Con(TEXT) 1: A PROJECT FACT(A) Update for 26 April 2018

As we continue our research and analysis about *R. v. Stanley*, a number of principles in Canadian law guide our investigations. The ones that appear below are well-established Canadian legal principles of particular concern to us. In the spirit of the Supreme Court of Canada's recent announcement regarding the importance of adopting "plain language" for the courts and society, we present these principles in a text we believe to be both accurate and widely accessible. We also provide the sources for these principles on the following pages.

1. "Self-defence" and "defence of property" may be argued by an accused person during a trial if the trial judge finds that there is an "air of reality to the defence". In R. v. Stanley, neither of these defences was presented to the jury to justify the fatal shot. For this reason, regardless of assertions made in public comments about the case that some evidence might have supported these defences, the jury could not consider these defences in reaching its verdict. The only legally relevant "defences" in this case were the defence of "accident" and the alleged "hang fire" of Stanley's firearm.
2. The Supreme Court of Canada recognizes evidence about Indigenous laws as relevant and potentially applicable in all areas of Canadian law that involve Indigenous peoples, including incidents involving property and criminal law. Indigenous law can help bring context to a variety of matters, such as explaining relationships between individuals, community standards about privacy, and land use. They are relevant whether an Indigenous person is accused or victim in a given case. They are also relevant when explaining how non-Indigenous individuals and families have lived in a specific area. Incorporating attention to Indigenous laws includes realizing that any references to Saskatchewan or Canada needs to be accompanied by recognition of "Treaty 6" in order for proper jurisdictional responsibilities to be fully understood.
3. The Supreme Court of Canada has recognized that there is a realistic possibility of bias against Indigenous peoples based on stereotypes associating them with negative conceptions about what the Court has called "credibility, worthiness and criminal propensity." The Saskatchewan Court of Appeal has also recognized this principle. This precedent has been applied to allow the prosecutor to ask prospective jurors whether they would be biased because victims were Indigenous. In R. v. Stanley the prosecutor did not bring a motion to challenge prospective jurors for racial bias.
4. The question of whether information can be admitted as evidence during a trial is governed by legal, constitutional and procedural rules that are collectively referred to as the law of evidence. All testimony, whether it is given by an expert or a non-expert witness, must be relevant to the issues in the case. Opinion evidence – that is, testimony which offers

inferences or opinions about the facts that must be proven in the case – should, according to evidence law, be strictly regulated. In *R. v. Stanley*, forensic scientists were qualified as "experts" to testify about tests that they had conducted with Stanley's gun. But witnesses who had not been qualified as experts in ballistics or firing mechanisms were also permitted to testify about their personal experiences with guns, and the reliability and applicability of their testimony was not carefully scrutinized.

5. Cultural competence is a core element of lawyering and decision making in criminal trials including, as the Supreme Court of Canada has recognised, when assessing the admissibility of evidence. In this case, racial dynamics were not carefully considered by the judge or lawyers in the matters of jury selection, cross-examination, the admissibility of evidence or the instructions to the jury. In fact, defence counsel stated that the trial was "not a referendum on racism". Cultural competence is relevant in all cases involving Indigenous victims, accused or witnesses to ensure that racial bias does not operate to distort the fact finding process and thereby subvert the administration of justice for everyone involved.

SOURCES FOR PLAIN LANGUAGE FORMAT AND PRINCIPLES

For Plain Language

Supreme Court of Canada, "News Release", 22 March 2018

For Principle 1:

R. v. Cinous, 2002 SCC 29, [2002] 2 SCR 3

R v Gunning, 2005 SCC 27, [2005] 1 SCR 627

Canadian Press, "'It could have been me:' Some farmers support acquittal of Gerald Stanley in Colten Boushie shooting death," (13 February 2018).

Full transcript of judge's instructions to Colten Boushie jury: "Put yourself in a juror's shoes," National Post (14 February 2018).

Quan, Douglas. "'Scared how bad it could get': Racial tension hangs over Sask. as trial for farmer who allegedly killed Indigenous man looms," National Post (6 January 2018).

Zinchuk, Brian. "Opinion: There is so much wrong being said by both sides about the Gerald Stanley trial," Battlefords News-Optimist (14 February 2018).

For Principle 2:

Alderville v. Canada (2015) FC 920

Borrows, John, "Creating an Indigenous Legal Community," (2005) 50 *McGill L.J.* 153

Calder et al v. Attorney-General of British Columbia [1973] S.C.R. 313.

Connolly v Woolrich [1867] QJ No 1 (QL)

Delgamuukw v British Columbia [1997] 3 SCR 1010

R. v. Van der Peet [1996] 2 S.C.R. 507

Henry v. Roseau River Anishinabe First Nation Government, 2017 FC 1038

Mitchell v M.N.R. [2001] 1 S.C.R. 911

R. v. Marshall; R. v. Bernard [2005] 2 S.C.R. 220

R. v. Meshake, 223 O.A.C. 194 (CA)

R. v. Pelletier (2016) ONCJ 628

Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257

For Principle 3:

R. v. Horse, 2003 SKCA 51[9]

R. v. Williams, [1998] 1 S.C.R. 1128

Tanovich, David. "How Racial Bias Likely Impacted the Stanley Verdict". *The Conversation,* 5 April 2018.

For Principle 4:

R v Collins, (2001) 150 OAC 220

R v Graat, [1982] 2 S.C.R. 819

R v KA, (1999) 45 OR (3d) 641

R v Modern Organics Inc 1993 CanLII 6613 (SK CA)

R v Parada, 2016 SKCA 102

R v White, 1 S.C.R. 433

Stewart, Hamish et al, *Evidence: A Canadian Casebook* (Toronto: Emond, 2016)

White Burgess Langille Inman v Abbott & Haliburton [2015] 2 S.C.R. 182

For Principle 5:

CBC News, "Coming Trial 'is Not a Referendum on Racism,' says lawyer for man accused of killing Colton Boushie," 26 January 2018

Mitchell v M.N.R., [2001] 1 S.C.R. 911

R. v. Barton, 2017 ABCA 216

R. v. Gladue, [1999] 1 S.C.R. 688

R. v. Parks, (1993) 15 OR (3d) 324

R. v. Rogers, [2000] O.T.C. 627, 38 C.R. (5th) 331

R. v. Williams, [1998] 1 S.C.R. 1128