ACCESS TO JUSTICE AND *ROWBOTHAM* APPLICATIONS: CHALLENGING THE MYTH OF THE SIMPLE TRIAL

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This article challenges the traditional assumption that common legal issues in criminal proceedings are not sufficiently complex to require an accused to be represented by counsel. When considering the current complexity of the substantive, procedural and evidentiary rules that arise in almost every case, and the degree to which they involve critical strategic considerations, the reality emerges that almost every criminal proceeding is inherently complex. This actuality should be a factor that weighs in favour of the appointment of counsel to indigent accused to preserve a fair trial. This position is reinforced by the duty of a court to apply the same legal rules in all proceedings, and the prohibition against trial judges acting in an advocate role for a self-represented accused. The notion of a "simple" criminal trial is a legal fiction that our justice system cannot afford to perpetuate given the complex legal rules that apply in almost every case, and the critical individual and societal interests at stake in every criminal proceeding.

L'auteur de cet article remet en question l'idée reçue voulant que certaines questions de droit qui reviennent couramment dans les poursuites criminelles ne soient pas assez complexes pour que l'accusé doive être représenté par un avocat. Quand on examine la complexité actuelle des règles juridiques de fond, de procédure et de preuve appliquées dans presque chaque dossier, et les analyses stratégiques d'importance cruciale que ces règles suscitent, force est de constater la réalité : presque toutes les instances criminelles sont complexes par nature. Cette réalité doit être reconnue comme l'argument qu'elle est en faveur de la représentation par avocat des accusés moins fortunés afin de leur garantir un procès équitable. En outre, le tribunal est tenu d'appliquer les règles de droit uniformément, et il est interdit au juge de défendre les intérêts d'un accusé non représenté par un avocat. Ainsi, l'idée d'un procès criminel « simple » est un mythe juridique que notre système de

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justice ne peut se permettre de perpétuer, vu la complexité des règles de droit qui s'appliquent dans presque tous les cas, et vu l'importance fondamentale, tant pour l'individu que pour la société, de ce qui se joue dans chaque procédure criminelle.

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1. Introduction

The right to retain and instruct counsel contained in section 10(b) in the *Canadian Charter of Rights and Freedoms* ["*Charter*"] has been interpreted as not affording a right of indigent accused to receive state funded counsel in criminal proceedings.[2] However, sections 7 and 11(d) of the *Charter* guarantee a fair trial in a criminal proceeding, raising the issue of whether this right requires an indigent accused to be provided a lawyer. The jurisprudence has recognized a limited jurisdiction of a court to grant a "*Rowbotham* Order" which requires the appointment of counsel to an indigent accused where representation is necessary to

2 *Canadian Charter of Rights and Freedoms*, s 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *R v Prosper*, [1994] 3 SCR 236, 1994 CanLII 65; *R v Burden*, 2023 ONSC 1166 at para 6.

protect the fairness of the proceedings. One important factor in the test for a *Rowbotham* Order is an assessment of whether the legal issues in the case are "complex." While traditional interpretations of this factor have focused on whether the case has exceptional aspects, such as difficult pre-trial motions or intricate statutory provisions, a realistic assessment of the modern criminal trial reveals an inherent complexity beyond a lay litigant's abilities. The *Rowbotham* test must reflect this reality if it is to achieve its stated objective of protecting an accused's right to a fair trial.

2. Competently Defending a Criminal Charge

Conducting a competent defence to a criminal charge requires a vast array of knowledge and skills: a deep understanding of constantly changing substantive and procedural criminal law; detailed knowledge of the relevant common law, statutory and *Charter* based rules of evidence; awareness of ethical rules, many of which have specific application to criminal proceedings; and competency in a host of advocacy skills, including how to effectively formulate a theory of the case, adduce evidence, cross-examine witnesses, make objections and deliver closing submissions. Defence counsel will commonly have taken multiple courses in these areas as law students,[3] further developed their knowledge and skills in a law school clinical program,[4] and then spent a year articling with an experienced criminal lawyer.

Even with this training, certain issues in a criminal trial can "… cause a junior lawyer at the bar significant difficulty."[5] It is, therefore, advisable for less experienced criminal lawyers to have the opportunity to junior

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3 Students in Canadian law schools generally complete a mandatory first-year course in criminal law and procedure. There are a variety of upper-year courses in advanced criminal law, trial advocacy, and evidence, as well as seminars which focus on specific areas of criminal law, such as financial crimes, sexual assault, sentencing, penal policy, and homicide.

4 For example, at the Peter A. Allard School of Law, many students interested in pursuing criminal law will participate in a clinical program where they learn substantive criminal law and practical skills while representing persons who cannot afford legal services under the supervision of an experienced lawyer: see the Criminal Law Clinic, UBC Innocence Project, Indigenous Community Legal Clinic, and the Law Students Legal Advice Program Credit Clinic at "Experiential Learning," online: *Peter A. Allard School of Law: The University of British Columbia* <https://tinyurl.com/mtmwpwbv> [perma.cc/8DKK-YQYU]. These clinical programs make very significant contributions to access to justice by both providing free representation to persons in the community and educating students about the many barriers to justice faced by low-income and marginalized persons: online: Peter A. Allard School of Law: The University of British Columbia <https://tinyurl.com/35763k79> [perma.cc/7ULA-D45B].

5 *R v Gooch*, 2022 NSSC 171 at para 31 [*Gooch*].While there is no presumption that a junior lawyer is not competent to conduct a proceeding (*R v Singh*, 2018 ONSC 1533

a senior lawyer in a number of cases, and to consult with senior counsel when making difficult decisions in cases they are conducting on their own.[6] The detailed knowledge of law and host of advocacy skills required to reasonably conduct a criminal trial necessitates legal education, as "… no resource for lay people will ever be as effective as having legal representation. Only legally trained people can recognize and analyze complex legal issues and have the skills to effectively examine and cross-examine witnesses."[7]

Given the critical interests at stake in any legal proceeding, and the fact that our adversarial system puts most decisions concerning adducing and challenging evidence in the hands of the parties,[8] it is important in all cases that litigants be competently represented. However, the liberty, stigma and public safety issues engaged in criminal proceedings, including the significant impacts of a criminal record,[9] make it particularly vital that accused persons be represented by competent counsel. As Justice Henschel noted in *R v Sabattis*, a criminal record can have serious and ongoing detrimental impacts on a person:

> [127] … There is no doubt that a criminal record has serious collateral consequences to an offender, including making it more difficult for an individual to access education, and obtain employment and housing. It may limit an individual's social participation by restricting volunteer opportunities and restrict the ability to travel. I also accept that it carries with it a significant stigma that can impact the emotional well being of an individual.[10]

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at para 37), a lack of experience can contribute to a lawyer making errors which prejudices an accused: see for example, *R v Gardiner*, 2010 NBCA 46.

6 There are also a number of professional rules which regulate competency standards for lawyers, including limitations on the types of proceedings that articling students can undertake by themselves, detailed competency duties, and requirements for annual ongoing legal education: see for example The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, 2013, c 3.1; The Law Society of British Columbia, Law Society Rules, 2015, r 2–71, online: <https://tinyurl.com/43uuusr3> [perma.cc/Z2FM-AMWM]; "Continuing Professional Development," online: L*aw Society of British Columbia* <https://tinyurl.com/3svhmpe9> [perma.cc/Z2FM-AMWM].

7 *R v Hamiane*, 2016 ABQB 409 at para 82 [*Hamiane*].

8 *R v Stucky*, 2009 ONCA 151 at para 69; *R v Vlachos*, 2015 ONSC 1700 at para 30; *R v Saddleback*, 2016 ABCA 204 at para 12.

