

PARDON ME? HOW A TYPO IN A CASE REPORT BROKE THE LAW ON PARDONS

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ABSTRACT

This paper identifies an error in a 1977 case report that created a false judicial discretion in the sentencing of persons with pardoned criminal offences on their records. The error resulted in the exercise of the false discretion in reported judgments and a false rule that was promulgated throughout the legal literature. It arguably contributed to the decline in the potency of the Canadian pardon that occurred afterward. Potential remedies are discussed and an image of the original judgment is provided for future citation.

* * *

RÉSUMÉ

Cet article identifie une erreur contenue dans un rapport de cas de 1977, qui a créé un pouvoir discrétionnaire judiciaire erroné dans la détermination de la peine des personnes avec les infractions criminelles pardonnées inscrites à leur casier judiciaire. Cette erreur a entraîné l'exercice de ce pouvoir discrétionnaire erroné dans des jugements publiés et a donné

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lieu à une règle erronée qui s'est propagée dans la littérature juridique. Elle a vraisemblablement contribué au déclin de la portée du pardon canadien survenu par la suite. Des solutions possibles sont examinées et une image du jugement original est fournie pour les références futures.

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“It is but little consolation to say, on the trial of a cause, ‘That case is not law,’ after it has misled half the kingdom.”¹

INTRODUCTION

IN sentencing a criminal offender, can a court consider pardoned offences on the offender’s record? Is the existence of pardoned offences an aggravating factor? A mandatory minimum sentence may be increased by the offender’s prior convictions²—do pardoned convictions count? Anyone researching these questions would find the same answer in nearly all the primary and secondary sources: if an offender’s record contains only pardoned offences, the sentencing judge possesses a discretion as to whether to treat the offender as a first offender, and need not do so.

That answer is wrong. As a matter of law, the court has no discretion and is bound by statute to treat the pardon grantee as a first offender. The illusive judicial discretion to do otherwise was created by a typo or mis-transcription in a commercial report of the leading judgment on this issue in 1977 and then repeated and maintained to the present day in over a dozen authoritative sources. The common understanding of the law on this point has been wrong for nearly fifty years.

I. THE ERROR

On 28 March 1977, the Ontario Court of Appeal issued an oral judgment in the sentence appeal *Regina v. Spring*.³ The case was mostly

1 Charles Watkins, *Principles of Conveyancing: Designed for the Use of Students; With an Introduction on the Study of that Branch of Law* (London, UK: J Butterworth, Fleet-Street, 1800) at xv, n *.

2 For example, there are graduated mandatory minimum sentences for impaired driving offences (see *Criminal Code*, RSC 1985, c C-46, ss 320.19 to 320.26 [*Criminal Code*]).

3 (1977), 35 CCC (2d) 308, 1977 CanLII 2046 (ONCA) [*Spring CCC*]. The court file for this case contains Justice Brooke’s handwritten disposition dated 28 March 1977, but the reasons for judgment appear only in the typed copy released on 25 April 1977. The judgment is also reported at *R v Spring*, [1977] OJ No 463 (ONCA) [*Spring QL*]; *R v Spring*, 1977 CarswellOnt 996 (ONCA) [*Spring WL Can*]; *Regina v Harry James Spring* (1977), 1 WCB 280 (ONCA) [*Spring WCB*]; *Reg v Spring* (1977), CCH DRS 1978 16–911, O (ONCA) [*Spring DRS*]; *R v Spring* (1977), CD-CRM 3622 (ONCA) [*Spring CRM*].

routine: the appellant had pleaded guilty to attempting to defraud his vehicle insurer of \$1,359 and been sentenced to six months' imprisonment by Justice Morris Hay of the Provincial Court of Ontario. The court of appeal reduced the sentence on the grounds that the sentencing judge had overemphasized the principle of general deterrence, and that "six months' imprisonment is too long and that the interest of justice would have been satisfied with a 90-day sentence, to be served intermittently."⁴ According to the report of the judgment in the *Canadian Criminal Cases* commercial reporter, Justice Brooke then stated the following:

A matter of importance was pointed out to us in argument. The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We treat him as such because we think the statute gives us this discretion in these circumstances.⁵

As noted by Justice Brooke, this issue was raised in oral argument and does not appear in the written materials in the court file. The pre-sentence report records the offender's "Previous Record" as "Nil,"⁶ and David Watt for the respondent Crown, as he then was, acknowledged the "unblemished antecedents of the offender."⁷

The judgment was reported in digest form in both the *Weekly Criminal Bulletin*⁸ and CCH Canadian Ltd.'s *Dominion Report Service*,⁹ and in full by the *Canadian Criminal Cases* reporter,¹⁰ then in its second edition. Justice Brooke's three sentences on this issue were poised to become the leading authority on the use of pardoned offences in sentencing and all three reports were in accord: the Ontario Court of Appeal had held that a

4 *Spring CCC*, *supra* note 3 at 309.

5 *Ibid* [emphasis added].

6 *R v Spring* (25 April 1977), Ontario 78/77 (ONCA) (Pre-sentence report, Kent at 2).

7 *R v Spring* (25 April 1977), Ontario 78/77 (ONCA) (Respondent's statement, Watt at para 4).

8 *Spring WCB*, *supra* note 3.

9 *Spring DRS*, *supra* note 3. The *Dominion Report Service* is now subsumed in LexisNexis' *Canadian Case Summaries*.

10 *Spring CCC*, *supra* note 3.

sentencing judge possesses a statutory discretion regarding the treatment of pardoned offences.¹¹

This holding must have seemed odd even at the time. Although “the statute” referred to by Justice Brooke is not named in the judgment or included in the court file, it must have been the *Criminal Records Act* which—although decried as “one of the worst-drafted, most obscure and unhelpful statutes on the Canadian book”¹²—was clear enough on this point in 1977:

5. The grant of a pardon

- (a) is evidence of the fact that the [National Parole] Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and
- (b) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.¹³

Nothing in this section creates a judicial discretion, and the incongruence between the court of appeal’s holding in *Regina v. Spring* and this straightforward statutory language was obvious. The following discussion appears in the seventh edition of the text *Sentencing*:

In *Spring*, the Ontario Court of Appeal had before it an offender who had been pardoned for an earlier offence. The court treated him as a first offender, “because we think the statute gives us this

11 This paper mainly uses “pardon,” the term in use before 13 March 2012, rather than the modern “record suspension.” Both terms refer to the administrative pardon/record suspension created by the *Criminal Records Act* (RSC 1985, c C-47 [*Criminal Records Act* 1985]), rather than the rarer “free” or “royal” pardon recognized by the *Criminal Code* (*supra* note 2, s 748).

12 R Paul Nadin-Davis, “Canada’s *Criminal Records Act*: Notes on How Not to Expunge Criminal Convictions” (1980–1981) 45:2 Sask L Rev 221 at 222 [Nadin-Davis, “Canada’s *Criminal Records Act*”].

13 *Criminal Records Act*, RSC 1970 (1st Supp), c 12, s 5 [*Criminal Records Act* 1970].

discretion in these circumstances". It is hard to imagine how the discretion could be exercised otherwise, in view of the clear language of section 5 of the Criminal Records Act, which provides that previous convictions "should no longer reflect adversely on ... character". Indeed, it is strange that the court was even informed of the earlier offence.¹⁴

Confusion over this issue was well-founded. All three reports of the judgment were wrong. The relevant paragraph in the original judgment in the court file reads as follows:

A matter of importance was pointed out to us in argument. The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We treat him as such because we think the statute gives us this direction in these circumstances.¹⁵

There is a big difference between a statutory discretion and a statutory direction. In this case the slip created in the minds of the legal community a false judicial discretion to be exercised in the face of a clear statutory rule.

