I should go or not.<sup>63</sup>

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<sup>61</sup> See above, note 35.

<sup>62</sup> *Ibid* at 466–67 (Gregory Williams, evidence in chief).

<sup>63</sup> *Ibid* at 214 (Sergeant Jennifer Barnes, cross examination).

In this passage, defence counsel and expert witness are grappling with the lack of evidence about Boushie's body position and location at the moment the fatal shot was fired. However, Barnes also appears to be defending the RCMP process and—with caveats—the crime scene investigator's institutional responsibility to assess the scene himself.

Although they acknowledged that blood had been washed away, Barnes and Heroux never fully explained how the rain that fell on 10 and 11 August altered the crime scene or what evidence might have been lost as a result of this rain. This failure is unfortunate. If the RCMP's failure to protect the scene resulted in a loss of vital evidence, Heroux and Barnes had a duty, as independent witnesses whose role was to advise the court, to be forthright about that loss. Furthermore, the evidence wholly fails to disclose whether the RCMP has standard protocols for crime scene investigation, evidence preservation and the collection of evidence, and whether those protocols were followed in this case.<sup>64</sup> As I will explain in Part 3 of this article, such protocols are now standard—and public—in peer jurisdictions. Lacking any information about standard practices, it is impossible to know for certain whether this was an unusually shoddy crime scene investigation or whether all RCMP forensic investigations are as haphazard as this one appears to have been.

How do the shortcomings in this investigation tie into the discussion about systemic racism? A key difficulty with the chaotic manner in which this crime scene investigation proceeded is that Heroux and Barnes seemingly had the institutional licence to exercise subjective judgment about what evidence was worth searching for, what should be preserved, and what analysed—without regulation or oversight. They exercised their discretion in a context where Heroux, at least, appears to have had access to the investigative team's working theories. Specifically, Heroux seems to have proceeded on the assumption that the accounts supplied by Sheldon and Gerald Stanley were essentially truthful so conflicting eyewitness accounts supplied by Indigenous witnesses were not accounted for within the search for forensic evidence. Where forensic practitioners receive information that they do not need to know and they also have wide discretion about how to discharge their responsibilities, a concern

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<sup>64</sup> *Stanley Preliminary Hearing Transcript*, *supra* note 35 at 47–48 (Corporal Terry Heroux, cross-examination). The only partial exception to this proposition relates to the RCMP decision to release the Ford Escape to a wrecking yard after Corporal Terry Heroux had completed his investigation of it. At the preliminary hearing, Heroux testified that it is standard practice to release a vehicle back to Major Crimes after processing, and that he has no further role with respect to the preservation of evidence. When Spencer pressed the proposition that Heroux should have been concerned about the preservation of evidence for further testing, the judge intervened to indicate that he considered it inappropriate to cross-examine the witness about a decision made by another police officer.

arises that assumptions about the (blame)worthiness of a victim, the credibility of an eyewitness, or the circumstances of a death may influence the practitioners' motivation and diligence. Had clearer guidelines and protocols guided the preservation and collection of evidence, it would be easier to accept that the RCMP did all it could—or at least all it generally would—to determine the course of events in this case.

While much of the discussion about the importance of rigorous protocols and standard operating procedures in forensic science focuses on the risk of wrongful convictions, the *Stanley* case illustrates that, when forensic procedures remain largely unregulated, we also run an increased risk of losing important evidence, and correspondingly increasing the risk of wrongful acquittals. In a context of widespread concern about the under-investigation of Indigenous people's deaths, against a backdrop of information suggesting institutional racism, the RCMP's failure to adopt and publish standard forensic investigative protocols leaves the door open to accusations of differential treatment of the violent deaths of Indigenous people. Necessarily, when a crime scene is poorly investigated or forensic evidence is badly handled, the proper legal consequence is to give the benefit of any resulting doubt to an accused person. If Indigenous people's deaths are disproportionately likely to be under-investigated, this principle may operate to deprive Indigenous people of the equal protection and benefit of Canadian legal processes.

### 3. Flawed Forensics—International Trends and the RCMP

Forensic science and medicine play a central role in modern criminal investigation. Forensic pathologists seek to identify the cause and manner in which a person has died. DNA analysts compare biological traces found at the scene of a crime with the DNA of suspects and victims. Blood spatter analysts seek to reconstruct how injuries were caused and the movements of injured persons. Crime scene investigators are forensic science generalists who review the evidence at the scene and decide which of these specialists are required. Each of these experts played a role in the police investigation of Boushie's death. Forensic practitioners have a duty to be diligent in the collection and analysis of evidence<sup>65</sup> and they must provide independent evidence to courts.<sup>66</sup> In 2015, the Supreme Court of Canada described this duty of independence as follows:

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<sup>65</sup> Where they are members of the RCMP, see *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, Schedule, (4.2) made pursuant to *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 21.

<sup>66</sup> *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23.

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her[.]<sup>67</sup>

An expert witness's duty of independence requires them to consider all reasonable explanations for the forensic evidence.<sup>68</sup> Forensic practitioners' opinions are therefore routinely central to the decision whether to prosecute, as well as to prosecution itself.

Documents produced by the RCMP suggest that, from the earliest hours of the investigation into Boushie's death, the RCMP settled on a theory of the physical dynamics of the shooting, and focused the search for physical evidence on that theory. The RCMP's failure to protect the crime scene from heavy rain deprived them of the opportunity to investigate alternative possibilities. Spencer made much of these shortcomings at trial. While these case-specific failures were crucial to the acquittal, they should also be assessed in light of a concern that arises from my broader research: that the RCMP's forensic services have not adequately grappled with the implications of an international turn towards more transparent, scientific, forensic practice.<sup>69</sup> In order to explain the significance of this context for the crime scene investigation in *Stanley*, it is helpful to describe the turn towards evidence-based forensics before applying some precepts of evidence-based forensics to the RCMP's work in this case.

A mountain of authoritative scientific research demonstrates that forensic science and medicine do not have the nearly magical capacities sometimes attributed to them in popular culture. In fact, the correctness of

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<sup>67</sup> *Ibid* at para 32.

<sup>68</sup> See particularly Stephen T Goudge, *Report of the Inquiry into Pediatric Forensic Pathology Services in Ontario*, vol 3 (Toronto: Queen's Printer, 2008) at 495.

<sup>69</sup> I am a member of the Evidence-Based Forensic Initiative, a multidisciplinary panel of academics and forensic practitioners who are working collectively to improve the quality and reliability of forensic science. See <http://evidencebasedforensics.com/> for a summary of our work. Group publications of particular interest for present purposes include: Gary Edmond et al, "Model forensic science" (2016) 48:5 *Australian J Forensic Sciences*, 496–537; Gary Edmond, et al "How to cross-examine forensic scientists: A guide for lawyers" (2014) 39:2 *Australian Bar Rev* 174–97. Specifically, with respect to RCMP forensics, see Emma Cunliffe & Gary Edmond, "Justice without Science? Expert evidence and factual reasoning in *R v Bornyk*" [forthcoming] [Cunliffe & Edmond *Bornyk*].

basic claims made in many fields has never been systematically studied.<sup>70</sup> Authoritative scientific bodies such as the National Research Council of the National Academy of Science (“NRC”) and President Obama’s Council of Advisors on Science and Technology (“PCAST”) have been scathing in their criticisms of the lack of empirical warrant for many claims made by forensic scientists. These bodies have also questioned whether courts have the capacity to safeguard the reliability of forensic evidence.<sup>71</sup>

In 2016, PCAST considered the empirical warrant for forensic claims in several fields. This committee found some signs of progress in some fields and evidence of serious shortcomings in the methods and claims of others. PCAST concluded:

[T]here are two important gaps [in research]: (1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable.<sup>72</sup>

PCAST’s recommendations suggested how such gaps in research should be communicated by forensic practitioners when providing expert reports and testifying, and proposed a program of empirical study that will begin to fill these gaps.