9 *R v Malmo-Levine*, 2003 SCC 74 at para 172; *Chu v Canada (AG)*, 2017 BCSC 630 at paras 228–232. Further, sentencing fines and conditions can have a significantly disproportionate impact on marginalized persons, and can also lead to incarceration and spiralling sets of additional charges and convictions: *R v Boudreault*, 2018 SCC 58 at paras 66–79; *R v Zora*, 2020 SCC 14 at paras 53–58.

10 *R v Sabattis*, 2020 ONCJ 242 at para 127.

3. Self-Represented Accused

In the context of the vast consequences of a criminal conviction and the high level of academic and experiential training required to be competent defence counsel, it is shocking that many accused are forced to represent themselves because they are ineligible for legal aid and cannot afford private legal services.[11] The issue of accused persons being unable to afford legal services has grown due to the increased length and complexity of criminal proceedings, significant income inequality, and an increasingly high cost of living.[12] Given that a private retainer generally costs, at the very least, thousands of dollars, it is not surprising that many persons are caught in circumstances where they earn "too much" for legal aid but have no resources to retain private counsel.[13]

Legal aid programs in Canada are cost-effective and highly innovative.[14] However, given the approximately 300,000 applications for criminal legal aid each year and limited funding, the reality is that "… many low-income individuals facing the likelihood of imprisonment can neither afford lawyers nor quality for legal aid."[15] The fact that an accused's income is close to the poverty line, or that their income is totally consumed by household expenses, typically still results in a person being ineligible for legal aid.[16]

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11 The limited budgets for legal aid programs and the massive demand for their services have resulted in strict financial criteria. A very modest income for a person can result in a person being ineligible: see for example, "Do I qualify for legal representation" online: *Legal Aid BC* <https://tinyurl.com/3ve7seju>; see also the strict financial eligibility in Ontario summarized in Benjamin D Schnell, "The Journey to Universal Legal Aid: Protecting the Criminally Accused's *Charter* Rights by Introducing a Public Defender System to Ontario" (2018) 8:2 online: Western J Leg Studies 1 at 8 [Schnell].

12 *R v Rose*, 2019 ONSC 4842 at para 11 [*Rose*]; "Evaluation of the Legal Aid Program: Final Report" (2021) at 35–37 online (pdf): *Department of Justice Canada* <https://tinyurl.com/3svsakvu> [perma.cc/L57X-K7BN] [DOJ Final Report]; see also "Canadian Judicial Council Publishes New Handbooks for Self-Represented Litigants" (2021) online (press release): *Canadian Judicial Counsel* <https://tinyurl.com/5ezn7rxz> [perma.cc/Q4G7-9LPW].

13 *R v Moodie*, 2016 ONSC 3469 at para 6 [*Moodie*]; As the Court noted in *Rose*, *supra* note 12 at para 16, even those with substantial incomes are often unable to afford legal services; see also Schnell, *supra* note 11.

14 DOJ Final Report, *supra* note 12 at 25; see for example "New legal aid service offers early resolution for criminal cases" online: *Legal Aid BC* <http://tinyurl.com/bdhxfmey>.

15 DOJ Final Report, *supra* note 12 at 8, 24.

16 See for example *R v McLarty-Mathieu*, 2022 ONCJ 498 at para 11; *R v DCS*, 2023 NSSC 41 at para 77; *Moodie*, *supra* note 13 at para 6; *Rose*, *supra* note 12 at para 16; *R v Regnier*, 2014 SKQB 144 at para 8.

Self-representation can lead to numerous unjust outcomes, including an accused being less likely to receive bail, being more likely to get a custodial sentence, or being convicted because a viable defence was not raised.[17] As the British Columbia Court of Appeal noted in overturning the convictions of Ivan Henry, "[i]t is a common experience of judges that self-represented accused persons are at a substantial disadvantage."[18] The risk of miscarriages of justice stemming from a lack of legal representation impacts our entire society, but more greatly affects racialized persons and members of low-income communities who are subject to significantly disproportionate levels of contact with the police and the criminal justice system due to factors such as profiling and systemic discrimination.[19] Further, self-representation puts a greater burden on those already facing barriers and challenges in our society, including those already struggling with mental health issues, addictions and trauma.[20]

Our society has somehow normalized persons being forced to represent themselves in our criminal justice system, but it is the equivalent of walking into a hospital and seeing a patient attempting to operate on themselves with some general advice from a doctor. The stark reality of self-represented accused was captured in a paper by Justice Michelle Fuerst, quoted in the case of *R v Lewis*, as follows:

> Whatever the reason for his or her status, the self-represented accused is usually ill-equipped to conduct a criminal trial. He or she comes to court with a rudimentary understanding of the trial process, often influenced by misleading depictions from television shows and the movies … His or her knowledge of substantive legal principles is limited to that derived from reading an annotated criminal code. He or she is unaware of procedure and evidentiary rules. Even once made aware of the rules, he or she is reluctant to comply with them, or has difficulty doing so. … The limitations imposed by the concept of relevance are not understood or are ignored, and the focus of the trial is often on tangential matters. Questions, whether in examination-in-chief or cross-examination, are not framed properly. Rambling, disjointed or convoluted questions are the norm. The opportunity to make submissions is viewed as an opportunity to give evidence without entering the witness box.[21]

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17 Schnell, *supra* note 11 at 10–12.

18 *R v Henry*, 2010 BCCA 462 at para 6, emphasis added; see also *Henry v. British Columbia (AG)*, 2016 BCSC 1038 [*Henry*].

19 *R v Le*, 2019 SCC 34 at paras 89–97; *R v Natomagan*, 2022 ABCA 48 at paras 106–108; *R v King*, 2019 ONSC 6851 at para 36; *R v King*, 2022 ONCA 665 [*King*]; *R v Theriault*, 2021 ONCA 517 at paras 143–144.

20 DOJ Final Report, *supra* note 12 at 10.

21 *R v Lewis*, 2016 ONCJ 859 at para 19; see also *MR c R*, 2018 QCCA 1983 at para 41.

However, a trial judge in a criminal trial is not a "mere observer" of the trial process, and has a broad common law jurisdiction to "… ensure that trial is effective, efficient and fair to both sides."[22] Further, sections 7 and 11(d) of the *Charter* accord accused persons a constitutional right to a fair trial. Pursuant to these fair trial protections, courts possess a limited jurisdiction to halt proceedings until an indigent accused is provided with state funded defence counsel. This exceptional "*Rowbotham* Order" considers a series of criteria, including whether the legal issues in the proceeding are sufficiently complex that a self-represented accused would be unlikely to receive a fair trial.

I argue in this article that the current state of substantive, procedural, and evidentiary rules make almost every criminal proceeding legally complex, and therefore this factor should generally weigh in favour of the appointment of counsel. This submission does not attempt to alter or broaden the criteria for *Rowbotham* Orders,[23] but argues that the inherent legal complexity of most criminal trials must be incorporated into the existing test for the appointment of counsel.

This article first provides an overview of the criteria for *Rowbotham* Orders, then provides an analysis of the factors relating to the complexity of the case, and finally sets out a number of reasons why almost every criminal proceeding, if conducted fairly for all parties, has legal issues which are too complex to be litigated by a self-represented accused.

4. Threshold for a *Rowbotham* Order

A) Three Part Test

While there is no specific *Charter* right which guarantees a right to counsel, in the seminal case of *R v Rowbotham*, the Court of Appeal for Ontario held that courts have a narrow *Charter* jurisdiction to find that the appointment of defence counsel is necessary to protect a protect the right to a fair trial:

> [156] … In our opinion, those who framed the *Charter* did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within

22 *R v Snow*, 2004, 73 OR (3d) 40, [2004] OJ No 4309 at para 24.