A probable source of the error is that, even though the *Canadian Criminal Cases* version of the judgment gives the date of the typed judgment release, its case report in 1977 relied on a transcription of the oral judgment by ear rather than the typed file copy. The case report omits the judgment's file number, which was written on the typed copy.¹⁶ The report also omits an unrelated typographical error in the court-file copy of the judgment in which Justice Brooke states that the accused withdrew his fraudulent insurance claim once "his arrest was eminent [*sic*]."¹⁷ The *Canadian Criminal Cases* report instead gives the (correct) near-

14 Clayton C Ruby et al, *Sentencing*, 7th ed (Toronto: LexisNexis Canada, 2008) at § 8.53 [references omitted, ellipses in original].

15 *R v Spring* (25 April 1977), Ontario 78/77 at 2 (ONCA) [emphasis added]. This is the court file copy, obtained by the author from the Archives of Ontario.

16 The omission appears to be normal for judgments of the Ontario Court of Appeal reported in *Canadian Criminal Cases* at the time and may indicate a practice of reporting the court's judgments without double-checking the court file. The file number for *Regina v Spring* is 78/77.

17 The word "eminent" also appears on Lexis Advance Quicklaw (*Spring QL*, *supra* note 3 at para 2) and Westlaw Canada (*Spring WL Can*, *supra* note 3 at para 2).

homophone “imminent.”¹⁸ The same process that corrected “eminent” to “imminent” likely slipped “direction” to “discretion.” That this occurred is speculation, but as a source of error it would not be unique: “[W]hen the judge speaks softly and the reporter is hard of hearing, the choice often lies between improvising the law and leaving the point unreported.”¹⁹

Despite these reasons for suspicion and the doubts expressed by commentators, the typo spread like a virus through the secondary literature. The current or most recent editions of the following sources now either reproduce the judgment with the typo “discretion,” or cite *Regina v. Spring* for the proposition that a sentencing judge possesses a discretion as to whether to treat an offender with only pardoned offences as a first offender:

- *Canada Criminal Digest*²⁰
- *Canadian Case Summaries*²¹
- *Canadian Criminal Cases*²²
- *Canadian Encyclopedic Digest*²³
- *Canadian Sentencing Digest*²⁴
- *Canadian Sentencing Handbook*²⁵
- CanLII²⁶
- *Crankshaw’s Criminal Code of Canada*²⁷

18 *Spring CCC*, *supra* note 3 at 308.

19 RE Megarry, *Miscellany-at-Law: A Diversion for Lawyers and Others* (London, UK: Stevens & Sons, 1955) at 294.

20 *Spring CRM*, *supra* note 3.

21 *Spring DRS*, *supra* note 3.

22 *Spring CCC*, *supra* note 3 at 309.

23 CED 4th, *Prisons*, “Effect” at § 76, n 19 (October 2024).

24 R Paul Nadin-Davis & Clarey B Sproule, *Canadian Sentencing Digest Quantum Service* (Toronto: Thomson Reuters, 1988) (loose-leaf updated 2023, release 10), ch 3 at §§ 3:13 to 3:14.

25 Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook* (Ottawa: Canadian Association of Provincial Court Judges, 1982) at 46.

26 *Spring CCC*, *supra* note 3 at 309.

27 Gary P Rodrigues, ed, *Crankshaw’s Criminal Code of Canada*, RSC 1985, 8th ed (Toronto: Thomson Reuters Canada, 1993) (loose-leaf revision 2024) at § 748(2).

- *Criminal Law Quarterly*²⁸
- *Pénologie*²⁹
- *Sentencing*³⁰
- *Sentencing in Canada*³¹
- *Tremear's Criminal Code*³²
- *Weekly Criminal Bulletin*³³
- Westlaw Canada³⁴

This list includes most of the “first stop” sentencing reference materials available to Canadian practitioners. The freely available version of the judgment hosted on CanLII, the preferred source for Canadian case citation,³⁵ is a scan of the *Canadian Criminal Cases* report and therefore includes the typo “discretion.” The commercial electronic service Westlaw Canada has a copy of the correct typed decision but, as of the date of this article, includes a headnote summary that describes the existence of the false discretion inches above the contrary text of the judgment.³⁶ Perhaps the most damaging entry on this list was the 1982 *Canadian Sentencing Handbook*,³⁷ funded by the Department of Justice and prepared by the Canadian Association of Provincial Court Judges “for

28 Jeffrey S Leon, “Post-Sentencing Problems: Some Consequences of a Finding of Guilt in Criminal Cases” (1979) 21:3 *Crim LQ* 318 at 329–30, n 50.

29 Hélène Dumont, *Pénologie : Le droit canadien relatif aux peines et aux sentences* (Montreal: Thémis, 1993) at 164 [Dumont, *Pénologie*].

30 The current edition omits the discussion of this issue quoted above, but still cites *Regina v Spring* for the principle that “one *may* be treated as if one were a first offender if one has received a pardon” (see Clayton C Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis Canada, 2020), ch 8 at § 8.13, n 17 [emphasis added, references omitted]).

31 R Paul Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982) at 71.

32 David Watt & The Honourable Madam Justice Michelle Fuerst, eds, *The 2024 Annotated Tremear's Criminal Code* (Toronto: Thomson Reuters Canada, 2023), s 748.

33 *Spring* WCB, *supra* note 3.

34 *Spring* WL Can, *supra* note 3 at headnote.

35 McGill Law Journal, *Canadian Guide to Uniform Legal Citation*, 10th ed (Toronto: Carswell Thomson Reuters, 2023) at E-37, E-45, F-39, F-47.

36 *Spring* WL Can, *supra* note 3 at headnote.

37 Canadian Association of Provincial Court Judges, *supra* note 25.

Provincial Court Judges across Canada.”³⁸ Any judge consulting this text would be referred to the erroneous *Canadian Criminal Cases* report of *Regina v. Spring* and told that “[a]n accused who received a pardon under the *Criminal Records Act* may be treated as a first offender.”³⁹ Although some sources now gloss *Regina v. Spring* correctly,⁴⁰ it is far more likely that a judge or legal practitioner researching the effect of a pardon at any time after 1977 would find the wrong rule.

Perfection in the reportage of the law is unachievable, and we cannot fault the many authors, lawyers, and judges who have relied on ostensibly clear judicial language in the reported decision of a higher court. However, for nearly fifty years the false judicial discretion has been at the fingertips of any legal professional or layperson researching the effect of a pardon. A person being sentenced, for example, for an impaired driving offence with a pardoned impaired driving conviction on their record was at risk of the court imposing an increased mandatory minimum sentence via the exercise of the false discretion. Even where no mandatory minimum sentence is prescribed, criminal antecedents routinely aggravate criminal sentences. The notion of a “first offender” with no criminal record is a well-known mitigating factor⁴¹ and requires a sentencing judge to “explore all other dispositions before imposing a custodial sentence.”⁴² The loss of this status due to the exercise of a false judicial discretion puts an offender at a much greater risk of being imprisoned by the state. The *Regina v. Spring* error is only a typo, but it is a typo with a direct effect on a pardon grantee’s Charter-protected liberty interest.

38 The Honourable Mr Justice Rick Libman, *Sentencing Purposes and Principles for Provincial Offences: The Modernization of the Provincial Offences Act* (Toronto: Law Commission of Ontario, 2010) at 43, online (pdf): <lco-cdo.org> [perma.cc/D82S-A2TY].

39 Canadian Association of Provincial Court Judges, *supra* note 25 at 46 [emphasis added, references omitted].

40 Of the few modern sources that give the correct rule, *Martin’s Annual Criminal Code* is perhaps the most widely used and deserves special mention: it has given the accurate mandatory version of the rule in every edition since 1978 (see Edward L Greenspan, ed, *Martin’s Annual Criminal Code*, 1978 ed (Toronto: Canada Law Book, 1978) at 567; Edward L Greenspan et al, eds, *Martin’s Annual Criminal Code*, 2026 ed (Toronto: Thomson Reuters, 2025) pt XXIII at § CC748:3).