In the United Kingdom, a Forensic Science Regulator has been established to ensure that, “the provision of forensic science services across the criminal justice system is subject to an appropriate regime of scientific quality standards.”<sup>73</sup> As Regulator, Dr. Gillian Tully has issued standards for forensic science providers and practitioners, and guidance on particular topics. These standards seek to cultivate uniform approaches to evidence collection, analysis and reporting:

[S]o that it is much easier to see where two experts differ, for example, because they will have to state what propositions they are comparing, what data they have used in comparing them and what assumptions they have made.<sup>74</sup>

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<sup>70</sup> See e.g. *PCAST Report*, *supra* note 52; National Research Council of the National Academies of Science, *Strengthening Forensic Science in the United States: A Path Forward* (Washington: National Academies Press, 2009) [*NRC Report*].

<sup>71</sup> *NRC Report*, *supra* note 70 at 53, 109.

<sup>72</sup> *PCAST Report*, *supra* note 52 at x.

<sup>73</sup> “[Forensic Science Regulator](http://www.gov.uk)”, online: GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>74</sup> UK, HL Deb, Select Committee on Science and Technology, [Corrected Oral Evidence: Forensic Science](#), (22 January 2019), No 18 at 18 (Dr. Gillian Tully), online (pdf): <[data.parliament.uk](http://data.parliament.uk)>.

Complementing Tully's work, the Royal Society and the Royal Society of Edinburgh have partnered with the judiciary to produce a series of "primers on scientific evidence ... as a working tool for judges."<sup>75</sup> Each primer focuses on a routine field of forensic science, aiming "to provide a judge with the scientific baseline from which any expert dispute in a particular case can begin."<sup>76</sup> With these significant developments in place, a House of Lords Select Committee recently examined whether the present institutional arrangements are adequate and properly funded, and how the British government can better support forensic scientists, forensic agencies and courts to produce and act upon reliable forensic science evidence. That committee recommended the establishment of a forensic science board tasked with "ensuring ongoing guidance to the judiciary and the legal professional [*sic*] about the accurate scientific position on the main types of forensic science," "sharing best practice" and "responding to new developments" in forensic science.<sup>77</sup> It also recommended increased investment in forensic science research. Even before these recommendations were made, the United Kingdom already provided far more regulation and public oversight of forensic science and medicine than Canadian jurisdictions.

Canadian forensic agencies have been active participants in some of the US-based committees established to respond to the scathing criticisms made in the NRC and PCAST reports. For example, two Canadian representatives—one from the RCMP and one from the Ontario Provincial Police—sit on the Scientific Working Group on Bloodstain Pattern Analysis (SWGSTAIN).<sup>78</sup> At least at their senior, research-focused ranks, Canadian forensic institutions are well-aware of the criticisms that have been made by scientists and legal academics of the reliability and

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<sup>75</sup> "[Courtroom Science Primers launched today](#)" (22 November 2017), online: *The Royal Society* <[royalsociety.org/news/](http://royalsociety.org/news/)>.

<sup>76</sup> *Ibid.* For those who would like to know more about these and other developments, a useful comparative study of the criticisms that have been made of forensic science and of the institutions and research agendas that have emerged in response to these criticisms has recently been published by Paul Roberts & Michael Stockdale, eds, *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform* (Cheltenham, UK: Elgar, 2018).

<sup>77</sup> UK, HL Deb, Select Committee on Science and Technology, [Forensic Science and the Criminal Justice System: A Blueprint for Change](#), (01 May 2019), Session 2017–2019, *Summary of Conclusions and Recommendations*, online: <[publications.parliament.uk](http://publications.parliament.uk)>.

<sup>78</sup> These members do not seem to have joined SWGSTAIN's replacement body, the National Institute of Standards and Technology-sponsored Organization Scientific Area Committee Bloodstain Pattern Analysis Subcommittee [OSAC].

shortcomings of traditional forensic practice.<sup>79</sup> In 2012, a coalition of senior figures within Canadian forensic science and medicine published a report about forensic science in Canada that was framed partly as a response to NRC Report. However, this report was a general account of institutional functions and did not attend to critical gaps in knowledge and institutional procedure.<sup>80</sup> It remains unclear from public sources whether forensic practitioners receive thorough training in, for example, the current state of scientific research or the empirical warrant for the claims they make when preparing reports and testifying. However, the (scant) available evidence suggests that they do not.<sup>81</sup>

When compared with institutional responses in the US and UK, the Canadian legal and forensic systems have largely failed to respond transparently and systematically to the evidence-based conclusion that many routine forms of forensic science are of unknown and unstudied reliability. While an RCMP scientist has testified to the existence of ‘organizational standards’ with respect to the collection and interpretation of forensic evidence in other cases,<sup>82</sup> these standards are not published (as they are the US and the UK) and, in my experience, they are not routinely disclosed as part of first-party disclosure packages.<sup>83</sup> The lack of public information about the RCMP’s forensic practices means that those who

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<sup>79</sup> This awareness is evident from the active participation of RCMP and other Canadian representatives on OSAC and its SWG predecessors. See also, Cunliffe & Edmond *Bornyk*, *supra* note 69.

<sup>80</sup> Michael Pollanen et al, *Forensic Science in Canada: A Report of Multidisciplinary Discussion* (Toronto: Centre for Forensic Science & Medicine, May 4–5, 2012), online (pdf): <[www.crime-scene-investigator.net/forensic-science-in-canada.pdf](http://www.crime-scene-investigator.net/forensic-science-in-canada.pdf)>.

<sup>81</sup> In *R v Bornyk*, 2017 BCSC 849, a RCMP fingerprint examiner testified that he became aware of some of these reports after a trial judge had drawn them to counsel’s attention after the 2013 trial in *R v Bornyk*, 2013 BCSC 1927 (retrial ordered 2015 BCCA 28). However, it appeared that only more senior employees within the Integrated Forensics Identification Section at the RCMP have engaged systematically with the implications of these reports for RCMP forensic practice. See Gary Edmond, David Hamer & Emma Cunliffe, “A Little Ignorance is a Dangerous Thing: Engaging With Exogenous Knowledge Not Adduced by the Parties” (2016) 25:3 Griffith LJ 383–413; Cunliffe & Edmond *Bornyk*, *supra* note 69; Della Wilkinson, David Richard & Daniel Hockey, “Expert Fingerprint Testimony Post-PCAST—A Canadian Case Study” (2018) 68:3 J Forensic Identification 299– 331. See also *R v Gubbins*, 2018 SCC 44 at paras 74–83.

<sup>82</sup> *R v Bornyk*, Trial transcript, at 25 [*Bornyk Trial Transcript*], Dr. Della Wilkinson, RCMP Research Scientist, evidence in chief, 25 January 2017.

<sup>83</sup> Constituting policy rather than information generated as part of the ‘fruits of the investigation’, it seems likely in the wake of *R v Gubbins*, 2018 SCC 44, that defence counsel will need to make an *O’Connor* application to obtain access to RCMP standards with respect to forensic investigation, testing and interpretation. Such an application was vigorously opposed in *R v Bornyk*, 2017 BCSC 849, but the trial judge in that case ordered disclosure.



are interested in the reliability of Canadian forensics as presently practiced must glean information from industry publications by RCMP scientists and, in very rare cases, testimony. Neither of these sources provides much basis to believe that the RCMP's forensics practitioners are being equipped with the kind of rigorous and systematic institutional procedures that will help them to minimise bias and error.

Published legal commentary has emphasized the prevalence of faulty forensic science within identified wrongful convictions.<sup>84</sup> However, to the extent that forensic science is heavily predicated on the unregulated exercise of subjective judgment,<sup>85</sup> those failings also raise the spectre of missed opportunities to investigate and secure evidence that may bear upon criminal responsibility. The forensic investigation in *R v Stanley* provides an object lesson in the latter danger. There is good reason to be concerned about whether the lack of standard practice for crime scene investigation contributes to the troubling statistics about Canada's inadequate criminal justice response to murdered and missing Indigenous people.