23 There are some excellent arguments for creating a broader system of state-funded legal representation, which would not only assist in preventing miscarriages of justice but also bring greater economy, efficiency and legitimacy to our criminal justice system: see Schnell, *supra* note 11; DOJ Final Report, *supra* note 12 at 9–10, 19.

> provincial legal aid plans, ss. 7 and 11*(d)* of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.[24] [emphasis added]

The remedy for a successful *Rowbotham* application is an order that provides a conditional stay of proceedings which is lifted when the state provides funded counsel to the accused.[25] *Rowbotham* Orders are only to be provided in rare circumstances,[26] and an applicant must meet the following three stringent tests:

> [15] The court's determination of whether to conditionally stay proceedings pending the appointment of publicly funded counsel depends on the applicant satisfying all three of the following conditions, on the balance of probabilities:
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> 1) The applicant is ineligible for or has been refused legal aid and has exhausted all appeals for re-consideration of his eligibility.
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> 2) The applicant is indigent and unable to privately retain counsel to represent him; and
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> 3) The applicant's right to a fair trial will be materially compromised absent funding for counsel …[27]

The *Rowbotham* test accordingly has an eligibility component, an indigence component, and a fair trial component. This paper focuses on the fair trial component and, in particular, its assessment of the complexity of the legal issues in the proceedings.

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24 *R v Rowbotham*, 1988, 63 CR (3d) 113, [1988] OJ No 271, 1988 CanLII 147 (ON CA) at para 156; *R v Rafilovich*, 2019 SCC 51 at para 80.

25 *Ibid.*

26 For an overview of the reasons courts have concluded that they only have a limited jurisdiction to provide *Rowbotham* Orders, see *R v Tremblay*, 2013 BCSC 56 at para 2 [*Tremblay*].

27 *Gooch*, *supra* note 5 at para 15; *Rowbotham* applications are distinct from *amicus* appointments, and *amicus* appointments cannot be used to circumvent an unsuccessful application for state-funded defence counsel: *R v Kahsai*, 2023 SCC 20 at para 48 [*Kahsai*]. *Amicus* appointments are also often made in the context of an accused who insists on representing themselves, and therefore the fair trial analysis for the role of *amicus* must consider the constitution rights of an accused to represent themselves and control their own defence, even if those decisions are unwise: *Kahsai* at paras 38, 43, 45, 49, 58, 74. *Rowbotham* applications conversely engage circumstances where a person is desperately attempting to secure legal representation to help ensure the fairness of the proceedings.

B) Fair Trial Component and the Complexity of the Proceedings

The fair trial component of the *Rowbotham* test does not assess whether an unrepresented indigent accused will have a "perfect trial" or one without "any risk" of unfairness. Rather this component determines whether there is a "real and substantial risk" that an accused's right to a fair trial will be violated.[28] This test considers both the seriousness of the charges and the complexity of the proceedings.[29] The seriousness of the case factor is based on the nature of the allegations and the potential for a sentence of imprisonment.[30] However, the fair trial component tends to focus on the complexity of the proceedings, which is appropriate given the severe implications of any criminal conviction. The complexity of the proceedings is assessed based on a number of factors, including:

- the length of the proceedings;[31]
- the volume of disclosure;[32]
- the extent of pre-trial motions, including *Charter* applications;[33]
- whether the proceedings involve co-accused;[34]
- the personal characteristics of the applicant regarding their ability to properly conduct the proceedings, such as their "education, verbal and intellectual skills, employment background, ability to read, facility with language, and experience with the criminal justice process";[35] and,
- the complexity of the legal issues in the case.[36]

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28 *R v Bourdeau*, 2016 ONSC 6079 at para 26 [*Bourdeau*]; *R v Bancroft*, 2019 ONSC 1931at para 7 [*Bancroft*]; *R v Mostowy*, 2014 BCSC 2479 at para 21 [*Mostowy*].

29 *R v Pastuch*, 2022 SKCA 109 at para 10.

30 *R v Rushlow*, 2009 ONCA 461 at paras 19–20 [*Rushlow*].

31 *R v Kelley*, 2019 ONSC 5343 at para 16 [*Kelley*]; *R v Vuong*, 2016 ONSC 7277 at para 116 [*Voung*].

32 *Ibid.*

33 *Gooch*, *supra* note 5 at para 30; *R v Wesaquate*, 2020 SKQB 64 at para 33 [*Wesaquate*].

34 *Tremblay*, *supra* note 26 at para 12.

35 *Kelley*, *supra* note 31 at para 17; see also *Tremblay*, *supra* note 26 at para 13; *Vuong*, *supra* note 31 at para 116.

36 *Vuong*, *supra* note 31 at para 116; *R v Bear*, 2014 SKQB 338 at para 18; *Wesaquate*, *supra* note 33 at para 11; *R v Tehrani*, 2016 ONSC 2228 at para 8.

While the complexity of the legal issues is only one of the criteria to be considered in the fair trial component of the *Rowbotham* test, a finding that there are highly complex legal issues in a case can weigh strongly in favour of a finding that an unrepresented accused will likely not have a fair trial.[37] Further, the complexities are not required to be "unique" to justify a *Rowbotham* Order. In *R v Rushlow*, Justice of Appeal Rosenberg held as follows:

> [24] In my view, the trial judge applied too stringent a test. This court has never said that a *Rowbotham* order is limited to an extreme case where Legal Aid's decision is completely perverse, and there is a substantial possibility of lengthy imprisonment. The passage from *Rowbotham* quoted by the trial judge is from the reasons of the trial judge in that case. This court did not endorse that test. Nor need the case be one posing "unique challenges." The authorities hold that the case must be of some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and that the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial.[38] [emphasis added]

The complexity factor is also analyzed in the context of a trial judge's duty to assist an unrepresented accused to protect the fairness of the proceedings.[39] However, this duty has a number of limitations that are necessary to protect the interests of the state and to avoid the perception of judicial bias. The trial judge's role in assisting the accused is significantly limited and does not permit the judge to act as an advocate or require the court to provide competent representation to the accused:

> [92] When assisting an unrepresented accused, a trial judge must exercise caution to avoid becoming an advocate for, or legal advisor to, the accused. As Justice Griffin recently stated in *R v Wyatt*, 2018 BCCA 162 at para 12, "A judge presiding over a criminal trial with a selfrepresented accused must remain neutral and cannot become the lawyer for the accused."

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37 *Gooch*, *supra* note 5 at para 29.

38 *Rushlow*, *supra* note 30 at para 24.

39 *Kahsai*, *supra* note 27 at para 54; *R v Woolsey*, 2021 BCCA 253 [*Woolsey*]; see also *R v Tran*, 2001, 55 OR (3d) 161, [2001] OJ No 3056 at paras 22–23. There are also some excellent materials available to assist unrepresented persons in criminal cases: see, for example, "Criminal Law Handbook for Self-Represented Accused," online (pdf): *Canadian Judicial Council* <https://tinyurl.com/3333eaks> [perma.cc/G48G-V4U6]; "Representing Yourself in a Criminal Trial," (2022) online (pdf): *Legal Aid BC* <https://tinyurl.com/yc7tph29> [perma.cc/4C2U-988H]. However, there is an immense gap between having some knowledge of the legal rules and an ability to navigate and apply those rules in an adversarial trial. This issue is recognized in legal education, where after learning legal rules, students spend significant time learning to apply those rules in experiential exercises, moot courts, and supervised clinical programs.

