

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA, FROM
JUDGMENT OF THE HONOURABLE JUDGE N. PHILLIPS PRONOUNCED ON THE
19TH DAY OF AUGUST 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S BOOK OF AUTHORITIES

The Appellant:

PATRICK HENRY FOX
c/o North Fraser Pretrial Centre
1451 Kingsway Ave
Port Coquitlam, BC
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IN-PERSON

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Tab 1:

R. v. Allaby, 2017 SKCA 25

Court of Appeal for Saskatchewan

Citation: *R v Allaby*, 2017 SKCA 25

Docket: CACR2737

Date: 2017-03-27

Between:

Her Majesty the Queen

Appellant

And

Robert Keith Allaby

Respondent

Before: Lane, Ottenbreit and Caldwell JJ.A.

Disposition: Appeal allowed

Written reasons by: The Honourable Mr. Justice Ottenbreit

In concurrence: The Honourable Mr. Justice Lane
The Honourable Mr. Justice Caldwell

On Appeal From: 2016 SKPC 14, Regina

Appeal Heard: November 15, 2016

Counsel: Beverly L. Klatt for the Appellant
Carson D. Demmans for the Respondent

Ottenbreit J.A.

I. INTRODUCTION

[1] The Crown appeals against the decision of the Provincial Court judge acquitting Robert Keith Allaby of failure to comply with a probation order under s. 733.1(1) of the *Criminal Code* and failure to comply with a prohibition order under s. 161(4) of the *Criminal Code* (2016 SKPC 14).

[2] For the reasons hereinafter set forth, the appeal is allowed.

II. FACTS AND BACKGROUND

[3] Mr. Allaby had been convicted of various sexual offences with respect to children. As a result of those convictions, he was at the relevant times bound by several court orders. The first was a lifetime prohibition order under s. 161 of the *Criminal Code* imposed on July 5, 2004, the terms of which prohibited him from:

Attending at a public park or public swimming area, daycare centre, school ground or playground or community centre where persons under the age of fourteen (14) years are present or can reasonably be expected to be present.

[4] Mr. Allaby was also bound by an 18 month probation order made under s. 731 of the *Criminal Code* imposed on January 16, 2015, and enforced under s. 733.1(1) that prohibited him from attending:

... schools, children's playgrounds, community centres, day-cares, swimming areas, public parks and arcades where persons under the age of 16 years [are] present or can be reasonably expected to be present.

[5] Mr. Allaby while subject to the prohibition order and the probation order attended the main branch of the Regina Public Library (RPL) in downtown Regina almost daily between February 15 and April 8, 2015. As a result, Mr. Allaby was charged with breaching the orders by attending the library.

[6] At the trial of this matter, the Chief Executive Officer (CEO) of the RPL testified that the main library branch contains a children's library, a film theatre that is used to show films geared towards adults and families, and has additional space for children's programs offered by the

library. He indicated that the main floor contains the library's book collection and an art gallery, and the upper floor contains non-book materials including DVDs, magazines, newspapers as well as has meeting rooms for the public and office space. Public washrooms are located on the lower and upper levels of the library. He testified children are commonly seen on all floors of the library and children who are ten years or older can use any floor of the library without adult supervision. He further testified that young children use the children's library, but often accompany their parents on the main and upper floors. Teenagers often use the upper floor as a place to study.

[7] The CEO testified that the RPL is funded primarily by municipal taxes. It offers about 5,000 to 6,500 programs every year. Some of those programs are offered for teenagers but the majority of the programming is for children from preschool age to 12 years and adults. Any member of the public can participate in the library programs and a library card is not required. Any member of the public can use the library free of charge.

[8] Tracy Stewart, Mr. Allaby's probation officer, testified that she reviewed the conditions of the probation order with Mr. Allaby at their first meeting but could not recall whether she discussed in particular the meaning of "community centre" with Mr. Allaby or whether she told him what specific facilities fell within that definition. She became aware that Mr. Allaby had attended the RPL after he was charged with breaching his court orders.

[9] Cpl. Shalansky, a police officer with Regina Police Service, testified she was responsible for supervising Mr. Allaby in the community. She stated that she did not give Mr. Allaby a definition of the term "community centre" referred to in his court orders. She only became aware that Mr. Allaby was attending the RPL when a witness reported it to her.

[10] Mr. Allaby also testified. He admitted that he attended the RPL almost every day to use computers and books during the period of time set out in the charges. He admitted that when he attended the library, teenagers were around although he believed they were all over 16 years of age. He denied going into the children's library. He acknowledged that there were children in the children's library.

[11] Mr. Allaby testified that he did not believe his attendance at the library violated his court orders because he did not think the library constituted a “community centre”. He admitted that he did not ask either Ms. Stewart or Cpl. Shalansky about the definition of community centre nor did he ask whether the RPL fit within that definition. He testified that Ms. Stewart simply read him the condition of his probation order, which prohibited him from attending community centres, and he said he understood the condition.

[12] He further testified while living in Vancouver and subject to parole conditions and the same s. 161 order, which also prohibited him from attending “community centres”, he was allowed to go into a library with a parole officer’s permission. He did not understand the library to be a community centre. However, when he attended a library that was located inside a building designated a “community centre”, he was charged for that matter and his parole conditions were revised to include the word library and to clarify that a library was one of the locations he was prohibited from attending. As a result of all this, he believed that a library and a community centre were different places.

III. DECISION OF THE TRIAL JUDGE

[13] After reviewing the evidence and determining that the RPL provided recreational and educational activities to the public, the trial judge turned his attention to whether the RPL was a “community centre” for the purpose of the prohibition order and probation order.

[14] He initially reviewed the case of *R v McIntyre*, 2015 ONSC 70 [*McIntyre*], where the Court determined that a community centre for the purposes of a s. 161 order could be defined as a place that provided educational or recreational activities (para 61).

[15] The trial judge accepted that the objective and purpose of s. 161(1)(a) as enunciated in *McIntyre* was to protect children from becoming the victims of sexual offences at specified locations at the hands of those who have committed specified offences in the past. He concluded that if he were to follow the definition of community centre and approach in *McIntyre* that would lead him to conclude the RPL was a community centre. However, he preferred a different definition of community centre and concluded that the evidence did not establish that the RPL fell within that definition:

[31] I am of the view that the evidence of Mr. Jeff Barber establishes that the RPL is a place that provides educational and recreational activities for the neighbourhood, in this case, the city of Regina.

[32] However, I prefer a different definition of community centre and approach to interpreting those words.

[33] The Canadian Oxford Dictionary 1998, Oxford University Press defines community centre as follows:

n. a place providing social and recreational facilities for a neighbourhood.

[34] I am of the view that Mr. Jeff Barber's evidence does not clearly establish that the RPL is a place that provides social and recreational activities for the neighbourhood, in this case, the city of Regina.

[16] Without directly saying so, the trial judge had also determined that the term "community centre" was ambiguous and he applied the *dicta* of Lamer C.J. in *R v McIntosh*, [1995] 1 SCR 686 [*McIntosh*], as follows:

[38] As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte, supra*, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

[17] The trial judge concluded:

[36] Construed in this way, given the nature of the RPL, and its use I find that the Regina Public Library is not a community centre within the meaning of the section 161 Prohibition Order (Exhibit P-1) and the clause 5 of the Prohibition [*sic*] Order (Exhibit P-2). This is consistent with Mr. Allaby's experience in Vancouver.

[18] In the event he was wrong on the meaning of the term "community centre", the trial judge then went on to determine whether there was proof beyond a reasonable doubt that Mr. Allaby intended to breach the two court orders. He found, applying *R v Eby*, 2007 ABPC 81, [2007] 9 WWR 747, that Mr. Allaby had no intention to breach the orders:

[40] Mr. Allaby's uncontradicted evidence revealed he was released on parole for a period of time in 2008 and he had written permission to go to the main library in Vancouver. He went to the main library in Vancouver many times without incident or charge. Mr. Allaby subsequently breached a condition of his parole when he lived in another area of Vancouver by going through the door to a community centre, that also housed a library. The National Parole Board's decision of March 17, 2010 [Exhibit D-1] reveals that Mr. Allaby began a statutory release on December 31, 2009. His statutory release was suspended less than a week later after he attended a community centre which

also contained a library. The National Parole Board revoked his parole on March 17, 2010 and imposed a new condition on his next statutory release that he was to avoid libraries. When Mr. Allaby moved to Regina in 2014 he was no longer on parole. As a result, he understood that he no longer had to avoid libraries.

[41] The evidence also reveals that neither his probation officer, Ms. Stewart or Corporal Shalansky provided Mr. Allaby with a definition of “community centre”.

[42] In the present case I find that when Mr. Allaby attended the RPL he believed he was in a public library and not a community centre. His past experience while living in Vancouver supports his belief that a library is distinct from community centre. As a result, I am of the view that the Crown has not proved the *mens rea* component of the charges before me. Put another way, I am not satisfied beyond a reasonable doubt that Mr. Allaby knowingly acted contrary to the prohibition and probation order or was wilfully blind and engaged in conduct that was contrary to the prohibition and probation order. As a result I find him not guilty of the offences set out in Information 44841004.

Accordingly, he acquitted Mr. Allaby.

IV. POINTS IN ISSUE

[19] The issues in this appeal can be stated as follows:

- (a) Did the trial judge err in law by concluding the RPL was not a “community centre”?
- (b) Did the trial judge err in determining Mr. Allaby did not have the requisite *mens rea*?

A. Did the trial judge err in law by concluding the RPL was not a “community centre”?

[20] The Crown submits that in interpreting the term “community centre”, the trial judge failed to construe the term in the context of the purpose and intent of s. 161 and the purpose and intent of the probation order made pursuant to s. 731 of the *Criminal Code*, which is to restrict an offender’s access to children and to protect children from being victimized by sexual predators (*R v Budreo* (2000), 183 DLR (4th) 519 at para 37 (Ont CA)). The Crown submits that the trial judge’s narrow construction of the term as providing social *and* recreational activities cannot be reconciled with that purpose and intent. The Crown argues that as a result he adopted a definition of community centre that erroneously led to an acquittal. The Crown further argues that the term “community centre” did not give rise to ambiguity and there was therefore no basis for applying

the statutory principle that penal legislation which is ambiguous should be interpreted in a way that favours the accused.

[21] Mr. Allaby submits the trial judge found that the library did provide recreational activities for the neighbourhood but not social activities and that whether the RPL fell within the definition of community centre is a question of fact and not subject to appeal.

[22] The issue before the Court is one of law; whether the trial judge properly construed the term “community centre” as used in both the probation order and the prohibition order.

[23] The term “community centre” used in the prohibition order is a statutory term set forth in s. 161(1)(a) of the *Criminal Code* which reads as follows:

161(1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;

The term “community centre” as used in the probation order made under s. 731 has no statutory parallel. It is verbiage included pursuant to s. 732.1(3)(h) that allows the court to impose “reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender’s successful reintegration into the community”.

[24] The meaning of the term “community centre” as it is used in both the prohibition order and probation order must be construed in accordance with *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 [*Rizzo*], the germane portion of which is as follows:

[21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and

ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[25] The purpose of s. 161 has recently been addressed in *R v K.R.J.*, 2016 SCC 31, [2016] 1 SCR 906:

[44] The legislative history, judicial interpretation, and design of s. 161 all confirm that the section has an overarching protective function: to shield children from sexual violence.

[45] Section 161 was enacted in 1993 in response to the decision in *R. v. Heywood* (1992), 20 B.C.A.C. 166, in which the British Columbia Court of Appeal struck down under s. 7 of the *Charter* the offence of loitering; see *An Act to amend the Criminal Code and the Young Offenders Act*, S.C. 1993, c. 45, s. 1. After 1993, s. 161 continued to evolve and, in 2012, the impugned amendments were introduced through the *Safe Streets and Communities Act*. The protective function of s. 161 generally, and the 2012 amendments specifically, was repeatedly emphasized throughout the legislative debates. For example, at the Bill's third reading, the Minister of Justice stated that the proposed amendments are "an important step forward in the protection of children in this country" (*House of Commons Debates*, vol. 145, No. 144, 3rd Sess., 40th Parl., March 11, 2011, at p. 8967).

[46] The jurisprudence interpreting and applying s. 161 confirms the provision's protective purpose: see, e.g., *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 803; *R. v. A. (R.K.)*, 2006 ABCA 82, 208 C.C.C. (3d) 74, at para. 20; *R. v. Perron*, 2009 ONCA 498, 244 C.C.C. (3d) 369, at para. 13.

[26] In *R v Perron*, 2009 ONCA 498, 244 CCC (3d) 369 [*Perron*], the Court stated:

[13] The purpose of s. 161(1)(a) is to protect children from becoming victims of sexual offences at the hands of those who have previously committed certain specified offences. The protection of this particularly vulnerable group in Canadian society must inform the task of construing the phrase in issue in this appeal. See *R. v. D'Angelo*, 8 C.R. (6th) 386 (Ont. C.A.).

[14] Section 161(1)(a) addresses the legislative objective by specifying a number of locations that an offender can be prohibited from attending. The context provided by the full list of locations is of assistance in construing the phrase in issue here. Some locations such as day care centers or school grounds are places where children will inevitably be present because of the activities carried on there. However, this is not necessarily so for other locations such as public parks. As the Supreme Court of Canada said in *R. v. Heywood*, [1994] 3 S.C.R. 761, not all public parks are places where children are likely to be found. Wilderness parks for example are public parks where nothing goes on that is likely to attract children. However, consistent with the legislative objective, only public parks where children are present or can reasonably be expected to be present can be included in a prohibition order. In other words, Parliament has specified locations in s. 161(1)(a) because what goes on there makes it likely that young children will be present.

[27] On the basis of the foregoing, the purpose of s. 161(1)(a) is manifestly to restrict a past offender's access to children and protect them from being victimized by sexual predators. The

use of the term “community centre” set forth in that subsection and found in orders pursuant to that provision must be interpreted through this lens.

[28] This interpretive approach also applies to s. 731 probation orders and the terms imposed under s. 732.1(3)(h) and enforced through s. 733.1(1) where the terms of the probation order have the objective to restrict or prohibit contact by a sexual offender with children. In this case, the probation order was made because Mr. Allaby was convicted of breaching the prohibition order. The probation order’s purpose, and the purpose of setting forth places where Mr. Allaby is prohibited from attending, is essentially the same as the purpose of the order made under s. 161, i.e., to protect children. Its terms, although somewhat different, mirror the places set out in the prohibition order where children are present or can reasonably be expected to be present. On this basis the term community centre as found in the probation order must be interpreted in the same way as in the prohibition order.

[29] The ordinary and grammatical sense of the term community centre implies a place where people of the community can congregate for various purposes. Children are part of the community and it is common sense that the existence of activities or resources at a place which is beneficial or attractive to children would result in the presence of children to participate in those activities or use those resources or could reasonably be expected to be present.

[30] The ordinary and grammatical sense of the term is also informed by dictionary definitions. In *McIntyre*, the Court approached the dictionary definition as follows:

[61] In the Concise Oxford English Dictionary, thumb index edition, community center is defined as a place providing educational or recreational activities for a neighbourhood. Clearly, the HSZ provided recreational activities and the neighbourhood, in this case, is the City of Mississauga.

[62] I can only conclude, given the purpose of section 161, that is, the protection of persons under the age of 16 from sexual predators, that community centers were included because they would be places where children would likely attend.

[63] While “community center” is not defined in the *Code*, applying the ordinary meaning to words suggests the HSZ is a community center. The fact that the words “community center” were not included in the signage or on the website for the City of Mississauga is not determinative of the issue. What is determinative is the use of the facility and the intended target group which includes children.

I agree with this approach. Whatever the dictionary definition, the touchstone of construing “community centre” in the context of a prohibition against contact with children is whether the

use of the facility and intended target group includes children who will be present there or can reasonably be expected to be present.

[31] The Court in *Perron* (at paras 19 and 20) in construing the term “public park” in s. 161(1)(a) determined that the legislative purpose of the provision, the kinds of locations that can be included in an order under s. 161(1)(a) and the ordinary grammatical meaning of the words clearly focus on the kinds of activities involved and whether they were likely to involve the presence of children at that location.

[32] The trial judge gave no reasons for preferring the dictionary definition of community centre as “a place providing social and recreational facilities for a neighbourhood” as part of his interpretive analysis of the term. That definition ironically was from the Canadian version of the same Oxford Dictionary chosen by the court in *McIntyre* but stated slightly different activities which could be provided at a “community centre”. This slight difference was crucial to the trial judge’s construction of the term “community centre”.

[33] Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) at 39:

We speak of looking up words in “the” dictionary as if all dictionaries were the same. In fact, the meaning and scope of words differ significantly from one dictionary to the next. And even minor differences in the way words are defined can make a difference in the outcome of a case.

[34] The Court in *Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031, made a similar point:

[67] A review of these cases indicates that courts have generally looked to dictionary definitions of the word ... as a starting point in the interpretative process. However, the proper legal interpretation ... is context- and fact-specific, and this may require a refinement of the definition in a particular circumstance. ...

(Emphasis in original)

[35] Surely, the correct legal meaning of the term in light of the purpose and intent of the orders cannot depend on which dictionary is chosen or on slight variations in dictionary definitions. Dictionary definitions are an aid to the interpretation of community centre but a dictionary definition cannot attenuate the central role that the purpose and intent of the germane *Criminal Code* provisions play in any interpretation of the term to ensure the definition promotes protection of children to the extent that it is possible. The trial judge lost sight of this.

[36] The trial judge, although he appeared to understand the purpose of the s. 161(1)(a) order and probation order, gave little effect to that purpose by determining the term community centre encompassed only activities that were social and recreational and by excluding “educational activities” from the definition. To do so implies that sexual offenders can be prohibited from access to children at community centres where children partake in social and recreational activities but cannot at places such as the RPL where they partake in educational and recreational activities. Given the purpose and objectives of s. 161(1)(a) and the probation order, it is unreasonable to so restrict the nature of activities which may inform the definition of “community centre”. The trial judge also placed a further restriction on the definition by requiring the activities that may comprise the definition to be conjunctive rather than disjunctive. The trial judge’s erroneous restrictions on the definition inevitably had an effect on the verdict in light of the evidence which he acknowledged established the RPL was a place that provided recreational and educational activities in which children were invited to partake.

[37] The term community centre as it applies to orders protecting children must be given an expansive meaning. As a matter of common sense, children partake in social, recreational or educational activities at various locations including places that are open to the public or community and where the children are invited to attend for such activities. Places hosting such activities need not be explicitly designated community centres. At a minimum, the definition of community centre would include places where children are present or can be reasonably expected to be present to participate in social, recreational or educational activities or any one of them. Of course whether any facility falls within such definition depends on the circumstances of each case.

[38] As a final matter on this issue, while the trial judge found the principle that ambiguous or unclear penal provisions should be interpreted in a way that favours the accused applied (*McIntosh* at para 38), there is in this case nothing ambiguous or unclear about the term construed in the context of the purpose and intent of the provisions of the *Criminal Code* which underpin the probation and prohibition orders.

[39] I conclude that the trial judge erred in his interpretation of the term community centre in both the prohibition order and probation order.

B. Did the trial judge err in determining Mr. Allaby did not have the requisite *mens rea*?

[40] The trial judge found that he had a reasonable doubt that Mr. Allaby had knowingly acted contrary to the orders or was wilfully blind and engaged in conduct contrary to the orders (para 42). The trial judge's decision respecting lack of *mens rea* was based on Mr. Allaby's mistaken belief that the library was not a community centre. Accordingly, I need not address whether the trial judge erred in his interpretation of the *mens rea* required to sustain the convictions. The question to be determined therefore is what the nature of the mistaken belief was and whether such belief was a defence.

[41] I turn first to the relevant case law. Pursuant to s. 19 of the *Criminal Code*, ignorance of the law does not operate as a defence. In *R v Forster*, [1992] 1 SCR 339 at 346, Lamer C.J. accurately and succinctly explained this as follows:

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen*, [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence.

[42] The governing law respecting the characterization of the mistake is set out in *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37 [*MacDonald*], and *R v The Star Phoenix* 911909, 2003 SKCA 108 at para 27, [2004] 3 WWR 639. An accused who erroneously believes that his voluntary action does not contravene a legal order or who is mistaken about the application of a legal order is mistaken in law.

[43] In *MacDonald*, the accused mistakenly believed that an authorization allowed him to possess a firearm at his residence when in fact it only allowed him to transport the firearm between his residence and shooting ranges. The Court held that the accused's mistaken belief was about the applicability of the legal authorization and could not negate *mens rea* as a matter of law:

[55] The *mens rea* the Crown is required to prove under s. 95(1) does not, however, include knowledge that possession in the place in question is *unauthorized*. Rather, knowledge that one possesses a loaded restricted firearm, together with an intention to possess the loaded firearm in that place, is enough. An individual who knowingly possesses a loaded restricted firearm in a particular place with an intention to do so will

be liable to punishment for the offence provided for in s. 95(1) unless he or she holds an authorization or a licence under which the firearm may be possessed in that place. Thus, a proper authorization or licence serves to negate the *actus reus* of the offence, thereby allowing someone who legitimately possesses a restricted firearm in a given place to avoid liability.

[56] With respect, the Court of Appeal erred in law by improperly reading a defence of ignorance of the law into s. 95(1). In the majority's view, the Crown had to prove that Mr. MacDonald knew or was wilfully blind to the fact that his possession was unauthorized. Such a burden would compel the Crown to prove that an accused knew the conditions of his or her authorization or licence. This amounts to requiring the Crown to prove that the accused knew the law.

...

[58] I therefore find that a requirement that an accused knew or was wilfully blind to the fact that his possession was unauthorized would be grounded on the acceptance of mistake of law as a defence to a charge under s. 95(1). It is trite law that, except in the case of an officially induced error, a mistake of law is no defence in our criminal justice system. Section 19 of the *Code* states:

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

(Emphasis in original)

[44] The trial judge made the same error as the lower court made in *MacDonald*, i.e., requiring the Crown to prove that the accused knew the law or was wilfully blind to the law. Mr. Allaby was not mistaken about what he had done. He was clearly aware that he was bound by two court orders that prohibited him from attending a community centre where children under 16 years and 14 years of age respectively were either present or could reasonably be expected to be present. He deliberately chose to go to the RPL. On the evidence presented at trial, Mr. Allaby was mistaken about the ambit of the term "community centre" and the legal consequences of his actions. Such a mistake was one of law and could not operate as a defence and negate his intention to commit the offences save in the case of officially induced error. The trial judge erred in determining that his mistake was a defence given the evidence before him.

V. CONCLUSION

[45] The appeal of the Crown is allowed. However, the Crown takes the position that Mr. Allaby at trial tendered some evidence to suggest that his mistake of law arose as a result of an officially induced error as to how his s. 161 order was interpreted by officials in Vancouver. In *MacDonald*, the Court acknowledged that a mistake of law caused by officially induced error

can serve as a defence to a charge. Accordingly, the Crown submits that the appropriate remedy in this case is a new trial if the appeal is allowed so that a proper evidentiary basis for such a defence, if it exists, can be established. I am in agreement with this. There will be a new trial of this matter.

“Ottenbreit J.A.”

Ottenbreit J.A.

I concur.

“Lane J.A.”

Lane J.A.

I concur.

“Caldwell J.A.”

Caldwell J.A.

Tab 2:

R. v. Arnold(1990), 74 C.R. (3d) 394

BETWEEN:	)	
	)	
REGINA	)	
	)	REASONS FOR JUDGMENT
RESPONDENT	)	
	)	OF THE COURT
AND:	)	
	)	
RONALD EDWARD ARNOLD	)	
	)	
APPELLANT	)	

Before: The Honourable Mr. Justice Hutcheon
The Honourable Mr. Justice Toy
The Honourable Mr. Justice Taylor

Counsel for the Appellant:	George Angelomatis
Counsel for the Respondent:	Brian Purdy

Date of hearing: September 15, 1989

Vancouver, British Columbia

January 31, 1990

The appellant was found guilty of unlawfully cultivating marijuana on East Redonda Island on August 26, 1983. On that date a team of R.C.M.P. officers seized a mature crop of 1,140 fully-grown marijuana plants from within a fenced area on that remote and uninhabited island which had an estimated street value of between \$150,000 and \$350,000. The officers at that time were unable to ascertain who had cultivated the marijuana plants.

Several years later an ex-R.C.M.P. officer, who had worked on the narcotic squad, being then employed as an undercover Fisheries' Officer, while conducting an investigation crossed paths with the appellant. In the course of their discussions, which occurred on April 24, and May 1, 1987, the following exchanges took place between the undercover Fisheries' Officer Kirkpatrick and the appellant who was referred to throughout as Ron:

A I comment here:
There is a lot on the Gulf Islands,
Ron.
Yeah. A few years ago a friend and
I had about a thousand marijuana
plants on Redonda Island. It was real
good.

MR. ANGELOMATIS: Excuse me. Would you go
over that again officer, more slowly.

A Ron: Yeah. A few years ago a friend
and I had about a thousand
marijuana plants on Redonda
Island. It was real good. We
had a fence around it to keep
the deer out. My friend had a
two-seat ultra light, and we
used that to fly over it and
check it. It was almost ready
and the RCMP went in and seized
it. It was in the papers that
it was real great marijuana and
that it was worth \$200,000.

I then reply:
That's a real bummer, Ron.
Yeah. We were around there and they
checked us on his boat. We used a
skiff to go on shore.

I reply:
The police chase you?

Ron: Yeah. We cleared out and left a rototiller behind. We never went back.

I then reply:
That's too bad losing that.

* * *

On the first of May 1987 I picked the accused Ron Arnold up at the Vancouver International Airport and driving between Vancouver International Airport and Chilliwack I had a large quantity of conversation with him. Page 38 of my notes:

It's too bad lost that crop of marijuana, Ron.

Yeah. Two hundred thousand, that's hard to take. I don't need another one like that.

I reply:
You said you used a boat; was around 50 feet?

Ron: Yeah. 52.

I reply:
It sounds like a nice boat.

Ron: Yeah.

(emphasis added)

On the basis of those statements, the cultivating charge was laid and, ultimately, the appellant was tried by a County Court judge sitting without a jury.

The Crown's case consisted of the seizing officer's evidence describing the growing scene on East Redonda Island, some opinion evidence concerning the marijuana plants and there was further evidence that the appellant and one Doye were on a boat not far from East Redonda Island on the day the

plants were seized. In addition, the appellant's statements to Kirkpatrick, referred to above, were admitted into evidence.

The accused testified in his own defence as follows:

. . . . Do you recall speaking to Constable or Officer Fitzpatrick (sic) and making statements regarding involvement with that marijuana?

A Yes, I do.

Q Now, were those statements true?

A No, they weren't.

Q All right. On August 26th, 1983 had you been or were you intending to go to Redonda Island?

A Again?

Q On August 26th, 1983 had you been on Redonda Island or were you in the process of going to Redonda Island?

A No. I was going on a fishing expedition.

Q And, prior to August 26th, 1983, had you ever been on Redonda Island?

A No.

Additionally, the appellant gave explanations as to why he told falsehoods to Kirkpatrick and how he had gained knowledge of certain facts such as the rototiller being at the site where the marijuana plants were being grown, which had not been part of the R.C.M.P. press release shortly after the time of the seizure back in the summer of 1983.

The trial judge did not believe the accused's denial or his explanations as to his acquiring knowledge of this growing operation and convicted the appellant largely on his own statements made to Fisheries Officer Kirkpatrick.

In this Court the appellant argued that the trial judge misdirected himself on the proper interpretation of the word "cultivate".

In this connection, our attention was drawn to certain passages in the trial judge's reasons for judgment including this passage:

I think one must look at the, not from a too narrow or technical point of view. I think the average person on the street would say if one prepares ground for a planting, puts seeds in the ground, possibly some fertilizer and then sits back to wait the inevitable result of nature proceeds according to custom, that person is cultivating right up until the day when harvesting takes place whether anything more is actively done or not. I think that produce or plants such as marijuana need not be tended every single day during the maturation process.

Although the trial judge's reference to what the average man in the street would say is an unfortunate choice of words, the essence of what the judge was saying accurately defines the concept of cultivating marijuana as prohibited in the Narcotic Control Act.

The meaning of "cultivate" in s. 6(1) of the Narcotic Control Act, now R.S.C. 1985 c.-N.-1 has previously been considered in the Yukon Court of Appeal in R. v. Busby (1972), 7 C.C.C. (2d) 234, the Ontario Court of Appeal in R. v. Gauvreau (1982), 68 C.C.C. (2d) 316 and more recently in this Court in R. v. Powell (1983), 9 C.C.C. (3d) 442. However, those courts have restrictively interpreted the verb adopting an Oxford English dictionary meaning, namely, "to bestow labour and attention upon land in order to the raising of crops, to till, to improve and render fertile by husbandry".

As a result of one of the oral submissions made by the appellant's counsel we think it will be necessary to add a gloss to the previous decisions concerning the meaning of the prohibition against cultivating marijuana.

Counsel for the appellant's submission was that although there was evidence of cultivating at some indeterminate time before August 26, 1983 - the date specified in the charge - there was no evidence that the accused or anyone else for that matter had bestowed any labour or attention on the marijuana plants or the soil in which they were located at any time sufficiently proximate to that particular date to sustain a conviction.

Counsel for the appellant having correctly, in our view, conceded that if the accused's statements to Kirkpatrick

were true there was evidence that the accused may have cultivated marijuana previously, that the only way that the accused could be properly convicted was if the Crown had specified a beginning and end date for the alleged cultivation in the charge encompassing the entire period of gestation of the marijuana plants.

On the sole date specified in the charge, namely, "on the 26th day of August, 1983," the accused performed no overt act that could be considered as having bestowed labour or attention on the marijuana plants growing on Redonda Island. Even if the charge had read "on or about the 26th day of August, 1983," the evidence would not support such a charge as whatever the accused and his associate did to actively cultivate the marijuana plants was done some considerable time before, at or about the time the seeding process took place and the period of gestation commenced.

In prior judgments to which the court was referred, emphasis was placed on the Oxford dictionary definition of "cultivate" which focuses on the improving and rendering fertile the land to foster the growing of crops whereas the prohibition encompassed in s. 6(1) is the cultivating of marijuana.

In our judgment the prohibited conduct commences when seeding takes place and continues until the marijuana plants

are harvested or they die. Once a person normally takes on the task of raising a plant or a crop of marijuana to maturity, he is cultivating that crop until such time as he abandons the task or the crop is harvested.

Inevitably, there will be periods of days, weeks or even months when nothing is actively done to the plants. The crop is being cultivated simply by being left alone to grow and mature in the environment created by the person who undertook the cultivation of the plants. It is not to be said that a person who undertakes the task of raising a crop to maturity ceases to cultivate during such periods of deliberate inactivity.

In coming to the foregoing conclusion, we are relying in great part on the principle that cultivating marijuana is a continuing offence. In this connection, the reasons for judgment of Mr. Justice McIntyre, speaking for the majority, in Bell v. The Queen, [1983] 2 S.C.R. 471 at 488, where he concluded that importing was not a continuing offence, are apposite:

It can be seen that there is judicial support for the Crown's contention in the case at bar that the 'continuing offence' principle could be used to justify the conviction of the appellant. It therefore becomes necessary to consider what a continuing offence is and whether importing can be classed as one.

A continuing offence is not simply an offence which takes or may take a long time to commit. It may be described as an offence where the conjunction of the actus reus and the mens rea, which makes the offence complete, does not, as well, terminate the offence. The conjunction of the two essential elements for the commission of the offence continues and the accused remains in what might be described as a state of criminality while the offence continues. Murder is not a continuing offence. When the requisite intent to kill is present the crime is complete when the killing is effected. Conspiracy to commit murder could be a continuing offence. The actus reus and mens rea are present when the unlawful agreement is made and continue until the killing occurs or the conspiracy is abandoned. Whatever the length of time involved, the conspirators remain in the act of commission of a truly continuing offence. Theft is not a continuing offence. It is terminated when the wrongful taking has occurred with the requisite intention. On the other hand, possession of goods knowing them to have been obtained by the commission of theft is a continuing offence. The offence of kidnapping would not be a continuing offence, but that of wrongful detention of the victim following the kidnapping would be.

It is apparent, in my view, that importing a narcotic cannot be a continuing offence. . . .

In our judgment, there are a multitude of activities that circumstantially would point to a logical inference being drawn that marijuana was being cultivated. For the offence to be complete, in addition to the actus reus, there must be the requisite mens rea.

In the case at bar the overt acts pointing to the actus reus obviously occurred long before the one date

specified in the charge. However, the mens rea, the accused and presumably his associate had continued on until the date specified in the charge when the R.C.M.P. officers frustrated the anticipated harvesting of the crop by their seizure and removal of the crop. In our judgment, the accused could have been charged with cultivating marijuana on any one day from the date that the marijuana seeds were sown until and including the day the marijuana plants were seized by the R.C.M.P. as there was evidence that the accused never abandoned his plan or intention to cultivate the marijuana to maturity until he and his associate became aware of the seizure of the crop.

The only other issue argued by the appellant's counsel that needs to be addressed is his submission that the trial judge erred in his reasoning process by disbelieving the accused's testimony and accepting Kirkpatrick's evidence as to what the accused said as being the truth.

After reviewing the evidence of the accused given at trial, the effect of which was to assert that in the accused's dealings with Kirkpatrick he was engaged in "puffery" to establish his credibility with Kirkpatrick for some other illicit activity, the trial judge made these two critical findings:

All in all, I regret that I have to say that the accused's evidence simply does not have a ring of truth about it to me, is not capable of being believed. I do not believe it.

I, instead, am satisfied beyond a reasonable doubt that what he told Constable or Officer Kirkpatrick was substantially true, and accordingly I find the accused guilty.

Arnold accepted the fact that he told Kirkpatrick, among other things, that a rototiller was left behind. The evidence was that the newspaper account of the seizure of marijuana did not mention the rototiller that was found by the police. One of the police officers testified that the ground had not been tilled for some time.

Arnold agreed in cross-examination that so far as he could recall the newspaper account did not mention the rototiller. He gave a confused story about his knowledge of the rototiller that made no sense. He testified that on the same day the police seized the marijuana he visited an elderly man who was the caretaker of property on an island near Redonda Island and "there was some talk about a rototiller being lost."

When the trial judge said that the evidence of the accused was not capable of being believed he clearly negated any notion that the evidence might reasonably be true.

The trial judge properly dealt with the credibility issue and as with the other grounds of appeal addressed in the appellant's factum and his counsel's oral submissions, we would reject them and dismiss this conviction appeal.

"The Honourable Mr. Justice Hutcheon"

"The Honourable Mr. Justice Toy"

"The Honourable Mr. Justice Taylor"

Tab 3:

R. v. Batstone, 2021 BCCA 398

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Batstone*,
2021 BCCA 398

Date: 20211022
Docket: CA46377

Between:

Regina

Respondent

And

Lisa Deanne Batstone

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 22, 2019 (*R. v. Batstone*, 2019 BCSC 476, New Westminster Docket X-079455-2).

Counsel for the Appellant
(via videoconference):

E. V. Gottardi, Q.C.
R. McConchie

Counsel for the Respondent
(via videoconference):

M. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia
March 30, 2021

Place and Date of Judgment:

Vancouver, British Columbia
October 22, 2021

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Chief Justice Bauman
The Honourable Madam Justice Saunders

Summary:

The appellant challenges her conviction for second-degree murder alleging the trial judge erred in concluding she had the requisite intent for the crime. The appellant argues the trial judge committed this error by (1) misapprehending important evidence, (2) speculating how the offence occurred, and (3) failing to provide sufficient reasons for the finding that all after-the-fact evidence supported an intent to kill.

Held: Appeal Dismissed. First, the trial judge only misapprehended the substance of the evidence concerning the length of time it would have taken the victim to die by smothering, however the error would not have changed the outcome regarding the appellant's intent. Second, the trial judge made two erroneous conclusions with regard to speculating how the offence occurred, however they were harmless errors and did not impact the trial judge's conclusion that the appellant had the requisite intent. Finally, the trial judge did not find that every after-the-fact action was consistent with intent, rather she properly considered actions relevant to intent and the defences raised by the appellant.

Reasons for Judgment of the Honourable Mr. Justice Goepel:**INTRODUCTION**

[1] On December 10, 2014, the appellant, Lisa Batstone, killed her sleeping eight year-old daughter Teagan by suffocating her with a plastic bag. Following a judge alone trial, the appellant was convicted of second-degree murder. The appellant admitted that she suffocated her daughter. The sole issue at trial was whether she intended to cause her daughter's death and accordingly, should be convicted of second-degree murder or manslaughter.

[2] The trial judge found that the appellant had the requisite intent for second-degree murder. On the appeal, the appellant alleges that the trial judge erred by misapprehending important evidence, speculating how the offence occurred, and failing to provide sufficient reasons for the finding that all after-the-fact evidence supported an intent to kill.

[3] The Crown agrees that the trial judge did misapprehend one aspect of the evidence but submits the misapprehension did not play an essential role in the reasoning process that the appellant had the requisite intent. The Crown denies that

the trial judge made the other errors alleged but says that if she did make any of those errors, the curative proviso should be applied because the errors were so harmless that they could not have affected the verdict, or that the errors, while serious, did not result in a miscarriage of justice or a substantial wrong because the case against the appellant was overwhelming.

BACKGROUND

A. Overview

[4] At trial the Crown led evidence from 36 witnesses, including police officers and health care workers who interacted with the appellant after her arrest, people who testified to the appellant's increasingly erratic behaviour in the weeks leading up to the offence, a forensic pathologist, and a forensic toxicologist. The defence led evidence from two experts in the field of forensic psychiatry, Dr. Jeanette Smith and Dr. Shabehram Lohrasbe. The appellant did not testify. However, her post-arrest statements to the police and others were entered into evidence for the truth of their contents.

[5] In her reasons that are indexed at 2019 BCSC 476 ("RJ"), the trial judge set out in great detail the events prior to and following Teagan's death. These reasons will focus on the events that are relevant to the issues raised on the appeal.

B. Evidence at Trial

[6] The appellant was 41 years old at the time of the offence. Teagan was eight. They lived together in Surrey, where the appellant worked as a teaching assistant. The appellant was deeply devoted to Teagan and Teagan's well-being.

[7] The appellant and Teagan's father, Gabe Batstone, separated in 2008 when Teagan was two, and were divorced in 2010. Their divorce was acrimonious and they had ongoing difficulties communicating about Teagan. The appellant never came to terms with the marital breakdown and felt great resentment toward her former husband.

[8] Following their separation, Mr. Batstone moved to Ontario where he lives with his current wife and children. Teagan lived with the appellant but regularly spent time with her father both when he came to B.C. to visit her and in Ontario. The appellant believed Mr. Batstone was mentally and emotionally abusive and at times deficient in his treatment of Teagan, causing Teagan to have separation anxiety and other struggles.

[9] The appellant was under a variety of stressors in the months leading up to Teagan's death. These included resentment towards Mr. Batstone and difficulties parenting with him; mental health issues; a falling out with a friend leading to the appellant leaving her church, which had been a source of community support; a back injury requiring rehabilitation; financial struggles; her mother's failing health; and the withdrawal of the parenting coordinator she and Mr. Batstone had worked with since 2008. However, at the time of the killing, the appellant's back was on the mend and she was scheduled to return to work in January 2015. The weekend prior to the killing, the appellant and Teagan had an enjoyable time at a Cultus Lake retreat.

[10] None of the appellant's actions in the weeks leading up to the offence suggested that she was planning to commit suicide or harm Teagan. Rather, her emails indicated that she was planning for the future. On December 7 and 9, 2014, the appellant sent emails to various people inquiring about after-school care and activities for Teagan in January 2015. On the morning of December 9, 2014, the appellant confirmed Teagan's dentist appointment for December 11, 2014.

[11] On the evening of December 9, 2014, Teagan and the appellant had a "camp-out" in their living room, intending to sleep there for the night. At some point between 2:04 am and 4:35 am on December 10, 2014, the appellant smothered Teagan.

[12] After Teagan's death, the appellant wrote a four-page letter explaining what she had done and why. She then posted notes saying "You win Gabe" and "You broke me" by the entry to her home. She then attempted to take her own life by putting over her head two plastic bags secured by duct tape. She was unable to go

through with her suicide attempt. She then placed those bags and the bag used to smother Teagan in the garbage, along with another note saying “I’m so sorry.”

[13] The appellant then googled ways to kill herself, and did Internet searches of Mr. Batstone’s new wife and family. The appellant sent emails to Mr. Batstone, Teagan’s school, and others advising that Teagan had the flu and would not be at school that day. She later told police that these messages were sent to give herself time to commit suicide.

[14] The appellant then texted numerous people with messages that she was sorry. She reached out to her former friend and former church community, asserting among other things that the former friend was evil and had killed them. Concerned, Ms. Ogilvie, a member of the church, tried calling the appellant but got no answer. She then went to the appellant’s house and knocked on the door. The appellant did not answer. Ms. Ogilvie and the appellant then exchanged text and email messages. The appellant denied she was intending to hurt herself and asked Ms. Ogilvie to leave her alone. Upon receiving these messages, Ms. Ogilvie drove a short distance away and called the police and advised them of her concern for the appellant’s well being.

[15] After Ms. Ogilvie left, the appellant put Teagan’s body in the back of her car and drove away. She also put the dog in the car. She said that she left the home to give herself more time to commit suicide, and intended to drop the dog at the dog sitter. On the way to the dog sitter, her car got stuck in a ditch. Ms. Batstone exited the car and approached a nearby home, asking the resident to call 911 and saying to the resident “my baby is dead.” When emergency personnel arrived, they found the appellant in the trunk of her car, cradling Teagan’s body.

[16] The appellant made many statements to emergency personnel at the scene, to medical officials at the hospital she was subsequently brought to, and to the police. These statements were all found voluntary and admissible. The general theme of the statements was that the appellant was sorry, that she had killed her daughter, and that she wanted to die.

[17] Constable Cucheran, who had initially responded to Ms. Ogilvie's call to police and subsequently was dispatched to the scene, saw a large kitchen knife on the seat in the car. The appellant had a superficial cut on her neck. The emergency personnel at the scene did not notice any signs of intoxication, but Cst. Cucheran was able to detect the odour of liquor once the appellant was confined in the back of a police vehicle. Cst. Cucheran advised the appellant that she was under arrest.

[18] The appellant was brought to a hospital after a paramedic who assessed her at the scene determined she was distraught and suicidal. A psychiatrist who spoke with her at the hospital testified that she was distraught, remorseful and that he was concerned by the risk of suicide. He did not observe anything abnormal in her thought processes, or evidence of thought disorder, hallucinations, or psychosis.

THE TRIAL REASONS

[19] The main issue at trial was whether the Crown had proved beyond a reasonable doubt that the appellant had intended to cause Teagan's death and was thus guilty of second-degree murder as opposed to manslaughter.

[20] The defence argued that there was reasonable doubt as to whether Ms. Batstone had an intent to kill due to her alcohol consumption, her reduced executive functioning that was caused by mental disorder and psychosocial stressors, or a combination of these factors. The defence pointed to circumstantial evidence, including a blood alcohol reading taken at hospital, in support of their intoxication argument. The defence called two expert witnesses in support of their mental disorder argument. The Crown argued that while there was some evidence of alcohol consumption prior to the appellant's arrest, a history of mental and emotional instability, and evidence that she was experiencing some stressors, the circumstances did not raise a reasonable doubt.

[21] The judge began her reasons by reviewing the background events and the evidence at trial (RJ 1–97). She then considered the law on second-degree murder and manslaughter, proof of intent, intoxication, mental disorder, "cumulative effect"

defences, and after-the-fact evidence (RJ 110–40). The judge then analysed the defences.

[22] The judge rejected the intoxication defence, concluding that even if the appellant had consumed alcohol prior to smothering Teagan, this did not impair her ability to understand and foresee the consequences of her act (RJ 143–51). The judge found that none of her electronic communications before or after the killing suggested any level of impairment; that smothering someone requires several actions and decisions, as well as an extended period of focus to execute the act; that her actions after the smothering indicated no confusion of thought; that her letters and notes were neatly printed and intentionally positioned to be found; and that she was able to craft a head covering for the purposes of suffocating herself with considerable care. The judge also noted that the appellant had strong, clear, detailed memories of the event, and her statements at the time indicated an understanding that Teagan was dead and she was responsible. Furthermore, none of the witnesses noted any impairment; only Cst. Cucheran could smell liquor, and that was in an enclosed vehicle. Finally, the factual foundation was lacking because there was no evidence of a drinking pattern.

[23] On the mental disorder defence, the judge found that the appellant was likely suffering from depression, anxiety, and borderline personality traits at the time, and that she was also experiencing psychosocial stressors. However, the judge rejected this defence (RJ 152–77). In assessing the evidence on this point, the judge preferred the opinion of expert witness Dr. Lohrasbe that all the evidence must be considered, with acts and statements closest in time to the act being the most reliable in helping to determine the appellant's mental state at the time of the act (RJ 156–61).

[24] The judge went on to note that smothering someone requires conscious forethought and deliberate action, and found that the appellant did not stop smothering Teagan until death was a certain outcome. This finding was based on the evidence of the forensic pathologist. The judge used this evidence to find that

the appellant had held the bag over Teagan's face for about four to five minutes, without interruption.

[25] The judge noted that afterwards, the appellant did not call for help. The judge had previously noted that failure to render aid is more consistent with murder than manslaughter (RJ 138). The judge held that the appellant's after-the-fact conduct was consistent only with the intention to cause death. She found the appellant's statements, both voluntarily offered and given to police and doctors, were consistent only with having meant to cause Teagan's death and nothing else. There was nothing either said or done by the appellant after Teagan's death that is inconsistent with this intention (RJ 173–75). Moreover, the trial judge held that an intention to send Teagan to heaven is still an intention to cause Teagan's death.

[26] Finally, the trial judge dismissed the “rolled up” factors defence (RJ 178–82). The trial judge reiterated that the killing was deliberate, that smothering involved a series of choices, decisions and some effort, that the appellant's actions were purposeful and goal-directed, and that she had her reasons for wanting Teagan dead (these reasons included among other things, ending Teagan's pain). The trial judge noted that “[h]aving regard to the totality of the evidence there is nothing that indicates [Ms. Batstone] had anything other than the intention to cause her daughter's death” (RJ 179).

ON APPEAL

[27] The appellant raises the following grounds of appeal:

- i. The trial judge misapprehended evidence central to her decision to convict;
- ii. The trial judge engaged in speculation to make critical findings of fact; and
- iii. The trial judge's reasons on the issue of the probative value of the post-offence conduct evidence were deficient and reveal legal error.

[28] I will deal with each ground in turn.

DISCUSSION**A. Misapprehension of Evidence*****i. Overview***

[29] The appellant alleges two misapprehensions of evidence by the trial judge. Firstly, she submits the trial judge's finding that the appellant "weighed options" about how to kill her daughter before deciding to smother her, misapprehended the substance of the evidence respecting the appellant's statement to the police. Secondly, the appellant submits that the judge misapprehended the substance of the forensic pathologist's evidence respecting the length of time it would have taken for Teagan to die by smothering. The appellant submits this misapprehension led to an erroneous factual finding about how the killing occurred, which was central to the judge's finding that the appellant had acted with the intent to kill.

[30] The test for demonstrating a misapprehension of evidence warranting appellant intervention is stringent. The appellant bears the onus of showing that: 1) the misapprehension went to substance; 2) it was material to the judge's reasoning process; and 3) it played an essential part in the reasoning process resulting in conviction. To suggest a difference in interpretation of the evidence does not amount to misapprehension of the evidence: *R. v. Swales*, 2014 BCCA 350 at paras. 48–49, leave to appeal ref'd [2016] S.C.C.A. No.36862.

[31] In *R. v. Lohrer*, 2004 SCC 80, the Court emphasized the centrality that misapprehension of the evidence must play in a trial judge's reasoning process leading to the conviction in order to overturn that conviction on appeal. The misapprehension must go to the core of the reasoning process which resulted in the conviction: *R. v. Shen*, 2010 BCCA 554 at para. 29. One way of determining whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *R. v. Zedeh*, 2020 BCCA 93 at para. 38.

ii. Statement re Suffering

[32] In her reasons, the judge found that the act of smothering Teagan required conscious forethought and deliberate action that required a number of decisions and several steps. The judge found that one of those steps was deciding that she would kill her by smothering her. In that regard, she said:

[164] Next she decided that she would kill her by smothering her. In coming to this conclusion she weighed options as she told the police later that she decided to suffocate Teagan so she would not suffer.

[33] The appellant submits that the trial judge's finding reflects a misapprehension of the substance of the evidence respecting the appellant's statement to the police. Read in context, the appellant submits that she did not say she chose suffocation over other methods for killing her daughter in order to prevent Teagan from suffering; rather, she said, she did not know why she chose suffocation.

[34] During the appellant's lengthy interrogation, the police repeatedly pressed her to explain her thinking at the time of the death. The appellant was only able to say she was trying to protect Teagan from suffering. Towards the end of the interrogation, Sergeant Carr and the appellant had an exchange where he asked why the appellant had chosen suffocation:

Sgt. D. CARR: And you know in the eyes of the law that killing someone's wrong as well. Right?

Lisa BATSTONE: Yeah. I was just trying to save her from being in pain.

Sgt. D. CARR: But you didn't expect that you'd be caught. You didn't think you was gonna be here. Right?

Lisa BATSTONE: I thought I was going to die with her. We could both be in no more pain.

Sgt. D. CARR: Yeah. Well, why, why did you, why did you choose suffocation? Why, why did you come with that idea?

Lisa BATSTONE: 'Cause I didn't want her to suffer.

Sgt. D. CARR: And I understand that but like there's lots of ways you could end someone's life. Right? Why did, what, why, how did you come up with that idea?

Lisa BATSTONE: I don't know. I just did it. And then I looked online for ways to do it myself.

Sgt. D. CARR: Did you look online for ways to kill Teagan?

Lisa BATSTONE: No.

Sgt. D. CARR: No. Okay.

[35] The trial judge found that the explanation for why she chose to suffocate Teagan as opposed to using a different method to kill her was because she did not want her to suffer. The appellant submits that that is not a reasonable interpretation of the appellant's statement. She submits that she was just repeating her consistent explanation for why she killed Teagan: to protect her from pain and suffering. The appellant submits that Sgt. Carr understood that this is what the appellant meant, so he asked the question again, clarifying what he wanted to know was why she chose suffocation as the way of killing Teagan as opposed to something else. Once Sgt. Carr clarified his question, the appellant responded that she did not know—she just did it.

[36] The appellant submits that the trial judge's finding that the appellant had weighed options about how to kill her daughter and decided to use suffocation as opposed to other methods was an important factual finding in terms of the appellant's *mens rea*. It was evidence that the appellant had engaged in an assessment of the consequences of her actions, thereby supporting a conviction for murder as opposed to manslaughter. It was an evidentiary pillar upon which the trial judge formed her conclusion that the plaintiff was guilty of second-degree murder.

[37] The Crown submits that the judge did not misapprehend this evidence, and that the appellant is simply inviting this Court to substitute a finding that is more favourable to her, based on an interpretation of the evidence that the appellant would have preferred. The Crown submits that the judge's finding was reasonable based on what the appellant said to Sgt Carr.

[38] It is not enough for the appellant to merely suggest a different interpretation of the evidence. Differences in interpretation are not misapprehensions, but disagreements with the judge's differing view of the evidence. I agree with the Crown that it was open to the judge to find that the appellant decided to suffocate Teagan

so she would not suffer. The judge's finding was consistent with the appellant's testimony. I would not accede to this ground of appeal.

iii. Dr. Litwin's Evidence

[39] The second alleged misapprehension concerning the evidence of Dr. Litwin raises a more difficult question. The Crown concedes that the judge misapprehended the substance of Dr. Litwin's evidence respecting the length of time it would have taken for Teagan to die by smothering. It submits, however, that this ground of appeal ought to be dismissed because the misapprehension did not play an essential role in the judge's reasoning process in finding the appellant had the requisite intent for murder.

[40] Resolution of this ground of appeal requires a detailed review of Dr. Litwin's evidence and the use the trial judge made of that evidence. There is no dispute amongst the parties that Teagan died from asphyxia by smothering. Dr. Litwin explained that death from asphyxia involves a body being deprived of oxygen, leading to death due to tissue death and/or a disruption of the body's vital functions, such as the heart's ability to beat. Smothering is asphyxia due to an external blockage of the airways, and can occur without physical injury to the victim's body.

[41] Dr. Litwin gave evidence concerning the length of time a person's airways would need to be blocked in order for the person to die. He explained that how long it took a person to feel the deadly effects of oxygen deprivation varied from person to person depending on their unique traits and other factors. In the course of his examination in chief, just after Dr. Litwin had finished explaining that asphyxia could cause death by disrupting the vital functions of the body, the trial judge asked, "How quickly does this start?" Dr. Litwin replied as follows:

So My Lady, it's -- again, that -- that's a question that can't be answered with any precision because it depends upon the circumstances. It can occur relatively quickly, perhaps within several seconds, maybe half a minute, 30, something of that nature, many seconds, the effect can occur. And this can occur -- this can include a relatively rapid loss of consciousness at which point the person can no longer react, and then the process of tissue damage and death continues. And uninterrupted beyond four to five minutes of the body

being deprived of oxygen, particularly the brain, there's increasingly less ability to meaningfully recover. That sounds perhaps confusing, My Lady. What I would say is once the oxygen is completely blocked from getting into the body, within several seconds to -- that the person may develop an irregularity of heartbeat or lose consciousness, and then beyond several minutes, four or five minutes, the damage and the ability to recover becomes less and less likely.

[42] The Crown then followed up on that question and the following exchange took place:

Q So let's just drill down to that just a little bit. So the person is now deprived -
- in a hypothetical, again, let's talk about a plastic bag -- of oxygen.
Let's start with the loss of consciousness, the range of that would be --
and, again, I appreciate these are just ranges.

A So it would be several seconds. And this is, again, assuming there's a complete conclusion, or a complete -- that the -- the blockage is constant, and we're not talking about intermittent blockage, but within several seconds, potentially, the person could lose consciousness and within that timeframe irregularities of heartbeat could begin. Upwards of several minutes to the person becoming unconscious and irregularities of heartbeat and/or other vital functions occurring, resulting in irreparable damage to the body.

Q What sort of length of time, again, I appreciate it's a range, would this complete -- the deprivation of oxygen cause a person's death? How long would it have to be completely deprived?

A If we're talking -- the -- the brain can survive probably no more than several minutes, four or five minutes, something like that, on average, before the damage becomes irreparable and meaningful recovery becomes less and less likely.

Q And --

A But again, that's -- that's a -- that's a range and it depends upon many factors unique to that individual. How well they're able to tolerate the lack of oxygen delivery to the brain.

Q So it could be less, I take it?

A Potentially, it could be less.

[43] In cross-examination, defence counsel returned to this subject, and the following exchange took place:

Q And I just want to ask a little bit of clarification on that. So you told my friend that in terms of -- I can't remember if this was during the plastic bag hypothetical, or not, but presuming a consistent blockage of the external airways, loss of conscious -- consciousness can occur within several seconds, right?

A Potentially, yes.

Q And this is all potentially, right?

A Yes.

Q We're not -- never going to be able to know exactly how long it took with Teagan, right?

A Correct.

Q But within several seconds, the person could be unconscious, right?

A Yes.

Q And there could be an irregularity of the heartbeat, correct?

A Yes.

Q And that irregularity of the heartbeat can lead to death, correct?

A Yes.

Q So within several seconds, essentially, the pathway to death has been established?

A Correct.

Q If I can put it that way?

A Yes. Yes.

Q So even if nothing further was done after this several seconds had passed, death could still occur?

A Potentially, yes.

[44] In her reasons, the trial judge found that the act of smothering Teagan required a number of decisions and several steps. In that regard, she said:

[162] Based on all of the evidence I conclude that the act of smothering Teagan required conscious forethought and deliberate action. It was not a hasty, spur of the moment act. It required a number of decisions and several steps.

[163] First the accused formed the idea to kill Teagan.

[164] Next she decided that she would kill her by smothering her. In coming to this conclusion she weighed options as she told the police later that she decided to suffocate Teagan so she would not suffer.

[165] Then she chose the tool to commit the act – a plastic bag. She had to get up from the couch or mattress, walk into the kitchen, and retrieve a bag from under the sink. She did not grab just any bag; she chose a heavy enough bag that she could use it alone. That was clearly part of the thought process as when the accused tried to kill herself using the same method a short time later she used lighter plastic bags and put two of them together, one inside the other. With Teagan she just needed the one.

[166] The accused then returned to the living room and positioned herself beside or on top of her sleeping daughter and according to the evidence of the forensic pathologist Dr. Litwin, held the bag over her mouth and nose, with enough pressure to block the airways, for about 4 to 5 minutes. Without interruption. Until she was certain that she was dead. According to Dr. Litwin had there been any interruption Teagan may have revived.

[167] As per Dr. Litwin, Teagan would have been rendered unconscious within approximately 30 seconds but before that it is possible that she, once aware of what was happening, may have struggled to try to remove the smothering object. However the accused told police that Teagan did not suffer and Dr. Litwin did not see any injuries that he could confidently say were defensive injuries.

[168] In order to know that Teagan did not suffer and to ensure that she was maintaining the blockage of her airways, the accused must have been watching her throughout the time she was holding the bag over her face. Four to five minutes in these circumstances is a long period of time. Never did she waiver from her goal. As in *Damin*, she did not stop until death was a certain outcome.

...

[171] The accused's actions were systematic, focussed, purposeful and goal directed. That goal: to end her daughter's short life.

[172] The consequence of holding a bag over Teagan's mouth and nose was predictable. The accused was aware of that. The fact she wanted to die the same way Teagan did proves that she knew it led to death.

[45] The appellant submits the judge's findings reflect a misapprehension of the substance of Dr. Litwin's evidence about the length of time to cause death by asphyxia. She submits the trial judge's misapprehension of Dr. Litwin's evidence resulted in her finding the appellant engaged in a lengthy, sustained act of smothering when the reality was that the appellant may have only engaged in several seconds of action. The appellant submits that this was a significant factual finding about how she killed her daughter, and that the finding was central to the trial judge's conclusion that the appellant intended to kill her daughter. The appellant submits that for the trial judge, Dr. Litwin's evidence proved the appellant's act was not a hasty or impulsive action. The appellant submits that the judge's finding that the expert evidence established that the appellant must have smothered Teagan for four or five interrupted minutes was critical to her reasoning respecting the appellant's intent.

[46] The Crown agrees with the appellant that the judge misapprehended the substance of Dr. Litwin's evidence respecting the length of time it would have taken for Teagan to die by smothering. They submit, however, that the apprehension did not play an essential role in the judge's reasoning process in finding that the appellant had the requisite intent for murder. In this regard, they submit that the issue is not whether the judge misapprehended this one aspect of Dr. Litwin's evidence, but rather whether she erred in her appreciation of the evidence in a manner that could have affected the outcome. The Crown disagrees with the appellant's submission that misapprehension of Dr. Litwin's evidence as to the length of time it may have taken to kill Teagan was central to her conclusion that the appellant had the requisite intent for murder.

[47] The Crown submits that the judge's finding was multi-faceted. Dr. Litwin's evidence on the duration of the smothering was just one of a number of factors that the judge relied on in finding the appellant had the requisite intent. The Crown highlights the following findings:

- the appellant formed the idea to kill Teagan (RJ 163);
- the appellant decided she would kill Teagan by smothering her (RJ 164);
- in coming to her conclusion to smother Teagan, the appellant decided to suffocate Teagan so she would not suffer (RJ 164);
- the appellant chose the tool to commit the act—a plastic bag (RJ 165);
- the appellant had to get up from the couch or mattress, walk into the kitchen, and retrieve the bag from under the sink (RJ 165);
- the appellant then returned to the living room, positioned herself beside or on top of her sleeping daughter and held the bag over her mouth and nose with enough pressure to block the airways until she was certain that she was dead (RJ 166).

[48] The Crown submits that whether the appellant held the bag over Teagan's face with enough pressure to block the airways for at least several or 30 seconds, as opposed to about four or five minutes, does not take away from the judge's finding that the act of smothering required a number of decisions and steps. One of the undisputed steps was the appellant holding the plastic bag over Teagan's face long enough—uninterruptedly—to stop Teagan from breathing.

[49] I agree with the Crown that the trial judge's findings of intent was multi-faceted. In addition to the decisions and actions highlighted above, the judge also considered the appellant's writings and statements about the killing. In this regard she said:

[174] The accused's statements both voluntarily offered and given to police and doctors are consistent only with having meant to cause Teagan's death and nothing else.

[175] There is nothing either said or done by the accused after Teagan's death that is inconsistent with this intention.

[50] The judge also pointed out the appellant had reasons for wanting her daughter dead, as referenced in her statements as well as the letter she wrote and left at her residence. In the context of all of these individual findings, I find the appellant has not established that the judge's finding that the appellant had held the plastic bag over Teagan's face uninterruptedly, with enough pressure to block the airways for about four or five minutes—as opposed to potentially at least several or 30 seconds—would have made a difference to the judge's finding of intent. The judge's error on the duration of the smothering is relatively unimportant in the context of the evidence as a whole. Striking the error from her reasons would not leave her reasoning on intent on unsteady ground. I would not accede to this ground of appeal.

B. Speculation in Making Critical Findings of Fact

i. Overview

[51] Triers of fact are often required to make factual findings based on inferences drawn from the evidence. There is a distinction between conjecture and speculation

on the one hand, and rational conclusions from the whole of the evidence on the other. In *R. v. Morrissey*, (1995) 22 O.R. (3d) 514 at 530 (C.A.), 1995 CanLII 3498 (ON CA) at 22, the Court of Appeal for Ontario described the distinction:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.

[52] Where a trial judge has employed speculative reasoning, the convictions touched by that error must be quashed unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice: *Morrissey* at 531.

[53] In finding that the appellant had the *mens rea* for murder, the trial judge made numerous factual findings that established that the appellant acted with “conscious forethought”, making “a number of decisions” and acting in a “systematic, focussed, purposeful, and goal directed” manner to fulfill her “plan” of killing her daughter (RJ 162-171). The appellant submits that certain findings were the result of speculation, not reasonable inferences drawn from proven facts. In particular, they refer to her findings that the appellant used a particular bag to smother Teagan, that the appellant was watching Teagan throughout the time she was holding the bag over her face and her findings concerning the order of events that occurred after Teagan’s death.

[54] The Crown submits the judge did not make any palpable or overriding errors that would permit this Court to interfere with these factual findings. Alternatively, it submits, that if this Court finds the judge improperly drew inferences based on speculation, the errors were harmless and insignificant, and could not have affected the verdict: *R. v. White*, 2011 SCC 13 at para. 93. The Crown says whether the appellant chose to use a heavier plastic bag, whether she watched her daughter when she smothered her, and whatever time she wrote the letters and sent the emails or googled ways to kill herself are minor matters on the issue of intent when considered in context of the entirety of her actions and decisions.

ii. Choice of Bag

[55] The trial judge found that the appellant choose a particular plastic bag to smother Teagan:

[165] Then she chose the tool to commit the act – a plastic bag. She had to get up from the couch or mattress, walk into the kitchen, and retrieve a bag from under the sink. She did not grab just any bag; she chose a heavy enough bag that she could use it alone. That was clearly part of the thought process as when the accused tried to kill herself using the same method a short time later she used lighter plastic bags and put two of them together, one inside the other. With Teagan she just needed the one.

[Emphasis added.]

[56] The only evidence concerning the choice of the bag used on Teagan was inconsistent with the inference drawn by the trial judge. In her police interrogation, the appellant was asked what she smothered Teagan with. She said, “A bag.” Sgt. Carr asked, “A bag? What kind of bag was it, Lisa?” The appellant said, “I just grabbed a bag from under the cupboard.” There was no suggestion in her evidence that the appellant considered the heaviness of the bag.

[57] The appellant submits there is no evidence to support the judge’s finding that the appellant deliberately chose a heavy enough bag so she could use it on Teagan without doubling up. They note that the evidence on the record only supports the finding that the appellant used a black plastic bag to smother Teagan, and subsequently put two plastic bags (one inside the other) over her own head in an attempt to suffocate herself.

[58] The appellant submits that the fact the appellant used doubled-up bags on herself does not logically support the inference that the appellant intentionally selected a heavy bag to use on Teagan. They note that there was no evidence that the appellant doubled up the bags she used on herself at the time of her suicide attempt, or that she was even the person who doubled them up. Further, even if the appellant had intentionally doubled up the bags before attempting suicide, that would not logically support the inference that before she attempted suicide, she had

foreseen the need to double up with thinner bags, and had therefore intentionally chosen a heavier bag to smother Teagan.

[59] The Crown submits that there was evidence upon which the judge could reasonably make this inference, including the fact that the appellant used the single black plastic bag to smother Teagan, put two plastic bags (one inside the other) over her head in an attempt to suffocate herself, and the bag the appellant used to smother Teagan was heavier than the thinner plastic bags she used in attempting to suffocate herself.

[60] I agree with the appellant that the evidence does not support the inference that the appellant deliberately chose a heavy enough bag that she could use on Teagan without doubling it up. I find, however, that the error was harmless and it could not have affected the verdict. The important finding was that the appellant took a bag and used that bag to suffocate her daughter. Whether she did or did not compare various bags is of no import.

iii. Watching Her Daughter

[61] The trial judge found that the appellant watched her daughter throughout the smothering. In this regard, she said:

[168] In order to know that Teagan did not suffer and to ensure that she was maintaining the blockage of her airways, the accused must have been watching her throughout the time she was holding the bag over her face.

...

[62] The appellant submits that the judge's finding that she watched her daughter throughout the smothering was speculative. She submits there was no evidence suggesting where the appellant was looking at the time of the act. While the appellant said Teagan did not suffer, she was not asked, and did not say why she believed this.

[63] The Crown submits there was evidence from which the judge made this inference:

- The appellant articulated two purposes for using the plastic bag: 1) to kill Teagan; and 2) so Teagan would not suffer while the appellant smothered her.
- It would have taken some time to block the airways uninterrupted before rendering Teagan unconscious.

[64] The Crown submits that reasonable inference based on this evidence is the appellant “must have been watching” her daughter to make sure she did not suffer. I agree with the Crown that in the circumstances the inference that the appellant watched her daughter was an inference that was open to the trial judge.

iv. The Judge’s Findings about Order of Events after Teagan’s Death

[65] The appellant submits that the trial judge made findings of fact about the order of events that occurred after Teagan’s death. In this regard, they refer to certain passages at paras. 169, 170, 173:

[169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

[170] Dr. Smith found it “odd” that the accused googled suicide methods. According to her this showed confusion and that the accused had not previously thought about killing herself. I disagree. The accused had had a plan. She explained it herself. She was going to kill herself and she did not want to leave Teagan behind. She wanted to die the same way she killed Teagan – by suffocation. The plan was dashed when she could not go through with it. That is when she searched for a different method.

[173] The accused’s after-the-fact conduct is consistent only with the intention to cause death. There is no other reasonable explanation. After Teagan’s death she sent emails and left notes to avenge Gabe, Ms. Joseph and the church for their perceived betrayal of her and to leave them with the responsibility for the deaths of her and Teagan. She then set about trying to kill herself.

[Emphasis added.]

[66] The appellant submits the judge's findings respecting the order of the appellant's post-offence conduct was speculative. She submits there was no way to know when after the smothering the appellant wrote the handwritten letters and notes; there was simply no evidence on this point.