How would a better regulated and more uniform approach to forensic science evidence have changed the course of the *Stanley* case? The adoption of best practices for evidence collection and preservation; communication protocols between the investigative team, crime scene investigators, and forensic practitioners; and better documentation of decision-making, would likely have resulted in far greater clarity about matters that became important at trial. These matters include whether information supplied by Indigenous eyewitnesses was conveyed to the crime scene investigators; whether it was necessary for the forensic team to withdraw from the Stanley farm after Boushie's body was removed; and, if so, how the scene should have been protected in anticipation of the wait for a judicial warrant to re-enter. The need to preserve evidence, including the car in which Boushie was killed would have been more apparent. As I explain in Part 4 of this article, had these steps been taken, the prosecution would have been better prepared to assist the jury to evaluate Stanley's eventual hang fire defence. It would likely have been more apparent to prosecutors well before trial that the forensic pathologist, firearms expert and blood spatter expert all

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<sup>84</sup> See e.g. Michael Saks & Jonathan J Koehler, "The Coming Paradigm Shift in Forensic Identification Science" (2005) 309:5736 *Science* 892. In Canada, see Emma Cunliffe & Gary Edmond, "Reviewing Wrongful Convictions in Canada" (2017) 64 *Crim LQ* 475–88; Emma Cunliffe & Gary Edmond, "What Have We Learned? Lessons from Wrongful Convictions in Canada" in Benjamin Berger, Emma Cunliffe & James Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) 129–47.

<sup>85</sup> Michael Saks et al, "Context effects in forensic science: A review and application of the science of science to crime laboratory practice in the United States" (2003) 43:2 *Science & Justice* 77; *PCAST Report*, *supra* note 52 at 5–6.

had the potential to offer crucial evidence about Boushie's position within the car at the time that he was shot, and these experts would have been better prepared for the questions they received in cross-examination (in the case of the forensic pathologist, who did not testify, this would likely have meant that the prosecutor would have decided to call him to give evidence). Importantly, the steps I have described above are standard in other jurisdictions, and they are set out in public documents that establish best practices and routine procedure. In Canada, it would seem from the evidence given by RCMP employees at the *Stanley* trial, that no similar internal or external standards guide the work of forensic practitioners. Working against a background of concern about racism manifesting in the RCMP's response to Boushie's death, the lack of public, standard operating protocols makes it even more difficult to allay concerns about whether this death was investigated as thoroughly and painstakingly as that of a non-Indigenous person would have been.

#### 4. What about hang fire?

A firearm ... is always a weapon.<sup>86</sup>

The possibility that the bullet that killed Boushie was discharged from the gun after a lengthy hang fire first arose at the preliminary hearing in *Stanley*. A hang fire is a phenomenon in which there is a discernable delay between trigger pull and the discharge of a bullet from the barrel of the gun. RCMP forensic firearm expert Gregory Williams testified at the preliminary hearing as to the possible causes of an unusual bulge in the cartridge that was presumed to have held the lethal bullet. Hang fire was one of several potential causes Williams identified for this bulge.<sup>87</sup> Williams testified that when he tested six shells from the same box as those involved in the shooting, one misfired.<sup>88</sup> When a bullet misfires, it fails to discharge from the chamber after being struck by the hammer. At preliminary hearing and in the trial, Williams explained that misfires are "not entirely uncommon" in his extensive experience, but that he has never experienced a hang fire.<sup>89</sup> After Spencer exhibited some interest in the potential of a hang fire, Williams did further research into the phenomenon. He testified at trial that published research suggests:

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<sup>86</sup> *R v Felawka*, [1993] 4 SCR 199 at 211, 33 BCAC 241, *per* Justice Cory.

<sup>87</sup> *Stanley Preliminary Hearing Transcript*, *supra* note 35 at 353–55 (Gregory Williams, evidence in chief).

<sup>88</sup> *Ibid* at 355. Williams testified at trial that he had conducted further testing after the preliminary hearing, and experienced no further misfires from 36 cartridges, *Stanley Trial Transcript*, *supra* note 3 at 476 (Gregory Williams, evidence in chief).

<sup>89</sup> *Stanley Preliminary Hearing Transcript*, *supra* note 35 at 366–67 (Gregory Williams, evidence in chief); *Stanley Trial Transcript*, *supra* note 3 at 472 (Gregory Williams, evidence in chief).

hang fires are exceedingly rare ... In—in modern ammunition, hang fires tend to be less than half a second from the time that the—the primer is struck until the bullet goes ... You click, and then bang, not a 10-second delay, and not a 20-second delay, but less than half a second.<sup>90</sup>

This evidence about time delay was predicated on an assumption about the chemical composition of the primer that Williams testified he had been unable to empirically verify.<sup>91</sup> However, subsequent expert testimony confirmed that Williams' premise was correct.<sup>92</sup> Ultimately, Williams testified that in his opinion the cause of the unusual bulge in the cartridge case was that it was out of its usual position during firing.<sup>93</sup> (This is different from a hang fire, though the two may co-occur.)

Gerald Stanley's testimony put the hang fire theory firmly into play. The evidence he gave regarding the physical mechanism of the shooting included that he believed he had loaded two bullets into his Tokarev handgun,<sup>94</sup> that he fired two shots into the air to scare Eric Meechance and Cassidy Cross as they ran away,<sup>95</sup> and that after the second shot had fired, he pulled the trigger again but there was no gunshot and no bullet fired.<sup>96</sup> Stanley testified that at this point, the "barrel was sticking out of the end [of the handgun] as if it was empty and he removed the magazine from the gun "[t]o ensure that it was disarmed, or what I thought."<sup>97</sup>

Stanley stated that after firing into the air, he continued towards the vehicle in which the group had arrived on the Stanley farm and that he then saw the ride-on mower on which his wife had been working near the group's car. At this point, he testified his emotion was "pure terror. I thought the car had run over my wife."<sup>98</sup> He went to check underneath the car, heard it rev and noticed someone in the driver's seat.<sup>99</sup> Stanley's testimony about what happened next is central to the material questions at trial, and so I have reproduced the significant portions:

Q. Okay. What happened?

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<sup>90</sup> *Stanley Trial Transcript, supra* note 3 at 474.

<sup>91</sup> *Ibid* at 475. The 'primer' is the chemical compound that ignites the propellant powder within a bullet.

<sup>92</sup> *Ibid* at 554 (John Ervin, evidence in chief).

<sup>93</sup> *Ibid* at 492 (Gregory Williams, cross-examination).

<sup>94</sup> *Ibid* at 664 (Gerald Stanley, evidence in chief).

<sup>95</sup> *Ibid* at 691–92.

<sup>96</sup> *Ibid* at 692.

<sup>97</sup> *Ibid* at 693.

<sup>98</sup> *Ibid* at 697.

<sup>99</sup> *Ibid*.

A. So I took my left hand, and I banged that piece of pipe ahead, and I wanted to turn that car off so he couldn't move again.

Q. Okay.

A. So I reached for the keys.<sup>100</sup>

...

Q. Okay. What are you doing with your right hand?

A. Well, I'm not even sure. I'm not exactly sure what I was doing with it.

Q. Okay. Okay. So put the gun down on the back there, faced away again, please. Was your finger on the trigger?

A. No.

Q. Did the deceased bump or pull the trigger or anything of that nature?

A. If—I can't say for sure. There wasn't—I didn't feel a lot of struggling on my right hand.

Q. Okay. Did you point the Tokarev at the deceased?

A. No, I didn't.

Q. At any—at any time?

A. No.

Q. Did you point it at anyone that day?

A. No.

Q. Did you have any intent to hurt anyone?

A. No. I just wanted them to leave.

...