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> [93] It is important to keep in mind that trial fairness does not require that an unrepresented litigant be able to present their case as effectively as a competent lawyer. Rather, they must be given a fair opportunity to present their case to the best of their ability. In providing assistance to an unrepresented litigant, a trial judge must respect the rights of the other parties …[40] [emphasis added]

A trial judge must avoid advising an accused on strategic issues, as the court "… should not assist the self-represented accused with trial tactics or provide the accused with advice on tactical decisions."[41] A trial judge also cannot "enter the arena" by actively conducting the accused's defence.[42] A trial judge "… cannot assume the role of counsel; must not provide legal advice; and must maintain a position of impartiality as between the parties."[43] It is the responsibility of the self-represented accused to "familiarize themselves with the relevant legal practices and procedures pertaining to their case" and to "prepare their own case."[44]

Further, a trial judge cannot use different rules for self-represented accused, as this approach undermines the fair trial interests of opposing parties.[45] As courts have held, "as a matter of principle, even when an accused is self-represented, the same rules of evidence apply,"[46] and "[t]here is not one set of rules and laws for self-represented litigants and another for everyone else."[47] Similarly, while the Crown has a duty of fairness which includes helping a self-represented accused understand the genera; procedures in a proceeding and alerting the court to relevant facts and laws,[48] Crown counsel are particularly constrained from offering any legal or strategic advice to an accused. The Crown has a duty to be skillful advocates for the state and to diligently pursue a legitimate case in the public interest.[49]

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40 *R v Neidig*, 2018 BCCA 485 at paras 92–93; see also *R v Forrester*, 2019 ONCA 255 at paras 15–16 [*Forrester*].

41 *Woolsey*, *supra* note 39 at para 51; *Kahsai*, *supra* note 27 at para 54.

42 *Hamiane*, *supra* note 7 at paras 57, 77.

43 *R v Thiessen*, 2022 BCPC 71 at para 50.

44 *R v Morillo*, 2018 ONCA 582 at para 11; see also "Statement of Principles on Self-represented Litigants and Accused Persons," (2006), online (pdf): *Canadian Judicial Council* <https://tinyurl.com/4p4nxhnk> [perma.cc/QG7S-X4QQ].

45 *Dujardin v Dujardin Estate*, 2018 ONCA 597 at para 37.

46 *R v Shenker*, 2021 QCCQ 2376 at para 39; *R v Fabrikant*, 1995, 39 CR (4th) 1, [1995] QJ No 300 at para 85.

47 *Durkin v Facebook, Inc*, 2022 BCSC 1305 at para 18.

48 *Woosley*, *supra* note 39 at para 50; *Kahsai*, *supra* note 27 at paras 55–56.

49 *R v Atout*, 2013 ONSC 1312 at para 49.

Accordingly, the challenges posed by complex legal issues cannot be solved by applying different legal rules in trials with self-represented accused or by having the trial judge perform a quasi-counsel role in the proceedings.

5. Current Complexity of Legal Issues

The traditional analysis of the legal complexity factor in *Rowbotham* applications assesses whether the proceeding only involves standard issues, or issues that engage unique complexities, such as difficult pre-trial applications or an offence or defence with particularly complex elements.[50] However, I argue that numerous common law and statutory rules render almost every criminal proceeding legally complex. Some of these are long-standing rules, some have become more complex over time, and some are of more recent vintage. Together they create a current reality where most criminal proceedings inherently have complex legal issues that are beyond the abilities of a person without significant legal training. Therefore, the complexity of the legal issues factor should almost always weigh in favour of a finding that the "fair trial" threshold is met for a *Rowbotham* Order. Set out below are six examples of these common and complex legal rules, though many more could be added.[51]

A) The Required Elements the Crown Must Prove

A fundamental principle of criminal law is that the Crown must prove each essential element of an offence beyond a reasonable doubt.[52] The main source of these elements is the text of the relevant statutory provision, and it is well within the role of a trial judge to explain to the accused the

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50 *Bourdeau*, *supra* note 28; *Wesaquate*, *supra* note 33; *Bancroft*, *supra* note 28; *Tremblay*, *supra* note 26; *R v Zreik*, 2015 ONSC 6680.

51 Some further common areas of complexity include: the options the Crown has to prove a subjective *mens rea*, which always includes wilful blindness (*R v Briscoe*, 2010 SCC 13) but may or may not include subjective recklessness depending on the legislative intent drawn from each statutory provision (*R v Jacquard*, 2019 NSSC 338; *R v Buzeta*, [2003] OJ No 1547, 2003 CanLII 12456 (ON SC)); the complex law for *Corbett* applications, where an accused who intends to testify seeks to limit the admissibility of their criminal record (*King*, *supra* note 19; *R v MC*, 2019 ONCA 502; *R v Singh*, 2022 BCSC 1645); recognizing which defences are available, and understanding the elements of each defence, including whether the elements are subjective, objective or both, and utilizing the modified objective aspect which infuses certain traits and experiences of the accused into the analysis of objective elements (*R v Khill*, 2021 SCC 37; *R v Ryan*, 2013 SCC 3); and any sexual assault proceeding, as these trials are inherently legally complex given the many unique evidentiary and procedural provisions which apply in these cases (see discussion in *R v JJ*, 2022 SCC 28; *R v RV*, 2019 SCC 41; *R v Goldfinch*, 2019 SCC 38; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1.

52 *R v Thomas*, 2016 BCSC 1888 at para 19; *R v Gill*, 2018 ONSC 6341 at para 5.

statutory elements the Crown must prove. However, there are numerous other issues concerning the proof of essential elements that are not only highly complex but also involve critical tactical decisions that are well beyond the scope of the limited assistance role of a trial judge.

1) Particulars

A second source of elements of the offence arises from the particulars contained in the indictment that give the accused notice of the specific conduct at issue in the charge. These particulars are presumptively additional essential elements that the Crown must prove.[53] These particulars can significantly narrow the scope of the accused's liability, and an accused can bring a motion for further particulars to be added to an indictment if the charge is too vague.[54] There are complex exceptions to the rule that the Crown must prove particulars, including the "surplusage" exception, which holds that particulars relating to issues outside the statutory elements of an offence do not have to be proven.[55] Further, the Crown has the ability to apply to amend a particular so that it matches the evidence called at trial. This amendment can be made at any time during the proceedings, including at the close of the case.[56] However, the surplusage exception and amendment powers are subject to a prejudice assessment, as a particular cannot be amended or declared surplusage if the accused conducted their defence in reliance on that particular.[57]

Accordingly, the issue of which exact elements of an offence have to be proven is not only legally complex, but also can depend on how the defence conducts its case in each proceeding, raising important strategic considerations. For example, where it appears that the Crown may not be

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53 *R v Saunders*, [1990] 1 SCR 1020, 46 BCLR (2d) 145 [*Saunders*]; *R v Sadeghi-Jebelli*, 2013 ONCA 747; *R v Tomshak*, 2016 ABQB 718 at para 17. For example, the indictment in a fraud case might particularize that the accused committed the fraud by making certain specific false claims to the victim, and an indictment in an aggravated assault case might particularize that the accused committed the offence by causing a wound to the victim. However, the date and place listed in an indictment are usually not essential elements (*Criminal Code of Canada*, RSC 1985, c C–46, s 601(4.1) [*Criminal Code*]), and the Crown may also have some flexibility on certain particulars, such as the type of controlled substance the accused trafficked (*R v Rai*, 2011 BCCA 341; *R v Zamora*, 2023 ONSC 2169 at para 20).

54 *Criminal Code*, s 587; *Saunders*, *supra* note 53.

55 *R v JBM*, (2000), 145 ManR (2d) 91, [2000] MJ No 113 [*JBM*]; *R v JSW*, 2017 BCPC 47 [*JSW*]. This issue of surplusage is also not easily definable, as it appears to apply where a particular adds an additional element to the offence not included in the statutory provision, but does apply where the particular specifies how the accused committed the elements of the offence: see *Saunders*, *supra* note 53; *JBM*.

56 *Criminal Code*, s 601.