41 See e.g. *R v Bertrand Marchand*, 2023 SCC 26 at para 132.

42 *R v Priest* (1996), 110 CCC (3d) 289 at 294–95, 1996 CanLII 1381 (ONCA).

II. REPORTAGE ERRORS AND THE COMMON LAW

The common law itself is not influenced by errors in case reportage: case reports “do not make law but are only the best evidence of what the law is. ... For, after all, what is authoritative is not the report, but, so far as it goes, the record.”⁴³ The Ontario Court of Appeal is, and was in 1977, a superior court of record,⁴⁴ and therefore its original records are “irrefragable”; that is, they are the sole authoritative evidence of what was said and done by the court.⁴⁵

Practitioners must, however, deduce the state of the common law from what they can read, and errors in the report of a judgment can have a profound impact on the de facto perception of the common law. The most salient Canadian example is the so-called “*Sellars* principle,” a false rule that purportedly made the obiter dicta of the Supreme Court of Canada binding on the inferior courts. The “principle” originated with the 1980 judgment *Sellars v. The Queen*,⁴⁶ in which Justice Chouinard considered a point of interpretation the Supreme Court had opined on three years earlier but had not decided. He held that, due to the court’s prior obiter dicta, “on doit donc, me semble-t-il, tenir que telle est l’interprétation qui prévaut,” which translates to “we ought to therefore, I think, hold that such is the prevailing interpretation.”⁴⁷

43 Sir William Holdsworth, *A History of English Law* (London, UK: Methuen & Co, 1938) vol XII at 150, 154 [footnotes omitted]. See also William Blackstone, *Commentaries on the Laws of England*, vol 1, *Of the Rights of Persons*, 3rd ed (Dublin: John Exshaw, Henry Saunders, Boulter Grierson & James Williams, 1769) at 71; The Right Hon Sir Frederick Pollock, *Essays in the Law* (London, UK: MacMillan & Co, 1922) (“[t]he record is authentic; a report has not, in this jurisdiction, any authentic or even official character” at 233) [Pollock, *Essays*]. This latter passage first appeared in Canada in Frederick Pollock, “Judicial Records” (Lecture delivered at the Faculty of Law, University of London, 26 February 1913) (1913) 33:9 Can LT 815 at 822 [Pollock, “Records”].

44 For the court today, see *Courts of Justice Act*, RSO 1990, c C.43, s 2(1). In 1977, see *Judicature Act*, RSO 1970, c 228, ss 2–3.

45 *Re Rose*, 1963 CarswellOnt 11, 1963 CanLII 309 (ON H Ct J) (“the record of a court of record cannot be attacked, is absolute, and must be accepted as final” at para 2). See also *In Re Sproule* (1886), 12 SCR 140 at 194, 1886 CanLII 51 (SCC), Ritchie CJC.

46 1980 CanLII 166 (SCC) [*Sellars* CanLII].

47 *Ibid* at 529. The verb “doit” (devoir) in this context is ambiguous, and it is possible to read as “must” or “should.” Commentary on the translation in *Sellars v The Queen* concludes that in context the term should be read as “should” or “ought to” (see The

This simple passage received several amplifications before it reached the majority of Canada's legal community. In the English translation of Justice Chouinard's words, the court had held that "this is the interpretation that must prevail."⁴⁸ The overstatement was strengthened again by the court's official headnote summary: "[T]he Court has ruled on the point and this interpretation must be followed."⁴⁹ In the summaries of *Sellars v. The Queen* in the commercial reporters *Canadian Criminal Cases* and *Dominion Law Reports*, the "principle" was more muscular still: "Where the Supreme Court of Canada expresses an opinion on a point of law, then such ruling is *binding* on the lower Courts notwithstanding it was not absolutely necessary to rule on the point in order to dispose of the appeal."⁵⁰ This reportage resulted in a widespread belief in a principle of stare decisis binding the lower courts to follow the words of the majority of the Supreme Court of Canada, no matter how collateral those words were to the ratio decidendi.⁵¹ The false principle was followed by the lower courts and bedevilled Canada's jurisprudence for years.⁵²

The "Sellars principle" travelled a well-trod circular path of error perpetuation between legal publishers and the courts. One commentator laid out the circuit in 1916:

Honourable Mr Justice Douglas Lambert, "*Ratio Decidendi* and *Obiter Dicta*: Some Observations about *Sellars v The Queen*, [1980] 1 SCR 527", Case Comment (1993) 51:5 Advocate 689 at 693; Mathieu Devinat, "The Trouble with *Henry*: Legal Methodology and Precedents in Canadian Law", Case Comment (2006) 32:1 Queen's LJ 278 at 281, n 10 [Devinat, "The Trouble with *Henry*"]).

48 *Sellars* CanLII, *supra* note 46 at 529.

49 The French headnote was equally exaggerated: "Même s'il n'était pas indispensable de le faire pour disposer du pourvoi, la Cour s'étant prononcée sur la question, cette interprétation doit prévaloir" (see *ibid* at 527).

50 *Sellars v The Queen* (1980), 52 CCC (2d) 345 at 345 (SCC); *Sellars v The Queen* (1980), 110 DLR (3d) 629 at 629 (SCC) [emphasis added]. According to Devinat, "[b]oth headnotes probably had a role in the recognition of the *Sellars* principle" (see "The Trouble with *Henry*", *supra* note 47 at 281, n 9).

51 Justice Lambert's article highlights the impossibility of perfection in legal reportage and commentary: despite its accurate diagnosis of the errors that led to the creation of the false "*Sellars* principle," the article itself contains several errors and actually misquotes the critical passage from *Sellars v The Queen*! I have no doubt that the careful reader will find sufficient cause in this paper to hoist me on my own petard (see Lambert, *supra* note 47 at 692–93).

52 *R v Henry*, 2005 SCC 76 at para 55 [*Henry*].

The reporter inserts both doctrine and *dicta* in his headnotes; the digester follows the reporter; the text-writer follows the digester; and from the text-book there is an easy step back into the reports again, and this time with the error enthroned as legal truth, the bar sinister [i.e., illegitimacy] effaced in the course of the circuit.⁵³

In the case of the *Regina v. Spring* typo, the error was not in the headnote but in the text of the decision; in other respects the path followed the same turns.

III. IMPACT ON THE MODERN COMMON LAW

The current state of the common law of Canada is that a court cannot make use of a pardoned offence as an aggravating factor on sentence where the pardon is in effect. This legal rule conforms to the plain and controlling language of the *Criminal Records Act*, to the actual holding in *Regina v. Spring*, and to common sense. Yet no jurist, lawyer, or other citizen is expected to doubt the existence of a judicial discretion described throughout respected legal publications and seek out the irrefragable court records at the Archives of Ontario. The de facto rule in *Regina v. Spring*, as it exists in the collective mind of the legal profession, has been since 1977 that the court possesses a discretion to ignore pardons in sentencing pardoned offenders.

The *Regina v. Spring* false discretion has likely been exercised many times in unreported sentencing proceedings across Canada. More than 490,000 Canadians received pardons and record suspensions between 1970 and 2017, and fewer than 5 per cent of those pardons have ceased or been revoked.⁵⁴ Unfortunately there is a dearth of reported caselaw on its application, likely due to the apparently settled nature of the false rule. Judicial exercises of the *Regina v. Spring* false discretion would rarely be reported since the de facto rule purports to be unambiguous, and even diligent counsel for the prosecution and defence will accept a false rule given in multiple authoritative sources. Still, the sheer number of modern

53 WM Lile, "Some Views on the Rule of Stare Decisis" (Address delivered at the Alabama State Bar Association, July 1916) (1916) 4:2 Va L Rev 95 at 108.