[67] The Crown submits the judge's reasons as a whole demonstrate she did not speculate with respect to the order of the appellant's actions. The judge set out in detail the appellant's actions after the killing (RJ 30- 45), noting at para. 30 that after she killed Teagan "the accused did many things." She then listed the appellant's actions after the killing. These actions included:

- The appellant wrote a four-page letter and two notes. (RJ 31-33)
- She put two bags over her head to try to smother herself, but she could not go through with it. (RJ 34)
- She googled the "easiest ways to kill oneself." (RJ 36)
- She sent emails to Mr. Batstone, Teagan's school and others stating that Teagan had the flu and would not be at school. (RJ 37)
- She left a message at her rehab program saying that she would not be at the program that day. (RJ 37)
- She texted to a number of people a message saying, "I'm sorry." (RJ 38)
- She sent a number of recriminatory emails to Ms. Joseph and other church members. (RJ 39-42)

[68] The four page letter explained what she had done and why. In the letter she blamed Mr. Batstone, Ms. Joseph and the church group who she believed had betrayed her.

[69] The two notes read “You win Gabe” and “You broke me.” The appellant posted the notes at the top of the stairs so to be seen as soon as someone entered the front door of her townhouse

[70] The judge found that the appellant wrote the letter and the notes between the time the appellant killed Teagan and when she tried to kill herself. I agree with the Crown that this is a reasonable inference from the evidence. The letter was clearly written after the appellant killed Teagan, and it is reasonable to infer that the appellant wanted to convey the messages in the notes to Mr. Batstone before she killed herself. Thus, the judge did not speculate in her reasons at para. 169 in finding “She tried to kill herself the same way she killed Teagan after she wrote the letters and notes.” Similarly, the judge’s finding at para. 170 that the appellant only googled suicide methods after her initial attempt to kill herself had failed was, on the evidence, a reasonable inference to draw.

[71] I agree that at para. 173 the judge erroneously indicates that she sent emails prior to attempting to kill herself. The emails which were time stamped were only sent after she had tried to kill herself. To the extent that was an error, it is a harmless error and did not impact the judge’s conclusion that the appellant had the requisite intent to kill.

C. After-the-Fact Conduct

i. Overview

[72] The appellant submits that the Reasons reveal two legal errors in the trial judge’s approach to the after-the-fact conduct evidence in this case. First, the trial judge erred in law by failing to explain her reasons for concluding that all the appellant’s post-offence actions and statements were consistent with the intent to kill. Second, the appellant submits the trial judge erred in interpreting the law as holding that a failure to render aid will always be probative of intent because it is more consistent with murder than manslaughter.

[73] The Crown disagrees. It submits the judge considered just some of the appellant's after-the-fact conduct as relevant circumstantial evidence on intent and she sufficiently explained how she reached that finding. The Crown further submits the appellant is wrong in asserting that the judge said that failure to render aid will "always" be probative of intent because it is more consistent with murder than manslaughter. Rather, she correctly said that it is a relevant consideration.

ii. Sufficiency of Reasons

[74] The trial judge's reasons will be sufficient if they inform the parties of the basis of the verdict, permit meaningful appellate review, and provide public accountability for the judge's decisions. The reasons will fulfill these functions if, when read in context, they show what the trial judge has decided and why the judge made that decision: *R. v. Sheppard*, 2002 SCC 26 at para. 55; *R. v. R.E.M.*, 2008 SCC 51 at paras. 11, 17.

[75] A functional test requires that a trial judge's reasons be sufficient for that purpose: *Sheppard* at para. 28. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no impediment to appellate review, there is no cause for appellate intervention: *Sheppard* at paras. 26, 46.

[76] In *R.E.M.*, McLachlin, C.J., following *Sheppard*, held that a functional context-specific approach is taken to the adequacy of reasons in a criminal case. Reasons must be sufficient to "fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review": *R.E.M.* at para. 15. Therefore, appellate courts "considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": *R.E.M.* at para. 16. Reasons will be sufficient if they show why the judge decided as she did. A judge is not required to demonstrate how she arrived at her conclusion but, rather, the foundations of the decision must be

discernible when examined in the context of the evidence, the submissions of counsel and the history of how the trial unfolded: *R.E.M.* at para. 17.

iii. Positions at Trial

[77] At trial, the appellant submitted that her after-the-fact conduct was not probative of intent because of the dangers of drawing reliable inferences from after-the-fact conduct given the facts in the case, and because much of the conduct was at least equally consistent with the appellant acting without understanding the true consequences of her actions, as with the intent to kill.

[78] The Crown submitted that the appellant's purposeful and deliberate after-the-fact conduct was circumstantial evidence that the appellant's mental functioning was not substantially impaired due to intoxication or mental disorder. The Crown noted the law respecting difficulties with inferring level of culpability from after-the-fact conduct, and submitted that it "isn't so much that it [the post-offence conduct] relates directly on intent, but its circumstantial evidence, at least of whatever mental state the person was in at the time of the after-the-fact conduct."

iv. The Judge's Reasons

[79] The judge dealt with the issue of after-the-fact conduct in four parts of her reasons. She first detailed the appellant's after-the-fact conduct following the killing (RJ 30-45).

[80] In her review of the relevant principles of law she reviewed the leading case law and the legal principles governing the use and relevance of after-the-fact conduct to the determination of intent (RJ 131-140). From that review she concluded that the appellant's after-the-fact conduct could be considered, along with all of the other evidence, to determine the accused's intent. The appellant does not suggest that the judge erred in her interpretation of the legal principles, except with respect to the law on failure to render aid.

[81] Next, the judge referred to the appellant's after-the-fact conduct in assessing her state of intoxication on the issue of intent. As there is no evidence of how much,

if any, alcohol the accused had to drink before she smothered Teagan, the judge had to consider all of the evidence to determine whether the accused was intoxicated at the time of the killing and if so, whether the impairment raised a reasonable doubt that she could foresee the consequences of her actions. In this regard, she made several findings concerning the appellant's after-the-fact conduct, including the following:

[147] In assessing the accused's state of intoxication, I note the following:

- 1) None of her electronic communications made before or after she killed Teagan suggest any level of impairment. The content was consistent with the content of her communications of the months prior. She was able to carry on several conversations at the same time. She responded appropriately and coherently. There were no signs of confusion of thought. She had few typographical errors. She even corrected some typos.
- 2) . . .
- 3) Her actions after the act indicate no confusion of thought. The four page letter was neatly written. It made sense. Again the content was consistent with everything she had written before and after Teagan's killing as well as the statements she made after. The accused left in plain view in the living room near where her daughter's dead body would have been found had she not been interrupted, clearly intending it to be found.
- 4) The notes were neatly printed and again were consistent in content to what she wrote and said before the killing and after. She carefully hung the notes in the front hallway, one above the other, so they would be seen immediately on entering the front door.
- 5) The note in the kitchen garbage can was purposefully placed on top of the bag she used to suffocate Teagan. Again, it was positioned to be found.
- 6) Making the head covering to suffocate herself required considerable care and an even hand. She used two plastic grocery bags, putting one inside another. I note that these bags appear to be thinner plastic than the one bag she used to smother Teagan. She then wrapped a substantial amount of duct tape around the bags. Some if not all of it had to be applied with the bag on her head. The tape was neatly cut. There were no balls of duct tape or botched attempts found by the police.
- 7) The accused exhibits a strong memory of the events including what happened before, during and after. She provided details of the killing to both emergency responders, police officers and medical officials including what she was thinking. Her statements clearly indicate an understanding that Teagan was dead and that she was responsible.
- 8) ...

[82] Having considered all of the evidence, including the after-the-fact conduct, the judge was satisfied that even if the appellant had consumed some alcohol before the killing she was not impaired to the extent that it affected her ability to understand and foresee the true consequences of her act (RJ 150).

[83] The judge next referred to the appellant's after-the-fact conduct in the context of analysing the defence of mental disorder short of NCRMD. In this regard, she said:

[169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

[170] Dr. Smith found it "odd" that the accused googled suicide methods. According to her this showed confusion and that the accused had not previously thought about killing herself. I disagree. The accused had had a plan. She explained it herself. She was going to kill herself and she did not want to leave Teagan behind. She wanted to die the same way she killed Teagan – by suffocation. The plan was dashed when she could not go through with it. That is when she searched for a different method.

...

[173] The accused's after-the-fact conduct is consistent only with the intention to cause death. There is no other reasonable explanation. After Teagan's death she sent emails and left notes to avenge Gabe, Ms. Joseph and the church for their perceived betrayal of her and to leave them with the responsibility for the deaths of her and Teagan. She then set about trying to kill herself. Of course she was frustrated when Ms. Ogilvie showed up at her door and then again when her car went into the ditch.

[174] The accused's statements both voluntarily offered and given to police and doctors are consistent only with having meant to cause Teagan's death and nothing else.

[175] There is nothing either said or done by the accused after Teagan's death that is inconsistent with this intention.

[84] The judge ultimately found that there is nothing in the evidence that suggested that the accused's mental disorders prevented her from forming the subjective intent to kill her daughter, and while she may have had a diminished capacity, it did not preclude her from forming the requisite intent for murder (RJ 177).

[85] The appellant submits that the trial judge's reasons respecting the probative value of the after-the-fact conduct did not meet the functional test set out in *Sheppard*. The trial judge's reasons show that she found everything the appellant said and did after Teagan's death was evidence of intent to kill. However, the appellant does not know why the judge came to this unusual and important conclusion. The appellant submits the trial judge's reasons in this case are devoid of any articulation of the potential inferences to be drawn from specific pieces of after-the-fact conduct evidence, why she found it unreasonable to draw inferences consistent with manslaughter, or of the chain of reasoning she followed to find the evidence consistent with murder. The appellant submits that much of the appellant's after-the-fact conduct was consistent with manslaughter. She submits it is not obvious in the record why the judge concluded the evidence was wholly consistent with an intent to kill.

[86] The Crown challenges the appellant's submission that the judge found that "all" of the appellant's after-the-fact conduct was only consistent with the intent to kill. The Crown submits that the judge did not find that "everything the appellant did after the killing was evidence of intent." Rather, she referred to specific after-the-fact actions, and explained why each of these actions informed the appellant's state of mind. In her analysis of this evidence, the judge found that the appellant's actions after she killed Teagan indicated no confusion of thought. She thus concluded these actions were consistent only with the intention to cause death. The judge's finding at para. 175 that nothing said or done after the killing was inconsistent with the intention to kill is not a finding that "everything" she said and did afterwards was consistent with this intention.

[87] I agree with the Crown's submission. The judge did not find that every after-the-fact action was consistent with intent. The Crown relied on only some of the appellant's after-the-fact conduct, and only for the limited purpose of refuting the specific defences of intoxication and mental disorder. The judge gave appropriate reasons why those actions informed the issue of intent. While the appellant raises the risk of misusing after-the-fact conduct, the judge relied on the appellant's after-

the-fact conduct only for a limited purpose, that is, for determining the appellant's state of mind in the context of the appellant's defences. This is a proper use of such evidence. In *R. v. Jaw*, 2009 SCC 42 at para. 40, LeBel J. stated:

[40] Post-offence conduct may also be used to discredit a defence that relates to the accused person's state of mind at the time of the offence and that is therefore relevant to his or her ability to form the requisite intent for the offence, such as intoxication (*R. v. Pharr*, 2007 ONCA 551, 227 O.A.C. 112, at paras. 8-15; *Peavoy*, at pp. 630-31) or the "not criminally responsible" defence under s. 16 (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 42-53).

[88] The trial judge's reasons show what she has decided and why she made that decision. The reasons provide no impediment to appellate review. The foundations of the decision are discernible when examined in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[89] I would not accede to this ground of appeal.

vi. Consideration of the Appellant's Failure to Render Aid

[90] The appellant submits the trial judge erred by determining that the law established that the failure to render aid was more consistent with murder than manslaughter. The evidence that a person did not render aid to someone after they harmed them is not necessarily more consistent with the intent for murder. Rather, whether the failure to render aid is probative of an intent to kill will depend on all the circumstances.

[91] The Crown submits the appellant is wrong in asserting that the judge said the failure to render aid "will always" be probative of intent. What she said was that it is a relevant consideration:

[138] Evidence that a person did not render aid to someone after they had harmed them is a relevant consideration in the analysis of the mental element for murder as it is more consistent with intending the death of a person than not: *R. v. Campbell*, [2018] O.J. No. 5415 (Ont. C.A.) at para. 12.

[92] In *Campbell*, the after-the-fact conduct of failure to perform CPR on the victim or to call 911 immediately after shooting the victim was used, like the present case,

as circumstantial evidence of intent. The Ontario Court of Appeal held that this was a relevant consideration on the issue of intent.

[93] In analysing the appellant's mental disorder in the context of determining the appellant's state of mind at the time of the killing, the judge said:

[169] After she was finished the accused did not call an ambulance. She did not call anyone for help. She did nothing to try to save her. Instead she wrote the letters and notes to explain her actions and burden others with the responsibility for it. Then she tried to kill herself the same way she killed Teagan.

[94] Whether the failure to render aid is probative of intent will depend on the circumstances. I agree with the Crown that, in the circumstances of this case, the appellant's failure to seek help was probative to rebut the defence's theory that the appellant did not grasp the real-world consequences of her action. At the trial, the Crown argued it was inconceivable that once the appellant realized her daughter was dead, she did not seek any assistance. I agree that the inference the Crown sought was an available inference, and it was reasonable according to logic.

[95] I would not accede to this ground of appeal.

CONCLUSION

[96] In the result, therefore, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Saunders"

Tab 4:

R. v. Blaney, 2022 BCCA 98

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Blaney*,
2022 BCCA 98

Date: 20220316
Docket: CA45750

Between:

Regina

Respondent

And

Barry Ross Blaney

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated
October 30, 2018 (conviction) (*R. v. Blaney*, 2018 BCSC 2211,
Chilliwack Docket 67163).

Counsel for the Appellant:

E. Holzman

Counsel for the Respondent
(via audioconference):

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia
October 19, 2021

Place and Date of Judgment:

Vancouver, British Columbia
March 16, 2022

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury
The Honourable Madam Justice Fisher

Summary:

The appellant challenges his conviction for two counts of breaching a condition of a long-term supervision order. Count 1 alleged that the appellant failed to take his medication as prescribed and Count 2 alleged the appellant failed to hand some of his medication into the facility where he lived. The appellant submits the verdict on Count 1 was unreasonable because the Crown failed to prove the actus reus of the offence or, alternatively, that the evidence was incompatible with the appellant's evidence, which the trial judge never rejected and was not otherwise contradicted. Regarding Count 2, the appellant submits the trial judge erred in law by failing to consider subjective mens rea. Held: The appeal of Count 1 is allowed; the appeal of Count 2 is dismissed. On Count 1, the judge assumed the actus reus for both counts was the same and failed to distinguish the factual elements needed to be proved for Count 1. The appellant gave direct evidence as to the directions provided by his doctor that was not contradicted or rejected. There is no basis for the conclusion the appellant failed to take the medication as prescribed. On Count 2, the judge properly applied a subjective mens rea standard and considered whether the Crown had shown the appellant did not have a reasonable excuse for failing to turn in the medication.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Barry Blaney appeals his conviction for two counts of breaching a condition of a long-term supervision order ("LTSO") pursuant to s. 753.3(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The condition required him to take medication as prescribed and, when living in a Community Residential Facility ("CRF"), to hand in prescription medications to staff at the facility (the "Medication Condition"). The breaches stemmed from a routine search of the facility where Mr. Blaney resided that resulted in the discovery of a bottle containing capsules of Gabapentin, a prescription medication. The bottle was found in a backpack located in his room.

[2] When the Gabapentin was discovered in his room, he was charged with a two-count indictment:

Count 1

[Mr. Blaney], on or about the 27th day of September, 2017, ... did, without reasonable excuse, fail or refuse to comply with a long-term supervision order, by failing to take medication as prescribed, contrary to Section 753.3(1) of the *Criminal Code*.

Count 2

[Mr. Blaney], on or about the 27th day of September, 2017, ... did, without reasonable excuse, fail or refuse to comply with a long-term supervision order, by not handing some of his medication into the community residential facility or community correctional centre at which he was living, contrary to Section 753.3(1) of the *Criminal Code*.

[3] Mr. Blaney submits that the verdict on Count 1 was unreasonable as the Crown failed to prove the *actus reus* of the offence because there was no evidence as to directions given by a health care practitioner or, alternatively, that it was incompatible with Mr. Blaney's evidence that the trial judge never rejected and was not otherwise contradicted. Regarding Count 2, he submits that the trial judge erred in law in failing to apply subjective fault in his analysis of the required *mens rea* for the offence.

[4] For the reasons that follow, I would allow the appeal of the conviction on Count 1, but dismiss the appeal on the Count 2.

Background

[5] Pursuant to the terms of the sentence imposed for the predicate offence committed by Mr. Blaney, he became subject to an LTSO imposed by the Parole Board of Canada on November 22, 2011, following his release from a custodial sentence. The conditions imposed were varied on a number of occasions. The Medication Condition is contained in a Long Term Supervision Certificate issued on July 4, 2017. At the time, Mr. Blaney resided at the Chilliwack Community Correctional Centre ("CCC"). The condition provided that he was required to:

Take prescribed medication as directed by a health care practitioner and while required to live at a CRF, all medications must be handed to the CRF and dispensed in accordance with the prescribed dosage as outlined on the medication package.

[6] By way of admissions of fact filed as an exhibit at trial, Mr. Blaney agreed that he was bound by the Medication Condition. He also admitted that the Chilliwack CCC is a CRF, as described by the Parole Board of Canada.

[7] At trial, the Crown called the evidence of two psychiatric nurses, a corrections officer and a parole officer. Mr. Blaney also testified. Trevor Nicholl, one of the psychiatric nurses, testified that residents who filled their own prescriptions were required to hand in their medications for safekeeping, and that they would be dispensed by the CCC staff. He stated that he reminded Mr. Blaney about the requirement to hand in his medications every time he went to see his doctor. Jim Jones, a parole officer, testified that he had discussed the Medication Condition with Mr. Blaney many times and that the facility dispensed Tylenol 3 to him on a daily basis. While he was aware of Mr. Blaney's neurological issues, he did not consider him to be forgetful.

[8] Mr. Blaney testified that he had a brain injury and pain stemming from a number of injuries including those he had sustained as a professional fighter and in several motor vehicle collisions. He was prescribed Tylenol 3 in April 2017. He was aware of the Medication Condition and that it required him to turn in any prescription medication and indicated that he had provided the Tylenol 3 medication to the CCC in accordance with that condition. He also testified that he did not like using narcotics and did not want to continue taking Tylenol 3 that had been prescribed for pain management. Some time in the summer, he raised that concern with his doctor. Mr. Blaney maintained that the doctor prescribed Gabapentin in place of Tylenol 3, but directed him to finish the Tylenol 3 tablets before starting the Gabapentin prescription.

[9] Mr. Blaney went to Vancouver to have the prescription filled. While he did not remember the date, the prescription was ordered and filled on September 8, 2017. Afterwards, he and a friend took the Skytrain to Waterfront Station. His friend noticed that the bag holding the pills had ripped and that one of the bottles was missing. Mr. Blaney said that he considered returning to the Skytrain to look for it, but that it was too busy and this made him uncomfortable. Instead, they visited friends who gave him a paper bag for the pills and a backpack in which he placed the pills.

[10] Mr. Blaney testified that after he returned to the CCC in Chilliwack, he placed the backpack on the floor at the end of his bed and forgot about it. He said that he never opened the bottle and did not take any of the Gabapentin, as his intention was to begin using it once he had finished the Tylenol 3, as directed by his doctor.

[11] On September 27, 2017, staff carried out a routine search of the facility and its residents. The trial judge heard from a number of witnesses regarding the search. The corrections officer searched the backpack found at the foot of the bed in Mr. Blaney's room and located the bottle of Gabapentin. Mr. Blaney admitted that the backpack was his.

[12] Mr. Nicholl testified that he examined the prescription bottle after the search and that it contained 111 pills. The prescription was for 240 pills, which would have been dispensed in two bottles. He observed that if they were divided equally, there would have been 120 pills in each bottle. However, he did not know how many were dispensed in each bottle. On the assumption that Mr. Blaney had been taking the prescribed four pills per day, Mr. Nicholl testified that he should still have had 163 pills, meaning that 52 were unaccounted for.

[13] At trial, the appellant argued on Count 1 that there was no evidence to prove beyond a reasonable doubt that he had failed to take his medication as prescribed. On Count 2, he argued that the *mens rea* of the offence was not made out, and that there was no evidence that his failure to turn his medication in to the facility was intentional. Further, he submitted that he had a reasonable excuse for failing to do so: he simply forgot to turn the Gabapentin medication in to the staff at the CCC. He highlighted his traumatic brain injury and his assertions that he was still taking the Tylenol 3 medication and did not know that Gabapentin had a street value.

[14] The Crown took the position that the case was straightforward. The evidence established that Mr. Blaney had failed to take his medication as directed by the terms of the label affixed to the Gabapentin bottle, contrary to the Medication Condition of the LTSO, and had failed to turn the medication in as required. The Crown argued that what the doctor may have said to Mr. Blaney about finishing the

Tylenol 3 tablets before beginning the Gabapentin prescription was irrelevant to the LTSO condition, because the prescription label set out the prescribed dosage and gave no indication that he was to refrain from taking the medication until he had finished the Tylenol 3 prescription. Additionally, even if he had lost some of the pills, he was required to hand in what remained and to take what remained as prescribed. It was clear that he failed to do that. The Crown argued that the defence evidence about reasonable excuse was undermined by the length of time the backpack sat at the end of Mr. Blaney's bed, and that it made little sense for Mr. Blaney's doctor to instruct him to continue to take Tylenol 3 after being told that Mr. Blaney did not want to continue taking narcotics.

[15] The judge's reasons set out the evidence presented at trial and the submissions of counsel in great detail. However, the analysis leading to the convictions is brief, the substance of which is contained in two paragraphs:

[221] In the case at bar, even were I to accept Mr. Blaney's testimony that the missing pills were inadvertently lost and that he had no intention of using Gabapentin until he had used up his Tylenol 3 prescription, the fact remains he knew he was required to turn in the prescription and pills he had in his possession in his backpack and did not do so; this is sufficient to provide a path to conviction. In my opinion, the fact that most undercuts the defence position on reasonable excuse and *mens rea* is the days Mr. Blaney's large, zippered backpack remained at the foot of his bed, 21 days, where it remained until the September 27 search.

[222] Mr. Blaney's testimony that he had forgotten about the Gabapentin is not reasonable, considering the circumstances as a whole. Put another way, while it may be possible Mr. Blaney inadvertently lost some of the prescribed medication, he still had pills in his possession that he was obliged to turn in to the CCC, and to Mr. Nicholl specifically. As discussed in these reasons, a significant number of pills went missing.

[16] Considering the evidence as a whole, the judge found Mr. Blaney guilty of both counts.

On appeal

Issues

[17] The appellant is charged with breaching the Medication Condition of his LTSO. Section 753.3(1) of the *Criminal Code* provides:

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years ...

[18] In *R. v. Zora*, 2020 SCC 14, the Court affirmed the presumption that the Crown is required to prove subjective *mens rea* for most criminal offences:

[33] As described by this Court in [*R. v. A.D.H.*, 2013 SCC 28], this presumption of subjective fault reflects the underlying value in criminal law that the “morally innocent should not be punished” (*A.D.H.*, at para. 27). This starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26). The presumption of subjective fault will only be overridden by “clear expressions of a different legislative intent” (paras. 27-29). ...

Zora involved a conviction for failure to comply with a condition of recognizance, an offence that is similar to the breach offence in question. Here, the parties agree that the Crown was required to prove subjective intent to satisfy the *mens rea* for an offence under s. 753.3(1).

[19] The appellant raises a single ground of appeal with respect to each conviction. With respect to Count 1, he argues that the verdict was unreasonable. For Count 2, he says that the judge failed to consider subjective *mens rea* as required for breaches of s. 753.3(1).

Count 1 – Was the verdict unreasonable?

Parties’ positions

[20] Mr. Blaney argues that the verdict on Count 1 was unreasonable because there was no evidence capable of supporting the *actus reus*: that he failed to take medication as prescribed. He argues “prescribed” must be read with regard to the Medication Condition, which required him to take “prescribed medication as directed by a health care practitioner”. He says the only evidence on what was directed by a health care practitioner was that given by Mr. Blaney: that he was not to take the Gabapentin until he had finished taking all of the previously prescribed Tylenol 3. Referring to s. 686 (1)(a) of the *Criminal Code*, he says that there was no evidentiary

basis on which a properly instructed jury could have rendered a guilty verdict: *R. v. Biniaris*, 2000 SCC 15.

[21] Alternatively, Mr. Blaney argues that the verdict was unreasonable because of a “*Beaudry/Sinclair*” reasoning error (*R. v. Beaudry*, 2007 SCC 5 and *R. v. Sinclair*, 2011 SCC 40). He says that if this Court determines there was sufficient evidence to support a guilty verdict, it should conclude that the judge nevertheless erred by failing to make factual findings on critical matters that could have supported a verdict of not guilty. The two unresolved evidentiary issues were: whether Mr. Blaney had lost some of the Gabapentin pills; and whether he had not consumed any of that medication because he was following the doctor’s directions. He acknowledges that if the verdict is set aside on this basis, it would mean that a new trial should be ordered rather than an acquittal.

[22] The Crown argues that LTSO conditions must be interpreted in view of their protective purpose. Here, the purpose of the Medication Condition was to ensure that the staff at the CCC could monitor and implement the proper use of prescription drugs, for the benefit of the appellant and the safety of the community. The Crown says that the *actus reus* for Count 1—failing to take medication as prescribed—incorporates both parts of the Medication Condition. It required that the appellant take the medication: 1) as prescribed; and 2) that he do so “in accordance with the prescribed dosage as outlined on the medication package.” The Crown says the appellant wrongly focuses only on the first part of the condition, but that the judge correctly viewed the medication label on the Gabapentin bottle as a concrete and specific reflection of the directions provided by the health care practitioner. On the basis of this approach, the Crown says there was evidence on which the judge properly concluded that it had proved the *actus reus* of Count 1.

[23] With regard to the appellant’s alternate position, that the judge made a *Beaudry/Sinclair* reasoning error, the Crown says the judge did not have to resolve evidentiary issues in order to conclude that the *actus reus* of Count 1 was proved. The Crown says the appellant’s assertion that he was directed by his doctor not to

take the Gabapentin until he had taken all of the remaining Tylenol 3s, was a non-essential issue. Similarly, whether he lost some of the Gabapentin and if so, how much, did not have to be resolved because the judge did not have to decide the precise manner in which the appellant had failed to take his prescription as required. All he had to do was reach the conclusion that he had not done so. There were two paths by which he could arrive at that conclusion. The judge could take note of the large number of pills missing to conclude Mr. Blaney had disposed of them or used them in a manner contrary to the prescription. Or, the judge could accept the appellant's evidence that he had not been taking any of the Gabapentin. Either was sufficient to arrive at the conclusion that Mr. Blaney had not taken the medication as prescribed, which is the *actus reus* of Count 1. As a result, the judge did not need to resolve whether Mr. Blaney's doctor directed him to finish taking the Tylenol 3 before starting to take the Gabapentin, or whether he had been following that direction and had lost some of the pills.

Analysis

[24] On the hearing of an appeal against conviction, this Court may allow an appeal if it is of the opinion that the verdict "is unreasonable or cannot be supported by the evidence": *Criminal Code*, s. 686(1)(a)(i).

[25] The test for determining whether the verdict is unreasonable is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *Biniaris* at para. 36; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185. In applying the test, an appellate court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence": *Biniaris* at para. 36. The weighing of evidence is considered a subjective exercise, the goal of which is to examine the weight of the evidence "rather than its bare sufficiency": *Biniaris* at para. 36. An appellate court is justified in intervening where the trial judge was not alive to an applicable legal principle, their reasons indicate a flaw in the evaluation of the evidence, or they entered a conviction that was inconsistent with the factual conclusions: *Biniaris* at para. 37.

[26] The judge described the considerable body of evidence in detail. However, as both parties observe, the judge did not resolve some of the key evidentiary issues, including whether Mr. Blaney's evidence about the directions provided by his doctor was credible and should be accepted. I would agree with the appellant that the weight of the evidence is insufficient to support a guilty verdict. There was no evidence from which a safe inference could be drawn as to when Mr. Blaney was directed by his doctor to start taking the replacement medication. The judge failed to evaluate Mr. Blaney's evidence of the directions he received from his doctor and did not draw a conclusion as to whether that evidence was true or raised a reasonable doubt. In my view, the judge's reasons clearly demonstrate the flaw in his analysis and evaluation of the evidence.

[27] The starting point is to note, as the Crown emphasizes in its factum, that the Medication Condition has two parts. The first part of that condition required the appellant to take "prescribed medication as directed by a health care practitioner". Count 1 is directed at a breach of that part of the condition. The breach alleged is the failure to "take medication as prescribed". The second part of the Medication Condition stated that "all medications must be handed to the CRF and dispensed in accordance with the prescribed dosage as outlined on the medication package" while Mr. Blaney was living "at a CRF". Count 2 is directed at that term of the Medication Condition. The breach alleged is the failure to hand "his medication into the community residential facility or community correctional centre at which he was living".

[28] The judge describes the inferences he drew from the evidence, as well as the factual matters that he chose not to resolve. The flaw in the judge's reasoning or analysis is that he failed to apply his findings, including with regard to the unresolved factual matters, to the two counts in the indictment. He appears to have assumed that the *actus reus* for both counts was the same and did not attempt to distinguish the factual elements that needed to be proved for each offence.

[29] The reasons clearly articulate the judge's conclusion that the elements of the breach alleged in Count 2 had been established beyond a reasonable doubt. The judge began his analysis by observing that the evidence of the Crown witnesses and Mr. Blaney was "not arraigned totally against one another" and that "the evidence on the critical issues is not in opposition": at para. 216. He further noted that Mr. Blaney acknowledged that he was bound to turn in prescription medications to Mr. Nicholl who would oversee their proper dispensation.

[30] In response to the defence argument that there was no evidence to prove that he had not complied with the Medication Condition, the judge found that the argument was "not supportable, because Mr. Blaney had unreported Gabapentin in his possession and some pills were missing from the prescribed amount": at para. 218. The reference to "unreported" medication is directed at the failure to report and hand in the prescription medication to the CRF, a finding which the judge explains in more detail. However, this observation does not consider, let alone make a finding about, the directions provided to Mr. Blaney by his doctor for taking the medication.

[31] The judge then turned to the circumstantial evidence, "including the missing pills": at para. 119. After citing passages from *R. v. Villaroman*, 2016 SCC 33, he performed the analysis at paras. 221–222 which I have set out above. For ease of reference I will repeat those conclusions which demonstrate that his findings only support the *actus reus* for Count 2. The judge found, "... the fact remains he knew he was required to turn in the prescription and pills he had in his possession in his backpack and did not do so": at para. 221; emphasis added. The judge concluded that this was "sufficient to provide a path to conviction": at para. 221. While that is correct, it is only so with regard to Count 2. The same can be said of the conclusion that, "while it may be possible Mr. Blaney inadvertently lost some of the prescribed medication, he still had pills in his possession that he was obliged to turn in to the CCC, and to Mr. Nicholl specifically": at para. 222; emphasis added. These findings support the conclusion that the Crown proved the *actus reus* for Count 2 beyond a

reasonable doubt, but provide no support for a similar conclusion about the *actus reus* for Count 1.

[32] The testimony of the appellant was described in detail by the judge, including his statement that his doctor “told him to finish Tylenol 3 first, then start using Gabapentin” (at para. 120), and his assertion that he lost some of the Gabapentin and never took any of them: at paras. 106, 108. The judge specifically refrained from deciding whether to accept those averments. The judge simply stated, “even were I to accept Mr. Blaney’s testimony that the missing pills were inadvertently lost and that he had no intention of using Gabapentin until he had used up his Tylenol 3 prescription”, Mr. Blaney knew of the requirement to turn in the medication and failed to do so: at para. 221. As I have indicated, this does not resolve the question of what directions were given by the doctor to Mr. Blaney. Further, in spite of the controversial evidence, the judge did not carry out a credibility analysis. He found that “Mr. Blaney presented fairly well as a witness”, was “straightforward and courteous”, and “exhibited some signs of a keen intelligence”: at para. 217. The judge never decided if he should accept or reject Mr. Blaney’s evidence about the directions given by his doctor. It appears that the judge was of the view he did not need to resolve that issue since he could reach a guilty verdict on both counts because Mr. Blaney acknowledged that he knew of the requirement to hand in prescription medication and he had failed to do so. As I have indicated, that reflects a misunderstanding of the distinction between the elements of the two offences.

[33] I would also reject the Crown’s submission that the prescription label is evidence that the judge could properly rely on to find that the appellant “failed to take medication as prescribed”. To establish the *actus reus* for Count 1, the Crown had to prove that Mr. Blaney failed to “take prescribed medication as directed by a health care practitioner”, contrary to the first term in the Medication Condition. Mr. Blaney gave direct evidence as to the directions provided by his doctor: he was to finish the Tylenol 3 prescription before starting the Gabapentin. He did not state or agree that he was told to start the course of medication right away and the prescription label does not specify when Mr. Blaney was to commence taking the Gabapentin. There

was no contrary evidence. Mr. Nicholl's evidence did not challenge any of Mr. Blaney's assertions about the directions he received or that the Gabapentin was a replacement for Tylenol 3. Accordingly, the only evidence before the judge was that Mr. Blaney was not to start taking the Gabapentin until he was finished taking the Tylenol 3 medication. The judge neither rejected Mr. Blaney's evidence nor found that he was not credible. Accordingly, there was no basis for the conclusion that Mr. Blaney failed to take the medication as prescribed.

[34] I would also reject the Crown's position that the reference to the "prescribed dosage as outlined on the medication package" in the second part of the Medication Condition somehow informs the breach alleged in Count 1. The second part of the condition, which forms the basis for Count 2, is directed at how medications are to be handled and dispensed while Mr. Blaney is living at a CRF. He was required to hand in all prescription medications to the CRF, and the medications were required to be "dispensed in accordance with the prescribed dosage as outlined on the medication package." For the purpose of the Medication Condition, the prescribed dosage on the label established the manner in which the medication was to be dispensed. However, in the face of Mr. Blaney's evidence as to his doctor's directions, it is not evidence that could be relied on to establish when he was to start the course of medication.

[35] Having arrived at the conclusion that the verdict was unreasonable on the weight of the evidence and that the judge's reasons clearly indicate a flaw in the evaluation of that evidence, I need not consider the appellant's alternate argument based on a so-called *Beaudry* reasoning flaw.

[36] In summary, I would conclude that the verdict cannot be supported by the evidence and was thus unreasonable. I would allow the appeal from the guilty verdict on Count 1 and would enter an acquittal on that count.

Count 2 – Did the judge fail to apply subjective fault principles?

[37] The appellant argues that the judge failed to properly apply the subjective fault standard in determining that the *mens rea* for the Count 2 offence had been

made out. He says this led the judge into error in his assessment of Mr. Blaney's exculpatory evidence of his reasonable excuse: that he forgot that he had the prescribed Gabapentin medication in his possession.

[38] The appellant starts with the uncontroversial proposition that s. 753.3(1) does not create a "duty-based offence" that would displace the presumption of subjective fault, and that there is no indication of legislative intent to displace that standard: *Zora* at paras. 41–45. He says that the provision allowing an offender to establish a "reasonable excuse" for failing or refusing to comply with an LTSO should play no role in the interpretation of the *mens rea*. Rather, it creates a defence that is available to an accused that should only be considered by a court after the Crown has established all elements of the offence, including *mens rea*. I note that the respondent does not take any issue with this statement of the legal principles.

[39] The appellant argues that the judge essentially conflated the proof of *mens rea* and the defence of a "reasonable excuse". The judge incorrectly assumed that genuine forgetfulness was not relevant because Mr. Blaney had knowledge of the Medication Condition. The appellant says the judge did not consider whether Mr. Blaney, notwithstanding his knowledge of the condition, intended to breach it—which he needed to do to resolve the *mens rea* question. The judge compounded this error when he failed to consider Mr. Blaney's evidence about his brain injury and forgetfulness in order to determine if it supported his reasonable excuse: that he simply forgot to turn the medication in to the CRF. The appellant says this was a failure to consider Mr. Blaney's personal characteristics as the judge was required to do.

[40] Finally, the appellant argues that the judge proceeded on the assumption that any risk of non-compliance with the Medication Condition was sufficient to establish recklessness in breaching that condition. This is contrary to *Zora* which establishes that *mens rea* is only satisfied where it is shown that an accused knew or perceived a substantial and unjustified risk that their conduct would likely fail to comply with a condition and yet persisted in that conduct: at paras. 109, 118.

[41] The respondent submits that if the reasons are read in context, taking into account the detailed evidence reviewed by the judge and the way in which the parties framed the issues at trial, it is clear that the judge properly considered all of the evidence about whether the appellant intended to breach the Medication Condition on a subjective fault standard. Further, the judge considered and rejected the defence argument on reasonable excuse.

[42] In my view, when the reasons are considered in context, there is little merit to the appellant's position.

[43] In *Zora*, the Court set out the requirements for the proof of subjective *mens rea* for a failure to comply offence:

[109] Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and
 2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or
- The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

[44] Although there is no appellate authority dealing with the *mens rea* requirement for s. 753.3(1), and *Zora* concerned s. 145(3) of the *Criminal Code* which has a slightly different statutory construction, I agree with the parties that the requirements set out in *Zora* are applicable to this failure to comply offence. In that regard, I note that in *R. v. Docherty*, [1989] 2 S.C.R. 941, the Court held that proof of subjective *mens rea* was required for a breach of probation offence (now s. 733.1). The statutory construction for the two offences (s. 753.3(1) and s. 733.1) is similar;

both state that an offender “who, without reasonable excuse, fails or refuses to comply” with an LTSO or probation order is guilty of the offence.

[45] Adapting the requirements from *Zora* to the circumstances here, in order to satisfy the *mens rea* requirement for the Medication Condition, the Crown had to establish that Mr. Blaney:

- knew of the Medication Condition and that it required him to turn in his prescription medications to the CCC staff; and
- knowingly failed to act (or recklessly failed to act) according to that condition knowing that he had the Gabapentin, a prescription medication, in his possession after he returned to the CCC on September 8, 2017.

[46] As I understand the appellant’s position, he accepts that the judge correctly concluded that Mr. Blaney had knowledge of the Medication Condition and its requirements. However, the judge failed to properly consider whether Mr. Blaney knowingly failed to act in accordance with that condition. The appellant suggests that the judge somehow conflated proof of subjective *mens rea* and consideration of whether Mr. Blaney had a reasonable excuse, and that the judge did not consider Mr. Blaney’s personal characteristics.

[47] I would reject each of these arguments. This Court must take a functional approach when considering reasons for judgment. A judge’s reasons must be considered as a whole in the context of the evidence adduced, the submissions of counsel, and the history of the trial: *R. v. R.E.M.*, 2008 SCC 51 at para. 35. When the reasons are considered in context here, it is clear that the judge properly applied a subjective *mens rea* standard and that he considered whether the Crown had shown that Mr. Blaney did not have a reasonable excuse for failing to turn in the medication.

[48] First, as the Crown argues, the submissions of counsel focused on what was actually in the appellant’s mind in view of his particular circumstances and challenges, not on what a reasonable person would have done or thought. In other

words, the submissions were focused on a subjective standard. Further, at para. 176 of the reasons, the judge referred to his own decision in *R. v. Elder*, 2017 BCSC 1164:

[176] In *Elder*, Crown and defence counsel agreed the Crown must prove the *actus reus* and *mens rea* of the alleged offence, and that the *mens rea* is not one of general intent. Further, in this vein, I noted at para. 58 that breach of a long-term sentence offender condition is not a strict liability offence and that the accused is innocent until proven guilty, that the terms of the indictment, its essential elements, have to be proven beyond a reasonable doubt. In that case, I was left with a reasonable doubt that Mr. Elder had intentionally refused to participate in a counselling program and did not breach the conditions stated in Count 2 ...

[Emphasis added.]

The reference to *Elder* confirms that the judge was aware of the requirement for, and applied, a subjective *mens rea* standard when he considered whether the appellant's refusal or failure to turn in the prescription medication to the CRF was intentional.

[49] Second, there is no merit to the suggestion that the judge failed to consider Mr. Blaney's personal characteristics and frailties, including his brain injury and reported forgetfulness. The judge set out the evidence adduced about Mr. Blaney's personal characteristics, including about his head injuries. The judge noted that Mr. Blaney had been a boxer and had "been engaged in too many fights": at para. 97. The judge summarized Mr. Blaney's testimony that he had been in more than one motor vehicle accident and had been diagnosed with a brain injury for which he had received treatment at the UBC Brain Clinic. The judge observed that Mr. Blaney's doctor described his neurological condition as "very complex": at para. 103. The judge also referred to the evidence of the CCC staff about Mr. Blaney's behaviour in the facility.

[50] Having stated the law correctly and considered the relevant evidence about Mr. Blaney's personal characteristics and frailties, I see no basis to conclude that the judge did not apply the law correctly when he considered whether Mr. Blaney knowingly, or recklessly, failed to act in accordance with the Medication Condition

when he did not turn the Gabapentin into the staff at the CCC as he was required to do.

[51] Third, I would reject the suggestion that the judge somehow conflated the reasonable excuse defence and the Crown's requirement to prove subjective intent.

[52] The judge accepted Crown counsel's submission that a key piece of evidence was the length of time that had passed since the prescription was filled. There was conflicting evidence about how often Mr. Blaney used the backpack—he said only rarely while Crown witnesses said he used it almost daily. But Mr. Blaney admitted that he had kept the backpack at the foot of his bed in his room. Crown counsel argued that Mr. Blaney's evidence that he had forgotten about the Gabapentin was undermined by the fact that the backpack was in plain view for almost three weeks. Counsel urged the judge to conclude that it was extremely unlikely that the appellant could have completely forgotten about the Gabapentin for that length of time.

[53] The judge accepted that argument, and in doing so, arrived at conclusions on both *mens rea* and reasonable excuse. He stated:

[221] ... In my opinion, the fact that most undercuts the defence position on reasonable excuse and *mens rea* is the days Mr. Blaney's large, zippered backpack remained at the foot of his bed, 21 days, where it remained until the September 27 search.

[Emphasis added.]

I note that the period of time in question was 19 days, not 21 days as stated in the paragraph above, but this miscalculation did not ultimately affect the outcome of the decision.

[54] While the analysis is brief, it is clear the judge considered the evidence and the submissions, both of which are set out in detail, and that he rejected the defence arguments both on *mens rea* and reasonable excuse. The fact that the judge referred to those findings together does not demonstrate any conflation of the two issues. Rather, it is a consequence of the fact that the evidence relied on by each party in support of their submissions on *mens rea* and on the defence of reasonable

excuse was the same for both issues. Mr. Blaney argued that he had genuinely forgotten about the Gabapentin prescription and had no intent to breach the Medication Condition. That same evidence was the basis on which he argued that he had a reasonable excuse. The Crown argued that his evidence could not be believed in large part because he had the bottle in his backpack either at the foot of his bed or in use for almost three weeks. The Crown argued that intent could be inferred from these circumstances and that also had the effect of establishing that Mr. Blaney did not have a reasonable excuse for not turning in the medication. The judge could and did reject the defence position on both *mens rea* and reasonable excuse based on his assessment of the same evidence.

[55] In summary, I would dismiss this ground of appeal.

Disposition

[56] I would allow the appeal from the conviction on Count 1 and substitute an acquittal. I would dismiss the appeal on Count 2.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Madam Justice Newbury”

I AGREE:

“The Honourable Madam Justice Fisher”

Tab 5:

R. v. Burgoyne, 2021 BCCA 51

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Burgoyne*,
2021 BCCA 51

Date: 20210120
Docket: CA46884

Between:

Regina

Respondent

And

Henry Harold Burgoyne

Appellant

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
May 21, 2020 (*R. v. Burgoyne*, Cranbrook Dockets 33877-1; 34378-2-C).

Oral Reasons for Judgment

Counsel for the Appellant
(via videoconference):

B. Blakley
M.A.S. Blakley

Counsel for the Respondent
(via videoconference):

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia
January 20, 2021

Place and Date of Judgment:

Vancouver, British Columbia
January 20, 2021

Summary:

The appellant pleaded guilty to assault and breaking and entering a dwelling house and committing an indictable offence therein. He appeals a “No Go” condition of his probation order restraining him from being within 100 kilometres of any place one of the victims lives, works, attends school, worships, or happens to be. Held: Leave to appeal granted; appeal allowed in part. The Crown concedes that the condition as worded amounts to a banishment condition and is unreasonable. The circumstances identified by the sentencing judge justify the imposition of a reasonable “No Go” condition. The condition is varied by replacing the words “100 kilometres” with “100 metres”.

[1] **VOITH J.A.:** The appellant, Mr. Burgoyne, applies for leave to appeal from sentence and, if leave is granted, appeals a condition of the probation order that was imposed when he was sentenced. He entered guilty pleas to breaking and entering a dwelling house in Invermere, British Columbia, and committing assault therein, and to assaulting Ms. Arlene Hunter, the sister of his wife, Ms. Betty Burgoyne. He was sentenced for these two offences to 700 days’ jail and 90 days’ jail, respectively, to be served concurrently, less 315 days’ credit for 210 days actual time served, to be followed by three years’ probation.

[2] On this appeal Mr. Burgoyne takes issue with a single term of the probation order. That condition requires Mr. Burgoyne to “not go to or be within 100 kilometres of any place where Betty Burgoyne lives, works, attends school, worships, or happens to be” and, in the event he sees her, to “leave her presence immediately without any words or gestures.”

[3] The Crown concedes that the impugned condition, as worded, is unreasonable given the length and extent of the geographic restriction but submits that this Court ought to vary, rather than remove, the condition “by substituting metres for kilometres.”

Circumstances of the Offences

[4] The circumstances of Mr. Burgoyne’s offences were captured in an Agreed Statement of Facts. On October 24, 2019, Mr. Burgoyne entered the residence of

Ms. Hunter (defined as the “Residence” in the Agreed Statement of Facts). The Residence is located in Invermere, British Columbia.

[5] Mr. Burgoyne was intoxicated when he entered the Residence. He then assaulted Ms. Hunter in the Residence by kneeling her in the stomach. He wanted his wife, Ms. Burgoyne, to go home with him, but she refused, saying that he was drunk. Mr. Burgoyne was told to leave the Residence, which he did after some delay. Mr. Burgoyne left the Residence driving a green pickup truck. He was prohibited from driving at the time under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.

[6] Mr. Burgoyne then returned and entered the Residence just after midnight. He was carrying a loaded .22 calibre rifle with the safety on. In the hallway, Mr. Michel, another person at the Residence, wrestled the rifle away from Mr. Burgoyne and pushed him out the door.

[7] Mr. Burgoyne was arrested a short time later, while driving the green pickup truck. He later stated to the police that Mr. Michel should have let him walk past so that he could shoot Ms. Hunter.

The Reasons of the Sentencing Judge

[8] Before the sentencing judge, the Crown sought a custodial sentence of six years. The defence sought a sentence of time served. The sentencing judge, in unreported reasons dated May 21, 2020, read the Agreed Statement of Facts into the record. He addressed Mr. Burgoyne’s circumstances, noting that he was 54 years old, that he was of Indigenous descent, that aspects of his life had been difficult, and that a “thorough” *Gladue* report had been prepared for the sentencing.

[9] He addressed Mr. Burgoyne’s criminal record, which consisted of seven convictions over 37 years. Four of those convictions related to driving while impaired. He had two prior convictions for assault and one for assault causing bodily harm, though each of these latter convictions was dated.

[10] The sentencing judge addressed the three victim impact statements that had been filed and dealt with two of them, from Ms. Hunter and Ms. Burgoyne, at some length.

[11] The sentencing judge noted that Mr. Burgoyne recognized that “alcohol and anger were factors” in the offences and that he was an alcoholic. The sentencing judge further noted that, unfortunately, Mr. Burgoyne did not see the need to receive any treatment and that he blamed Ms. Hunter for the offences. The sentencing judge then dealt with the mitigating and aggravating circumstances before the court, several of which are relevant to this appeal.

[12] The sentencing judge accepted that Mr. Burgoyne “believe[d]” that he had made a stupid mistake and that this would not happen again. It seems clear, however, that the sentencing judge was skeptical about this assurance. He again noted that, unfortunately, Mr. Burgoyne saw “no need to address his alcoholism” and that it appeared he had “no empathy for the harm he has caused to Arlene Hunter and the other victims.” He said, “It is clear Mr. Burgoyne was not traumatized by what happened and that concerns me.”

[13] He emphasized that the offences had occurred at a dwelling house, that Mr. Burgoyne knew the house was occupied, and that there had been some violence, which are deemed to be aggravating circumstances under s. 348.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. It was also an aggravating factor that there was a firearm involved. He considered that it was a further aggravating factor that the break and enter had occurred twice. He observed that on the first occasion, when he was confronted, Mr. Burgoyne left the Residence. He also said, “Sadly or unfortunately this did not cool off his anger, and he in fact upped the ante and he made everything more terrifying for everyone in that residence.”

[14] Still further, the sentencing judge noted that the offences were in the nature of a domestic dispute, and he quoted from portions of s. 718.2(a) of the *Criminal Code*, which provide that the following are deemed to be aggravating circumstances:

- (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family ...
- (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation ...

[15] The trial judge also noted relevant mitigating factors, including the fact that Mr. Burgoyne had pleaded guilty, that he had generally been a productive member of society, and that he did not have a general pattern of antisocial behaviour. He recognized that Mr. Burgoyne was of Indigenous descent and the resulting importance of s. 718.2(e) of the *Criminal Code*. He noted that the *Gladue* report he had reviewed had been helpful and informative and that “without it the sentence would almost certainly have been higher.”

[16] Finally, it is relevant that in imposing various conditions of probation, the judge did not impose any rehabilitative conditions. This is notwithstanding the role that alcohol played in these offences and Mr. Burgoyne's history of difficulty with alcohol. This was, again, on account of the fact that Mr. Burgoyne was not willing to attend counselling, a fact that was confirmed in the *Gladue* report that was before the court. Instead, various protective conditions were imposed with reference to the conditions as worded and numbered in the *General Harmonized 2019 Probation and Peace Bond Picklist* (December 16, 2019) (the “Picklist”).

[17] Under condition 2002, the judge imposed a “No Contact” condition, prohibiting Mr. Burgoyne from directly or indirectly contacting or communicating with Ms. Hunter, Ms. Burgoyne, or a Mr. Jesse Paul.

[18] The judge did not purport to rely on condition 2302-2, the “Banishment” condition. Instead, under condition 2005-1, which is described as a “No Go” condition, he imposed a condition that Mr. Burgoyne not go or be “within 100 kilometres of any place where [Ms.] Burgoyne lives, works, attends school, worships, or happens to be.” However, condition 2005-1, as it appears on the Picklist, starts with the words “you must not go to (or be within ____ metres of)” where one or more named individuals “lives, works, attends school, worships, or

happens to be.” When the sentencing judge pronounced this condition, the defence inquired, and the judge confirmed, that he had intended to impose a 100-kilometre restriction.

The General Legal Framework

[19] Sentencing judges have considerable latitude in crafting appropriate conditions of probation: *R. v. Shoker*, 2006 SCC 44 at para. 14; *R. v. Goddard*, 2019 BCCA 164 at para. 19. The sentencing judge’s decision about which conditions to include in a probation order involves an exercise of discretion. An appellate court will intervene in that exercise of discretion only if the judge has erred in principle, imposed a condition that is clearly unreasonable, or if the order is manifestly inappropriate or renders the sentence unfit: *Goddard* at para. 19; *R. v. Manca*, 2019 BCCA 280 at para. 42.

[20] Under the residual clause in s. 732.1(3)(h) of the *Criminal Code*, a judge has broad authority to impose reasonable conditions that are considered desirable to protect the public and to facilitate an offender’s reintegration into the community: *Manca* at para. 39.

[21] Conditions of probation do not have to be linked to the offence. There must, however, be a nexus between the offender, the protection of the public, and the offender’s reintegration or rehabilitation into the community: *R. v. Duguay*, 2019 BCCA 53 at para. 65, citing *Shoker* at para. 13. Furthermore, conditions may serve either one or both of the purposes of protection of the public and rehabilitation: *R. v. Timmins*, 2006 BCCA 354 at para. 9; *Goddard* at para. 23; *Duguay* at para. 63. Finally, conditions must be clear, unambiguous, enforceable, and compliant with federal and provincial laws and the *Charter*: *Goddard* at paras. 20–23.

[22] Mr. Burgoyne reasonably characterizes the condition at issue, which adopts the language of a “No Go” condition from the Picklist, as amounting to a banishment condition due to its geographic scope. The Crown agrees with this characterization. Banishment conditions are rare: *R. v. Forner*, 2020 BCCA 103 at para. 53. They are often viewed as “fundamentally wrong”: *Forner* at para. 53. In *R. v. Rowe* (2006),

212 C.C.C. (3d) 254 at para. 7, the Ontario Court of Appeal said, “Plainly, the larger the ambit of the banishment, the more difficult the order will be to justify.”

[23] Counsel accept that, if the sentencing judge has made an error in principle, this Court can undertake its own analysis to determine a fit sentence or condition of probation: *R. v. Friesen*, 2020 SCC 9 at para. 27; *Manca* at paras. 42, 53, 56.

Analysis

[24] Mr. Burgoyne raises various concerns in relation to the condition that the judge imposed. I have said that the Crown agrees that the condition was inappropriate in the circumstances of this case. There is, accordingly, no need to address aspects of the specific concerns that are raised and developed by Mr. Burgoyne.

[25] The only question is whether the No Contact condition that was imposed by the sentencing judge is sufficient, without more, in the circumstances of this case. Alternatively, is a new “No Go” restriction, which limits Mr. Burgoyne’s ability to go within some reasonable physical distance of where Ms. Burgoyne lives, works, attends school, worships, or happens to be, reasonable in the circumstances of this case?

[26] Not surprisingly, such determinations are largely case specific. In *R. v. Deering*, 2019 NLCA 31, the accused appealed a condition of his probation order that barred him from being present on any part of the Burin Peninsula in Newfoundland south of a particular bridge. He had an “unenviable criminal record” of 82 convictions over 17 years. Of those convictions, 36 involved breaches of probation: at para. 6. The court observed that “the appellant’s criminal history demonstrates an unwillingness or inability to abide by court orders in general and no-contact orders in particular”: at para. 22. The court upheld the challenged condition of probation.

[27] In *Forner*, the appellant appealed both her custodial sentence and a condition in her probation order that prevented her from being within a 50-kilometre radius of

Osoyoos, British Columbia, other than with the written permission of her probation officer. The Court noted that at the time of the offence, the appellant had a 16-year history of alcohol abuse. She expressed what was considered to be genuine and significant remorse about the offence but said she had no memory of it: at para. 12. The Court subsequently emphasized the appellant's genuine remorse, her post-offence rehabilitation efforts, and her lack of any record of violent behaviour: at para. 50. When addressing the banishment condition, the Court noted the condition would force the appellant to live outside of her community of ordinary residence, thereby likely hindering her rehabilitation: at para. 59. There was also no reason to believe that the condition would render society safer or more secure: at para. 60.

[28] Notably, in *Forner*, the Court considered that there were other conditions in place that would protect the victim of the appellant's attack. This included both a prohibition on the appellant having any direct or indirect contact or communication with the victim or her family and a further prohibition that prevented her from going to any residence, school, or workplace of the victim or members of her immediate family: at para. 60. Accordingly, the Court considered that "the safety of the victim and her children has been addressed": at para. 60.

[29] In this case, Mr. Burgoyne's primary submission is that there is no basis for a "No Go" condition because there is no evidence that he poses a risk or danger to his wife. In aid of this submission his counsel identifies, for example, that it was Ms. Hunter, rather than Ms. Burgoyne, who was assaulted.

[30] This mischaracterizes what occurred. Mr. Burgoyne broke into the Residence to get his wife to leave with him, in circumstances where she made clear that she did not wish to do so. Ms. Hunter was assaulted because she appears to have been in the way. He later returned to the Residence with a loaded weapon. Furthermore, the assertion that he did not assault Ms. Burgoyne, or poses no risk to her, ignores the significant distress and ongoing anxiety that he has caused her. She too was a victim of his actions.

[31] Mr. Burgoyne also argued, in the alternative, that some of the language of the “No Go” condition the sentencing judge imposed should be varied to address various potential scenarios and changes of circumstance. Under s. 732.2(3) of the *Criminal Code*, it is open to Mr. Burgoyne, should there be such a change of circumstance, to return before the sentencing judge and to seek a variation of the conditions of his probation.

[32] In the present circumstances, the various conditions of probation that the sentencing judge imposed were protective, rather than rehabilitative, in nature. Mr. Burgoyne showed no remorse for his offences. His offences took place in an occupied dwelling house and were violent in nature. He showed no interest in addressing his difficulties with alcohol, though he recognized that they had likely fueled his behaviour. He also had some history of violence, albeit dated. The victim impact statements the judge referred to established that Mr. Burgoyne’s behaviour had caused Ms. Burgoyne considerable anxiety and concern for her safety.

[33] There is a clear nexus between a reasonable “No Go” condition and Mr. Burgoyne’s offences. Such “No Go” conditions, though restrictive, are frequently justified in the case of violent and other offences. There is often no good reason for an offender who has committed a violent offence to be within a limited but fixed distance of the victim or the places she frequents.

[34] Further, as previously noted, Mr. Burgoyne drove his pickup truck while prohibited from driving under the *Motor Vehicle Act*. He was sentenced simultaneously on a separate information for a guilty plea to operating a motor vehicle while prohibited. The sentencing judge referred to a statement attributed to Mr. Burgoyne in his *Gladue* report that he has never had a driver’s licence, and the judge noted that Mr. Burgoyne appeared to have “no intention of complying with the law”. This demonstrates some unwillingness on Mr. Burgoyne’s part to abide by legal prohibitions.

[35] Accordingly, I would grant leave to appeal from sentence and allow the appeal to the extent of varying the “No Go” condition that was imposed by the sentencing judge by replacing the words “100 kilometres” with “100 metres”.

[36] **ABRIOUX J.A.:** I agree.

[37] **GRAUER J.A.:** I agree.

[38] **ABRIOUX J.A.:** Leave to appeal from sentence is granted and the appeal is allowed to the extent of varying the “No Go” condition that was imposed by the sentencing judge by replacing the words “100 kilometres” with “100 metres”.

“The Honourable Mr. Justice Voith”

Tab 6:

R. v. C.P., 2021 SCC 19



SUPREME COURT OF CANADA

CITATION: R. v. C.P., 2021 SCC
19

APPEAL HEARD: November 10,
2020

JUDGMENT RENDERED: May 7,
2021

DOCKET: 38546

BETWEEN:

C.P.
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Canada, Criminal Lawyers' Association (Ontario), Justice for
Children and Youth and British Columbia Civil Liberties Association**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 120)

Abella J. (Karakatsanis and Martin JJ. concurring)

CONCURRING REASONS:
(paras. 121 to 164)

Wagner C.J. (Moldaver, Brown and Rowe JJ. concurring)

CONCURRING REASONS: Kasirer J.
(paras. 165 to 216)

DISSENTING REASONS: Côté J.
(paras. 217 to 304)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. C.P.

C.P.

Appellant

v.

Her Majesty The Queen

Respondent

and

**Attorney General of Canada,
Criminal Lawyers' Association (Ontario),
Justice for Children and Youth and
British Columbia Civil Liberties Association**

Interveners

Indexed as: R. v. C.P.

2021 SCC 19

File No.: 38546.

2020: November 10; 2021: May 7.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Appeals — Unreasonable verdict — Accused young person convicted of sexual assault by judge sitting alone — Accused appealing conviction on basis that verdict was unreasonable — Conviction affirmed by majority of Court of Appeal — Whether verdict unreasonable.

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Right to equality — Young persons — Appeals to Supreme Court of Canada — Accused young person convicted of sexual assault — Majority of Court of Appeal affirming conviction but one judge dissenting — Young person filing appeal as of right to Supreme Court under s. 691(1)(a) of Criminal Code — Section 37(10) of Youth Criminal Justice Act stating that no appeal lies to Supreme Court unless young person is granted leave to appeal — Whether s. 37(10) of Youth Criminal Justice Act infringes young person's right to equality and right not to be deprived of liberty except in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15 — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 37(10).

When P was 15, he went to a party at a beach to celebrate a friend's birthday with a group of young people. The complainant, D, was 14. They had both been drinking. Sexual intercourse took place. P was charged with sexually assaulting D. The Crown's position at trial was that P had sex with D when he knew she was too drunk to be capable of consenting. P's defence was that D consented to having sex with him before there were any signs that she was too drunk to consent. One of D's friends, G, came to the party later than the rest of the group. She saw D lying on the ground and

went to her right away. D had been vomiting, could not get up, and was incapable of communicating. There was no dispute that D was intoxicated to the point of incapacity when G found her. The question was how soon after the sexual activity took place did G see D. The trial judge rejected P's evidence in chief that he spoke with G before G attended to D, but accepted P's evidence that he heard G arrive at the party right after he finished having sex with D, and his admission in cross-examination that G went directly to D when she arrived, which aligned with G's evidence. The trial judge concluded that D was in an incapacitated state at the time of intercourse and therefore incapable of consenting at that time. The trial judge was satisfied beyond a reasonable doubt that P knew or was reckless or wilfully blind to the fact that D was so intoxicated that she could not have consented to sexual activity. She found P guilty of sexual assault.

P appealed to the Court of Appeal, arguing that the verdict was unreasonable. The majority dismissed the appeal, but one judge would have allowed the appeal, set aside the conviction and entered an acquittal. P filed a notice of appeal as of right to the Court pursuant to s. 691(1)(a) of the *Criminal Code*. The Crown filed a motion to quash the appeal, based on the fact that under s. 37(10) of the *Youth Criminal Justice Act* ("YCJA"), young persons have no automatic right of appeal to the Court. While s. 37(1) of the YCJA incorporates the appeal routes for indictable offences under the *Criminal Code* into the youth justice system, s. 37(10) denies young persons the automatic rights to appeal to the Court available to adults, including those set out in s. 691(1)(a) of the *Criminal Code*. Leave is therefore required even when the court

of appeal affirms a conviction for an indictable offence and there is a dissent on a question of law at the court of appeal. P argued that s. 37(10) of the *YCJA* is contrary to ss. 7 and 15 of the *Charter*. The Court adjourned the Crown's motion to quash without prejudice to P's right to seek leave to appeal, including on the question of the constitutionality of s. 37(10) of the *YCJA*. The Court granted leave to appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

(1) *Unreasonableness of the Verdict*

Per Abella, Karakatsanis and Martin JJ.: The verdict was reasonable. The trial judge's reasons for finding P guilty of sexual assault are model trial reasons: rigorous and thoughtfully explained. There is no basis for finding the verdict to be unreasonable.

A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached illogically or irrationally. This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge. The inquiry is narrowly targeted at fundamental flaws in the reasoning process which means that the verdict was not reached judicially or in accordance with the rule of law.

Here, the reasoning that led the trial judge to conclude that G discovered D in her incapacitated state right after the intercourse was both logical and rational. The trial judge rejected P's evidence that he spoke with G before she attended to D because it was internally inconsistent with his own evidence on cross-examination, externally contradicted by the evidence of G, and because P was intoxicated, particularly in comparison to G, whose memory was not suspect. The trial judge provided sound reasons for what she believed and what she did not, explaining why she found that some of P's evidence did not suffer from the same flaws that led her to reject other aspects of his testimony. The verdict was clearly one that a properly instructed judge acting judicially, could reasonably have rendered. The trial judge was well aware that the time of intercourse could not be ascertained in absolute terms, and that what mattered was the relative time of G's arrival in relation to the sexual activity. The combination of G's evidence and P's evidence satisfied the trial judge that G went to D as soon as she arrived, and that, on P's own evidence, G's arrival at the party was right after intercourse had taken place. This entitled the trial judge logically to conclude that the totally incapacitated condition G found D in when she arrived was the condition she was in during the sexual activity.

*Per **Wagner** C.J. and Moldaver, Brown and Rowe JJ.:* There is agreement with Abella J. that the verdict was reasonable.

*Per **Kasirer** J.:* There is agreement with Abella J. that the verdict was reasonable.

Per Côté J. (dissenting): P's conviction for sexual assault is unreasonable.

First, the trial judge's finding of D's incapacity to consent to sexual intercourse was reached illogically. The trial judge was well aware that the timing of the intercourse was the central issue of the case. The combination of the evidence of P and D's friend, G, was crucial to the trial judge's finding of incapacity. G's evidence alone was insufficient to support a finding of incapacity at the time of the intercourse and additional evidence was necessary to narrow the gap between the time of the intercourse and the time when G went to see D. It was only P's evidence that could address the timing of the intercourse in relation to G's arrival and her observation of D. The trial judge bridged that gap by rejecting the evidence that P spoke with G before she tended to D for three reasons: (1) P contradicted himself; (2) G was more reliable and credible; and (3) P's evidence was unreliable because he was intoxicated at this point in the evening. It was open to the trial judge to reject certain portions of P's evidence due to internal and external contradictions provided that the trial judge had a logical and reasonable basis for doing so. However, here, the source of the trial judge's illogical reasoning stems from her third reason. It was illogical for the trial judge to find, on the one hand, that P could not testify reliably about what had happened after the intercourse because he had been too intoxicated at that point in the night, while also finding, on the other hand, that P could nevertheless testify reliably about the fact that he had heard when G had arrived at the party. These findings are irreconcilable. If P was too intoxicated at that time to be subsequently able to testify reliably about the conversation, his testimony about having heard G arriving was also necessarily unreliable. These two events would have occurred at the same point in time, that is, at

a time when, in the trial judge's view, P had been too drunk for his subsequent testimony to be reliable. The trial judge found that P had been too drunk at that time to subsequently remember some things yet not too drunk to subsequently remember other things that would have happened at the same time. The trial judge gave no reason to explain this inconsistency on a crucial piece of evidence. Without P's evidence that he heard G arriving after the intercourse, it was impossible to convict P of sexual assault. This logical flaw would suffice to order a new trial.

Second, the evidence available to the trial judge is not capable of supporting the finding of D's incapacity to consent and a verdict of acquittal should be entered instead of ordering a new trial. The trial judge should have accorded far less weight to P's evidence about the timing of the intercourse in relation to G's arrival than she did in her reasons. The trial judge attached significant weight to P's evidence that he had heard about G arriving shortly after the intercourse. It constituted the centerpiece of her reasons. This was, however, incompatible with her repeated findings to the effect that P had been quite intoxicated and was thus an unreliable witness. Once the reliability of P's testimony is approached coherently with the trial judge's repeated findings to the effect that he had been quite intoxicated and that his memory of the crucial events was unreliable, it is simply impossible to pinpoint, even roughly, the time when the intercourse occurred on the basis of the rest of the circumstantial evidence. A reconstruction of the timeline indicates that the intercourse may have occurred at any time during a window of roughly two hours. As a result, the evidence did not permit the time of the intercourse to be determined beyond a reasonable doubt.

The trial judge could not reasonably conclude that D's being incapable of consenting at the time of the intercourse was the only reasonable finding available on the evidence. Without the finding of incapacity, there was no case against P, because neither D nor any other witness had testified that D had not consented as a matter of fact. Consequently, the evidence is not capable of supporting the verdict that P is guilty of sexual assault, and an acquittal should be entered in its place.

(2) Constitutionality of Section 37(10) of the Youth Criminal Justice Act

*Per **Wagner** C.J. and Moldaver, Brown and Rowe JJ.:* Section 37(10) of the YCJA is consistent with ss. 7 and 15 of the *Charter*.