57 *JBM*, *supra* note 55; *R v Irwin*, (1998), 38 OR (3d) 689, [1998] OJ No 627 [*Irwin*].

able to prove a particular, the defence may want to avoid drawing attention to it so that the Crown is not alerted to bring an early application to amend the particular. The earlier in the proceedings an application is made to amend a particular, the less likely it is that the amendment will prejudice the defence, and therefore the more likely it is that the amendment will be allowed.[58] The defence, therefore, might avoid a pre-trial application or certain areas of cross-examination of a Crown witness that would highlight the suspect particular.[59]

However, there are significant risks to this "lay in the weeds" strategy, as the decision to forgo certain aspects of their defence for strategic reasons is not considered "prejudice" to the defence if the Crown does eventually bring an amendment application.[60] On the other hand, if the defence conducts its case in clear reliance on a particular, such as cross-examining witnesses or calling defence evidence to dispute the particular, it creates a stronger prejudice argument. However, this "active approach" will also be more likely to alert the Crown to the suspect particular early in the proceedings when an amendment application is more likely to be approved.

Given that every essential element of an offence must be proven by the Crown, determining whether a particular has been proven, and whether the particular can be amended or declared surplusage, can be the difference between conviction and acquittal.[61] Decisions about how to navigate these issues not only require a detailed understanding of the complex rules and exceptions to the rules, but also engage questions of trial strategy which are beyond the scope of permitted judicial assistance.

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58 Where significant evidence has been led in a proceeding, it is more likely that an amendment will cause prejudice because the defence will have taken many positions in the cross-examination of Crown witnesses and in leading evidence which may be impacted by altering the particular: see *Criminal Code*, s 601(4); *Saunders*, *supra* note 53; *Irwin*, *supra* note 57.

59 In *R v Harris*, 2014 BCSC 1058 at para 21 [*Harris*], the defence noticed that a weapon which was particularized in the indictment as a "restricted weapon" was actually a "prohibited weapon." To avoid calling attention to this discrepancy, the defence decided not to bring a pre-trial *Charter* motion which would have focussed on the evidence of the weapon in the case. However, when the Crown did later bring an application to amend this particular, the Court found that this tactical decision to forgo certain aspects of the defence did not constitute prejudice.

60 *Ibid.*

61 See for example *Saunders*, *supra* note 53; *R v Frimerman*, 2019 BCPC 169 at para 58; *JSW*, *supra* note 55; *R v Tran*, 2019 BCPC 364 at para 94.

2) Included Offences

The issue of what elements of the offence need to be proven by the Crown is made even more complex by included offences. Identifying included offences is complex because, in addition to statutorily included offences, such as "attempts" for every substantive offence,[62] there are two less obvious categories of included offences. First, an offence will be an included offence if it must be committed in every instance of conducting the charged offence, such as a possession charge for a possession for the purposes of trafficking offence. Second, an offence can be included if the particulars of the charged offence use language that gives notice that there is an included offence.[63] Further, the Crown has the power at any stage of the proceedings to request that the charged offence be amended to a different offence that is not an included offence.[64]

Further, included offences again raise a host of strategic issues. These tactical issues include the risks of cross-examining Crown witnesses and leading defence evidence demonstrating that the charged offence is not established, but may help the Crown prove an included offence.[65]

What this area of law requires is that the defence be able to analyze the Crown's case and the accused's version of events in light of the substantive charge, all included offences, and each particular in the indictment, and then devise a strategic approach to the trial which takes into account each of these complexities. This approach, essential to a reasonable defence, is beyond the scope of almost any lay litigant and the limited assistance role of a trial judge.

B) Managing Disclosure

A second inherent legal complexity of a criminal trial is the issue of managing Crown disclosure.

A central requirement of a fair trial is ensuring that the accused receives timely disclosure of any relevant material in the investigative

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62 See *Criminal Code*, s 660.

63 *R v G.R*, 2005 SCC 45; *R v Sickles*, 2015 ONSC 6151 [*Sickles*].

64 *Sickles*, *supra* note 63; *Irwin*, *supra* note 57. This amendment to an indictment would also be subject to a prejudice analysis.

65 For example, a self-represented accused might testify that they did not complete the *actus reus* of the offence, which is a defence to the substantive offence but may assist the Crown in proving the included offence of an attempt to commit that offence. Similarly, an accused might lead evidence that they only possessed prohibited drugs for personal use, creating a defence to possession for the purposes of trafficking but admitting to the included offence of possession.

file.[66] Such disclosure is not only critical to understanding the case against the accused, but is also important for providing information that may assist the accused in raising a defence or undermining the strength of Crown evidence. While a self-represented person will receive a disclosure package after a charge, the disclosure process extends far beyond the initial materials provided by the Crown.[67] First, the Crown may limit or redact disclosure under a number of exceptions and privileges that have to be litigated before a judge if the defence contests them.[68] This process puts the defence in a position where it needs sufficient information about the undisclosed material to determine whether it should make a court application to obtain it, possibly requiring the defence to apply for summaries of materials which are not being disclosed.[69]

Further, a review of Crown disclosure to a legally trained eye will often reveal the absence of materials that may be highly useful to the defence but are often not provided in initial Crown disclosure. Such materials can include emails and texts between police officers relating to the investigation,[70] and files relating to prior convictions or investigations of important Crown witnesses.[71] Further, Crown disclosure will usually not include potentially relevant third party records, including those in possession of other government agencies or disciplinary bodies, putting the onus on the accused to seek these materials. The defence can first bring a motion to have certain third party documents declared as part of the investigatory file because they are "obviously relevant" to the accused's case.[72] However, if these documents are in private hands, or a court does not agree they are "obviously relevant," then the defence must make a complex third party record application that involves creating an

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66 *R v Gubbins*, 2018 SCC 44 at paras 18–22 [*Gubbins*]; *R v Yogeswaran*, 2021 ONSC 1242 at paras 125–126; *R v Baxter*, [1997] BCJ No 722,1997 CanLII 3873 (BC CA).

67 The provision of initial disclosure can also raise numerous complexities, including rules about the use of disclosure and attempting to access digital documents, photos and videos, which are now common in criminal cases. Self-represented persons often do not have easy access to computers or other devices to review digital disclosure or digital evidence.

68 Privileges include informer privilege, litigation privilege and solicitor-client privilege, and the Crown can also refuse to disclose, or delay disclosure, based on several common law grounds, including irrelevance and to protect witness safety, ongoing investigations and investigative techniques: *R v Edwardsen*, 2015 BCSC 705; *United States v Meng*, 2020 BCSC 1461.

69 These summaries are often referred to as a "*Laporte* list," which is created by Crown counsel to provide a general overview of the materials not being disclosed: *R v Latimer*, 2020 BCSC 697 at para 5 [*Latimer*]; *Laporte v Saskatchewan*, 1993, SaskR 34, [1993] SJ No 361.

70 *Latimer*, *supra* note 69; *R v McKinnon*, 2014 BCSC 2051.

71 *R v Landriault*, 2019 ONSC 2020.

72 *Gubbins*, *supra* note 66 at para 21.

application record, serving the Crown and third parties with the materials, and meeting a relevance threshold without access to the requested material.[73]

Not only is the process of obtaining further disclosure highly complex, but it also requires a detailed review of the initial disclosure and knowledge of the accused's version of events. While a judge in a pre-trial conference can make inquiries concerning whether the accused has received full disclosure and make further disclosure orders, the disclosure framework significantly relies on the defence conducting a detailed review of the material it has received and determining what additional material may exist and would be important to the defence theory of the case.[74] A trial judge is usually not in a practical position to review the entirety of Crown disclosure,[75] and such a process would further risk exposing a trial judge to prejudicial materials which are not admissible at trial.[76] Further, reviewing of all the disclosure in combination with information from the defence about its theory of the case and any other evidence it has collected would involve a trial judge stepping outside their limited assistance role.