54 EKOS Research Associates, *Public Consultation on the Records Suspension Program: Final Report*, Submitted to Public Safety and Emergency Preparedness Canada (Ottawa: EKOS Research Associates, 2017) at 5, online (pdf): <publicsafety.gc.ca> [perma.cc/LA3Z-R28P].

secondary sources and annually published practice materials that continue to cite the false discretion in *Regina v. Spring* (a case nearly half a century old) is strong evidence that the error is alive and well in the Canadian courts.

The false discretion does make sporadic appearances in the jurisprudence. At the 1998 sentencing of an impaired driver in the Ontario Court of Justice, counsel for the Crown cited the erroneous *Canadian Criminal Cases* version of *Regina v. Spring* and represented to the court that it possessed the discretion to ignore the offender's pardons for three prior offences. The judgment was apparently provided by counsel for the defence. Justice Gorewich held, reasonably given the material before the court, that the disclosure of the offender's pardoned record "allows me to use my discretion. My hands are not tied in terms of how I decide to sentence [the offender]." ⁵⁵ Justice Gorewich went on to read into the record and consider the offender's pardoned offences ⁵⁶ before sentencing him to a term of one day's imprisonment and eighteen months' probation.

In other contexts, the false discretion has appeared in cases affecting livelihoods and even the custody of children. In 1994 the false discretion was exercised in support of a decision to uphold a refusal to licence a pardon grantee as a gaming assistant, ⁵⁷ while at a 1997 child protection hearing the false discretion was relied on to admit evidence of a pardoned offence to support the removal of the applicants' children. ⁵⁸

IV. IMPACT ON THE MODERN PARDON

The modern pardon (now "record suspension") ⁵⁹ carries many limitations and is often subject to discretionary revocation by the Parole Board of Canada or to automatic cessation. The fragile nature of the

55 *R v A (D)*, 1998 CarswellOnt 3334 at para 7, (*sub nom R v Audet*) [1998] OJ No 2812 (ON Ct J (PD)).

56 *Ibid* at paras 25–27.

57 *Re Steinberg*, [1994] OCRATD No 134, aff'd (23 May 1995) 706/94 (ON Div Ct). For an additional case on the use of the false discretion to uphold the refusal of a licence, see *7036 v Registrar*, Motor Vehicle Dealers Act, 2002, 2012 CanLII 80457 (ONLAT) [7036 v Registrar].

58 *C (J) v British Columbia (Director of Child, Family and Community Service)*, 1997 CanLII 569 at paras 25, 33 (BCSC).

59 *Criminal Records Act* 1985, *supra* note 11, s 2(1).

modern pardon may seem to mitigate the impact of the *Regina v. Spring* error: What harm is done by the false discretion if pardons now provide only weak or nonexistent protection to the grantee?

This reasoning may be backward. It is arguable on the historical record that the *Regina v. Spring* error contributed in a minor but notable way to the enfeebled state of the modern pardon. It may be that the typo helped cause the shift in the law toward a weaker modern pardon.

The weakening of the modern pardon began in 2001, when the Supreme Court of Canada decided the case of *Re Therrien*.⁶⁰ *Re Therrien* became the leading judgment on the nature of the Canadian pardon, and it was a case in which an erroneous copy of *Regina v. Spring* appeared throughout the appellate record and in material relied on by the Supreme Court of Canada. One issue in *Re Therrien* was whether a pardon grantee (in that case an applicant for a judicial position) was entitled to answer “No” to the question “Have you ever been in trouble with the law[?]” Given the ephemeral nature of the modern pardon it may be difficult to imagine that a pardon might ever have imposed a duty on anyone to accept this answer. However, before 2001 the courts had not fully defined the effects of a pardon, and a robust model with far-reaching mandatory effects had prevailed.⁶¹ In *Re Therrien* itself, the Office des droits des détenus (Prisoners’ Rights Office) and the Association des services de réhabilitation sociale du Québec (Association of Social Rehabilitation Services of Quebec) argued as interveners that “There must exist a completely effective way of wiping out past errors; otherwise, early errors would continue to plague even the most meritorious individuals for the rest of their

60 2001 SCC 35 [*Re Therrien* SCC].

61 See e.g. *R v Paterson*, 1998 CanLII 14969 at paras 99–104 (BCCA); Office of the Solicitor General of Canada, *Proposal for Reform of the Criminal Records Act (CRA)* (Ottawa: Office of the Solicitor General of Canada, 20 July 1991), online (pdf): <public safety.gc.ca> [perma.cc/66SG-MVVC]; Canada, Library of Parliament, *Bill C-7: An Act to Amend the Criminal Records Act*, by David Goetz, Catalogue No YM32-3/362-345E-PDF (Ottawa: Library of Parliament, 25 November 1999) at Part B-2, online (pdf): <publications.gc.ca> [perma.cc/2SMR-ZD4H].

lives.”⁶² Some commentators even proposed a *Charter* right to non-discrimination on the basis of pardoned criminal antecedents.⁶³

This robust vision of the pardon accorded with the original intention of the *Criminal Records Act*. The act had been modelled on the recommendations of the 1969 *Report of the Canadian Committee on Corrections*,⁶⁴ issued by a body known as the Ouimet Committee.⁶⁵ The Ouimet Committee’s report formed the backbone of the *Criminal Records Act*,⁶⁶ and the report was explicit that “the Committee means that [pardoned] official criminal records should not be available to the court, where they affect sentence, or the public, where they affect many aspects of an ex-offender’s life, including employment.”⁶⁷ The committee recognized the impossibility of completely erasing convictions from all records and from public memory, but was unequivocal that “The effect [of the pardon] should be that, for the purposes of the court and the public, the conviction never occurred.”⁶⁸ Debates preceding the creation of the *Criminal Records Act* indicate that this was Parliament’s understanding of the statutory language as well.⁶⁹ The federal Progressive Conservative party, as Official Opposition, unanimously supported the Liberal government’s pardon

62 *Re Therrien*, 2001 SCC 35 (Factum, Interveners at 5) [emphasis omitted].

63 TJ Singleton, “La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens” (1993) 72:4 Can B Rev 456 at 488ff.

64 *Report of the Canadian Committee on Corrections: Toward Unity; Criminal Justice and Corrections*, by Roger Ouimet, Catalogue No J552-1-1968 (Ottawa: The Queen’s Printer, 31 March 1969), online (pdf): <publications.gc.ca> [perma.cc/T2H3-6D43].

65 The committee was named after commissioner Justice Roger Ouimet. The other members were G Arthur Martin, QC; JR Lemieux; Dorothy McArton; and William T McGrath.

66 Nadin-Davis, “Canada’s *Criminal Records Act*”, *supra* note 12 at 227.

67 Ouimet, *supra* note 64 at 408.

68 This approach is formalized in the committee’s recommendation (see *ibid* at 408–09).

69 Parliament’s intention was that a pardon grantee “could be cleansed of any stain that the conviction caused” (see *Canada (Minister of Employment & Immigration) v Burgon*, [1991] 3 FC 44 at 59, 1991 CanLII 13555 (FCA)). See House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, 28-2, No 25 (30 April 1970) at 25:18ff; “Bill C-5, An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves”, 2nd reading, *Senate Debates*, 28-2, No 2 (19 May 1970) at 1066 (Hon Sarto Fournier, Hon Lionel Choquette). Not everyone agrees that Parliament’s intention on this point was clear (see Nadin-Davis, “Canada’s *Criminal Records Act*”, *supra* note 12 at 236, n 61).

bill on the basis that “it was absolutely unfair for a person to carry on his shoulders for a lifetime, something which was done perhaps on the spur of the moment.”⁷⁰

The Supreme Court of Canada in *Re Therrien* rejected this robust model of the pardon, instead laying down the equivocal guiding principle that “while a pardon does not make the past go away, it expunges consequences for the future.”⁷¹ The court held that a pardon does not permit the grantee to deny that they have a criminal record: “An employer is ... entitled to consider the facts that resulted in a finding of guilt in assessing whether a candidate has the qualifications required for a job. Those facts are inevitably part of the candidate’s past. However, the employer must also consider the fact that the person has been pardoned.”⁷²

Whether the type of pardon that emerged from *Re Therrien* does the grantee any good is questionable. It is unclear what an employer is intended to do with the information that an applicant has a pardoned conviction if the pardon “expunges consequences for the future”; the Supreme Court’s formulation seems to permit the employer to know that an applicant has a criminal history but forbid them to do anything with the knowledge.⁷³ In practice, of course, knowledge of a pardon grantee’s criminal history routinely excludes the grantee from employment and from other social and legal benefits. Empirical studies find that “People with records of contact with the criminal justice system find that persuading others—potential employers or landlords—to overlook their records is just about impossible.”⁷⁴ In contrast, real expungement of the type

70 “Bill C-5, An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves”, 3rd reading, *House of Commons Debates*, 28-2, No 7 (12 May 1970) at 6863 (Robert McCleave).