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<sup>100</sup> *Ibid* at 698. Stanley testified that he noticed a piece of pipe emerging out of the driver's side window of the car in which Boushie was seated. Other evidence suggested that this 'pipe' was the barrel of a non-operational .22 calibre rifle.

Q. When did you last pull the trigger?

A. When I was back at our SUV, near it.

Q. Okay. What did you do after the gun went off?

A. I couldn't believe what just happened. And everything seemed to just go silent. Like, the mower quit running. It was wide open, also, at the same time. And I just backed away, and I looked over, and [my wife] was standing there.<sup>101</sup>

Two things may be evident to readers. First, Spencer led the witness without objection despite the fact that he was here testifying in-chief about the most important events for this trial. Secondly, nowhere in this extract (or in the brief portions I have omitted from the quoted exchange) does Stanley speak directly to the moment when the gun fired. Regarding the moment when the gun fired, Stanley later testified as follows:

Q. So then your right hand, describe it, what you recall, where it was at this time. Is it in the vehicle?

A. Yeah, it was in the window. I was like this. I was concentrating here. And then about the same time the car shut down, just boom, and it kicked back like this.<sup>102</sup>

One thing that is not apparent from the passages I have quoted is that even when Spencer was eliciting evidence about the moment when Stanley killed Boushie, he took the opportunity to remind the jury about the property damage that had been caused by the Indigenous group. Within less than a transcript page of the lengthy passage above, Spencer and Stanley had the following exchange:

Q. Okay. How much damage was there to your SUV?

A. It was between 4 and 5,000, I think.<sup>103</sup>

Spencer had not asked Stanley about Boushie's condition after the gun was discharged, about whether Stanley took any steps to ascertain whether Boushie was alive, or to render him assistance. Indeed, Stanley was never asked those questions by either counsel.

The prosecutor cross-examined Stanley on his training and understanding of gun safety practices,<sup>104</sup> his belief that he had only loaded

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<sup>101</sup> *Ibid* at 700–701.

<sup>102</sup> *Ibid* at 708.

<sup>103</sup> *Ibid* at 701.

<sup>104</sup> *Ibid* at 710–12 (Gerald Stanley, cross-examination).

two bullets into the magazine,<sup>105</sup> his claim that the slide was back after he fired the second shot into the air (which would have been a signal that the handgun's chamber was empty),<sup>106</sup> and his belief that the gun was safe if the magazine was removed (this particular handgun did not have that safety feature).<sup>107</sup> He also cross-examined Stanley on the fact that Stanley directed the gun at Boushie's head:

Q. What care were you taking with this handgun to make sure it didn't discharge at this person in the front seat? Were you taking any care?

A. Well, in my mind, it was empty, so I was just holding it.

Q. Do you—do you agree that the gun would have been pointed directly at his head—

A. No.

Q.—when it—when it—the gun would have been lined up right at his head—

A. No.

Q. —when it discharged?

A. I couldn't say that.

Q. How close were you to him?

A. Well, from here to there. From here to the pitcher.

Q. Close enough that he could touch you?

A. Yeah.

Q. You could—you tell us you could grab the keys with your left hand, reaching through the driver's window?

A. Yeah. I had to reach in.

Q. Well, you had—you had to reach as far as the steering column?

A. M-hm, and beyond. So ...

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<sup>105</sup> *Ibid* at 729.

<sup>106</sup> *Ibid* at 729–31, 733–34.

<sup>107</sup> *Ibid* at 732.

Q. And you had a gun in your right hand?

A. Yeah.

Q. Why did you have your gun, this gun, inside that cabin of that vehicle?

A. Well, I didn't even realize I did have it inside.

Q. Well, it's—it's a gun. Don't you—don't you—

A. When it's empty, it's just a piece of metal, you know—<sup>108</sup>

In this and other passages during the cross-examination, the prosecutor implied that Stanley had—at the very least—acted rashly by approaching Boushie with a gun in his hand, given that he had not fully checked that the gun was safe. Stanley resisted this suggestion on the basis that he believed the slide was back and that he had removed the magazine and therefore, that the gun was, in that state, “just a piece of metal”. It may also be significant to note that Stanley stated that he held the magazine in his left hand when he reached into the car to turn off the ignition.<sup>109</sup>

In his closing address, the prosecutor invited the jury to find that Stanley was lying about how the gun had discharged and that his testimony that he was concerned for his wife in that moment was a *post-hoc* fabrication.<sup>110</sup> However, remarkably, the prosecutor did not remind the jury that two independent pieces of evidence could help them to assess Stanley's testimony about the circumstances in which the gun discharged. First, the autopsy report concluded that the shot travelled through Boushie's head from left to right, on a downward and slightly forward trajectory.<sup>111</sup> The bullet entered Boushie's head high enough to damage his baseball cap.<sup>112</sup> Secondly, Williams testified on the basis of his forensic analysis of Boushie's clothing that the gun was at least 24 inches from Boushie's head when the bullet discharged.<sup>113</sup> Neither piece of evidence was challenged by the defence. The jury should have been invited to consider whether the gun *could* have been held by Stanley in the manner he described, inside the car, at least 24 inches from Boushie's head, and pointed in the correct trajectory—even in the absence of blood spatter evidence that could have clarified this matter. Similarly, the trial judge did not direct the jury's attention to the possibility that these pieces

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<sup>108</sup> *Ibid* at 741.

<sup>109</sup> *Ibid* at 739.

<sup>110</sup> *Ibid* at 864–65 (William Burge, closing address to the jury).

<sup>111</sup> *Ibid* at 858.

<sup>112</sup> *Ibid* at 466–67 (Gregory Williams, evidence in chief).

<sup>113</sup> *Ibid*.

of evidence collectively shed light on the circumstances of the shooting. Especially because the forensic pathologist did not testify, it is difficult to know whether the jury would have appreciated the potential significance of this physical evidence.

Three other witnesses called by the defence provided information that bears upon the hang fire theory. John Ervin was a firearms instructor and armourer with the RCMP with responsibility for quality assurance, maintenance and testing of service weapons. He testified that he had fired something approaching one million rounds in the course of his career.<sup>114</sup> Ervin was qualified as an expert witness. He testified that by a process of testing, he concluded that the cartridge case found on the dash of the car in which Boushie was killed (and which was presumed to have carried the bullet that killed Boushie) had been out of position in the barrel of the Tokarev when it detonated.<sup>115</sup> However, when testing cartridges in this position, Ervin had been unable to ignite the explosive primer that begins the process of propelling the bullet forward.<sup>116</sup> He identified hang fire as one possible explanation for a chain of events that leads the cartridge to detonate while out of position.<sup>117</sup>

Ervin emphasized the extreme rarity of hang fires<sup>118</sup> and explained that his only experience with hang fire (having fired almost a million rounds, most while testing firearms and ammunition) arose using self-packed powder. In that instance, the pressure created by the detonating powder was sufficient to eject the bullet from the barrel of the gun, but insufficient to create the ‘bang’ that is characteristic of a normal gunshot.<sup>119</sup> In Stanley’s trial, witnesses—including those located some distance away—testified that when the bullet that killed Boushie discharged from the Tokarev, they heard a gunshot.<sup>120</sup> This is important evidence because it points away from the proposition that the powder in the cartridge had

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<sup>114</sup> *Ibid* at 550–51 (John Ervin, evidence in chief).

<sup>115</sup> *Ibid* at 578–79.

<sup>116</sup> *Ibid* at 579.

<sup>117</sup> *Ibid* at 579–80.

<sup>118</sup> *Ibid* at 579.

<sup>119</sup> *Ibid* at 579–80.