The reality is that in most cases, a self-represented accused will assume that the initial disclosure they receive from the Crown is all they are entitled to. More complex disclosure requests or applications that defence counsel would routinely raise will not arise. Given the importance of full disclosure to a fair trial and preventing wrongful convictions,[77] this issue alone can create an unfair trial for a self-represented accused.

C) Cross-Examination and Evidentiary Issues

Given the importance of cross-examination to our adversarial system of justice,[78] and the complexities of conducting an effective cross-examination, it strains reason to think that any person without significant legal training could adequately conduct this crucial aspect of a trial.[79] Further, effective

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73 *Gubbins*, *supra* note 66; *R v Sipes*, 2010 BCSC 1625 at para 3.

74 *R v Dixon*, [1998] 1 SCR 244, 166 NSR (2d) 241 at para 37; *R v Noel*, 2022 ABPC 43 at para 40.

75 *R v Abbott*, 2016 ONSC 1284 at para 22.

76 Disclosure includes inadmissible material and evidence not being led at trial, such as statements of an accused obtained in violation of the *Charter* or common law rules, information about past misconduct of an accused, and statements from witnesses who the Crown is not calling.

77 *R v Trotta*, 2004, 23 CR (6th) 261, [2004] OJ No 2439 at para 21; *R v Darling*, 2017 BCSC 2439 at para 9; *Henry*, *supra* note 18 at para 186.

78 *R v Lyttle*, 2004 SCC 5 at paras 1–2.

79 In *Hamiane*, *supra* note 7 at para 54, the Court noted that the area of the proceedings where the self-represented accused struggled the most was conducting cross-examination:

cross-examination relies on legal knowledge, such as the difference between the concepts of credibility and reliability and the many factors relevant to assessing each of these critical issues.[80]

However, beyond these foundational issues, there are a number of specific legal complexities which arise in cross-examination. First, pursuant to the rule in *Browne v Dunn*, the defence has a duty to confront Crown witnesses with any evidence which contradicts their testimony that will be called in the defence case.[81] For example, if the defence is calling evidence in an assault case that the complainant was acting aggressively, was the first to punch the accused, and apologized to the accused after the event, all these matters must be put to the complainant in cross-examination. This rule is fundamental to a fair trial for all parties and to the ability of a court to weigh competing versions of events.[82] Further, the defence must put to a witness any challenges to their credibility or reliability that they plan to rely upon during closing submissions.[83] A breach of these rules can have serious consequences, including a court putting little weight on the uncontradicted defence evidence or position taken in the defence closing.[84]

A remedy to a violation of the *Browne v Dunn* rule may be avoidable if Crown witnesses can be recalled at the end of the defence case in order to have the contrary evidence put to them,[85] but in many cases this option will not be practical or can result in significant delays in the proceedings. Further, given that this issue only arises once the defence calls evidence during their case or takes a specific position in closing, it is difficult for

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> [54] The issue facing the trial judge was credibility. Clearly, a lawyer might have done better than Mr. Hamiane did in cross-examining the Crown witnesses. Mr. Hamiane's disadvantage in representing himself was clearest during his cross-examination of the Crown's witnesses. The transcript shows that he did not show any real understanding of the purpose of cross-examination or the topics he might cross-examine on. Nevertheless, skilled lawyers do not always weaken opposing witnesses' credibility, and skilled lawyers do not always win at trial. [emphasis added]

80 *R v Paterson*, 2017 BCSC 536 at paras 115–118. The cases *R v Parent*, 2000 BCPC 11 at para 5 and *R v Gonsalves*, 2008, 56 CR (6th) 379, [2008] OJ No 2711 at para 39 provide a helpful list of factors to consider when assessing the credibility and reliability of witness testimony.

81 *Browne v Dunn*, 1894, 6 R 67, [1893] JCJ No 5; *R v McNeill*, 2000, 48 OR (3d) 212, [2000] OJ No 1357 [*McNeil*].

82 *R v Dexter*, 2013 ONCA 744 at paras 13–17.

83 *R v Podolski*, 2018 BCCA 96 at paras 160–162. For example, if the defence is going to alleged that a witness's memory is unreliable because they were intoxicated at the time of events, this specific proposition must be put to the witness in cross-examination.

84 *Forrester*, *supra* note 40 at para 36; *R v Mai*, 2013 ONSC 2359.

85 *McNeill*, *supra* note 81 at para 47–49.

a trial judge to assist an accused on this issue when the accused is cross-examining Crown witnesses. Further, even if a self-represented accused is informed by the trial judge of the need to confront Crown witnesses with contrary evidence to be called by the defence, putting this rule into practice is another manner. In *R v Forrester*, the Court of Appeal for Ontario noted as follows in a case with a self-represented accused:

> [36] We find no error in the exercise of the trial judge's discretion in drawing an adverse inference from the appellant's failure to cross-examine Sinclair on the issue of the allegedly missing wallet. The appellant's defence rested on his theory that Sinclair had had the prescription filled and had used his health card without his permission. The trial judge clearly brought home to the appellant the importance of challenging a witness on evidence he proposed to impeach. Most of the appellant's cross-examination of Sinclair was peripheral to the theory of the defence. He was given a full and fair opportunity to put that theory to Sinclair but never did so. Instead, he attempted to impeach Sinclair's credibility in other ways. The trial judge was not required to instruct the appellant on how to conduct his cross-examination of Sinclair. We dismiss this ground of appeal.[86] [emphasis added]

Adding further complexity to a self-represented accused conducting cross-examination, the particular manner in which the defence cross-examines a witness can engage a number of substantive evidentiary issues, including: if the defence puts prior statements to a witness which are unfavourable to the defence, the defence risks the witness adopting those statements and that evidence becoming admissible for its truth;[87] suggestions to a witness that the accused is not the type of person to have committed the offence can open up the character of the accused, resulting in the ability of the Crown to lead bad character evidence in response;[88] and, if the defence alleges that a specific event caused a Crown witness to fabricate their testimony, prior consistent statements of the witness can become admissible to rebut this assertion.[89] These legal issues, which often arise in cross-examination, are not only complex but also engage tactical issues, once again putting these issues generally beyond the limited scope of the assistance role of a trial judge.

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86 *Forrester*, *supra* note 40 at para 36. As is noted in footnotes 39 and 96, being told about a rule or reading about a rule will not usually equip a lay litigant to apply these rules during a trial.

87 *R v Sawatzky*, 2017 ABCA 179 at para 22.

88 *R v Mullin*, 2011 ONSC 6328 at paras 10–11.

89 *R v Stirling*, 2008 SCC 10 [*Stirling*].

D) Parties to the Offence

A third common legal complexity in criminal trials is the many routes the Crown can use to find the accused guilty of an offence.

Every criminal charge can be committed through a number of different routes, including in "parties" circumstances that do not require that the accused directly engage in the prohibited conduct. These routes include aiding, abetting, and joint participation, and each have different elements. They collectively accord broad liability to secondary parties.[90] Due to the language of section 21 of the *Criminal Code*, the charging sheet does not need to indicate which route is being relied upon, and the Crown can rely on multiple routes to conviction.[91]

A party route to conviction not only potentially arises in every case where there are co-accused, but can also feature in cases where the accused is being tried alone. For example, the Crown can seek a conviction on the basis that the accused assisted a principal offender who is not on trial, including in cases where the principal is not identified and the precise role of each person is not discernible.[92] Further, if an accused raises a defence that another person committed the offence, this position can permit the Crown to put forward a new theory during the trial that the accused was a party to the conduct of that principal offender.[93]

Not only is the law of parties highly complex,[94] but it is another area where consultation with counsel and tactical considerations are essential. The defence needs to fully assess all potential routes to liability before settling on a theory of the case, cross-examining Crown witnesses or presenting defence evidence. Given that the Crown does not have to disclose

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90 See *Criminal Code*, ss 21(1), 21(2); *R v Strathdee*, 2021 SCC 40, affirming 2020 ABCA 443; *R v Rai*, 2020 BCSC 1579 at paras 168–175.