Two elements must be established in order to show a violation of s. 7 of the *Charter*: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice. Here, the requirements of the first step are satisfied, as a limit on young persons' right to appeal to the Court engages residual liberty interests under s. 7. The outcome hinges on whether this deprivation is in accordance with the proposed new principle of fundamental justice that young persons are entitled to enhanced procedural protections in the criminal justice system. For a principle of justice to be "fundamental" within the meaning of s. 7: (i) it must be a legal principle; (ii) there must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate;

and (iii) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

If this proposed new principle entails a comparative assessment of procedural rights of young persons and those of adults, then it yields neither a meaningful standard nor one upon which any consensus is conceivable. If it is construed as a freestanding principle, the s. 7 argument depends on whether s. 37(10) deprives young persons of a liberty interest without adequate procedural safeguards. Denying young persons an automatic right to a hearing in the Court where a court of appeal affirms a conviction for an indictable offence, but a judge of that court dissents on a question of law, cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system because there is no constitutional right to an appeal, let alone an automatic one at the apex of the judicial system. The principles of fundamental justice could not require an automatic hearing in the Court in such narrow circumstances as this would have the effect of constitutionalizing the application of s. 691(1)(a) of the *Criminal Code* to young persons, thereby implying that Parliament would be under a positive obligation to enact such a provision if one did not already exist. Automatic appeals for young persons are not a foundational requirement for the dispensation of justice. The absence of an automatic appeal does not increase the likelihood of wrongful convictions or other miscarriages of justice. The dearth of evidence that there is an actual problem with the way the Court has been exercising its discretion to grant leave belies the conclusion that s. 37(10) denies young persons adequate procedural safeguards. The modern youth

justice system provides young persons with enhanced procedural protections commensurate with their unique circumstances and inherent vulnerability in the justice system. Accordingly, s. 37(10) of the *YCJA* is consistent with s. 7 of the *Charter*.

With respect to s. 15 of the *Charter*, the question is whether s. 37(10) of the *YCJA* deprives young persons of a procedural benefit that is available to adults under s. 691(1)(a) of the *Criminal Code*. A law or a government action will contravene the guarantee in s. 15: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage. Section 37(10) of the *YCJA* creates a distinction based on age. The issue is whether it draws a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. Understanding the distinct legislative scheme underlying s. 37(10) is crucial to the assessment of the actual impact of the provision on young persons.

The *YCJA* is designed to balance multiple interests including promptness and enhanced procedural protection, which are both core tenets of the youth criminal justice system. While young persons are uniquely vulnerable to miscarriages of justice, they are also uniquely vulnerable to harms resulting from protracted legal proceedings. A contextual understanding of the place of young persons in the procedural scheme of the *YCJA* must therefore account for both of these interests: a structurally prolonged appellate review can be more prejudicial to them. Section 37(10) does not perpetuate

any disadvantage but, rather, appropriately balances the overlapping interests of young persons in prompt resolution and in appellate review. Above all, the leave requirement in s. 37(10) applies equally to the Crown and confers the corollary procedural benefit for young persons of being protected from an as of right appeal by the Crown pursuant to s. 693(1)(a) of the *Criminal Code*, a safeguard that is not afforded to adults.

The benefits of the provision must also be considered in conjunction with the absence of evidence that the Court's leave process perpetuates a tangible disadvantage for young persons. The final bulwark against a miscarriage of justice is not a right to an automatic appeal, but the right of appeal itself. The vulnerability of young persons in the criminal justice system is not exacerbated simply because a provision of the *YCJA* fails to offer the maximum imaginable procedural benefit available to adults. In choosing to deny young persons an automatic right to appeal to the Court, Parliament did not discriminate against them, but responded to the reality of their lives by balancing the benefits of appellate review against the harms inherent in that process, in keeping with the dictum that there should not be unnecessary delay in the final disposition of criminal proceedings.

Per Kasirer J.: Section 37(10) of the *YCJA* is constitutionally valid. There is agreement with the Chief Justice that s. 37(10) is consistent with s. 7 of the *Charter*. There is also agreement with Abella J. that s. 37(10) constitutes a limit on s. 15(1) *Charter* rights; however, the limit to the equality right of young persons prescribed by

s. 37(10), when read in conjunction with s. 691(1)(a) of the *Criminal Code*, is justified in a free and democratic society under s. 1 of the *Charter*.

The burden is on the party seeking to rely on the impugned provision to establish that the limit on s. 15(1) is justified under s. 1 of the *Charter*. That party must demonstrate a pressing and substantial objective for the limit and that the means chosen to advance this objective do not disproportionately limit the s. 15(1) right. Proportionality demands that the limit be rationally connected to the stated pressing and substantial objective, that it be minimally impairing, and that its benefits outweigh its negative effects. The relationship between s. 15(1) and s. 1 requires careful attention. The focus of the inquiry must be on the seriousness of the discrimination and its relationship with the underlying values in a free and democratic society. A limit on s. 15(1) rights based on a person's age has been viewed in some contexts as less serious and thus more easily justified. The analysis must be attentive to the context of the legislative objectives at issue. The pressing and substantial objective must be scrutinized so that state conduct resulting in the most odious forms of discrimination is not excused. This does not preclude limits that promote other values and principles.

As the constitutional question before the Court is particularized to the s. 691(1)(a) appeal route, it is this narrow instance of *prima facie* age discrimination that the Crown must justify. Section 37(10) of the *YCJA* has a pressing and substantial objective of promoting timeliness, early rehabilitation and reintegration in youth criminal matters, which the youth criminal justice system is designed, in part, to

promote. Providing for appeals by leave instead of by right favours early resolution of matters involving youth. Timeliness reinforces the connection between the actions and consequences, reduces psychological impact, avoids a sense of potential unfairness, and advances societal interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible.

Section 37(10) is rationally connected to the pressing and substantial objective of timeliness, early rehabilitation, and reintegration. By requiring leave in those circumstances where there would otherwise be appeals as of right, s. 37(10) serves the goal of timeliness as the leave requirement may be a disincentive to bringing an unmeritorious appeal. Moreover, leave applications are generally decided more quickly than appeals. While the appeal process may be longer on average for those young persons who are successful in their leave applications to the Court as compared to a scenario in which there was no leave requirement, this does not preclude a finding that s. 37(10) is rationally connected to the legislative objective, since it is designed to bring a rapid conclusion to those cases where there is no reason to hear the appeal which raises a question of law that is without merit.

Turning to minimal impairment, Parliament's imposition of a leave requirement in s. 37(10) does not go too far to achieve its objective of timeliness, early rehabilitation, and reintegration in youth criminal matters. While imposing a leave requirement on an otherwise meritorious appeal could raise a potential for miscarriage of justice that is not present in the case of adults who have an appeal as of right, the

Court exercises its leave power in a manner that allows it to hear appeals in cases raising a potential miscarriage of justice. In criminal matters, the concept of public importance, the most important criterion for determining the success or failure of a leave application, is best understood as being engaged not only by jurisprudentially important legal issues that qualify as issues of public importance on that basis, but also by those that raise serious questions of law about the safety of the verdict in criminal matters. The issue of a wrongful conviction transcends the particular defendant and engages the integrity of our system of justice as a whole. The Court has the institutional capacity to identify possible miscarriages of justice through the leave to appeal process. Not only does it have the ability to exercise its power to grant leave mindful of *Charter* rights and the fundamental principles of justice, but it has a responsibility to do so. It follows that the leave process provides an effective safeguard for young persons in those cases where a similarly situated adult would have an appeal as of right under s. 691(1)(a).

Finally, the benefit in s. 37(10) of the timely conclusion of youth criminal matters outweighs the negative effect of the discriminatory impact of imposing a leave requirement for young persons in circumstances where adults can appeal as of right. In enacting s. 37(10) of the *YCJA*, Parliament did not choose to take away a young person's access to the Court, it only added a leave requirement. When deciding the leave application, the Court will have the benefit of the reasons offered in the dissent below on the question of law, the argument in support of leave and the required supporting materials. Most importantly, the criteria for granting leave as relevant to youth criminal matters means that when the liberty of the young person is at stake, a

prima facie meritorious appeal on the question of law would meet the public importance standard even if the matter does not transcend in jurisprudential importance the interest of the parties. Any enhanced risk of miscarriage of justice as a result of having to seek leave to appeal in these circumstances is minimized by the leave to appeal process. Imposing a leave requirement in service of the broader goals of youth criminal justice is consistent with the place of equality in a free and democratic society.

Per Abella, Karakatsanis and Martin JJ.: The limitation in s. 37(10) of the *YCJA* constitutes a *prima facie* breach of s. 15 of the *Charter* that cannot be justified under s. 1 of the *Charter*, making s. 37(10) unconstitutional.

To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Substantive equality requires attention to the full context of the claimant group's situation and to the impact of the limitation on that situation. But context must not be confused with justification. Neither stage of the s. 15(1) test permits the objectives of the legislation to infuse the analysis into whether the limitation itself is a distinction that has the effect of perpetuating, reinforcing, or exacerbating the disadvantage of the claimant group. Only at the s. 1 justificatory stage are the statutory objectives relevant, and then only to the extent that they justify the limitation.

Here, the parties acknowledge that the first step of the s. 15(1) test is satisfied because there is a distinction between the appeal rights to the Court available to adults and young people on the basis of age. The second step, determining whether depriving young people of the automatic rights to appeal that adults have reinforces, perpetuates or exacerbates their disadvantage, requires consideration of what benefit an automatic right to appeal to the Court provides.

The principal object of an appeal as of right to the Court in a criminal case is to rectify legal errors in the trial of serious offences. A dissent on a question of law in a provincial court of appeal, including an unreasonable conviction, or one that cannot be supported by the evidence, automatically triggers a right of appeal to the Court in order to guard against miscarriages of justice. Robust procedural protections against wrongful convictions are crucial. The history of wrongful convictions such as those of Steven Truscott, David Milgaard and Donald Marshall Jr. are evidence of the unconscionable consequences of their absence.

This is an access to justice issue of fundamental importance to young people seeking to prevent wrongful convictions. The automatic appeal right available to adults under s. 691(1)(a) of the *Criminal Code* is premised on the understanding that a dissent on a question of law at the court of appeal raises a legitimate question as to the validity of the conviction, necessitating final review by the Court regardless of whether the case would otherwise meet the Court's standard for leave to appeal. Likewise, s. 691(2)(b) is an expression of the basic concept that it is essential to a fair

criminal justice system that anyone convicted of an indictable offence is entitled to at least one appeal from the initial finding of guilt, whether that finding is first entered at trial or on appeal. These automatic appeal rights provide an automatic additional layer of judicial scrutiny and they offer a significant procedural safeguard.

Section 37(10) of the *YCJA* deprives young people of a significant procedural safeguard against wrongful convictions for adults, despite evidence that young people are more vulnerable to them than adults. Moreover, by virtue of its effect on s. 691(2) of the *Criminal Code*, s. 37(10) deprives young people who are found guilty for the first time by a court of appeal of the right to have their case reviewed at all. This deprivation demonstrably perpetuates young people's disadvantage within the criminal justice system. It is a holdover from an antiquated and paternalistic model of youth justice. It would be untenable to suggest that young persons are less worthy of protection from miscarriages of justice than adults. The very philosophy and purpose of the *YCJA*, with its emphasis on providing substantial procedural protections for young persons, argues for procedures to prevent the ultimate disadvantage, namely, a wrongful conviction. While the Court strives to detect any sign that a miscarriage of justice may have occurred at the leave to appeal stage, an application for leave to appeal does not involve a screening for error in the level of depth that characterizes an appeal on the merits. The objective of timeliness is not a justification for denying access to a procedural protection that has historically served to guard against miscarriages of justice. There is no justification for a speedy resolution if the resolution is based on an unfair trial. There is therefore a *prima facie* breach of s. 15.

Turning to s. 1 of the *Charter*, even accepting that granting the Court the discretion to decide when criminal cases involving young persons merit a second level of appellate review is a pressing and substantial objective for s. 37(10)'s deprivation of an automatic right of appeal, it fails at the final stage of the proportionality analysis because any benefits of the denial are far outweighed by the deleterious effects. Promoting timeliness, early rehabilitation and reintegration are salutary goals, but s. 37(10)'s actual contribution to achieving them is minimal. The most that will be saved is a few months in those cases where leave is denied. On the other hand, requiring a young accused person to go through the leave to appeal process before they are entitled to a hearing has the effect of prolonging the process, since if leave is granted, the appeal will not be heard for several more months. This means that s. 37(10) exposes young people to a greater risk of miscarriages of justice in aid of the possibility of saving a few months of time. Denying young people the automatic full scrutiny of an appeal and accepting a less rigorous appeal process makes justice the servant of expedition for young people, rather than the other way around. The objectives of timeliness, rehabilitation and reintegration are meaningless if wrongful findings of guilt are tolerated in the service of speed. The *YCJA* is not intended to promote swift *injustice*. The profoundly harmful impact of fast-tracking rehabilitation and reintegration over the right to have the basic procedural appeal protection from miscarriages of justice as adults far outweighs the benefit of the potential shaving of a few months off the appeal process.

Per Côté J.: It is not necessary to answer the constitutional questions pertaining to the validity of s. 37(10) of the *YCJA* because they are moot. The constitutional analysis of the denial of an automatic right of appeal to the Court would have no impact on the underlying criminal appeal in this case, as the Court granted leave to appeal.

Cases Cited

By Abella J.

Referred to: *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. K.J.M.*, 2019 SCC 55; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32; *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426; *R. v. Le*, 2019 SCC 34; *R. v. Parks* (1993), 15 O.R. (3d) 324; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Kahkewistahaw First Nation v.*

Taypotat, 2015 SCC 30, [2015] 2 S.C.R. 548; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

By Wagner C.J.

Referred to: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Lyons*, [1987] 2 S.C.R. 309; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *R. v. R.L.* (1986), 26 C.C.C. (3d) 417; *R. v. K.G.* (1986), 31 C.C.C. (3d) 81; *R. v. B. (S.)* (1989), 50 C.C.C. (3d) 34; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. M. (J.S.)*, 2005 BCCA 417, 200 C.C.C. (3d) 400; *R. v. D.F.G.* (1986), 29 C.C.C. (3d) 451; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99; *R. v. K.J.M.*, 2019 SCC 55; *Krishnapillai v. Canada (C.A.)*, 2001 FCA 378, [2002]

3 F.C. 74; *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426.

By Kasirer J.

Referred to: *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Ontario (Attorney General) v. G*, 2020 SCC 38; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. K.J.M.*, 2019 SCC 55; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206; *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By Côté J. (dissenting)

R. v. Beaudry, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *R. v. Barton*, 2019 SCC 33; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152; *R. v. Mathieu* (1994), 90 C.C.C. (3d) 415, aff'd [1995] 4 S.C.R. 46; *R. v. Cedeno*, 2005 ONCJ 91, 27 C.R. (6th) 251; *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

Criminal Code, R.S.C. 1985, c. C-46, ss. 273.2(a)(ii), 677, 685(1), 691, 693(1)(a).

Criminal Code, 1892, S.C. 1892, c. 29, s. 750.

Juvenile Delinquents Act, 1908, S.C. 1908, c. 40, s. 31.

Juvenile Delinquents Act, 1929, S.C. 1929, c. 46, s. 37(1), (2).

Rules of the Supreme Court of Canada, SOR/2002-156, rr. 25(1), 26(1), 33(2).

Supreme and Exchequer Court Act, S.C. 1875, c. 11, s. 49.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 44.

Young Offenders Act, R.S.C. 1985, c. Y-1, ss. 3, 27(1) [rep. & sub. c. 24 (2nd Supp.), s. 20], (5) [*idem*].

Youth Criminal Justice Act, S.C. 2002, c. 1, preamble, ss. 3 [am. 2012, c. 1, s. 168(2)], 37, 142.

Treaties and Other International Instruments

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 40(2)(b)(iii).

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985, Rule 20.1.

Authors Cited

Bala, Nicholas. “Changing Professional Culture and Reducing Use of Courts and Custody For Youth: *The Youth Criminal Justice Act* and Bill C-10” (2015), 78 *Sask. L. Rev.* 127.

Bala, Nicholas, and Sanjeev Anand. *Youth Criminal Justice Law*, 3rd ed. Toronto: Irwin Law, 2012.

Bolton, Janet, et al. “The *Young Offenders Act*: Principles and Policy — The First Decade in Review” (1993), 38 *McGill L.J.* 939.

Bredt, Christopher D. “The Right to Equality and *Oakes*: Time for Change” (2009), 27 *N.J.C.L.* 59.

Butts, Jeffrey A., Gretchen Ruth Cusick and Benjamin Adam. *Delays in Youth Justice*. Chicago: University of Chicago, 2009.

Canada. Department of Justice. Committee on Juvenile Delinquency. *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency*. Ottawa, 1965.

Canada. Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions. *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, 2018 (online: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC19_1_eng.pdf).

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-53*, No. 1, 2nd Sess., 33rd Parl., October 5, 1987, p. 17.

Canada. Library of Parliament. Parliamentary Information and Research Service. *Wrongful Convictions in Canada*, Background Paper 77-E, by Robert Mason, Legal and Social Affairs Division, September 23, 2020.

- Cesaroni, Carla, Chris Grol and Kaitlin Fredericks. "Overrepresentation of Indigenous youth in Canada's Criminal Justice System: Perspectives of Indigenous young people" (2019), 52 *Austl. & N.Z. J. Crim.* 111.
- Davis-Barron, Sherri. *Youth and the Law in Canada*, 2nd ed. Toronto: LexisNexis, 2015.
- Drizin, Steven A., and Greg Luloff. "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" (2007), 34 *N. Ky. L. Rev.* 257.
- Fitzgerald, Robin T., and Peter J. Carrington. "Disproportionate Minority Contact in Canada: Police and Visible Minority Youth" (2011), 53 *C.J.C.C.J.* 449.
- Flemming, Roy B. *Tournament of Appeals: Granting Judicial Review in Canada*. Vancouver: UBC Press, 2004.
- Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 5th ed. Supp. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 1).
- Iacobucci, Frank. "The Supreme Court of Canada: Its History, Powers and Responsibilities" (2002), 4 *J. App. Prac. & Process* 27.
- Jackson, Nate. "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence" (2015), 52 *Alta. L. Rev.* 927.
- Jackson, Vicki C. "Proportionality and Equality", in Vicki C. Jackson and Mark Tushnet, eds., *Proportionality: New Frontiers, New Challenges*. New York: Cambridge University Press, 2017, 171.
- Kassin, Saul M., et al. "Police-Induced Confessions: Risk Factors and Recommendations" (2010), 34 *Law & Hum. Behav.* 3.
- Lawrence, Sonia. "Equality and Anti-discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15", in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution*. New York: Oxford University Press, 2017, 815.
- Martin, Sheilah. "Balancing Individual Rights To Equality And Social Goals" (2001), 80 *Can. Bar Rev.* 299.
- Meehan, Eugene, et al. *Supreme Court of Canada Manual: Practice and Advocacy*. Toronto: Thomson Reuters, 2019 (loose-leaf updated March 2021, release 1).
- Monahan, Patrick J., Byron Shaw and Padraic Ryan. *Constitutional Law*, 5th ed. Toronto: Irwin Law, 2017.

- Proulx, Daniel. “Droit à l’égalité”, dans *JurisClasseur Québec — Collection droit public — Droit constitutionnel*, vol. 2, par Stéphane Beaulac et Jean-François Gaudreault-Desbiens, dir. Montréal: LexisNexis, 2011, fascicule 9 (feuilles mobiles mises à jour novembre 2020, envoi n° 18).
- Russell, Peter H. “The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform” (1968), 6 *Osgoode Hall L.J.* 1.
- Schauer, Frederick. “Slippery Slopes” (1985), 99 *Harv. L. Rev.* 361.
- Supreme Court of Canada. *2020 Year in Review*, Ottawa, 2021.
- Supreme Court of Canada. *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, January 27, 2021 (online: <https://www.scc-csc.ca/parties/gl-ld2021-01-27-eng.aspx>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC19_2_eng.pdf).
- Tepfer, Joshua A., Laura H. Nirider and Lynda M. Tricarico. “Arresting Development: Convictions of Innocent Youth” (2010), 62 *Rutgers L. Rev.* 887.
- Vauclair, Martin, et Tristan Desjardins. *Traité général de preuve et de procédure pénales*, 27^e éd. Montréal: Yvon Blais, 2020.
- Weinrib, Jacob. “The Modern Constitutional State: A Defence” (2014), 40 *Queen’s L.J.* 165.
- Weinrib, Lorraine Eisenstat. “The Body and the Body Politic: Assisted Suicide under the *Canadian Charter of Rights and Freedoms*” (1994), 39 *McGill L.J.* 618.
- West, Emily, and Vanessa Meterko. “Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years” (2016), 79 *Alb. L. Rev.* 717.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Nordheimer JJ.A.), 2019 ONCA 85, 373 C.C.C. (3d) 244, [2019] O.J. No. 644 (QL), 2019 CarswellOnt 1642 (WL Can.), affirming a decision of Crosbie J., 2017 ONCJ 277, [2017] O.J. No. 2221 (QL), 2017 CarswellOnt 6476 (WL Can.). Appeal dismissed, Côté J. dissenting.

Matthew R. Gourlay, for the appellant.

Grace Choi and Holly Loubert, for the respondent.

John Provart, for the intervener the Attorney General of Canada.

Michelle M. Biddulph, for the intervener the Criminal Lawyers' Association (Ontario).

Jane Stewart, for the intervener Justice for Children and Youth.

Alison M. Latimer, for the intervener the British Columbia Civil Liberties Association.

The judgment of Abella, Karakatsanis and Martin JJ. was delivered by

ABELLA J. —

[1] This is an appeal by a young person from a finding of guilt of sexual assault on the ground that the verdict was unreasonable. It is also a challenge to the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, which denies young persons rights of appeal available to all adults convicted of indictable offences, namely an automatic right to appeal to the Supreme Court of Canada when there is a dissent in the court of appeal on a question of law or when the court of appeal enters a finding of guilt on a Crown appeal from an acquittal at trial. These rights of

appeal serve as a substantial safeguard against miscarriages of justice. Under the *YCJA*, they are not available to young persons in the criminal justice system.

[2] The constitutional issue turns on whether this deprivation violates the rights of young people under the *Canadian Charter of Rights and Freedoms*, and, if so, whether it can be justified. The argument was based both on ss. 15 and 7 of the *Charter*, but in view of my conclusion under s. 15, it is unnecessary to address the s. 7 issue. The essence of the s. 15 argument is that the deprivation perpetuates and reinforces young people's disadvantage in criminal proceedings and there is therefore a breach of s. 15(1) of the *Charter*.

[3] The Crown's position can be distilled into two main propositions:

- The *YCJA* is ameliorative legislation that provides young people other protections, making this particular safeguard against wrongful convictions for indictable offences unnecessary.
- Appeals prolong the process, and young people need a speedy resolution to criminal proceedings. Under the *YCJA*, timeliness is a key objective so that young persons found guilty can be quickly rehabilitated and reintegrated into society.

[4] The answer to these propositions can be summarized as follows and leads me to conclude, respectfully, that the limitation in s. 37(10) constitutes a *prima facie* breach of s. 15 that cannot be justified under s. 1:

- The fact that the overall purpose of the legislation is ameliorative is of no relevance in determining whether a particular limitation represents a *prima facie* breach of s. 15. It may factor contextually into the justificatory analysis in s. 1, but what is at issue at the breach stage is the impact of the limitation on the claimant group, not the purpose of the legislation as a whole. The crucial fact remains that the *YCJA* does not provide any analogous procedural substitute for a guaranteed right to appeal to this Court.
- The objective of timeliness is not a justification for denying access to a procedural protection that has historically served to guard against miscarriages of justice. There is no justification for a speedy resolution if the resolution is based on an unfair trial.

[5] As to the appeal from the finding of guilt, I agree with the majority in the Court of Appeal that the verdict was reasonable and would dismiss the appeal.

Prior Proceedings

[6] When C.P. was 15, he went to a party at a beach to celebrate a friend's birthday with a group of young people. The complainant, R.D., was 14. They had both been drinking. Sexual intercourse took place.

[7] C.P. was charged with sexually assaulting R.D. He was tried before Crosbie J. sitting as a youth justice court judge under the *YCJA*.

[8] The Crown's position at trial was that C.P. had sex with R.D. when he knew she was too drunk to be capable of consenting. C.P.'s defence was that R.D. consented to having sex with him before there were any signs that she was too drunk to consent. He said he thought she was "fine" when they had intercourse.

[9] Crosbie J., in thorough and thoughtful reasons, addressed whether R.D. was too intoxicated to consent and whether C.P. had an honest but mistaken belief in R.D.'s consent (2017 ONCJ 277).

[10] R.D. did not testify. Her videotaped statement to the police was admitted at trial. She did not remember the sexual activity.

[11] One of R.D.'s friends, E.G., gave a videotaped statement to the police that was admitted at trial. She said that she came to the party with a friend later than the rest of the group. The very first thing she saw was R.D. lying on the ground. She went to her right away. She found R.D. extremely intoxicated. She had been vomiting, could not get up, and was incapable of communicating. In her oral evidence, E.G. reiterated

that she immediately went to R.D. when she arrived at the party. E.G.'s evidence on this point was not challenged.

[12] The trial judge found that E.G. was a "credible and reliable witness" with "no animus towards C.P."

[13] C.P.'s evidence was that R.D. consented to sexual intercourse. He testified that he and R.D. arrived at the party with a group of friends. They sat on a mattress by a bonfire, where they talked and kissed. R.D. walked away from the bonfire by herself and sat by some rocks away from the group. C.P. talked to another friend for about five minutes, then returned to R.D. C.P. testified that he and R.D. started kissing, and that at one point she said "Fuck me". He said he was surprised at first, but he believed her and thought she was able to give consent. He did not use protection.

[14] C.P. said that after ejaculating, he stood up and heard E.G. and another young person arrive. He said he went to talk to them for 10 or 15 minutes before returning to R.D. On cross-examination, however, C.P. admitted that E.G. went "directly to [R.D.]" when she arrived.

[15] The trial judge did not believe certain critical aspects of C.P.'s evidence, including that R.D. was "fine" during intercourse and that she asked him for sex. On these points, she found that C.P. was "evasive and rattled" and "trying to downplay the impact of his drunken state on his ability to remember what happened and on his actions that evening". C.P.'s demeanour, based on his tone, manner and language, suggested

to her that he was guessing about certain answers, and that at other times, he “desperately wanted it to be the case that something had happened, but in fact, it had not”. She was aware, however, that C.P. was

remembering an event from a year ago. C.P. is also only 16 years old and I suspect, was nervous when testifying, especially under the skilled cross-examination of counsel. I am, by no means, criticizing his evidence in its entirety. What I have set out above are the many reasons upon which I rejected his evidence on certain, key points. [para. 114]

[16] Crosbie J. rejected C.P.’s evidence in chief that he spoke with E.G. for 10 to 15 minutes before E.G. attended to R.D., but she accepted his evidence that he heard E.G. arrive at the party right after he finished having sex with R.D., and his admission in cross-examination that E.G. went directly to R.D. when she arrived, which aligned with E.G.’s evidence.

[17] There is no dispute that R.D. was intoxicated to the point of incapacity when E.G. found her. The question, therefore, was how soon after the sexual activity took place did E.G. see R.D. Based on C.P.’s evidence that he heard E.G. arrive right after the intercourse and the evidence from E.G. and C.P. that E.G. went directly to R.D. when she arrived, the trial judge concluded that R.D. was in an incapacitated state at the time of intercourse:

This evidence . . . leads me to conclude beyond a reasonable doubt that R.D. was extremely intoxicated at the time C.P. admitted to being with her and admitted to having sex with her. E.G. found R.D. having already vomited. She was found unconscious and generally unresponsive — all

within a very, very short period of time from when C.P., on his own evidence, had just ejaculated inside her. [para. 95]

[18] This led Crosbie J. to conclude beyond a reasonable doubt that R.D. was incapable of consenting at the time of intercourse.

[19] Having found that R.D. was too intoxicated to consent at the time of sexual activity, Crosbie J. turned to whether C.P. had an honest but mistaken belief in communicated consent. She made three key findings. First, she expressly found that “[R.D.] did not ask C.P. to ‘fuck me’”. Second, she concluded that there was “no room to doubt [C.P.’s] knowledge of how drunk” R.D. was when sexual intercourse took place:

. . . within a very short period of time of the sexual activity, R.D. was falling asleep, had vomit on her, did not appear to be comprehending what E.G. [her friend] was saying and was unable to meaningfully respond. In his testimony, C.P. put himself with R.D. during this time period. There is simply no room to doubt his knowledge of how drunk R.D. really was at the relevant time. [para. 120]

[20] Finally, she found that, despite his knowledge of her intoxicated state, C.P. failed to take steps to ascertain whether R.D. was consenting, instead choosing to “forg[e] ahead, knowing there existed a danger or risk that [R.D.] was too drunk”. While he knew there was “a need for some inquiry”, he “did not wish to pursue the truth — he preferred to remain ignorant”.

[21] As a result, the trial judge was satisfied, “beyond a reasonable doubt that C.P. knew or was reckless or wilfully blind to the fact that R.D. was so intoxicated that she could not have consented to sexual activity”.

[22] She found C.P. guilty of sexual assault.

[23] C.P. appealed to the Court of Appeal for Ontario, arguing that the verdict was unreasonable. MacPherson J.A., writing for the majority, dismissed C.P.’s appeal (2019 ONCA 85, 373 C.C.C. (3d) 244). He found that “the trial judge’s careful and comprehensive reasons led to an entirely reasonable verdict”. In his view, the trial judge did not commit any errors in her treatment of C.P.’s evidence or of the applicable law. Her finding, based on the evidence, that E.G. went directly to R.D. when she arrived at the party and that C.P. had heard her arrive as soon as he ejaculated and stood up, reasonably led to the conclusion both that R.D. was incapable of consenting and that C.P. knew she was unable to consent. The trial judge explained the bases for her negative assessment of C.P.’s credibility clearly, and why she expressly rejected key aspects of his evidence, such as his evidence that R.D. was “fine” during intercourse and that she had asked him for sex.

[24] Writing in dissent, Nordheimer J.A. would have allowed the appeal, set aside the conviction and entered an acquittal on the basis that “proof of the offence beyond a reasonable doubt was not an available verdict” on a “fair and balanced review of the evidence as a whole”. In his view, the trial judge erred in relying on C.P.’s evidence that he heard E.G. arrive at the beach after he ejaculated, while rejecting all

other aspects of his evidence. As C.P.'s evidence regarding the relative timing of his ejaculation and E.G.'s arrival was the "missing link" that tied the sexual activity to R.D.'s incapacitated state, it was incumbent on the trial judge to explain her rationale for relying on this single piece of evidence. He also found that there were significant problems with E.G.'s evidence about the time of her arrival.

[25] C.P. filed a notice of appeal pursuant to s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides an automatic appeal as of right to an accused who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal with a dissent on a question of law. The Crown filed a motion to quash, based on the fact that under s. 37(10) of the *YCJA* young persons have no automatic right of appeal. Leave is therefore required even when there is a dissent on a question of law at the court of appeal (*R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. K.J.M.*, 2019 SCC 55, at para. 35).

[26] C.P. filed a notice of constitutional question and argued that s. 37(10) of the *YCJA* was contrary to ss. 7 and 15 of the *Charter*.

[27] This Court adjourned the Crown's motion to quash without prejudice to C.P.'s right to seek leave to appeal, including on the question of the constitutionality of s. 37(10) of the *YCJA*. The Court granted leave to appeal both the verdict and the constitutional issue.

Analysis on Finding of Guilt

[28] When a verdict is reached by a judge sitting alone and explained in reasons for judgment, there are two bases on which a court of appeal may find the verdict unreasonable. First, a verdict is unreasonable if it is not one that a “properly instructed jury acting judicially, could reasonably have rendered” (*R. v. Biniaris*, [2000] 1 S.C.R. 381, at para. 36, quoting *R. v. Yebe*, [1987] 2 S.C.R. 168, at p. 185). In *Biniaris*, Arbour J. clarified that this standard, despite being expressed in terms of a verdict reached by a jury, also applies to the decisions of a judge sitting without a jury. She explained, however, that review for unreasonableness on appeal is “somewhat easier when the judgment under attack is that of a single judge”, since judges give reasons whereby

the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. [para. 37]

[29] Arbour J.’s comments in *Biniaris* led to the adoption, in *R. v. Beaudry*, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, [2011] 3 S.C.R. 3, of a narrowly expanded, second avenue of review for unreasonableness. A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached “illogically or irrationally” (*Beaudry*, at paras. 96-97, per Fish J. (dissenting in the result); *Sinclair*, at paras. 4 and 15-17, per Fish J. (dissenting in the result), and at para. 44, per LeBel J.). This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in

support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge (*Sinclair*, at paras. 4, 16 and 19-21; *R. v. R.P.*, [2012] 1 S.C.R. 746, at para. 9).

[30] The *Beaudry* and *Sinclair* inquiry into illogical or irrational findings or inferences is not an invitation for reviewing judges to substitute their preferred findings of fact for those made by the trial judge (*Beaudry*, at para. 98). As MacPherson J.A. noted in the Court of Appeal, the “fact that an appeal court judge would have had a doubt when the trial judge did not is insufficient to justify the conclusion that the trial judgment was unreasonable” (para. 67, quoting *R. v. A.G.*, [2000] 1 S.C.R. 439, at para. 29). Nor is it an invitation to unjustifiably interfere with a trial judge’s credibility assessments. A court of appeal reviewing credibility assessments in order to determine whether the verdict is reasonable cannot interfere with those assessments unless they cannot be supported on any reasonable view of the evidence (*R.P.*, at para. 10; *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). The inquiry into the logic or rationality of a judge’s essential findings under *Beaudry* and *Sinclair* is narrowly targeted at “fundamental flaws in the reasoning process” which means that the verdict was not reached judicially or in accordance with the rule of law (*Sinclair*, at paras. 4, 26 and 77).

[31] Relying on *Beaudry* and *Sinclair*, C.P. argued that it was illogical for the trial judge to find that E.G. discovered R.D. in a state of incapacity very shortly after the intercourse. Building on the reasons of Nordheimer J.A. in dissent, C.P. submitted

that the fundamental flaw in the trial judge's reasoning was that she accepted his evidence that E.G. arrived right after the intercourse, but rejected his evidence on all other material points. Relying on the traditional *Biniaris* standard, C.P. also argued that the verdict was not one that a properly instructed trier of fact could reasonably have rendered based on the available evidence, because the evidence could not establish the timing of the intercourse with any precision.

[32] In my respectful view, the reasoning that led the trial judge to conclude that E.G. discovered R.D. in her incapacitated state right after the intercourse was both logical and rational.

[33] C.P. argued that the trial judge's "selective reliance" on his evidence regarding E.G.'s arrival was illogical because her reason for rejecting other parts of his evidence was that he was too drunk to be relied upon. In particular, C.P. argued that the judge could not logically reject his evidence, based on his drunkenness, that he spoke with E.G. for 10 or 15 minutes before she went to R.D., while accepting his evidence, in the same sequence of events, that E.G. arrived right after the intercourse.

[34] This argument misapprehends the trial judge's reasons. She rejected C.P.'s evidence that he spoke with E.G. before she attended to R.D. because it was internally inconsistent with his own evidence on cross-examination, externally contradicted by the evidence of E.G., *and* because C.P. was intoxicated, particularly in comparison to E.G., whose memory was "not suspect". More broadly, C.P.'s intoxication *and* his dishonesty about his intoxication were among numerous factors relevant to the trial

judge's assessment of C.P.'s credibility. At no point did the judge find that C.P. was so drunk that his memory was categorically unreliable. The effect of intoxication on a witness's testimony is not all or nothing.

[35] It is a well-established principle that a judge or jury may “believe some, none, or all of the testimony of any witness, including that of an accused” (*R. v. J.H.S.*, [2008] 2 S.C.R. 152, at para. 10). Here, the trial judge rejected certain key points in C.P.'s evidence but believed his evidence that he heard E.G. arrive right after intercourse. She provided sound reasons for what she believed and what she did not, explaining why she found that some of his evidence did not suffer from the same flaws that led her to reject other aspects of his testimony.

[36] The verdict was also clearly one that “a properly instructed [judge or] jury acting judicially, could reasonably have rendered” (*Biniaris*, at para. 36, quoting *Yebe*, at p. 185). There was evidence to support the trial judge's finding that E.G. discovered R.D. in an incapacitated state shortly after the intercourse occurred. Crosbie J. was well aware that the time of intercourse could not be ascertained in absolute terms. She understood that “there was a lack of clarity with respect to the timing of the sexual activity”. The Crown witnesses were only able to “make a guess” about when the group arrived at the beach, and none of the Crown witnesses could “pinpoint the time” the intercourse happened. But what mattered, as the Court of Appeal majority explained, was not the precise time, but the “*relative* time of [E.G.'s] arrival in relation to the sexual activity” (para. 56 (emphasis added)).

[37] The combination of E.G.'s evidence and C.P.'s evidence satisfied the trial judge that E.G. went to R.D. as soon as she arrived, and that, on C.P.'s own evidence, her arrival at the party was right after intercourse had taken place. This entitled the trial judge logically to conclude that the totally incapacitated condition E.G. found the victim in when she arrived was the condition she was in *during* the sexual activity.

[38] For these reasons, I agree with the majority in the Court of Appeal that there is no basis for finding the verdict to be unreasonable. Crosbie J.'s reasons for finding C.P. guilty of sexual assault are model trial reasons: rigorous and thoughtfully explained.

[39] I would therefore dismiss the appeal.

The Constitutionality of Section 37(10) of the YCJA

[40] There remains the issue of the constitutionality of s. 37(10) of the YCJA, which deprives young persons of the automatic rights of appeal to this Court in s. 691 of the *Criminal Code*.

[41] On March 11, 2019, C.P. filed a notice of appeal pursuant to s. 691(1)(a) of the *Criminal Code*, which grants an automatic right of appeal to persons convicted of an indictable offence when there is a dissent on a question of law in the court of appeal.

[42] In response, the Crown filed a motion to quash pursuant to s. 44 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, which says:

44 The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith.

[43] It based its motion on the requirement, under s. 37(10) of the *YCJA*, that a young person obtain leave before they can appeal to this Court. In response to the Crown's motion to quash, C.P. filed a notice of constitutional question pursuant to r. 33(2) of the *Rules of the Supreme Court of Canada*, SOR/2002-156. After receiving written submissions, the Court adjourned the Crown's motion to quash "without prejudice to C.P.'s right to serve and file an application for leave to appeal" (*Bulletin of Proceedings*, November 15, 2019, at p. 36). The Court's order stated that C.P. could "raise as a ground for leave to appeal any constitutional issue in respect of s. 37(10) of the *Youth Criminal Justice Act*" (p. 36).

[44] C.P. filed an application for leave to appeal in which he raised two grounds: the reasonableness of his verdict and the constitutionality of s. 37(10) of the *YCJA*.

[45] The Crown filed a response to the leave application, submitting that this Court did not have jurisdiction to hear the constitutional issue because there was no final order or judgment with respect to the constitutionality of s. 37(10) for C.P. to appeal from. Secondly, while acknowledging that this Court has discretion to consider new constitutional issues raised for the first time before it, the Crown submitted that

this discretion should only be exercised when there is a meaningful nexus between the constitutional issue and the judgment or order under appeal.

[46] This Court granted leave to appeal. The Attorney General of Canada intervened on the constitutional question.

[47] At the hearing, the Crown again asserted its position that the Court had no jurisdiction to decide the constitutional issue, but it did not press the point since all parties were present and prepared to argue the constitutional question.

[48] This Court's decision in *Guindon v. Canada*, [2015] 3 S.C.R. 3, governs. In *Guindon*, the majority held that once an appeal is before the Court, the decision about

[w]hether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.

...

... The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties. [paras. 20 and 23]

[49] In this case, there is no prejudice to the parties. All Attorneys General were given notice of the constitutional question and the Attorney General of Canada exercised its right to intervene. As in *Guindon*, no party "suggested that any additional

evidence is required, let alone requested permission to supplement the record” (para. 35).

[50] But of particular relevance is the fact that it is clearly in the interests of the administration of justice for this Court to exercise its discretion to hear and decide the issue, since it is one which could only come before this Court for the first time on an appeal from a court of appeal. Declining to hear C.P.’s constitutional argument would mean leaving an access-to-justice issue of fundamental importance to young persons in jurisdictional limbo.

[51] The procedural history in this matter provides further support for the Court’s jurisdiction to decide the constitutional issue. It is beyond dispute that it would have been necessary for the Court to determine the validity of s. 37(10) in order to properly dispose of the Crown’s motion to quash C.P.’s initial notice of appeal as of right. By adjourning that motion and permitting C.P. to raise the constitutional question in his application for leave to appeal, the Court retained the jurisdiction to decide the question, which it had acquired as a result of the motion to quash, on the appeal proper.

[52] Turning then to the merits of the constitutional question, namely, whether s. 37(10) of the *YCJA* is a breach of ss. 15 or 7 of the *Charter*.

[53] Section 691 of the *Criminal Code* sets out the appeal routes to this Court for indictable offences. It gives an accused the benefit of automatic rights to appeal to

this Court in specific circumstances. Section 691(1)(a)¹ gives a person whose conviction for an indictable offence is upheld at the court of appeal an automatic right to appeal to this Court on any question of law on which a judge at the court of appeal dissents. Additionally, s. 691(2)² gives a person whose acquittal is overturned at the court of appeal an automatic right to appeal to this Court on any question of law on which a judge of the court of appeal dissents, or on any question of law if the court of appeal enters a verdict of guilty against that person.

[54] Section 37(1)³ of the *YCJA* incorporates the appeal routes for indictable offences under the *Criminal Code* into the youth justice system. But s. 37(10) of the *YCJA* denies young persons the automatic rights to appeal to this Court set out in ss. 691(1)(a) and 691(2) of the *Criminal Code*, and instead requires them to seek leave before they can appeal. Section 37(10) states:

¹ **691 (1)** A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada:

(a) on any question of law on which a judge of the court of appeal dissents

² **(2)** A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents;

(b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person . . .

³ **37 (1)** An appeal in respect of an indictable offence or an offence that the Attorney General elects to proceed with as an indictable offence lies under this Act in accordance with Part XXI (appeals — indictable offences) of the *Criminal Code*, which Part applies with any modifications that the circumstances require.

(10) No appeal lies under subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada.

[55] That brings us to whether this provision violates s. 15 of the *Charter*.

Section 15(1) states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[56] This Court recently reaffirmed the test for identifying breaches of s. 15(1) in *Fraser v. Canada (Attorney General)*, 2020 SCC 28. To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law:

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. [para. 27]

[57] Substantive equality requires attention to the full context of the claimant group's situation and to the impact of the limitation on that situation (*Fraser*, at para. 42). But context must not be confused with justification. Neither stage of the test for determining whether there is a breach of s. 15 under our jurisprudence permits the objectives of the legislation to infuse the analysis into whether the limitation itself is a distinction that has the effect of perpetuating, reinforcing, or exacerbating the

disadvantage of the claimant group. Only at the s. 1 justificatory stage are the statutory objectives relevant, and then only to the extent that they justify the limitation (*Fraser*, at para. 79).

[58] The parties acknowledge that the first step of the s. 15(1) test is satisfied because there is a distinction between the appeal rights to this Court available to adults and young people on the basis of age. As a result, the dispute in this appeal revolves around whether the second step of the test has been met. Does depriving young people of the automatic rights to appeal that adults have reinforce, perpetuate or exacerbate their disadvantage? If it does, a *prima facie* breach of s. 15 is made out.

[59] Determining this constitutional issue requires us to first consider what benefit an automatic right to appeal to this Court provides. An appeal as of right to this Court when a judge of the court of appeal dissents on a question of law in a criminal case has existed since this Court was established in 1875 (*Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 49). The right was transferred to the *Criminal Code* in 1892 (see *Criminal Code*, 1892, S.C. 1892, c. 29, s. 750). Professor Peter H. Russell explains that the “principal object” of an appeal as of right to this Court in a criminal case is to rectify legal errors in the trial of serious offences. Disagreement between members of the provincial court of appeal is considered sufficient evidence of the possibility of such an error, providing grounds for this Court’s review (“The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform” (1968), 6 *Osgoode Hall L.J.* 1, at pp. 13-14).

[60] In *Biniaris*, Arbour J. echoed this view in her discussion of why a dissent on a question of law, including an unreasonable conviction, or one that cannot be supported by the evidence, automatically triggers a right of appeal to this Court:

Criminal appeals on questions of law are based in part on the desire to ensure that criminal convictions are the product of error-free trials. Error-free trials are desirable as such, but even more so as a safeguard against wrongful convictions. [para. 26]

No one before us challenged the merits of this proposition, namely, that the purpose of these automatic appeal rights is to guard against miscarriages of justice. The *Criminal Code* provisions themselves reflect Parliament’s acknowledgment that a dissent on a question of law in a court of appeal, or a conviction entered for the first time on appeal, demands automatic review.

[61] The importance of preventing wrongful convictions cannot be overstated. As this Court held in *United States v. Burns*, [2001] 1 S.C.R. 283, “[t]he avoidance of conviction and punishment of the innocent has long been in the forefront of ‘the basic tenets of our legal system’. It is reflected in the presumption of innocence under s. 11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals” (para. 95). Robust procedural protections against wrongful convictions are crucial. The history of wrongful convictions such as those of Steven Truscott, David Milgaard and Donald Marshall Jr. are evidence of the unconscionable consequences of their absence. The

very existence of wrongful convictions shows that the risk of miscarriages of justice is far from theoretical.

[62] The automatic appeal right under s. 691(1)(a) — available to any adult convicted of an indictable offence if a judge on a court of appeal has doubts about the validity of the conviction — is a significant safeguard against wrongful convictions and miscarriages of justice. It is premised on the common sense understanding that a dissent on a question of law at the court of appeal raises a legitimate question as to the validity of the conviction, necessitating final review by this Court regardless of whether or not the case would otherwise meet the Court's standard for leave to appeal.

[63] Where a court of appeal sets aside an acquittal and enters a guilty verdict for the first time on appeal, s. 691(2)(b) likewise provides a critical check on the safety of the verdict. When s. 691(2)(b) is triggered, the right of appeal to this Court is the accused person's *first* right of appeal. Without it, an offender acquitted at trial and then convicted by the court of appeal is left without a guarantee that his conviction will be reviewed by any court.

[64] Section 691(2)(b) operates when a court of appeal substitutes a finding of guilt for an acquittal entered at trial. When s. 691(2)(b) is triggered and a judge on the court of appeal dissents, the premise underlying s. 691(1)(a) continues to hold true. The dissent against the court of appeal's decision to substitute a finding of guilt raises doubt as to the validity of that decision.

[65] Even when the decision to substitute a guilty finding is unanimous, however, s. 691(2)(b) serves, for adults, as an important check against miscarriages of justice. The purpose of the provision is plain. The reviewability of criminal convictions has “been an integral part of our criminal law system at least since the enactment of the *Criminal Code*” in 1892 (*R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 42). Appeals are an “integral part of the criminal justice system in Canada”, which “protect against wrongful convictions and enhance the fairness of the process” (*R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641, at para. 16). Accordingly, the *Criminal Code* provides for “virtually unfettered” first level appeals from findings of guilt (*R. (R.)*, at para. 19). Section 691(2)(b) is an expression of the basic concept that it is essential to a fair criminal justice system that anyone convicted of an indictable offence is entitled to at least one appeal from the initial finding of guilt, whether that finding is first entered at trial or on appeal. In this section, Parliament has determined that the availability of an appeal with leave does not provide a sufficient guarantee of first level review for adult offenders.

[66] These automatic appeal rights, are, of course, no guarantee against miscarriages of justice, but at the very least, in providing an automatic additional layer of judicial scrutiny, they offer a significant procedural safeguard. The question then is whether denying this procedural safeguard to young people violates s. 15 of the *Charter*.

[67] Having considered the substance of the benefit provided by an automatic appeal to this Court, some historical context about the youth justice system is now required.

[68] Young people have been subject to a separate criminal justice system since 1908. The philosophy of this system has evolved over time. A review of the system's history shows a shift from a paternalistic model that limited young people's procedural rights, towards a due process model that recognizes young people as rights-bearing individuals who require enhanced procedural protections to accommodate their vulnerability. The evolution of rights of appeal within the youth justice system has followed a similar trajectory. Crucially, however, young people's access to this Court has lagged behind.

[69] Canada's first separate youth justice system was established under the *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40. The *Juvenile Delinquents Act* was animated by a welfare-oriented philosophy, with the court acting as *parens patriae*. Its purpose was expressed as follows:

31. . . . That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but *as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.*

[70] In furtherance of the *Juvenile Delinquents Act*'s underlying philosophy, young people's legal rights were deliberately limited. The "treatment-based philosophy

underlying the legislation necessitated a system based on both procedural and dispositional paternalism because the emphasis in the [*Juvenile Delinquents Act*] was on helping the juvenile delinquent as quickly as possible” (Janet Bolton, et al., “The *Young Offenders Act*: Principles and Policy — The First Decade in Review” (1993), 38 *McGill L.J.* 939, at p. 947).

[71] Consequently, under the *Juvenile Delinquents Act*, young people were afforded few procedural protections. A first level of appeal was only available by special leave, if a judge of the Superior Court was of the view that “in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that such leave be granted” (*Juvenile Delinquents Act*, 1929, S.C. 1929, c. 46, s. 37(1) and (2)). The restriction on appeals was justified by the view that the expeditious resolution of young people’s criminal cases should be prioritized over due process rights (see Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 466; see also Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), at pp. 154-55 (“*Juvenile Delinquency in Canada*”)).

[72] By the 1960s, the *Juvenile Delinquents Act* had attracted attention for failing to provide adequate legal rights to young people. The limitation on appeals was subject to specific criticism. The Department of Justice Report entitled *Juvenile Delinquency in Canada* argued that the existing system for accessing appeals was

“unduly restrictive” and recommended that the young person and the Crown be given direct access to the court of appeal on questions of law (pp. 154-55).

[73] The *Juvenile Delinquents Act* was replaced in 1984 by the *Young Offenders Act*, R.S.C. 1985, c. Y-1, marking a significant shift in Canada’s philosophical approach to youth justice. The enactment of the *Charter* in 1982 provided the impetus for Parliament to expand the legal protections given to young people facing criminal charges (see Nicholas Bala, “Changing Professional Culture and Reducing Use of Courts and Custody For Youth: *The Youth Criminal Justice Act* and Bill C-10” (2015), 78 *Sask. L. Rev.* 127, at p. 131).

[74] One of the *Young Offenders Act*’s guiding themes was that young people should be afforded the same rights to due process and fair and equal treatment as adults (see *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, at p. 779, per L’Heureux-Dubé J. (dissenting), citing the Solicitor General’s Office report, *The Young Offenders Act: Highlights* (1981), at p. 4). Its Declaration of Principle, articulated in s. 3, announced that “young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms*” (see s. 3(1)(e)), giving young people a substantial suite of procedural protections for the first time. These rights included rights of appeal, which acknowledged that unless there is a valid conviction in accordance with correct legal principles, there is no “offender” to hold accountable (Bala and Anand, at p. 466).

[75] Section 27(1)⁴ of the *Young Offenders Act* incorporated the provisions respecting appeals for indictable offences in the *Criminal Code* into the youth justice system. This would have included automatic rights to appeal to this Court, but s. 27(5)⁵ stipulated that a young person was required to obtain leave before an appeal to this Court could be heard:

(5) No appeal lies pursuant to subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment of the court of appeal is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

[76] In a case involving statutory interpretation, this Court said in *obiter* that this limitation reflected “[t]he policy favouring the early resolution of the adjudicative stage in order to facilitate commencement of rehabilitation” (*C. (T.L.)*, at p. 1016). In this way, it aligned with the *parens patriae* approach to youth justice that prevailed under the predecessor legislation, the *Juvenile Delinquents Act*.

[77] The *Young Offenders Act* was replaced in 2003 by the current legislation, the *Youth Criminal Justice Act*. Like the *Young Offenders Act*, the YCJA’s Declaration of Principle recognizes that “young persons have rights and freedoms in their own right” (s. 3(1)(d)(i)). But the YCJA’s Declaration of Principle goes further. It states that the criminal justice system for young persons must emphasize “*enhanced procedural*

⁴ rep. & sub. c. 24 (2nd supp.), s. 20.

⁵ rep. & sub. c. 24 (2nd supp.), s. 20.

protection to ensure that young persons are treated fairly and that their rights . . . are protected” (s. 3(1)(b)(iii)). In accordance with this principle, the *YCJA* affords young people a wide range of supplementary rights and procedural protections (see *K.J.M.*, at para. 142, per Abella and Brown JJ.).

[78] Subsections 27(1) and (5) of the *Young Offenders Act* were replaced without substantive changes by subsections 37(1) and (10) of the *YCJA*. In other words, despite its emphasis on providing young people with procedural protection, access to this Court by way of appeal remained limited under the *YCJA* as it had been under the *Young Offenders Act*. C.P. argues that the deprivation of this procedural benefit perpetuates young people’s unique disadvantage within the criminal justice system.

[79] This Court has repeatedly recognized that young people are distinctively vulnerable in the criminal justice context. In *R. v. D.B.*, [2008] 2 S.C.R. 3, this Court held that the *YCJA*’s presumptive offence regime, which listed a set of offences to which an adult sentence presumptively applied, violated s. 7 of the *Charter*. The Court explained that Canada has a separate youth justice system for a reason, namely, that “because of their age, young people have heightened vulnerability” (para. 41). Further, the Court held that:

A young person should receive, at the very least, *the same procedural benefit afforded to a convicted adult on sentencing*, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7. [Emphasis added; para. 82.]

[80] *D.B.* constitutionalized the special status of young people in the criminal justice system in light of their distinctive vulnerability. It also recognized, in the context of sentencing, that procedural rules that benefit adults must apply equally in youth proceedings.

[81] That same year, in *R. v. L.T.H.*, [2008] 2 S.C.R. 739, Fish J. emphasized the importance of the enhanced procedural protections that govern the admissibility of statements made by young people to authority figures. He explained that these protections are justified on the basis that the “procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults” (para. 3). In particular, Fish J. found that young people are vulnerable because they “generally do not understand their legal rights as well as adults, are less likely to assert those rights in the face of a confrontation with a person in authority and are more susceptible to the pressures of interrogation” (para. 24).

[82] One year later, in *R. v. S.J.L.*, [2009] 1 S.C.R. 426, this Court held that if a young person and an adult are alleged to have committed an offence in tandem, they must be tried separately. Deschamps J. held that the creation of the youth justice system “was based on recognition of the presumption of diminished moral blameworthiness of young persons and on their heightened vulnerability in dealing with the justice system” (para. 64). A joint trial would “be inconsistent with the governing principle of the

YCJA, which maintains a justice *system* for young people that is separate from the system for adults” (para. 56 (emphasis in original)).

[83] In response to these cases, Parliament amended the YCJA in 2012⁶ and updated its Declaration of Principle at s. 3(1)(b). The emphasis on enhanced procedural protection for young people was preserved at s. 3(1)(b)(iii).

[84] Professors Nicholas Bala and Sanjeev Anand explain the relationship between young people’s vulnerability and their concomitant need for enhanced procedural protection compellingly:

The underlying rationale for giving greater legal protections to young persons than to adults — like the rationale for the limited accountability of adolescents — is their intellectual, social, and psychological immaturity. Adolescents are less likely to appreciate the significance of the legal process and the legal consequences of the decisions they are required to make. They generally do not fully understand and appreciate their rights and are likely unable to exercise them fully without assistance. Adolescents are also likely to have greater difficulty in formulating realistic plans and advocating for their views in the youth justice system. They may also be more vulnerable to pressure from the police and other agents of the state.
[p. 164]

[85] In short, the enhanced procedural protections afforded to young people in the youth justice system are not gratuitous benefits. They are directly responsive to the vulnerability and concomitant disadvantage that inheres in young people because of their age. Sometimes young people will be entitled to the same procedural protections

⁶ See 2012, c. 1, s. 168(2).

as adults, and sometimes different protections will be required. The *YCJA* does not and need not strive for line by line parity with the *Criminal Code* and none of our *YCJA* jurisprudence advances this hyperbolic proposition. The question before us is not whether young people should be entitled to *all* procedural rights afforded to adults; it is about s. 37(10) of the *YCJA*, and whether s. 15(1) of the *Charter* entitles young people to the automatic rights of appeal available to adults. The answer to this question depends on whether the deprivation of the rights to appeal to this Court reinforces, perpetuates or exacerbates young people's disadvantage within the criminal justice system.

[86] Clearly it does. It deprives young people of what is acknowledged to be a significant safeguard against wrongful convictions for adults, despite the evidence that young people are more vulnerable to them than adults. A recent report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions identifies young people as a population that is at risk of wrongful convictions, explaining:

Ample research now suggests that young persons are also more vulnerable to wrongful convictions, as compared to adults, for a variety of age-related reasons. The nature of the young developing brain is considered a key factor. In essence, youthful brains are wired differently, and those underdeveloped brains result in young persons being poor decision-makers, in contrast to adults. Experts across disciplines point to a trilogy of judgments by the United States Supreme Court, including *Roper v Simmons* where the Court acknowledged the scientific evidence that young persons are less mature, less able to assess risks and long-term consequences of their conduct, more vulnerable to external pressures and more compliant to authority. As a result, the traits that make young persons different from adults cognitively, socially and emotionally, may also make

them particularly susceptible to the recognized systemic factors that contribute to wrongful convictions.

(Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada, 2018 (online), at p. 243.)

[87] Research from the United States also develops the contours of the unique vulnerability of young people, including that they are more suggestible and compliant than adults during police questioning and are less likely to understand their legal rights. These traits are significant risk factors for wrongful findings of guilt (Emily West and Vanessa Meterko, “Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years” (2016), 79 *Alb. L. Rev.* 717, at pp. 728, 759-60, 763 and 783; Saul M. Kassin, et al., “Police-Induced Confessions: Risk Factors and Recommendations” (2010), 34 *Law & Hum. Behav.* 3). The research also demonstrates that the risk of wrongful findings of guilt is increased when young people are denied the due process protections afforded to adults (Steven A. Drizin and Greg Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions?” (2007), 34 *N. Ky. L. Rev.* 257, at p. 260; Joshua A. Tepfer, Laura H. Nirider and Lynda M. Tricarico, “Arresting Development: Convictions of Innocent Youth” (2010), 62 *Rutgers L. Rev.* 887).

[88] *D.B.* explained the unique disadvantages of young people in the criminal justice system: their “heightened vulnerability, less maturity and a reduced capacity for moral judgment” (para. 41). Moreover, it is important to stress that the vulnerability experienced by young people in general is amplified for those young people who are

indigenous or members of racial minorities. The unfortunate reality, as this Court recently pointed out in *R. v. Le*, 2019 SCC 34, is that “being frequently targeted, stopped, and subjected to pointed and familiar questions” by police is a “common and shared experience” for racialized youth (para. 97). These young people disproportionately interact with the criminal justice system for a complex variety of reasons, which include both direct and systemic racial discrimination within the system (Bala and Anand, at pp. 58-59; Robin T. Fitzgerald and Peter J. Carrington, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” (2011), 53 *C.J.C.C.J.* 449, at pp. 450-54 and 473; Carla Cesaroni, Chris Grol and Kaitlin Fredericks, “Overrepresentation of Indigenous youth in Canada’s Criminal Justice System: Perspectives of Indigenous young people” (2019), 52 *Austl. & N.Z. J. Crim.* 111, at p. 112; Nate Jackson, “Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence” (2015), 52 *Alta. L. Rev.* 927, at pp. 929-32).

[89] This is not a new phenomenon, either in the public’s or in the judiciary’s consciousness. Since *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), courts have acknowledged the wide range of ways the criminal justice system can disproportionately affect accused persons in these groups (*R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, [2012] 1 S.C.R. 433). If being indigenous or a racial minority can have a disparately negative impact on *adult* accused persons, the double jeopardy vulnerability of being both a young accused *and* a member of a racial minority follows

regrettably and inexorably (see Robert Mason, Library of Parliament, *Wrongful Convictions in Canada*, Background Paper 77-E, September 23, 2020, at p. 10).

[90] All this confirms that young people are particularly vulnerable to wrongful convictions in the criminal justice system, and are in any event no less vulnerable to them than are adults. Yet s. 37(10) of the *YCJA* deprives young people of the benefit of an automatic right to appeal to this Court when a judge on the court of appeal has identified a risk of legal error, a benefit that has long been available to adult accused people. Moreover, by virtue of its effect on s. 691(2) of the *Criminal Code*, s. 37(10) of the *YCJA* deprives young people who are found guilty for the first time by a court of appeal of the right to have their case reviewed *at all*. This deprivation demonstrably perpetuates young people's disadvantage within the criminal justice system. It is a holdover from an antiquated and paternalistic model of youth justice and deprives young people of a procedural safeguard designed to reduce the risk of miscarriages of justice.

[91] It would be untenable to suggest that young persons are less worthy of protection from miscarriages of justice than adults. As *D.B.* pointed out, the very philosophy and purpose of the *YCJA*, with its emphasis on providing substantial procedural protections for young persons, argues for procedures to prevent the ultimate disadvantage, namely, a wrongful conviction.

[92] The Crown argues that the leave to appeal process is an adequate substitute for an automatic right of appeal. But the process in the regular application for leave to

appeal stage is by its very nature less intensive than the scrupulous search for legal error conducted during a hearing on the merits. As the Crown acknowledges in its factum, “[t]he leave process is designed to be more streamlined than the appeal process” (para. 56). While this Court strives to detect any sign that a miscarriage of justice may have occurred at the leave to appeal stage, the fact remains that an application for leave to appeal does not involve a screening for error in the level of depth that characterizes an appeal on the merits. Leave to appeal decisions are made without an oral hearing or the benefit of the full record on which to assess any legal infirmities.

[93] The Crown also argues that this Court could alleviate the disadvantageous impact of s. 37(10) by applying a lower standard to leave to appeal decisions involving youth justice. It is worth noting that the Crown’s argument on discretion was used, unsuccessfully, to justify the sentencing provisions that were deemed unconstitutional in *D.B.* Those provisions left the ultimate issue of whether to impose an adult sentence on a young person in the discretion of the sentencing judge. The Court found, however, that the existence of discretion did not make them any less infringing of young people’s s. 7 right to liberty. The same reasoning applies here. Even though this Court could theoretically exercise its discretion in a way that reduces the unconstitutional effects of s. 37(10), this does not render an unconstitutional provision constitutional.

[94] Nor am I persuaded by the Crown’s argument that there is no disadvantage because there are many other procedural benefits available to young people in the

YCJA. This evokes Sopinka J.'s *obiter* statement in 1994 in *C. (T.L.)* that it is "difficult to accept that a young offender can select one aspect of the [adult] scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied to adults" (pp. 1017-18). It is important to remember not only that these comments were made in *obiter*, but that the issue in that case was one of statutory interpretation, not constitutional validity.

[95] Moreover, the case was about the rule against multiple convictions for a single criminal act, not an unsafe verdict. There is no basis for assuming that in those circumstances, Sopinka J. would have turned his mind to the role of appeal rights in preventing miscarriages of justice. Most significantly, his comments were made well before this Court's decisions in *D.B.*, *L.T.H.* and *S.J.L.*, all of which underscore the importance of providing procedural protection to young people in recognition of their vulnerability. Despite the range of procedural protections afforded to young people by the YCJA, the fact remains that s. 37(10) of the YCJA provides young people with less robust rights of appellate review than adults on the basis of their age, in a context where they are already uniquely vulnerable. The existence of other procedural safeguards provides no legal comfort to a young person subjected to a dubious finding of guilt.

[96] And my colleague's assertion that the objective of timeliness in the YCJA should form part of the context at the s. 15 stage, confuses context with justification. Timeliness was in fact advanced by the Crown as a justification for the limitation under s. 1. This is where it belongs (*Andrews v. Law Society of British Columbia*, [1989] 1

S.C.R. 143, at p. 178; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at para. 331; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at para. 16; *Fraser*, at para. 42). It has no place in determining whether there is a *prima facie* breach of s. 15(1). *Fraser* emphasized this point:

The perpetuation of disadvantage . . . does not become less serious under s. 15(1) simply because it was relevant to a legitimate state objective. . . . The test for a *prima facie* breach of s. 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to s. 1 [Emphasis in original; para. 79.]

[97] The fact that timeliness is one of the objectives of the limitation or of the YCJA is irrelevant to whether depriving young people of a significant safeguard against miscarriages of justice perpetuates their disadvantage. It amounts to telling them that as long as they are processed through the system quickly, they should be grateful for not having to go through an added layer of protection from miscarriages of justice.

[98] My colleague’s reliance on *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, to suggest that young accused people’s interest in timeliness must be balanced against their interest in procedural protection as a part of a “contextual” s. 15(1) analysis is misplaced. *Withler* was specifically concerned with “how an analysis under s. 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of government benefits” (para. 25). Against that background, we held that the “multiplicity of interests” balanced by the impugned law will “colour the discrimination analysis”, as it is necessary to take “into account the universe of potential beneficiaries” (paras. 3 and 38). *Withler* does not support the proposition that

a legislative provision that perpetuates a claimant group's disadvantage will pass s. 15(1) scrutiny as long as a "contextual" inquiry shows that the broader legislative scheme is intended to promote that group's other interests in different ways.

[99] Parliament has determined that where the judges of a court of appeal are divided on whether an adult's conviction for an indictable offence is legally sustainable, or where they overturn an acquittal in favour of a guilty verdict, the accused person should have an automatic right to appeal to this Court to ensure that the trial was a fair one and that no miscarriage of justice occurred. The absence of that protection for young persons is the denial of a procedural benefit that perpetuates and reinforces their inherent vulnerability in the criminal justice system. There is therefore a *prima facie* breach of s. 15.

[100] Turning to s. 1, the Crown submits that the pressing and substantial objective for s. 37(10)'s deprivation of an automatic right of appeal is

to grant the Supreme Court of Canada the discretion to decide when criminal cases involving young persons merit a second level of appellate review. There is a societal interest in vesting with the Supreme Court the decision-making power to decide when a young person's criminal case merits further review and when there would be minimal or no utility to further prolonging the appellate process in the light of the primacy of the YCJA principles of timeliness, rehabilitation and reintegration. [R.F., at para. 55]

[101] Even accepting that quick decision-making by this Court is an important goal for limiting appeal rights for young people, it fails at the final stage of the

proportionality analysis because any benefits of the denial are far outweighed by the deleterious effects. This is an access to justice issue of fundamental importance to young people seeking to prevent wrongful convictions.

[102] I accept that promoting timeliness, early rehabilitation and reintegration are salutary goals, but s. 37(10)'s actual contribution to achieving them is minimal. The most that will be saved is a few months in those cases where leave is denied. On the other hand, requiring a young accused person to go through the leave to appeal process before they are entitled to a hearing has the effect of prolonging the process, not abbreviating it in cases when leave is granted, since if leave is granted, the appeal will not be heard for several more months. If, however, an appeal is immediately scheduled because there is an automatic right of appeal, the process of fulsome scrutiny for error will get underway months earlier. That means that s. 37(10) exposes young people to a greater risk of miscarriages of justice in aid of the possibility of saving a few months of time.

[103] It is also important to point out the critical difference between the capacity for scrutiny in an application for leave to appeal and in an actual appeal. Leave decisions are made by this Court without the benefit of a full hearing. Without these assessment tools, the Court is screening for miscarriages of justice with one hand tied behind its back. That is why Parliament decided that heightened scrutiny is automatically required *for adults* when the criteria under s. 691 of the *Criminal Code* are satisfied.

[104] Denying young people the automatic full scrutiny of an appeal and accepting a less rigorous appeal process makes justice the servant of expedition for young people, rather than the other way around. There is no doubt that expedition is important for young people, but not at the expense of procedural protections designed to minimize the risk of miscarriages of justice.

[105] Preventing miscarriages of justice is at the core of every layer of scrutiny in the criminal justice system for every accused person. A wrongful finding of guilt under the *YCJA* is no less a miscarriage of justice than a wrongful conviction for adults under the *Criminal Code*.

[106] Yet s. 37(10) not only denies access to an automatic appeal for young people when there is a dissent, it even denies it when the Attorney General has filed a notice of intention to seek an adult sentence thereby depriving them of a right guaranteed to an adult even when the state wants to treat them like one.