<sup>120</sup> *Ibid* at 708 (Gerald Stanley, evidence in chief); *Ibid* at 258 (Sheldon Stanley, evidence in chief); *Ibid* at 300 (Eric Meechance, evidence in chief); *Ibid* at 413 (Belinda Jackson, evidence in chief, Belinda Jackson testified that she heard two shots when Boushie was killed); *Ibid* at 838 (Scott Spencer, closing address to the jury), Spencer suggested in his closing address that Jackson was lying in her testimony. However, research on the acoustics of gun shots suggests that two distinct sounds may well be heard by those who are positioned forward of the muzzle of a gun if the bullet’s speed exceeds the sound barrier. See Robert C Maher, *Principles of Forensic Audio Analysis* (Switzerland: Springer, 2018) at 97–105.



burned slowly. Equally, the bullet was propelled from the Tokarev with enough force to travel completely through Boushie's head, creating an exit wound.

Ervin testified that he did not know the maximum length of time for a hang fire.<sup>121</sup> When Spencer pressed him on this question, the prosecutor objected on the basis that the defence was inviting its witness to speculate. The jury and witness were excluded from the courtroom. In *R v Sekhon*, the Supreme Court of Canada held as follows:

Given the concerns about the impact expert evidence can have on a trial—including the possibility that experts may usurp the role of the trier of fact—trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges—including those in judge-alone trials—have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the *Mohan* criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence ...

The trial judge must both ensure that an expert stays within the proper bounds of his or her expertise and that the content of the evidence itself is properly the subject of expert evidence.<sup>122</sup>

Chief Justice Popescul indicated that he would allow Spencer to question Ervin about the maximum length of time for a hang fire despite Ervin's protestations that he was unsure but, if the defence failed to lay a proper foundation for the opinion, he would direct the jury to disregard the answer.<sup>123</sup> This approach seems at odds with the caution in *Sekhon* regarding the trial judge's gatekeeping responsibilities with respect to the scope of expert evidence. Ultimately, Spencer elicited testimony that the RCMP trains its officers to wait 30–60 seconds after a misfire or possible hang fire and, even then, to secure a dud cartridge within a safe container.<sup>124</sup>

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<sup>121</sup> *Ibid* at 585 (John Ervin, evidence in chief).

<sup>122</sup> *R v Sekhon*, 2014 SCC 15 at paras 46–47.

<sup>123</sup> *Stanley Trial Transcript*, *supra* note 3 at 589 (Chief Justice Popescul). It would probably have been more appropriate to bring the witness into *voir dire* and ask the questions in the absence of the jury in the first instance, before deciding whether the questioning could take place before the jury. See Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts & Michael Stockdale, eds, *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Cheltenham, UK: Edward Elgar Publishing, 2018) at 310–333 [Cunliffe *Paradigm*].

<sup>124</sup> *Stanley Trial Transcript*, *supra* note 3 at 590 (John Ervin, evidence in chief).

The other two defence witnesses were offered as lay opinion witnesses. Each testified that he had personally experienced a hang fire of several seconds duration.<sup>125</sup> Both incidents occurred with very different firearms from the Tokarev used by Stanley, and with different ammunition. Based on their recollection of events “many years ago”<sup>126</sup> and at some unspecified time in the past<sup>127</sup> they estimated the duration of the hang fire they had experienced between 7 and 12 seconds.<sup>128</sup>

Lay opinion evidence is presumptively inadmissible in Canadian evidence law. In *R v Graat*, Justice Dickson suggested that “broad principles” should govern the admissibility of lay opinion evidence including the basic concept of relevance and the question of “whether, though probative, the evidence must be excluded by a clear ground of policy or of law.”<sup>129</sup> Justice Dickson described the kinds of grounds that may warrant exclusion:

The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time.<sup>130</sup>

Since *Graat* was decided, the Supreme Court of Canada has significantly amended the common law of evidence. In particular, the caselaw of the past twenty years emphasizes the importance of judicial attention to the reliability of evidence.<sup>131</sup> Justice Dickson does not list reliability among the grounds that should be considered when assessing the admissibility of lay opinion evidence, but this concern is arguably inherent within the guidance he supplies. For instance, he directs the trial judge to consider whether the matter is one for expert testimony or one in which “common ordinary knowledge and experience” are the best guide.<sup>132</sup>

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<sup>125</sup> *Ibid* at 616 (Wayne Popovich, evidence in chief); *Ibid* at 628 (Nathan Voinorosky evidence in chief).

<sup>126</sup> *Ibid* at 615.

<sup>127</sup> *Ibid* at 628.

<sup>128</sup> *Ibid* at 616, 628.

<sup>129</sup> *R v Graat*, [1982] 2 SCR 819 at 835–36, 144 DLR (3d) 267 [*Graat*].

<sup>130</sup> *Ibid* at 836.

<sup>131</sup> See e.g. Cunliffe *Paradigm*, *supra* note 123, for a discussion of the role of reliability in the admissibility of expert evidence; *R v Khelawon*, 2006 SCC 57 & *R v Bradshaw*, 2017 SCC 35 (re: hearsay); *R v Hart*, 2014 SCC 52 (confessions in the ‘Mr. Big’ context); *R v Grant*, 2009 SCC 32 (re: role of reliability in s. 24(2) *Charter* analysis).

<sup>132</sup> *Graat*, *supra* note 129 at 838.

In the *Stanley* trial, the question of whether it is possible for a hang fire to last several seconds was crucial to the plausibility of the defence theory that in this case, a hang fire of several seconds caused the fatal bullet to discharge spontaneously while the gun was pointed towards Boushie's head. The prosecution did not object to the admissibility of lay opinion evidence on this question. In my opinion, they should have done so. The trial judge should have excluded that evidence on the basis that the experiences of two witnesses with wholly different firearms, with no evidence as to mechanism, was of minimal probative value that was substantially outweighed by its prejudicial risks.<sup>133</sup> Specifically, the evidence distracted the jury from the expert evidence about the mechanism by which hang fire occurs and it was not readily susceptible to critical assessment through cross-examination or otherwise. Evaluating this evidence engaged the credibility, recollection and motives of two witnesses who were otherwise unconnected with the trial, before one can even turn to the question of whether the events they described were fairly analogous to the situation in the *Stanley* case.

The trial judge had earlier queried the defence strategy of cross-examining firearms expert Gregory Williams with information posted in discussion threads on Reddit and other discussion fora. Reddit is an online chat forum in which users exchange views about all manner of topics. The defence had obtained chat threads in which users, most of whom were anonymous or posting under pseudonyms, speculated about the possibility of hang fire occurring and the conditions under which such a phenomenon might occur. After the admissibility of this line of questioning was judicially raised, the prosecution objected to the defence strategy and the trial judge ruled that this information was inadmissible because of concerns about its reliability.<sup>134</sup> In his ruling, Chief Justice Popescul focused on concerns about the anonymity of much internet content, the unverifiable nature of much of the information contained within the discussion threads, and the inflammatory nature of some of the posts.<sup>135</sup>

Different reliability concerns arise with respect to the lay opinion witnesses. These witnesses may—at least for admissibility purposes—be accepted as having sufficient familiarity with firearms to recount that they have experienced a perceptible delay between trigger pull and the discharge of a bullet. However, Ervin's testimony gave good grounds to be very cautious before drawing an analogy between a hang fire that occurs with

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<sup>133</sup> *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193; *R v Gayme*, [1991] 2 SCR 577 at 611, 83 DLR (4th) 193; *Sweitzer v The Queen*, [1982] 1 SCR 949 at 953, 137 DLR (3d) 702.

<sup>134</sup> *Stanley Trial Transcript*, *supra* note 3 at 529–40.