91 *R v Thatcher*, [1987] 1 SCR 652, 39 DLR (4th) 275.

92 *R v Cowan*, 2021 SCC 45 at para 30–31 [*Cowan*].

93 *R v Pickton*, 2010 SCC 32 at paras 21–24; *Cowan*, *supra* note 92 at paras 40–44.

94 For example, accused persons can be convicted as principal offenders for many offences based on subjective recklessness, but can only be convicted as an aider for the same offence based on actual knowledge or wilful blindness (*R v Roach*, [2004] OJ No 2566, 2004 CanLII 59974 (ON CA)). Further, an accused can be convicted of a series of offences under section 21(2) of the *Criminal Code* for offences committed by another party. Where the accused agreed to commit an unlawful act with another party, and the charged offence was an objectively foreseeable consequence of carrying out the unlawful agreement, the accused will be guilty of the secondary offence committed by the other party: *R v Cadeddu*, 2013 ONCA 729 at paras 50–62. This objective route to liability however is not available to "high stigma" offences including murder and attempted murder: *R v Logan*, [1990] 2 SCR 731, 73 DLR (4th) 40.

its theory of the case and can alter its approach during the proceedings,[95] an accused can face a theory of liability they did not anticipate, including after they have already adduced evidence that implicates them in this additional route to liability. Even if a trial judge informs an accused of the various party routes to conviction, it will be exceedingly difficult for the accused to understand the detailed elements of each route and how they could arise in their particular case.[96]

This highly complex area of law requires a careful, pre-trial assessment of the implications of the Crown case and the accused's version of events to each route to liability, and then for the defence to make strategic decisions concerning what evidence to challenge and what evidence to adduce. This task is both unrealistic for a lay accused and clearly outside the limited assistance role of the trial judge.

E) Character Evidence

In most criminal proceedings, the accused and witnesses will likely have engaged in prior offences. In addition to the approximately 3.8 million Canadians with a criminal record,[97] many more people will have engaged in any number of uncharged crimes. An accused's prior misconduct is presumptively inadmissible, and a trial judge is well placed to ensure that the Crown's reliance on such evidence meets an established exception, such as similar fact evidence. However, the complexities in this area of law quickly multiply and require a series of strategic choices by the defence which can substantially impact the result at trial.

1) Probative versus Prejudicial Balancing

First, the Crown can attempt to lead evidence which engages an accused's bad character if it is relevant to an issue other than character and its probative value outweighs its prejudicial effect.[98] This test not only involves weighing a number of complex factors,[99] but may also require a *voir dire*

95 *R v Pangman*, 1999, 143 ManR (2d) 161, [1999] MJ No 396; *R v Heaton*, 2014 SKCA 140.

96 As the Court noted in *Hamiane*, *supra* note 7 at para 83, there are questions about a self-represented accused's ability to digest legal recitations from a trial judge. While an accused who has chosen to represent himself, as was the case in *Hamiane*, may have more responsibility to bear such risks, an indigent accused does not make this choice. Low-income persons already suffer numerous significant disadvantages in our society, and the absence of a fair criminal trial should not be one of them.

97 "Criminal Records" (2020) online: *Public Safety Canada*, <https://tinyurl.com/2s385fej> [perma.cc/3UAD-JSJJ].

98 For example, motive evidence is commonly based on prior misconduct against the victim, indicating an animus that may have been the reason for the accused committing the offence.

99 *R v Sipes*, 2011 BCSC 640 at paras 36–73.

where the Crown witnesses providing this evidence are cross-examined to determine the strength of their evidence.[100] Then, if the evidence is admitted, the accused will have to consider calling evidence to dispute this extrinsic misconduct evidence. For example, if the Crown calls evidence of prior threats against the alleged victim of an assault to establish motive, and the defence disputes that those threats occurred, the accused must consider adducing defence evidence on this issue. This process involves an accused defending themselves against the substantive allegation and the facts underlying the extrinsic misconduct.

Accordingly, the admissibility of bad character evidence and defending against it are legally and strategically complex. As noted above, this complexity cannot be solved by changing the rules to preclude the Crown from attempting to call such evidence against an unrepresented accused. This "solution" undermines the principle that the same legal rules apply in all cases and prejudices the duty of the Crown to diligently present relevant evidence to support its case.

2) Misconduct of Crown Witnesses

Unlike the Crown, an accused is entitled to rely on a broad array of misconduct evidence relating to Crown witnesses in order to challenge their credibility, including uncharged offences and the details of criminal convictions.[101] Further, an accused can rely on general propensity evidence relating to a witness, or a third party, to support certain defences.[102] It is generally too late for an accused to be advised at trial of this ability to use witness and third party misconduct evidence, as this evidence is usually gathered through defence investigation, follow-up disclosure requests, and third party record applications. Further, even if the accused is aware of this possibility before trial, marshalling this evidence, which may include obtaining subpoenas for reluctant witnesses and ensuring the evidence meets admissibility standards,[103] is a difficult task for any lay accused.

A further layer of complexity is that the defence use of misconduct evidence has significant implications for the accused. Broad attacks on the

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100 The credibility of the witness providing the bad character witness is relevant to the assessment of the admissibility of the evidence: *R v Aragon*, 2022 ONCA 244 at paras 39–40.

101 *R v McKinnon*, 2014 BCSC 399 at para 14.

102 These defences include self-defence and a third-party perpetrator defence: *R v Hamilton*, 2003 BCCA 490; *R v Sipes*, 2012 BCSC 351 at paras 22–33.

103 For example, propensity evidence supporting an argument that a witness or third party committed the offence is only admissible if the accused can establish that this person had a "reasonable connection" to the offence: see *R v Luciano*, 2011 ONCA 89 at paras 209–216 [*Luciano*].

credibility of Crown witnesses through misconduct evidence can make it more likely that an accused's criminal record will be admissible to assess an accused's credibility if they testify.[104] In addition, leading evidence of a witness's or third party's prior conduct for propensity purposes (as opposed to solely to assess their credibility) can result in the Crown being able to lead evidence of the accused's general propensities for criminal conduct.[105] Defence use of propensity evidence accordingly depends on balancing a host of factors, including the extent of the accused's past misconduct, whether the witness's or third party's past misconduct has some similarity to the charged offence, and whether the defence has means other than misconduct evidence to challenge witness credibility or to put forward a third party perpetrator defence.[106]

These various forms of bad character evidence, which commonly arise in criminal proceedings, not only involve a series of complex legal rules but also lie beyond the limited role of a trial judge due to the host of tactical considerations in deciding whether or not to make use of this evidence.

3) Good Character Evidence

The rules concerning character evidence have an added level of complexity because an accused can adduce evidence of their good character as part of their defence. This evidence can support the credibility of an accused and support an inference that they are less likely to have committed the offence.[107] However, reliance by an accused on evidence of good character can open the door to the Crown adducing otherwise inadmissible character evidence in response, including evidence of specific misconduct of the accused. Many accused persons instinctively wish to assert in their defence, either through their testimony or in cross-examination of witnesses, that they would "never do something" like what they are accused of, are not the "type of person" to commit the offence, or are "law-abiding" individuals. While this type of self-serving evidence of good character will often be

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104 *Canada Evidence Act*, RSC 1985, c C–5, s 12; *R v H.W*, 2021 ONSC 5477.

105 *Luciano*, *supra* note 103 at para 216.