[107] The counter argument, that the benefit of the denial of an automatic right of appeal facilitates the prioritization of immediate rehabilitation and reintegration, reflects the paternalism that prevailed under the previous *Juvenile Delinquents Act*. It suggests that young people do not need the procedural protection of an automatic appeal available to adults because starting on their rehabilitative journey is more important than ensuring that the convictions that launched them into that journey are the result of fair trials.

[108] This is an argument that justifies an increased risk of wrongful findings of guilt as an acceptable cost of doing business within the youth justice system, based on timeliness and early rehabilitation and reintegration. But timeliness, rehabilitation and reintegration are not legitimate objectives if the underlying finding of guilt resulted from an unfair trial. The objectives of timeliness, rehabilitation and reintegration are based on an assumption that the finding of guilt is not based on a miscarriage of justice. They are meaningless if wrongful findings of guilt are tolerated in the service of speed. The *YCJA* is not intended to promote swift *injustice*. There is no need for rehabilitation or reintegration if the young person should not have been found guilty in the first place.

[109] The profoundly harmful impact of fast-tracking rehabilitation and reintegration over the right to have the basic procedural appeal protection from miscarriages of justice as adults far outweighs the benefit of the potential shaving of a few months off the appeal process.

[110] Finally, an argument raised at the hearing that this Court should not find a breach of s. 15 because it could provide the precedential basis for findings of other s. 15 breaches in the *YCJA* calls for a response. The proposition is, with respect, problematic not only jurisprudentially, but conceptually.

[111] The underlying jurisprudential problem with the suggestion is that it relies on an approach to s. 15 that this Court has never applied — equality as sameness — in order to warn that finding a breach in this case could lead, by logical extension, to increased access to procedural protections like jury trials and preliminary inquiries for

young people. In this Court's very first equality case, *Andrews*, the Court rejected a "sameness", or formal theory of equality, adopting substantive equality instead, an approach that recognizes, respects, and accommodates difference (pp. 164-65, 168 and 171). The rejection of "identical treatment" under s. 15 was confirmed in, among others, *R. v. Kapp*, [2008] 2 S.C.R. 483, at paras. 14-16 and 27-28, *Withler*, at paras. 2 and 39-66, and most recently in *Fraser*, at paras. 40-41 and 47. Instead, this Court looks to whether the specific limitation before the Court is a distinction that has the *effect* of reinforcing, perpetuating or exacerbating the claimant's disadvantage.

[112] There is also a conceptual problem with what amounts to an argument that there should be no finding of a *prima facie* breach of s. 15 in this case because it could potentially lead to finding other s. 15 breaches. This adds a troubling factor to our *Charter* analysis. The idea that the Court should decline to find that a limiting distinction has the effect of perpetuating disadvantage for the claimant group if it would encourage other rights claimants to come forward, undermines the whole of the s. 15 analysis. The burden at the breach stage is on the claimant to satisfy this Court's two-part test. We do not ask claimants to anticipate what other claims their success may inspire, the potential consequences of those claims, or to justify why they should succeed anyway.

[113] Nor, in fact, has this kind of "slippery slope" argument ever played an analytical role in determining whether or not a *Charter* right has been breached. To inject it now, as a potential barrier to s. 15 claims, or any other *Charter* claim, would

hold the Court hostage to the fear of unknown consequences. By engaging in this type of argument, judges risk giving “short shrift” to the case before the court and deciding future claims without the factual foundation and legal arguments necessary for a proper assessment (Lorraine Eisenstat Weinrib, “The Body and the Body Politic: Assisted Suicide under the *Canadian Charter of Rights and Freedoms*” (1994), 39 *McGill L.J.* 618, at pp. 636-37; see also Frederick Schauer, “Slippery Slopes” (1985), 99 *Harv. L. Rev.* 361).

[114] The purpose of the as-of-right appeal denied by s. 37(10) is straightforward — to ensure the safety of a verdict in circumstances where that verdict is called into question by a judge on the court of appeal, or when a guilty verdict is entered for the first time on appeal. The concern that a claim could be advanced for jury trials and preliminary inquiries if a young person wins an automatic appeal right in this case, ignores the significant differences between the procedures, differences best explored in a case where the issue is before the court and the parties have had the chance to argue the merits.

[115] In this case, there is a direct link between the denial of a procedural protection available to adults, and youth vulnerability to miscarriages of justice. The denial has the effect of perpetuating that vulnerability. In examining whether a provision perpetuates a disadvantage under s. 15, it is far from obvious that there is anything like the same link with jury trials and preliminary inquiries that engages the risk of a miscarriage of justice. There is only one purpose of the procedural benefit

denied here, namely to ensure the safety of a verdict in circumstances where that verdict is called into question by a judge on the court of appeal. This is simply not comparable to the multi-faceted complexity of jury trials. The attempt to speculatively analogize them emblemizes the fallacy of the slippery slope.

[116] Ultimately, in my respectful view, this type of argument seems to me to be fundamentally incompatible with the purpose of the *Charter*. The *Charter* was intended to impose a set of justiciable constraints and obligations on government that are enforceable by individuals and groups (see Jacob Weinrib, “The Modern Constitutional State: A Defence” (2014), 40 *Queen’s L.J.* 165). As this Court explained in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, “[c]itizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge” (para. 56). Implicit in this statement is the proposition that the Court must rule on the case that is actually before it, not a hypothetical future claim.

[117] The only question before us is whether s. 37(10) of the *YCJA* violates the *Charter*. In my respectful view, it does.

[118] For all the foregoing reasons, the *prima facie* breach of s. 15 cannot be justified, making s. 37(10) of the *YCJA* unconstitutional.

[119] Given this conclusion, it is unnecessary to address C.P.’s submission that s. 37(10) of the *YCJA* also breaches his s. 7 *Charter* right as a violation of the suggested

principle of fundamental justice that young persons are entitled to enhanced procedural protections in the criminal justice system.

[120] This constitutional issue does not affect C.P.'s appeal from the finding of guilt. I would dismiss the appeal.

The reasons of Wagner C.J. and Moldaver, Brown and Rowe JJ. were delivered by

THE CHIEF JUSTICE —

I. Introduction

[121] This appeal raises two distinct issues. The first concerns the reasonableness of a finding of guilt on a charge of sexual assault. The appellant, C.P., maintains that the verdict was reached illogically and was not reasonably available on the evidence. For the same reasons as my colleague Abella J., I would dismiss the appeal from the finding of guilt. The trial judge's reasons were rigorous and cogent, and there is no basis for finding that the verdict was unreasonable.

[122] The second issue is the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("YCJA"), which requires young offenders to seek leave before they can appeal to this Court. In the appellant's view, this provision infringes ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, because it deprives

young persons of a procedural benefit that is available to adults under s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, namely an automatic right of appeal where an appellate court affirms a conviction for an indictable offence, but one judge of that court dissents on a question of law.

[123] I agree with the conclusion of my colleague Abella J. on the preliminary matter of jurisdiction. However, for the reasons that follow, I would dismiss the constitutional challenge.

II. Constitutionality of Section 37(10) of the YCJA

A. *Analysis With Respect to Section 7*

[124] Section 7 of the *Charter* guarantees that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[125] Two elements must be established in order to show a violation of s. 7: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 37).

[126] In this appeal, the requirements of the first step are readily satisfied, as a limit on young persons' right to appeal to this Court engages residual liberty interests that are cognizable under s. 7 (*R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 645; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 40). Both parties acknowledge this. The outcome thus hinges on whether this deprivation is in accordance with the principles of fundamental justice.

[127] The appellant asks this Court to recognize a new principle of fundamental justice — that young persons are entitled to “enhanced procedural protections” in the criminal justice system. A cornerstone of his argument is this Court’s decision in *D.B.* in which Abella J., writing for the majority, recognized “a *presumption* of diminished moral blameworthiness or culpability” for young persons as a principle of fundamental justice and held that, accordingly, “[a] young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing” (paras. 41 and 82 (emphasis in original)). The appellant argues that *D.B.* constitutionalized the special status of young persons in the criminal justice system and established enhanced procedural protection as a guiding principle in the youth justice jurisprudence. In his opinion, the time has come for the Court to constitutionalize the latter principle under s. 7.

[128] The appellant submits that the principle of enhanced procedural protection satisfies the three criteria reiterated by Abella J. in *D.B.*, namely that for a principle of justice to be “fundamental” within the meaning of s. 7: (i) it must be a legal principle;

(ii) there must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and (iii) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person (para. 46).

[129] But it is somewhat unclear from the appellant's submissions if this principle of enhanced procedural protection entails a comparative assessment of procedural rights of young persons and those of adults, or if it is a freestanding standard that applies independently to young persons in light of their unique circumstances irrespective of what is available to adults. At times, the appellant seems to interpret the principle as requiring that procedural protections afforded to young persons be greater than, or at least equal to, those that are provided to adults throughout the criminal justice system. According to this approach, s. 7 guarantees that young persons will not be deprived of any significant procedure available to adults without good reason.

[130] If the content of the principle is indeed strictly contingent on a comparative assessment, one that fluctuates depending on the procedural benefits Parliament sees fit to extend to or withhold from adults at a given time, then it yields neither a meaningful standard nor one upon which any consensus is conceivable. To the extent that the concern is solely how young persons are treated *in comparison* to adults, the argument appears better suited to a s. 15 *Charter* analysis, not to one that engages principles of fundamental justice under s. 7.

[131] But the appellant, who is aware of these difficulties, also suggests that enhanced procedural protection can be a freestanding principle, which means that any procedural safeguard for young persons must account for their unique status in the criminal justice system. He submits that, rather than requiring procedures *identical* to those accorded to adults,

the principle of “enhanced procedural protection” allows for a reasoned evaluation of legislative choices against the assumption that young people must enjoy special consideration in the justice system. It does *not* mean that for every procedure “X” adopted for adults, Parliament must accord “X + 1” or even “X” to young people. Differences in procedure — even ones that appear to confer less elaborate rights on young people — can be fully consistent with this principle provided that, when viewed in context, the procedure in question vindicates rather than derogates from the interests of the young accused. [Emphasis in original.]

(A.F., at para. 71.)

[132] The difficulty with this freestanding interpretation of the principle, then, is that it quite simply offers nothing new. There is already a well-established principle of fundamental justice that *all* accused must be accorded *adequate* procedural safeguards against wrongful convictions or other miscarriages of justice in the criminal process (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 5). As for the requirements that afford adequate procedural protection, they “are not immutable”, but “vary according to the context in which they are invoked”, which means that “certain procedural protections might be constitutionally mandated in one context but not in another” (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361; see also *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 32; *Idziak v. Canada (Minister of Justice)*, [1992] 3

S.C.R. 631, at pp. 656-57). In other words, the adequacy of procedural protections will necessarily be sensitive to the unique circumstances of young persons that have been identified by this Court, including their diminished moral culpability and their need for enhanced procedural protection in the criminal justice system (*D.B.*, at para. 41). If enhanced procedural protection is construed as a freestanding principle, the appellant's s. 7 argument, worded differently, depends on whether s. 37(10) deprives young persons of a liberty interest without *adequate* procedural safeguards.

[133] In my view, denying young persons an automatic right to a hearing in this Court where a court of appeal judge has dissented on a question of law cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system. This Court has steadfastly affirmed in various contexts that “there is no constitutional right to an appeal”, let alone an automatic one at the apex of the judicial system, including in circumstances that unequivocally engaged liberty interests and principles of fundamental justice that are cognizable under s. 7 (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 136, citing *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; see also *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 739). Fundamental justice does not entail “the most favourable procedures that could possibly be imagined” (*Lyons*, at p. 362). Although I do not foreclose the theoretical possibility that s. 7 would ever provide a right of appeal in some other context — an issue which need not be decided here — I cannot see how the principles of fundamental justice could require something as specific as an automatic hearing in this Court in the

narrow circumstances in which a court of appeal affirms a conviction for an indictable offence, but a judge of that court dissents on a question of law.

[134] Such a requirement would have the effect of constitutionalizing the application of s. 691(1)(a) of the *Criminal Code* to young persons, thereby implying that Parliament would be under a positive obligation to enact such a provision if one did not already exist. This conclusion would appear all the more anomalous in light of the fact that a leave requirement for criminal cases in this Court is the rule, not an exception. There is of course no automatic statutory right to appeal to this Court in a summary conviction case even when an appellate court has set aside an acquittal and entered a conviction for the first time, just as there is no right to appeal on a question of fact even when a judge of the court of appeal has dissented. What is more, the summary conviction procedure, which is the default procedure for young persons (s. 142 of the *YCJA*) and in which the avenues of appeal available to an accused are generally more limited, has consistently been held to be constitutional (*R. v. R.L.* (1986), 26 C.C.C. (3d) 417 (Ont. C.A.); *R. v. K.G.* (1986), 31 C.C.C. (3d) 81 (Alta. C.A.); *R. v. B. (S.)* (1989), 50 C.C.C. (3d) 34 (Sask. C.A.)). In other words, automatic appeals for young persons are not — in the words this Court used in rejecting a similar request to entrench the “best interests of the child” as a principle of fundamental justice — a “foundational requirement for the dispensation of justice” (*Canadian Foundation for Children*, at paras. 10-12).

[135] A contextual assessment of the adequacy of procedural protections should also be sensitive to the unique costs of a prolonged appellate process in the youth justice system — for the young accused, but also for victims, who themselves are often young persons (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 154, citing National Council of Welfare, *Justice and the Poor* (2000)). The governing principles of timely intervention and prompt action stated in s. 3(1)(b)(iv) and s. 3(1)(b)(v) of the *YCJA*, which I will discuss in greater detail in my analysis with respect to s. 15, also colour the s. 7 analysis. The principles of fundamental justice “reflect a spectrum of interests, from the rights of the accused to broader societal concerns”, and while the fairness of a procedure will be assessed primarily from the point of view of the accused, “it must as well be looked at from the point of view of fairness in the eyes of the community and the complainant” (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 198).

[136] It also bears emphasizing at this juncture that the threat of wrongful conviction which my colleague Abella J. seeks to address is, on the record before us, entirely theoretical. The appellant has provided no evidence that the absence of an automatic appeal in any way increases the likelihood of wrongful convictions or other miscarriages of justice for young persons tried for indictable offences. Nor is there any evidence before us suggesting that the Court’s leave process affords inadequate procedural protection. In other words, it has not been shown that there is an actual problem with the way the Court has been exercising its discretion to grant leave, let alone one that warrants a finding of a constitutional violation.

[137] On the contrary, the leave process in this Court is rigorous. While it is true that leave applications are not subject to the same in-depth screening for errors as is the case in an appeal on the merits, the Court has a wide discretion to consider factors that might suggest a possibility of error, including the fact that a judge dissented on a question of law or a conviction entered for the first time on appeal. There is no basis to believe that a serious argument pointing to a miscarriage of justice would not meet the public interest standard for leave to appeal to the Court. As former Justice Iacobucci observed, “even where there has been no dissent or reversal of an acquittal at the Court of Appeal, leave to appeal in criminal cases often is granted given that criminal cases are frequently considered to raise issues of public importance because they involve the liberty of the subject” (F. Iacobucci, “The Supreme Court of Canada: Its History, Powers and Responsibilities” (2002), 4 *J. App. Prac. & Process* 27, at pp. 34-35). The Supreme Court would and does exercise its leave requirement in accordance with the principles of fundamental justice.

[138] In my view, the dearth of evidence of a problem in this regard belies the conclusion that s. 37(10) denies young persons adequate procedural safeguards as was the case under past youth justice legislation, which did indeed provide for paternalistic practices and left young persons vulnerable to miscarriages of justice. On the contrary, our modern youth justice system has long left those problematic practices behind, providing young persons with enhanced procedural protections commensurate with their unique circumstances and inherent vulnerability in the justice system.

[139] For these reasons, I conclude that s. 37(10) of the *YCJA* is consistent with s. 7 of the *Charter* even in a case in which a court of appeal judge has dissented on a question of law. Nonetheless, I would not foreclose the theoretical possibility that s. 7 may guarantee an appeal as of right where a court of appeal has entered a conviction for the first time, but this is an issue which need not be decided on the facts of this case.

B. *Analysis With Respect to Section 15*

[140] The appellant also maintains that s. 37(10) of the *YCJA* discriminates against young persons on the basis of age by denying them an important procedural benefit that is granted to adults in similar circumstances. Section 15(1) of the *Charter* sets out the following guarantee:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[141] A law or a government action will contravene this guarantee: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage (*Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[142] The parties agree that s. 37(10) of the *YCJA* creates a distinction based on age. The issue is whether it draws a *discriminatory* distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. In this respect, it should also be borne in mind that age-based distinctions are generally a "common and necessary way of ordering our society" and are "not strongly associated with discrimination and arbitrary denial of privilege" (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 31).

[143] This is not the first time that an equality argument has been raised in this Court with respect to the relatively limited avenues of appeal that are available to young persons in the criminal justice system. In *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, the Court considered the statutory interpretation of s. 27(5) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, a functionally equivalent provision of the precursor to the *YCJA*. In that case, Sopinka J. noted that, in light of "[t]he policy favouring the early resolution of the adjudicative stage", "there is no anomaly" in the fact "that a young person found guilty of an offence should enjoy more restricted rights of appeal than an adult who is convicted of an offence" (pp. 1015-16). Although he did not definitively rule out an equality challenge, Sopinka J. found it "difficult to accept that a young offender can select one aspect of the scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied to adults" (p. 1017).

[144] While *C. (T.L.)* was not formally dispositive of the issue, part of its underlying rationale remains relevant to the instant case. Sopinka J.'s *obiter* remarks caution against artificially cherry-picking individual features from a multifaceted legislative scheme in order to reveal inequities between fundamentally distinct systems. The Court of Appeal for British Columbia has made similar comments warning "against artificially isolating a single provision from a comprehensive criminal justice regime intended to benefit youth and thereby finding a constitutional violation" and stating that "it is improper to single out a particular subsection", because each subsection "is so much a detail of the over-all comprehensive scheme that it cannot be, and should not be, considered separately" (*R. v. M. (J.S.)*, 2005 BCCA 417, 200 C.C.C. (3d) 400, at para. 31; *R. v. D.F.G.* (1986), 29 C.C.C. (3d) 451, at pp. 453-54).

[145] In other words, it is the actual impact of the provision in its full context that should govern the analysis, and s. 37(10) should not be divorced from its entire legislative context. An approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the *YCJA* would indeed be contrary to the contextual approach mandated in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 73, 76 and 79. The analysis instead requires a "contextual understanding of a claimant's place within a legislative scheme and society at large"; the court must ask "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme" (paras. 65 and 67). Understanding the distinct legislative scheme underlying s. 37(10) is crucial to the assessment of the *actual* impact of the law on

young persons (see P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 469).

[146] In this case, the appeal options set out in s. 37 of the *YCJA* form part of a comprehensive scheme designed to implement the Declaration of Principle made in s. 3 together with the restorative and rehabilitative concepts outlined in the preamble to the *YCJA*. Section 3(1)(b) in particular provides:

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[147] It is evident that the *YCJA* is designed to balance multiple interests. First, as Fish J. noted in *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, “[i]n keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections” which they alone enjoy (para. 41). These wide-

ranging procedural safeguards were aptly summarized by Abella and Brown JJ. in *R. v. K.J.M.*, 2019 SCC 55, at para. 142 (dissenting, though not on this point):

Such enhanced procedural rights in the *YCJA* include: extrajudicial measures (ss. 4 to 12); notice to parents (s. 26); the possibility of compelling parents to attend court (s. 27); an enhanced right to counsel (ss. 10(2)(d), 25 and 32); specific obligations for youth justice court judges to ensure that young persons are treated fairly (s. 32); reducing the possibility of bail (s. 29); creating the option of releasing young persons who would otherwise be denied bail (s. 31); *de novo* bail reviews (s. 33); the right of young persons to be separated from adults in temporary detention (s. 30); enhanced procedural safeguards surrounding the admissibility of statements made by young persons to authorities (s. 146); and a distinct sentencing regime (ss. 38 to 82).

[148] Second, the long-recognized need for enhanced timeliness and promptness in the resolution of youth cases, a principle that has been a leitmotif of this Court's jurisprudence as well as of Canada's international obligations, is codified in s. 3(1)(b)(iv) and s. 3(1)(b)(v) of the *YCJA*. Internationally, the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which is named in the *YCJA*'s preamble, guarantees the right of young persons to have criminal proceedings against them determined without delay (art. 40(2)(b)(iii)). Likewise, Rule 20.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33 (November 29, 1985), provides that cases involving young persons "shall from the outset be handled expeditiously, without any unnecessary delay". It is significant that s. 3(1)(b)(iv) and s. 3(1)(b)(v) had no equivalent in the former *Young Offenders Act* (Bala and Anand, at p. 441).

[149] In a similar vein, the Court, in determining how presumptive ceilings with respect to unreasonable delays apply in youth cases, recognized in *K.J.M.* that the interest in timeliness in such cases requires a more holistic approach, one that is multifaceted rather than being focused only on rehabilitation. It identified five main reasons why timeliness has special significance for young persons:

Reinforcing the connection between actions and consequences. First, because young persons have “a different perception of time and less well-developed memories than adults”, their ability to appreciate the connection between actions and consequences is impaired. . . .

Reducing psychological impact. Second, bearing in mind that any time spent awaiting trial occupies a greater proportion of a young person’s life than an adult’s, and that young persons perceive time differently than adults do, delay may have a greater psychological impact on a young person. . . .

Preserving the right to make full answer and defence. Third, memories tend to fade faster for young persons than for adults. The increased rapidity with which a young person’s memory fades may make it more difficult for him or her to recall past events, which may in turn impair his or her ability to make full answer and defence, a right which is protected by s. 7 of the *Charter*

Avoiding potential unfairness. Fourth, . . . [w]here a prolonged delay separates the offending conduct from the corresponding punishment, the young person may experience a sense of unfairness, as his or her thoughts and behaviours may well have changed considerably since the offending conduct took place. Therefore, to avoid punishing young persons for “who they used to be”, delay should be minimized.

Advancing societal interests. Fifth, trying young persons in a timely manner advances societal interests. Society has an interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible. [Citations omitted; paras. 51-55.]

[150] Also of significance is the role of timeliness in relation to the psychological state of victims, themselves often children, as illustrated in the instant case. This flows from the rule regarding “special considerations” in s. 3(1)(d)(ii) of the *YCJA* to the effect that “victims . . . should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system”.

[151] Thus, promptness and enhanced procedural protection are both core tenets of the youth criminal justice system (see S. Davis-Barron, *Youth and the Law in Canada* (2nd ed. 2015), at p. 177). In creating a separate youth system with distinct procedures, Parliament has acknowledged that, while young persons are uniquely vulnerable to miscarriages of justice, they are also uniquely vulnerable to harms resulting from protracted legal proceedings. These unique vulnerabilities are two sides of the same coin, and will at times even overlap. As Abella and Brown JJ. noted in *K.J.M.*, “timeliness as a procedural safeguard takes on heightened significance for young persons” in the context of a trial, not least because delays could also affect their ability to make full answer and defence (para. 151 (underlining added)).

[152] I am of the opinion that a contextual understanding of the place of young persons in the procedural scheme of the *YCJA* must also account both for their interest in prompt resolution and for the general prejudice of interacting with the criminal justice system, given that “the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (*Withler*, at para. 38).

[153] I hasten to emphasize, however, that in considering the relevance of timeliness to the question whether s. 37(10) perpetuates a disadvantage faced by young persons, I am not seeking to justify any such disadvantage on the basis that it is relevant to a legitimate state objective or on the basis of the ameliorative effect of the *YCJA* as a whole — such concerns are properly left to the inquiry under s. 1 of the *Charter*, and then only to the extent that they can specifically justify the impugned limitation (*Fraser*, at para. 69). Rather, I am simply giving full effect to the contextual analysis mandated by this Court’s approach to substantive equality (*Fraser*, at para. 42). The inquiry under s. 15(1) of the *Charter* into the perpetuation of a disadvantage requires attention to “the full context of the claimant group’s situation” and to “the actual impact of the law on that situation” (*Withler*, at para. 43; see also *Taypotat*, at para. 17). The result of this contextual inquiry may in turn be to reveal that differential treatment is discriminatory because it perpetuates disadvantage, that it is neutral, or “that differential treatment is required in order to ameliorate the actual situation of the claimant group” (*Withler*, at para. 39). This Court must, therefore, in assessing the actual impact of a leave requirement, have regard to the full context of the situation of young persons, which, I find, includes the fact that a structurally prolonged appellate review can be more prejudicial to them.

[154] With respect, Abella J.’s analysis on s. 37(10) does the opposite, as it deviates from the contextual approach mandated by substantive equality. In my view, considered in context, s. 37(10) does not perpetuate any disadvantage but, rather, appropriately balances the overlapping interests of young persons in prompt resolution

and in appellate review, given the common sense understanding that there will be an inherent and inevitable trade-off between these interests.

[155] Above all, it should be borne in mind that s. 37(10) applies equally to the Crown. Viewed in context, a leave requirement confers the corollary procedural benefit for young persons of being protected from an as of right appeal by the Crown pursuant to s. 693(1)(a) of the *Criminal Code*, a safeguard that is not afforded to adults. Where a young person is acquitted by the court of appeal but one judge of that court dissents on a question of law, s. 37(10) acts as a bulwark against protracted delays, and the benefit of finality and closure conferred by the provision is far from trivial, not just for the accused, but also for the complainants, who may themselves be young persons. The claim that this provision offers only “the possibility of saving a few months” loses sight of this crucial contextual aspect (Abella J.’s reasons, at para. 102). In other words, this claim disregards the fact that invalidating s. 37(10) would also equip the Crown with an automatic appeal against a young person who has been acquitted. In my view, to dismiss the young person’s interest in timeliness as an argument that is relevant only to the justification inquiry under s. 1 would be to bypass the contextual assessment that is needed in order to grasp the actual impact of the provision.

[156] It is true that, in a case in which leave is ultimately granted, s. 37(10) will have prolonged the process slightly for a young person whose conviction led to a dissent in the court of appeal. But this negates neither the promptness achieved where leave is denied nor the structural disincentive flowing from a leave requirement and its

impact on timeliness in the youth criminal justice system as a whole. As well, leave applications can be heard more quickly than appeals and are likely to be expedited where young offenders are involved. Considered in the context of the YCJA as a whole, s. 37(10) legitimately fosters promptness and timeliness.

[157] These benefits of the provision must also be considered in conjunction with the absence of evidence that this Court's leave process perpetuates a tangible disadvantage for young persons. Put plainly, Abella J.'s contention that "young people's access to this Court has lagged behind" is not borne out by any evidence in the record before us (para. 68). Neither the appellant nor my colleague could point to a single case in which this Court denied leave to a young person where a judge of a court of appeal had dissented. I would add that young persons are not *denied* access to this Court, given that "[t]he right to apply for leave is itself a right of access to the [c]ourt" (*Krishnapillai v. Canada (C.A.)*, 2001 FCA 378, [2002] 3 F.C. 74, at para. 24, quoting *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317 (F.C.A.), at p. 318). The final bulwark against a miscarriage of justice is not, strictly speaking, a right to an *automatic* appeal, but the right of appeal itself, whether by leave or as of right; moreover, "continuous re-litigation is not a guarantee of factual accuracy" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 41). Where a young person brings an application for leave to appeal against an affirmed conviction after a judge of the court of appeal dissents on a question of law, this Court is uniquely suited in such circumstances to consider all relevant factors, including arguments pointing to a miscarriage of justice. Given the particular costs for

young persons of an automatic oral hearing and an in-depth review of the record by a full panel, such a proceeding will not serve their interests in every case. This is especially true in light of the dictum that “[s]ometimes the opportunity for more opinions does not serve the ends of justice” (*Kourtessis*, at p. 70).

[158] Needless to say, no member of this Court would tolerate having a dubious conviction rest undisturbed simply to ensure a prompt resolution. And I am of the opinion that nothing in a leave requirement implies that wrongful convictions are somehow more tolerable in the youth justice system. This Court is not to rely on a dissent as a blanket proxy for merit in all cases, although that might be a convenient metric in the adult system. Rather, s. 37(10) allows it to take an individualized and sensitive approach which can also account for the harm of protracted appellate review in the youth justice system.

[159] A decontextualized analysis fails to capture these essential features, and effectively equates equal treatment with identical treatment, which is an approach this Court has consistently rejected (*Canadian Foundation for Children*, at para. 51). The vulnerability of young persons in the criminal justice system is not exacerbated simply because a provision of the *YCJA* fails to offer the maximum imaginable procedural benefit available to adults. This is all the more true of a benefit that is unrelated, or has at best a dubious link, to their actual vulnerability and their unique needs.

[160] In my view, the leave requirement under s. 37(10) is one of several legitimate ways in which the youth justice system can provide different procedural

avenues than the ones available to adults without degrading young persons' equal worth or reinforcing their disadvantage. Another is that young offenders are not entitled to a jury trial in every case in which an adult can elect trial by jury. Nor do they enjoy the same right to a preliminary hearing, which has historically been narrower for young persons than for adults. And yet, in deciding whether direct indictments were available to the Crown under the *YCJA*, the Court has previously acknowledged that Parliament's decision to restrict preliminary hearings for youth can actually be construed as a benefit:

Furthermore, it could even be said that there will be cases in which a direct indictment will advance the objectives and principles of the *YCJA*. To preclude prosecutors from ever using it might place those objectives and principles in jeopardy. For example, the reason related to the psychological state of witnesses is especially significant in light of the special rule set out in s. 3(1)(d)(ii) of the *YCJA* that “victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system”. Similarly, it is recognized that the preliminary inquiry lengthens the judicial process, which has a greater impact on accused young persons, “given [their] perception of time”, and given that holding a preliminary inquiry could conflict with the objectives of promptness and speed provided for in s. 3(1)(b)(v) of the *YCJA*. [Emphasis in original; text in brackets in original.]

(*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 40; it should be noted that the case preceded amendments to the *Criminal Code* which restricted preliminary inquiries to offences punishable by 14 years or more.)

[161] My colleague Abella J. and I agree that it is trite to say that the *Charter*'s guarantee of equality requires neither a sameness or formal equality nor line-by-line parity with the *Criminal Code*, but rather a search for substantive equality. Young persons have different needs and vulnerabilities than adults, which is precisely why

Canada’s youth justice system “stands separate” from that of adults (*K.J.M.*, at para. 49; *R.C.*, at para. 41). In my view, a leave requirement corresponds to that reality.

[162] In choosing to deny young persons an automatic right to appeal to this Court, Parliament did not discriminate against them, but responded to the reality of their lives by balancing the benefits of appellate review against the harms inherent in that process, in keeping with the dictum that “there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character” (*Kourtesis*, at p. 70). The fact that one specific feature of the youth system does not mirror a feature of the adult system is not a basis for a finding of discrimination.

III. Conclusion

[163] Accordingly, s. 37(10) of the *YCJA* is consistent with ss. 7 and 15 of the *Charter*, and there is no need to proceed to an analysis under s. 1.

[164] I would dismiss the appeal.

The following are the reasons delivered by

KASIRER J. —

I. Overview

[165] I have had the advantage of reading the reasons prepared by my colleagues the Chief Justice and Abella and Côté JJ. With respect for other views, I have come to the conclusion, like the Chief Justice, that s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”), is constitutionally valid. I also conclude the guilty verdict rendered against the appellant, C.P., was not unreasonable and the appeal should be dismissed on this basis.

[166] To be most plain on the various matters before the Court, I agree with Abella J.’s reasons, and with those of the majority of the Court of Appeal, that the guilty verdict rendered against the appellant, C.P., was not unreasonable. In respect of the second issue bearing on the constitutionality of s. 37(10) of the YCJA, I agree with Abella J. that this Court has jurisdiction to decide the constitutional questions. I also share the Chief Justice’s view that s. 37(10) is consistent with s. 7 of the *Canadian Charter of Rights and Freedoms*. Like him, I would leave the matter of whether s. 7 requires a first right to appeal from a conviction entered by a court of appeal — a question not before this Court — to another day.

[167] My reasons differ from those of my colleagues on whether s. 37(10) of the YCJA infringes the equality guarantee in s. 15(1) of the *Charter*. Our differences bear, in particular, on the application of s. 1 of the *Charter* to the requirement that a young person seek leave to appeal to this Court where a court of appeal affirms a conviction on an indictable offence but there is a dissent on a question of law. Like Abella J., and based in particular on the judgments of this Court in *Fraser v. Canada (Attorney*

General), 2020 SCC 28, and *Ontario (Attorney General) v. G*, 2020 SCC 38, I conclude that s. 37(10) of the *YCJA* does constitute a limit on s. 15(1) *Charter* rights. But in my respectful opinion the Crown has shown here that the limit to the equality right of young persons prescribed by s. 37(10) of the *YCJA*, when read in conjunction with s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, is justified in a free and democratic society. In the result, I would conclude that s. 37(10) is constitutionally valid.

[168] I hasten to say that I agree with many of the observations made by the Chief Justice in respect of the importance of timeliness to the rule in s. 37(10) of the *YCJA* and many of his remarks regarding the safeguards against a miscarriage of justice that are afforded to young persons who seek leave to appeal to this Court in a criminal matter. I agree too with his view that the Court's leave process is sufficiently flexible to guard against the injustice brought by the leave requirement alleged by C.P. The Chief Justice sees these considerations of timeliness and the safeguards as relevant features of the context for the determination of whether s. 15(1) has been limited; instead, as I shall endeavour to explain, I understand them as pertinent to the demonstration that the limit on s. 15(1) rights is justified under s. 1 of the *Charter*, which is a task that falls to the state. I conclude that s. 37(10) of the *YCJA* is constitutionally compliant, but I propose to come to that conclusion using some of the Chief Justice's arguments on this different path.

[169] It is best to acknowledge, from the outset, that the burden of showing the limit on s. 15(1) rights is justified that falls to the Crown under s. 1 is a heavy one. It is

best to recognize, too, that the benefit of timeliness to youth rehabilitation and reintegration into society afforded by s. 37(10) represents, at least in terms of time saved in the justice system, a relatively modest advantage over an appeal as of right. Furthermore, it is plain that if the risk of a miscarriage of justice brought by the leave requirement in s. 37(10) were a real one, that risk would likely outweigh the modest advantage of timeliness under the s. 1 analysis. I share Abella J.'s view — I am inclined to think that all members of this Court would share her view — that swift injustice for a young person would be no justice at all. There is no virtue in timely rehabilitation of an innocent young person. Section 37(10) would be a failed project if it championed rehabilitation over unsafe verdicts.

[170] But in my respectful view, s. 37(10) does not, practically speaking, expose a young person to a real risk of swift injustice and, notwithstanding the *prima facie* s. 15(1) breach for age discrimination, it is nevertheless constitutionally valid. However modest, the timeliness advantage outweighs any true risk of a miscarriage of justice for young persons associated with the added leave requirement. There is no trivializing the risks of miscarriages of justice in the criminal law but, to my mind, the Crown has demonstrated that any additional risk of a juridical error pointed to by C.P. is more theoretical than real. Where a young person seeks leave to appeal against a conviction on a question of law on which there was a dissent below, and the proposed appeal has a reasonable prospect of success, there is every reason to believe that leave would be granted. Avoiding the risk of a miscarriage of justice — even if the question of law was a matter of interest only to the parties — would in my view be a matter of public

importance warranting leave to appeal under the applicable provisions in the *Supreme Court Act*, R.S.C. 1985, c. S-26, and the *Criminal Code*.

[171] It was argued here, in particular, that the danger of miscarriage of justice is heightened when a young person must seek leave to appeal where, in the court of appeal, the dissent bears on an unreasonable verdict as the relevant question of law. I disagree. When the leave process discloses an arguable case pointing to a possible miscarriage of justice on this basis, the matter would be elevated to one meeting the requisite standard of public importance. This is because all of society has a stake in the particular young person's liberty interest even if the question of law in issue is not jurisprudentially significant. Where the proposed appeal has a reasonable prospect of success — disclosed by the reasons of the dissenting judge, the application for leave, or the record filed in support thereof — leave would be granted because the public importance criterion will have been met. The notion that leave would be denied in such circumstances — that, for reasons of dispatch, leave would be denied to a reasonably arguable appeal from a young person's conviction supported by a dissent below — is to suggest that this Court would act in a manner contrary to the principles of fundamental justice, which is untenable. Importantly, given the generous interpretation of leave criteria relevant in these circumstances, this Court is able to identify such cases on a leave application and distinguish them from those which should not go forward to the merits.

[172] Imposing a leave requirement for young persons in the limited circumstances in which an appeal as of right to this Court is available to adults under the *Criminal Code* is thus a proportionate measure open to Parliament in pursuit of the objective of timeliness, early rehabilitation, and reintegration of young people in criminal matters. This Court is institutionally equipped to identify and grant leave, based on the leave application including the evidence filed, which allows it to guard against potential miscarriages of justice in circumstances where young persons would otherwise have had an appeal as of right pursuant to s. 691(1)(a) of the *Criminal Code*. Where there is no reasonable prospect of success for the proposed appeal, the leave requirement can bring an end to cases that manifestly do not raise this potential injustice in a timely manner, before proceeding to a full hearing. In that light, it was open to Parliament, as the Crown argues, to enact s. 37(10) of the *YCJA*, as a rule that brings an advantage of timeliness to young persons in a manner that outweighs any negative effects brought by the requirement of leave. For the reasons that follow, I conclude the limit on the guarantee against age discrimination is justified.

II. The Applicable Legal Principles

[173] The burden is on the party seeking to rely on the impugned provision to establish that the limit on s. 15(1) is justified under s. 1 of the *Charter* (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-37). The law is well settled here: that party must demonstrate a pressing and substantial objective for the limit and that the means chosen to advance this objective do not disproportionately limit the s. 15(1) right.

Proportionality demands that the limit be rationally connected to the stated pressing and substantial objective, that it be minimally impairing, and that its benefits outweigh its negative effects (*Ontario v. G*, at para. 71).

[174] The right to equality, like all *Charter* rights, must sometimes give way to legitimate societal objectives. I am mindful, however, that the relationship between s. 15(1) and s. 1 requires careful attention. As one scholar has observed, there is something of a “normative mismatch” between these two provisions of the *Charter*, in that “section 15 could be seen as an attempt to protect from the ‘tyranny of the majority’, . . . and section 1 brings back the idea that the needs of the whole might, on balance, justify discrimination” (S. Lawrence, “Equality and Anti-discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 815, at p. 829).

[175] Wilson J. explained in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that the burden resting on the state to justify a limit on s. 15(1) rights is rightly an onerous one (p. 154). I agree with Professor S. Martin, writing before she was a judge, that “a strong understanding of the interrelationship of equality, freedom and democracy under the *Charter* will provide the basis to distinguish between infringements which are reasonable and demonstrably justified” and those which are not (“Balancing Individual Rights To Equality And Social Goals” (2001), 80 *Can. Bar Rev.* 299, at p. 364). The focus of the inquiry must be “on the seriousness of the

discrimination and its relationship with the underlying values in a free and democratic society” (pp. 366-67; see also p. 365).

[176] On this latter point, I note that a limit on s. 15(1) rights based on a person’s age has been viewed in some contexts as less serious and thus more easily justified. As Professor P. W. Hogg wrote, a “minority defined by age is much less likely to suffer from the prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess” (*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at p. 55-66). Moreover, it is notable that this Court has found limits on s. 15(1) rights on the basis of age to be more susceptible to justification based on legitimate state objectives (see, e.g., *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 297 and following; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 520-31; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, at pp. 463-64; see also, relatedly, *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 110).

[177] The justification analysis must be attentive to the context of the legislative objectives at issue (see, e.g., C. D. Brecht, “The Right to Equality and *Oakes*: Time for Change” (2009), 27 *N.J.C.L.* 59, at p. 73). The state must not only identify a pressing and substantial objective (*Fraser*, at paras. 125-29), but that objective must also be scrutinized so that state conduct resulting in the most odious forms of discrimination is not excused. As Iacobucci J., dissenting, put it in *Egan v. Canada*, [1995] 2 S.C.R. 513,

“a constitutionally impermissible purpose will not save a law under s. 1” (para. 210; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 115-16). When considering whether the objective is pressing and substantial, for example, an avowed purpose of “injuring or degrading” a group would be plainly illegitimate (V. C. Jackson, “Proportionality and Equality”, in V. C. Jackson and M. Tushnet, eds., *Proportionality: New Frontiers, New Challenges* (2017), 171, at p. 175).

[178] This does not, however, preclude limits that “promote other values and principles” (*M. v. H.*, [1999] 2 S.C.R. 3, at para. 107 (emphasis in original); D. Proulx, “Droit à l’égalité”, in *JurisClasseur Québec — Collection droit public — Droit constitutionnel* (loose-leaf), vol. 2, by S. Beaulac and J.-F. Gaudreault-DesBiens, eds., fasc. 9, at Nos. 6 and 47). At the rational connection stage, the key question is whether the *prima facie* discrimination at issue furthers the legitimate legislative objectives (see *Egan*, at paras. 191-98, per Iacobucci J., dissenting; *M. v. H.*, at paras. 109-16; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 44; *Ontario v. G.*, at para. 73).

[179] If these hurdles can be overcome, a margin of appreciation is afforded to legislatures in selecting the means to achieve their objectives (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 439-40, per McLachlin C.J., concurring, and at paras. 401-5, per Deschamps J., dissenting in part; *Centrale*, at paras. 45-50). The means must fall within a range of reasonable alternatives open to a legislature to achieve its objectives so as to be minimally impairing (*RJR-MacDonald*

Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 160; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 93-94). Finally, the benefits of the legislative objectives must, of course, outweigh their negative effects (*Centrale*, at paras. 51-54).

III. The Limit on Section 15(1) Is Justified Under Section 1

[180] Mindful of these principles, I turn to the constitutional question at issue. The notice of constitutional question summarizes C.P.'s specific concern with s. 37(10) of the *YCJA* as it relates to s. 15(1) of the *Charter*, and connects it to s. 691(1)(a) of the *Criminal Code*:

Does s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by impermissibly discriminating against young people to the extent that it purports to deny a young person whose conviction was upheld by a majority of the court of appeal the procedural benefit of an appeal as of right to the Supreme Court of Canada pursuant to s. 691(1)(a) of the *Criminal Code*, where such benefit is granted to an identically situated adult offender?

[181] For indictable appeals in youth matters, the *YCJA* incorporates the *Criminal Code* appeal provisions (*YCJA*, s. 37(1)). Like an adult, a young person convicted of an indictable offence and whose conviction is unanimously affirmed by the court of appeal has an appeal to this Court with leave on any question of law (*Criminal Code*, s. 691(1)(b)). However, because s. 37(10) of the *YCJA* provides that the judgment of a court of appeal in a youth criminal matter cannot be appealed to this

Court except with leave, young persons, unlike adults, do not have an automatic right to appeal to this Court where a conviction on an indictable offence is affirmed at the court of appeal and there is a dissent on a question of law (*Criminal Code*, s. 691(1)(a)). The constitutional question before this Court is particularized to this s. 691(1)(a) appeal route. It is this narrow instance of *prima facie* age discrimination that the Crown must therefore justify.

[182] While the constitutional issue is being argued for the first time before this Court, it bears noting that the question pertains to proceedings unique to this forum and, as the Crown noted in its argument in support of the constitutionality of s. 37(10), engages its particular institutional knowledge of the leave process (R.F., at para. 38). Indeed, when, as in this case, an enactment that limits the right to equality relating to the criminal justice system is scrutinized under s. 1, judges’ “knowledge and understanding” of the workings of the courts may provide them with a “higher degree of certainty” than in some other settings when measuring whether the limit is justified in a free and democratic society (*McKinney*, at p. 305). I also note the Attorney General of Canada intervened in this case and made submissions on s. 1 of the *Charter* with a view to justifying a provision enacted by Parliament.

A. *Pressing and Substantial Objective*

[183] C.P. does not accept that s. 37(10) of the *YCJA* has a pressing and substantial objective (A.F., at para. 92; transcript, at p. 41). I must respectfully disagree.

[184] According to the statutory Declaration of Principle in s. 3 of the *YCJA*, the youth criminal justice system is designed, in part, to promote timeliness, early rehabilitation, and reintegration in youth criminal matters. Section 3(1)(b) of the *YCJA* provides that the criminal justice system for young persons must emphasize “(i) rehabilitation and reintegration, . . . (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time”.

[185] While the case did not concern issues of constitutionality, in *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, Sopinka J. recognized that the policy favouring early resolution and rehabilitation was served by an analogous appeal provision under the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (p. 1016; R.F., at paras. 16 and 27; I.F., AGC, at para. 12). Likewise, in the case of s. 37(10) of the *YCJA*, I agree with the Attorney General of Canada that “providing for appeals by leave instead of by right favours early resolution of matters involving youth to allow for commencement of the rehabilitation stage” (para. 54).

[186] Timeliness has special significance for young persons. Youth justice scholars have observed in this context that young people perceive time differently and have less well developed memories than adults (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 144). Timeliness reinforces the connection between the actions and consequences, reduces psychological impact, avoids a sense of potential

unfairness, and advances societal interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible (*R. v. K.J.M.*, 2019 SCC 55, at paras. 51-52 and 54-55). It has consequently been said that “[t]he effectiveness of the juvenile justice process depends at least in part on its timeliness” (J. A. Butts, G. R. Cusick and B. Adam, *Delays in Youth Justice* (2009), at p. 8; see also Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), at p. 154).

[187] In light of the above, I have no difficulty concluding that promoting timeliness, early rehabilitation, and reintegration in youth criminal matters is a pressing and substantial objective.

B. *Rational Connection*

[188] A reasonable inference that s. 37(10) of the *YCJA* will help to bring about the pressing and substantial objective is sufficient to establish a rational connection (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 143).

[189] C.P. says s. 37(10) of the *YCJA* is not connected to the pressing and substantial objective of timeliness, early rehabilitation, and reintegration. The total time to process and decide a leave application, he says, is not materially shorter than the

time to hear and decide an as of right appeal and, if leave is granted, the total time is longer than an as of right appeal.

[190] I disagree. Section 37(10) of the *YCJA* is rationally connected to the relevant objective. By requiring leave in those circumstances where there would otherwise be appeals as of right, this provision serves the goal of timeliness. The leave requirement may well serve as a disincentive to bringing an unmeritorious appeal. Moreover, leave applications are generally decided more quickly than appeals. On average, this Court renders leave decisions in approximately four months (Supreme Court of Canada, *2020 Year in Review* (2021), at p. 34). Conversely, it takes cases at this Court an average of eight months to be heard after leave is granted or a notice of appeal as of right is filed. Should the appeal be taken on reserve, further time will elapse prior to the time judgment is rendered. As the Attorney General of Canada argues, the leave to appeal process can bring an early end to the proceedings of applicants whose potential appeals are without merit (para. 55). Such applications for leave will be dismissed, rather than proceeding to a full appeal. In this way, and while it should be acknowledged the time saved is not always substantial, s. 37(10) of the *YCJA* is rationally connected to the goal of promoting timeliness, early rehabilitation, and reintegration. When C.P. argues that s. 37(10) “does vanishingly little” (A.F., at para. 90) to advance the objective of early resolution of the adjudicative process for young people in order to facilitate rehabilitation, he is not denying a rational connection but proposing an argument that is best left to the final step of the proportionality analysis.

[191] I do recognize the appeal process may be longer on average for those young persons who are successful in their leave applications to this Court, as compared to a scenario in which there was no leave requirement.

[192] The comparison proposed by C.P. is, however, a difficult one to make. When the Court grants leave, it does so on the unstated presumption that the proposed appeal is an arguable one or the question of law requires the guidance of the Court. No such presumption obtains in respect of an appeal as of right. I note further that when leave is granted, an appellant is not necessarily confined to arguing the narrow question of law identified by the dissent in the court below as in an appeal as of right. Unless this Court restricts the issues that will be heard, leave to appeal is generally understood to be granted at large (*R. v. Keegstra*, [1995] 2 S.C.R. 381, at para. 28). This makes the comparison difficult.

[193] But, in any event, C.P.'s observation, as it relates to appeals in which the Court sees some *prima facie* merit at the leave stage, does not preclude a finding that s. 37(10) of the *YCJA* is rationally connected to the legislative objective. Section 37(10) of the *YCJA* is designed to bring a rapid conclusion to those cases where there is no reason to hear the appeal which raises a question of law that is without merit. This is broadly analogous to the power courts of appeal have to dismiss summarily an appeal as of right on a question of law that is frivolous without a full hearing on the merits (*Criminal Code*, s. 685(1)). Section 37(10) of the *YCJA* therefore furthers the

legislative goal of timeliness, early rehabilitation, and reintegration in youth criminal matters.

C. *Minimal Impairment*

[194] The question at this step of the analysis is whether s. 37(10) of the *YCJA* falls within a range of reasonable alternatives open to Parliament to achieve its objective. This margin of appreciation afforded to legislatures, as McLachlin C.J. explained in *Quebec v. A*, is particularly important where the measure seeks to balance legitimate competing social values (para. 439). In that case, the provincial legislature sought to balance equal treatment of property rights and support obligations in conjugal relationships against individual freedom to choose whether or not to marry or enter into a civil union. McLachlin C.J. explained that the question the Court must ask is whether “the law goes too far *in relation to the goal the legislature seeks to achieve*” (para. 442 (emphasis in original)). Likewise, in this case, Parliament set out to balance the various social objectives identified in the Declaration of Principle in designing a system of youth criminal justice (*YCJA*, s. 3). The question is whether Parliament’s imposition of a leave requirement in s. 37(10) goes too far to achieve its objective of timeliness, early rehabilitation, and reintegration in youth criminal matters.

[195] C.P. says s. 37(10) of the *YCJA* is not minimally impairing because the leave to appeal process is no substitute for an appeal as of right. I acknowledge that imposing a leave requirement on an otherwise meritorious appeal could raise a potential for miscarriage of justice that is not present in the case of adults who have an appeal as

of right. Youth must first convince this Court to grant leave before their appeal is heard on the merits, even though they are at least as susceptible to wrongful conviction. However, in my view, the leave to appeal process serves as an effective bulwark against miscarriages of justice and is sufficient to fulfill the requirement of minimal impairment.

[196] This Court exercises its leave power in a manner that allows it to hear appeals in cases raising a potential miscarriage of justice. I acknowledge the observations that, as a general matter, leave to appeal is granted exceptionally (M. Vauclair and T. Desjardins, *Traité général de preuve et de procédure pénales* (27th ed. 2020), at para. 341), and that “[t]he single most important criterion determining the success or failure of a leave application is the public importance of the issues it raises” (E. Meehan, et al., *Supreme Court of Canada Manual: Practice and Advocacy* (loose-leaf), at p. 3-3). But commentators have also long recognized that the concept of “public importance” does not necessarily mean that the issue raised in the application has a far-reaching impact on the law in criminal matters, as the Crown observes (R.F., at para. 39). Sopinka J., speaking extra-judicially, noted that in criminal matters the public importance criterion is “not applied as strictly. If an applicant has not had a fair trial or was possibly wrongfully convicted, we may grant leave even in the absence of an ‘earth-shaking’ issue of law” (Meehan, at pp. 3-4 to 3-4.1, quoting an address by Sopinka J. given on April 10, 1997). This principle was corroborated by Iacobucci J., writing extra-judicially, who stated that “even where there has been no dissent or reversal of an acquittal at the Court of Appeal, leave to appeal in criminal

cases often is granted given that criminal cases are frequently considered to raise issues of public importance because they involve the liberty of the subject” (F. Iacobucci, “The Supreme Court of Canada: Its History, Powers and Responsibilities” (2002), 4 *J. App. Prac. & Process* 27, at pp. 34-35).

[197] There is only one circumstance we are called upon to consider by the constitutional question in this appeal: when a young person who is convicted of an indictable offence, and whose conviction is affirmed by the court of appeal, seeks to appeal to this Court. Like an adult, the young person has a right of appeal on any question of law on which a judge of the court of appeal dissents. Unlike an adult, by reason of s. 37(10), the young person’s right of appeal requires leave.

[198] C.P. says this constitutes a limit on his s. 15(1) right to equality that cannot be justified under s. 1. He argues — and in this he is joined by the intervener Criminal Lawyers’ Association (Ontario) (“CLA”) — that when that question of law upon which the dissent rests is an unreasonable verdict, the added requirement of leave creates a serious risk that leave will be denied because the question of law will not be seen as one of “public importance”.

[199] The CLA says that “a test of ‘public importance’ implies that the legal issues at stake in the case must transcend the particular dispute between the two parties” (I.F., at para. 12). The CLA submits that an unreasonable verdict, while a question of law, does not typically raise a question that transcends the parties’ particular dispute. Generally speaking, an appeal based on a dissent that has identified a verdict as

unreasonable does not raise a novel or unsettled point of law that requires direction from this Court. As a result, submits the intervener, “an unreasonable conviction, will, largely, not be reviewed by this Court and errors upon which provincial Courts of Appeal cannot agree will not be corrected. Wrongful convictions will result” (para. 2).

[200] I disagree. This risk of wrongful convictions decried by C.P. and the CLA rests on a flawed understanding of the leave process.

[201] In my view, the public importance criterion is best understood in this context as one that is engaged not only by jurisprudentially important legal issues that qualify as issues of public importance on that basis, but also by those that raise serious questions of law about the safety of the verdict in criminal matters. The issue of a wrongful conviction transcends the particular defendant and engages the integrity of our system of justice as a whole, thereby raising issues of public importance for the purposes of granting leave to appeal.

[202] By way of example, I note that in *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206, the defendant sought leave to this Court on the ground that the guilty verdict was unreasonable (para. 1). Cromwell J., writing for the panel of three judges, found it was in the interests of justice to order the release of certain exhibits for the purpose of this leave application, due to the possible significance of this evidence to the unreasonable verdict issue (para. 9). Ultimately, leave to appeal was granted, fresh evidence related to the released exhibits was admitted and the appeal was allowed on that basis (*R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at paras. 74-75 and 78). These

proceedings suggest strongly that this Court is alive to issues of unreasonable verdicts at the leave to appeal stage even if those issues do not necessarily demonstrate a broad legal importance that transcends the interests of the parties beyond the possibility of a wrongful conviction. This Court is unquestionably concerned with the possibility of miscarriages of justice (see, e.g., *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 26) and can be expected to exercise its power to grant leave accordingly.

[203] I note as well that in *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641, Doherty J.A. discussed leave to appeal to a provincial court of appeal from a decision upholding a conviction on a summary offence and, in doing so, analogized to this Court's ability to grant leave to appeal for indictable offences (para. 20). Notably, he explained that the interests of justice require granting leave where there is a "strong likelihood" an error of law by the lower court caused the conviction to be sustained (para. 34). In the same way, I am of the view that this Court has the power to grant leave in youth criminal matters when the application for leave to appeal raises the risk that a miscarriage of justice will occur if the appeal is not heard and where the proposed appeal has a reasonable prospect of success.

[204] Indeed, as a guardian of rights under the *Charter* (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169), this Court has not only an ability to exercise its power to grant leave mindful of those rights and the fundamental principles of justice, but, in my view, has a responsibility to do so.

[205] I also note that this Court has the institutional capacity to identify possible miscarriages of justice through the leave to appeal process. In an application for leave, the applicant must file not only the lower court decisions and argument, but also any relevant excerpts of the transcripts or evidence, including exhibits, on which it intends to rely (*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 25(1)). These materials must be filed with the Court electronically, in addition to printed versions (r. 26(1)), and, pursuant to the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, January 27, 2021 (online), electronically filed material must be searchable. The overall result is that the evidentiary record relevant, for example, to advancing an argument based on an unreasonable verdict may be filed at the leave stage.

[206] Further, I recall that the as of right appeal from which C.P. would have benefited had he been an adult is restricted to instances where there is a dissent in the court of appeal on a question of law. The grounds for such dissent will be explicitly recorded in the formal judgment pursuant to s. 677 of the *Criminal Code*. In these circumstances, this Court's attention is not only drawn to the dissent, but to the question of law that meant the dissenting judge would have arrived at a different outcome. In deciding whether a proposed appeal meets the criteria for granting leave, this Court will naturally consider, as a practical matter, the presence of a dissent in the court below as one sign that the appeal may well have a reasonable prospect of success. In some measure, one might be inclined to say that the very fact of the dissent is something of a red flag; it serves as a signal to the possible seriousness of the appeal for which leave

is sought. In fact, a study of leave decisions between 1993 and 1995 noted that a “dissenting vote in the lower appellate court also catches the eye of the Court; dissents are significantly and positively related to leave decisions” (R. B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (2004), at p. 70; see also p. 10). It follows that the leave process provides an effective safeguard for young persons in those cases where a similarly situated adult would have an appeal as of right under s. 691(1)(a).

[207] For these reasons, I conclude that Parliament’s decision to impose a leave requirement in these circumstances in pursuit of the goal of timeliness, early rehabilitation, and reintegration in youth criminal justice matters is one that minimally impairs the s. 15(1) right.

D. *Overall Proportionality*

[208] The final question is whether the Crown has met its burden to show that the benefits of s. 37(10) of the *YCJA* outweigh its negative effects. This case requires the Court to balance the benefits of the timely conclusion of youth criminal matters against the discriminatory impact of imposing a leave requirement in circumstances where adults can appeal as of right.

[209] Section 37(10) of the *YCJA* addresses the heightened degree of prejudice associated with structurally drawn-out appellate review. As Doherty J.A. noted in *R. (R.)*, “[p]rolonged appellate proceedings detract from the timeliness and finality of

criminal verdicts. Dispositions in criminal matters made in the detached, rarefied climate of the appeal court, years after the relevant events, by a court with virtually no connection to the place or people affected by the allegation are not the ideal way to resolve criminal cases” (para. 16). Timeliness is an especially important goal in youth criminal justice with demonstrable and long-recognized benefits (*K.J.M.*, at paras. 51-52 and 54-55) and s. 37(10) of the *YCJA* confers those benefits by allowing this Court to filter out appeals that are without merit at the leave stage. As I noted above, the leave process is, on average, completed sooner than the hearing of an appeal as of right.

[210] This benefit must be weighed against the negative effects caused by the *prima facie* discrimination. In this case, this is the fact that young persons whose conviction for an indictable offence is affirmed by a court of appeal, but with a dissent on a question of law, must seek leave to appeal to this Court.

[211] I acknowledge that the appeal as of right to this Court has been described as “very meaningful” (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-53*, No. 1, 2nd Sess., 33rd Parl., October 5, 1987, at p. 17 (Robert Kaplan)). It is no doubt true that this Court retains jurisdiction as a so-called “court of error” on some questions of law in criminal matters. But, when compared carefully to the right of appeal with leave, the different role of the appeal as of right should not be overstated. As the Crown underscores, s. 37(10) of the *YCJA* does not deny a young person the possibility of an appeal to this Court (*R.F.*, at

para. 38). It affords young persons the ability to seek leave to appeal on the basis of the process I have described above. Even where leave is required, this Court is alerted to the fact that a dissent by a court of appeal judge raises doubt, in the mind of that judge, about the safety of the verdict and is able to measure the seriousness of the argument that there has been a miscarriage of justice. The leave process allows this Court to identify and grant leave in those cases where there is a reasonable prospect that an appeal may correct a miscarriage of justice.

[212] To summarize on this point, I recall that Parliament, in enacting s. 37(10) of the *YCJA*, did not choose to take away a young person's access to this Court, it only added a leave requirement. When deciding the leave application, this Court will have the benefit of the reasons offered in the dissent below on the question of law on appeal, as isolated by s. 677 of the *Criminal Code*. The Court will have the argument in support of leave and the required supporting materials, including evidence at trial, that will allow the Court to measure whether the question of law raises a meritorious appeal. Most importantly, and contrary to what C.P. and some of the interveners have argued before us, the criteria for granting leave as relevant to youth criminal matters means that when the liberty of the young person is at stake, a *prima facie* meritorious appeal on the question of law — including an unreasonable verdict argument — would meet the public importance standard even if the matter does not, on its face, transcend in jurisprudential importance the interest of the parties. Where, in such cases, the leave application discloses a reasonable prospect of success, this Court can grant leave.

[213] For the reasons outlined above, I am confident that the leave process provides a safeguard for youth in circumstances where an adult would have an appeal as of right. It was open to Parliament to seek a legislative path that places greater weight on the negative effect of longer appellate proceedings that have no utility while simultaneously maintaining access for meritorious appeals through the leave process.

[214] For these reasons, I conclude that the benefits in terms of timeliness outweigh the negative effects of the *prima facie* discrimination at issue. Any enhanced risk of miscarriage of justice as a result of having to seek leave to appeal in the circumstances raised in the notice of constitutional question is minimized by the leave to appeal process. Imposing a leave requirement in service of the broader goals of youth criminal justice is consistent with the place of equality in a free and democratic society.

IV. Conclusion

[215] I would dismiss the appeal.

[216] In answer to the constitutional questions raised here, I conclude that s. 37(10) of the *YCJA* does not infringe s. 7 of the *Charter*. It amounts to a limit of s. 15(1) of the *Charter*, but one that is justified by s. 1. Accordingly, I would conclude that s. 37(10) of the *YCJA* is constitutionally valid.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[217] This is an appeal from a verdict of guilty of sexual assault entered by Crosbie J. of the Ontario Court of Justice. The appellant, C.P., was 15 years old at the time of the events and was therefore tried pursuant to the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

[218] It was not in dispute that C.P. had had sexual intercourse with the complainant, R.D., who was 14 years old at the time, at a beach party where both had been drinking alcohol. Because R.D. had no memory of the intercourse, she was unable to provide direct evidence that she had not consented. The central question in this case was thus whether R.D. had been too intoxicated to consent when the intercourse took place, and not whether she did or did not in fact consent. Pinpointing the time of the sexual activity was key to answering this question. If it had occurred *early in the evening* when R.D. was only beginning to experience some of the effects of the alcohol she was drinking, a capacity to consent could be inferred. However, if the intercourse had occurred *later in the evening* when R.D. was severely intoxicated, it would be open to the trial judge to infer that R.D. was incapable of consenting.

[219] The trial judge (2017 ONCJ 277) found that the intercourse had occurred later in the evening. She therefore concluded beyond a reasonable doubt that R.D. had

been too intoxicated to be capable of consenting at the time of the intercourse and that C.P. had had knowledge of her incapacity.

[220] A majority of the Court of Appeal for Ontario (2019 ONCA 85, 373 C.C.C. (3d) 244) upheld C.P.'s conviction. Nordheimer J.A., dissenting, would have entered an acquittal. C.P. is asking this Court to set aside his conviction and to enter a verdict of acquittal. In the alternative, he asks us to order a new trial. I agree with C.P. that the verdict is unreasonable.

[221] C.P. also submits that s. 37(10) of the *YCJA*, which deprives young persons of the automatic right of appeal that is available to adults where there is a dissent on a question of law in a court of appeal, violates ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and that the violations are not justified under s. 1 of the *Charter*. Given that leave has been granted in this case, and given the conclusion I reach on the merits of the appeal, I decline to take a position on the *Charter* arguments. However, I feel a need to reiterate the importance of a dissent on a question of law. More particularly, in matters involving young persons, I am of the view that such a dissent, especially a powerful one like that of Nordheimer J.A. in this case, clearly indicates that an appeal has some merit and that the conviction must be reviewed.

[222] For the following reasons, I would allow the appeal, set aside the conviction and enter an acquittal.

II. Context

[223] On April 23, 2016, a number of teenagers met outside a liquor store (“LCBO”) in Toronto to “shoulder tap”, that is, to ask adults to go into the store and buy alcohol for them. The group of teenagers had planned to take alcohol to a nearby beach to celebrate the birthday of a certain T. Among them were R.D. and C.P.

[224] R.D. and C.P. had known each other for about two months. They became friends by frequently spending time together with other teenagers after school and on weekends at a coffee shop.

[225] It is not clear exactly when the group was at the LCBO. C.P. testified that he had arrived around 8:30 or 9:00 p.m. and was there for about 30 to 45 minutes, whereas R.D. said they had been at the LCBO at about 9:00 or 10:00 p.m. In any event, it is not in dispute that the LCBO closed at 10:00 p.m. and that the group would thus not have left later than that.

[226] After obtaining bottles of vodka for their party, the group of teenagers made their way to the beach. C.P. and R.D. walked together to a streetcar that went in that direction. They sat close to each other in the streetcar and talked. On the way to the beach, the teenagers were drinking straight from the bottles and passing them around.

[227] To get to the beach, they had to walk through a parking lot and then down a steep hill. When they arrived at the beach, a group of older youths, who were already

there, had started a bonfire. The older group agreed to let the new arrivals join them. According to her friend G.G., R.D. was not drunk when they arrived at the beach.

[228] Once again, it is not clear exactly when the group got to the beach, although the evidence places the time of arrival somewhere between 10:00 and 11:00 p.m. R.D. told the police that the group had arrived during that period, and G.G. testified that they had arrived around 10:30 p.m. C.P.'s account of the duration of the trip from the LCBO to the beach, which the trial judge did not reject, points to the same period.

[229] C.P. and R.D. sat down together on a mattress by the fire. They talked and drank together. After 15 to 20 minutes, they started French kissing on the mattress. Their kissing was interrupted, however, when some people from the older group decided to throw the mattress into the fire.

[230] Having been forced to move, R.D. went to sit by some rocks about 5 to 10 feet away from the fire and C.P. went to talk with one of his friends for 5 minutes.

[231] R.D. did not testify at trial and was never cross-examined. Instead, the Crown filed a videotaped statement R.D. had made to the police and a transcript of that statement. In her statement, R.D. had told the police that her memory was blurry, but that she remembered kissing C.P. on the mattress until it was thrown into the fire and sitting by the rocks.

[232] C.P. testified that he had decided to leave his friend and join R.D. by the rocks because he wanted to continue kissing her. According to C.P., they began again where they had left off. Despite her allegedly blurry memory, R.D. did remember lying on the sand by the rocks covered with a blanket and kissing C.P.

[233] C.P. added that while they were kissing by the rocks, he started touching her crotch through her clothes. He testified that R.D. had then asked him to “Fuck me, [C.]”. C.P. admitted that this had taken him by surprise, but that he had no reason to doubt that she wanted to have intercourse with him. Given the earlier kissing, this may have appeared as the natural culmination of what was happening between them.

[234] C.P. testified that after R.D. had said “Fuck me, [C.]”, he helped her pull down her pants and they had sexual intercourse. He did not use a condom, because he did not have any. He stated that R.D. had been conscious throughout the intercourse and that she did not appear to be too intoxicated to consent. R.D. told the police that she did not remember having had intercourse, but recalled pulling up her pants afterwards.

[235] Significantly, although there were about a dozen people around the fire, that is, within 5 to 10 feet of the place where the intercourse occurred, the Crown did not call a single witness who had witnessed it and could tell the court whether R.D. had been passed out or had simply been tipsy. This is surprising, given that it took place only 5 to 10 feet away and thus must not have occurred unnoticed. In fact, there were

a number of people who discussed that “event” among themselves that evening, and on social media the next morning.

[236] C.P. testified that after they had finished, he stood up while R.D. pulled up her pants. As I mentioned above, although R.D. said that she did not remember having had intercourse with C.P., she did recall pulling up her pants.

[237] It is not in dispute that E.G. arrived at the party after the intercourse and found R.D. asleep with vomit on her, and that, on being awakened, R.D. had trouble talking and kept saying that she was cold. What is in dispute, however, is the timing of E.G.’s arrival in relation to the intercourse.

[238] On the one hand, C.P. testified that when he had stood up after having intercourse, he heard that his friends J. and E.G. were arriving at the beach and decided to go talk to them, which he did for 10 to 15 minutes. C.P., J. and E.G. then walked over to see R.D. and found her vomiting. In response to a leading question asked by the Crown in cross-examination, C.P. agreed, however, that E.G. had gone “directly” over to R.D.