<sup>135</sup> *Ibid* at 540.

one kind of ammunition in a certain kind of firearm, to an alleged hang fire in a firearm and ammunition that may have a completely different firing mechanism, chemical composition, etc. The two witnesses stated plainly that they were not experts and it is evident from the transcript that they could not cast light on these matters for the jury. To the extent that the lay witnesses' evidence was offered as evidence of what caused the fatal bullet in the *Stanley* case to discharge when it did, this is a matter that is not something that "[o]rdinary people with ordinary experience are able to know as a matter of fact," as the SCC expressed the rule in *Graat*.<sup>136</sup> It would have been open for the defence to have the weapons and ammunition in question assessed by Ervin and to have him testify about the extent to which these incidents were analogous to the *Stanley* case. In the absence of such a link, however, even if these witnesses are accepted as testifying truthfully and with a clear recall of events that had occurred years before, the information supplied by these witnesses is of unknown reliability and its applicability to the facts before the jury is even more uncertain. The evidence also had the very real potential to confuse the jury. It should simply have been excluded.

Lacking clear guidance about how to assess the significance of these lay recollections to the situation in *Stanley*, it is difficult to know how the jury approached their task. In *Canadian Justice, Indigenous Injustice*, Kent Roach argues that evidence about hunting safety practices (the recommended 30-second wait after an apparent misfire) could well have been misunderstood by the jury as evidence that a hang fire might last up to 30 seconds.<sup>137</sup> I share Roach's concern, and consider that the admission of the two lay witnesses may have only served to confuse things further. Worse, it arguably distracted the parties (and may therefore have distracted the jury) from a much more important—and objectively verifiable—question: is it physically possible for Boushie to have been shot in the head from a distance of at least 24 inches on the trajectory described in the autopsy report, if Boushie was in the driver's seat and Stanley was in the location and bodily posture he described? The closing addresses of both parties focused to a large extent on how the jury should assess the hang fire evidence, as did the trial judge's instructions to the jury. Neither the Crown nor the trial judge reminded the jury of the importance of focusing upon the physical plausibility of the scenario described by Stanley.<sup>138</sup> Accordingly, I now turn to the jury instructions and the role of the trial judge in *Stanley*.

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<sup>136</sup> *Graat*, *supra* note 129 at 840.

<sup>137</sup> Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queens, 2019) at 120–22 [Roach *Canadian Justice, Indigenous Injustice*].

<sup>138</sup> See Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18:2 *Intl J Evidence & Proof* 139 at 175–77.

## 5. Anti-Indigenous racism and the trial judge's role

In Part 4, I observed that Spencer elicited testimony from Stanley about the damage done by Boushie's companions to Stanley's personal property, but that neither counsel asked Stanley what steps he took, if any, to check on Boushie's condition after he had been shot. The latter question is legally irrelevant within Canadian law—it is trite<sup>139</sup> as a principle of common law that there is no duty to offer assistance in these circumstances. But the lack of care and dignity afforded to Boushie during and after his death by the Stanley family and the RCMP was repeatedly referenced by Indigenous commentators, within whose legal orders such disregard was a shocking breach of fundamental responsibility.<sup>140</sup> The gulf between the Canadian and Cree legal orders was starkly on display to Cree observers of Stanley's trial. As I am not Cree, nor an expert in Cree legal orders, it is not my place to speak further to Cree legal principles. However, the Canadian legal system also contains principles that promote respect for the dignity of victims and, accordingly, establish boundaries to the *Charter* right to make full answer and defence and for the ethical conduct of trials. In this part, I consider whether legal principles that are well established within Canadian law were fully respected at trial. I argue that the trial judge can and should have done more to guard against the operation of anti-Indigenous bias and the demonization of Boushie and the Indigenous eyewitnesses.

A possible interpretation of Stanley's acquittal is that the jury had a reasonable doubt about the prosecution's case, though the source of that doubt is necessarily speculative and the possibility of jury nullification also arises in this case.<sup>141</sup> The material issues that fell to be determined by the jury were limited to questions of *mens rea* and carelessness. Stanley did not argue that he had shot Boushie in self-defence or in defence of property, and the jury was not instructed on these defences.<sup>142</sup> However, Spencer's strategy appears to have been to offer a narrative of lawless,

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<sup>139</sup> If surprising to many people.

<sup>140</sup> See e.g. Jason Warick, "[The Long List of Problems Colten Boushie's Family Says Marred the Case](#)" (13 February 2018), online: *CBC News* <[www.cbc.ca/news](http://www.cbc.ca/news)>; *nîpawistamâsowin: We Will Stand Up*, documentary film directed by Tasha Hubbard (2019) [*Nîpawistamâsowin*].

<sup>141</sup> For a concise summary of Canadian law regarding jury nullification, judicial duties and the ethical obligations of defence counsel, see Martin L. Friedland, "Searching for Truth in the Criminal Justice System" (2014) 60 *Crim LQ* 487 at 515. See also, Roach *Canadian Justice, Indigenous Injustice*, *supra* note 136 at 147–49, which provides a longer discussion of the possibility of jury nullification in the *Stanley* trial.

<sup>142</sup> See further, Wagner & Flynn, *supra* note 30. See also, Roach *Canadian Justice, Indigenous Injustice*, *supra* note 137 at 165–83, for an analysis of the ways in which defence counsel invoked "phantom defences" of defence of property and self-defence within his

violent behaviour on the part of Boushie's companions that arguably served to ameliorate the moral burden of acquitting Stanley. This strategy may well have been abetted by unclear jury instructions about the *mens rea* for murder.

Although Boushie's behaviour was largely irrelevant to the material issues at trial, defence counsel made insinuations about Boushie and his companions that courted the operation of anti-Indigenous bias. Spencer denigrated the young Indigenous witnesses, characterising them as threatening because they were "stealing in broad daylight"<sup>143</sup> and pointing to discrepancies in their narrative as evidence that the witnesses lied during the trial.<sup>144</sup> He also denigrated Boushie, emphasizing the suggestion that Boushie had participated in an attempted theft earlier that afternoon.<sup>145</sup> Spencer suggested that the ultimate blame for creating the conditions in which Boushie died lay with the Indigenous youths. Ultimately, Spencer submitted:

Things happen. When you create this type of home invasion, fear-filled, high-energy roller coaster ride, when you create that, you create an opportunity for there to be an accident and a tragedy. And that's what happened here.<sup>146</sup>

Evidence about what happened in the moments leading up to Boushie's shooting was potentially relevant background to determining *mens rea* for murder and deciding carelessness with respect to Stanley's use of his firearm.<sup>147</sup> Spencer's strategy of casting blame upon the young Indigenous group for lawless behaviour that, on Stanley's account, set the scene for a tragic accident is discussed further in the contribution made by Estair Van Wagner & Alexandra Flynn to this special issue. For present purposes, I wish to focus on the concern that these submissions raised substantial risks of prejudicial reasoning, specifically: a risk that the jury would reason from a legally improper conception of justification when assessing Stanley's handling of the Tokarev handgun; and a risk that the jury would be distracted from a close analysis of the physical evidence supplied by the forensic pathologist and firearms experts. The trial judge did not warn the jurors that they were to avoid these errors, nor were they expressly cautioned to avoid engaging in racist stereotypes about Indigenous youth when assessing the circumstances in which the handgun was used.

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presentation of evidence and closing address without ever fully engaging the legal elements of these defences.

<sup>143</sup> *Stanley Trial Transcript*, *supra* note 3 at 843 (Defence closing address to the jury).

<sup>144</sup> *Ibid* at 838, 841, 850.

<sup>145</sup> *Ibid* at 838.

<sup>146</sup> *Ibid* at 852 (Defence closing address to the jury).

<sup>147</sup> See Roach *Canadian Justice, Indigenous Injustice*, *supra* note 137 at 165–83.

In 2019 (after the *Stanley* trial, but citing previous caselaw), the Supreme Court of Canada emphasized the duty of trial judges to guard against the operation of racism within jury deliberations:

it would be naïve to assume that the moment the jurors enter the courtroom, they leave their biases, prejudices, and sympathies behind. That reality was openly acknowledged in *R. v. Williams*, [1998] 1 S.C.R. 1128, where this Court discussed the “invasive”, “elusive”, and “corrosive” nature of one particular type of bias: racism against Indigenous persons (para. 22). Justice McLachlin (as she then was) emphasized that “[t]o suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it” (para. 21).