71 *Re Therrien* SCC, *supra* note 60 at para 127.

72 *Montréal (City) v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48 at paras 20, 26, glossing the outcome of *Re Therrien* SCC, *supra* note 60.

73 This is a feature shared with some modern provincial human rights codes. For example, Ontario’s *Human Rights Code* (RSO 1990, c H.19) prohibits most discrimination on the basis of pardoned offences, but does not prohibit asking about them.

74 Maria Jung, Jane B Sprott & Anthony N Doob, *Evaluating the Benefits of Pardons: An Overview of Criminological Highlights Summaries of Research Related to Pardons* (Toronto: Centre for Criminology and Sociolegal Studies, 2020) at 13, citing Simone Ispa-Landa & Charles E Loeffler, “Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois” (2016) 54:3 *Criminology*

intended by the Ouimet Committee correlates with “large gains in employment rates and wages” for grantees, and “extremely low” rates of reoffending.⁷⁵

Following *Re Therrien*, the Canadian pardon could no longer achieve this true expungement. The Supreme Court of Canada had instead made the grantee’s criminal record accessible while purporting to limit the impact of that accessibility. One author summarized the effects of *Re Therrien* and then wondered, “If the above is a rather long list of all the things a pardon does not do, one must ask what it can do and why anyone would want one.”⁷⁶ Another wrote that “Practically speaking, one wonders whether the provision of a record suspension is meaningful in any event.”⁷⁷

Re Therrien certainly up-ended the Canadian pardon, but it only marked the beginning of a long slide. Following the ambivalent rule in *Re Therrien* that “while a pardon does not make the past go away, it expunges consequences for the future,” the courts attenuated the effects of the Canadian pardon even further. The Ontario Court of Justice followed *Re Therrien* to admit pardoned convictions at bail hearings.⁷⁸ Witnesses may now be cross-examined on pardoned convictions.⁷⁹ A person

387. See also Douglas N Evans & Jeremy R Porter, “Criminal History and Landlord Rental Decisions: A New York Quasi-Experimental Study” (2015) 11 J Experimental Criminology 21. In Canada, see Safiyah Husein & Capryce Taylor, *Sentenced to Unemployment: The Workforce Exclusion of Ontarians With Criminal Records*, Re/Thinking Justice Series (Toronto: John Howard Society of Ontario, 2025); Hannah Cook et al, *Not in My Workplace: Addressing Workplace Exclusion of Individuals With Criminal Records* (Toronto: John Howard Society of Ontario, 2024).

75 JJ Prescott & Sonja B Starr, “Expungement of Criminal Convictions: An Empirical Study” (2020) 133:8 Harv L Rev 2460 at 2551–52. See also Megan Denver, Garima Siwach & Shawn D Bushway, “A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check” (2017) 55:1 Criminology 174; Cook et al, *supra* note 74.

76 The author allows that the pardon has “some limited effects” (see Jean Teillet, “Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?” (2004) 67:1 Sask L Rev 359 at 377).

77 Reem Zaia, “On Pardons and Miscarriages of Justice: Extracting and Dissecting Institutional Bias from the Conviction Review Framework in Canada” (2016) 49:1 UBC L Rev 835 at 842.

78 *R v Storr*, 2008 ONCJ 571 at paras 13–21.

79 *R v Foreshaw*, 2024 ONCA 177 at para 32, leave to appeal to SCC refused, 2026 CanLII 1606 (SCC). *Contra R v Bruha*, 2006 NWTCA 1 at para 19.

removed from Canada due to a conviction who then receives a pardon for that conviction is not entitled to return.⁸⁰ *Re Therrien* has also allowed decision-makers to consider pardoned convictions in professional discipline and licensure proceedings,⁸¹ and in decisions regarding driving⁸² and insurance.⁸³

Courts have also relied on *Re Therrien* to hold that pardons cease by operation of statute earlier than the *Criminal Records Act* provides. The act states that pardons cease automatically when an accused is “subsequently convicted” of many hybrid offences in the *Criminal Code* and for any offences prosecuted by indictment.⁸⁴ A conviction is registered, if at all, at the time the sentence is imposed rather than at the time of the verdict.⁸⁵ Thus the act seems to require that a pardon grantee who is found guilty of a new offence capable of causing cessation should be sentenced with the pardon still in effect, following which a conviction would be registered and the pardon would cease. This would accord with a legislative intention that the pardon have some benefit for the grantee even if the grantee reoffends. Despite the clear statutory language that pardons cease upon conviction, the courts, following *Re Therrien*, have held that a pardon now ceases automatically upon the finding of guilt, eliminating the effect of the pardon at many sentencing hearings where it would otherwise apply.⁸⁶ In addition to depriving the grantee of the benefit of their

80 *RH v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 1274 at para 27. See also *Laroche v Canada (Citizenship and Immigration)*, 2022 FC 1017 at para 10.

81 *Law Society of Upper Canada v Tunney*, 2016 ONLSTA 20 at paras 41–42; *7036 v Registrar*, *supra* note 57; *Walsh v Canada (Minister of Transport)*, 2011 TATCE 9 at paras 30–37.

82 *R v RZ*, 2016 ONCJ 438 at paras 11–12 [*R v RZ*].

83 *RV c Québec (Société de l’assurance automobile)*, 2020 QCTAQ 10542 at para 42; *CT c Québec (Société de l’assurance automobile)*, 2019 QCTAQ 06370.

84 *Criminal Records Act* 1985, *supra* note 11, s 7.2.

85 *R v Wolfe*, 2024 SCC 34 at paras 43–45; *R v Mack*, [1988] 2 SCR 903 at 972, 1988 CanLII 24 (SCC); *R v Bérubé*, 2012 BCCA 345 at paras 44–49; *R v Payne*, 2002 MBCA 169 at para 28.

86 *R c Poupart*, 2010 QCCA 1956, leave to appeal to SCC refused, 2011 CanLII 19620 (SCC). The rule in *R c Poupart* has been followed outside Quebec: *R v Kanagarajah*, 2013 ONCJ 16 at para 41; *R v Dhanoa*, 2016 BCSC 1282 at paras 5, 10; *R v D’Souza and D’Gama*, 2017 ONSC 5176 at para 9; *R v Gillis*, 2017 NWTSC 83 at 27; *R v Gamble*, 2011 ONCJ 513 at para 10. See also *R v HB*, 2010 NBQB 214 at para 35–43; *R v JK*, 2007

pardon, this interpretation creates the puzzling possibility that a grantee who receives a discharge or a post-verdict stay of proceedings will see their pardon cease due to being “subsequently convicted” despite never having been convicted.