[239] On the other hand, E.G., who had had little to drink that evening, testified at trial that she had arrived at the beach after the rest of the group and went *directly* over to R.D. upon arriving. But this testimony is inconsistent with E.G.’s statement to the police that she drank some of the vodka that had been left and then stayed with R.D. for the rest of the evening. If she stayed with R.D. throughout the evening, there is no

time when she could have drunk vodka other than between her arrival at the beach and her observation of R.D. lying asleep, which has the effect of widening the gap between the time of the intercourse and the time when she went to see R.D.

[240] E.G. also said that C.P. was very drunk when she arrived. According to her testimony, C.P. was having difficulty walking, and kept repeating himself and making random comments.

[241] G.G. who was also at the beach that evening, confirmed that C.P. was quite intoxicated that evening. She also testified that when she left the party around 12:30 a.m., E.G. had not yet arrived. G.G. added that R.D. had started throwing up just before she left.

[242] At either 1:24 or 1:49 a.m., R.D. had a telephone conversation with L.L., another teenager who was not at the party. L.L. testified that R.D. was slurring her words over the phone. She also kept apologizing, but he did not know the reason why. At the time, L.L. and R.D. had been seeing each other romantically, but they were not in a formal relationship.

[243] Later on, the mothers of three of the girls arrived at the beach to take them home. R.D. was helped up the hill to the parking lot. While the mothers were assembling the teenagers in the parking lot, R.D. and C.P. were seen hugging each other: R.D. had her hands around C.P.'s waist and her head was resting on his shoulder. R.D. then got into the vehicle of E.G.'s mother.

[244] E.G.'s mother did not take R.D. home. It had instead been decided that she would be taken to G.G.'s house. G.G.'s mother gave R.D. toast and water and offered her a bed. R.D.'s mother was then informed that her daughter was staying at G.G.'s house.

[245] The next morning, R.D.'s mother picked her up at G.G.'s house and took her home. R.D. went back to sleep. After waking up, she read a text message from one of her friends, who told her that a picture of her sleeping under a blanket on the beach, with the caption "[s]he fucked [C.] then passed out", was being sent around. Humiliated, R.D. said to her friend, "I wanna die [*sic*]". L.L., the boy R.D. was seeing at the time, also got the message. Clearly upset, he forwarded the picture to R.D. and said "U fucked [C.]. Thats why im done [*sic*]". R.D. answered "I don't remember that tho [*sic*]".

[246] Alarmed by the situation, R.D. called her mother to her bed and told her about the rumour. R.D.'s mother provided double hearsay evidence⁷ to the effect that her daughter R.D. had told her that some of her friends were saying that C.P. had had sex with her *while* she was passed out on the beach; at least, that is how R.D.'s mother interpreted the situation. It is noteworthy, however, that none of the text messages R.D. received that morning mentioned that C.P. had had sex with her *while* she was passed out. Rather, the message indicated that she had had sex with C.P. and *then* passed out.

⁷ Although the hearsay evidence was admissible because the defence did not object to it, it should nonetheless be of lower probative value.

[247] R.D.'s mother decided to take her daughter to the hospital to be examined. The medical staff swabbed R.D. and found DNA that was later confirmed to match that of C.P. R.D. initially refused to report the incident to the police. However, her mother managed to convince her to do so by saying, among other things, that not to report it would amount to condoning the fact that C.P. had had sex with her while she was passed out, although R.D. could not confirm that it had in fact occurred *while* she was passed out and the text messages were actually to the opposite effect. When making her statement to the police later in the day after she went to the hospital, she was asked whether she had wanted to have sex with C.P., and her answer was "I don't remember it so, I don't, I don't think so".

III. Decisions of the Courts Below

A. *Ontario Court of Justice, 2017 ONCJ 277 (Crosbie J.)*

[248] The trial judge noted that it was not in dispute that C.P. had had sexual intercourse with R.D. Because R.D.'s lack of memory meant that she could not testify that she had not communicated consent, the Crown's case rested on the theory that her intoxication had made her incapable of consenting in any event. The Crown therefore had to prove the following elements beyond a reasonable doubt: (1) R.D. was too intoxicated to consent; (2) C.P. knew that R.D. could not have consented; and (3) C.P. did not have an honest but mistaken belief in consent. The trial judge concluded that all these elements were established beyond a reasonable doubt, and convicted C.P. of sexual assault.

(1) Actus Reus — R.D.'s Incapacity to Consent

[249] The trial judge properly recognized that the timing of the sexual intercourse during the evening was crucial to the determination of whether R.D. had been too intoxicated to consent:

Had the sexual activity occurred closer in time to when the group first arrived — when R.D. was drinking but not yet feeling significant effects of her alcohol consumption — the Crown may well have had more difficulty establishing that R.D. lacked the capacity to consent. The further in time, however, to the point when R.D. was asleep, motionless, incomprehensible, and vomiting, the more likely it is that the Crown would be able to establish that R.D. lacked the minimal capacity to consent. [Emphasis added; para. 90 (CanLII).]

In other words, the question was *how long* after the intercourse R.D. was discovered by her friends in a state of extreme intoxication. If the Crown was unable to determine beyond a reasonable doubt that it had taken place shortly before E.G. saw R.D., a finding of guilt would be unavailable.

[250] Although the trial judge fully understood the importance of the timing, she acknowledged that the evidence was insufficient for her to determine approximately when the intercourse had occurred during the evening:

As the trial unfolded, it seemed there was a lack of clarity with respect to the timing of the sexual activity. As noted in the review of the evidence, the Crown witnesses were only able to make a guess about when the group arrived at the beach. E.G. and G.G. did not witness any sexual activity and therefore could not help pinpoint the time it happened. R.D. had fragments

of memory but certainly was not able to specify the timing of the incident.
[Emphasis added; para. 90.]

[251] Ultimately, the trial judge found that the intercourse had occurred shortly before E.G. arrived at the beach. She based this finding on “[t]he combination of E.G.’s and C.P.’s evidence” (para. 90).

[252] First, the trial judge noted that E.G. had testified that she went over to R.D. “instantly” upon arriving.

[253] Second, the trial judge opined that E.G.’s testimony was corroborated by that of C.P. In his examination-in-chief, C.P. said that after the intercourse, he stood up and heard “that [J.] and E.G. . . . had arrived” (para. 92). He added that he then went to where they were and had a 10- to 15-minute conversation with them before they went to see R.D. But the trial judge was of the view that C.P. had then confirmed, during his cross-examination, “that E.G. went right over to R.D. when she arrived” (para. 92 (emphasis added)).

[254] To be able to rely on C.P.’s testimony as corroboration of E.G.’s evidence, the trial judge had to reject C.P.’s evidence that he had had a 10- to 15-minute conversation with E.G. before she went over to R.D. The trial judge did so, and she based this conclusion on, among other things, her view (1) that C.P. had contradicted himself under cross-examination, (2) that E.G.’s evidence was more believable and (3) that C.P.’s testimony was unreliable because he had been too intoxicated at that point

in the evening. This enabled the trial judge to isolate the answer C.P. had given in cross-examination and to use it to bolster E.G.'s testimony.

[255] Having found that the intercourse occurred shortly before E.G.'s arrival, the trial judge concluded that R.D. must have been incapacitated when it took place owing to her level of intoxication. Indeed, the trial judge had noted that E.G. had found R.D. "unconscious, vomit-laden and generally unresponsive" upon her arrival (para. 100).

(2) Mens Rea — C.P.'s Knowledge That R.D. Was Too Intoxicated to Consent

[256] The trial judge "concluded beyond a reasonable doubt that C.P. knew or was reckless or wilfully blind to the fact that R.D. was so intoxicated that she could not have consented to sexual activity" (para. 117). In her view, R.D.'s impairment was evident to G.G., E.G. and C.P.

[257] The trial judge also found as a fact that R.D. did not say "Fuck me, [C.]" First, she viewed C.P.'s evidence as neither credible nor reliable. Second, she had doubts about the plausibility of that communicated consent. Because their relationship was a "platonic" one, it was unlikely that their kissing would naturally have led to R.D. asking C.P. to have sex with her on a beach where there were people nearby (para. 126). In any event, the trial judge was of the opinion that even if R.D. had done so, "she was too intoxicated to have given voluntary consent to sexual activity" (para. 121).

(3) Defence of Honest but Mistaken Belief in Consent

[258] Lastly, the trial judge rejected C.P.’s defence of honest but mistaken belief in consent. She concluded that even if R.D. had said “Fuck me, [C.]”, C.P. would not have been entitled to rely on that communicated consent. Without deciding conclusively, the trial judge stated that C.P. was legally barred from relying on the defence either because of his intoxication or because his mind was clear enough for him to be well aware of R.D.’s incapacity and of the need to take reasonable steps to ascertain the voluntariness of her consent.

B. *Court of Appeal for Ontario, 2019 ONCA 85, 373 C.C.C. (3d) 244*

(1) Dissent (Nordheimer J.A.)

[259] Nordheimer J.A., dissenting, found that the trial judge’s verdict was unreasonable. In his view, her finding that R.D. had been incapable of consenting was “incompatible with the whole of the evidence, especially the uncontradicted evidence” (C.A. reasons, at para. 15). Nordheimer J.A. disagreed with the trial judge’s finding that the intercourse had occurred *later in time* during the evening.

[260] First, Nordheimer J.A. concluded that the trial judge had erred in law by failing to explain why she was isolating a single piece of C.P.’s evidence and rejecting all the rest. He noted that there was only one piece of evidence that could place the intercourse close in time to E.G.’s arrival. It consisted in a single answer given by C.P.

in cross-examination in response to an ambiguous suggestion made by the Crown that E.G. had gone “directly” to R.D. upon her arrival. This single piece of evidence was crucial to the trial judge’s chain of reasoning. Without it, there was no other evidence that could connect the time of the intercourse with that of E.G.’s arrival. The only evidence E.G. could provide was that R.D. had been asleep when she arrived, but she could not say whether she had arrived shortly after or long after the intercourse, because she had not been there when it happened. Nordheimer J.A. stated that, although it is open to a trier of fact to accept only some of a witness’s evidence, the trial judge had to provide an explanation for her crucial decision to reject all of C.P.’s evidence but this single answer. Her not doing so constituted an error of law.

[261] Second, Nordheimer J.A. was of the opinion that the totality of the evidence demonstrated that “there was a larger gap in time between the sexual activity and E.G.’s arrival than the trial judge allowed for” (para. 31 (emphasis added)). E.G.’s statement that she had upon arriving found R.D. asleep could not therefore be relied on to establish that R.D. was incapacitated during the intercourse. It is quite possible that R.D.’s state changed from being capable to being incapable during that gap between the intercourse and E.G.’s arrival.

[262] Having found that the trial judge’s finding on the *actus reus* was unreasonable, Nordheimer J.A. did not address the reasonableness of the decision to reject C.P.’s defence of honest but mistaken belief in consent. He would have set aside the conviction and entered an acquittal.

(2) Majority (MacPherson J.A. With Feldman J.A. Concurring)

[263] MacPherson J.A., writing for the majority, concluded that the verdict was reasonable. He disagreed with Nordheimer J.A.'s reasoning.

[264] First, MacPherson J.A. was of the view that the trial judge had not erred in law by failing to explain her reasons for accepting only part of C.P.'s evidence and rejecting the rest. He stated that the trial judge had explained why she found that C.P. was not credible and why she rejected his evidence on certain key points, such as its veracity on the question of the 10- to 15-minute conversation. It was therefore open to the trial judge to accept only some of C.P.'s evidence.

[265] Second, MacPherson J.A. disagreed that the trial judge's finding that the sexual activity had occurred immediately before E.G. arrived at the beach was incompatible with the rest of the evidence. In his view, what mattered was not "the exact time of E.G.'s arrival and observation of the complainant" (para. 56). Rather, what was critical to the trial judge's finding of incapacity was the relative time of E.G.'s arrival in relation to the intercourse. C.P. had testified that the gap in time between the intercourse and E.G.'s arrival was relatively narrow. Ten or fifteen minutes would not have made a difference.

IV. Issue

[266] On the merits of C.P.'s appeal, the only question is whether the conviction of C.P. for sexual assault is reasonable.

V. Analysis

[267] C.P. asks this Court to set aside his conviction and to enter a verdict of acquittal. In the alternative, he asks us to order a new trial. C.P. raises three grounds of appeal. In my view, the verdict of guilty is unreasonable for two reasons.

[268] First, there is a logical flaw in the trial judge's reasoning that corrupts an evidentiary finding that is crucial to the outcome of the case. The trial judge made two irreconcilable findings. On the one hand, she relied on C.P.'s recollection of events contemporaneous with the intercourse in order to convict him. But, on the other hand, she found that C.P. had been too intoxicated at that point in the evening to be subsequently capable of testifying reliably about what had happened. This first reason alone would suffice for this Court to order a new trial.

[269] Second, I am also of the view that the evidence is not capable of supporting the finding of incapacity to consent and that the Court should therefore enter a verdict of acquittal instead of ordering a new trial. An approach to the reliability of C.P.'s testimony that is consistent with the trial judge's repeated findings to the effect that C.P. was quite intoxicated and that his memory of the crucial events was unreliable leads to the conclusion that the balance of the circumstantial evidence simply does not make it possible to pinpoint the time when the intercourse occurred. This means that

the intercourse may have occurred at any time within an approximately two-hour window during which R.D.'s state changed from not being drunk to being unconscious.

A. *Whether the Finding of Incapacity Was Reached Illogically*

[270] C.P.'s first ground of appeal is that the trial judge's reasoning is illogical within the meaning of *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3. Illogicality may occur in "various ways" (*Sinclair*, at para. 19). In the case at bar, C.P. argues that the trial judge made two irreconcilable findings of fact. On the one hand, she rejected C.P.'s evidence that he had had a 10- to 15-minute conversation with E.G. when she arrived at the beach and before E.G. went over to R.D., because he had been quite intoxicated *at that point in the evening*. But, on the other hand, the trial judge accepted another part of his evidence about what had happened *at that point in the evening*, that is, his testimony that he had heard "that [J.] and E.G. . . . had arrived" shortly after the intercourse. C.P. submits that if he had been too inebriated at that time to be subsequently able to testify reliably about the conversation, he would logically also be unable to testify reliably that E.G. had arrived shortly after the intercourse. Those two things would have occurred at the same time, a time when he was, in the trial judge's view, too drunk to subsequently remember what had happened. C.P. points out that the trial judge failed to provide an explanation for this "selective reliance" (A.F., para. 120). I agree that the trial judge's finding of incapacity was reached illogically.

[271] As I mentioned above, the trial judge was well aware that the timing of the intercourse was the central issue of this case. The defence did not dispute E.G.'s testimony that she had found R.D. virtually passed out with vomit on her. If the intercourse had occurred very shortly before E.G.'s arrival, an inference of incapacity would be more plausible than it would if the intercourse had occurred long before that time. According to G.G., R.D. was not drunk when the group arrived at the beach, but she became more and more drunk as time passed until she began throwing up around 12:30 a.m. If the intercourse had occurred early in the evening, at a time when R.D. was either sober or, if drunk, not incapacitated, an inference of incapacity would therefore be too tenuous for C.P. to be found guilty beyond a reasonable doubt. It is important to note that R.D. being intoxicated early in the evening would not mean that she was necessarily incapable of consenting. It was only when she reached the stage at which she became impaired to the point that she no longer had an operating mind — if that did in fact happen — that her consent would have become vitiated at law (see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 66; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55-57; *R. v. Barton*, 2019 SCC 33, at para. 88).

[272] The trial judge was of the view that the question of the timing of the intercourse was answered by the “combination of E.G.'s and C.P.'s evidence” (para. 90). The combination of their evidence was indeed crucial to her finding of incapacity. E.G. testified that she had gone over to R.D. instantly and found her to be extremely intoxicated (para. 91). However, because E.G. was not at the beach when the intercourse occurred, her evidence alone could not serve to pinpoint the time of the

intercourse in relation to the time when she saw that R.D. was asleep. Even if it is assumed that E.G. went over to R.D. instantly upon her arrival, that does not establish whether she observed R.D. within minutes after the intercourse or an hour later. Put simply, E.G.'s evidence alone was insufficient to support a finding of incapacity at the time of the intercourse. Whatever the case may be, additional evidence was necessary in order to narrow the gap between the time of the intercourse and the time when she went to see R.D. In this instance, only C.P.'s evidence could address the timing of the intercourse in relation to E.G.'s arrival and her observation of R.D.

[273] C.P. testified that after the intercourse, he had stood up and heard at the same time "that [J.] and E.G. . . . had arrived". This statement by C.P. helped narrow the gap between the time of the intercourse and the time when E.G. went to see R.D. The combination of this statement with E.G.'s testimony that she had gone over to R.D. instantly made the two events contemporaneous, if not almost concomitant. However, C.P. added that he had had a 10- to 15-minute conversation with E.G. before she tended to R.D., which meant that there was a gap of 10 to 15 minutes between the events in question. According to C.P., R.D.'s state changed from being capable to being incapable during that time.

[274] The trial judge bridged that 10- to 15-minute gap by rejecting the evidence that "[C.P.] spoke with E.G. before she tended to R.D." for three reasons (para. 93). So far, there is nothing illogical in the trial judge's reasoning. It is well established that it is open to a trier of fact to accept only some of a witness's testimony (*R. v. J.H.S.*, 2008

SCC 30, [2008] 2 S.C.R. 152, at para. 10; *R. v. Mathieu* (1994), 90 C.C.C. (3d) 415 (Que. C.A.), at p. 430, per Fish J.A., *aff'd* [1995] 4 S.C.R. 46). It was therefore open to the trial judge to reject C.P.'s evidence about the conversation and accept only his evidence that he had heard E.G. arriving shortly after the intercourse, provided that she had a logical and reasonable basis for doing so.

[275] Where the trial judge's reasoning becomes illogical, however, is in the three reasons she gave for rejecting C.P.'s evidence about the conversation:

- a) Internal contradiction: C.P. contradicted himself when he said, in his examination-in-chief, that he had had a conversation with E.G. *before* she went to see R.D., but then indicated, in a single answer to a leading question asked by the Crown in cross-examination, that E.G. had gone *directly* over to R.D. upon arriving.
- b) External contradiction: The trial judge preferred E.G.'s version that she had not had a conversation with C.P. upon arriving, because she found E.G. more reliable and credible than C.P.
- c) Unreliability caused by intoxication: C.P.'s evidence was unreliable because "he was [too] intoxicated at this point" in the evening (paras. 91-94).

The source of the illogicality stems from this third reason.

[276] What is illogical is not the trial judge's treatment of the existence or inexistence of the conversation, that is, her acceptance of a single answer from C.P.'s cross-examination that E.G. went directly over to R.D. and her rejection of the rest of his evidence relating to the issue of the conversation. Nordheimer J.A. concluded that the trial judge's relying on this single answer without giving any explanation constituted an error of law (C.A. reasons, at paras. 23-26). However, I am of the view that the trial judge did in fact give reasons for relying on this single answer and rejecting the evidence that the conversation took place. She rejected C.P.'s testimony about the conversation because alcohol had impacted his reliability, because he had contradicted himself and because she believed another witness instead of him.

[277] Rather, what was illogical was for the trial judge to find, on the one hand, that C.P. could not testify reliably about what had happened after the intercourse because he had been too intoxicated at that point in the night, while also finding, on the other hand, that C.P. could nevertheless testify reliably about the fact that he had heard "that [J.] and E.G. . . . had arrived". These findings are irreconcilable. If C.P. was too intoxicated at that time to be subsequently able to testify reliably about the conversation, his testimony about having heard E.G. arriving was also necessarily unreliable. These two events would have occurred at the same point in time, that is, at a time when, in the trial judge's view, C.P. had been too drunk for his subsequent testimony to be reliable.

[278] The Crown counter-argues that the trial judge's findings are in fact compatible. In the Crown's view, it was open to the trial judge to rely on her credibility findings in order to reject most of C.P.'s testimony and accept only some of his evidence. She made detailed adverse credibility findings at paras. 107-14. The Crown adds that the other two reasons the trial judge gave — the internal and external contradictions — were sufficient to justify her rejection of C.P.'s evidence about the conversation and her acceptance of his evidence that E.G.'s arrival was contemporaneous with the intercourse.

[279] I agree with the Crown that those are two valid reasons for doing so. But that is beside the point. Again, the problem is not that the trial judge irrationally rejected the evidence about the conversation. Rejecting an internally contradictory testimony or believing another more credible and reliable witness is logical. Rather, the problem is that she made two irreconcilable findings. She found that C.P. had been too drunk at that time to subsequently remember some things yet not too drunk to subsequently remember other things that would have happened at the same time.

[280] In other words, if the trial judge had said that she was rejecting C.P.'s testimony about the conversation for only two reasons — the internal and external contradictions — and had not mentioned C.P.'s being intoxicated as an additional reason, her reasons would have been logical. But by adding this third reason, she introduced illogicality into her reasoning.

[281] The trial judge gave no reasons to explain this inconsistency on a crucial piece of evidence. Without C.P.'s evidence that he had heard E.G. arriving after the intercourse, it was impossible to convict him. The trial judge explained why she rejected the evidence about the conversation, not why she cherry-picked "a sort of island of acuity" from "a sea of oblivion" (*R. v. Cedeno*, 2005 ONCJ 91, 27 C.R. (6th) 251, at para. 20).

[282] If I may borrow Stratas J.A.'s words from *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286, at para. 46, and adapt them to the context of the case at bar, a logical flaw that corrupts an evidentiary finding that is crucial to the outcome of the case — the finding of incapacity here — does not merely pull at leaves and branches and leave the tree standing, but causes the entire tree to fall. Because the finding of incapacity has fallen to the ground, the verdict of guilty is unreasonable and the conviction cannot stand.

[283] Where a logical flaw in a trial judge's reasoning renders a verdict unreasonable within the meaning of *Beaudry* and *Sinclair*, a new trial must be ordered (*Sinclair*, at para. 23). If, however, the verdict is at the same time unavailable on the record, an appellate court must enter a verdict of acquittal instead of ordering a new trial (para. 23). Whether a verdict of acquittal should be entered or a new trial ordered in this case will therefore depend on my answer on C.P.'s second ground of appeal.

B. *Whether the Finding of Incapacity Was Reasonably Available on the Evidence*

[284] C.P.’s second ground of appeal is that the evidence available to the trial judge was capable of supporting neither her finding of incapacity nor, as a result, the verdict of guilty (*R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381). As I mentioned above, if this second ground should succeed, the result will be an acquittal instead of a new trial. Where, as in the instant case, the Crown’s case is based on circumstantial evidence, the appeal court must determine “whether the trier of fact, acting judicially, could reasonably be satisfied that the accused’s guilt was the only reasonable conclusion available on the totality of the evidence” (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55). In contrast with the ground of unreasonableness under *Beaudry* and *Sinclair*, which is concerned with “fundamental flaws in the reasoning process that led to [the trial judge’s verdict]” (*Sinclair*, at para. 4, quoting para. 77 (text in brackets in original); see also *Beaudry*), this second ground of appeal is concerned with the weight of the evidence in the record. It “requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence” (*Villaroman*, at para. 55; see also *Biniaris*, at para. 36).

[285] In this case, I am of the view that the trial judge could not reasonably conclude that R.D.’s being incapable of consenting at the time of the intercourse was the only reasonable finding available on the evidence. Without the finding of incapacity, there was no case against C.P., because neither R.D. nor any other witness had testified that R.D. had not consented as a matter of fact. Consequently, the evidence is not capable of supporting the verdict of guilty, and a verdict of acquittal should be entered in its place.

[286] The starting point of the re-examination of the evidence is the weight attached to C.P.'s testimony. In my opinion, the trial judge should have accorded far less weight to C.P.'s evidence about the timing of the intercourse in relation to E.G.'s arrival than she did in her reasons. The trial judge attached significant weight to C.P.'s evidence that he had heard E.G. arriving shortly after the intercourse. It constituted the centrepiece of her reasons. This was, however, incompatible with her repeated findings to the effect that C.P. had been quite intoxicated and was thus an unreliable witness.

[287] After getting vodka from the LCBO, C.P. began drinking early in the night while the group was walking to the streetcar on the way to the beach. He continued drinking on the streetcar. Once they arrived at the beach, he drank even more vodka around the bonfire. According to E.G. and G.G., all this alcohol made C.P. very drunk. E.G. said that C.P. could not speak coherently or walk properly. G.G. added that C.P. was stumbling. C.P. himself confirmed that he had drunk so much that his friend J. told him to sit down because he could barely walk.

[288] The trial judge made several adverse findings against C.P. based on the evidence of his level of intoxication. First, she rejected his evidence that he had had a conversation with E.G. upon her arrival, because he had been too intoxicated at that point in the night for his testimony to be reliable. Second, the trial judge noted that C.P.'s level of intoxication could explain "his lack of recollection about certain details" (para. 110). She added that, "if [C.P.] was as drunk as witnesses suggest, it would be understandable for him to have gaps in his memory" (para. 114). Third, the trial judge

concluded that, because of s. 273.2(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, C.P.'s level of intoxication barred him legally from relying on the defence of honest but mistaken belief in consent.

[289] In addition to C.P.'s unreliability based on his level of intoxication, the rest of the evidence relating to the timeline of the evening's events further undermined the probative value of his evidence. The evidence did not permit the time of the intercourse to be determined beyond a reasonable doubt. A reconstruction of the timeline indicates that the intercourse may have occurred at any time during a window of roughly two hours.

[290] First, R.D. and G.G. stated that the group had arrived at the beach sometime between 10:00 and 11:00 p.m. This approximate time of arrival is consistent with the balance of the evidence. The group must have left the LCBO sometime before it closed at 10:00 p.m. According to C.P.'s uncontradicted testimony, they then walked for 15 to 30 minutes, rode the streetcar for about 15 minutes, walked to the beach for 10 minutes and then discussed whether they would join the older group or start their own bonfire — these were all narrative details the trial judge did not reject.

[291] Second, 15 or 20 minutes after C.P. and R.D. sat down together on the mattress, they started kissing until it was thrown into the fire. Shortly thereafter, C.P. joined R.D. by the rocks and had intercourse with her. I agree with Nordheimer J.A. that, on the strength of judicial experience, the sexual activity occurred in all likelihood

before R.D. had gotten vomit on her (C.A. reasons, at para. 31). In any event, the Crown did not argue the contrary.

[292] Third, according to G.G.'s testimony, R.D. started throwing up sometime around 12:30 a.m. No witness other than G.G. saw when R.D. started throwing up. C.P. testified that he had not been there, and E.G. arrived after that. G.G. left the party very shortly afterwards, at 12:30 a.m. She was certain that she had left around that time, because she had looked at her phone before leaving. Contrary to other witnesses who were only guessing about the timing of certain events, G.G.'s evidence in this respect was unambiguous.

[293] Fourth, E.G. arrived at the beach sometime after 12:30 a.m. G.G.'s testimony makes this timing limp. Indeed, G.G. was adamant that when she left at 12:30 a.m., she had not yet seen E.G. In contrast, E.G. admitted that she was unable to affirm with certainty when she arrived. It follows that E.G. necessarily arrived sometime after 12:30 a.m.

[294] Fifth, following an undetermined period of time after her arrival, E.G. went over to R.D. and found her asleep with vomit on her. Whether E.G. went directly over to R.D. upon arriving or had a 10- to 15-minute conversation with C.P. first, as he testified, should not have been given the weight the trial judge gave it. There was in fact ample evidence arising from E.G.'s testimony to support a conclusion that going over to R.D. was not the very first thing she did upon arriving. The first piece of evidence was the fact that E.G. told the police that, when she arrived, she had drunk

some vodka that was left. As Nordheimer J.A. noted, E.G. going over to R.D. instantly is inconsistent with her statement that she drank some vodka, because she also said that she had stayed with R.D. for her entire time at the beach until they all left. If she stayed with R.D. constantly after going to see her, she must have drunk the vodka before doing so. The second piece of evidence was E.G.'s statement that she had heard a rumour that C.P. and R.D. had had intercourse earlier in the evening. Her statement implies that when she arrived, she had a conversation with some of the young people around the fire about the intercourse before going over to R.D. This is what she said:

. . . I'm not really too sure who was saying it but a few people were like, oh like, [R.D.] and [C.P.] like, had sex earlier today, tonight and I was like when? And they were like oh like, before you and [G.] showed up. . . .

(A.R., vol. II, at p. 30)

[295] This timeline shows that there was roughly a two-hour window between (1) the group's arrival at the beach between 10:00 and 11:00 p.m. and (2) E.G.'s observation of R.D. sometime after 12:30 a.m. The evidence as a whole cannot reasonably be interpreted in such a way that R.D.'s being incapable of consenting is the only reasonable conclusion. The trial judge should have acquitted C.P. Once the reliability of C.P.'s testimony is approached coherently with the trial judge's repeated findings to the effect that he had been quite intoxicated and that his memory of the crucial events was unreliable, it is simply impossible to pinpoint, even roughly, the time when the intercourse occurred on the basis of the rest of the circumstantial evidence. In fact, the available circumstantial evidence indicates that the intercourse

may have occurred at any time in the two-hour window. R.D.'s level of intoxication changed considerably during that time from not being drunk, according to G.G., upon arriving at the beach to being passed out later on. The trial judge herself acknowledged that, without C.P.'s evidence, the rest of the circumstantial evidence could not on its own pinpoint the time of the intercourse in that window:

As the trial unfolded, it seemed there was a lack of clarity with respect to the timing of the sexual activity. As noted in the review of the evidence, the Crown witnesses were only able to make a guess about when the group arrived at the beach. E.G. and G.G. did not witness any sexual activity and therefore could not help pinpoint the time it happened. R.D. had fragments of memory but certainly was not able to specify the timing of the incident. . . . The combination of E.G.'s and C.P.'s evidence, however, has answered the question of when during the evening the sexual activity took place. [Emphasis added; para. 90.]

[296] Furthermore, there is other evidence that, although not necessary to a finding that the verdict was unreasonable, should have reinforced the existence of a reasonable doubt in the trial judge's mind.

[297] Although the intercourse occurred at a distance of only 5 to 10 feet from the fire pit where a dozen or so young people were assembled, the Crown did not call a single witness who had seen it happen. The Crown called E.G., who had arrived after it occurred, and G.G., who also had not seen it happen. Yet there were obviously some people who had witnessed the intercourse, as can be seen from the messages exchanged on social media the next morning in which teenagers shared the information that R.D. and C.P. had had sex together. Also, there were some who told E.G., after her arrival,

that R.D. and C.P. had had intercourse earlier in the night, which makes clear that their sexual activity had not gone unnoticed.

[298] The phone conversation between R.D. and L.L. that occurred after 1:00 a.m. should also have reinforced the existence of a reasonable doubt. During that conversation, R.D. kept apologizing to L.L., whom she was seeing romantically. When considered together with the rest of the evidence, it tends to indicate that R.D. was aware of and sorry for what had happened. In the same vein, the fact that R.D. remembered kissing C.P. by the rocks and pulling up her pants after the intercourse were further signs that she had been aware of what was happening, which constitutes fertile ground for a reasonable doubt.

[299] Finally, the Crown's case appears to have been constructed on a narrative informed by rumours and double hearsay. As I noted above, R.D.'s mother may not have forced her daughter to report to the police, but she convinced her to do so on the premise that R.D. had been assaulted *while* being passed out. It is this narrative based on the rumour R.D. heard from her friends that appears to have informed the case built by the police and the prosecution. Obviously, this alone does not mean that the Crown's case could not stand, but a trial judge drawing on his or her judicial experience should have approached the theory of the case with an extra layer of caution.

[300] In conclusion, without the crucial finding of incapacity, the Crown could not prove its case, because there was no evidence of absence of consent. The verdict is unreasonable, and the trial judge should have acquitted C.P.

C. *Whether the Trial Judge Erred in Rejecting the Defence of Honest but Mistaken Belief in Consent*

[301] C.P.'s third ground of appeal is that the trial judge erred in law by rejecting his defence of honest but mistaken belief in communicated consent. He argues that she should have considered his youth in assessing the circumstances known to him for purposes of the quasi-objective standard for determining whether an accused can rely on that defence. In C.P.'s view, the principle of diminished moral blameworthiness imposes the application of a lower standard. Although everyone is presumed to know the law, it is absurd to propose that an intoxicated teenager is presumed to know the intricacies of the jurisprudence pertaining to what constitutes valid consent. Therefore, the trial judge should have considered C.P.'s limited understanding of criminal law principles in analyzing his defence.

[302] Despite the question being a matter of doctrinal interest, I do not believe that it should be answered in this case. Doing so would have no impact on the outcome of this appeal. C.P. asks us to rule on this legal issue in order to provide guidance to the court below should a new trial be ordered. Because I have concluded that a verdict of acquittal should be entered, such guidance is not necessary. In any event, even if I had concluded that a new trial should be ordered, the answer to this question would have had no impact on the outcome of the appeal. The question would be purely theoretical. C.P. does not challenge the trial judge's finding that R.D. did not say "Fuck me, [C.]" — this alleged communicated consent constituted the condition precedent to his defence. Nor does he challenge the trial judge's finding that his level of intoxication

barred him legally from relying on the defence — this is another hurdle that made this defence unavailable to him. In brief, the error of law, if any, would be of no consequence. Lastly, it seems that C.P. is raising this issue for the first time in his appeal to this Court.

VI. Conclusion

[303] As mentioned above, I am of the opinion that it is not necessary to answer the constitutional questions pertaining to the validity of s. 37(10) of the *YCJA*, because they are now moot. Given that this Court has granted leave to appeal, the constitutional analysis of the denial of an automatic right of appeal to this Court would have no impact on the underlying criminal appeal in this case. Therefore, I decline to take a position on those questions.

[304] For the foregoing reasons, I would allow the appeal, set aside the conviction and enter an acquittal.

Appeal dismissed, CÔTÉ J. dissenting.

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Solicitor for the intervener the British Columbia Civil Liberties Association: Alison M. Latimer, Vancouver.

Tab 7:

**R. v. Canadian Broadcasting Corp.,
2018 ABCA 391**

In the Court of Appeal of Alberta

Citation: R v Canadian Broadcasting Corporation, 2018 ABCA 391

Date: 20181123

Docket: 1703-0136-A

Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Canadian Broadcasting Corporation

Respondent

The Court:

**The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Sheila Greckol**

**Reasons for Judgment Reserved of The Honourable Madam Justice Rowbotham
Concurred in by The Honourable Mr. Justice Martin
Concurred in by The Honourable Madam Justice Greckol**

Appeal from the Decision by
The Honourable Mr. Justice T.D. Clackson
Dated the 16th day of May, 2017
(2017 ABQB 329, Docket: 160339594X1)

**Reasons for Judgment Reserved of
The Honourable Madam Justice Rowbotham**

I Introduction

[1] The Crown appeals the acquittal of the Canadian Broadcasting Corporation (CBC) of criminal contempt for violating a publication ban (Ban) issued under section 486.4(2.2) of the *Criminal Code*, RSC 1985, c C-46. On an application for a section 486.4 ban, it is mandatory that the presiding judge impose it when the victim of the crime is under the age of 18: s 486.4(2.2)(b). The Ban prohibits “any information that could identify the victim” from being “published in any document or broadcast or transmitted in any way”: s 486.4(2.1).

[2] Before the Ban issued, the CBC posted a news story on its website identifying a 14-year old victim of a homicide. Although the CBC did not post any more information identifying the victim after the Ban issued, it refused to remove the information posted before the Ban. The Crown’s position is that each time a new reader accessed that online content, the child’s identifying information was “published” and “transmitted”, and CBC’s failure to comply with the Ban after it issued constituted an act of criminal contempt.

[3] The appeal turns on the trial judge’s statutory interpretation of the meaning of “published” and “transmitted” as used in section 486.4 of the *Criminal Code*. While similar provisions prohibit making identifying information “available” or “accessible”, section 486.4(2.2) is more narrowly worded. Even if this case is under common law contempt and not under the *Criminal Code*, it is clear that this is a state prosecution for criminal law purposes. The form and object of this proceeding is a criminal prosecution thus underlining the criminal nature of some forms of contempt of Court by disobedience: see *Carey v Laiken*, 2015 SCC 17 at paras 30 to 38, [2015] 2 SCR 79, particularly if the assertion is “public defiance” (para 63); *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at para 8; *Morasse v Nadeau-Dubois*, 2016 SCC 44 at para 21 and 81, [2016] 2 SCR 232. That is a key feature to the statutory construction analysis which follows. Under the rule of law, prosecution for criminal conduct should never be on an uncertain legal footing.

II Background

[4] On March 4, 2016, the body of a child was found. On March 5 and March 8, 2016, the CBC posted articles on its website that included the child’s name, photograph and other identifying information.

[5] The Ban issued on March 16, 2016 at the first court appearance of the person accused of killing the child. After the Ban issued, the CBC posted no more information identifying the child. However, it refused the requests from Alberta Justice and Solicitor General to remove the

identifying information from the March 5 and 8, 2016, articles which were still accessible on its website.

[6] The Crown’s application for an injunction compelling the CBC to remove the identifying information was refused: *R v Canadian Broadcasting Corporation*, 2016 ABQB 204; rev’d 2016 ABCA 326, rev’d 2018 SCC 5. The Supreme Court concluded that the Crown had not discharged its burden of proving “a strong likelihood” that it would ultimately be successful in proving CBC’s guilt of criminal contempt. In part, that was because section 486.4(2.1) “might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban”: para 30. As a result, no injunctive relief—interlocutory or mandatory—was granted to compel the CBC to remove the identifying information.

[7] At trial the CBC was acquitted of criminal contempt: *R v The Canadian Broadcasting Corporation*, 2017 ABQB 329, 59 Alta LR (6th) 342. (The trial judge also found no civil contempt but that is not appealed.) The trial judge applied the criminal contempt test from *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609 [UNA]. The majority in UNA held that like civil contempt, criminal contempt is the disobedience of a court order and the distinction “rests in the concept of public defiance that accompanies criminal contempt”. The test requires the Crown to prove that the CBC disobeyed the Ban in a public way, and intended or knew that it would or would likely depreciate or undermine the court’s authority: Reasons at paras 15–16. After reviewing the law of civil contempt and its similarities with criminal contempt, the trial judge held that because of the penal nature of criminal contempt, he was required to interpret section 486.4 strictly, and resolve any ambiguity in the CBC’s favour.

[8] The trial judge did not accept the Crown’s argument that the definition of “publication” in the *Youth Criminal Justice Act*, SC 2002, c 1, [YCJA], s 2(1)—which includes “making accessible”—informs the meaning of “publish” in section 486.4: paras 26–27. Nor did he accept that the section 299 *Criminal Code* definition of “publish” in the context of defamatory libel assisted in interpreting the meaning of “publish” in section 486.4: para 29. He found that “publish” did not include “access”, and that “accessing is plainly what is going on here. There is no evidence that the CBC is doing anything but opening its library and allowing access”; and section 486.4 did not specifically limit “accessing”: paras 20–25.

[9] The trial judge also found that what occurred did not amount to “transmitting” or “broadcasting”, which he held to consist of “broad dissemination” rather than mere access to prohibited information. “[G]etting hold of the material or ‘accessing’ it would not be broadcasting or transmitting. Something more must be done. Similarly, allowing access is not good enough to amount to broadcasting or transmitting. In the end, it is my view that the fact that the CBC maintains the original articles in its archives, which can be accessed, does *not* amount to publication, transmission or broadcast.”: paras 41–42 (emphasis in original).

[10] He acquitted the CBC of criminal contempt.

III Grounds of Appeal and Standard of Review

[11] The Crown contends that the trial judge erred in his interpretation of the meaning of “published” and “transmitted in any way” in section 486.4 of the *Criminal Code*, misapprehended the evidence and failed to recognize its legal significance. The Crown also argues the trial judge misapprehended the legal requirements of criminal contempt and erred in his application of *UNA* by adding an element of criminal *mens rea*.

[12] The Crown’s right of appeal is on a question of law alone: s 676(1)(d). The meaning of “published” and “transmitted” in section 486.4 of the *Criminal Code* is a question of law and is reviewable on the correctness standard: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8–9, [2002] 2 SCR 235. See also *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33, [2014] 2 SCR 135.

IV Analysis

[13] As there is an anomaly, in sections 486.4 and 486.6, it is necessary to set out most of the provisions.

[14] Section 486.4 provides:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way. (emphasis added)

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

[15] Section 486.6 provides:

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

[16] Curiously, section 486.6(1), the charging section relative to the publication bans, applies only to subsections 486.4 (1) (2) or (3) and states that any person who fails to comply is guilty of an offence punishable on summary conviction. Failure to comply with an order made under subsection 486.4 (2.2) is not included. This may explain why the Crown brought an originating application in the Court of Queen’s Bench requesting that the CBC be cited in criminal contempt, rather than charging the CBC with a criminal offence. It is not open to a court to assume that Parliament merely overlooked s 486(2.2) from the list. In this instance, I should assume that when Parliament did not include that reference to s 486(2.2) for a reason: compare *R v Carson*, 2018 SCC 12 at para 26, 145 WCB (2d) 82. Inclusion of s 486(2.2) was a readily available option.

[17] The *Criminal Code* does not define “published”, “broadcast” or “transmitted” for the purposes of section 486.4. This means the principles of statutory interpretation must be applied to determine their meaning. Since “broadcast” is not at issue on appeal, no further reference is made to it.

a. Statutory Interpretation Principles

[18] Section 12 of the *Interpretation Act*, RSC 1985, c I-21 requires that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” The starting point for the interpretation of all legislation, including penal statutes, is the modern principle. The “words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 36 OR (3d) 418, quoting E. A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. As the Supreme Court held recently, provisions of the *Criminal Code* are subject to interpretation in “‘their entire context and in their grammatical and ordinary sense harmoniously’ with [the relevant Part’s] scheme and undergirding purpose ...”: *R v Jones*, 2017 SCC 60 at para 59, [2017] 2 SCR 696.

[19] Reconciling the former “strict construction” approach with the modern principle is explained in *R v Hasselwander*, [1993] 2 SCR 398 at 412–13, 1993 CanLII 90 (citations omitted):

The apparent conflict between a strict construction of a penal statute and the remedial interpretation required by s. 12 of the *Interpretation Act* was resolved by according the rule of strict construction of penal statutes a subsidiary role. ...

... Thus, the rule of strict construction becomes applicable only when attempts at the neutral interpretation suggested by s. 12 of the *Interpretation Act* still leave reasonable doubt as to the meaning or scope of the text of the statute.

[20] That is, “courts may resort to strict construction of penal statutes where ordinary principles of interpretation do not resolve an ambiguity”: *R v Mac*, 2002 SCC 24 at para 4, [2002] 1 SCR 856.

[21] To summarize, when the words used in a *Criminal Code* provision are capable of more than one meaning and the ordinary principles of interpretation do not resolve the ambiguity, the rule of strict construction is engaged. Strict interpretation demands of “statutory language the highest degree of clarity, explicitness and specificity in order to support a conclusion that it was intended to authorize infringements of [rights]. That is, it requires language which is absolutely clear, such that the underlying legislative intent is completely explicit”: *University of Calgary v JR*, 2015 ABCA 118 at para 48, 602 AR 35, aff’d 2016 SCC 53 at para 30, [2016] 2 SCR 555. See also Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, c2011) at 475-482 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014).

b. Discussion

[22] I first discuss the grammatical and ordinary meaning of “published” and “transmitted in any way” in their context before turning to the scheme and purpose of section 486.4, and publication bans in the *Criminal Code* and other statutes.

i. “Published”

[23] Section 299 of the *Criminal Code* provides that a person publishes a libel when it is exhibited in public, when the person causes it to be read or seen, or “shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person”. However, that meaning is restricted to libel.

[24] In defamation law, the meaning of the word “publish” is settled. A statement is published each time it is communicated to someone other than the person defamed: *Breeden v Black*, 2012 SCC 19 at para 20, [2012] 1 SCR 666. That is, “publication occur[s] when the impugned statements were read, downloaded and republished It is also well established that every repetition or republication of a defamatory statement constitutes a new publication”: *ibid*. In *Black*, allegedly defamatory statements were published in a press release and three Canadian newspapers republished them. Establishing publication or republication requires proof that “the defendant has, *by any act*, conveyed defamatory meaning to a single third party who has received it”: *Crookes v Newton*, 2011 SCC 47 at para 16, [2011] 3 SCR 269 with emphasis in original. Hyperlinking to defamatory content without repeating the defamatory content is not publication due to its passive nature and lack of control of the content: *ibid* paras 21, 26-27.

[25] In *Re Orr’s Stated Case (sub nom Re R v Leong)*, [1961] 38 WWR 114 at 115, 132 CCC 273 (BC SC) the trial judge considered the meaning of publication in what is now section 163(1) of the *Criminal Code* (publishing obscenity):

[Publication] has other special meanings in law; publication of a will, publication of an invention. But this does not involve the acceptance of those special meanings in connection with unrelated legal subjects and where the word “publication” is used in a penal statute without definition, and with no context which would assign to it a special meaning, it must be considered to bear the meaning it would bear in ordinary English speech or writing. Certainly, where crime is involved a court should not go out of its way to attribute to the word an extraordinary meaning involving the culpability of the accused, but should rather hew strictly to the line resolving any possible doubt in favour of the accused.

[26] The trial judge in *Re Orr* adopted the common meaning of ‘publish’, “to make publicly or generally known” and held that a private screening of a film among a small group of friends, with “[n]o invitation to the public” and “no suggestion of commercialism” was not “publication” of the film.

[27] In *R v Giftcraft Ltd* (1984), 13 CCC (3d) 192, [1984] OJ No 390 (H Ct J) the trial judge distinguished the meaning of ‘publish’ in what is now section 457(1)(a)) of the *Criminal Code* (which prohibits publishing the likeness of banknotes) from technical copyright and libel meanings of the word. The dictionary meaning of ‘publish,’ “to make public” applied with the result that Giftcraft Ltd ‘published’ the likeness of banknotes when it distributed them even though it had not printed them.

[28] I was also referred to this Court’s “Public and Media Access Guide,” where the following appears:

A publication ban will prohibit publishing the information in print, radio, television or via the Internet. Publication bans only restrict publication, not access. The publication ban does not limit viewing, searching or copying for private use.

[29] To summarize, the *Criminal Code* defines publish only for libel and its grammatical and ordinary meaning—‘to make public or generally known’—has been used to interpret the word when used in other *Criminal Code* provisions. The word has been interpreted broadly in the law of defamation to include republication. None of these interpretations, however, addresses the question that arises in this case: whether the ordinary meaning of “published” refers to the one-time act when content is first published online or whether content is “published” each time a new reader accesses the previously published content. This case is not concerned with defamation, copyright or intellectual property. I turn to the broader statutory context of “published” after the discussion of “transmitted in any way”.

ii. “Transmitted in any way”

[30] The *Oxford English Dictionary*, 2nd ed, includes the following definition:

Transmit – I.1.a. “To cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space”

[31] This definition corresponds to the word ‘transmission’ as used in the *Interpretation Act*. Although the *Interpretation Act* does not define the word, its definitions for ‘broadcasting’ and ‘radiocommunication’, refer to the transmission of data. Similarly, the definition of ‘telecommunications’ in section 35(1) of the *Interpretation Act* refers to the transmission of information through other media. Transmitting, as distinguished from emitting or receiving, is the process of sending information to a destination.

[32] The Supreme Court has considered the meaning of “transmission” in copyright law: *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 [SOCAN]. The issue was whether the defendants, Internet Service Providers located in Canada, “transmitted” copyrighted material. The following

passages illuminate the meaning of ‘transmitted’ in the context of the internet (with emphasis added):

8 A “content provider” uploads his or her data, usually in the form of a website, to a host server. The content is then forwarded to a destination computer (the end user). End users and content providers can connect to the Internet with a modem under contract with an Internet Service Provider.

9 An Internet transmission is generally made in response to a request sent over the Internet from the end user (referred to as a “pull”). The host server provider transmits content

[...]

20 The host server breaks the content down into units of data called “packets” The various packets are forwarded ... until they reach the Internet Service Provider at the receiving end which ... transmits the packets to a computer operated by the end user. The result is the reconstitution on the end user’s computer of all that is required to view ... the work, either at that time or later if the work is saved on the end user’s computer.

[33] The foregoing suggests that transmission occurs between the host server and the Internet Service Provider and between the Internet Service Provider and the end user who accesses the content. The court also acknowledged that the issue in that case “plays out against the much larger conundrum of trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries”: para 41. And, “Internet liability is thus a vast field where the legal harvest is only beginning to ripen”: *ibid*.

[34] *R v Spencer*, 2011 SKCA 144 at para 70, 377 Sask R 280, aff’d 2014 SCC 43, [2014] 2 SCR 212 considered whether passively hosting content online is “transmitting” under section 163.1(3) of the *Criminal Code* (child pornography). That section also criminalizes making child pornography “available”. The court considered excerpts from *Hansard*, which suggested that the child pornography provisions were amended to include “transmits” to cover one-to-one distribution such as via e-mail and “makes available” to capture posting child pornography on a publicly-accessible website but not taking steps to distribute it. *Hansard* indicates these two terms were included to criminalize situations that might not otherwise constitute “distributes”. Caldwell JA held that the section makes it a crime “to do anything which disseminates or facilitates the dissemination of child pornography.” In his view, prohibited activity under section 163.1(3) includes both “overt acts of dissemination (i.e., transmit, distribute, sell, import and export) and the facilitation of the carrying out of those acts (i.e., make available, advertise and possess)”: para 70. Based on the principle that different words are presumed to have different meanings, Caldwell JA concluded that the fault element for ‘makes available’ does not require the same positive intention as ‘transmits’ or there would be no distinction between the terms. As a result, he held that

passively hosting prohibited content on internet file-sharing programs constitutes ‘makes available’. The Court of Appeal remitted the issue of guilt back to trial but its analysis and the Supreme Court’s express agreement with much of Caldwell JA’s reasoning suggests that “transmits” in *Spencer* is even narrower than in *SOCAN*.

[35] Applying this line of reasoning to section 486.4 would lead to the conclusion that by passively maintaining the previously existing identifying information about the victim on its website, the CBC would likely have ‘made it available’ or ‘makes it accessible’ but did not ‘transmit’ it. Section 486.4(2.1) does not list ‘making available’ or ‘makes accessible’ as prohibited conduct.

[36] In this appeal, section 486.4 prohibits “transmitted in any way” (emphasis added). The trial judge found the qualifier “in any way” added nothing to the meaning of transmitted or published for three reasons. First, a criminal act must be specifically identified; second, *UNA* holds that criminal contempt can be “neither vague nor arbitrary” and requires that a “person can predict in advance whether his or her conduct will constitute a crime”; and, third, freedom of speech is a *Charter*-protected right and any limit on that right must be clearly delineated in order to be justifiable.

[37] The trial judge’s analysis of the relevance of “in any way” to qualify “transmitted” was correct. The definition of an offence must be sufficiently clear to ensure some predictability. The law must give fair notice of conduct which is criminal”: *Alberta v The Edmonton Sun*, 2003 ABCA 3 at para 50, 221 DLR (4th) 438. Given the narrow interpretation of transmit—host server to Internet Service Provider and Internet Service Provider to end user in *SOCAN*, and one-to-one distribution such as via e-mail but not passively making it available in *Spencer*—it is doubtful that the qualifier “in any way” adds anything of relevance to the question on appeal.

iii. Scheme and Purpose of Publication Bans

[38] Part of the modern approach to statutory interpretation requires regard to the scheme of relevant parts of the *Criminal Code* and the provision’s purpose.

[39] Sections 486.4(2.1) and (2.2) were enacted in 2015 by the *Victims Bill of Rights Act*, SC 2015, c 13. The *Victims Bill of Rights Act* legislative summary states:

This enactment enacts the *Canadian Victims Bill of Rights*, which specifies that victims of crime have the following rights: ...

(c) the right to have their security and privacy considered by the appropriate authorities in the criminal justice system; ...

This enactment amends the *Criminal Code* to ...

(g) make publication bans for victims under the age of 18 mandatory on application;

[40] Parliament’s purpose in enacting the sections appears to have had two components: security and privacy for victims of crime. One method Parliament selected to implement those purposes was to allow publication bans on identifying information. Allowing public access to that information undermines that objective. This suggests that maintaining identifying information on a publicly accessible website after a section 486.4 ban has issued is contrary to the stated purpose of the legislation.

[41] Sections 486.4(2.1) and (2.2) “expand the ability of the court to grant a publication ban ...”: *R v Clark*, 2015 ABQB 729 at para 8, [2015] AJ No 1247 (QL). The sections use the identical language to other related and existing *Criminal Code* publication bans. Regard must therefore be had to the broader publication ban scheme for interpretive guidance.

[42] First, like other sections, section 486.4 does not apply “in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community”: s 486.4(4). It is at least arguable that once the identifying information is first published, its continued existence on the website does not constitute “mak[ing] the information known in the community”.

[43] Second, other *Criminal Code* offences use different language to identify prohibited means of communicating information. Section 163.1(3) provides that every person who “transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission” child pornography commits an offence. As noted above, courts have drawn a distinction between ‘makes available’ and ‘transmits’ for the purposes of this offence: *Spencer*. Section 162(4) (voyeuristic recordings) prohibits both ‘publishes’ and ‘makes available’, suggesting that there is a distinction. Section 162.1(1) (intimate images without consent) uses ‘publishes’, ‘transmits’ and ‘makes available’. This lends support to the conclusion that ‘transmit’ and ‘publish’ each have a separate and distinct meaning from ‘makes available’. It is well established that the contextual reading of legislation involves a presumption of consistent expression throughout the statute which recognizes both that the same words connote the same meaning, and also that different words or “forms of expression” (in this instance, different lists which distinguish legal terms) connote different meanings: see eg *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81, [2013] 2 SCR 559; *Contino v Leonelli-Contino*, 2005 SCC 63 at para 25, [2005] 3 SCR 217. It is true that such presumption can be rebutted, and some legal terms can include other terms: compare *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 25, [2017] 2 SCR 488. But this statute has a list which clearly distinguishes Term A from Term B, and another list which distinguishes Term A from Term B and Term C. The court can take the hint about Term A when it appears by itself. Wilson J’s interpretation in *Re Orr* is also to this effect. The reasoning in *Spencer* and *Re Orr* suggests that it

is unlikely that the CBC “published” prohibited information simply by leaving the un-redacted articles on its website.

[44] Publication bans are also found in the *YCJA*. Statutes “dealing with similar subjects must be presumed to be coherent” and “interpretations favouring harmony among statutes should prevail over discordant ones”: *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015 at para 61, [1997] SCJ No 41 (QL). Section 2(1) of the *YCJA* defines “publication” to including making information “accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means” (with emphasis). It also defines “disclosure” to mean “the communication of information other than by way of publication”, which is also prohibited in certain circumstances. Neither definition is found in the *Criminal Code* which tends to suggest that if Parliament meant to give “published” a broad meaning it would have done so. As section 486.4(2.2) came into force in 2015 and as both the *YCJA* and the *Criminal Code* are enactments of Parliament, I must assume that any differences in these provisions were intentional rather than inadvertent.

[45] Having carefully considered all of the above, I am of the view that section 486.4 is capable of two interpretations. That is, arguments for both the broad and narrow interpretation of “published” and “transmitted” are plausible using the modern approach of statutory interpretation. This leaves a reasonable doubt as to their meaning and scope, which requires us to apply the rule of strict construction.

[46] I fully appreciate the harm that is intended to be reduced by the issuance of publication bans of youth victims of crime. Nevertheless, criminal contempt is a serious offence that “may result in imprisonment, constituting a denial of liberty”: *UNA*. Violation of a section 486.4 ban is a summary conviction offence: s 486.6. A review of reported appellate-level criminal contempt cases reveals that six and four-month sentences with lengthy probation periods are not uncommon, see for example, *Regina (City) v Cunningham*, (1994) 123 Sask R 233, [1994] 8 WWR 457 (CA); *MacMillan Bloedel Ltd v Simpson* (1993), 32 BCAC 244, 106 DLR (4th) 540; *Puddester v Newfoundland (Attorney General)*, 2001 NLCA 25, 226 Nfld & PEIR 1.

[47] The “highest degree of clarity, explicitness and specificity” in a *Criminal Code* offence is necessary before concluding that Parliament intended to authorize a justified infringement of CBC’s *Charter*-protected right to publish. Parliament did so in other *Criminal Code* publication ban provisions and in the *YCJA*. Further, it is critical for an accused to know precisely what constitutes the order which it is alleged to have breached.

[48] Accordingly, I conclude that the narrow definitions of published and transmitted apply. That is, “published” and “transmitted in any way” do not capture the CBC’s refusal to remove or redact previous identifying information after the Ban issued. In this respect online publication of identifying information is no different than if reported in traditional media. If section 486.4(2.1) and (2.2) are intended to apply when identifying information is published and transmitted *before* a section 486.4 ban issues, statutory amendments are required.

V. Conclusion

[49] I fully recognize the pervasive nature of the internet and the concern that what is on the internet stays forever but in my view it is Parliament that must initiate any desired reform. Given my conclusion about the meaning of “published” and “transmitted in any way”, I need not address the other grounds of appeal. The trial judge did not err in his interpretation of the meanings of “published” in s 486.4 of the *Criminal Code*.

[50] The appeal is dismissed.

Appeal heard on June 5, 2018

Reasons filed at Edmonton, Alberta
this 23rd day of November, 2018

I concur: _____
Martin J.A.

Rowbotham J.A.

I concur: _____
Authorized to sign for: Greckol J.A.

Appearances:

I. Kuklicz
for the Appellant

S.E. Ward
T.C. Layton
for the Respondent

Tab 8:

R. v. Capancioni, 2018 ONCA 173

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order

directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Capancioni, 2018 ONCA 173

DATE: 20180223

DOCKET: C62698 and C62585

Hoy A.C.J.O., MacPherson and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent/Appellant

and

Robert Capancioni

Appellant/Respondent

Andrew Furguele, for the appellant/respondent on Crown appeal

Melissa Adams, for the respondent/appellant on Crown appeal

Heard: January 22, 2018

On appeal from the conviction and the acquittal entered by Justice Edward Gareau of the Superior Court of Justice, dated July 27, 2016.

Hoy A.C.J.O.:

[1] Robert Capancioni was convicted of possession of child pornography, contrary to s. 163.1(4) of the *Criminal Code*, but acquitted of making child pornography available, contrary to s. 163.1(3) of the *Criminal Code*.

[2] He appeals his conviction on *Charter* grounds, arguing that the search of his residence and computer violated his rights under s. 8 of the *Charter of Rights*

and Freedoms and the evidence flowing from it should have been excluded under s. 24(2) of the *Charter*. The Crown concedes that the search was unlawful. Therefore, the narrow issue on Mr. Capancioni's appeal is whether the evidence flowing from the unlawful search should have been excluded under s. 24(2) of the *Charter*.

[3] The Crown appeals Mr. Capancioni's acquittal on the count of making child pornography available, arguing that the trial judge erred in his application of the *mens rea* requirement for making child pornography available under s. 163.1(3) of the *Code*.

I THE BACKGROUND

[4] A host of computer applications have been developed for the purpose of allowing individual computer users to obtain and share information over the internet. They use what are referred to as "peer-to-peer" networks.

[5] The Internet Crimes Against Children Task Force uses sophisticated investigative software to investigate suspected child pornography possessors and traffickers within these peer-to-peer networks. The Task Force suspected that internet protocol ("IP") address 24.109.39.74 (the "Address") was downloading and sharing child pornography on the internet through a peer-to-peer file sharing software program.

[6] As a result of the Task Force's suspicions, Detective Constable Erkkila began monitoring the Address in November 2012.

[7] On December 2, 2012, Erkkila identified and downloaded a suspect file located at the Address. Erkkila was not satisfied that the downloaded images that were able to be viewed met the definition of child pornography, although one image showed a naked prepubescent female who appeared to be approximately 10 years of age. She lay on her back, on a red shag carpet, with her body oriented away from the camera.

[8] The 40-digit "peer ID number", that is, the serial number identifying the specific installation of the file sharing software on the computer from which Erkkila downloaded the file, was recorded.

[9] Information about the general geographic location of the Address was publicly available over the internet. The Address was registered to Shaw Communications Inc. On December 3, 2012, Erkkila submitted a Law Enforcement Request ("LER") to Shaw, requesting the subscriber information for the Address. On December 5, 2012, Shaw provided the name and precise municipal address of the account holder, the appellant's spouse.

[10] On December 31, 2012, Erkkila downloaded from the Address two different files that police investigative software flagged as suspect. Both contained images of child pornography. At the time of each download, the 40-

digit peer ID number indicating the specific installation of software on the suspect computer from which the file was downloaded was recorded. One set of downloaded images featured a prepubescent female who appeared to be between 8 and 10 years of age.

[11] Erkkila obtained a search warrant to search the house located at the address disclosed by Shaw in response to the LER and to search and seize the computer systems and all related devices and data located in the house.

[12] The evidence seized as a result of that search led to the appellant's conviction for possession of child pornography.

II THE *CHARTER* APPEAL

The reasons below

[13] A year and a half after Erkkila submitted the LER to Shaw, the Supreme Court, in *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, determined that a police request that an internet service provider disclose subscriber information amounts to a search, and, if prior judicial authorization is not obtained, violates the subscriber's rights under s. 8 of the *Charter*.

[14] Applying *Spencer* in his Reasons on *Charter* Application, the trial judge found that Erkkila would not have had reasonable and probable grounds to obtain a judicial authorization at the time that he submitted the LER, and

therefore, although consistent with police practice at the time, the LER was obtained in breach of the appellant's *Charter* rights.

[15] The trial judge then applied the three-pronged test in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, to determine if the admission of the evidence would bring the administration of justice into disrepute, or if the evidence should be admitted under s. 24(2) of the *Charter*.

[16] He found that the first *Grant* consideration – the seriousness of the *Charter*-infringing State conduct – favoured inclusion of the evidence. Erkkila was simply following procedures that, in the pre-*Spencer* world, he reasonably believed to be lawful. The second *Grant* consideration – the impact of the *Charter* breach on Mr. Capancioni's *Charter*-protected interests – favoured excluding the evidence. The violation of an individual's privacy rights is a serious matter. The third *Grant* factor – society's interest in the adjudication of the case on its merits – favoured the inclusion of the evidence. The evidence sought to be excluded was crucial to establishing that Mr. Capancioni accessed, possessed and made available child pornography. Balancing these three factors, the trial judge concluded that the exclusion of the evidence would bring the administration of justice into disrepute.

[17] The trial judge then turned to the appellant's argument that the Information to Obtain (the "ITO") the search warrant did not contain full and frank disclosure and misstated the facts.

[18] Erkkila acknowledged that he had mistakenly stated in the ITO that the same peer ID number was identified on his download of the file on December 2, and on the downloads of the two files on December 31. In fact, the first 16 digits of the 40-digit number were the same. Erkkila explained that he looked at the first 12 or 16 digits and, because they were the same, assumed that it was the same peer ID number.

[19] The trial judge found that there was no bad faith, and that Erkkila's error was inadvertent and inconsequential. In the trial judge's view, if the erroneous information were removed, the ITO provided reasonable and probable grounds for the issuance of the warrant.

[20] The trial judge explained that Erkkila:

[W]as very clear in his evidence that it is the IPA number, the internet protocol number, which identifies the internet location that the computer is attached to. It is the IP address that provides the link to the geographical address. The peer ID number does not assist in connecting the virtual world to the geographical location of the computer.

If the IP addresses were reported as being the same and they were in fact not, that would be a matter of consequence with respect to the ITO and the issuance of the search warrant.

[21] The trial judge concluded that there was no breach of Mr. Capancioni's s. 8 *Charter* rights "as it relates to the Information to Obtain". Given that conclusion, he did not address s. 24(2) of the *Charter*.

Section 24(2) analysis

[22] On this appeal, the Crown concedes that the trial judge erred in his *Charter* analysis in relation to the error contained in the ITO. In determining whether there were reasonable and probable grounds for the issuance of the warrant, the trial judge should have excluded the information obtained pursuant to the LER, and not just the erroneous information about the peer ID number. The Crown concedes that without that information, the warrant to search the residence clearly could not have issued.

[23] It is agreed that, because of this error, this court must apply the three-prong test in *Grant* and conduct its own s. 24(2) analysis.

(i) Seriousness of the *Charter*-Infringing State Conduct

[24] With respect to the first *Grant* factor – the seriousness of the *Charter*-infringing state conduct that led to the breach of Mr. Capancioni's s. 8 *Charter* rights – like the trial judge, having regard to the circumstances, I would not characterize the making of the LER as serious *Charter*-infringing state conduct. As the trial judge reasoned, in making the LER, Erkkila followed procedures that

he reasonably believed to be lawful and was proven wrong, after the fact, by developments in the jurisprudence.

[25] This leads to the significance of Erkkila's mistake in relation to the peer ID numbers in determining the seriousness of the state conduct that infringed Mr. Capancioni's s. 8 *Charter* rights.

[26] Mr. Capancioni does not dispute the trial judge's findings that Erkkila's error was inadvertent and there was no bad faith, and I agree with those important findings.

[27] Mr. Capancioni argues that the trial judge's conclusion that the "peer ID number does not assist in connecting the virtual world to the geographic location of the computer" resulted from a misapprehension of the corroborative importance of the peer ID numbers and led him to mistakenly characterize Erkkila's error as "inconsequential".

[28] In the ITO, Erkkila explained that an IP address can be static or dynamic, meaning that the subscriber's IP address may change. He indicated that, in his experience, Shaw subscribers "typically" have a dynamic IP address "but they may keep the same IP address for longer periods of time ranging from several days to several months."

[29] Assuming the Address was dynamic, Mr. Capancioni asserts that if the peer ID number had been the same on December 31 as on December 2, the fact

that it was the same would have provided certainty that the Address had not been assigned to a different Shaw subscriber, located at a different address, after Shaw responded to the LER, and that, at the time that Erkkila swore the ITO, the Address remained associated with Mr. Capancioni's residence. Mr. Capancioni asserts that without such corroboration, the issuing judge could not have issued the warrant. Therefore, he submits, although Erkkila's mistake was inadvertent and there was no bad faith, his mistake was nonetheless serious *Charter*-infringing state conduct, and weighs in favour of the exclusion of the evidence.

[30] I agree with Mr. Capancioni that, although Erkkila was clear that he did not rely on the peer ID number to determine the location of the house, logically, had the peer ID number been the same at the time of the downloads on December 31 as on December 2, it would have had some corroborative value. However, I would not characterize Erkkila's mistake about the peer ID number as serious *Charter*-infringing state conduct favouring exclusion of the evidence.

[31] Turning first to the corroborative effect, Erkkila testified that the peer ID number is not information that he required to determine the location of the house, and that he included the peer ID number because he had this information during the investigation and wanted to ensure that he provided full, fair and frank disclosure to the issuing justice. Erkkila testified that the Address was in fact a

static address.¹ He also testified that he had “the same Internet Protocol address on three different occasions...between the 2nd and 31st”, and that he did not require another LER to confirm that the Address remained associated with the same subscriber.

[32] In lay terms, Erkkila explained that a peer ID number is specific to a program on a particular device. The IP address is associated with the router – the physical point at which internet access is provided to a residence or business. When internet is provided to the residence or business through the router, multiple devices – including those of visitors to the residence or business – can access the internet. The peer ID number permits police to determine which device accessed the internet through the IP address under investigation.

[33] If the peer ID number had been the same on December 31 as on December 2, it would have indicated that on both December 2 and December 31 the same device accessed the internet through the Address. In light of the information in the ITO that Shaw IP addresses are “typically” dynamic, logically, this could have provided the issuing justice with greater certainty that, on December 31, the Address remained associated with the same subscriber, and therefore the same municipal address, as on December 2.

¹ The transcript is not entirely clear whether this information was available to Erkkila at the time he swore the ITO.

[34] However, for several reasons I conclude that Erkkila's mistake in the ITO with respect to the peer ID number is not state conduct that favours exclusion of the evidence seized under the first *Grant* factor.