Trial judges, as gatekeepers, play an important role in keeping biases, prejudices, and stereotypes out of the courtroom. In this regard, one of the main tools trial judges have at their disposal is the ability to provide instructions to the jury. Bearing in mind this Court’s admonition that “it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice” (*Williams*, at para. 21), such instructions can in my view play a role in exposing biases, prejudices, and stereotypes and encouraging jurors to discharge their duties fairly and impartially. In particular, a carefully crafted instruction can expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on—openly, honestly, and without fear.<sup>148</sup>

The Court emphasized that forensic evidence can be an important source of information by which the veracity of an accused person’s account can be tested, and it suggested that a trial judge should remind the jury of this tool.<sup>149</sup> The minority of the Court in *Barton* would have gone further, observing that appeals to anti-Indigenous prejudice within evidence and closing addresses can give rise to “a significant possibility that the jury’s *entire* deliberations would have been based on fundamentally flawed—and prohibited—legal premises.”<sup>150</sup> While the factual context of *Barton* was somewhat different from *Stanley*—involving stereotypes about Indigenous women who allegedly exchange sexual activity for payment rather than stereotypes about young Indigenous men presenting threats to law, order, and settler property—the risks of invoking stereotypes that diminish the substantive equality of the victim and the right to the equal protection of Canadian legal processes are analogous.

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<sup>148</sup> *R v Barton*, 2019 SCC 33 at paras 196–97 [*Barton*].

<sup>149</sup> *Ibid* at paras 127–28.

<sup>150</sup> *Ibid* at para 228. See also paras 233–34 [emphasis in original].

In *Stanley*, the trial judge did not clearly instruct the jury about what use they could properly make of evidence that Boushie's companions had been attempting to steal a quad bike from the Stanley farm, or other allegations of prior misconduct by Boushie and his companions. The trial judge instructed the jury:

There is no dispute that Mr. Stanley was lawfully justified in the circumstances of this case to retrieve his handgun and fire it into the air as warning shots, if you find that this is what he did. Beyond that, it is for you to determine if his actions continued to be lawful.<sup>151</sup>

On one reading, this instruction implied that a deliberate act of shooting Boushie had the potential to be lawful. Elsewhere Chief Justice Popescul moderated that impression by differentiating the elements of murder and manslaughter. However, he did so in a somewhat convoluted manner which differentiated between (A) deliberately pulling the trigger while pointing the gun at Boushie's head; and (B) intending that Boushie suffer bodily harm, knowing death was likely and reckless as to that result. On my reading of the defence submissions at trial, Spencer did not contest the proposition that if (A) were proven beyond a reasonable doubt by the Crown then (B) would inexorably follow and therefore Stanley would properly be found guilty of second-degree murder. Rather, the defence case was that the Crown had not proven (A). But the jury instructions seem to imply scope for the jury to find that (A) had been proven, but (B) had not:

The only real question relates to whether Mr. Stanley intentionally applied force, in other words, voluntarily shot, Mr. Boushie.

To intentionally discharge a firearm means to fire it by intentionally pulling the trigger. "Intentionally" means "on purpose". In other words, not by accident ...<sup>152</sup>

If you are satisfied beyond a reasonable doubt that what happened to Mr. Boushie was not an unintended involuntary action, that is, not an accident, you must go on to the next question, which is whether Mr. Stanley had the state of mind for murder ...<sup>153</sup>

To help you determine whether the Crown has proven beyond a reasonable doubt that Mr. Stanley had one of those intents required to make the unlawful killing of Mr. Boushie murder, you may conclude, as a matter of common sense, that a

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<sup>151</sup> *Stanley Trial Transcript*, *supra* note 3 at 893 (Trial judge instructions to the jury).

<sup>152</sup> *Ibid* at 889.

<sup>153</sup> *Ibid* at 895.



person usually knows what the predictable consequences of his or her conduct are, and means to bring them about. This is simply one way for you to determine a person's actual state of mind, what he actually meant to do. *You may but are not required to reach that conclusion about Mr. Stanley.* Indeed, you must not do so if, on the evidence as a whole, you have a reasonable doubt whether Mr. Stanley had one of the intents required to make the unlawful killing murder. *Consider, in particular, whether this evidence causes you to have a reasonable doubt about whether Mr. Stanley knew that Mr. Boushie would likely die from any bodily harm that he caused. It is for you to decide on all the evidence.*

If you have got to this stage in your deliberations, you would have already concluded that Mr. Stanley deliberately fired a gun at Mr. Boushie. Intent can be inferred from actions. Generally speaking, if you point a gun at the head or a significant organ of a person and fire the gun, you intend to cause his death.

If you are not satisfied beyond a reasonable doubt that Mr. Stanley had either state of mind required to make his unlawful killing of Mr. Boushie murder, you must find Mr. Stanley not guilty of second degree murder, but guilty of manslaughter.<sup>154</sup>

This charge is legally correct, in the sense that Canadian criminal law does create room for the possibility that an accused may deliberately point a gun at a person's head, believing it to be loaded, and intentionally pull the trigger, yet fail to have the requisite subjective *mens rea* for murder. However, this instruction is wholly disconnected from the evidence and respective strategies of the Crown and defence in this case. By the end of the trial, it was apparent that Stanley relied solely on the defence of hang fire—i.e. accident. Chief Justice Popescul did not instruct the jury about how to navigate the credibility challenges that would arise if they disbelieved Stanley's denial as to an intentional trigger pull (A) but considered that a reasonable doubt remained as to Stanley's intention with respect to the consequences of pulling the trigger while the Tokarev was pointed at Boushie's head (B). A significant portion of Chief Justice Popescul's relatively brief instructions seem to have been devoted to a scenario that was not realistically in play on any version of the evidence. Unfortunately, Chief Justice Popescul also failed to provide jury instructions on other, more salient, matters.

Ultimately, Chief Justice Popescul defined the potential (un)lawfulness of Stanley's actions in two alternative senses. First, he identified lawfulness as an element of murder, in terms that broadly asked the jury to consider whether the Crown had proven beyond a reasonable doubt that Stanley had deliberately pulled the trigger while pointing the gun at Boushie, intending—at minimum—to cause him bodily harm and knowing death

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<sup>154</sup> *Ibid* at 896 [emphasis added].

was likely. Secondly, lawfulness became an element of manslaughter in terms that asked the jury to consider whether Stanley had been careless in his handling of the handgun. Chief Justice Popescul did not caution the jury to avoid relying on anti-Indigenous stereotypes in assessing what had happened at the Stanley farm and how Stanley responded to that situation. Nor did he remind the jury that Boushie was entitled to the equal protection and benefit of Canadian legal principles regardless of any prior wrongdoing with which the jury heard he may have been involved. Chief Justice Popescul did not remind the jury to consider whether Stanley's account of the manner in which his weapon discharged was consistent with the expert evidence provided within the report of the forensic pathologist (which was admitted by the defence) and the firearms expert Gregory Williams (uncontested on this point) about the relative position and trajectory of the gun to Boushie's head at the time it discharged.

In short, the jury heard somewhat convoluted instructions about the path to conviction for second degree murder that seemed to draw a distinction between the act of pointing the gun and pulling the trigger and the intention as to consequences. While that distinction is legally correct, it was at best implausible on the evidence in this case. The instructions did not clearly explain the basis on which the jury might legitimately reason that Stanley had deliberately pointed the gun and intentionally pulled the trigger but also lacked the requisite intent for murder. Compounding this problem, the jury was not given clear guidance about how to approach much of the evidence it had heard, particularly testimony that raised a substantial risk of prejudice and anti-Indigenous bias. I would argue that the court in *Barton* directs trial judges to provide juries with far clearer and more substantive guidance than that which was offered in this case. At the end of the day, the jury instructions which were delivered failed to dispel the risk presented by Spencer's narrative that moral indignation at the alleged activities of Boushie and his companions, coupled with racism towards Indigenous youth in rural Saskatchewan, factored into the jury's assessment of the evidence against Stanley.