Starting in 2008 Parliament, under a Conservative majority, also began limiting the pardon’s effects with amendments to the *Criminal Records Act* with titles like the *Limiting Pardons for Serious Crimes Act*⁸⁷ and the *Safe Streets and Communities Act*.⁸⁸ Gone entirely was the “pardon,” replaced by the “record suspension”;⁸⁹ the government was unequivocal that the purpose of the name change was to remove the suggestion of societal forgiveness.⁹⁰ The *Criminal Records Act*’s long title had been *An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves*;⁹¹ the amendments removed the reference to “relief.”⁹² The original *Criminal Records Act* directed that a pardon “vacates the conviction,”⁹³ language taken from the Ouimet Committee report and intended to mean that “for the purposes of the court and the public, the conviction never occurred.”⁹⁴ The amended act instead provided only that a conviction subject to a record suspension “shall be kept separate and apart from other criminal records,” with prescribed circumstances under which it can be disclosed.⁹⁵ Parliament lengthened waiting

ONCJ 66 at paras 24–25; *R v Sharman*, [2011] OJ No 922 at para 4, 93 WCB (2nd) 223 (ONCJ).

87 SC 2010, c 5 [*Limiting Pardons Act*].

88 SC 2012, c 1 [*Safe Streets Act*].

89 *Ibid*, s 109.

90 *House of Commons Debates*, 40-3, No 57 (7 June 2010) at 3481–82 (Dave MacKenzie), online (pdf): <ourcommons.ca> [perma.cc/5SRM-LTXP].

91 *Criminal Records Act* 1985, *supra* note 11 as it appeared 12 March 2012.

92 *Safe Streets Act*, *supra* note 88, s 108. In *R v BL*, the British Columbia Court of Appeal held that the appellant was entitled to have his name anonymized during his appeal because the appeal pertained to a pardoned offence that pre-dated the 2012 amendment, and the appellant was therefore still entitled to some “relief” (see 2024 BCCA 108 at para 62).

93 *Criminal Records Act* 1970, *supra* note 13, s 5.

94 Ouimet, *supra* note 64 at 408; *MS v GS*, 1980 ABCA 138 at para 15.

95 *Criminal Records Act* 1985, *supra* note 11, s 2.3(b). The effect of these changes is thoughtfully analyzed by Justice Wakefield in *R v RZ*, *supra* note 82.

periods,⁹⁶ added ineligibilities,⁹⁷ increased application fees more than tenfold,⁹⁸ and broadened the authority of the Parole Board of Canada to revoke pardons to an “absolute discretion.”⁹⁹

The Parole Board of Canada has taken up the invitation to exercise its revocation power more broadly. The board always had jurisdiction to revoke a pardon upon evidence that the grantee “is no longer of good conduct,” and the Federal Court, following *Re Therrien*, has upheld the board’s exercise of its power to revoke pardons on the basis of untried charges of which the grantee is presumed innocent. In one such case the police charged the grantee with twelve offences and then sent a copy of the information they had drafted to the board. The board received the information in 2014, and relied on it to revoke the grantee’s pardons relating to convictions in 1994 and 1986.¹⁰⁰ Even more striking is that, according to its policy manual, the board now considers itself empowered to consider “information about an incident that resulted in a charge that was subsequently withdrawn, stayed or dismissed, or that resulted in a peace bond or acquittal, including a finding of not guilty.”¹⁰¹

The intended model of the pardon was that “for the purposes of the court and the public, the conviction never occurred.”¹⁰² What remains today is the “record suspension”: more difficult to obtain, easier to lose, and providing a fraction of the pardon’s intended protection.

If *Re Therrien* was a step onto this slippery slope for the Canadian pardon, what role did the false discretion in *Regina v. Spring* play in the

96 *Limiting Pardons Act*, *supra* note 87, s 2; *Safe Streets Act*, *supra* note 88, s 115.

97 *Limiting Pardons Act*, *supra* note 87; *Safe Streets Act*, *supra* note 88. The amendments applied these ineligibilities retrospectively, violating the *Charter* guarantees against retroactive punishment (see *Canada (Attorney General) v Power*, 2024 SCC 26 at paras 2, 12).

98 *Order Amending the Pardon Services Fees Order*, SOR/2012-12, s 1. The fee was raised from \$50 to \$631 (see House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 143 (6 December 2018) at 15:32 (Daryl Churney)). As of January 2022 the fee is back to \$50.

99 *Safe Streets Act*, *supra* note 88, s 110; *Saini v Canada (Attorney General)*, 2014 FC 375 at para 26.

100 *Buffone v Canada (Attorney General)*, 2017 FC 346.

101 Parole Board of Canada, *Decision-Making Policy Manual for Board Members*, 3rd ed, no 4, Catalogue No PS91-12-PDF (Ottawa: PBC, 2025) at policy 12.1, para 22(b).

102 Ouimet, *supra* note 64 at 408.

decision? The decision of first instance in *Re Therrien* was made by a majority of the Quebec Conseil de la magistrature, which removed Justice Richard Therrien for failing to disclose a pardoned conviction on his application for a judicial position. A majority of the committee presaged the Supreme Court of Canada's ambivalent rule, deciding that the pardon "does not erase the past, it restores the reputation of a person who has a criminal record but does not allow him/her to respond in the negative to a question asked about the convictions for which s/he has obtained a pardon."¹⁰³ This committee decision cited, but did not quote, the erroneous *Canadian Criminal Cases* version of *Regina v. Spring*.¹⁰⁴

In reviewing this decision, the Quebec Court of Appeal (sitting as an inquiry panel of five) relied on the same version of *Regina v. Spring* and actually cited the false discretion to support its holding that a pardon did not erase ("efface") the pardoned conviction. The court supported its holding on this point with statutory analysis, followed by a survey of academic writings;¹⁰⁵ it then wrote that "La jurisprudence est peu abondante sur cette question" (There is little case law on this issue),¹⁰⁶ before continuing:

Dans l'arrêt *R. c. Spring* (1977), 35 C.C.C. (2d) 308, la Cour d'appel de l'Ontario a décidé que l'on pouvait traiter une accusation contre le bénéficiaire d'un pardon comme une première infraction et non comme une récidive. Cet arrêt peut s'expliquer tout simplement par la reconnaissance des effets du pardon pour l'avenir. (In *R. v. Spring* [1977], 35 C.C.C. (2d) 308, the Ontario Court of Appeal ruled that a charge against a pardon recipient could be treated as a first offence and not a repeat offence. This ruling can be explained simply as an acknowledgement of the effects of a pardon for the future.)¹⁰⁷

It is clear from the in-text citation and from the court's reproduction of the error that it considered a copy of *Regina v. Spring* that contained the

103 *Re Therrien*, 2001 SCC 35 (Application record at 45 [AR] [translated by author]).

104 *Ibid* at 100.

105 *Re Therrien*, [1998] JQ No 3105 at paras 60–72, 1998 CanLII 12509 (QCCA) [*Re Therrien CA*], *aff'd Re Therrien SCC*, *supra* note 60.

106 *Re Therrien CA*, *supra* note 105 at para 73 [translated by author].

107 *Ibid* [emphasis added, translated by author].

false discretion. Following this incorrect gloss and the discussion of several other judgments, the court of appeal held two paragraphs later that “L’article 5 de la Loi sur le casier judiciaire s’avère ainsi d’une portée limitée” (Section 5 of the *Criminal Records Act* is thus limited in scope) and that, “Le législateur n’a pas voulu que la condamnation soit réputée ne pas avoir existé” (The legislator did not intend the conviction to be deemed not to have existed).¹⁰⁸

These two holdings by the Quebec Court of Appeal are critical to the result in *Re Therrien*. Holding that the pardon provisions of the *Criminal Records Act* were limited in scope (“d’une portée limitée”) ran directly against statutory language that provided for an extensive scope rather than a limited one: “[U]nless the pardon is subsequently revoked, [it] vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing ...”¹⁰⁹ The holding that the legislature did not intend that pardoned convictions be expunged ran against the same statutory language, and contradicted the Ouimet Report and the parliamentary documents discussed above. The court’s interpretation therefore required extrinsic support, which it drew in part from the error in *Regina v. Spring*. If the court had considered the correct text of *Regina v. Spring* with its “statutory direction” to treat a pardon grantee as a first offender, it would have been compelled to grapple with the “erasing” effect of a rule that required courts to ignore pardoned offences. Instead, it took into account a persuasive ruling by a higher court that appeared to hold that pardoned offences are not erased. The court glossed the import of *Regina v. Spring* as “Cet arrêt peut s’expliquer tout simplement par la reconnaissance des effets du pardon pour l’avenir” (This ruling can be explained simply as an acknowledgement of the effects of a pardon for the future),¹¹⁰ which supported its interpretation of the pardon as providing only prospective mitigation rather than retrospective expungement. This discussion of the false discretion from *Regina v. Spring* appears directly in the court’s chain of reasoning as it builds to a decision that a pardoned offence may also be considered in other contexts.