[35] First, the first line of inquiry under *Grant* necessitates an evaluation of the seriousness of the state conduct that led to the violation of the *Charter* – in this case the unlawful search of Mr. Capancioni's residence. The state conduct that led to the violation of the *Charter* was the unlawful search by making the LER. Without the information obtained in response to the LER, Erkkila could not and would not have sought the warrant. In light of this, his subsequent mistake in the ITO with respect to the peer ID number was, as the trial judge found (albeit for different reasons), inconsequential.

[36] Second, the trial judge accepted Erkkila's evidence that he did not rely on the peer ID number in determining the location of the house. As the trial judge erroneously considered the evidence in response to the LER linking Mr. Capancioni's house to the Address on December 3, he effectively considered the significance of Erkkila's error on a stand-alone basis. He found that Erkkila's error was inconsequential and there was sufficient information in the ITO to establish that evidence of child pornography would probably be found if Mr. Capancioni's house and computer were searched. Although the peer ID number had some corroborative value, if the information in response to the LER linking Mr. Capancioni's home to the Address could have been considered, this finding

may well have been open to the trial judge given: the evidence of how and why the Task Force had identified the Address as suspect; the evidence of the photo of the nude pre-pubescent girl, approximately 10 years of age, downloaded via the Address on December 2; and the 77 images of child pornography downloaded on December 31 some of which featured a nude pre-pubescent girl who appeared to be between the ages of 8 and 10.

[37] Third, and significantly, Erkkila's mistake was inadvertent, and there was no bad faith. His mistake was made in the context of rapidly evolving technology. Two different peer ID numbers were associated with Mr. Capancioni's computer on December 31. This was the first investigation that Erkkila – an uncontested expert in the field of computer forensics who had been involved in approximately 40 to 50 child pornography investigations – had been involved with where the peer ID number changed.

(ii) Impact on the *Charter*-Protected Interests of the Accused

[38] The unlawful search impacted on Mr. Capancioni's *Charter*-protected privacy interests. As the Supreme Court noted in *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 105, it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. This factor weighs in favour of the exclusion of the evidence.

(iii) Society's Interest in an Adjudication on the Merits

[39] The evidence seized was reliable and critical to the prosecution's case. This factor favours admission of the evidence.

[40] Balancing my assessments under each of these three lines of inquiry, I conclude that the admission of the evidence would not bring the administration of justice into disrepute.

[41] Accordingly, I would dismiss Mr. Capancioni's conviction appeal.

III THE CROWN APPEAL

[42] Mr. Capancioni was charged with making available child pornography between September 23, 2012 and January 15, 2013, contrary to s. 163.1(3) of the *Criminal Code*. That section provides as follows:

Distribution, etc. of child pornography

(3) Every person who transmits, *makes available*, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year. [Emphasis added.]

[43] The accepted evidence at trial was that the peer-to-peer file sharing program Azureus was located on Mr. Capancioni's computer.

[44] In a prosecution under s. 163.1(3) for making available child pornography, the Crown must prove that the accused had knowledge that the pornographic material was being made available. In the context of a file sharing program, the *mens rea* element of making available child pornography requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge, or wilful blindness to the fact, that the file sharing program makes files available to others. There is no additional requirement on the Crown to prove that the accused knowingly, by some positive act, facilitated the availability of the material: see *Spencer*, at paras. 83, 84.

[45] The trial judge wrote, at para. 46 of his Reasons for Judgment:

From the description of how the Azureus file sharing program is installed given in evidence by Detective Constable Erkkila there are active steps to be followed to install this type of program on a computer. *It would be difficult to believe that someone who was installing the Azureus program on their computer would not know that this program was a file sharing program where information and images could be downloaded from your computer to another computer which is also connected to the program*, as put by Erkkila in his evidence, “When a person downloads this software, the terms of use and service must be agreed to before continuing the actual installation process”. [Emphasis added.]

[46] Then, at para. 51, the trial judge concluded as follows:

... I am satisfied that *the Crown... has established that the offence took place on December 31, 2012* when the material was downloaded to the police investigative computer, that the material downloaded were images of child pornography and that these images were made

available by the accused, Robert Capancioni. Having said this, I can indicate that I am not satisfied beyond a reasonable doubt, in examining the totality of the evidence, that the Crown has proven that Robert Capancioni had the intent to make child pornography available to others. From the evidence *it is entirely possible that Robert Capancioni was transferring images from his computer to another computer without expressly knowing that these images were being transferred.* [Emphasis added.]

[47] The Crown argues that the trial judge erred in law by requiring the Crown to prove that Mr. Capancioni knew about a specific act of “distribution” on December 31, 2012, a more onerous *mens rea* element than required.

[48] I agree with the Crown that the trial judge erred by requiring the Crown to prove a more onerous *mens rea* element than required. Section 163.1(3) distinguishes between overt acts of dissemination, such as distribution, and the facilitation of the carrying out of those acts, such as “make available”: see *Spencer*, at paras. 82, 83.

[49] The Crown was not required to prove that Mr. Capancioni had knowledge of an overt act of dissemination, namely that images of child pornography were being transferred to other computers. There was evidence that the images downloaded to the police investigative computer on December 31, 2012 had resided on Mr. Capancioni’s computer and were available to other members of the Azureus network since early August 2012. As the Crown submits, it was only

required to prove that Mr. Capancioni knew, or was willfully blind to the fact, that Azureus makes files available to others.

[50] I also agree that this error might reasonably be thought, in the concrete reality of this case, to have had a material bearing on the trial judge's decision to acquit Mr. Capancioni and therefore satisfies the test in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14, that must be met before an appeal of an acquittal by the Crown can succeed.

[51] The Crown argues that the trial judge made the finding necessary to support a finding of guilt on the count of making available at para. 46 of his reasons and, therefore, this court may substitute a verdict of guilty and remit the matter back to the trial judge for sentencing. I disagree. In my view, a new trial is required. The trial judge's finding at para. 46 is prefaced by the words "it would be difficult to believe". The *mens rea* requirement must be established beyond a reasonable doubt. Arguably, para. 46 is not a clear finding that the trial judge was satisfied beyond a reasonable doubt that Mr. Capancioni knew, or was wilfully blind to the fact, that the Azureus program shared data with other computers.

IV DISPOSITION

[52] For these reasons, I would dismiss Mr. Capancioni's appeal and I would allow the Crown's appeal, overturn Mr. Capancioni's acquittal on the count of making child pornography available, and order a new trial on that count.

Released: "AH" "FEB 23 2018"

"Alexandra Hoy A.C.J.O."
"I agree J.C. MacPherson J.A."
"I agree Paul Rouleau J.A."

Tab 9:

R. v. Duguay, 2019 BCCA 53

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Duguay*,
2019 BCCA 53

Date: 20190214
Docket: CA44668

Between:

Regina

Appellant

And

Patrick Benoit Duguay

Respondent

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the *Criminal Code* in cases involving sexual offences to ban the publication, broadcasting or transmission in any way of evidence that could identify a complainant or any witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated July 21, 2017 (*R. v. Duguay*, 2017 BCSC 1399, Victoria Docket 163577-2).

Counsel for the Appellant (Crown): S.E. Elliott

Counsel appearing as *Amicus Curiae*: J.T.J. Campbell, Q.C.
M. Shah

Place and Date of Hearing: Vancouver, British Columbia
September 14, 2018

Place and Date of Judgment: Vancouver, British Columbia
February 14, 2019

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock

Summary:

Following his conviction for indecent exposure, the respondent was sentenced to 45 days' imprisonment and two years' probation. His probation order included Condition 6 (that he reside in a residence approved by his probation officer) and Condition 9 (that he attend any assessment, counselling, or program directed by his probation officer, including sexual offence prevention and a full-time treatment program for sex offenders). The probation officer refused to approve the respondent's residence, which he owned and had occupied with his spouse for nine years. His application to vary the terms of the order was dismissed. He appealed, arguing that Condition 6 was an improper delegation of a judicial function and that he could not be ordered to participate in a full-time treatment program without his consent. The summary conviction appeal judge held: (1) the sentencing judge lacked jurisdiction to impose Condition 6 and, in the alternative, that it was an improper delegation of a judicial function; and (2) "counselling" is sufficiently akin to "treatment" that it cannot be imposed without an offender's consent pursuant to s. 732.1(3)(g) of the Criminal Code. The Crown appealed. Held: Appeal allowed. Although the probation order was spent and the appeal was moot, the interests of justice required it to be heard because it raised issues of broad public importance to the administration of criminal justice. The summary conviction appeal judge erred in finding that the sentencing judge lacked jurisdiction to impose Condition 6. Section 732.1(3)(h) of the Code vests sentencing judges with broad discretion to impose reasonable probation conditions that will achieve the applicable sentencing objectives. It is not an improper delegation of a judicial function to require an offender to reside where directed by a probation officer. When a sentencing judge determines that a residency condition is appropriate, and the order establishes criteria that meaningfully inform the probation officer's exercise of discretionary authority, the probation officer's function is properly characterized as an administrative one. The summary conviction appeal judge further erred in finding that consent is required for a counselling condition that does not involve active participation in a treatment program.

Reasons for Judgment of the Honourable Mr. Justice Fitch:**I. Introduction**

[1] This Crown appeal from sentence raises two questions of law concerning the interpretation of s. 732.1(3)(h) of the *Criminal Code*, R.S.C. 1985, c. C-46 [Code]. This provision (the "residual clause") gives sentencing judges broad authority to impose, as optional conditions of a probation order, reasonable terms not specifically enumerated in ss. 732.1(3)(a)-(g.2) in order to protect society and facilitate an offender's reintegration into the community. The power conferred by the residual clause is necessary to the attainment of an individualized sentencing process – one

that seeks to reduce reliance on incarceration while at the same time promoting public protection by holding offenders to account and actively encouraging their rehabilitation.

[2] The two questions that arise in this appeal may be stated as follows:

1. Does s. 732.1(3)(h) of the *Code* authorize the imposition of a probation condition that an offender reside in a place approved of by a probation officer?
2. Does s. 732.1(3)(h) of the *Code* authorize the imposition of a probation condition that an offender take counselling without the consent of the offender?

[3] The first question has two components: (a) whether a sentencing judge has jurisdiction under the residual clause to impose a residency condition; and (b) if so, whether the judge can delegate to a probation officer the power to determine whether an offender will be permitted to reside at a particular place. The summary conviction appeal judge concluded that a judge has no jurisdiction under s. 732.1(3)(h) to impose a residency requirement as a condition of a probation order. In what I would characterize as alternative conclusions, the judge held: (1) that a condition requiring an offender to reside “in a place approved of by a probation officer” constitutes an impermissible delegation of a judicial function; and (2) that the residency condition imposed in this case was unreasonable.

[4] On the second question, the judge concluded that a counselling condition can only be imposed with the consent of an offender. He noted that s. 732.1(3)(g) of the *Code* requires the offender to consent to the imposition of a condition requiring active participation in a treatment program. The judge held there is no meaningful difference between “counselling” and “treatment.”

[5] The Crown appealed from the order of the summary conviction appeal judge. The respondent did not participate in the hearing of the appeal, which was rendered moot by the expiry of the probation order. *Amicus curiae* was appointed to prepare a factum addressing the two questions of law and make oral submissions.

[6] I am of the view that the summary conviction appeal judge erred in law in his interpretation of s. 732.1(3)(h). When the words of the residual clause are given their ordinary meaning and read in context with the sentencing objectives of the *Code* in mind, I have no doubt that a sentencing judge has jurisdiction to impose a residency requirement as a condition of probation. This conclusion is consistent with settled jurisprudence and established practice. With respect, the judge was wrong to decide the point as he did. I am also of the view that the judge erred in his alternative conclusion that a condition of a probation order requiring an offender to reside in a place approved by a probation officer necessarily constitutes the impermissible delegation of a judicial function. Finally, I conclude that the judge erred in law in holding that the residual clause does not authorize the imposition of a counselling condition without an offender's consent.

[7] In my view, for reasons I will develop, the answer to both questions that arise on appeal is "Yes".

II. Legislative Context

[8] The following provisions of the *Code* are relevant to the determination of this appeal:

PART XXIII – SENTENCING

Interpretation

Definitions

716 In this Part,

...

court means

...

(c) a justice or provincial court judge acting as a summary conviction court under Part XXVII, or

...

Purpose and Principles of Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

...

(b) to deter the offender and other persons from committing offences;

...

(d) to assist in rehabilitating offenders;

...

(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

...

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

...

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

...

Procedure and Evidence

Report by probation officer

721 (1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.

...

Content of report

(3) Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:

(a) the offender's age, maturity, character, behaviour, attitude and willingness to make amends;

...

Idem

(4) The report must also contain information on any other matter required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2).

...

Probation

Making of probation order

731 (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

...

(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

...

Definitions

732.1 (1) In this section and section 732.2,

"change", in relation to optional conditions, includes deletions and additions;

"optional conditions" means the conditions referred to in subsection (3) or (3.1).

Compulsory conditions of probation order

(2) The court shall prescribe, as conditions of a probation order, that the offender do all of the following:

(a) keep the peace and be of good behaviour;

(a.1) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, or refrain from going to any place specified in the order, except in accordance with the conditions specified in the order that the court considers necessary ...

...

(b) appear before the court when required to do so by the court; and

(c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

...

Optional conditions of probation order

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(a) report to a probation officer

(i) within two working days, or such longer period as the court directs, after the making of the probation order, and

(ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;

(b) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;

(c) abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(c.1) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection (9) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the offender has breached a condition of the order that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(c.2) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by a probation officer in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(d) abstain from owning, possessing or carrying a weapon;

(e) provide for the support or care of dependants;

(f) perform up to 240 hours of community service over a period not exceeding eighteen months;

(g) if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;

(g.1) where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;

(g.2) where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and

(h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for

protecting society and for facilitating the offender's successful reintegration into the community.

...

Changes to probation order

732.2 (3) A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

(a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,

(b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or

(c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

...

[Emphasis added.]

III. Background

[9] The respondent, Patrick Benoit Duguay, was charged with indecent exposure contrary to s. 173(2) of the *Code*. It was alleged that he opened the front door of his residence and exposed his genitals to a 14-year-old neighbourhood girl as she passed by on her newspaper delivery route. The victim testified that the respondent had taken to calling her “sweetie” and “beautiful” – remarks the respondent did not deny. The victim testified she was “creeped out” by these remarks.

[10] The Crown proceeded summarily. The respondent was convicted on December 15, 2015, following a trial in the Provincial Court.

[11] A presentence report was prepared. The respondent, who was then 63 years old, had lived with his common-law spouse for nine years in the residence where the offence was committed. He had a dated criminal record for property offences and assault that the sentencing judge gave “very little weight”. He was unwilling to provide collateral contacts to assist in the preparation of the report. He told the

probation officer he was also unwilling to participate in a sex offender treatment program offered through the Forensic Psychiatric Services Commission (FPSC).

[12] If the sentencing judge determined to impose a period of community supervision, the probation officer recommended the following terms:

- You shall report forthwith to the Probation Office located at 200-3965 Quadra Street, Victoria BC and thereafter you shall report as directed.
- You shall reside in a place approved of by a Probation Officer and you must not change that residence without the prior written permission of a Probation Officer.
- You shall, having consented in court, attend, participate in, and complete individual and/or group therapy/counselling and/or program(s) for sex offenders as directed by, and to the satisfaction of a Probation Officer.
- You shall attend for, participate in, and successfully complete any assessment, counselling or programming as directed by your Probation Officer.
- You shall have no contact or communication directly or indirectly with any person you know to be, or who reasonably appears to be, of 16 years or less.
- You shall not attend a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or area where children under the age of 16 years are known to congregate.

[13] As is apparent, the probation officer distinguished “assessment, counselling or programming” from participation in the kind of sex offender treatment program offered through the FPSC. His recommendation contemplated the imposition of a condition requiring participation in a sex offender treatment program only with the respondent’s in-court consent.

[14] On sentencing, Crown and defence counsel jointly submitted that the respondent should serve a 45-day period of incarceration. The Crown sought a two-year probation order on the conditions recommended in the presentence report. The respondent sought a one-year probation order but made no submissions on the conditions that should attach to the order. The respondent did not suggest the sentencing judge lacked jurisdiction to impose a residency condition nor did he suggest that a condition requiring him to reside in a place approved by his probation order would constitute impermissible delegation of a judicial function.

[15] The judge acceded to the joint submission respecting the custodial portion of the sentence. He imposed a sentence of 45 days' imprisonment to be followed by two years' probation on the compulsory conditions set out in s. 732.1(2), and on a number of optional conditions he implicitly considered to be authorized by s. 732.1(3)(h), including:

Condition 6: You shall reside in a place approved of by a Probation Officer and you may not change that residence without the prior written permission of a Probation Officer.

Condition 7: You shall have no contact or communication, directly or indirectly, with any person you know to be, or who reasonably appears to be, of 16 years of age or less.

Condition 8: You shall not attend at a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or area where children under the age of 16 years are known to congregate.

Condition 9: You shall attend, participate in and successfully complete any assessment, counselling or program as directed by the Probation Officer which may include: a.) sexual offence prevention; b.) a full time attendance program for sex offenders, and you shall comply with all rules and regulations of any such assessment, counselling or program.

[16] Following a home visit and the giving of notice to the respondent's neighbours, the probation officer refused to approve the respondent's proposal that he continue to live in his residence where the offence was committed. The refusal was based on the following considerations: children lived in the neighbourhood; the respondent was said to have called a child who lived next door "a sweetheart"; and neighbourhood residents provided hearsay information about similar behaviour the respondent was alleged to have engaged in over the past 10 years.

[17] The respondent applied under s. 732.2(3)(b) for an order varying or otherwise relieving him from compliance with Condition 6 and permitting him to continue living in his home. The application, which was heard by the sentencing judge, was dismissed.

[18] The respondent appealed his conviction and sentence to the summary conviction appeal court. The conviction appeal was dismissed. The sentence appeal was confined to the propriety of Conditions 6, 8 and 9 of the probation order.

IV. Summary Conviction Appeal

1. Submissions of Counsel

[19] The respondent argued, for the first time on appeal, that Condition 6 (reside in a place approved by the probation officer) reflected an improper delegation of a judicial function to the probation officer. Alternatively, the respondent argued that the condition was clearly unreasonable and that it should be set aside as unfit.

[20] The respondent also argued, and the Crown conceded, that Condition 8 was overly broad. The condition was varied to delete the words “or area where children under the age of 16 years are known to congregate.”

[21] With respect to Condition 9, the respondent argued that he could not be required to participate in a full-time treatment program for sexual offenders without his consent. He relied on s. 732.1(3)(g) of the *Code* which requires an offender’s consent to the imposition of a condition involving active participation in a treatment program. The respondent argued that the term should be modified to require his consent or, alternatively, recast to impose upon him the obligation only to participate in and successfully complete any assessment, counselling or programming as directed by his probation officer.

[22] The summary conviction appeal judge raised, on his own motion and without notice to the parties, two additional issues concerning the interpretation of s. 732.1(3): (1) whether a sentencing judge has jurisdiction to impose a residency condition; and (2) whether there is a difference between “counselling” and a “treatment program” as the latter phrase is used in s. 732.1(3)(g). He questioned whether a counselling condition can be imposed without the offender’s consent.

[23] The Crown objected to the respondent taking issue with aspects of the probation order for the first time on appeal. He argued that the joint submission was predicated on the respondent's agreement to the imposition of conditions that would protect society and facilitate his reintegration into the community.

[24] The Crown cited *R. v. Degan* (1985), 20 C.C.C. (3d) 293 (Sask. C.A.), in support of the proposition that sentencing judges have long been considered to have jurisdiction to include reasonable residency conditions in probation orders. The Crown noted that judges routinely impose such conditions and that doing so is accepted practice in British Columbia and elsewhere.

[25] The Crown submitted that, for practical reasons, it is sometimes necessary for judges, having imposed a residency condition, to delegate to probation officers the administration of the condition, including whether approval to reside at a proposed residence (or move to a new residence) will be granted. The Crown noted that sentencing judges are ill-equipped to conduct community-based inquiries to determine whether to approve a residence. Further, if the court was obliged to approve changes in residence, the administration of criminal justice would be overwhelmed by variation applications.

[26] The Crown did not seek to defend the broad language of Condition 9, but argued that a counselling condition is authorized by the residual clause and does not require an offender's consent. In support, the Crown relied on *R. v. Lee*, 2012 BCSC 137 at paras. 1, 3, 38-39, and *R. v. E.A.*, 2015 BCSC 1943 at para. 11, leave to appeal ref'd 2015 BCCA 463. The Crown noted that *Lee* also stands for the proposition that requiring an offender to take counselling "as directed by your probation officer" does not involve the improper delegation of a judicial function.

2. Reasons for Judgment

[27] In unpublished oral reasons for judgment indexed as 2017 BCSC 1399, the appeal judge expressed concern about the reasonableness of Condition 6 in the circumstances of this case and whether the variation application was procedurally

fair to the respondent. I make no comment on either point as neither is before us. This appeal is restricted to the two questions of law identified herein.

(a) Condition 6: The Residency Term

(i) Jurisdiction of a Judge to Impose a Residency Condition

[28] The judge seems to have concluded that a sentencing judge does not have jurisdiction to impose a probation order with a residency condition. He said this:

[36] Mr. Duguay objects to the reside where directed provision in his probation order largely on the ground that it is an impermissible delegation of authority by the court to the probation officer. ...

...

[38] With respect to the delegation argument, it should be apparent that before the question of delegation is addressed, it must be shown that the court has jurisdiction to impose the condition that it purports to delegate, in this case, to a probation officer. Put another way, a sentencing judge has no authority or jurisdiction to delegate to an inferior tribunal authority or power that the judge himself or herself does not possess.

...

[48] I have concluded that a sentencing judge does not have general jurisdiction to impose a reside where directed condition as a term of probation outside the treatment provisions in ss. (g). In saying that, I recognize the multiple examples where such conditions have been imposed, or have been left undisturbed by the Court of Appeal, those decisions cited to me by counsel for the Crown on this appeal. I also recognize, and I am drawing an inference here, that reside where directed has become virtually a standard condition in the trial courts of this province, and so I have not come to my conclusion lightly.

[Emphasis added.]

[29] Although the judge cited no authority in direct support of his conclusion on this point, he referred to *R. v. Kieling* (1991), 64 C.C.C. (3d) 124 (Sask. C.A.). In that case, the Crown conceded, and the court held, that the residual clause (as it then read) did not authorize the court to require an offender to take a prescribed medication without the offender's consent. In reaching this conclusion, the court held that the language of the residual clause ("such other reasonable conditions") contemplates the imposition of conditions similar in nature to the enumerated optional conditions. The court concluded that while an optional condition of probation may require an offender to engage in or abstain from engaging in particular types of

conduct, it “can have no negative consequences” in the sense of presenting a risk to the offender or requiring behaviour of a type which, in fairness, should not be ordered in the absence of the offender’s consent: at 127.

[30] The appeal judge contrasted the decision in *Kieling* with that in *Degan*, relied upon by the Crown. In *Degan*, Vancise J.A., for the court, noted at 296:

Trial judges regularly impose residency requirements on persons placed on probation where they consider it necessary to secure the good conduct of the accused under the authority of [then] s. 663(2)(h). When such conditions of residency are reasonable, they are within the jurisdiction of the trial court judge: see *R. v. Horvath* (1970), 13 B.C.R.L.Q. 152 (Ont. C.A.); *R. v. Kennedy*, (February 24, 1976, No. 442/75), and *R. v. Beggs* (October 31, 1974, No. 686/74, B.C.C.A.).

(Neither the Crown nor the judge was able to locate this Court’s decision in *Beggs*. A copy was located for the purposes of this appeal, but it is not relevant for present purposes. It is likely that Vancise J.A. intended to cite *R. v. Beggs* (22 November 1976), Vancouver 760806 (C.A.), in which the Court, without being asked to consider the jurisdictional point, imposed a probation condition requiring the offender to reside with his sister.)

[31] The appeal judge considered the results in *Degan* and *Kieling* to be in conflict. Relying on *Kieling*, he appears to have regarded the language of Condition 6 as entailing negative consequences of a sort not contemplated by the residual clause: RFJ at paras. 41-47. He concluded that the sentencing judge had no jurisdiction to impose Condition 6.

[32] *Amicus* submits that, read as a whole, the reasons suggest the appeal judge did not decide that sentencing judges lack jurisdiction to impose a residency condition, but simply expressed his conclusion that the residency condition imposed in this case was unreasonable. In support of this submission, *amicus* highlights the judge’s conclusion that to be authorized under the residual clause, an optional condition, including a residency condition, must “be capable of being shown to be for societal protection and reintegration of the offender into society”: RFJ at para. 54 (emphasis added). Elsewhere in the reasons, the judge concluded that if a sentencing judge is satisfied that it is reasonable to direct where a probationer

should live, the judge should impose that condition with reasons explaining why such a condition is “needed” for both the protection of society and to facilitate the probationer’s reintegration into the community: RFJ at para. 65. The judge appears to have doubted that the condition in this case was needed to protect society and promote the offender’s reintegration into the community. He concluded that there was no “reasonable basis” to believe that requiring the respondent to live elsewhere would alter his behaviour: RFJ at para. 58. I note, as well, that the judge ultimately justified setting aside both Conditions 6 and 9 because they were “unfit”: RFJ at para. 73.

[33] Despite the able submissions of *amicus*, I am strongly inclined to the view that the judge struck Condition 6 because he concluded that a sentencing judge does not have jurisdiction to impose a residency condition under s. 732.1(3)(h). I am fortified in this conclusion by remarks made by the judge on the jurisdictional point after the comments highlighted by *amicus*. In the context of addressing the delegation issue, the judge said this:

[66] ... the sentencing judge clearly purported to delegate his discretion to direct where Mr. Duguay resided in the original probation order -- and I repeat, I do not think he had that power, in the first place ...

[Emphasis added.]

[34] In these circumstances, and given the importance of the jurisdictional question to the administration of criminal justice, I consider it both necessary and appropriate to proceed on the footing that the judge decided a sentencing judge has no jurisdiction to impose a residency condition on a probationer under s. 732.1(3)(h). In my view, the judge’s further conclusions that the residency condition imposed on the respondent involved the delegation of a judicial function to a probation officer and also resulted in an unfit sentence are best understood as alternative reasoning supporting the same result.

(ii) Impermissible Delegation of a Judicial Function to a Probation Officer

[35] The judge was cognizant of the fact that conditions requiring an offender to reside in a place approved by a probation officer have frequently been upheld or imposed by appellate courts, including this Court: see, for example, *R. v. Lea*, [1988] B.C.J. No. 1957 (C.A.) at para. 13; *R. v. Newcomb* (1997), 98 B.C.A.C. 219 at para. 15; *R. v. Mikolaczyhk*, 2002 BCCA 342 at paras. 9-10; *R. v. Colin*, 2005 BCCA 331 at para. 6; *R. v. Webber*, 2008 BCCA 371 at para. 20.

[36] A “Probation Picklist” (“Picklist”) developed for use by judges in British Columbia was put before the sentencing judge. The Picklist contemplates the imposition of a variety of conditions, under the authority of the residual clause, that delegate to probation officers the discretion to make decisions in relation to judicially-imposed conditions. For example, where a counselling condition is imposed, the Picklist contemplates that the condition may delegate to the probation officer authority to determine the counselling program the offender will be directed to attend. Further, it is contemplated that a probation officer may relieve an offender from complying with judicially-imposed conditions, including a curfew or an area restriction. Likewise, it is not uncommon for a condition to be imposed that permits an offender to do something otherwise prohibited by the terms of the order if, for example, the offender does that activity in the presence of, or while being supervised by, an informed adult who has been approved by the probation officer.

[37] These kinds of conditions recognize the institutional limitations of a sentencing court, the extent to which the needs of the offender and the community may change over the course of a three-year probation order, and the desirability of delegating authority to a probation officer to implement, monitor and modify judicially-imposed conditions in order to achieve the objectives underlying the order. Generally speaking, conditions of this kind have been characterized as delegating to probation officers administrative authority to manage the order.

[38] The Picklist suggests three different ways in which a residency condition may be imposed and monitored:

2201. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer.

2203. You must reside at a residence approved in advance by the probation officer. You must provide your probation officer with your phone number, and you must not change your residence or your phone number without written permission from your probation officer.

2204. You must reside at [address specified], with [person specified]. You must provide your probation officer with your phone number, and you must not change your residence or your phone number without written permission from your probation officer.

[Emphasis added.]

The residency condition imposed in the case at bar is a variation of the suggested wording of Picklist term 2203.

[39] The appeal judge determined that none of the authorities brought to his attention specifically addressed the question of whether the delegation in Condition 6 was permissible. In concluding that a judge cannot delegate authority to a probation officer to approve where a probationer will reside, the judge said this:

[63] Crown also provided the decision of this court in [E.A.] where a condition to reside where directed by a Youth Court worker was unsuccessfully challenged. A part of that challenge was that it was an impermissible delegation. That case was distinguishable, it seems to me, on the ground that the optional probation terms available under s. 55(2) of the *Youth Criminal Justice Act* are much broader than those in the *Criminal Code*, and in particular those in ss. 55(2)(f) and (g), particularly the latter which allows the court to direct a youth to reside at a place that the Provincial Director may specify, appear to contemplate just such a condition as was there under appeal.

[64] In *R. v. Traverse*, 2006 MBCA 7, the Manitoba Court of Appeal summarized the principles applicable to improper delegation at para. 30 where it said:

With respect to the issue of improper delegation, the basic principle is well known and can be stated easily enough. Simply, administrative functions can be delegated in a probation order, but judicial functions cannot [*Sterner v. Vander Kracht*, [1982] 1 S.C.R. 173]. A court can delegate some administrative functions to the probation officer so as to allow for supervision of the probationer and implementation of some probation conditions. The task in each case is the determination

whether the delegation is of a judicial or administrative function, and it is often a difficult task.

[65] The determination of where Mr. Duguay is permitted to live during his term of probation is a judicial function, in my view. It is not open to delegation to a probation officer. If a sentencing judge can be persuaded that it is reasonable to direct where a probationer is to live during the period of probation, that judge should make the direction himself or herself with reasons explaining why such direction is needed for protection of society and to facilitate reintegration.

[Emphasis added; citations added.]

(b) Condition 9: The Counselling Term

[40] In setting aside Condition 9, the judge held that the word “counselling” as used in the condition is analogous to the phrase “treatment program” used in s. 732.1(3)(g) and that a counselling condition must not, therefore, be imposed without the probationer’s consent:

[70] Counselling is sufficiently close to treatment that any difference is inconsequential, and my reading of s. (g) of the statute, persuades me that treatment, including counselling, can only be ordered with the consent of the offender. That is confirmed in [*R. v. Proulx*, 2000 SCC 5] at para. 25 in these words:

... Under a probation order, the judge can only impose a treatment order with the consent of the offender (with the exception of drug or alcohol addiction programs since the 1999 amendment to s. 732.1 [S.C. 1999, c. 32, s. 6]. In practice, however, this difference is not very significant, since it is unlikely that an offender faced with the choice between imprisonment and a suspended sentence with treatment as a condition of probation would refuse to consent to treatment.

[71] Well, here Mr. Duguay refused to consent to treatment -- or at least objected to it, and that was known to the sentencing judge. I take that from the statement in the presentence report [as read in]: “Mr. Duguay expressed an unwillingness to take part in the forensic sex offender program”. That was stated on the basis that -- or the reason for that influence was that he continued to deny guilt. There is nothing in the proceedings before the sentencing judge indicating that Mr. Duguay consented to counselling. ...

...

[73] I conclude that without the consent of the offender, counselling cannot be ordered as a term of probation. Mr. Duguay did not consent or clearly consent. Condition 9 must be struck and so that there is no doubt, condition 6 and condition 9, for the reasons I have already outlined, are unfit sentencing.

[Emphasis added; citations added.]

In coming to this conclusion, the appeal judge did not refer to *Lee* or to the principle of judicial comity expressed in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.).

[41] In the result, the appeal judge ordered that Conditions 6 and 9 be deleted from the probation order.

V. The Appeal in this Court

1. Procedural Issues

[42] The Crown was granted leave to appeal on the two questions of law identified herein on November 20, 2017. The respondent applied for an order appointing counsel to act for him. The application was dismissed on grounds of financial ineligibility. Unfortunately, the hearing of the appeal was delayed by this and other ancillary applications.

[43] By the time the appeal came on for hearing, the respondent had served the entirety of his sentence. The appeal is, accordingly, moot.

[44] On March 16, 2018, an order was made appointing *amicus curiae*.

[45] Although duly served, the respondent did not file a written argument or participate in the hearing of the appeal.

2. Positions of Counsel

[46] Crown counsel and *amicus* submit that although the appeal is moot, the Court should exercise its discretion to hear it. We agreed to do so, with reasons to follow.

[47] Crown counsel submits that the judge erred in principle by raising two new issues on the hearing of the appeal, both of which are fundamentally important to the daily operation of criminal courts, and doing so in the absence of notice and without soliciting considered submissions. In support of its position, the Crown cites *R. v. Mian*, 2014 SCC 54 at paras. 53-60, in which guidance was provided on the procedures that should be followed when an appellate court exercises its discretion to raise a new issue.

[48] While I am unable to endorse the manner in which the judge handled the introduction of new issues on appeal, the Crown seeks no particular remedy in relation to the alleged error. As I understand it, the point was raised to reinforce the principles set out in *Mian*, to put in context the somewhat fractured and incomplete submissions counsel were able to make on these issues, and to explain why seminal authorities like *R. v. Shoker*, 2006 SCC 44, were not mentioned in the judge's reasons.

[49] With respect to Condition 9, the Crown and *amicus* agree that the judge erred in concluding that a condition requiring a probationer to attend counselling can only be imposed with the offender's consent.

[50] *Amicus* raised before us a number of additional points regarding Condition 9 and analogous conditions. For example, *amicus* submits that "treatment" as used in s. 732.1(3)(g) should not be interpreted narrowly to include only medical treatment, but expansively to include some forms of intensive non-medical therapy. Further, *amicus* submits that counselling conditions should not require an offender to "participate in" or "successfully complete" a course as doing so may require the offender to admit responsibility or make admissions against their will or conscience. In addition, *amicus* submits that a condition which requires a probationer to "successfully complete" counselling is subjective and vague. *Amicus* submits that conditions that attach to a probation order must be clear so that an offender has fair notice of prohibited conduct – conduct that may lead to a criminal charge under s. 733.1 or revocation proceedings under s. 732.2(5) resulting in the imposition of a period of incarceration where sentence has been suspended and a probation order imposed.

[51] While these are legitimate issues, as we made clear during the hearing, it is unnecessary to address them to answer the second question. Indeed, these issues exceed the scope of the questions of law upon which leave to appeal was granted. Further, the Court should only seek to resolve issues of this kind with a proper evidentiary record and the benefit of full argument. In light of the way in which the issues arose in this case, we do not have either. In addition, if the issues were

resolved to the Crown's satisfaction, there is no opposing party who could seek leave to appeal the judgment of this Court to the Supreme Court of Canada. For these reasons, the additional issues raised by *amicus* are best left to another day.

[52] On the jurisdictional point that arises in relation to Condition 6, the Crown submits the judge erred by adopting an unduly restrictive interpretation of the residual clause that disregards the language of the provision and the purpose of sentencing. The Crown says the judge's interpretation also fails to give effect to the intention of Parliament to vest in sentencing judges a broad discretion to craft reasonable, individualized conditions of probation. The Crown submits that a proper application of the principles of statutory interpretation would have led the judge to conclude that the residual clause authorizes a sentencing judge to impose a residency condition as part of a probation order.

[53] As noted above, *amicus* says that the judge's reasons should be read not as a jurisdictional pronouncement, but merely as a ruling on the bounds of permissible delegation and the fitness of the sentence in this case. Should the Court interpret the judge's reasons as precluding sentencing judges from imposing residency conditions in probation orders, *amicus* agrees with the Crown that his conclusion was in error.

[54] The Crown submits that the judge also erred by finding that Condition 6 involved an impermissible delegation of a judicial function to the probation officer. Although the Crown acknowledges that the judge's opinion on this issue is *obiter*, it submits that the interests of justice would be advanced by this Court determining the point given the frequency with which the issue is likely to arise and its importance to the overall administration of criminal justice.

[55] The Crown argues that the sentencing judge properly exercised his judicial function by deciding to impose a residency condition. Given the nature of the offence, the context surrounding its commission and the offender's background and position on sentencing, the judge determined that it was desirable for community protection purposes that a condition be imposed requiring the respondent to reside in a place approved of by the probation officer. The Crown says that the delegation

was necessary and authorized the probation officer to manage the order, the parameters of which had already been put in place by the sentencing judge. The Crown also emphasizes that the judge retained ultimate authority to vary the terms of the order on application under s. 732.2(3). Indeed, in this case, there was judicial oversight of the manner in which the probation officer administered the order.

[56] *Amicus* disagrees, arguing that restricting an offender's residence is a judicial function that cannot be delegated to a probation officer. *Amicus* emphasizes that an individual's place of residence is a fundamental part of their life and identity. Where approval to reside in a particular place is denied, the offender may be forced to purchase or rent alternative accommodations and live away from their family during the currency of the order. In this case, Condition 6 gave the probation officer power to make a decision that would have required the respondent to move out of the house he owned and had occupied with his common-law spouse for nine years. *Amicus* submits that decisions that have such significant impacts on an offender's liberty interests should be made by sentencing judges, not probation officers.

VI. Analysis

1. Mootness

[57] It is common ground that the appeal is moot as the probation order is now spent. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, the Court identified two steps in a mootness analysis. First, the court must determine if the tangible and concrete dispute has disappeared and the issue has become academic. Second, the court must determine whether to exercise its discretion to hear the case, considering the three rationales underlying the mootness doctrine: the lack of an adversarial context, the concern for judicial economy, and the concern for preserving the proper adjudicative function of the court: at 358-63.

[58] The court should exercise its discretion to hear the case if it raises an issue of public importance such that it is preferable to allocate scarce judicial resources to resolve the issue rather than incur the social cost of leaving it unresolved: *Borowski* at 361. In *R. v. Smith*, 2004 SCC 14, Binnie J. noted that *Borowski* provides the

principled framework within which the court must consider whether it is in the interests of justice for an appeal to proceed: at paras. 20, 41.

[59] I am satisfied that it is in the interests of justice to resolve the questions that arise on appeal. While the respondent has not participated, the appointment of *amicus* permits the Court to approach the issues informed by a deeper understanding of the applicable law and the individual and societal implications of answering the questions one way or the other. In addition, because *amicus* takes a contrary position on whether a judge can delegate to a probation officer the authority to approve a residence, the adversarial context has, at least on this point, been preserved to some extent. Further, resolving the appeal would not be a waste of judicial resources, as it engages questions that are certain to recur and have already been found to raise issues of broad importance to the administration of criminal justice. In my view, the cost of leaving the issue unresolved – uncertainty about the availability of probation conditions routinely imposed in trial courts – justifies resolution of the questions in this case. Finally, in deciding the appeal, the Court will not be usurping the legislative function, but resolving an issue of statutory interpretation fundamentally related to the ability of judges to perform their duties fairly and efficiently.

2. Probation Orders: General Principles

[60] As explained in *R. v. Proulx*, 2000 SCC 5 at para. 32, probation has traditionally been viewed as a rehabilitative sentencing tool. A probation order may have punitive effects or aspects. But punishment is not the dominant purpose of such an order nor is it an inherent aspect of that order.

[61] While the primary purpose of a probation order is rehabilitative rather than punitive, its conditions will inevitably entail some restriction of liberty. As Bennett J.A. noted in *R. v. Voong*, 2015 BCCA 285 at para. 37, probation orders are designed not only to reintegrate offenders into the community but to protect society. The conditions imposed in pursuit of that goal will frequently be experienced by the offender as entailing “negative consequences”. What is prohibited is the imposition of a term of probation for a primarily punitive purpose: *Shoker* at paras. 10, 13.

[62] I cannot, therefore, agree with the judge's conclusion that optional conditions of a probation order, including those imposed under the residual clause, can have no negative consequences on the probationer in the sense of creating a risk or compulsion without the probationer's consent: RFJ at para. 52. With respect, I do not consider this broad proposition to be supportable on the language of s. 732.1 or justified by the objectives underlying the imposition of a probation order. In addition, I consider it to be inconsistent with the jurisprudence, including *Kieling*. Read in context, it is my view that *Kieling* goes no further than to say that the residual clause (as it then read) could not be construed as authorizing the imposition of a condition requiring an offender to assume the negative physical and psychological risks and consequences associated with the involuntary ingestion of medication.

[63] Further, I cannot agree with the judge's conclusion that the language of the residual clause is such that probation conditions must be shown to be desirable for protecting society and for facilitating an offender's reintegration into the community. In my view, this interpretation is inconsistent with the holding in *Shoker* at paras. 14 and 21, that the residual power to craft individualized conditions of probation is, and should be, "very broad". The judge's interpretation is also inconsistent with this Court's holding in *R. v. Timmins*, 2006 BCCA 354 at para. 9, that a term of probation does not have to address both rehabilitation and protection of the public. It is enough that the condition is reasonable and serves one or both of the stated purposes.

[64] *Shoker* also identifies a number of other important interpretive principles relating to the scope of the residual clause that frame resolution of the issues that arise on this appeal.

[65] First, while "reasonable conditions" will generally be linked to the particular offence, this is not an absolute requirement. What is required is a nexus between the offender, the protection of the community and the offender's reintegration into the community: at para. 13.

[66] Second, the broad power to craft conditions of probation under the residual clause is an important tool in a sentencing judge's arsenal. The Court recognized in *Shoker* that it would be impossible for Parliament to contemplate and spell out every possible condition that might serve to advance identified rehabilitative and public protection goals: at para. 14. In *R. v. Knott*, 2012 SCC 42, the Court confirmed that sentencing judges must retain as much flexibility as the *Code* permits in crafting individualized sentences that reflect the principles of sentencing, including reliance on community-based sanctions as an alternative to incarceration in appropriate cases: at paras. 1-2, 10, 43; ss. 718.2 (d)-(e) of the *Code*. There are, in fact, only a few judicially-recognized limits on the kinds of conditions that can be imposed under the residual clause. These limits include the rule against delegation of a judicial function. They also include the need for probation conditions to be clear, unambiguous and enforceable. In addition, in accordance with the language of the residual clause, the conditions must be "reasonable" in the circumstances and "desirable" to achieve the purposes of a probation order. Finally, they must be compliant with other provincial and federal legislation, including the *Charter*: *Shoker* at para. 14; *R. v. Traverse*, 2006 MBCA 7, at para. 24.

[67] Third, just as the wording of the residual clause can inform the sentencing judge's exercise of discretion in imposing one of the enumerated optional conditions, those enumerated conditions can, in turn, assist in interpreting the scope of the "other reasonable conditions" that can be imposed under the residual clause: *Shoker*, per Charron J., for the majority, at paras. 14, 22; per LeBel J., concurring in the result, at para. 30.

[68] In its enumeration of optional conditions, Parliament has expressly contemplated that it will be necessary and appropriate for a sentencing judge to delegate to a probation officer some decision-making authority in relation to a judicially-imposed condition. For example, s. 732.1(3)(a)(ii) expressly authorizes the imposition of an optional condition requiring an offender to report to a probation officer at a time the court directs and thereafter "when required by the probation officer and in the manner directed by the probation officer". Similarly, s. 732.1(3)(b)

expressly authorizes the imposition of an optional condition requiring an offender to remain within the jurisdiction of the court “unless written permission to go outside that jurisdiction is obtained from the court or the probation officer”. As the scope of the residual clause must be informed by the enumerated optional conditions, it is reasonable to suppose that Parliament intended to confer upon sentencing judges the ability to delegate some functions to probation officers when imposing optional conditions under s. 732.1(3)(h).

[69] Accordingly, the issue in this case is not whether the residual clause authorizes the imposition of conditions that delegate discretionary authority to a probation officer in respect of a judicially-imposed optional condition. Clearly, it does. Rather, the issue is how to determine when such a condition constitutes an impermissible delegation of a judicial function.

[70] The challenges inherent in drawing the line between a permissible and impermissible delegation of authority to a probation officer are reflected in the jurisprudence. The cases are not always easily reconciled. There is good reason for this. As Steel J.A., writing for the majority, observed in *Traverse*:

30 With respect to the issue of improper delegation, the basic principle is well known and can be stated easily enough. Simply, administrative functions can be delegated in a probation order, but judicial functions cannot. See *Sterner v. Vander Kracht*, [1982] 1 S.C.R. 173. A court can delegate some administrative functions to the probation officer so as to allow for supervision of the probationer and implementation of some probation conditions. The task in each case is the determination whether the delegation is of a judicial or administrative function, and it is often a difficult task. See Clayton C. Ruby, *Sentencing*, 6th ed. (Toronto: Butterworths, 2004) at para. 10.82.

31 So, for example, if the court determines that an accused is to perform 100 hours of community service, it is appropriate to delegate to the probation officer the details of determining the location and type of work. See *R. v. Tanner*, [1983] 6 W.W.R. 208 (Man. Prov. Ct.). The imposition of the program is for the judge to determine, but the day-to-day supervision can be delegated to Probation Services, who have the necessary expertise to adapt the program of rehabilitation to the needs of the accused. It is unrealistic and impractical to expect the trial judge to foresee every nuance in the carrying out of terms of probation.

32 However, fundamentally, it is for the judge to determine generally the conditions under which the accused is to serve his/her probation order.

[Emphasis added.]

[71] For the purposes of this appeal, it is also important to underscore the point made in *Shoker* at para. 15 that “[t]he underlying purpose for imposing conditions of probation also serves to define the role of the probation officer.” A probation officer appointed pursuant to s. 2 of the *Correction Act*, S.B.C. 2004, c. 46 [Act], is, by virtue of s. 4(1)(b), “an officer of every court in British Columbia”. Under s. 4(2)(a) of the Act, “[a] probation officer is responsible for the supervision of persons placed on probation by a court”. The emphasis Parliament has placed on exploring reasonable alternatives to incarceration means that probation officers play an increasingly important role in identifying to the court community-based sentencing options and ensuring that offenders comply with conditions designed to protect society and facilitate their rehabilitation.

3. The Jurisdiction of Sentencing Judges to Impose Residency Conditions on Probationers

[72] The modern approach to statutory interpretation is well-established, namely, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. The judge did not expressly refer to this governing principle in interpreting the scope of the residual clause, nor did he reference s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which requires that every enactment be “given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” More to the point, his analysis does not appear to have been guided by the interpretive exercise the modern rule requires.

[73] The plain language of the residual clause suggests that sentencing judges have broad discretion to impose reasonable conditions of probation. Nothing in the clause itself, the context in which it appears or the objectives of sentencing suggests that this discretion does not extend to imposing a residency condition in appropriate circumstances. Further, there is no policy-based reason to limit the reach of the provision and I am aware of no authority that dictates such a result. On the contrary,

giving a broad interpretation to a judge's powers under the residual clause is consistent with the general principles noted above.

[74] Residency conditions are commonly imposed by sentencing judges in adult and youth court. A similar residual clause in the (now repealed) *Young Offenders Act*, R.S.C. 1985, c. Y-1 [YOA], was held by this Court to remove any doubt that a youth court judge had jurisdiction to impose a residency condition as a term of probation: *R. v. S. (D.)* (1993), 86 C.C.C. (3d) 50 at 54 (B.C.C.A.). As noted by the Saskatchewan Court of Appeal in *Degan*, residency requirements as conditions of probation are within the jurisdiction of the sentencing judge, provided they are reasonable: at 296.

[75] The imposition of a residency condition by a sentencing judge will often be a critical component of an appropriate and just community-based disposition. As the Crown points out, if deprived of the power to impose such a condition, a sentencing judge could not prohibit:

- a paedophile from residing across the street from a school or playground, or from residing in a multi-unit development with neighbouring children and common space;
- a domestic abuser from residing in the familial home;
- a criminal harasser from residing across the street from his victim's place of residence or work; or
- a drug-addicted offender from residing at a residence used for drug-trafficking or a "crack shack."

Such a result would undermine the purpose of the residual clause and the obvious intent of Parliament in enacting it.

[76] I see no reason to depart from the holding in *Degan* that the imposition of a residency condition is authorized by the broad language of the residual clause and within the jurisdiction of a sentencing judge. In my view, the judge erred in coming to a contrary conclusion.

4. Is Condition 6 an Impermissible Delegation of a Judicial Function to a Probation Officer?

(a) Introduction

[77] As *amicus* points out, although a condition requiring an offender to reside in a place approved of by the probation officer is routinely imposed, there has been little judicial consideration of whether this is a permissible delegation of authority.

[78] The jurisprudence draws a clear distinction between the (permissible) delegation of administrative functions and the (impermissible) delegation of judicial functions to a probation officer. Although the distinction is helpful as an analytical tool, the line is not easily drawn. This is particularly so in difficult cases where the pragmatic challenges associated with managing transient, high needs, and sometimes high-risk offenders in the community come into sharp relief.

[79] In short, there is no magic formula or bright line test to distinguish between a judicial and an administrative function. What follows is a brief discussion of how courts have approached the question in the context of the delegation of authority to probation officers. I will first canvass cases that have considered non-residency conditions.

(b) Non-Residency Conditions

[80] To frame this discussion, I find it helpful to return to the frequently-cited observations of Allen P.C.J. in *R. v. Tanner* (1983), 36 C.R. (3d) 64 (Man. Prov. Ct.), a case involving a probation condition that required the offender to perform 96 hours of community service work but left the terms, location and type of work to be arranged by the offender's probation officer. The court rejected an argument that the condition involved the improper delegation of a judicial function (at 66, 70-73):

... judges serving in Provincial (and other) Courts have only such jurisdiction as is imposed upon them by statute. Certain limited functions of a purely administrative nature can be delegated but no more. The judicial function is imposed upon the judge alone.

...

The task in each case is to determine whether the delegation is of a judicial or administrative function. In determining that, regard must be had to the object of the legislation under which we act, what we wish to achieve, and the practicalities of the situation. Parliament has not legislated in a vacuum and programs providing for supervised probation, community service, and other means of punishing, rehabilitating, and deterring an accused person were created under a perceived need and after much study and consideration. The purpose of probation, community service and programs of like nature is to avoid, in appropriate cases, the imposition of terms of incarceration on those who, with assistance of whatever type may be necessary, may be rehabilitated and adequately punished without incarceration. The effort is made, through the type of programs described, to solve and alleviate anti-social behaviour, upgrade skills and education, and appraise and treat a variety of problems such as drug abuse, alcoholism and even a lack of social skills. The need for such programs can be and, under our laws must be, discovered by the court, with the assistance of persons and agencies available for that purpose, and it is the court that must prescribe the nature of the program to be followed by an accused person who is placed on probation in order to achieve the desired result. That I see as part of the judicial function.

But I cannot see that the day-to-day supervision of probationers is to be considered part of the judicial function. While as judges we may be able to identify the need for a program, few, if any of us, have the training or experience to oversee such programs on a day-to-day basis; we are dependent more and more on those who are probation officers, representatives of the Alcoholism Foundation, Alcoholics Anonymous, X-Kalay, the Salvation Army, and many other groups dedicated to assisting those who require their skills. It is the workers in these fields who have the necessary knowledge, skill and training to adapt the program of rehabilitation to the needs of the subject. The programs may require revision from time to time during the period of probation to adapt to the progress, or lack of it, by the subject. Efforts at first considered appropriate may have to give way to other methods that prove more appropriate. To have to specify in detail how a particular program should be carried out may be impossible for a judge at the time of sentencing.

At the risk of being over-zealous in making my point, let me give an example. Assume, as is often the case, the accused is one who requires counselling. To assure that counselling, he is placed on probation with directions to report to the probation officer. Must we specify the time, place, frequency and method of reporting? ... Once a court has ordered, say, counselling, the manner, place, time and frequency of such counselling is surely a matter of carrying out, i.e. administering, the court's order.

This approach is, in my opinion, recognized by the legislation. So far as probation officers are concerned, they are, by virtue of s. 4(1)(a) of the Manitoba Corrections Act, C.C.S.M., c. C230, officers of the court. The Criminal Code has, at least by implication, recognized probation officers and others as necessary adjuncts of the court: see ss. 662 [re-en. 1972, c. 13, s. 57] and 663(2) of the Code. I repeat, Parliament was not acting in a vacuum but, in providing for probation and conditions of probation,

recognized the need of the court for the assistance of those usually more fitted to carry out the administrative part of probation.

... difficulty is not the determining factor, but surely, once the need for community service is recognized by the court, the details of the nature of that work and time and place of performance are but administrative details.

...

... I have already noted that practicality, difficulty, and convenience should not dictate my decision in this case, and it has not. Nevertheless, having made mention of the possible need for changes in approach to a probationer and recognition of a change of circumstances, I realize that this could be overcome by appropriate applications under s. 664(3) of the Code [now s. 732.2(3)]. However, the fact that this section exists, in my mind, is not an answer to a determination of what is or what is not a judicial act. I see no reason why either the Crown or the accused should have to make continuous applications to court for variations of probation orders when purely administrative matters are being dealt with. If I am wrong, then I think there can be little doubt that the courts having the charge of administering the criminal law would soon be inundated with such applications.

[Emphasis added.]

[81] What may be gleaned from the cases that have been decided before and after *Tanner* is that sentencing judges must not, as a general rule, delegate to a probation officer the responsibility of determining the kinds of conditions with which an offender must comply. As noted in *Traverse* at para. 32, “it is for the judge to determine generally the conditions under which the accused is to serve his/her probation order.” Similarly, sentencing judges must not create broadly-worded conditions and leave the probation officer with an unfettered discretion to “fill in the blanks.” In sum, the general principle emerging from these cases may be summarized as follows: the court must not delegate to a probation officer the power to craft the terms of the sentence, but may delegate to the probation officer discretion in putting the terms of the sentence into effect.

[82] Conditions considered to engage only the administration of a probation order and, therefore, to be a permissible delegation of decision-making authority include:

- A condition that an offender be supervised or accompanied in defined activities by a third party approved of by a probation officer: *R. v. S.N.P.*, 2014 BCPC 199 at para. 34 (such conditions have been upheld by this Court

in cases where the impermissible delegation was not argued: *R. v. R.R.M.*, 2009 BCCA 578 at paras. 28-31; *R. v. Bourque*, 2013 BCCA 447);

- The nature, time and place of performance of work to be carried out under a condition requiring an offender to complete community work service: *Tanner* at 72 and *Traverse* at para. 31; and
- The manner, place, time and frequency of counselling an offender has been directed to take: *Lee* at para. 39.

[83] On the other hand, a number of cases illustrate the type of conditions found to involve the improper delegation of a judicial function. One obvious example is *R. v. Beam* (1954), 109 C.C.C. 381 (Ont. C.A.), where a condition of probation that the offender “promptly and faithfully obey the directions of the Probation Officer as to his habits of life and mode of living” was set aside as an improper delegation of a judicial function. The proposition that emerges from *Beam* (and like cases) is that the discretion a probation officer exercises must be bestowed by the court; it is not an unfettered discretion that arises as of right: *R. v. S. (D.)* at 54.

[84] Other cases illustrating the point are:

- *R. v. Shorten and Shorten* (1975), 29 C.C.C. (2d) 528 at 533 (B.C.C.A.) – a condition requiring an offender to make “restitution in such amounts and at such times as Probation Officer shall order, at his complete discretion, until \$4,260.50 is repaid” was set aside because it: (1) delegated to the probation officer the judicial function to make an inquiry into an offender’s ability to pay, and (2) delegated to the probation officer the power to make orders;
- *R. v. Hudson* (1981), 65 C.C.C. (2d) 171 at 173 (Ont. C.A.) – a condition requiring the offender to pay restitution in an amount “not to exceed \$127,000.00 the actual figure to be ascertained by your Probation Officer, the personnel of the Victim Offender Reconciliation Programme and yourself” was held to be an improper delegation of a judicial function;

- *R. v. Dankewich*, 2005 BCCA 629 at paras. 9-11, and *R. v. F.W.M.*, 2014 BCCA 459 at para. 7 – conditions requiring an offender to have no contact with “any other person named in writing by your probation officer” and prohibiting the offender from attending “any place that you have been prohibited from attending by your probation officer in writing” were found to constitute the improper delegation of judicial functions to a probation officer;
- *R. v. Innes*, 2000 BCCA 429 at paras. 13-15 – a condition requiring an offender to “take and successfully complete any substance abuse counselling program including residential treatment” was found to delegate to the probation officer a judicial function: the power to choose between a residential treatment program, which is very restrictive of a person’s liberty, and a non-residential program which is not. To give effect to the intent of the order, and to hold the offender to his agreement to adhere to this condition, the term was varied on appeal to require the offender to attend a residential treatment program if one was available. Failing that, the offender would be required to attend a non-residential program. I pause to make two observations about *Innes*. First, it was possible for the sentencing judge to craft an order that achieved the desired result without delegating decision-making authority to a probation officer. Second, the Court appears to have accepted the proposition that the extent to which an offender’s liberty may be impacted by a decision is a relevant factor in determining whether the decision may be delegated to a probation officer;
- *R. v. F. (P.D.)* (1987), 57 C.R. (3d) 22 at 28 (Ont. Prov. Ct.); *Re M.J.L.* (1990), 112 A.R. 231 (Prov. Ct.) – Probation conditions requiring an offender to obey “house rules”, or words to like effect, were found to be impermissibly vague and to constitute an impermissible delegation of a judicial function; and
- *R. v. Traverse* – a condition requiring a high-risk offender to “cooperate with and comply with the directions of [probation services]” was found to be an improper delegation because it gave no judicial guidance to probation services or the offender, and permitted the imposition of “directions” that

could conceivably be much more restrictive than any of the optional conditions already imposed by the court: at para. 39. But even here, the issue has been the subject of judicial debate. In his dissenting opinion in *Traverse*, Monnin J.A. concluded that a condition requiring an offender to cooperate with or follow and obey the directions of a probation officer or program to which they have been referred is an acceptable delegation of an administrative function. He relied on *R. v. Thompson*, 2003 BCCA 308 at para. 19, where a condition of probation was added that required the offender to attend a named recovery house and “obey its rules and cooperate in the treatment provided.”

[85] In some cases where decision-making authority was found to have been improperly delegated, courts have taken into account whether it would have been possible for the sentencing judge to impose the condition in the first instance. In *R. v. Stennes* (1975), 35 C.R.N.S. 123 (B.C.C.A.), a condition requiring the offender to “stay within the Province of British Columbia unless permission to leave the province is granted by a probation officer” was varied on appeal to retract the authority delegated to the probation officer. In coming to this conclusion, Bull J.A. said at 126:

... I see no reason why in this case the permission to leave the province should be granted by or delegated to a probation officer. If this man wishes to leave the province I think it appropriate that he should apply to the Court for permission so to do. ...

[Emphasis added.]

(c) Residency Conditions

[86] As noted earlier, the propriety of a residency condition that delegates approval authority to a probation officer has attracted scant judicial attention. The Crown and *amicus* brought to our attention three British Columbia cases that touch on the point.

[87] Saunders J.A. considered the role of a probation officer in approving a probationer’s residence in a civil context in *D.H. (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222. In that case, the order required the offender to

“Reside where directed and approved by your Probation Officer”: at para. 10. Other conditions prohibited the respondent from contacting children or attending places where children may congregate. Despite these conditions, the probation officer approved an arrangement whereby the offender lived in the same residence as a child. The offender sexually abused the child in the approved residence.

[88] Writing for the Court, Saunders J.A. found that the probation officer owed a duty of care to the child. On the first stage of the test set out in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.), there was a sufficiently close and direct relationship as the probation officer was responsible for approving the residence and was the only channel of information through which the other residents could learn of the offender’s criminal offence: at para. 49.

[89] On the second stage of the test, the existence of residual public policy considerations negating the *prima facie* duty of care, the Court held that in approving the offender’s residence, the probation officer was functioning at an operational level; the discretion he exercised did not require the application of judgment to a policy matter engaging the consideration of broad criteria. As a result, the nature of the discretion exercised by the probation officer did not warrant exclusion of liability. As Saunders J.A. explained:

[60] In this case the probation officer was supervising the compliance of Mr. Kline, an offender, with the terms of his probation order. In this he was functioning at what may be described as an operational level. Although he exercised discretion in the course of that supervision, and filled an important function both in the corrections system and the justice system in being the first-line check on compliance with the probation order imposed on Mr. Kline as part of his sentence, the probation officer's function in issue did not involve the design of the terms of the probation order or any program for Mr. Kline. Rather, the probation officer's task was management of the parameters already put in place by the sentencing judge. As such, I do not view Mr. Gill's function in relation to J.H. as reaching the high policy level contemplated by the authorities as required before immunity from liability is assured at this stage of the analysis.

[Emphasis added.]

[90] The probation officer was found to have breached the standard of care by approving the residence. In exercising his authority to approve a residence, the probation officer had to comply with the other terms of the order, including the

restrictions on contact with children. Thus, the probation officer exceeded his authority in giving approval because he was not complying with the terms ordered by the sentencing judge: at para. 76.

[91] *D.H.* was a civil case and the remarks of Saunders J.A. were made in a decidedly different context. But the judgment may be read as supporting the notion that delegation to a probation officer of the authority to approve a residence confers a limited discretion on the probation officer to manage the parameters of an order already put in place by the sentencing judge.

[92] The Crown also places reliance on *E.A.* In that case, Ehrcke J. rejected an argument that a condition of probation imposed under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA] that required the young person to “[r]eside where directed by your Youth Court Worker”... and “follow the rules and regulations of that residence” involved an improper delegation of a judicial function. However, the improper delegation argument in *E.A.* focused on the second part of the impugned condition. In addition, the issue was decided against a different legislative background and social context. I note, in this regard, that s. 55(2)(g) of the YCJA enumerates as one of the optional conditions that may be imposed a requirement that the young person “reside at a place that the provincial director may specify”. For these reasons, it is my view that *E.A.* provides limited guidance in resolving the issues that arise on this appeal.

[93] In *S. (D.)*, this Court found that delegating to a youth worker a limited discretion to approve a young offender’s residence under the now-repealed YOA was not improper, although a delegation of absolute discretion might be. The appellant argued that a probation condition which read “Reside where directed by the youth worker in a home provided by Social Services and Housing” was an improper delegation. The Court found that the condition delegated a limited discretionary power to the youth worker to select the Social Services and Housing home in which the young person would reside. As such, it was not improper: at 53. The Court did observe that giving a youth worker absolute discretion over the choice

of residence would “[narrow] the judge’s sentencing latitude” contrary to the wide discretion the YOA conferred upon judges to craft the order: at 53-54.

[94] Although the case was not specifically referred to by counsel, I note that in *R. v. Knoblauch*, 2000 SCC 58, a high-risk offender with entrenched mental health challenges was directed by a term of his conditional sentence and probation orders to reside in a treatment facility or such other address as directed by his attending psychiatrist: at paras. 11, 59. The issue of whether the delegation was proper was not before the Court, but the condition appears to have been treated as an important component of the disposition in a complex case that sought to balance the needs of the offender with those of the community.

(d) Distinguishing the Delegation of Judicial and Administrative Functions in Probation Orders

[95] In my view, the following non-exhaustive list of considerations emerges from the jurisprudence and helps to define whether a condition of probation involves the impermissible delegation of a judicial function:

- The nature and scope of the function delegated to the probation officer. Is the delegated authority in the nature of implementing or administering a judicially-imposed condition (what Saunders J.A. referred to as the “management of parameters already put in place by the sentencing judge”) or does it require a probation officer to establish parameters not otherwise addressed by judicial order? If the former, the condition is more likely to reflect a permissible delegation of authority to a probation officer to administer the order consistent with its terms and with the intent of the court as evidenced by those terms. If the latter, the condition is more likely to reflect an impermissible delegation of a judicial function;
- The extent to which the exercise of authority delegated to the probation officer is informed and judicially constrained by the wording of the condition that delegates the authority and by the conditions of the order as a whole;
- Whether the practicalities of the situation permit the judge at the time of sentencing to either avoid delegating the function or narrow the scope of the delegation and still achieve the objectives of sentencing applicable to the case; and
- The extent to which the exercise of a decision-making authority delegated to a probation officer may impact the liberty and security interests of an offender.

[96] Not all of these considerations will apply in every case and none of them is determinative.

[97] I note that several of these considerations speak to the requirement that the probation officer understand the intent of the court regarding the criteria to be considered in the exercise of their discretion. Part of the judicial function is to set parameters on the authority delegated, such that the probation officer is not given unfettered discretion in, for example, deciding whether or not to approve a residence. These parameters must be reasonably discernible from the circumstances of the offender and the offence, and from the other conditions of the order. Constrained by these parameters, the probation officer is limited to administering the order on the basis of identifiable criteria and in a manner consistent with the terms of the order as a whole.

[98] The Crown suggests that the availability of judicial oversight through the variation application provisions of the *Code* is a factor to be considered in determining whether the delegation is permissible. I do not agree. In my view, the availability of judicial oversight plays no role in determining whether the function delegated is judicial or administrative.

[99] I turn next to the application of these considerations to the case at bar.

[100] The judicial function at issue in this case was whether to impose a condition that regulated the offender's residence. The judge determined that such a condition should be imposed, primarily for public protection purposes, and he made that condition part of the probation order. He delegated to the probation officer the authority to approve the residence in accordance with the terms of the order as a whole.

[101] The rationale underlying the residency condition would be apparent to any probation officer familiar with the offence and offender and with the other optional conditions imposed in the order. Obviously, the order as a whole was designed to protect children from the risk of re-offence. The discretionary authority delegated under Condition 6 to the probation officer did not involve the creation of terms not

judicially imposed, nor did it empower the probation officer to impose more restrictive terms than those set out in the order. The delegation of authority to convey or withhold approval was informed and limited by the primary objective underlying the order – the protection of children. Ultimately, the probation officer did not approve the respondent's residence because of a concern that doing so would put other neighbourhood children at risk.

[102] I turn next to consider what Allen P.C.J. referred to as the “practicalities of the situation.” I agree that pragmatic considerations do not “dictate” the result, but neither are they irrelevant. The way in which criminal justice is administered must not only be principled; it must be workable.

[103] There are obvious practical impediments to the judiciary assuming supervision over an offender's place of residence. Probation orders are regularly imposed in conjunction with terms of imprisonment. An offender's residence on release may be unknown or uncertain. In these circumstances, a judge could not possibly impose a condition dictating where the offender will be permitted to reside on release. Appellate courts are in the same situation when a probation order with a residency condition is added on appeal. Even where an offender supplies a proposed residential address, a sentencing judge cannot venture out into the community to conduct a home assessment, and will often lack the localized knowledge probation officers have to assess whether known risk factors would be engaged by approving the proposed residence.

[104] Further, many orders include a condition that a probationer must not change their address without the permission of their probation officer. The living arrangements of probationers can be very dynamic. Proposed changes in address arise frequently and must be addressed quickly. Again, for practical reasons, probation officers are best positioned both from a timeliness perspective, and by virtue of their superior knowledge of the probationer's circumstances and current risk factors, to assess the appropriateness of a proposed change in residence. Yet, if the judge cannot delegate to a probation officer the authority to approve a proposed

residence, neither can the judge delegate the authority to approve a change in residence.

[105] Against these practical circumstances stands the reality, emphasized by *amicus*, that decisions about where a probationer will be permitted to live will, in some cases, have a significant impact on the probationer's liberty interest and emotional well-being. In the unusual circumstances that arose in this case, had the trial judge been alerted in advance to the problems that could arise, he could have required probation services to prepare a supplementary report addressed to the suitability of permitting the respondent to continue living at his residence: ss. 721(3) and (4). He might then have been able to resolve the issue himself. He was denied the opportunity to do so by virtue of the manner in which the case was conducted.