## 6. Conclusion

This article has traced a bungled forensic investigation that was conducted against a backdrop of systemic racism. By leaving a crime scene unprotected in heavy rain and failing to secure blood spatter evidence, RCMP investigators failed to preserve trace evidence that could have cast considerable light on the circumstances of Boushie's death. The crime scene investigator's search for physical evidence appears to have been premised on Stanley family members' witness statements, despite the presence of contradictory reports from Indigenous eyewitnesses. Had

the crime scene been properly protected against the elements, additional evidence would almost certainly have been available to help the jury assess the contradictory witness testimony. Had the blood pattern analyst viewed objects associated with the crime scene in person, she may have been able to provide the jury with more assistance about the manner in which the shooting occurred. Had the forensic pathologist Dr Ladham been called to testify, he may have done the same. Compounding these failures, the hang fire evidence distracted the jury from the most important question of whether Boushie *could* have been shot in the manner in which he was shot if Stanley had acted as he described in his testimony.

But the failures of forensic science go deeper than that. Gregory Williams testified that when he conducted specific research on hang fire, he found only two industry publications that reported any kind of empirical testing of hang fires, their cause, incidence and duration. In the absence of sound, empirically-based expert testimony about this phenomenon, the judge and jury heard lay opinion evidence, of doubtful applicability, and the trial was, to a large extent, deflected into a contest about whether lengthy hang fires are possible. The defence may have used this evidence to great effect to undermine the testimony given by the experts—Williams and Ervin—that hang fires are extremely rare, and to distract from Ervin’s testimony that the longer the powder in a cartridge burns, the more likely it is that the bullet will be propelled at a low velocity, if at all. In short, decades of failure by the forensic community to conduct sound scientific research manifested in this case as a lack of reliable scientific evidence about the nature, incidence and possible duration of hang fires, and opened the door to questionable lay opinion evidence. As Roach has also observed, lay testimony was placed on an equal footing with the testimony of experts who were appropriately careful to observe the limits of their expertise and knowledge.<sup>155</sup>

Forensic science and medicine cannot provide a panacea to systemic and institutional racism within Canadian police forces and the legal system. However, in their present largely-unregulated and unscrutinized state in Canada, these fields may well be exacerbating problems that are more often recognized as originating elsewhere. Concerns about how racism operates within the legal system should therefore extend to a careful analysis of forensic practices and procedures. At present, a regulatory vacuum permits investigator discretion to prevail within this branch of law enforcement services, as elsewhere. Unguided discretion is one portal through which bias enters institutional processes.<sup>156</sup> The RCMP’s

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<sup>155</sup> Roach *Canadian Justice, Indigenous Injustice*, *supra* note 137 at 121.

<sup>156</sup> Andrew Camilleri et al, “A risk-based approach to cognitive bias in forensic science” (2019) 59:5 *Science & Justice* 533; *PCAST Report*, *supra* note 52.

resistance to adopting and publishing robust standards for crime scene investigation and forensic procedure may have contributed to the bungled forensic investigation in the *Stanley* case, particularly given the apparently close working relationship between the crime scene investigator and other police investigators. These factors seem to have enabled a sloppy forensic investigation that reinforced other sources of bias towards the Indigenous eyewitnesses in this case. Crucial evidence was irretrievably lost as a result.

The scientific and medical evidence that *was* led in the *Stanley* trial was also poorly handled. In particular, the forensic pathologist's report and Gregory Williams' testimony afforded crucial information. Indeed, this evidence supplied "a sound basis ... to question the veracity"<sup>157</sup> of Stanley's testimony. By failing to advert to this evidence in their respective closing address and judicial instructions, the prosecutor and trial judge missed a key opportunity to establish a more objective, less racially-charged approach to contested questions of fact. As it was, after hearing emotive submissions that resonated with prejudicial stereotypes about Indigenous youth in rural Saskatchewan, and lacking clear judicial direction, it is difficult to believe that the jury focused its attention on the contradictions between physical evidence such as bullet trajectory and minimum distance from gun muzzle to entry wound; and the account supplied by Stanley. This case is therefore as much about inattention to core principles of evidence, proof and the prosecutor's and trial judge's responsibilities as it is about the operation of full answer and defence. Perhaps, in a case such as this, the very operation of proof beyond a reasonable doubt becomes entangled with colonial race logic.

After Stanley was acquitted, Métis lawyer Jean Teillet identified that the Canadian legal system has "failed Indigenous communities in essential ways."<sup>158</sup> She wrote:

Our adversarial system succeeds in establishing some facts, but it rarely—if ever—delivers the whole truth. Facts and truth do not equate to justice. Too many facts are excluded at trial to arrive at the truth; too much rides on the possibility of jail.<sup>159</sup>

Boushie's family has responded to these failures with impressive grace and clarity:

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<sup>157</sup> *Barton*, *supra* note 148 at para 128.

<sup>158</sup> Jean Teillet, "[To Believe in Justice, We Must Probe Our Sacred Cow: The System Itself](#)" (27 February 2018), online: *Maclean's* <[www.macleans.ca/opinion](http://www.macleans.ca/opinion)>.

<sup>159</sup> *Ibid.*

‘We saw a judicial system that continues to fail Indigenous people all across the country,’ ... ‘We are angry, we are upset and we are hurt. But we will only continue to pursue justice for Colten.’<sup>160</sup>

The RCMP and the Canadian legal system must begin to address the operation of anti-Indigenous bias “openly, honestly and without fear,”<sup>161</sup> including through the development of and rigorous adherence to evidence-based death investigation procedures and crime scene protocols. Until such protocols are adopted, Indigenous deaths in Canada are likely to continue to be under-investigated and under-prosecuted.

Boushie’s family has called for an inquiry into the police and legal system’s handling of the *Stanley* case.<sup>162</sup> As others have observed, similar inquiries have occurred in Saskatchewan and elsewhere in Canada, and have not necessarily resulted in the government action that such inquiries promise.<sup>163</sup> Nonetheless, with political will, appropriate resources and follow through, an inquiry into the RCMP’s and legal system’s handling of Boushie’s death, conducted in the tradition of the *Royal Commission on the Donald Marshall Jr Prosecution*<sup>164</sup> and the *Aboriginal Justice Inquiry of Manitoba*,<sup>165</sup> could yet provide an avenue to address pressing questions of institutional and systemic racism within death investigation and the criminal legal system in Canada.

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<sup>160</sup> Andrea Hill, “[Justice crumbled today: First Nations community reacts after Stanley verdict](#)” (12 February 2018), online: *Saskatoon StarPhoenix* <thestarphoenix.com/news> Boushie’s cousin and family spokesperson Jade Tootoosis quote.

<sup>161</sup> *Barton*, *supra* note 148 at para 197.

<sup>162</sup> *Nipawistamâsowin*, *supra* note 140; Denise Balkissoon, “[Colten Boushie’s family want an inquiry. What they deserve is action](#)” (28 May 2019), online: *Globe and Mail* <www.theglobeandmail.com/>.

<sup>163</sup> Balkissoon, *supra* note 162; Kent Roach, “The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?” (2010) 85:1 *Chicago-Kent L Rev* 89; Emma Cunliffe & Gary Edmond, “What Have We Learned? Lessons from Wrongful Convictions in Canada” in Benjamin Berger, Emma Cunliffe & James Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters) at 129–47.

<sup>164</sup> Thomas Alexander Hickman, Lawrence A Poitras and Gregory T Evans, *Report of the Royal Commission on the Donald Marshall Jr Prosecution* (Halifax: Royal Commission on the Donald Marshall, Jr Prosecution, 1989).

<sup>165</sup> *Report of the Aboriginal Justice Inquiry of Manitoba*, *supra* note 15.