106 For example, if the witness has made a series of prior inconsistent statements and has a motivation to lie, the defence may not need to emphasize the witness's prior misconduct to attack their credibility. Similarly, if strong evidence ties a third party to the charged offence, an accused may not need to lead general propensity evidence to support a third-party perpetrator defence.

107 *R v W.C*, 2012 ONSC 7094 at paras 54–58; *Regina v Tarrant*, 1981, 34 OR (2d) 747, 1981 CanLII 1635 (ON CA). An additional complexity of this evidence is that it is generally attributed less weight when an offence usually occurs in a private setting: see *R v Profit*, 1993, 15 OR (3d) 803, [1993] SCJ No 104.

given limited weight, it can open the door to the Crown being able to lead evidence of highly damaging past misconduct of the accused.[108]

A more effective way to lead good character evidence is through the testimony of defence witnesses, but in these circumstances, the evidence must be adduced in the form of evidence of the general reputation of the accused within a community for a relevant trait, such as honesty.[109] This evidence is particularly complex as it must not include reference to specifics acts of the accused and it must come from a defined "community."[110] Further, this evidence opens the door to the Crown to calling evidence of the accused's poor reputation in the community for the trait in issue.[111]

The decision of whether good character evidence should be led involves assessing whether it is likely to be accorded weight in the particular circumstances of the case and analyzing the consequences to an accused of opening up the character issue. This task is well suited to defence counsel who can review the disclosure and conduct detailed interviews with the accused and potential witnesses, but not to a trial judge providing limited assistance to an accused during the proceedings.

F) Applications Relating to the Admissibility of Evidence

While certain types of pre-trial motions, such as challenging a search warrant or seeking severance, are commonly viewed as adding to the complexity of a case, every accused must consider a series of evidentiary motions relating to the leading and excluding evidence. These applications commonly include:

- challenging the admissibility of statements of the accused based on the common law voluntariness rule, the right to silence, partial overhears, and section 10(b) of the *Charter*;[112]

- challenging the admissibility of items found in the possession of an accused based on violations of sections 8 and 9 of the *Charter*;[113]

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108 *R v Mullin*, 2019 ONCA 890 at paras 23–27; *R v LKW*, [1999] OJ No 3575, 1999 CanLII 3791 (ON CA); *R v Moores*, 2020 NLCA 23; *R v G.M*, 2011 ONCA 503 at paras 64–65; *R v Farrant*, [1983] 1 SCR 124, 147 DLR (3d) 511.

109 *R v Bonilla*, 2015 ONSC 7663 at para 134.

110 *R v Clarke*, 1998, 18 CR (5th) 219, [1998] OJ No 3521.

111 *R v Cater*, 2014 NSCA 74 at para 184.

112 See *R v Tessier*, 2022 SCC 35; *R v Beaver*, 2022 SCC 54; *R v Schneider*, 2022 SCC 34; *R v Lafrance*, 2022 SCC 32; *R v Noel*, 2019 ONCA 860.

113 See *R v Stairs*, 2022 SCC 11; *R v Dudhi*, 2019 ONCA 665; *R v Pope*, 2015 BCSC 2391; *R v Mansfield*, 2022 ONSC 2733; *R v Mann*, 2004 SCC 52.

- assessing the broadening rules concerning the admissibility of prior *consistent* statements of Crown or defence witnesses for credibility or narrative purposes;[114]

- assessing the admissibility of an accused's post-offence conduct to support inferences of guilt or innocence;[115]

- assessing the admissibility of hearsay evidence for the defence, and contesting proposed hearsay evidence from the Crown, under statutory exceptions, traditional common law exceptions, and the principled necessity and reliability test.[116]

While a trial judge can assist an accused with aspects of these evidentiary applications, the basis for assessing the admissibility of evidence may be buried in the disclosure materials or based on material which needs to be collected by the defence. This is again a legal area essential to a reasonable defence which necessitates the assistance of counsel with strong knowledge of the evidentiary rules and access to the entire defence file.

6. Conclusion

It is without question that trial judges have been able to navigate self-represented accused through very complex areas of law.[117] However, given how often these complex legal issues arise in criminal proceedings, and the fact that so many of them involve critical tactical decisions, it is not realistic that these complexities can be routinely solved by the limited assistance role of a trial judge. Further, these are not issues necessary for a "perfect trial." They are each of fundamental importance to making a reasonable defence to charges, and their complexity creates real and substantial risk that a self-represented accused will not have a fair trial. Failing to obtain relevant disclosure, an inability to properly test the Crown case through effective cross-examination and applications to exclude evidence, not understanding the exact elements of the offence,

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114 *Stirling*, *supra* note 89; *R v Angel*, 2019 BCCA 449; *R v Gill*, 2018 BCCA 275; *R v Edgar*, 2010 ONCA 529.

115 *R v Calnen*, 2019 SCC 6; *R v White*, 2011 SCC 13; *R v B (SC)*, 1997, 36 OR (3d) 516, [1997] OJ No 4183; *R v Gill*, 2021 ONSC 6328 at paras 1259–1268.

116 *R v Khelawon*, 2006 SCC 57; *R v Wilcox*, 2001 NSCA 45; *R v Young*, 2021 ONCA 535.

117 Provincial Court Judges, who deal with the bulk of self-represented accused, are especially commended in this regard. Their dedication to assisting self-represented accused in the most challenging circumstances is a testament to their patience and deep understanding of the challenges faced by lay persons in our criminal justice system. However, we have developed an inherently complex criminal justice system that only permits trial judges to provide limited assistance to the accused.

and an inability to marshal and adduce defence evidence create very real dangers of miscarriages of justice. Further, a solution to these difficulties cannot be found in applying different legal rules to proceedings with self-represented accused, or having the judge act in a counsel role for the accused.

Given these realities, the complexity of the legal issues factor should almost always weigh in favour of the fair trial component of the *Rowbotham* test being met.[118] This approach is consistent with the holding of Justice of Appeal Rosenberg in *R v Rushlow* that the challenges and complexities in criminal proceedings do not have to be "unique" for a fair trial to require counsel.[119]

Recognizing the inherent legal complexity of most criminal trials would not translate into blanket granting of *Rowbotham* Orders. The fair trial component of the *Rowbotham* test considers a number of factors other than the complexity of the legal issues, including the volume of the case materials, the length of the proceeding and the seriousness of the charge. The accused also must meet a very onerous standard of indigence for a *Rowbotham* Order, which can involve the assessment of loan applications, sale of all assets, attempts to borrow from family and friends, and scrutiny of any discretionary spending that occurred prior to the application.[120]

It is critical that our criminal justice system recognize that criminal trials, which are fair from both the perspective of the accused and the state, are inherently complex because they involve a series of complicated rules and strategic choices that can be the difference between an acquittal and a conviction. These issues are beyond the ability of almost any lay accused and are often challenging for experienced counsel. The determination of *Rowbotham* applications must incorporate this reality into its "fair trial" analysis unless we are willing to accept a lower level of justice for the indigent accused.

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118 I say "almost always" because the fact that the issues set out above commonly arise in criminal proceedings does not mean that there will not be some cases which do not engage a number of the above issues, such as a case where there is no potential of a second party being involved in the offence, the defence is reasonably not challenging the credibility of the Crown witnesses, the transaction which bases the offence is clear, and the character of accused reasonably does not arise in either the Crown or defence case. I would still argue that such a proceeding is far from "simple," but there may be some criminal cases which are less legally complex because they do not engage a number of the issues which commonly arise, or should arise, in trials.

119 *Rushlow*, *supra* note 30 at para 24.

120 *Mostowy*, *supra* note 28; *R v Morris*, 2017 ONSC 78 at paras 30–31; *R v Wruck*, 2015 ABQB 164.