[106] Taking all of these factors into account, it is my view that where a residency condition has been judicially imposed, delegation to a probation officer of the authority to approve a probationer's proposed residence is properly regarded as a permissible delegation of administrative authority to implement and manage the condition provided the order as a whole reasonably permits discernment of the criteria to be applied in determining whether to grant or withhold such approval. Challenges to residency condition on grounds of improper delegation are unlikely to arise often, as the applicable criteria will generally be evident on the face of the order and from the circumstances of the offence and the offender.

5. Does the Residual Clause Authorize the Imposition of a Counselling Condition without the Offender's Consent?

[107] Section 732.1(3)(g) was enacted in response to *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.C.A) and *Kieling*. *Rogers* held that a probation order compelling an offender to take psychiatric treatment or medication is contrary to s. 7 of the *Charter*; *Kieling* reached the same result, though for different reasons. Mere attendance at counselling was not considered in *Rogers* or *Kieling*. The provision is designed to prevent the imposition of a forced treatment condition in the absence of an offender's consent. It was not, in my view, intended to oust the jurisdiction of a sentencing court to impose a mandatory counselling condition under the residual

clause: see *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* (Issue No. 92, 21 March 1995); D.P. Cole, “*Bill C-41: An Overview and Some Introductory Thoughts*” (Paper delivered at the Canadian Institute for the Administration of Justice Conference, Montréal, 24-26 April 1997) at 68.

[108] Subsequent lower court decisions have consistently held that “counselling” is distinct from treatment, and therefore does not require the offender’s consent: *Lee* at para. 39; *R. v. Harris*, 2001 BCPC 97 at paras. 14-16; *R. v. Sam*, 2005 YKSC 02 at para. 22.

[109] In *Lee*, Dillon J. rejected a submission that a condition of probation requiring an offender to “take counselling as directed by your Probation Officer” was a direction for psychiatric treatment made without the offender’s consent as well as an unlawful delegation of authority:

[38] The requirement that the offender obtain counselling is completely appropriate in all of the circumstances and is reasonable to protect the public as stated by the trial judge. There is a necessary nexus between the offender, the protection of the community and his reintegration into the community, and the condition for counselling as discussed in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399 at para. 13. The learned trial judge crafted this condition to meet the unique situation of this offender who appeared in need of guidance with his lifestyle and for protection of the public from repetition of this behaviour. A risk assessment with a psychological component was also appropriate and could have included a psychiatric assessment given the random, bizarre nature of this offence (*R. v. Blackwell*, 2007 BCSC 1486 at paras. 31-32).

[39] The requirement to attend counselling is not an imposition of a requirement for psychiatric treatment without consent. Nor is it an improper delegation to impose counselling “as directed by the probation officer”.

[Emphasis added.]

[110] In *R. v. Shoker*, 2004 BCCA 643, this Court amended a probation order by deleting a reference to “treatment” but left intact a requirement that the offender attend for counselling. I would note, however, that the authority of a sentencing judge to impose a counselling condition under the residual clause in the absence of an offender’s consent does not appear to have been a live issue on appeal. Further, it was not an issue on appeal to the Supreme Court of Canada.

[111] In my view, a counselling condition can be imposed as part of a probation order under the residual clause without an offender's consent. As noted, the presentence report prepared in the case at bar carefully distinguished between counselling and active participation in a sex offender treatment program. The language used by the sentencing judge in Condition 9 blended these two requirements and likely ran afoul of s. 732.1(3)(g) and this Court's judgment in *Shoker*. While the condition should probably have been amended, the appeal judge erred as a matter of law in concluding that a counselling condition cannot be imposed under the residual clause without an offender's consent.

VII. Disposition

[112] I would answer the questions of law that arise on this appeal in the affirmative. Had the passage of time not rendered the appeal moot, I would have set aside the order of the appeal judge and reinstated Condition 6 in its entirety and Condition 9 in a modified form. However, because the appeal is moot, I would simply allow the appeal and make no further order.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Willcock"

Tab 10:

R. v. Fox, 2017 BCSC 2361

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Fox*,
2017 BCSC 2361

Date: 20171110
Docket: 27178
Registry: Vancouver

Regina

v.

Patrick Henry Fox

**A publication ban (based on the Court's inherent jurisdiction)
prohibits the publication of the names of the two young people
referred to as "G." and "S." in these reasons.**

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Sentence

Counsel for the Crown:

M. Myhre

The Accused Patrick Henry Fox:

Appearing in person

Place and Dates of Trial:

Vancouver, B.C.
September 12, 13, 14, 22
and November 10, 2017

Place and Date of Judgment:

Vancouver, B.C.
November 10, 2017

INTRODUCTION

[1] A jury found Patrick Fox guilty of two offences: (1) criminally harassing Desiree Capuano, who is his former spouse, and causing her to reasonably fear for her safety or the safety of people she knows (contrary to s. 264 of the *Criminal Code*); and (2) being in possession of firearms at a place other than where he was authorized to possess them (contrary to s. 93(1) of the *Criminal Code*). The criminal harassment took place between January 11, 2015 and May 27, 2016 – throughout that period, on the Crown’s evidence in the trial – while the firearms offence took place between May 17, 2016 and June 3, 2016.

[2] The task now is to determine the appropriate sentences.

THE OFFENCES

[3] In outlining the circumstances of the offences, I bear in mind the principles in s. 724(2) of the *Criminal Code*, and the more detailed guidance in *R. v. Ferguson*, 2008 SCC 6 at paras. 16-18. Subsection 724(2) addresses how the facts are to be determined after a jury trial, given that the jury gives only its verdict, without reasons. Its material part reads as follows:

- (2) Where the court is composed of a judge and jury, the court
 - (a) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven . . .

[4] I will begin by outlining the circumstances of the criminal harassment offence.

Count 1: Criminal Harassment between January 2015 and May 2016

[5] In brief overview, Mr. Fox conducted a campaign to, as he put it, make Ms. Capuano’s life as miserable as possible, hoping to drive her to suicide if that could be done within the confines of the law. It was a campaign conducted by means of hundreds – probably thousands – of emails he sent her, and sometimes to people she knew, as well as by means of a website he created in her name. These communications were designed to embarrass and humiliate Ms. Capuano by

disseminating personal information about her, to undermine her relationships with her family members, friends, and employers and work colleagues, to ruin her financially by preventing her from keeping or gaining employment, and generally to intimidate her.

[6] Before I describe the criminal harassment in greater detail, I will briefly outline the relationship between Mr. Fox and Ms. Capuano.

[7] They first met in January 2000, in Arizona, where they both lived at the time. He was in his mid-twenties, and she was 19. They married in August of that year, and their son G. was born prematurely shortly afterwards.

[8] The marriage broke down the following year, and a high-conflict custody dispute followed. At one point, a joint custody order provided for G. to spend some of his time with Mr. Fox, who lived in California at the time, and some of his time with Ms. Capuano, who lived in Florida. That arrangement continued for a while, but by late 2001 or early 2002, G. was with Mr. Fox entirely and had almost no contact at all with Ms. Capuano for approximately ten years. Mr. Fox and Ms. Capuano have different positions about the reason for the change from shared custody to the absence or exclusion of Ms. Capuano as a parent.

[9] Contact between Ms. Capuano and G. resumed in mid- or late 2011, and so too did the custody dispute. Court proceedings in California eventually led to an order for joint custody under which G. would live mainly with Mr. Fox, and would visit Ms. Capuano on school breaks. That arrangement went relatively smoothly until, in late 2012, Mr. Fox advised Ms. Capuano that he was thinking of moving to Vancouver, BC, to take up a job offer, and he asked for Ms. Capuano's consent to take G. with him. Ms. Capuano did not agree, and Mr. Fox filed a motion with the California court seeking authority to take G. to Canada, and to have Ms. Capuano's access time with G. suspended.

[10] Ms. Capuano understood that Mr. Fox had been living and working illegally in the USA. Fearing that he would succeed in taking G. to Canada, Ms. Capuano on

two occasions, in late 2012 and early 2013, notified US immigration authorities of Mr. Fox's status in the USA, as she understood it, and his whereabouts. On both occasions Mr. Fox was removed from the USA without G.

[11] Mr. Fox has lived in Canada since early 2013, after he was removed from the USA for the second time. In the fall of 2013, G. began to visit him during school breaks, and continued those visits for most of the time until early 2016, when Mr. Fox was detained in custody on these charges (on June 16, 2016) after having been detained by US authorities the month before.

[12] Back in 2013, following his removal from the USA, Mr. Fox told Ms. Capuano that if she did not return G. to him, he would devote the rest of his life to destroying her, within the confines of the law. In or around early 2014, he created the website in Ms. Capuano's name containing a very large amount of private information about her and the people associated with her. The website includes a "welcome" message that includes the following:

The goal of this website is to increase awareness of Desiree Capuano, by informing the public of the atrocious, the despicable, and the downright evil things Desiree has done.

We hope that by publishing the truth, together with hard proof (e.g. police reports, court testimony, recordings) of the countless horrendous acts Desiree has been committing all her life, we may help others to avoid being manipulated, exploited and harmed by this seemingly charming and sweet sociopath.

[13] The website includes personal details about Ms. Capuano, as well as purportedly biographical details and information about her character, preferences, and history. It includes dozens, probably hundreds, of photographs of Ms. Capuano in various aspects of her life, sometimes also showing her children (including her younger son in his underwear), her current partner and her previous partners, and the interior of her home. The website details the location of the home, with maps.

[14] The website also details the history of the custody dispute, from Mr. Fox's perspective, and includes copies of the vast email correspondence between him and Ms. Capuano.

[15] Another section of the website focuses, individual by individual, on the people associated with Ms. Capuano. These include her younger son (S.), her mother and her father, her current partner and his mother, and dozens of her friends and work associates. A photograph of each person is shown, together with contact information and a description in, it seems, as much detail as Mr. Fox was able to gather.

[16] A further section purports to detail contact, by Ms. Capuano and people associated with her, with courts of different types of jurisdiction in the USA.

[17] Finally, a series of dozens of blogs or posts, most of them purportedly written by Ms. Capuano, contains content designed to humiliate and degrade her. For example, one post has Ms. Capuano purportedly declaring, in some detail, raging hatred of people of non-white ethnic background. Another post, entitled, "An Open Letter to All Prospective Employers: Why You Should Hire Me", speaks sarcastically and in vulgar language (purportedly in Ms. Capuano's voice) about why she should be hired, the given "reasons" all weighing heavily against her (e.g. "I've never accepted responsibility for anything -- which is okay because so far there's always been someone else to blame it on").

[18] In an email in March 2014, Mr. Fox told Ms. Capuano about the website. He told her that he had sent a link to the website to her colleagues at work, as, in fact, he had, and he taunted her that colleagues would read about what a fool and a poor parent she was, and would see her in her underwear. He sent generally similar emails and many others on countless other subjects over the course of the next several years. I will highlight a few examples.

[19] For example, in December 2014, shortly before the period of the indictment, Mr. Fox outlined in clear terms (in an email, "The Ugly Proof") his objective and the approach he would be taking. He emphasized that his approach was a long-term one: "I'm methodical and think things through. I look at the long term. Sometimes my plans take years to complete, but I always see them through". Mr. Fox also noted that he had a changed identity (as Patrick Fox) with a "squeaky clean

background”, that he travelled easily into the USA, and that he had handguns (although he noted, as he always did, that his statements and references to his firearms should not be taken as a threat). He claimed that for years he had been paying Ms. Capuano a salary through his company, and that he may choose to notify the IRS so that they could collect back taxes from her.

[20] Over the period of the indictment (as well as before that period) Mr. Fox sent Ms. Capuano a vast number of emails in which he told her about the various steps he was taking to humiliate her, to damage her reputation, to undermine her relationships with her children, her spouse, her friends, and her employer, and, he stated he hoped, to make her unemployable and homeless.

[21] He was always explicit about his intentions. In an email on July 23, 2014, before the period of the indictment, he said: “I will destroy you - slowly and incrementally ... [e]very moment of my life is focused on the single goal”. He said similar things through the period of the indictment. In a blog post on May 23, 2016, near the end of the period of the indictment, he struck out at critics of his website, and gloated that their criticism had increased the website’s public profile. He concluded that, “every day this website continues to make Desiree’s life a little more dreary”, and that, “[e]very day Desiree gets a few steps closer to that inevitable rock bottom”. He made similar comments to the RCMP officer who interviewed him after his arrest.

[22] Mr. Fox succeeded in many of his appalling objectives.

[23] He placed untenable challenges on Ms. Capuano’s relationship with G. His purpose in doing so he had outlined in an email in December 2014, shortly before the period of the indictment:

I know that the best way to hurt you, permanently, is emotionally, not through your reputation, finances, or career (remember I told you many months ago that that other stuff I was doing was just to distract you?). And what could be more effective than for your child to utterly despise you because of your own actions?

[24] Mr. Fox gloated about his success in damaging Ms. Capuano's relationship with G. He told Ms. Capuano in numerous emails that she was a terrible parent, and taunted her by saying that G. viewed her and her other, younger son with hatred and disgust. In another email, he told her that he had discussed with G. his plan to ruin her life, using G. as a pawn to do so, and that G. was "okay" with that plan. In an email with the subject line "Your favourite child?", he said he had told G. that Ms. Capuano preferred S. In emails in June and July, 2015, he told her that he and G., who was then around 14 years old, had been "having fun" at her expense by identifying 51 specific defects (which he then listed) relating to her personal appearance, her style of dress, her character, her cooking, and her parenting. In another email, he predicted that G. would be withdrawn and sullen on returning to Ms. Capuano's home, and said that "the misery that will bring you and your home is far greater than a court order for you to return him". These are just some of many examples. Most – probably all – of them were copied to G.

[25] Indeed, most of Mr. Fox's emails to Ms. Capuano, no matter the subject, were also sent to G. This compounded the humiliation Mr. Fox caused Ms. Capuano, and damaged her relationship with G. It no doubt also caused psychological harm to G. as well.

[26] With a reorganization within her company employer, Ms. Capuano lost her job as a systems analyst shortly before or during the period of the indictment. There was no clear evidence that the harassment was the reason that she was selected to be laid off. However, one may reasonably infer that the harassment did not help Ms. Capuano's position because it intruded significantly into the workplace, placing an extra burden on the employer, and it was seen to put other employees at risk. Ms. Capuano certainly saw the situation that way.

[27] Mr. Fox delighted in Ms. Capuano's loss of her employment. In an email in November 2015, he said: "You will soon be homeless; you have no money; nobody believes anything you say anymore; nobody is coming to your aid or defense; you

will not be able to secure another job as long as that website exists – and it's not going anywhere as long as you're alive".

[28] At another time, Mr. Fox made a thinly veiled threat to interfere with Ms. Capuano's partner's livelihood, by calling into question the partner's entitlement to the security clearance he required for his employment. Mr. Fox also posted personal information identifying the partner and the partner's mother, including the mother's place of work.

[29] The harassment was particularly insidious because Mr. Fox kept Ms. Capuano in perpetual fear of new ways he would devise to torment her. Mr. Fox's professional expertise is in information technology, and he appeared to Ms. Capuano to have an alarming ability to gain access to confidential information about her and the people in her life. In an email in late January 2015, he threatened to infiltrate and expose her most personal life:

Desiree:

As a show of good faith, I'll fill you in on one of the plans that I'm working on for you. What I'd like, very much, is to be able to add some "intimate" pictures of you to your web site. To do that, of course, I'd have to hire someone to get close to you, pretend to be interested in you. Eventually, gain your trust, then eventually sleep with you. That should take...what? About 3, 4 days? Difficult to find people that unscrupulous. But for the right price there's always someone willing to do what you want. Hooray America!

There's nothing criminally illegal about it. You may be able to pursue a claim in civil court, but I'm not going to worry about that.

Okay, good evening.

Patrick

In another email around that time, Mr. Fox casually told Ms. Capuano that he had acquired her medical records, "(unofficially of course)". Then, in an email in November 2015, he threatened future action of several types:

I was pretty direct when I told Detective Tuchfarber that my intention was to do everything in my power and capabilities to make your life as miserable as possible, and, if possible, to the point that you ultimately commit suicide. That would be my ultimate desire. But before you reach that point it is imperative that you experience as much misery, disappointment, and suffering as possible first. At this point in your life you have very little to lose

so there is not much incentive for me to actively publish your information. I shall wait, patiently, until you rise up a bit, THEN proceed with the billboard campaign around Phoenix; I'll wait until you actually have some financial significance, THEN publish your complete credit and financial history - including your social security number and birth certificate (not illegal as long as it's done outside the US).

[30] As for the other emails to which I have referred in discussing other aspects of the offence, these emails are but a few examples of a vast number of similar communications.

[31] In various of his emails, Mr. Fox reminded Ms. Capuano that he had firearms, and the ability to cross the border (into the USA) surreptitiously. In one email, he detailed the logistics of bringing his firearms into the USA and using them to kill Ms. Capuano, while also adding that he would never do so – despite his wish to – because to kill would be illegal and immoral. In an email in January 2015, he told Ms. Capuano that G. once asked him if he would shoot her, and he explained how he responded as follows:

He [G] once asked me if I would shoot you. I told him that murder is illegal and immoral and can result in spending the rest of one's life in prison. And that the rest of my life in prison is not a risk I'm willing to take. But otherwise, no, I would have no qualms about it; that that is how much I despise you for the things you've done and continue to do. ... To be clear, I told Tuchfarber the same thing. There is nothing illegal or threatening about /wanting/ to harm someone - as long as you don't act on it. I am reasonable and rational enough to know the difference, and to refrain from engaging in such activity.

And let me be absolutely clear on this point: I would never deliberately cause you physical harm, other than in self defense or defense of another. Though that is nothing special toward you - I have that rule for *ALL* people. Also, I emphasize that G brought up the question and I only responded to it truthfully.

There can be no doubt that these communications were meant to intimidate Ms. Capuano, despite the caveat Mr. Fox always included about remaining within the confines of the law.

[32] Ms. Capuano contacted various authorities in the USA and Canada at various times, but was unsuccessful in her efforts to have the website removed. Her employer, in the early days, tried to assist, but also did not succeed.

[33] As to Mr. Fox's emails, both before the period of the indictment and during it, she took different approaches in trying to stop or reduce them. She tried ignoring the offensive messages, or responding aggressively with sarcasm or insults, but nothing succeeded. The barrage of emails continued, the abusive nature of the content unchanged.

[34] Undoubtedly to thwart Ms. Capuano's efforts to have the website taken down, Mr. Fox moved it to a different server. Also, during the sentencing proceedings, when Crown counsel suggested that the Court impose a probation order with a condition requiring Mr. Fox to take down the website, Mr. Fox advised that he no longer owns or controls the website, having transferred ownership of it at around the start of the trial. I am told that the website remains online and publicly accessible.

[35] Mr. Fox submits that the jury's verdict may be taken as relating to the emails alone, and not the website, but I disagree. The existence of the website, with its harmful content, underlays much of the harm caused by Mr. Fox's emails. As I have noted, in some of his emails, he reminded Ms. Capuano of the website, or told her of new content recently or soon to be added. In one email, he asked her to let him know if anything on the website was inaccurate. In some emails, he told her about people whose attention he had drawn to the website. In some, he told her how many people had visited the website, and he sometimes included usage graphs. The harassment by way of the emails thus relied in large part on the existence and content of the website, even if Ms. Capuano did not personally read all of that content. She had a fair idea of what the website included, based in large part, though not entirely, on what Mr. Fox told her about it. His emails were part of the way in which Mr. Fox made sure that Ms. Capuano suffered the intended effects of the website.

[36] Throughout, and during these proceedings, Mr. Fox has maintained that the website and his emails do not amount to harassment because what they say is true. His position that there was no harassment is obviously inconsistent with the jury's verdict, but I will also make some comments about it.

[37] From the earliest stages, and continuing through these proceedings, Mr. Fox held firm to the view that all of his statements about Ms. Capuano were true and therefore incapable of amounting to criminal harassment.

[38] Mr. Fox's concept of truth in this context is somewhat elastic and disingenuous. For example, cross-examination in the sentencing hearing revealed that Mr. Fox's sole basis for describing Ms. Capuano as a "white supremacist" numerous times on the website was that her former partner owned a dagger decorated with a swastika design. In another example, Mr. Fox's sole basis for describing Ms. Capuano's current partner as having had "a life of chronic drug abuse" was Mr. Fox's assumption (without actual knowledge) that the partner used caffeine, which Mr. Fox understood to be a drug.

[39] But even if Mr. Fox was convinced that his statements were true, it is abundantly clear from the evidence in the trial, as well as the evidence and submissions in the sentencing hearing, that Mr. Fox's objective was to harm Ms. Capuano, not to provide information to the public. Purporting to provide information simply gave him a convenient vehicle for the harm he was intent on causing.

[40] I turn now to the firearms offence.

Count 2: Possession of Firearms in a Place Other than Authorized

[41] Mr. Fox had a licence in Canada to acquire and possess firearms, including restricted firearms, as well as an authorization to transport his restricted firearms to certain places under certain conditions. He committed the offence when he was in possession of his firearms in violation of the conditions, which was while the firearms went from his home in Burnaby, BC to a shipping depot, also in Burnaby, and while they stayed there until UPS picked them up and transported them into the USA.

[42] The firearms had left Mr. Fox's home packed inside the CT unit of a computer in one of numerous – likely between 15 and 25 – boxes of household items sent to the home in California of Mr. Fox's friend.

[43] Four handguns were in the computer, and another firearm, a Mauser rifle, disassembled, was in another of the boxes. A total of seven pistol magazines, as well as ammunition, were also found.

THE EFFECTS OF THE OFFENCES

[44] It is no surprise that Ms. Capuano lost friends as a result of the harassment, and had trouble keeping or regaining employment. She was also concerned for her own and her family's safety in their home. Her relationship with her partner suffered, particularly after he and his mother were brought within the circle of abuse and his career was threatened. Ms. Capuano offered to leave the relationship for the partner's and his family's sake.

[45] Ms. Capuano felt isolated, beaten down, frustrated, and powerless. She felt that Mr. Fox might be right when he frequently told her that he had designed a campaign that simply could not be stopped. The harassment was all the more insidious for this.

[46] Ms. Capuano testified that she struggled every day. She apologized to the friends and associates who had been drawn in to the circle of harassment, and she refrained from making any new friends. She became depressed, but tried to conceal her depression for the sake of her son S. She considered relinquishing custody of G., but concluded that even if she did Mr. Fox would not stop. She was also scared, always looking over her shoulder.

[47] Ms. Capuano questioned whether she had the strength to keep going. Evidently, it was only her inner strength that prevented Mr. Fox from achieving his stated goal of driving her to suicide.

[48] It should be noted that although Ms. Capuano was aware that Mr. Fox had firearms, and was afraid that he would use them against her, she was not aware until after Mr. Fox was charged that he had actually arranged to have his firearms transported from his home in Burnaby into the USA. The effects on her of the firearms offence were therefore irrelevant to the jury's verdicts. However, that

Mr. Fox committed the firearms offence leaves Ms. Capuano now yet more unsettled about Mr. Fox's intentions in the future.

MR. FOX'S BACKGROUND AND CIRCUMSTANCES

[49] The Court made orders for a pre-sentence report and a psychological assessment. A probation officer and Dr. Randall Kropp, of the Forensic Psychiatric Services Commission, were prepared to assist. However, Mr. Fox then stipulated that he would not participate unless the sessions were audio-recorded and copies of the audio-recordings provided to him. These conditions were not acceptable to the professionals, and the interviews and the psychological evaluation therefore did not proceed.

[50] Only scant evidence about Mr. Fox's background and circumstances is available, namely the evidence in the trial – which is mainly Ms. Capuano's evidence, as Mr. Fox did not testify in the trial – together with Mr. Fox's evidence and his submissions in the sentencing proceedings.

[51] Indeed, little more is known about Mr. Fox's background than I have already recounted in the course of explaining the background to the criminal harassment offence. Still unclear, at this point, is how and why Mr. Fox changed from using the name Richard Riess, in the summer of 2014, and whether Mr. Fox is a citizen of the USA or Canada or both, despite some documentary and other evidence on the latter point.

[52] Mr. Fox has evidently enjoyed an education. He worked in information technology in the USA and, through his own company or companies, in Canada. He appears to be intelligent and capable, although with a profound lack of insight into his offending conduct.

[53] Mr. Fox has no criminal record in Canada.

[54] However, under the name of Richard Riess, Mr. Fox was convicted in Arizona of perjury and of falsely claiming US citizenship (on October 31, 2007). He was

sentenced on July 8, 2008 to 24 months' imprisonment on each count, to be served concurrently, with credit for time served, followed by supervised release for three years.

THE APPLICABLE SENTENCING PRINCIPLES

General Principles

[55] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. There are six main objectives in sentencing: (1) denouncing the offending conduct; (2) deterring the offender and other people from criminal conduct; (3) separating the offender from society when necessary; (4) rehabilitating the offender; (5) making reparation to victims or the community; and (6) fostering the offender's acknowledgement of responsibility and of the harm done to victims and the community.

[56] I will mention this next point only briefly. Mr. Fox submits that the *Criminal Code*, in setting out the fundamental purpose of sentencing as being to protect society, expresses an intent that is confined to the protection of people within Canada. He submits that the purpose does not extend to people such as Ms. Capuano in the USA.

[57] I am not able to accept that submission. It is clear that the *Criminal Code* uses the word "society" broadly, to refer to the public in the same way that the common law did before the enactment, in the *Criminal Code*, of the sentencing provisions that codified the common law. Parliament's intent, like that of the common law that Parliament codified, is to protect all of those damaged by offences which courts in Canada have the jurisdiction to address.

[58] Sentencing involves the exercise of a broad discretion in balancing all of the relevant factors to meet the applicable objectives. The relative emphasis given to the various objectives will vary according to the particular offence and the particular offender.

[59] Case authorities make clear that criminal harassment is an offence to which courts must respond, in the sentences they impose, in forceful and effective terms. Denunciation and general deterrence are therefore often the primary sentencing objectives. See, for example, *R. v. Finnessey*, [2000] O.J. No. 3316 (Ont. C.A.) at para. 12.

Available Range of Sentence

[60] The maximum available sentences for the offences provide general guidance about Parliament's view of the seriousness of the conduct they each encompass, while also recognizing that for each type of offence a very wide range of conduct may be involved.

[61] For the criminal harassment offence charged in Count 1, the maximum sentence is ten years' imprisonment.

[62] For the firearms offence charged in Count 2, the maximum sentence is five years' imprisonment.

THE PARTIES' POSITIONS

[63] The Crown submits that the extent and the huge scope of the harassment, together with Mr. Fox's malicious intent and his lack of insight into his conduct even now, would merit a sentence longer than the Crown seeks. The Crown seeks a somewhat shorter sentence because, the Crown submits, in all the circumstances it is important that Mr. Fox be subject to court-imposed conditions for as long as possible, to prevent him continuing the harassment. The Crown therefore seeks a sentence of imprisonment that, after credit for time in pre-sentencing custody, would also allow for a three-year probation order. Such an order is available in conjunction with sentences of imprisonment of up to two years.

[64] For the firearms offence, the Crown submits that the appropriate sentence is between six and twelve months' imprisonment to be served consecutively to the sentence for the criminal harassment. In the particular circumstances of this case, the Crown suggests a sentence of ten months.

[65] Mr. Fox has been in custody since June 16, 2016, when US authorities handed him over to the RCMP, thus for a total of approximately 17 months. With credit at one-and-a-half times, he would receive credit of 25½ months. The Crown seeks a “net” sentence (after credit for pre-sentencing custody, and with the two sentences consecutive to one another) of two years’ imprisonment less a day, followed by probation for the maximum available period, which is three years.

[66] Mr. Fox submits that the criminal harassment offence was not the serious offence the Crown describes. He submits that, with a few minor exceptions brought to his attention during the court proceedings, the content of his communications was true, and much of the information he communicated was publicly available. He submits that it was often Ms. Capuano who initiated the hostile email exchanges, and that his actions and communications toward her were no worse or different in their underlying character than her conduct and communications toward him.

[67] Mr. Fox submits that, in view of this background, both offences merit an absolute discharge.

DISCUSSION

Aggravating and Mitigating Circumstances

[68] The determination of a sentence must take into account the aggravating and mitigating circumstances relating to the offence and the offender, when considering where, within the applicable range of sentence, the particular sentence should fall.

[69] There are a number of aggravating circumstances in this case, relating to the criminal harassment.

[70] The harassment had a life-altering effect on Ms. Capuano.

[71] The harassment was conducted maliciously, with significant planning and a clear and sustained intent to inflict severe emotional harm.

[72] The harassment was conducted on a vast scale. It endured for the almost one-and-a-half year period of the indictment. It took many avenues, including by

victimising children. It made use of other people to damage Ms. Capuano, such as G. and Ms. Capuano's potential employers and her co-workers.

[73] As I have noted, Mr. Fox has a criminal record for two offences in the USA. However, the Crown fairly suggests that, in the circumstances, the record not be treated as an aggravating factor. I agree with that approach.

[74] Little appears to mitigate the offences.

[75] However, it is somewhat mitigating concerning the offender that Mr. Fox presented his defence in a polite, organized, and capable manner, and conducted himself throughout with apparent respect for the Court and its process.

Case Authorities

[76] No case is exactly like another. However, other case authorities help a sentencing judge identify the applicable range of available sentences and to gauge where, in that range, the particular sentence should fall.

[77] The Crown submits that other case authorities indicate that the applicable range of sentence for the criminal harassment is between one and four years' imprisonment. The Crown refers to the following cases, in which most of the offenders were sentenced to imprisonment for between two and three years, with one lower sentence (*R. v. Wenc*), and one for 4.5 years (*R. v. Taylor*):

- *R. v. J.S.M.*, 2006 BCCA 377;
- *R. v. Wenc*, 2009 ABCA 328;
- *R. v. Fader*, 2014 BCPC 327;
- *R. v. Cholin*, 2011 BCCA 116;
- *R. v. Kelly*, 2015 ABCA 332;
- *R. v. Malakpour*, 2008 BCCA 326;
- *R. v. Taylor*, 2014 BCCA 304.

[78] Mr. Fox submits that these cases do not assist at all, because in none of them did the complainant do as much harm to the accused as the accused did to the complainant.

[79] I do not agree, for reasons I will state briefly now and will develop shortly. Even if Ms. Capuano precipitated some of the aggressive or vulgar exchanges, Mr. Fox's response was out of all proportion. While Ms. Capuano sometimes tried to defend her position with strong words, Mr. Fox made it his life mission to destroy Ms. Capuano in every way, and to keep her constantly aware that he was dedicating his life to doing so.

[80] The cases on which the Crown relies involved sentences of different lengths, reflecting the particular circumstances. Each of them differs in one or more ways, sometimes significantly, from Mr. Fox's case. However, I agree with the Crown that, taken as a whole, the cases support the range of sentence the Crown puts forward.

Determining the Sentences in this Case

[81] The sentencing principles of specific deterrence and rehabilitation can have little play in the sentence for the criminal harassment, because Mr. Fox has no insight at all into his offending.

[82] It was beyond the scope of the trial to allocate fault, as between Mr. Fox and Ms. Capuano, in the various stages of their lengthy custody dispute. However, certain hurts obviously resulted, whether or not one party or the other was to be faulted for them. For example, whether or not – and it is unnecessary to make a finding on this point, and I do not do so – Ms. Capuano was to be faulted for notifying the US authorities that Mr. Fox was unlawfully in the USA, there can be no doubt that her doing so had a devastating effect on Mr. Fox: he was removed from the USA, and had no contact with G. until, in approximately October 2013, G. began to visit Mr. Fox in Canada during holiday breaks.

[83] However, that result or others, in the custody dispute, did not in any way justify Mr. Fox's reaction or explain it in a way the law can support or excuse.

Mr. Fox submits that Ms. Capuano's conduct in the custody dispute diminishes his own moral culpability in the criminal harassment, but I cannot agree.

Though temporarily stymied in the court proceedings concerning the custody dispute, Mr. Fox was not entitled to take his own action against Ms. Capuano outside those proceedings as he did in criminally harassing her. If anything, his conduct in doing so increases his moral culpability because he chose an essentially vigilante course of action.

[84] Mr. Fox submitted a large volume of emails in the sentencing proceeding, additional to those that were tendered in the trial, in an effort to support his position that his moral culpability is reduced because Ms. Capuano initiated any abuse, and inflicted more than he did. However, the emails do not bear this out.

[85] The emails show the types of conflicts, many of them trivial, which, unfortunately, can be typical in a high-conflict custody dispute: for example, arguments about G.'s travel arrangements to visit Mr. Fox, or receipts for expenses, or things purportedly said to G. by one parent or the other. Ms. Capuano's emails do show frustration and, sometimes, antagonism on her part, but to nowhere near the level of Mr. Fox's excessive responses. Mr. Fox uses every opportunity, in the emails, to criticize Ms. Capuano, often in terms that are sarcastic, extremely insulting, and, in at least one instance, gratuitously unkind when he knew her to be at a low ebb.

[86] It is troubling that Mr. Fox appears to sincerely believe that, in the email correspondence tendered in the trial and in the sentencing proceedings, he was more victim than abuser. The emails make abundantly clear that this was not so.

[87] As I have mentioned, Mr. Fox appears not to understand that harassment is not lawful even where the harassing communications are "true". (I put quotation marks around "true" for reasons I mentioned earlier, and also because, for many of Mr. Fox's communications, his statements represent his opinion, rather than objective fact.) In his sentencing submissions, he said he is baffled that anyone can view the situation as one of harassment, given what he describes as Ms. Capuano's

stronger position than his, and given the goal of the website to, as he puts it, inform the general public.

[88] What Mr. Fox's attitude disregards is that individuals are entitled to go about their lives without every detail relating to their personal lives -- even if true -- being conveyed to their family, friends, and co-workers, and published to the world at large. The harassing effect increases when the widely disseminated information is accompanied by disparaging opinion; it increases yet more when those who express concerns about the publication or who try to help the victim stop or resist the harassment are themselves brought within the circle of people to be harassed.

[89] Mr. Fox tormented Ms. Capuano in every way he could, taking considerable time and effort to do so. He delighted publicly in the harm he was causing her. In another example, in a blog post in October 2015, he noted that users from a particular hospital in her area had made several visits to the website, and he then located a hiring advertisement for a systems analyst at the hospital. He was amused that Ms. Capuano had evidently been considered for the position, but, after the visits to the website, obviously, in his view, would not be hired. Ms. Capuano had, in fact, applied for the position at the hospital, and was not hired.

[90] As I have explained, Mr. Fox did everything he could to humiliate and torment Ms. Capuano to the point that she feared reasonably for her own and her family members' safety. Her and their psychological or emotional well-being was under serious threat, and, because of Mr. Fox's comments about firearms and about shooting her, Ms. Capuano also feared reasonably for her physical safety.

[91] In all the circumstances, the sentencing objectives of denunciation and general deterrence require a significant sentence of imprisonment for the criminal harassment. I agree with the Crown's submission concerning the appropriate sentence for that offence.

[92] Firearms offences -- though often offences under s. 95(1) of the *Code*, rather than offences under s. 93(1), as here -- are often placed on a continuum, with

offences akin to regulatory infractions at the low end, and true criminal offences at the high end. The Crown does not suggest that Mr. Fox's firearms offence falls at the high end, or that the offence represented an attempt on his part to carry out a plan to enter the USA in order to shoot Ms. Capuano.

[93] Nonetheless, the firearms offence takes on a disturbing aspect in the light of the criminal harassment, with the later portion of which it coincided. Mr. Fox had deliberately made references to his firearms and to the logistics of entering the USA in order to shoot Ms. Capuano – although always with the caveats that he would not contravene the law – and he cannot have made the arrangements to transport his firearms without knowing that this action would seriously disturb her, or anyone else knowing of the situation, had they learned that he had done so. As Mr. Myhre noted during his submissions in the sentencing hearing, the firearms offence cannot be attributed to mere carelessness as, above all, Mr. Fox is not a careless person.

[94] Mr. Fox refers to cases where courts have imposed modest fines for offences under s. 93(1). However, I agree with the Crown that, in the circumstances, a more significant sentence is required to denounce the offence and to deter others from similar conduct, and, particularly in view of the poor prospects for rehabilitation, to specifically deter Mr. Fox.

[95] In my view, the sentences proposed by the Crown properly reflect the sentencing principles in light of the circumstances of the offences and those of Mr. Fox. Although a longer sentence of imprisonment could well be appropriate, in my view the overall sentence should not exceed two years less a day, so that a probation order may follow Mr. Fox's eventual release from custody and assist, as best can be done, with his rehabilitation. I have taken into account that the Crown made this submission on September 14, and that Mr. Fox has served more time in pre-sentencing custody since then. In my view, Mr. Fox should not be disadvantaged by the lapse of time between then and today.

SENTENCE

[96] Mr. Fox, I ask you to stand, please. I am going to impose sentence.

[97] On Count 1, which is the charge of criminal harassment, I sentence you to three years' imprisonment, followed by probation for three years on the conditions I will outline shortly.

[98] On Count 2, which is the charge of possessing firearms in a place other than where authorized, I sentence you to ten months' imprisonment.

[99] The two sentences of imprisonment are to be served consecutively.

[100] You will have credit for the approximately 17 months you have served in pre-sentencing custody. With credit at one-and-a-half times, this gives you credit of 25 ½ months.

[101] If the credit is applied against the total of the two consecutive sentences, which is three years and ten months, this leaves you a total of 20 ½ months remaining to be served.

[102] The three-year probation order which will follow your release will include the conditions in the written document provided to you and the Court on September 22, 2017.

[103] I will come to these terms shortly. Before I do, I will make the ancillary orders that are to be made.

[104] Mr. Fox, you are to have no communication with Desiree Capuano, James Pendleton, or S. That order is made under s. 743.21(1) of the *Criminal Code*.

[105] You are now prohibited from possessing any type of firearm, ammunition, cross-bow, or restricted or prohibited weapon, or explosive substance. That order is made under s. 109 of the *Criminal Code*, and its duration is for your lifetime.

[106] You are to provide a sample of bodily substance suitable for DNA analysis. That order is made under s. 487.051(3) of the *Criminal Code*. I have concluded that the order is appropriate, given the nature of the offences.

[107] You are also to pay a victim surcharge of \$200 for each offence, for a total of \$400.

[108] Returning to the probation order. It will apply for three years, and it will include the following conditions [as revised following submissions, below]:

Statutory

1. You must keep the peace and be of good behaviour.
2. You must appear before the court when required to do so by the court.
3. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

Supervision

4. You must report in person to a probation officer at 275 East Cordova Street, Vancouver, BC, within 48 hours of your release from custody, and after that, you must report at least once every four days, in person, as directed by the probation officer.
5. You must attend, participate in, and successfully complete any intake, assessment, counselling or program as directed by the probation officer, including but not limited to attendance at Forensic Psychiatric Services for assessment, counselling, and treatment, except that you shall not be required to submit to any treatment or medication prescribed or recommended by the Forensic Psychiatric Services to which you do not consent.
6. If you do not consent to the form of treatment or medication which is prescribed or recommended by Forensic Psychiatric Services, you shall forthwith inform your probation officer as to the reason you do not consent.

7. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer, given in advance.
8. You must provide your probation officer with the particulars of your employment, including any self-employment. You must inform your probation officer within two business days of any change in your employment.

Restrictions on Movement

9. You must not leave British Columbia unless you have the written permission of the probation officer, and you must carry the permission when you are outside the province.
10. You must not be within 100 metres of the United States border.
11. Immediately upon your release from custody, you must attend the Burnaby RCMP Detachment at 6355 Deer Lake Avenue, you must present a copy of this order to a peace officer there, and you must accompany a peace officer to the location of all travel documents in your possession, including any passport, Nexus card, travel visa, or enhanced driver's licence. You must surrender all such items to the peace officer and thereafter not obtain any further travel documents.

Restrictions to Prevent Harassment

12. You must have no contact or communication, directly or indirectly, with Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers, except you may have contact with [G.].
13. You must not disseminate, distribute, publish or make publicly available in any manner whatsoever, directly or indirectly, information,

statements, comments, videos or photographs which refer to or depict, by name or description, Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers.

14. Within 24 hours of your release from custody you will take all necessary steps to ensure that any website, social media page or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers, including the website published under the domain www.desireecapuano.com, is no longer accessible via the internet or by any other means.
15. You must not use the internet or any computer or cellular network except as required to fulfill condition 14 for the purpose of employment, or for sending personal emails.
16. You are to provide any email address you use, and a list of any email addresses you correspond with, to your probation officer.

Weapons Restrictions

17. You must not possess, either personally or through another person, any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in section 2 of the *Criminal Code*, or any related authorizations, licences, or registration certificates.
18. Immediately upon your release from custody, you must attend the Burnaby RCMP Detachment at 6355 Deer Lake Avenue, you must present a copy of this order to a peace officer there, and you must accompany a peace officer to the location in Canada of all firearms,

cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or explosive substances and all weapons, imitation weapons including imitation firearms possessed by you or through another person, and any related authorizations, licences or registration certificates. You must surrender all such items to the peace officer. You are also to advise the peace officer of the location outside Canada of any of the items described in this condition (condition 18).

[109] Is there anything further which should be addressed? Does anything require clarification, Mr. Myhre, Mr. Fox?

[110] THE ACCUSED: There is one point of clarification that I would like. With respect to bringing the RCMP to where I might have any weapons or firearms, etc., shall I take that to mean only within Canada? Because it seems to me that I could not take them -- well, given the terms of the probation, I would not legally be able to bring them to firearms outside of Canada, since I can't leave Canada.

[111] THE COURT: Yes, I see your point. Mr. Myhre, how do you wish that to be addressed? There is a condition that he not go anywhere within X metres of the U.S. border.

[112] MR. MYHRE: It seems to me that if Mr. Fox does have other firearms or weapons in the United States that were not seized and destroyed by the ATF, probably the best thing to do would be to have him inform that officer of their whereabouts, so that that officer can take steps to inform the ATF and they can take whatever steps they think are necessary.

[113] THE ACCUSED: Well, I was thinking more -- well, okay. That's fine.

[114] THE COURT: Would it assist, Mr. Fox, if I modify that condition so that that is clear?

[115] THE ACCUSED: What I was hoping was that it could be modified to be restricted only to weapons or firearms that are within Canada. At this point, I am

still quite confident that, upon my release from custody, I am going to be deported, and so I'm not really overly concerned about many of these probation conditions. But I just wanted some clarification on that one particular one, because the way it's worded, literally I would have to take an RCMP officer to wherever those firearms are located in the U.S., which would seem somewhat nonsensical.

[116] THE COURT: All right. The final condition will be modified, so that it will read, the portion that requires you to accompany a peace officer "to the location in Canada of all firearms, cross-bows, etc.". Then there will be an additional sentence that will say, at the very end of that condition, you are also to advise the peace officer of the location outside Canada of any of the items described in this condition.

[117] Is there anything else that should be addressed?

[118] MR. MYHRE: Not from the Crown, My Lady.

[119] THE COURT: Mr. Fox?

[120] THE ACCUSED: Nothing that would require clarification, but I would like to just point out that with respect to the probation conditions, once it is determined officially that I have no legal status in Canada and am not permitted to be here, if I am released from custody I would be immediately upon my release be in violation of probation, but I'll deal with that at that time if it becomes an issue.

[121] THE COURT: All right. Now, one further matter I will raise, because Mr. Fox, you have raised this a number of times. You wanted an opportunity to apply to be given audio recordings of the court proceedings in the trial, I think you said.

[122] THE ACCUSED: Yes. However, I have decided I am going to have an attorney do that for me. I don't want to risk that request being denied because of lack of knowledge of relevant case law on the matter, and so I'd rather have someone who's very experienced in those matters address that for me. So that will be at some point in the near future, I am sure.

[123] THE COURT: All right, are you content to leave things that way, Mr. Myhre?

[124] The application, if it is going to be brought, should be to me. You understand that?

[125] THE ACCUSED: Yes.

[126] THE COURT: All right. Thank you then, we will adjourn.

“The Honourable Madam Justice H. Holmes”

Tab 11:

R. v. Fazekas (2003), 171 O.A.C. 114

DATE: 20030505
DOCKET: C38710

COURT OF APPEAL FOR ONTARIO

RE: HER MAJESTY THE QUEEN (Respondent) - and - STEPHEN
FAZEKAS (Appellant)

BEFORE: CHARRON, MOLDAVER and FELDMAN J.J.A.

COUNSEL: John Norris
for the appellant

Philip Downes
for the respondent

HEARD: APRIL 29, 2003 (In Kingston)

ENDORSEMENT

[1] The appellant raised numerous grounds of appeal against conviction and sentence. In response, Crown counsel grouped the grounds respecting the conviction appeal into three categories.

CONVICTION

[2] The first ground relates to the duration of the trial. The appellant represented himself at the trial. He says that the trial was originally scheduled for ten days but was reduced to five days. He says that he was prejudiced because he had intended to call 15 jail guards but only called two because of the limited time available, and that the trial judge drew inferences about his opportunity to make phone calls from the fact that not all of the people who guarded him over the entire relevant period were called.

[3] A review of the transcript of the opening of the trial discloses that the trial judge specifically checked on the time that had been originally set for the trial and confirmed her understanding that it was five days. She further offered to re-attend at the end of August if the appellant required more time to present his defence at the end of the scheduled period. At the end of the evidence portion of the trial, the appellant confirmed that only three of his witnesses had not testified and that it appeared that they were not

going to show up. The matter was put over to the following week for submissions. It is clear that the appellant was not precluded from calling any relevant evidence or witnesses by the time scheduled for the trial and that the trial judge made every effort to accommodate him.

[4] The second ground relates to the sufficiency of the evidence and the trial judge's findings based on the evidence. We agree with the Crown that the trial judge was extremely thorough in considering all of the evidence and in making her findings. In several cases she agreed with the appellant that the evidence did not support a finding of proof beyond a reasonable doubt and dismissed those counts as a result. The trial judge was entitled to find that the complainant feared for her safety. We are satisfied that the trial judge drew reasonable inferences from the evidence and that there is no basis for interfering with her findings.

[5] Many of the appellant's grounds relate to matters which arose on previous charges which were not before the trial judge and are not before this court on the appeal. The appellant also complains about an allegedly unlawful arrest in respect of which the charges were withdrawn and are not before the court.

[6] Crown counsel brought to the court's attention an error made by the trial judge with respect to count 9, breach of probation. The trial judge held that the appellant was in breach of a term of his probation not to call the complainant when he called her from prison, where he remained on other charges when his probation period would otherwise have commenced. Because probation does not commence until the person is released from prison (s. 732.2(1)(b)), his probation period had not commenced at the time of the charge and the conviction is in error.

[7] The conviction for count 9 will therefore be quashed. In all other respects, the appeal against conviction is dismissed.

SENTENCE

[8] The appellant objected that the Crown had changed its requested sentence from two years one month before the trial, to five years following conviction. In support, he filed a pretrial screening form which contained the Crown's position on sentence if a guilty plea were entered prior to a date for trial or a preliminary hearing being set. This offer did not bind the Crown following a trial.

[9] The appellant had counsel assist him at the sentence. Counsel proposed a sentence of two years after credit of 12 months for pretrial custody of five months, part of which

was served in difficult conditions during the OPSEU strike. The Crown asked for a sentence of 50 months after credit of 10 months for the pretrial custody.

[10] In imposing sentence, the trial judge was particularly concerned that the appellant did not appear to understand the impact of his actions on the complainant and on other persons. The trial judge was concerned about the repetitive nature of the appellant's offences in the face of court orders, and noted the need to provide some peace for the complainant. The trial judge concluded that an appropriate sentence was 33 months. She then reduced that by the pretrial custody, using only a one for one basis, because the appellant continued to make the harassing calls from prison during that period. The appellant was therefore required to serve a further 28 months.

[11] In our view the trial judge made no error in her determination of the appropriate sentence and there is no basis to interfere with it.

[12] The only issue remaining is whether the removal of the conviction for the breach of probation count should result in a reduction of the sentence. It is clear that the trial judge imposed a global sentence of 28 months for all of the conduct, which she made concurrent on each count. In our view, in all the circumstances of these offences, there is no basis to reduce this global sentence.

[13] The appeal against sentence is therefore dismissed.

“Louise Charron J.A.”

“M.J. Moldaver J.A.”

“K. Feldman J.A.”

Tab 12:

R. v. G.F., 2018 BCCA 81

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. G.F.*,
2018 BCCA 81

Date: 20180313
Docket: CA44037

Between:

Regina

Respondent

And

G.F.

Appellant

Restriction on publication: An order has been made in this case directing that any information that could disclose the identity of the complainants referred to in this judgment as J.C. and D.G. should not be published in any document or broadcast in any way pursuant to s. 486.4(2) of the *Criminal Code*.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Hunter

On appeal from: An order of the Provincial Court of British Columbia, dated April 18, 2016 (*R. v. G.F.*, 2016 BCPC 0157, Vancouver Docket 229138-1).

Counsel for the Appellant: T.B. Magder

Counsel for the Respondent: L. Ruzicka

Place and Date of Hearing: Vancouver, British Columbia
December 6, 2017

Place and Date of Judgment: Vancouver, British Columbia
March 13, 2018

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Saunders
The Honourable Madam Justice MacKenzie

Summary:

The appellant G.F. was charged with eight counts of sexual interference with a young person, sexual exploitation, sexual assault causing bodily harm and distributing child pornography contrary to s. 163.1(3) of the Criminal Code. He pleaded guilty to two of the counts. Subsequently, he sought unsuccessfully to withdraw his guilty pleas. The trial judge held that the pleas had been voluntary, unequivocal and informed. The appellant appeals from conviction on these counts, and also appeals his conviction for distributing child pornography on the ground that the trial judge erred in failing to give effect to the private use exception defence.

Held: appeal dismissed. On the evidence before her, it was open to the trial judge to conclude that the guilty pleas were voluntary, unequivocal and informed. She committed no error in doing so and in not reconsidering this decision following the trial of the remaining counts and the Gardiner hearing. The defence of private use exception was not available to the appellant because the pornographic images did not depict lawful sexual activity. Transmission of the images to one of the victims did not constitute distribution within the meaning of the section, but the information could be amended to substitute “transmit” for “distribute” without any prejudice to the appellant. On the amended information, the conviction was affirmed.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] The appellant G.F. was charged with eight counts of sexual interference and distributing child pornography. The charges related to sexual encounters with two young complainants, J.C. and D.G. G.F. was J.C.’s great-uncle.

[2] The appellant entered guilty pleas to counts 1 and 8 but subsequently sought to withdraw his guilty pleas. After an evidentiary hearing, the trial judge dismissed his application to withdraw his plea. The principal ground of appeal is the allegation that the trial judge erred in doing so.

[3] The appellant also challenges his conviction on count 4 for distributing child pornography contrary to s. 163.1(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, on the ground that the evidence supported the conclusion that he sent pornographic images to one of the complainants only, and the term “distribute” implies transmission to more than one person. The Crown defends the conviction on the information as drafted, but submits in the alternative that the information should be amended to conform with the evidence.

[4] In my opinion, the trial judge did not err in dismissing the appellant's application to withdraw his guilty pleas and I would dismiss his appeal on counts 1 and 8.

[5] I agree with the appellant that the term "distribute" in s. 163.1(3) is intended to refer to transmission to more than one person. However, I would grant the Crown's application to amend the information to replace "distribute" with "transmit". I do not consider that such an amendment would prejudice the appellant in either his defence or on appeal.

[6] For the reasons that follow, I would dismiss the appeal.

Proceedings at the Trial Court

[7] The eight count information was sworn on March 18, 2013. The counts relevant to this appeal are as follows:

Count 1

[G.F.], between the 1st day of January, 1997, and the 21st day of July, 2006, inclusive, at or near 100 Mile House, Burnaby, Lillooet, Lytton, North Vancouver, Pemberton, Squamish, Surrey, Langley and Vancouver, in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of J.C., a person under the age of fourteen years, contrary to Section 151 of the Criminal Code.

Count 2

[G.F.], between the 22nd day of July, 2006, and the 31st day of December, 2008, inclusive, at or near 100 Mile House, Burnaby, Langley, Lillooet, Lytton, North Vancouver, Pemberton, Squamish, Surrey, and Vancouver, in the Province of British Columbia, being a person in a position of trust or authority towards a young person, J.C., or a person with whom that young person is in a relationship of dependency, did, for a sexual purpose, touch, directly or indirectly, with a part of his body, the body of that young person, contrary to Section 153 of the Criminal Code.

Count 4

[G.F.], on or about the 26th day of June, 2006, at or near Pemberton, in the Province of British Columbia, did distribute, child pornography, contrary to Section 163.1(3) of the Criminal Code.

Count 8

[G.F.], between the 1st day of January, 2004 and the 9th day of June, 2006, inclusive, at or near Burnaby, in the Province of British Columbia, in sexually assaulting D.G., caused bodily harm to D.G., contrary to Section 272(2)(b) of the Criminal Code.

[8] Count 4 was amended at trial to add two additional dates, June 27, 2006 and September 12, 2006, to the distribution charge.

[9] The first trial was scheduled to begin on June 23, 2014. On that date, the appellant entered guilty pleas to counts 1 and 8. He was represented by counsel, Mr. Picard. The trial was then adjourned for the preparation of a pre-sentence report and a risk assessment, and to fix a date for sentencing. On October 23, 2014, four days before the sentencing hearing was scheduled to begin, the appellant discharged Mr. Picard. He indicated to the Court that he might wish to make an application to have his guilty pleas struck. The sentencing hearing was adjourned.

Application to Withdraw Pleas

[10] The appellant retained new counsel and he subsequently brought an application to withdraw his guilty pleas. Affidavits were filed, including one by G.F.'s original counsel Mr. Picard, and the appellant testified *viva voce*. The appellant's affidavit and testimony centred around two assertions. He stated that he was hard of hearing and was not able to hear what was occurring in court on the day he pleaded guilty. He also said that he had understood that by pleading guilty to the two counts, he was pleading guilty only to two events that occurred after the two complainants were 14 years of age or older, not all the allegations contained in the two counts.

[11] Mr. Picard addressed each of these points in his affidavit. He stated that he had advised G.F. to tell him if he did not hear something during the interactions in court, and G.F. complained about an inability to hear only once, in an unrelated court appearance.

[12] Mr. Picard also explained the advice he had given to G.F. and stated that he had never advised G.F. that by pleading guilty, he would be admitting only two distinct incidents. He stated that he "advised [G.F.] that he had to admit all the allegations" and that "all the facts in the Crown disclosure would not be disputed and would be put before the judge". He also stated that that he "advised [G.F.] multiple times that he could not plead guilty unless he committed the offences as alleged". He also told G.F. that a plea was irrevocable.

[13] Mr. Picard further advised that he had obtained written instructions from G.F. confirming his advice and confirming that G.F. had in fact committed the offences as charged. The written instructions were attached to his affidavit. Mr. Picard stated that he had gone through the document with the appellant, one point at a time, before G.F. signed it. The document indicates two small changes initialled by G.F.

[14] The written instructions include the following statements:

2. That I committed the offences against the complainants in each count.
3. Specifically, that I sexually assaulted [J.C.] between the years 1997 and 2008, and [D.G.] during the year 2006. [This was the paragraph that contained an alteration in the dates.]
4. That, in regards to [J.C.], I [engaged in serious sexual activity with him] while he was a child and incapable of providing consent for those acts.
5. That, in regards to [D.G.], I [engaged in serious and persistent sexual activity with him], all while he was a child and incapable of providing consent for those acts.
6. Furthermore, in regards to [D.G.], that I caused him bodily harm while [engaging in serious sexual activity with him].
7. That my lawyer has advised me on the law in regards to these offences.
- ...
9. That my lawyer has advised me that I must proceed to trial if I did not commit the offences as alleged by the Crown.
- ...
18. That my lawyer has provided me with legal advice, but that I understand the decision whether to plead guilty or not is ultimately mine.

[15] When the application came on for hearing on September 30, 2015, counsel for the appellant advised the Court that she did not require the attendance of Mr. Picard for cross-examination. After hearing the testimony of G.F., which was not consistent with the affidavit of Mr. Picard in several respects, the trial judge expressed concern that Mr. Picard would not be cross-examined. She asked counsel whether she was to conclude that the contents of Mr. Picard's affidavit were correct and was advised by counsel affirmatively. The trial judge continued to express concerns about having to make decisions on credibility without cross-

examination and the hearing was adjourned to a date when Mr. Picard could be present.

[16] The hearing resumed on October 15, 2015. Mr. Picard was in attendance for cross-examination, but counsel for G.F. advised the Court that she did not intend to cross-examine Mr. Picard. There was then an extended colloquy between counsel and the trial judge concerning the implications of Mr. Picard's affidavit evidence being presented without any challenge on cross-examination. It culminated with this exchange:

THE COURT: All right. Well then I'm – I'm going to repeat so that we are very, very clear and because of the history of this matter, you are asking that I accept what Mr. Picard says in his affidavit and conclude that, where your client's *viva voce* evidence is different, that it is inaccurate?

MS. MAGDER: Yes, Your Honour.

[17] The trial judge dismissed the application, with reasons to follow.

Reasons for Ruling on Application to Withdraw Pleas

[18] In her written ruling on the withdrawal application, the trial judge reviewed the circumstances that led to the application and then considered the two principal submissions of the appellant.

[19] With respect to the allegation that he had not been able to hear the proceedings, the trial judge referred to Mr. Picard's affidavit which she accepted as accurate, and to her own observations during the various proceedings that had taken place before her. She then concluded as follows:

[22] On the basis of all the evidence before me I conclude that any difficulty [G.F.] has with his hearing has not interfered with his ability to understand and participate in these proceedings. I conclude that he did hear the charges when they were read to him on June 23, 2014. His response to each of the charges was, "I plead guilty."

[23] In addition, it is clear from the contents of Mr. Picard's affidavit that the recording of pleas of guilty was discussed with [G.F.] in detail. This is what he expected to occur on that day.

[20] With respect to the question whether the pleas were informed, the trial judge reviewed G.F.'s testimony and the written instructions he had signed. She pointed out that he had been represented by experienced and competent counsel during the time leading up to his pleas, and came to the following conclusion:

[41] [G.F.]'s testimony and the contents of the affidavits satisfy me that he had ample time to consider his options leading up to the trial, and also after the discussions which occurred between his then counsel and the Crown.

...

[43] I conclude on the basis of all the evidence on this Application that [G.F.]'s decision to plead guilty to two of the counts on the information was voluntary, unequivocal, and informed. ...

The Trial on the Remaining Counts and the Gardiner Hearing

[21] After the application to withdraw the guilty pleas was dismissed, G.F. was no longer prepared to admit the facts the Crown intended to allege on counts 1 and 8. As it was necessary to call both complainants to testify to prove the disputed facts, the Crown decided to proceed on counts 2 through 7, and also to prove the disputed facts on counts 1 and 8.

[22] A four day trial was then held in January 2016.

[23] During submissions after the evidence, counsel for the appellant began to make an argument that the evidence did not establish that G.F. had caused the injuries to D.G. charged in count 8. The trial judge pointed out that G.F. had pleaded guilty to that charge, and the Crown did not need to prove the elements of the offence in light of that plea.

[24] On April 18, 2016, the trial judge delivered reasons for judgment. She found G.F. guilty of counts 2, 3 and 4, but conditionally stayed count 3 pursuant to the principles of *R. v. Kienapple*, [1975] 1 S.C.R. 729. She acquitted G.F. on counts 5 and 6. The Crown directed a stay of proceedings with respect to count 7.

[25] Sentencing submissions were made on May 18, 2016. On May 25, 2016, the appellant was sentenced as follows:

Count 1 (sexual interference with J.C. contrary to s. 151) – five years, less two years and one month of credit for presentence custody;

Count 2 (sexual exploitation of J.C. contrary to s. 153) – two years concurrent with count 1;

Count 4 (distribution of child pornography contrary to s. 163.1(3)) – two years consecutive to counts 1 and 2; and

Count 8 (sexual assault of D.G. causing bodily harm contrary to s. 272(2)(b)) – five years consecutive to all other sentences.

[26] The total sentence was nine years and 11 months.

Issues on Appeal

[27] The errors in judgment alleged by the appellant are as follows:

- (i) denying the appellant's application to withdraw his guilty pleas;
- (ii) failing to reconsider the appellant's application to withdraw his guilty plea to count 8 after hearing evidence on the count; and
- (iii) failing to consider the private use exception defence to count 4.

[28] In submissions, the appellant also argued that the conviction on count 4 should be set aside because the evidence that G.F. had sent pornographic images to one of the complainants did not amount to distribution of child pornography within the meaning of s. 163.1(3) of the *Criminal Code*.

Analysis

[29] I propose to analyse the allegations of error under the following headings:

A. Counts 1 and 8 – Withdrawal of Guilty Pleas

- (i) Did the trial judge err in dismissing the application to withdraw the guilty pleas on counts 1 and 8?

(ii) If not, did the trial judge err in failing to reconsider the application in respect of count 8 after hearing evidence at the trial?

B. Count 4 – Distribution of Child Pornography

(i) Did the trial judge err in failing to give effect to the private use exception defence to count 4?

(ii) Does the offence of distributing child pornography require that the pornography be sent to more than one person?

(iii) If so, should the information be amended to replace “distribute” with “transmit” to conform with the evidence?

A. Counts 1 and 8 – Withdrawal of Guilty Pleas

(i) *Did the trial judge err in dismissing the application to withdraw the guilty pleas on counts 1 and 8?*

[30] The appellant seeks to set aside his guilty pleas on the ground that they were not informed, such that his convictions on counts 1 and 8 represent a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*.

[31] To withdraw a guilty plea, the accused must establish that the guilty plea was not voluntary, unequivocal or informed by an appreciation of the nature of the allegations, the legal effect of the plea, and the consequences of the plea: *R. v. Singh*, 2014 BCCA 373 at para. 33.

[32] A trial judge has the discretion to accept or refuse a guilty plea. Provided the trial judge exercises her discretion judicially, an appellate court will not lightly interfere: *Adgey v. The Queen*, [1975] 2 S.C.R. 426 at 430; *R. v. Alec*, 2016 BCCA 282 at para. 74.

[33] In *R. v. Alec*, Fitch J.A. referred at para. 77 to a number of considerations that “will feature prominently” in cases of this kind. Some of the considerations relevant to the case at bar are:

- Was the accused represented at the time of the plea?
- Was the plea entered by the accused personally?
- Is there any evidence that the accused's plea was involuntary?
- Does the record reflect equivocation about the plea? For example, did the accused seek to qualify the guilty plea in some way?
- Does the record establish that the accused did not fully appreciate the nature of the charge in respect of which the plea was entered?
- Does the record establish that the accused was uncertain about the consequences of the plea?
- Does the record establish that the accused did not intend to admit a fact which is an essential ingredient of the offence in respect of which the plea has been entered?
- Has the accused tendered an affidavit on appeal explaining why the plea is invalid and why the underlying conviction should be set aside as a miscarriage of justice?
- How much time passed between the entry of the plea and the accused's first assertion that the plea is invalid? Has any explanation been given for delay in challenging the validity of the plea?

[34] In this case, G.F. was represented by experienced and competent counsel at the time of the plea. He entered the plea personally. There was no equivocation in the plea and nothing to suggest that it was not voluntary or informed. He did, however, file an affidavit and give oral testimony that he did not understand the consequences of the plea. This was the issue the trial judge addressed.

[35] In this Court, G.F. says that he was not fully apprised of his position in law at the time of entering the plea, as he did not understand the difference between two

incidents and two counts. He argues that the trial judge should not have accepted the affidavit evidence of Mr. Picard over his evidence. He also says that the conflict in the evidence was not as great as it might appear, because Mr. Picard may have said something to him that he did not appreciate because of his hearing problems.

[36] These issues were all canvassed by the trial judge. She did not simply accept Mr. Picard's evidence over that of G.F., although she would have been entitled to do that, but rather weighed G.F.'s evidence in light of both Mr. Picard's affidavit and the written instructions. The context of this weighing exercise was the failure to cross-examine Mr. Picard and challenge any of his statements that he had fully informed G.F. of the extent of the allegations he would be admitting with a guilty plea and the consequences of that plea.

[37] On the evidence before the trial judge, it was open to her to find that the guilty pleas had been voluntary, unequivocal and informed. I can see no error in her consideration of this issue. I would not give effect to this ground of appeal.

(ii) If not, did the trial judge err in failing to reconsider the application in respect of count 8 after hearing evidence?

[38] The alternative position of the appellant is that the evidence called in relation to counts 2 through 7 created a reasonable doubt as to the guilt of G.F. in relation to count 8, and that after hearing this evidence, the trial judge should have reconsidered her decision not to permit G.F. to withdraw his guilty plea on count 8.

[39] Count 8 was a charge of sexual assault causing bodily harm to D.G., contrary to s. 272(2)(b) of the *Criminal Code*. The other counts that relate to D.G. were counts 5 and 6, which alleged sexual exploitation of a person under the age of 14 years.

[40] G.F. denied having sexual contact with D.G., but the trial judge did not accept that evidence. The issue for the trial judge was not whether the alleged sexual contact took place, but whether it took place when D.G. was under the age of 14

years. This was an essential element for the offences charged in counts 5 and 6, but not for the sexual assault causing bodily harm charge in count 8.

[41] The trial judge held that she had a reasonable doubt as to the age of D.G. when the sexual contact occurred, and accordingly acquitted G.F. of counts 5 and 6. In this Court, the appellant submits that the trial judge should have withdrawn the guilty plea to count 8 and heard evidence on the defence of consent. I fail to see the force of this submission.

[42] As the trial judge pointed out during submissions, one result of the guilty plea was that the Crown was not obliged to prove the elements of count 8. The guilty plea was an admission of all of the essential elements of the offence. By entering guilty pleas, G.F. waived his right to require the Crown to prove its case on those counts beyond a reasonable doubt: *R. v. Alec*, at para. 69.

[43] In any event, at the trial, D.G. stated clearly that he did not consent to the sexual contact with G.F. and the trial judge accepted his evidence. G.F. denied that he had had sexual contact with D.G., so it cannot be said that the issue of consent became a live issue.

[44] The trial judge was not asked by the appellant to reconsider her decision on the guilty plea application at the conclusion of the trial. In my view, the evidence at trial did not require such a reconsideration. I would not give effect to this ground of appeal.

B. Count 4 – Distribution of Child Pornography

[45] Count 4 as amended at trial charged G.F. as follows:

[G.F], on or about the 26th day of June, 2006, June 27, 2006 and September 12, 2006, at or near Pemberton, in the Province of British Columbia, did distribute, child pornography, contrary to Section 163.1(3) of the Criminal Code.

[46] At the relevant time, s. 163.1(3) described the offence in these terms:

Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making

available, distribution, sale, advertising, or exportation any child pornography is guilty of (a) an indictable offence ... or (b) an offence punishable on summary conviction ...

[47] The evidence on this count was that on June 26 and 27, 2006, G.F. sent emails to J.C. attaching a number of images, including images of J.C., which met the definition of child pornography. On September 12, 2006, G.F. sent an email to J.C. which attached a number of images, including images of J.C. and D.G., which met the definition of child pornography.

(i) Did the trial judge err in failing to consider the private use exception defence to count 4?

[48] In closing submissions, counsel for the appellant asserted that the private use exception applied to all of these emails, relying on *R. v. Sharpe*, 2001 SCC 2. The trial judge dismissed this argument, saying simply:

[50] The case of *R. v. Sharpe*, [2001] S.C.J. No. 3, referred to by the defence, does not apply to the circumstances in the case at bar.

[49] The private use exception was developed in *Sharpe* in respect to the offence of possession of child pornography described in s. 163.1(4) of the *Criminal Code*. It is unnecessary for the purposes of the appeal to determine whether it could ever apply to the distribution or transmission of child pornography because it is clear that it does not afford a defence when the pornographic images depict unlawful sexual activity.

[50] This qualification is explained by McLachlin C.J.C. at para. 128 in *Sharpe*:

6. ...

(b) The second exception protects a person's possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.

...

8. Neither exception affords protection to a person harbouring any other intention than private possession; any intention to distribute, publish, print, share or in any other way disseminate these materials will subject a person to the full force of s. 163.1.