At the Supreme Court of Canada, Chief Justice McLachlin in colloquy put the issue as whether, if a pardoned offence appears on a judicial

108 *Ibid* at para 75 [translated by author].

109 *Criminal Records Act* 1970, *supra* note 13, s 5(b) [emphasis added].

110 *Re Therrien* CA, *supra* note 105 at para 73 [emphasis added, translated by author].

applicant's record, "the appointing body has the right to know about it so they can make the evaluation as to whether it's something that should be considered or forgotten."¹¹¹ This is the very question of discretion for which the error in *Regina v. Spring* gives the wrong answer. If the Ontario Court of Appeal had truly held that decision-makers in sentencing possessed a discretion to consider pardoned offences in sentencing, this would bolster any argument that decision-makers in hiring ought to have the same discretion.

In its reasons regarding the scope of the pardon the Supreme Court of Canada relied heavily on academic sources that had been compromised by the *Regina v. Spring* error. By 2001 the error had thoroughly infected the academic literature about pardons, and in the Supreme Court's discussion of the pardon¹¹² it cites both an academic article and a sentencing text that give the erroneous rule.¹¹³ The 1993 *Canadian Bar Review* article "La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens" by T.J. Singleton dedicates a lengthy footnote to the effects of a pardon.¹¹⁴ This note cites and quotes in English the erroneous passage from *Regina v. Spring*, and the Supreme Court cites this precise page of Singleton's article.¹¹⁵ The court then quotes a book chapter titled "Le casier judiciaire : criminel un jour, criminel toujours?" by Professor Hélène Dumont, which interprets the *Criminal Records Act* pardon as not including expungement.¹¹⁶ Professor

111 *Re Therrien*, 2001 SCC 35 (Hearing video (2 October 2000) at 01h:05m:51s [verbal emphasis in original]). This issue was much on the court's mind: Justices Gonthier, Arbour, and L'Heureux-Dubé all asked similar questions about whether a decision-maker should be empowered to consider a pardoned offence (see *ibid* at 00h:50m:24s, 01h:36m:08s–01h:38m:24s).

112 *Re Therrien* SCC, *supra* note 60 at paras 113–27.

113 The court also cites an article by R. Paul Nadin-Davis that cites the erroneous *Canadian Criminal Cases* version of *Regina v Spring* but, in a footnote, gives the correct mandatory rule (see Nadin-Davis, "Canada's *Criminal Records Act*", *supra* note 12 at 226, n 12).

114 *Supra* note 63 at 463.

115 *Re Therrien* SCC, *supra* note 60 at para 118.

116 Hélène Dumont, "Le casier judiciaire : criminel un jour, criminel toujours?" in André Poupart, ed, *Le respect de la vie privée dans l'entreprise : de l'affirmation à l'exercice d'un droit; Les journées Maximilien-Caron, 1995* (Montreal: Thémis, 1996) 105 at 131–33 [Dumont, "Le casier judiciaire"], cited in *Re Therrien* SCC, *supra* note 60 at para 119. Professor Dumont answers the question in her title with a "Yes": "Vous aurez remarqué

Dumont's article does not cite *Regina v. Spring*, but it approvingly cites Singleton's article twelve times.

Even more seriously, the court dedicates a full paragraph of its judgment to the analysis of the pardon given by Professor Dumont in her 1993 text *Pénologie*.¹¹⁷ This text cites the erroneous version of *Regina v. Spring* twice. The first citation is brief;¹¹⁸ however, on the nature of a criminal record Professor Dumont writes the following:

La Cour d'appel d'Ontario a déjà affirmé qu'on devait traiter l'accusé ayant bénéficié du pardon ou de la radiation d'une faute antérieure comme s'il était à son premier délit lors d'une poursuite subséquente. L'article 5 de la *Loi sur le casier judiciaire* et l'article 749(3) C.cr. confèrent au juge cette discrétion sur sentence puisqu'il y est mentionné que « la condamnation en cause ne devrait plus ternir sa réputation », que la radiation « efface les conséquences de la condamnation et notamment fait cesser toute incapacité [...] et que la personne pardonnée [...] est par la suite réputée n'avoir jamais commis l'infraction à l'égard de laquelle le pardon est accordé ». (The Ontario Court of Appeal has already stated that an accused who has benefited from a pardon or expungement of a previous offence should be treated as if it were his first offence in a subsequent prosecution. Section 5 of the *Criminal Records Act* and section 749(3) of the *Criminal Code* give the judge this discretion over sentence since they state that ...)¹¹⁹

This passage was cited to the erroneous version of *Regina v. Spring*.

Thus the wrong answer to a critical question was before the Supreme Court of Canada as it penned the leading judgment on the nature of the Canadian pardon. Although the Supreme Court of Canada never cited *Regina v. Spring* in its own decision, an erroneous copy of the case was

qu'au programme ... notre conférence était intitulée : Criminel un jour, criminel toujours, point d'interrogation. Vous comprendrez qu'à la fin de cet exposé, nous vous proposons de conclure en remplaçant ce signe de ponctuation par un point d'exclamation" (see "Le casier judiciaire", *supra* note 116 at 140).

117 Dumont, *Pénologie*, *supra* note 29, cited in *Re Therrien* SCC, *supra* note 60 at para 113. This was Canada's first sentencing text in French (see Allan Manson, *The Law of Sentencing*, Essentials of Canadian Law (Toronto: Irwin Law, 2001) at xvii).

118 Dumont, *Pénologie*, *supra* note 29 at 446–47, n 35.

119 *Ibid* at 164 [footnotes omitted, emphasis added, translated by author].

cited by both the first-instance tribunal and the Quebec Court of Appeal; the error itself was reproduced and relied on in the court of appeal's decision on the scope of the pardon; the erroneous case report was before the Supreme Court of Canada;¹²⁰ the Supreme Court's reasoning relied on academic discourse that itself relied on the error; and the error supported the court's reasoning in its ultimate decision to attenuate the effects of the Canadian pardon.

Although the error in *Regina v. Spring* played into the result in *Re Therrien*, its contribution to the weakening of the Canadian pardon should not be overstated. An important legal institution did not decline because the Supreme Court of Canada was misled about a decision of the Ontario Court of Appeal from twenty-four years earlier. However, for the reasons given above, it is unmistakable that by 2001 the *Regina v. Spring* error had played a role in shaping the discourse surrounding the nature of the pardon and eventually in shaping the result in *Re Therrien*, a result that was the beginning of the end for the Ouimet Committee's model of the pardon.

Even a small role in such a large legal shift represents an egregious magnification of the effects of a typo in a case report. The false discretion to ignore pardons from *Regina v. Spring* was a single step away from the Ouimet Committee's robust pardon with mandatory effects, but it helped to propel the courts' and the legislature's further strides in the same direction.

V. REMEDY

There is no simple remedy for the damage done to the long-term state of the pardon by the typo in *Regina v. Spring*. The robust pardon is long dead, and the enfeebled record suspension is now deeply embedded in the statute and common law. Even with the benefit of a widely-recognized correction to *Regina v. Spring*, courts are bound by the principles of stare decisis to follow the Supreme Court of Canada's decision in *Re Therrien*. In addition, much of the damage done to the pardon after 2001 appeared in legislation; for example, even a corrected understanding of the common law would not assist a pardon grantee if their pardon is revoked by the Parole Board of Canada pursuant to the statutory absolute

120 AR, *supra* note 103.

discretion it gained in 2012.¹²¹ Substantive change to the institution of the pardon would require a major reassessment by the legislature and the courts.

A small step in the right direction would be to correct the typo, an undertaking less straightforward than it sounds. Historically, legal commentators spilled a lot of ink on the lack of accuracy in printed law reports; the fidelity of some reporters was said to be “shadowy, obscure, and flickering.”¹²² Modern methods and technologies have greatly reduced the number of reportage errors, and with it the attention paid to potential remedies. Some suggestions are given below.

Although the erroneous report of *Regina v. Spring* never had the force of law in the first place, it is possible the Ontario Court of Appeal possesses the jurisdiction to “correct” the judgment. The provincial courts of appeal are statutory courts whose jurisdiction is strictly limited by their enabling legislation,¹²³ but one of their rare inherent jurisdictions is the power to correct “clerical errors” or “accidental slips.”¹²⁴ In addition to the common-law power, the Ontario Court of Appeal recognizes a statutory route to correct slips in criminal judgments even when the court is *functus officio*.¹²⁵

It is conceivable the court could issue a “correction” to *Regina v. Spring* under either of these powers. Correction would have the strongest and most immediate effect on the public understanding of the law. However, since the slip occurred in the commercial reports and not in the original judgment, the approach is an uncomfortable fit. The Ontario Court

121 *Criminal Records Act* 1985, *supra* note 11, s 2.1(1) as amended by *Safe Streets Act*, *supra* note 88, s 110.

122 John William Wallace, *The Reporters: Arranged and Characterized with Incidental Remarks*, 4th ed by Franklin Fiske Heard (Boston: Soule & Bugbee, 1882) at 22.

123 *Kourtesis v MNR*, [1993] 2 SCR 53 at 65–66, 69–70, 1993 CanLII 137 (SCC).

124 *R v Hamilton*, [1997] OJ No 1110 at para 11, (*sub nom R v EFH*) 1997 CanLII 418 (ONCA), leave to appeal to SCC refused, [1997] SCCA No 256 (SCC); *R v Kohl*, 2009 ONCA 100, Addendum at para 12 [*Kohl*].

125 *R v Sabir*, 2019 ONCA 92 at paras 6–8; *Kohl*, *supra* note 124 at para 12. The route involves the power to amend “an error arising from an accidental slip or omission” found at rule 59.06(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194. The court held the civil rule was imported into the court’s statutory criminal jurisdiction by section 683(3) of the *Criminal Code*.

of Appeal has defined its correction power narrowly.¹²⁶ Correction also puts the court in the unusual position of issuing commentary on a prior judgment by justices who have long since passed away. The same objections apply to other correctional tools such as clarification¹²⁷ or reconsideration.¹²⁸ Unconventional exercises of judicial expression can have a mysterious effect on the state of the law and are perhaps best avoided.

The most practical remedy would be the publication of a correction of the error in the commercial reports and secondary commentary and, with luck, a quick permeation into the common understanding of the law on this point. The traditional rule in English law was that “a report can ... always be contradicted by a more accurate report,”¹²⁹ and this common-sense rule should also apply in Canada.

It is suggested therefore that this article represents a “more accurate report” of the judgment of *Regina v. Spring* and may stand as authority for the correct holding: where an offender has only pardoned offences on their criminal record and the pardons are still in effect, a sentencing judge must treat the offender as a first offender. Articles of this sort were instrumental in correcting the false “*Sellars* principle” discussed above.¹³⁰ The approach of publishing a more authoritative report of a historical judgment has a recent example in the United States, where a “corrected” version of the foundational constitutional judgment in *Entick v. Carrington* (1765) was recently published with commentary in the *Kentucky Law Journal*.¹³¹

126 *R v Codina*, 2009 ONCA 907 at para 8, leave to appeal to SCC refused, [2010] SCCA No 214 (SCC).

127 See e.g. *Cowan v Williams*, 2022 BCCA 400.

128 See e.g. *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33.

129 Pollock, *Essays*, *supra* note 43 at 233. This comment was drawn from an earlier speech by Pollock, which appeared in Canada in Pollock, “Records”, *supra* note 43 at 822.

130 The Supreme Court of Canada cited two such papers criticizing the translation and exaggeration of the holding in *R v Sellars* when it definitively killed off the “*Sellars* principle” in *R v Henry* (see *Henry*, *supra* note 52 at para 56, citing Lambert, *supra* note 47; Mathieu Devinat, “L’autorité des obiter dicta de la Cour Suprême” (1998) 77:1/2 Can Bar Rev 1).

131 TT Arvind & Christian R Burset, “A New Report of *Entick v. Carrington* (1765)” (2021–2022) 110:2 Ky LJ 265.

For this purpose an image of the original judgment in its entirety is annexed below under its own citation. Where primary authority is necessary, Justice Brooke's original typed reasons in *Regina v. Spring* are available at the Archives of Ontario in North York.¹³²

132 Or, in a pinch, one might contact the author for a copy.

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IN THE SUPREME COURT OF ONTARIO

COURT OF APPEAL

Brooke, MacKinnon and Houlden, JJ.A.

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Alan C. R. Whitten for
Respondent	)	the appellant
	)	
- and -	)	David Watt for the
	)	Crown, respondent
HARRY JAMES SPRING	)	
Appellant	)	Appeal heard:
	)	March 28, 1977.

BROOKE, J.A. (Orally):

The appellant appeals from the sentence of six months imposed upon him on his conviction on the charge that he did by deceit, falsehood or other fraudulent means, attempt to defraud the General Accident Group of \$1,359.00

The facts may be simply stated. This man purchased a motorcycle. He then reported it stolen, but the machine had not in fact been stolen. When the stripped parts came to the attention of the police and his arrest was eminent the appellant stopped payment on the claim he had lodged with the insurer. He was arrested and pleaded guilty to this offence.

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The pre-sentence report revealed that the appellant had been active in community matters, that he had a strong marriage and a good home life. He had a sporadic work record but, as was pointed out by the social worker who prepared the pre-sentence report, she found him to be quite intelligent, and personable. However, she said:

"Great difficulty has been experienced in attempting to reconcile the most glowing report which has been received with his involvement in the affair under consideration."

We have the same difficulty.

In our respectful view, the learned trial judge was quite right in concluding that this man's conduct called for a custodial sentence. What he did was a calculated attempt to defraud the insurer. We agree that the sentence in this case, with an individual of this background, required attention be paid to the principle of general deterrence. On the other hand, we are of the view that too much weight was given to that particular principle in determining the quantum of the sentence. While the case called for a custodial sentence, we think that six months imprisonment is too long and that the interest of justice would have been satisfied with a 90 day sentence, to be served intermittently, this way giving some opportunity to the appellant to maintain the strong family ties reported, and to meet his obligations and pay his debts.

A matter of importance was pointed out to us in argument. The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We treat him as such because we think the statute gives us this direction in these circumstances.

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In the result, the appeal is allowed. The sentence is reduced to 90 days imprisonment to be served intermittently, to report each Friday before 8:00 p.m. in the evening and released Monday morning at 6:00 a.m. Following the 90 day term of imprisonment, he will be on probation for a period of one year. The terms of probation will be applicable during the period which is at large, serving the 90 day sentence. The provisions of the probation order shall include a provision in the terms of s. 663(2)(a).

James W. Brodeur
Michael J. A. J.
L. W. H. J. J.

/db