[Underline emphasis added; emphasis in italics original.]

[51] The elements of the private use exception were summarized in *R. v. Barabash*, 2015 SCC 29:

[18] As this Court explained in *Sharpe*, there are three elements to the private use exception, all of which must have a basis in the evidence for the exception to apply: (1) the recording must depict lawful sexual activity; (2) the persons depicted must consent to the recording; and (3) the recording must be held for private use.

[Emphasis added.]

[52] The Court went on to discuss the application of the lawfulness requirement to child pornography:

[23] In the context of a child pornography prosecution, these legislative limits on minors' consent restrict the circumstances in which the underlying sexual activity will be lawful. In so doing, they restrict the circumstances in which a person charged under s. 163.1 can rely on the private use exception as a defence. Thus, subject to those exceptions explicitly permitted in the *Code*, the consent of a person under the age of 14 (now 16) would not be valid and the defence would not be available. Nor will the private use exception apply where the Crown proves beyond a reasonable doubt that the relationship between those involved is tainted by exploitation, dependency, or abuse of authority or of a position of trust, as those offences are described in s. 153(1). Of course, the exception does not apply to any activities that are themselves offences, regardless of consent, such as incest (s. 155).

[Emphasis added.]

[53] In this case, it is apparent that the relationship between G.F. and J.C. was one of “exploitation, dependency, [and] abuse of authority or of a position of trust”. That was the basis of the conviction on count 2, which G.F. does not challenge.

[54] The images sent to J.C. did not depict lawful sexual activity. I agree with the trial judge that the private use exception does not apply to the circumstances at bar.

(ii) Does the offence of distributing child pornography require that the pornography be sent to more than one person?

[55] Section 163.1(3) applies to every person “who transmits, makes available, distributes, sells, advertises, imports, exports ... any child pornography”. There is

also a prohibition against possession of child pornography for one of these purposes, but that conduct is not engaged in this case.

[56] The language “who transmits, makes available, distributes, sells, advertises, imports, exports” is clearly designed to encompass any means of disseminating child pornography, whether active or passive, whether for commercial or private purposes.

[57] G.F. was charged with distributing child pornography. The evidence was that he had sent pornographic images to one person. G.F. argues that distribute means to divide among many and that transmission to one person is not distribution.

[58] The word “distribute” is used in several sections of the *Criminal Code*, but is not defined. To interpret the word as it is used in s. 163.1(3), it is necessary to read the word in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

[59] The grammatical and ordinary sense of “distribute” is to apportion to a number of persons. For example, this Court recently reviewed a number of dictionary definitions of “distribute” in *Society of Notaries Public of British Columbia v. Law Society of British Columbia*, 2017 BCCA 448, in order to determine the meaning to be given to the term as used in the *Notaries Act*, R.S.B.C. 1996, c. 344:

[27] As mentioned above, what today is s. 18(b)(i) of the *Notaries Act*, was first enacted in 1981. At that time, *The Shorter Oxford English Dictionary* (Oxford University Press: 1979) contained the following definitions:

Distribute ... 1. trans. To deal out or bestow in portions or shares among many; to allot or apportion as his share to each. ...

Distribution ... 1. The action of distributing, dealing out, or bestowing in portions among a number; apportionment, allotment. ...

Black’s Law Dictionary, Fifth Edition (West Publishing Co.: 1979), contained the following definitions:

Distribute. To deal or divide out in portions or in shares.

Distribution. The giving out or division among a number, sharing or parcelling out, allotting, dispensing, apportioning.

Probate. The apportionment and division, under authority of a court, of the remainder of the estate of an intestate, after payment of the debts and charges, among those who are legally entitled to share in the same.

[60] Contemporary dictionary definitions are to similar effect.

[61] To read this term in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, it is necessary to review the structure of s. 163.1(3).

[62] The object of s. 163.1 of the *Criminal Code* is to criminalize behaviour relating to the scourge of child pornography. Section 163.1(3) addresses the dissemination of child pornography. The various means by which dissemination can occur are captured by the language “transmits, makes available, distributes, sells, imports, exports”. Parliament appears to have intended that each of these terms will describe a different means of disseminating child pornography, in order that the full range of possibilities is included. While there appears to be some overlap in the means identified, the section should be interpreted in such a way that none of the terms is mere surplusage: *R. v. Proulx*, 2000 SCC 5 at para. 28.

[63] “Makes available” is the broadest of the terms. Unlike transmits or distributes, it does not require a positive act by the accused to facilitate the availability of the material: *R. v. Spencer*, 2014 SCC 43 at para. 83. “Transmits” does require a positive act to send or forward to a recipient or recipients. To avoid surplusage, this structure suggests a different meaning for “distributes” than “transmits”. Applying the ordinary sense of “distribute” as sending to a number of people would capture a broader dissemination of pornographic images than might be implied by “transmit”, which could include a single transmission.

[64] This Court considered the meaning to be given to “distribute” in a provision of the *Criminal Code* in *R. v. Fraser* (1965), 51 D.L.R. (2d) 408 (BCCA) aff’d [1967] S.C.R. 38 and came to a similar conclusion. In considering the distinction between distribution and sale, Maclean J.A. made the following comments at 412:

The Shorter Oxford English Dictionary defines "distribution" as:

I. The action of distributing, dealing out, or bestowing in portions among a number; apportionment, allotment. b. *Pol. Econ.* (a) The dispersal among consumers of commodities produced: opp. to *production*. (b) The distribution of the aggregate produce of any society among its individual members. 1848.

"Distribution" is obviously a word of wider connotation than "sale", as indicated by the judgment referred to above, as sale is only one of a number of means by which distribution can be accomplished. There may, however, be cases where a sale would not be a distribution as in the case where all the evidence showed was that a single book had been sold to an individual. The word "distribution" seems to indicate the handing out of more than one article to more than one individual, and possession for the purpose of distribution would appear to have a corresponding meaning.

[Emphasis added.]

[65] Additional guidance can be derived from the interpretation of "distribute" in other statutes.

[66] In *R. v. Cole* (1981), 64 C.C.C. (2d) 119 (Ont. C.A.), for example, the Ontario Court of Appeal concluded that the term "distribute" as used in the *Food and Drugs Act*, R.S.C. 1970, c. F-27 regulations means to give to more than one person.

[67] In *Cole*, the accused had given prescription drugs to one person and the issue was whether that constituted distributing the drugs for purposes of the *Food and Drugs Act* regulations. Justice Lacourciere held that it did not (at 130):

The etymological sense of the word distribute is the only proper one. Distribute, in Latin *distributus*, participle of *distribuo*, or *dis*, apart, and *tribuo*, to bestow, signifies to portion out to several. See *Crabb's 1887 English Synonymes*, at p. 356. The idea of giving to several persons is the proper signification of the word.

[Emphasis added.]

[68] The *Cole* judgment was followed by the Ontario Court of Appeal in *R. v. Faulkner* (1997), 120 C.C.C. (3d) 377 (Ont. C.A.) where the Court at para. 18 rejected an expanded definition of distribute:

The Crown seeks to support the conviction on the basis of the expanded definition of "sell" in the *Food and Drugs Act* which includes the distribution, whether for consideration or not, of a proscribed drug. In my view, *R. v. Cole* (1981), 64 C.C.C. (2d) 119 (Ont. C.A.) is a full answer to this argument. The

court there concluded that the proper signification of the word "distribute" as used in this Act is the idea of giving to several persons. To give to a single individual is not to distribute.

[Emphasis added.]

[69] In the absence of context indicating that "distributes" was intended by Parliament to include delivery to a single person (as for instance can be found in s. 171.1(1) of the *Criminal Code*), in my view, "distributes" must be given its ordinary meaning of giving to several persons. In the case of s. 163.1(3), the context of the section supports this ordinary meaning of the word.

[70] The delivery of the pornographic images to J.C. was a transmittal of the images contrary to s. 163.1(3) of the *Criminal Code*, but not a distribution of the images within the meaning of that section.

(iii) If so, should the information be amended to replace "distribute" with "transmit" to conform with the evidence?

[71] As an alternative position, the Crown submits that if this Court determines that the meaning of the word "distributes" in s. 163.1(3) means to transmit to more than one person, the information should be amended to replace "distribute" with "transmit", which is another means of disseminating child pornography contrary to s. 163.1(3). The word "transmit" would include sending to one person and would conform to the evidence adduced at trial without prejudicing the defence of the appellant.

[72] Section 683(1)(g) permits a court of appeal to amend an indictment or information where it considers it to be in the interests of justice, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

[73] In *R. v. Irwin* (1998), 38 O.R. (3d) 689 (C.A.), the Ontario Court of Appeal interpreted the scope of the Court's discretion broadly, even when the amendment "materially changes the charge, substitutes a new charge for the initial charge, or adds an additional charge" (at para. 31), but cautioned that the nature of the

proposed amendment will be an important factor in determining whether an accused has been misled or prejudiced:

[33] ... The risk of prejudice is particularly great where it is proposed to materially amend an indictment on appeal and affirm the conviction on the basis of that amendment.

[74] The concept of prejudice to an accused was explained by Doherty J.A. in this way:

[38] Prejudice in the present context speaks to the effect of the amendment on an accused's ability and opportunity to meet the charge. In deciding whether an amendment should be allowed, the appellate court must consider whether the accused had a full opportunity to meet all issues raised by the charge as amended and whether the defence would have been conducted any differently had the amended charge been before the trial court. If the accused had a full opportunity to meet the issues and the conduct of the defence would have been the same, there is no prejudice ...

[75] This explanation of the concept of prejudice for purposes of s. 683(1)(g) was accepted by this Court in *R. v. Gooderham*, 2004 BCCA 248 at paras. 50-51.

[76] The *Irwin* judgment was cited with approval by this Court in *R. v. A.L.B.* (1998), 110 B.C.A.C. 257. Justice Prowse summarized the comments of Doherty J.A. on materiality in this way:

[21] ... as a practical matter, an amendment which materially changes the charge can have drastic effects on the case against the accused, while some amendments which substitute one charge for another will do no more than place a new label on essentially the same culpable conduct.

[77] In *A.L.B.*, this Court amended an indictment that was said to “capture a broader range of activity than did the original charge” (at para. 24). The Court was not satisfied that the amendment prejudiced the appellant within the meaning of the concept as explained in *Irwin*.

[78] Where the amendment does no more than to make the count conform to everyone’s understanding of the charge, it cannot be said that it affected the conduct of the defence or otherwise prejudiced the accused: *R. v. Careen*, 2013 BCCA 535.

[79] A circumstance similar to the case at bar arose in *R. v. Montgomery*, 2009 BCCA 41. The accused had been charged with possession of a loaded restricted firearm without being the holder of an authorization or a licence under which he may possess the firearm in that place and a registration certificate for the firearm, contrary to s. 95(1) of the *Criminal Code*. Section 95(1) creates an offence of possession of a prohibited or restricted firearm with ammunition without an authorization or a licence and a registration certificate for the firearm. The firearm possessed by the accused was a prohibited firearm rather than a restricted firearm. The question for this Court was whether the indictment should be amended to substitute “prohibited” for “restricted”.

[80] Justice Tysoe for this Court noted that an appellate court should proceed cautiously with an application to amend the indictment on appeal but pointed out that the appellant had not been misled and had not pointed to any prejudice that he suffered in his defence or the appeal. He also made this observation:

[68] ... The point is technical in nature, and if the handgun had not been a prohibited firearm, it would have been a restricted firearm. That the firearm was of a nature requiring an authorization or licence and a certificate was not disputed at trial.

[69] The appellant was not misled and has not pointed to any prejudice that he suffered in his defence or the appeal. I have no doubt that the proposed amendment would have been granted at trial if Crown counsel had made [an] application at the end of the evidence. It would not be in the interests of justice to require a new trial on count 4 to deal with this technicality. In my opinion, it would be in the interests of justice to grant the requested amendment.

[81] In the case at bar, the defence of G.F. to count 4 at trial was that the distribution of child pornography to the child depicted in the photograph was subject to the private use exception. The position was summarized by counsel during submissions in this way:

In my submission, the definition of “distributing” child pornography should not include distributing to the person actually depicted in the photographs and that distribution would have to include a third party and that’s the way that Parliament would have intended that part of the Act to be interpreted.

[82] In my view, it would not have made any difference to the defence if the information had charged G.F. with transmitting child pornography contrary to s. 163.1(3) of the *Criminal Code* instead of distributing the pornography. It was not in dispute that G.F. had sent the pornographic photos to J.C. The question was whether the private use exception applied when the recipient of the transmission was the person actually depicted in the photographs. I have already explained why the private use exception did not afford a defence in this case, whether the delivery is characterized as distribution or transmission.

[83] In my opinion, the appellant was not misled by the wording of the information and has not pointed to any prejudice that he suffered in his defence or on this appeal. The prohibition in s. 163.1(3) is against disseminating child pornography in any manner. I would amend the information by substituting “transmit” for “distribute” in count 4. As I have already concluded that the private use exception does not apply, I would dismiss the appeal in relation to count 4.

Conclusion

[84] For these reasons, I would extend the time for filing the appeal, but I would dismiss the appeal.

“The Honourable Mr. Justice Hunter”

I AGREE:

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Madam Justice MacKenzie”

Tab 13:

R. v. G.F., 2021 SCC 20



SUPREME COURT OF CANADA

CITATION: R. v. G.F., 2021 SCC
20

APPEAL HEARD: October 14,
2020

JUDGMENT RENDERED: May
14, 2021

DOCKET: 38801

BETWEEN:

Her Majesty The Queen
Appellant

and

G.F. and R.B.
Respondents

- and -

Criminal Lawyers' Association of Ontario
Intervener

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 104)

Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Martin
and Kasirer JJ. concurring)

JOINT CONCURRING REASONS:
(paras. 105 to 124)

Brown and Rowe JJ.

DISSENTING REASONS: Côté J.
(paras. 125 to 148)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. G.F.

Her Majesty The Queen

Appellant

v.

G.F. and R.B.

Respondents

and

Criminal Lawyers' Association of Ontario

Intervener

Indexed as: R. v. G.F.

2021 SCC 20

File No.: 38801.

2020: October 14; 2021: May 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Sexual assault — Consent — Capacity to consent — Complainant testifying to incapacity to consent due to intoxication and to having expressed non-consent to sexual activity — Accused convicted of sexual assault at trial but Court of Appeal ordering new trial — Whether trial judge required to address consent and capacity to consent separately when both at issue — Whether trial judge's reasons sufficient — Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3), 273.1.

F and B were charged with sexually assaulting the 16-year-old complainant during a camping trip. The issue at trial was whether the complainant, who had consumed alcohol, had consented to the sexual activity with F and B. The complainant and F both testified and presented diametrically opposed versions of events; B did not testify. The Crown argued that the complainant's evidence clearly established incapacity due to intoxication, and also that the complainant had not agreed to the sexual activity. F and B submitted that the complainant was not credible and that she had not been as intoxicated as she claimed, and that she had agreed to engage in the sexual activity. The trial judge accepted the complainant's evidence and convicted F and B of sexual assault.

F and B appealed. The Court of Appeal rejected the argument that the verdict was unreasonable, concluding that the complainant's evidence was not demonstrably incompatible with incapacity to consent. However, the Court of Appeal found that the trial judge failed to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent, and

failed to consider the issue of consent first and separately from the issue of capacity. As a result, the Court of Appeal concluded that a new trial was necessary for both F and B.

Held (Côté J. dissenting): The appeal should be allowed and the convictions restored.

Per Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Martin and Kasirer JJ.: Consent is the foundational principle upon which Canada's sexual assault laws are based. Consent and the capacity to give consent are inextricably joined, as subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent. Trial judges are under no obligation to evaluate consent and capacity separately or in any particular order. In the present case, it was open to the trial judge to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question, and he did not err in addressing these issues together in his reasons.

Where a complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent. This is distinct from circumstances where a person may provide subjective consent that is not legally effective due to, for example, duress or fraud. Thus, when a trial engages both the issues of whether a complainant was capable of consenting and whether they did agree to the sexual activity in question,

the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity.

There are two aspects to the overarching concept of consent. The first is subjective consent, which relates to the factual findings about whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second requires that subjective consent also be effective as a matter of law. The *Criminal Code* sets out a series of factors that will vitiate subjective consent in ss. 265(3) and 273.1(2). However, these factors do not prevent subjective consent, but recognize that even if a complainant has permitted the sexual activity in question, there are circumstances in which subjective consent will be deemed of no force or effect. The distinction between preventing subjective consent and rendering it ineffective is important, and the proposition that incapacity vitiates rather than prevents subjective consent must be rejected for three reasons. First, subjective consent requires a complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question, and it follows, as a matter of logic, that the complainant must be capable of forming such an agreement. Second, incapacity as a vitiating factor would be inconsistent with the structure of the *Criminal Code*, as incapacity under s. 273.1(2)(b) deprives the complainant of the ability to formulate a subjective agreement. Third, capacity as a precondition to subjective consent provides certainty because it is inextricably linked to what subjective consent requires: contemporaneous voluntary agreement to the sexual activity in question.

As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent. Capacity to consent requires that the complainant have an operating mind capable of understanding the physical act, its sexual nature, and the specific identity of their partner, and that they have a choice of whether or not to engage in the sexual activity in question.

The trial judge did not err in his treatment of consent. Both the complainant's capacity to consent and agreement to the sexual activity were at issue. It was open to the trial judge to accept the evidence of incapacity and the evidence that the complainant did not agree to the sexual activity. Both findings went to a lack of subjective consent and did not need to be reconciled with each other, nor approached in any particular order.

The trial judge's reasons were also sufficient. Trial reasons must be both factually and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal. The task for appellate courts is not to finely parse the trial judge's reasons in a search for error, but rather to assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.

Despite clear guidance in the 19 years since *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, appellate courts continue to scrutinize the text of trial reasons in

a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. To succeed on appeal, an appellant's burden is to demonstrate either error or the frustration of appellate review, and neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error, as it is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated.

A trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little evidence beyond the testimony of the complainant and the accused, and articulating reasons for findings of credibility can be more challenging. Such findings must be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between credibility and reliability. Appellate courts should consider not whether the trial judge specifically used the words "credibility" and "reliability" but whether the trial judge turned their mind to the relevant factors that go to the believability of the

evidence in the factual context of the case, including truthfulness and accuracy concerns.

In the present case, the Court of Appeal did not conduct a functional and contextual reading of the trial judge's reasons, but rather assessed those reasons removed from the context of the live issues at trial. The trial judge's reasons should not be read as equating any degree of intoxication with incapacity, as what was at issue was the extreme degree of intoxication to which the complainant testified. Similarly, the trial judge's blending of consent and capacity reveals neither an error in law nor insufficient reasons. Capacity was not the only issue at trial, and the trial judge's reasons can be read as finding both that the complainant was incapable of consenting and that she did not agree to the sexual activity. These findings are not legally contradictory and both were available on the evidence.

Per Brown and Rowe JJ.: There is agreement with the majority that capacity to consent should be understood as a precondition to consent under s. 273.1 of the *Criminal Code*, and that it is possible to find that a complainant lacked capacity to consent while being capable of withholding consent. There is also agreement with much of the majority's recounting of the law regarding appellate review for sufficiency of reasons, but disagreement as to the sufficiency of the trial judge's reasons in this case with respect to the complainant's capacity to consent. However, the evidence that the complainant did not consent is overwhelming and the curative proviso should apply.

While a trial judge's reasons need not be letter-perfect, scrutiny of a trial judge's reasons is not inconsistent with the guidance in *Sheppard*. An appellate reviewer's role is not discharged by giving trial reasons for judgment a once-over-lightly perusal, but by reading and considering a trial judgment in order to assess whether, in light of the evidence and arguments at trial, it shows that the trial judge discerned and decided the live issues so as to explain the verdict to the accused, provide public accountability, and permit meaningful appellate review. It is inaccurate to say that reasons are sufficient even where ambiguities therein leave open the possibility that the judge may or might have erred, and the presumption that trial judges know the law does not negate the appellate reviewer's duty to insist upon reasons for judgment that, read together with the record, show that the law was correctly applied in a particular case.

In this case, the trial judge's reasons make clear that he convicted on the basis of incapacity alone, but they do not disclose what standard he applied in deciding that the complainant was incapable of consenting. While a finding of incapacity was available on the evidence, the evidence could also support the conclusion that the complainant had the cognitive capacity to consent throughout the interaction, and it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent in order to convict F and B on that basis. However, in light of the overwhelming evidence that the complainant did not consent, no other verdict was possible.

Per Côté J. (dissenting): There is agreement with Brown and Rowe JJ. on the law regarding appellate review for sufficiency of reasons, and that the trial judge erred in convicting F and B on the basis of the complainant's incapacity to consent without explaining both the standard by which he decided incapacity as well as its application to the complainant's evidence. However, given that credibility was the central issue at trial and the Crown's case is not otherwise staggering, this is not an appropriate case in which to apply the curative proviso. The appeal should therefore be dismissed, and the Court of Appeal's order for a new trial upheld.

Section 273.1(2)(b) of the *Criminal Code* plainly shows that incapacity is a circumstance that may vitiate a complainant's apparent consent. While the proper framework for analyzing consent to sexual activity was succinctly set out in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, it is the *Criminal Code* which establishes the requirement of a two-step analysis of consent to sexual activity. The first step in the statutory framework is to determine whether the complainant voluntarily agreed to the sexual activity in question (s. 273.1(1)), or whether a reasonable doubt is raised in this regard. If so, the court should then turn to the second step and consider whether this agreement was obtained in circumstances vitiating consent (ss. 265(3) and 273.1(2)). In the instant case, the trial judge did not do so, which is an error of law.

While trial judges are presumed to know the basic legal principles with which they engage on a regular basis, there must be an intelligible foundation for their

verdicts. The trial judge's statement in the present case that s. 273.1(2)(b) applies in instances where a complainant is intoxicated suggests that his view was that any level of intoxication is sufficient to vitiate consent, and it is not clear that this belief did not constitute the basis for his conclusion that there was no consent. Although findings of incapacity or non-consent are not tainted by error simply because of the order in which they are made, the absence of analysis to substantiate the trial judge's conclusory statement does not provide the basis for meaningful appellate review. Furthermore, the trial judge's error cannot be said to be so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial that any reasonable judge could not possibly have rendered a different verdict if the error had not been made. The complainant's incapacity was a live issue at trial, and acceptance of her evidence as credible is insufficient to ground a conviction. Accordingly, the curative proviso should not be applied.

Cases Cited

By Karakatsanis J.

Explained: *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; **considered:** *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; **referred to:** *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Barton*, 2019 SCC 33; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Goldfinch*, 2019 SCC 38; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Lutoslawski*, 2010 ONCA 207, 260 O.A.C. 161; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Paice*,

2005 SCC 22, [2005] 1 S.C.R. 339; *Saint-Laurent v. Hétu*, [1994] R.J.Q. 69; *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299; *R. v. Snelgrove*, 2019 SCC 16, [2019] 2 S.C.R. 98; *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *R. v. Daigle* (1997), 127 C.C.C. (3d) 130, *aff'd* [1998] 1 S.C.R. 1220; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Chung*, 2020 SCC 8; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. McMaster*, [1996] 1 S.C.R. 740; *R. v. Langan*, 2020 SCC 33, *rev'g* 2019 BCCA 467, 383 C.C.C. (3d) 516; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Kishayinew*, 2020 SCC 34, *rev'g* 2019 SKCA 127, 382 C.C.C. (3d) 560; *R. v. Slatter*, 2020 SCC 36, *rev'g* 2019 ONCA 807, 148 O.R. (3d) 81; *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Mehari*, 2020 SCC 40; *R. v. Howe* (2005), 192 C.C.C. (3d) 480; *R. v. Kiss*, 2018 ONCA 184; *R. v. Wanihadie*, 2019 ABCA 402, 99 Alta. L.R. (6th) 56; *R. v. J.M.S.*, 2020 NSCA 71; *R. v. C.A.M.*, 2017 MBCA 70, 354 C.C.C. (3d) 100; *R. v. K.P.*, 2019 NLCA 37, 376 C.C.C. (3d) 460; *R. v. Aird (A.)*, 2013 ONCA 447, 307 O.A.C. 183; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111; *R. v. Willis*, 2019 NSCA 64, 379 C.C.C. (3d) 30; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107.

By Brown and Rowe JJ.

Referred to: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

By Côté J. (dissenting)

R. v. L.K.W. (1999), 126 O.A.C. 39; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Perkins (T.)*, 2016 ONCA 588, 352 O.A.C. 149; *R. v. Raghunauth (G.)* (2005), 203 O.A.C. 54.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 265, 273.1, 686(1)(b)(iii).

Authors Cited

Benedet, Janine, and Isabel Grant. “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007), 52 *McGill L.J.* 243.

Black’s Law Dictionary, 11th ed. by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, “credibility”.

Ferguson, Gerry A., and Michael R. Dambrot. *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed. Vancouver: Continuing Legal Education Society of British Columbia, 2005 (loose-leaf updated November 2019).

McWilliams' Canadian Criminal Evidence, vol. 3, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2020, release 4).

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

APPEAL from a judgment of the Ontario Court of Appeal (Watt, Pardu and Nordheimer JJ.A.), 2019 ONCA 493, 146 O.R. (3d) 289, 378 C.C.C. (3d) 518, 55 C.R. (7th) 437, [2019] O.J. No. 3106 (QL), 2019 CarswellOnt 9555 (WL Can.), setting aside the convictions for sexual assault entered by Koke J., 2016 ONSC 3465, [2016] O.J. No. 4256 (QL), 2016 CarswellOnt 12943 (WL Can.), and ordering a new trial. Appeal allowed, Côté J. dissenting.

Philippe Cowle, for the appellant.

Alison Craig and *Riaz Sayani*, for the respondents.

Peter Sankoff, for the intervener.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

[1] Consent is the foundational principle upon which Canada's sexual assault laws are based. For decades, this Court has recognized that "control over who touches one's body, and how, lies at the core of human dignity and autonomy": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28. As such, the contours of consent are carefully delineated and jealously guarded. It is now indisputable that consent is a subjective state of mind, entirely personal to the complainant. There is no room for implied consent in Canada, and the range of mistaken beliefs an accused may lawfully hold about the complainant's consent are tightly restricted by the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] This appeal provides the Court with an opportunity to clarify the relationship between consent and the capacity to give consent. In my view, capacity and consent are inextricably joined. Subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent.

[3] The respondents take a different view, and argue that incapacity is a vitiating factor that renders subjective consent of no force or effect. Accordingly, they argue that the trial judge erred by blending his assessments of consent and capacity and by failing to assess subjective consent first and separately from the capacity to consent.

[4] I do not agree. Only if subjective consent exists, or if there is a reasonable doubt as to subjective consent, does a trier of fact need to go further and ask whether that consent is otherwise vitiated. Vitiating was not at issue in this case; the only live issue was whether the complainant subjectively consented. The Crown argued that

subjective consent was absent for two reasons: the complainant was incapable of consenting and she did not agree to the sexual activity in question. The trial judge was under no obligation to evaluate these two issues separately or in any particular order.

[5] Nor did the trial judge err by failing to review the jurisprudence on when intoxication results in incapacity to consent. In the Court of Appeal's view, the trial judge's reasons could be read as equating *any* degree of intoxication with incapacity to consent. Obviously, such an equation would be an error in law. However, in the context of this trial, no such reading was available. Given that the trial judge accepted the complainant's testimony of her extreme intoxication, "any degree of intoxication" was not a live issue. This Court has consistently reiterated the importance of a functional and contextual reading of the trial judge's reasons. The duty of the appellate court is to determine whether the aggrieved party understands what the trial judge decided and why, and whether the reasons permit appellate review. In this case, the trial judge's reasons were sufficient to satisfy this purpose. I would also take this opportunity to discourage the technical search for error and to re-affirm the importance of approaching a trial judge's reasons with sensitivity to the trial judge's role and advantage in making findings of fact and credibility.

[6] I would therefore allow the Crown's appeal and restore the convictions.

I. Background

[7] The complainant, 16 years old at the time, went on a camping trip for the 2013 Canada Day weekend with her family and her mother's co-workers. Two of those co-workers were G.F. and R.B., common-law spouses and the respondents in this case.

[8] On the final night of the camping trip, the respondents engaged in sexual activity with the complainant. The issue at trial was whether this sexual activity was consensual. The complainant and G.F. both testified and presented diametrically opposed versions of events. R.B. did not testify.

[9] The complainant testified that she drank heavily throughout the night, consuming between 8 and 10 shots in total. Almost all of this alcohol was provided by G.F. She testified that G.F. gave her alcohol while the group was sitting around a campfire. She felt nauseous and went to lay down in the respondents' trailer, where G.F. continued to give her more alcohol. She vomited repeatedly and the last thing she remembered before the assault was playing with her phone until she eventually passed out or fell asleep. She was woken up when she felt her pants and underwear being pulled down. She heard G.F. tell R.B. to perform cunnilingus on her, which R.B. did while G.F. held her down. G.F. then inserted his penis into the complainant's vagina and directed the complainant to perform cunnilingus on R.B., which she did not do. The complainant testified that she felt dizzy, intoxicated, scared, and repeatedly told the respondents to stop. G.F. told her to "be quiet". She did not call for help because she was sick, confused, and felt out of control. She testified that she did not feel able to make a choice of whether or not to participate. She tried to push away for a bit but

got tired and then “just went along with it”. Eventually, she passed out again. She disclosed the assault to her aunt the next day.

[10] In contrast, G.F. testified that the complainant was not very intoxicated. He said he gave the complainant a beer and two half-ounce shots of alcohol by the fire but nothing in the trailer. He agreed that the complainant vomited but said that she told him she felt “fine” afterwards. He went fishing and then returned later that night to find the complainant lying in bed naked next to R.B. He asked the complainant to leave but the complainant said she wanted to stay. He testified that the complainant and R.B. began to kiss and that the complainant allowed him to rub her thigh. The three of them then participated in consensual oral and vaginal intercourse. G.F. testified that he asked for and received assurances, at least seven times, that the complainant was consenting to the sexual activity.

[11] In sum, the complainant’s testimony portrayed an extremely intoxicated 16-year-old who awoke to sexual acts being performed on her, who resisted but then acquiesced, thinking she did not have any choice in the matter. G.F. described the complainant as a sober, active, and enthusiastic participant.

A. *Trial Decision, 2016 ONSC 3465 (per Koke J.)*

[12] The trial Crown invited the trial judge to treat this as a case of credibility. He argued that the trial judge did not need to “delve into degrees of intoxication versus sobriety” because he was presented with a stark choice: accept the complainant’s

evidence, which would clearly establish incapacity, or accept G.F.'s evidence, which would clearly establish capacity. He also argued that the complainant did not agree to the sexual activity.

[13] The respondents argued that the complainant was not credible. They submitted that the complainant was not as intoxicated as she claimed and certainly not so intoxicated as to be incapable of consenting. Most of their submissions, however, focused on the argument that the complainant agreed to engage in the sexual activity.

[14] The trial judge accepted the complainant's evidence and convicted the respondents, finding that the complainant "did not consent to the sexual activity": para. 52 (CanLII). He found the complainant's evidence to be internally consistent and corroborated by other evidence. In contrast, he found that G.F.'s evidence was "riddled with inconsistencies": para. 54. After explaining these inconsistencies and rejecting other defence arguments, the trial judge concluded his decision, at paras. 71-73:

[R.B.] did not testify. I find [G.F.'s] evidence to be unbelievable. It does not leave me with reasonable doubt as to his or [R.B.'s] guilt and in my view, the balance of the evidence at trial convincingly supports the conclusion that [G.F.] and [R.B.] forced [the complainant] into having non-consensual sex.

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged.

B. *Appeal Decision, 2019 ONCA 493, 146 O.R. (3d) 289 (per Pardu J.A., Watt and Nordheimer JJ.A. concurring)*

[15] G.F. and R.B. appealed to the Court of Appeal for Ontario. G.F.'s factum argued that the verdict was unreasonable because the complainant's awareness and memory of the sexual activity demonstrated that she was capable of consenting. R.B.'s factum raised further grounds of appeal: that the trial judge erred in not declaring a mistrial; and that the trial judge unevenly scrutinized the evidence.

[16] The Court of Appeal rejected G.F.'s argument that the verdict was unreasonable, concluding that the complainant's awareness and memory were not "demonstrably incompatible with incapacity to consent" (para. 25) and that the trial judge properly considered this evidence. However, it found that a new trial was required for related reasons.

[17] The Court of Appeal found two related errors in the trial judge's reasons. First, he failed to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent. As such, his reasons "may be read as equating any degree of impairment by alcohol with incapacity": para. 2. Second, the trial judge failed to consider the issue of consent first and separately from the issue of capacity.

[18] The Court of Appeal held that when both consent and incapacity to consent are at issue, the trial judge should first consider whether the complainant did not

provide consent. Only if the complainant did consent or if there is a reasonable doubt about the lack of consent is the trial judge required to ask whether that consent was vitiated by incapacity. The Court of Appeal viewed this Court's decision in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, as mandating this two-step process.

[19] The Court of Appeal found that the trial judge failed to follow this two-step process and that it was unclear whether he considered the issue of consent separately from the issue of capacity at all. As a result, the Court of Appeal concluded that a new trial was necessary for both G.F. and R.B. The Court did not address R.B.'s other grounds of appeal.

II. Analysis

[20] This appeal raises four issues:

1. Did the trial judge err in his assessment of consent and capacity?
2. Were the trial judge's reasons sufficient?
3. Did the Court of Appeal breach the rules of natural justice?
4. Do R.B.'s other arguments demonstrate any error?

A. *Did the Trial Judge Err in his Assessment of Consent and Capacity?*

[21] The first and primary issue in this case concerns the relationship between consent and capacity and whether it was an error for the trial judge to address these concepts together throughout his reasons.

[22] At issue at trial was whether the complainant consented to the sexual activity. The trial Crown argued that consent was absent because the complainant both did not consent and was incapable of consenting. Acceptance of either argument would establish the absence of consent and therefore the *actus reus* of sexual assault. Before this Court, the Crown submits that the trial judge did not, therefore, err by addressing consent and capacity together throughout his reasons.

[23] The respondents, however, argue that incapacity *vitiates* the complainant's voluntary agreement to the sexual activity in question. As such, the trial judge needed to engage in the two-step process set out by *Hutchinson*, first determining if the complainant actually consented, and only then proceeding to consider whether that consent was vitiated by incapacity. The respondents argue that, by blending his assessments of consent and capacity throughout his reasons, the trial judge erred in failing to follow this two-step process.

[24] I cannot agree. In my view, where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent. As I shall explain, this is distinct from circumstances where a person may provide subjective

consent that is not legally effective, due to, for example, duress or fraud. Thus, when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity.

(1) The Role of Consent in the Offence of Sexual Assault

[25] The *actus reus* of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent: *Ewanchuk*, at para. 25; *R. v. Chase*, [1987] 2 S.C.R. 293. The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching: *Ewanchuk*, at paras. 25-26. At the *mens rea* stage, the Crown must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent: *Ewanchuk*, at para. 42. The accused's perception of consent is examined as part of the *mens rea*, including the defence of honest but mistaken belief in communicated consent: *R. v. Barton*, 2019 SCC 33, at para. 90.

[26] This appeal concerns the third element of the *actus reus*, requiring the absence of consent.

[27] Parliament has provided a broad definition of consent for the purposes of sexual assault, sexual assault with a weapon or causing bodily harm, and aggravated sexual assault in s. 273.1(1) of the *Criminal Code*:

Meaning of consent

273.1 (1) Subject to subsection (2) and subsection 265(3), **consent** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[28] This definition is subject to two other provisions in the *Criminal Code*, ss. 273.1(2) and 265(3):

No consent obtained

273.1 (2) For the purpose of subsection (1), no consent is obtained if

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (a.1) the complainant is unconscious;
- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Consent

265 (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

[29] Turning first to s. 273.1(1), consent is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question”. This Court’s jurisprudence establishes that whether or not the complainant consented is a purely subjective analysis, determined by reference to the complainant’s internal state of mind at the time of the touching: *Ewanchuk*, at paras. 26-27; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at paras. 34 and 43-44. At the *actus reus* stage, consent means that the complainant, in their mind, agreed to the sexual touching taking place: *Ewanchuk*, at para. 48; *J.A.*, at para. 23; *R. v. Park*, [1995] 2 S.C.R. 836, at para. 16, per L’Heureux-Dubé J.; *Barton*, at para. 89; *R. v. Goldfinch*, 2019 SCC 38, at para. 44. Consent requires “the conscious agreement of the complainant to engage in every sexual act in a particular encounter”: *J.A.*, at para. 31; see also para. 34. Furthermore, consent is not considered in the abstract but rather must be linked to the sexual activity in question. In *Hutchinson*, the Court explained that “the sexual activity in question” involves only the physical act, its sexual nature, and the specific identity of the complainant’s partner or partners: paras. 54-57. To provide consent, therefore, the complainant must subjectively agree to the act, its sexual nature, and the specific identity of their partner or partners: *Barton*, at para. 88.

[30] This Court’s jurisprudence is replete with a variety of terms to refer to different aspects of consent. While the *Criminal Code* simply speaks of “consent” (ss. 265 and 273.1(1)), this Court has variously talked about “meaningful consent” (*J.A.*, at para. 36), “true consent” (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 127),

“apparent consent” (*Ewanchuk*, at para. 36; *Hutchinson*, at para. 4), and “subjective consent” (*Hutchinson*, at para. 37).

[31] As I will explain, there are two aspects to the overarching concept of consent, the absence of which is an essential element of the offence of sexual assault. The first is what this Court has called “apparent consent” or “subjective consent”: see *Hutchinson*, at paras. 4 and 37. That aspect relates to the factual findings of the trier of fact about whether the complainant subjectively and voluntarily agreed to the sexual activity in question. If the trier of fact finds that there was no such agreement, the *actus reus* of sexual assault will be established.

[32] While this Court has previously used “subjective consent” and “apparent consent” seemingly interchangeably, the term “apparent consent” is not consonant with the fact that consent is a subjective assessment of the complainant’s personal state of mind. Considerations of what may be “apparent” are not relevant, coming dangerously close to reinjecting into our sexual assault law the long rejected concept of implied consent. I prefer the term “subjective consent” which more accurately conveys what is required by the *Criminal Code* and our jurisprudence for a complainant, in their own mind, to provide “voluntary agreement . . . [to] the sexual activity in question”.

[33] If the complainant did not subjectively consent (for whatever reason) then the *actus reus* is established. However, the presence of subjective consent, or a reasonable doubt as to subjective consent, does not necessarily end the matter and result in an acquittal. There is a second aspect to “consent” for the purposes of the *actus reus*

of sexual assault — subjective consent must also be effective “as a matter of law”: *Ewanchuk*, at paras. 36-40; see also *R. v. Lutoslawski*, 2010 ONCA 207, 260 O.A.C. 161, at para. 15. Another way of framing that question is to ask whether the subjective consent has been vitiated.

[34] Whether subjective consent will not be legally effective is ultimately a matter of policy. The law steps in to say that despite the complainant’s subjective agreement, it will not be given legal effect. Sometimes, the policy that vitiates consent comes from the common law.¹ Other times, the policy is codified. In the context of sexual assault, the *Criminal Code* sets out a series of factors that will vitiate subjective consent in ss. 265(3) and 273.1(2).

[35] Section 265(3) sets out four factors that will vitiate subjective consent to sexual activity. Subjective consent will not be given legal effect where it is the product of force, threats or fear of force, certain types of fraud, or the exercise of authority: s. 265(3)(a) to (d). Section 273.1(2)(c) also vitiates subjective consent where the complainant is induced into sexual activity by the accused abusing a position of trust, power, or authority: *Hutchinson*, at para. 4. When subjective consent is the product of these factors, the complainant has been deprived of control over who touches their

¹ In *R. v. Jobidon*, [1991] 2 S.C.R. 714, for example, this Court explained that the common law vitiates subjective consent to a fist-fight where bodily harm is both intended and caused: see also *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339.

body, and how, and there is no consent in law: *Ewanchuk*, at paras. 28 and 37-39; *Saint-Laurent v. Héту*, [1994] R.J.Q. 69 (C.A.), per Fish J.A.

[36] However, these factors do not *prevent* subjective consent. Rather, they recognize that even if the complainant has permitted the sexual activity in question, there are circumstances in which that subjective consent will be vitiated — deemed of no force or effect. The distinction between preventing subjective consent and rendering it ineffective may be subtle, but it is important. A factor that prevents subjective consent must logically be linked to what subjective consent requires. Conversely, a factor that vitiates subjective consent is not tethered to the conditions of subjective consent and must find footing and justification in broader policy considerations.

[37] The example of fraud demonstrates this distinction. Depending on the type, fraud can do one of three things: it can prevent subjective consent, it can vitiate subjective consent, or it can simply not relate to the legal analysis of consent at all.

[38] Fraud that prevents subjective consent must be inherently linked to the conditions of subjective consent. For example, subjective consent requires agreement to the act being done by the specific person the complainant thinks is doing it: *Hutchinson*, at para. 57. If, as a result of fraud, the complainant engages in sexual activity with someone other than the person they think they are with, then there is no subjective consent because the conditions for subjective consent are not met: *Hutchinson*, at paras. 57-63. However, at the *actus reus* stage, a simple mistake has the same effect. A complainant does not consent “to the sexual activity in question” when

the complainant mistakenly engages in sexual activity with the wrong person: see, e.g., *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299, at paras. 20-24.

[39] Fraud that is not tied to the conditions for subjective consent cannot logically prevent subjective consent from forming but can vitiate subjective consent. Thus s. 265(3)(c) captures fraud that relates to something other than the “sexual activity in question”: *Hutchinson*, at para. 55. As a matter of criminal policy though, fraud that vitiates consent is held to a far higher standard than fraud that prevents consent. While fraud preventing consent is interchangeable with a mistake, fraud will only vitiate consent where it entails the “reprehensible character of criminal acts”: *Cuerrier*, at para. 133; see also *Hutchinson*, at para. 42.

[40] If a fraud is not linked to the conditions for subjective consent *and* does not entail the reprehensible character of criminal acts, then it will not affect the legal analysis of consent in any way. That is why lying about matters such as one’s profession or net worth may be immoral, but it is not criminal: *Cuerrier*, at paras. 133-35.

[41] Fraud thus demonstrates the distinction between factors that prevent subjective consent, factors that vitiate it, and factors that do not relate to the legal analysis of consent. To prevent subjective consent, the factor must prevent a condition of subjective consent from being satisfied. If it does not then it can only vitiate consent, which entails questions of broad criminal law policy untethered from the conditions of subjective consent. If the answers to those questions do not justify the heavy hand of the criminal law then the factor does not relate to the legal analysis of consent.

[42] The respondents, with the support of the intervener, argue that incapacity vitiates rather than prevents subjective consent. I reject this proposition for three reasons.

[43] First, capacity must be understood as a precondition to subjective consent as a matter of logic. Subjective consent requires the complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question: *J.A.*, at paras. 31, 36 and 45; *Barton*, at para. 88. It naturally follows that the complainant must be *capable* of forming such an agreement.

[44] Second, incapacity as a vitiating factor would be inconsistent with the structure of the *Criminal Code*. The definition of consent for the purposes of sexual assault in s. 273.1(1) is “[s]ubject to” ss. 265(3) and 273.1(2), which set out circumstances where “no consent is obtained”. Section 265(3) is a purely vitiating provision, whereas s. 273.1(2) is multi-faceted, primarily serving to clarify the broad definition of “consent” in s. 273.1(1): *J.A.*, at para. 29. Only s. 273.1(2)(c) vitiates consent, where the complainant’s induced agreement by reason of an abuse of power, trust, or authority is deemed ineffective in law: *Hutchinson*, at para. 4; *R. v. Snelgrove*, 2019 SCC 16, [2019] 2 S.C.R. 98, at paras. 3-4. The other factors in s. 273.1(2) appear to clarify what subjective consent requires. It cannot be said that a complainant who expresses a lack of agreement has subjectively consented: s. 273.1(2)(d) and (e). Similarly, there can be no subjective consent to vitiate if the agreement comes from a third-party rather than the complainant: s. 273.1(2)(a). In *J.A.*, this Court, in

determining that the agreement must be contemporaneous to the touching, rejected the suggestion that unconsciousness, under what is now s. 273.1(2)(a.1), vitiates consent: para. 33. In my view, incapacity under s. 273.1(2)(b) is another clarifying provision. Like unconsciousness, incapacity deprives the complainant of the ability to formulate a subjective agreement: *J.A.*, at para. 33. An incapacitated complainant cannot provide voluntary agreement to the sexual activity in question and therefore cannot provide subjective consent.

[45] The third and final reason comes from the need for certainty in the criminal law. Capacity as a precondition to subjective consent provides certainty because it is inextricably linked to what subjective consent requires: contemporaneous voluntary agreement to the sexual activity in question. Capacity to consent requires that the complainant be capable of understanding what is required for subjective consent — no more, no less.

[46] Conversely, incapacity as a vitiating factor would bring with it a host of uncertainties. Untethered from the conditions for consent, an incapacity assessment would need to say that even though the complainant voluntarily agreed to the sexual activity in question, at some undefined point their decision-making process was so impaired that subjective consent was no longer effective. This would inject significant uncertainty into the task of establishing the *actus reus* of sexual assault; the blunt tool of the criminal law is poorly suited to such a delicate task as determining at what point a complainant has made an impaired but free and voluntary choice. Further difficulties

and uncertainty would arise at the *mens rea* stage where the accused's awareness of the complainant's impaired decision-making process would need to be assessed.

[47] For these reasons, it must be that the capacity to consent is a precondition to subjective consent. It is not a matter of vitiation. If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established.

[48] Despite these reasons why capacity to consent must be understood as a precondition to subjective consent, the Court of Appeal, like the respondents and the intervener, understood incapacity to be a vitiating factor. As such, they relied on *Hutchinson* for the proposition that a trial judge must consider whether the complainant provided subjective consent first and separately from the issue of the complainant's capacity to consent. Specifically, they read para. 4 of *Hutchinson* as setting out a "two-step process" that the trial judge must follow.

[49] Paragraph 4 of *Hutchinson* does not relate to incapacity in any way. That paragraph reads as follows:

The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3)

defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[50] This introductory paragraph does not contain any novel or controversial propositions of law. The sequential operation of subjective consent (“apparent consent”, in the language of *Hutchinson*) and whether that subjective consent is effective in law has always formed the common law of assault and is continued by the *Criminal Code*: *R. v. Jobidon*, [1991] 2 S.C.R. 714, at pp. 731-32. Paragraph 4 of *Hutchinson* is merely summarizing the process that “[t]he *Criminal Code* sets out”. It is nothing more than a concise description of the two aspects of consent when both subjective consent and effective consent are at issue. *Hutchinson* dealt with whether fraud by sabotaging a condom related to the “sexual activity in question” such that there was no subjective consent — or whether it vitiated consent. It has nothing to do with incapacity, does not engage in the issue, and does not suggest that incapacity to consent must be viewed as a vitiating factor.

[51] Further, *Hutchinson* does not mandate that the different aspects of subjective consent be considered in any rigid order. While a complainant logically must be capable of consenting before there can be a factual finding that they did consent, a trial judge may be faced with evidence that the complainant was incapable of consenting and also did not agree to the sexual activity in question, and a finding of either will establish a lack of subjective consent. While in some cases it may be more

respectful of a complainant's dignity to first address whether the complainant agreed to the sexual activity in question (see J. Benedet and I. Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007), 52 *McGill L.J.* 243, at p. 270), there is no strict requirement for a trial judge to consider one before or after the other.

[52] Similarly, *Hutchinson* should not be read as imposing a strict order-of-operations upon triers of fact when considering both subjective consent and whether that consent is effective in law. While it may usually make analytical sense to consider subjective consent first and legal effectiveness second, a trial judge will not necessarily err if they do not follow this order. There may be clear evidence that any subjective consent is vitiated. For example, if a complainant is forced into sexual activity by threats of violence, it would hardly be reversible error for a trial judge to find that there could not be effective consent in law, even if there was subjective consent.

[53] In sum, a finding of subjective consent requires both that the complainant was capable of consenting and did agree to the sexual activity. Finding that a complainant was either incapable of consenting or did not agree to the sexual activity in question will establish a lack of subjective consent. These two aspects of subjective consent do not need to be considered in any rigid order. Only if subjective consent exists, or if there is a reasonable doubt as to subjective consent, does a trier of fact need to go on and ask whether that consent was vitiated.

[54] The question of whether a complainant had the capacity to consent will not always be at issue; nor will the question of whether subjective consent was vitiated always be at issue. Such questions are driven by the facts and context of each individual case.

(2) The Four Requirements for Capacity

[55] As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent itself. Since subjective consent must be linked to the sexual activity in question, the capacity to consent requires that the complainant have an operating mind capable of understanding each element of the sexual activity in question: the physical act, its sexual nature, and the specific identity of their partner: *Barton*, at para. 88; *Hutchinson*, at paras. 54-57.

[56] There is one further requirement. Because subjective consent requires a “voluntary agreement”, the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: *Criminal Code*, s. 273.1(1). At the very least, a voluntary agreement would require that the complainant exercise a choice to engage in the sexual activity in question. In this narrow sense, in order to voluntarily agree to the sexual activity in question, the complainant must understand that saying “No” is an option. In *J.A.*, this Court held that consent requires that the complainant have “an operating mind” at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it: paras. 36 and 43-44. Thus, an unconscious complainant could not provide

contemporaneous consent. It follows that where the complainant is *incapable* of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent: see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 60, citing *R. v. Daigle* (1997), 127 C.C.C. (3d) 130 (Que. C.A.), *aff'd* [1998] 1 S.C.R. 1220.

[57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant's partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

[58] The complainant will only be capable of providing subjective consent if they are capable of understanding all four factors. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent and the absence of consent is established at the *actus reus* stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate.

(3) Application

[59] Based on their view that incapacity is a vitiating factor and their understanding of *Hutchinson*, the respondents submit that the trial judge erred in failing to consider consent and capacity separately and sequentially. As I have explained, I do not accept either of these propositions. Nor do I accept that the trial judge erred in his treatment of consent in this case.

[60] Both the complainant's capacity to consent and agreement to the sexual activity were at issue here. The trial judge was faced with evidence of incapacity to consent. Most significantly, the complainant testified that she drank heavily throughout the night, was passed out when the sexual activity began and, while she struggled briefly, she gave up as she thought she had no choice in the matter. The trial judge was also faced with evidence that the complainant did not agree to the sexual activity as the complainant testified that she tried to push away from the respondents and repeatedly told them to stop. It was open to the trial judge to accept the evidence of incapacity and the evidence that the complainant did not agree to the sexual activity. *Hutchinson* did not require these to be addressed separately or in any particular order.

[61] The respondents argued here, as they argued below, that the trial judge's error went beyond blending his consent and capacity assessments — they argue that he could not find both that the complainant was incapable of consenting and that she did not agree to the sexual activity. They argue that these findings are “mutually exclusive” and a complainant who is incapable of consenting is not capable of withholding agreement to sexual activity. I do not agree for two reasons.

[62] First, I am not convinced that these findings are mutually exclusive at the theoretical level. In my view, the capacity to consent requires a higher level of understanding than the capacity to withhold consent. As discussed, the capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate *all* the conditions of subjective consent. If a complainant is incapable of understanding any one of those conditions, then they are incapable of consenting. Conversely, the capacity to withhold consent inherently requires a lesser degree of understanding because that capacity is established by a complainant's capacity to understand *any* of the necessary factors. For example, if a complainant is incapable of understanding the sexual nature of proposed touching but knows they do not want to be touched, then they are capable of withholding consent despite being incapable of consenting.

[63] Second, the continuous nature of consent provides a further reason why the respondents' argument must fail at a practical level. Consent must be specifically directed to each sexual act: *J.A.*, at para. 34; *Criminal Code*, s. 273.1(2)(e). There is no reason why the entire course of sexual activity must be blanketed with a single finding of consent, non-consent, or incapacity. This case provides an example. On the trial judge's findings, the sexual activity began when the complainant was passed out — evidence of incapacity. As it continued, the complainant struggled and told the respondents to stop — evidence that she expressly refused to engage in the sexual activity. When those struggles and demands were ignored by the respondents, the

complainant, in her confused and intoxicated state, acquiesced, believing she had no choice in the matter — again, evidence of incapacity.

[64] Accordingly, it was open to the trial judge to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question. In the context of this case, the trial judge did not err in addressing these issues together in his reasons. Both findings went to a lack of subjective consent, thus establishing the final element of the *actus reus*. They did not need to be reconciled with each other, nor approached in any particular order.

[65] As a final note, I reject the respondents’ argument that the complainant’s claim of incapacity was belied by her thorough recollection of the sexual activity. Whether the complainant has a memory of events or not does not answer the incapacity question one way or another. The ultimate question of capacity must remain rooted in the subjective nature of consent. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.

B. *Were the Trial Judge’s Reasons Sufficient?*

[66] The Court of Appeal identified two concerns with the sufficiency of the trial judge’s reasons. First, the trial judge’s reasons “may be read as equating any

degree of impairment by alcohol with incapacity”. Second, it was unclear if the trial judge found that the complainant did not consent, regardless of capacity.

[67] As I explain below, I disagree. In the context of this case, the trial judge’s reasons were sufficient. The trial judge’s reasons should not be held to an abstract standard that is foreign to the realities of the case before him. All parties agreed at trial that the complainant’s evidence, if accepted, established incapacity. The trial judge accepted that evidence, and incapacity was clearly established. Similarly, all parties recognized that factual consent was at issue. The complainant testified that she did not consent, repeatedly told the respondents to stop, and was told to be quiet. The trial judge accepted that evidence, and the absence of agreement to sexual activity was clearly established.

(1) Appellate Review of Trial Reasons

[68] The importance of trial reasons should not be understated. It is through reasoned decisions that judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15, 42 and 55; R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 134. However, this Court in *Sheppard* emphasized that, for the purposes of appellate review, “the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability”: para. 42. On appeal, the issue is

whether there is reversible error. What is required are reasons that are sufficient in the context of the case for which they were given.

[69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient: *Sheppard*, at paras. 28-33 and 53; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 19; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 10, 15 and 19; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15; *R. v. Chung*, 2020 SCC 8, at paras. 13 and 33. Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.

[70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.

[71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.

[72] *Sheppard* itself was such a case. The trial judge's reasons for conviction read, in their entirety:

Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged. [paras. 2 and 10]

[73] This Court found that these reasons were factually insufficient because the pathway the trial judge took to the result was unintelligible: *Sheppard*, at para. 60. It

was simply not possible for the parties, counsel, or the courts to determine why the trial judge found as he did: paras. 2 and 61-62.

[74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that “the trial judge understands the basic principles of criminal law at issue in the trial”: *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, “Trial judges are presumed to know the law with which they work day in and day out”: see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

[75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge’s chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory.

However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.

[76] Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged.

[77] In three recent appeals as of right, this Court reinstated sexual assault convictions that were set aside on appeal, endorsing the reasons of a dissenting justice.

[78] In *R. v. Langan*, 2020 SCC 33, rev'g 2019 BCCA 467, 383 C.C.C. (3d) 516, this Court adopted the dissenting reasons of Bauman C.J.B.C. that held that the trial judge's ambiguous use of certain text messages did not demonstrate error on a functional and contextual reading. Bauman C.J.B.C. concluded that since there was a permissible basis on which to admit the text messages, "we should not speculate that the properly admitted evidence was improperly used, without clear indications to the contrary": *Langan* (C.A.), at para. 103; see also para. 140.

[79] To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review: *Sheppard*, at para. 54. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be

said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 523-25. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *Sheppard*, at para. 46. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity.

[80] In *R. v. Kishayinew*, 2020 SCC 34, rev'g 2019 SKCA 127, 382 C.C.C. (3d) 560, and *R. v. Slatter*, 2020 SCC 36, rev'g 2019 ONCA 807, 148 O.R. (3d) 81, this Court adopted the reasons of a dissenting judge holding that the trial judge did not err in conflating credibility and reliability. In both cases, the trial judges accepted the complainants' evidence and found them to be credible, even if their reliability findings were not explicit on the face of the reasons.

[81] As *Slatter* demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder

and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in *Gagnon*, at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

[82] Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility. The jurisprudence often stresses the distinction between reliability and credibility, equating reliability with the witness' ability to observe, recall, and recount events accurately, and referring to credibility as the witness' sincerity or honesty: see, e.g., *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41. However, under a functional and contextual reading of trial reasons, appellate courts should consider not whether the trial judge specifically used the words "credibility" and "reliability" but whether the trial judge turned their mind to the relevant factors

that go to the believability of the evidence in the factual context of the case, including truthfulness and accuracy concerns. A trial judge's determination to accept or believe inculpatory witness evidence includes an implicit assessment of truthfulness or sincerity and accuracy or reliability: *Vuradin*, at para. 16. Often, the term "credibility" is used in this broader sense to mean the believability of the evidence and it necessarily includes both truthfulness and accuracy: *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 3, at pp. 30-1 and 30-2. For example, *Black's Law Dictionary* (11th ed. 2019), at p. 463, defines credibility as "[t]he quality that makes something (as a witness or some evidence) worthy of belief" and model jury instructions include both truthfulness and accuracy within "credibility" assessments: G. A. Ferguson and M. R. Dambrot, *CRIMJI: Canadian Criminal Jury Instructions* (4th ed. (loose-leaf)). Provided trial judges turn their mind to these considerations, there is no requirement that they utter the word "reliable".

(2) Application

[83] In my view, the Court of Appeal in the present case did not conduct a functional and contextual reading of the trial judge's reasons, but rather assessed those reasons removed from the context of the live issues at trial.

[84] The Court of Appeal found that the trial judge's reasons "may be read as equating any degree of impairment by alcohol with incapacity". The respondents also urge this reading. Obviously, equating *any* degree of intoxication with incapacity would

be wrong in law. In my view, however, no such reading is appropriate here, on a functional, contextual approach.

[85] The trial judge made two references to intoxication as rendering the complainant incapable. When setting out his task, at para. 51, he framed one of the questions as whether the complainant “was unable to provide her consent to this sexual activity because she was impaired by alcohol consumption”. When concluding his judgment, at para. 72, he wrote that “no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.”

[86] The trial judge’s references to intoxication must be read in light of the live issues at trial. He recognized that intoxication could lead to incapacity. But “any degree of impairment” was not at issue — what was at issue was the *extreme* degree of intoxication to which the complainant testified. The complainant did not testify about some mild or abstract level of intoxication. Her evidence was that she was so intoxicated that she vomited repeatedly, passed out, felt “out of control” during the sexual activity, felt that she had no choice in the matter, and could not do anything to stop it. All parties recognized at trial that this evidence, if accepted, established incapacity to consent. It is that degree of extreme intoxication that the trial judge was referring to when discussing whether the complainant was so intoxicated as to be incapable of consenting. In the context of this trial, the trial judge’s reasons should not be read as equating *any* degree of intoxication with incapacity.

[87] Similarly, the trial judge's blending of consent and capacity reveals neither an error in law nor insufficient reasons. It would have been preferable for the trial judge to clearly identify what aspect of consent he was referring to in concluding that there was no consent. However, failing to do so did not amount to error.

[88] Capacity was not the only issue at trial. While a finding of incapacity would establish the *actus reus*, the trial judge also considered whether, if the complainant was capable, she did agree to the sexual activity.

[89] The trial judge's reasons can be read as finding both that the complainant was incapable of consenting and that she did not agree to the sexual activity. As explained earlier, these findings are not legally contradictory and both were available to him. Indeed, having chosen to accept and believe her evidence, both findings are obvious.

[90] The respondents, in their arguments before the Court of Appeal and before this Court, stressed that the trial Crown did not "invite" the trial judge to convict on the basis that the complainant did not agree to the sexual activity. While the trial Crown certainly focused on incapacity, it is not fair to say that he disavowed this theory. The charge was not particularized and the Crown adduced evidence that the complainant both was incapable of consenting and did not consent. The trial Crown's written and oral submissions both highlighted the complainant's evidence that she did not consent, such as her evidence that she told the respondents to stop and tried to push R.B. away. Whether the complainant agreed to the sexual activity was a live issue. Indeed, the

defence urged the trial judge to find that the complainant provided such an agreement. It was open to the trial judge to find that the complainant was incapable and that she expressly refused to engage in the sexual activity — either way, he found that the respondents sexually assaulted the complainant.

[91] The respondents received a fair trial. They were presumed innocent and held the Crown to its burden to prove their guilt beyond a reasonable doubt. They thoroughly cross-examined the complainant and mounted a multi-faceted defence against the charge. But fairness does not require perfection: *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45, per McLachlin J. The trial judge accepted the evidence of the complainant that sexual activity began when she was unconscious and continued despite her pleas for the respondents to stop. His reasons revealed no error on a proper appellate reading. The respondents' convictions should not have been overturned simply because the trial judge expressed himself poorly.

C. *Did the Court of Appeal Breach the Rules of Natural Justice in Deciding the Appeal for Reasons Not Raised by the Parties?*

[92] After rejecting G.F.'s unreasonable verdict argument, the Court of Appeal did not proceed to examine the grounds of appeal raised by R.B.'s arguments but rather found that the trial judge had committed the errors it identified. The Court of Appeal recognized that it was not addressing "the precise argument advanced" by G.F. and R.B. but proceeded because "issues related to consent and capacity were central to the arguments made on appeal" by all parties: para. 29. The Crown argues that the Court

of Appeal should not have decided the appeal on the basis of its concerns in the trial judge's reasons without providing the parties an express opportunity to respond. It argues that this was a breach of natural justice, in contravention of this Court's decision in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689.

[93] While this point is moot as I have determined that the Court of Appeal erred in reaching its conclusion, I do not agree that *Mian* was breached. *Mian* sought to strike a balance between the adversarial process and the appellate court's duty to ensure that justice is done. In pursuit of that duty, sometimes the appellate court will need to raise a new issue that suggests error in the decision below that goes beyond the arguments set forth by the parties. If the appellate court raises a new issue, fairness to the adversarial process requires the court to provide the parties with notice and an opportunity to respond to it: *Mian*, at para. 30. However, where the appellate court raises an issue that is not "new" but rather is rooted in or forms a component of the issues raised by the parties, *Mian* gives appellate courts a discretion to determine whether notice and submissions are warranted: para. 33.

[94] Here, this Court would have no basis upon which to interfere with the Court of Appeal's exercise of discretion. While the respondents' unreasonable verdict argument did not directly engage the framework for assessing consent and capacity or the sufficiency of the trial judge's reasons, the Court of Appeal reasonably exercised its discretion to address these issues, noting that they were not "new" because "issues related to consent and capacity were central to the arguments made on appeal by both

the [respondents] and the Crown”: para. 29. The respondents focused their argument on whether the complainant’s evidence, even if accepted, could establish incapacity. However, they also argued that the trial judge’s reasons were insufficient insofar as they concerned the issue of factual non-consent free from incapacity. The Crown argued below that the trial judge’s reasons on consent and incapacity were free of error. Notably, the Crown argued that the trial judge’s blending of these issues was not an error. This was not a case where natural justice demanded that the Court of Appeal provide the parties with notice or invite further submissions.

D. *Other Issues*

[95] The respondents raise three further issues that were not addressed by the Court of Appeal. The respondents argue that the trial judge erred in failing to declare a mistrial, erred in not considering whether the respondents harboured honest but mistaken beliefs that the complainant communicated consent, and unevenly scrutinized the evidence of the complainant and G.F. In my view, there is no merit to any of these arguments.

[96] First, the trial judge did not err in refusing to declare a mistrial. R.B. states she wanted to testify and her right to do so was usurped by her counsel. She claims that there was an agreement in place with her counsel that he would not close the defence case without first consulting her about whether she wanted to testify. Defence counsel, she submits, did not honour this agreement. As the Crown aptly notes though, R.B. made these submissions before the trial judge, who found that there was no such

agreement. Therefore, on the findings of the trial judge, there is no factual foundation for this ground of appeal.

[97] Similarly, there is no factual foundation for the argument that the trial judge erred in not considering whether the respondents had an honest but mistaken belief in communicated consent. This argument is predicated on G.F.'s testimony that he asked for and received repeated assurances of consent from the complainant. The trial judge rejected that evidence and accepted the complainant's evidence that she was unconscious when the sexual activity began, told the respondents to stop, and was told by G.F. to "be quiet". There could be no air of reality to an honest but mistaken belief in communicated consent.

[98] Finally, there is no merit to the claim that the trial judge applied a stricter level of scrutiny to G.F.'s evidence than to the complainant's evidence. The respondents take issue with each of the 10 reasons why the trial judge found the complainant to be a credible witness and each of the 12 reasons why the trial judge found G.F.'s evidence to be inconsistent. I agree with the Crown that this argument is simply a veiled attempt to re-litigate the trial judge's factual findings.

[99] This Court has never ruled on whether "uneven scrutiny" of Crown and defence evidence is an independent ground of appeal: *R. v. Mehari*, 2020 SCC 40. It was described by the Court of Appeal for Ontario in *R. v. Howe* (2005), 192 C.C.C. (3d) 480, at para. 59, as a common argument "on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of

the accused and the result turns on the trial judge’s credibility assessments”. In the last decade, provincial appellate courts have dealt with uneven scrutiny extensively and stressed that it is a notoriously difficult argument to prove: *Howe*, at para. 59; *R. v. Kiss*, 2018 ONCA 184, at para. 83 (CanLII); *R. v. Wanihadie*, 2019 ABCA 402, 99 Alta. L.R. (6th) 56, at para. 34; see also *R. v. J.M.S.*, 2020 NSCA 71; *R. v. C.A.M.*, 2017 MBCA 70, 354 C.C.C. (3d) 100, at para. 54; *R. v. K.P.*, 2019 NLCA 37, 376 C.C.C. (3d) 460. Credibility findings are the province of the trial judge and attract significant deference on appeal: *R. v. Aird (A.)*, 2013 ONCA 447, 307 O.A.C. 183, at para. 39; *Gagnon*, at para. 20. As explained by Doherty J.A.:

It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

(*Howe*, at para. 59)

[100] I have serious reservations about whether “uneven scrutiny” is a helpful analytical tool to demonstrate error in credibility findings. As reflected in the submissions here, it appears to focus on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis. In my view, the focus must always be on whether there is reversible error in the trial judge’s credibility findings. Even in *Howe*, Doherty J.A. ultimately chose to frame the uneven

scrutiny argument slightly differently: para. 64. Rather than say that the appellant had demonstrated uneven scrutiny of the evidence, Doherty J.A. explained that the essential problem in the trial judge's reasons was that he had "failed to factor into his assessment of [the complainant's] credibility his finding that she deliberately lied on important matters in the course of testifying in reply": para. 64. In appellate cases that have accepted an uneven scrutiny argument, there was some specific error in the credibility assessments: see, e.g., *Kiss*, at paras. 88-106; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111, at paras. 37-43; *R. v. Willis*, 2019 NSCA 64, 379 C.C.C. (3d) 30, at paras. 55-62; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, at para. 54. As shown in *Howe*, uneven scrutiny easily overlaps with other arguments for why a trial judge's credibility findings are problematic. It is therefore unsurprising to see uneven scrutiny tacked on to arguments like insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict.

[101] Nevertheless, without full submissions, I would not comment further on whether uneven scrutiny is a helpful or independent ground of appeal. In this case, it is clear that the respondents have neither demonstrated that the trial judge unevenly scrutinized the evidence in the course of his credibility assessments nor that any alleged error in reasoning figured in his ultimate conclusion as to the respondents' guilt: see, e.g., *Gravesande*, at paras. 18-19 and 43; *Howe*, at para. 65. While the respondents have pointed to 22 reasons why they disagree with the trial judge's findings, there is no suggestion that he treated similar inconsistencies, or similar positive evidence, differently when making credibility findings for each side: see, e.g., *Kiss*, at

paras. 93-97. The respondents simply invite this Court to reassess the trial judge's credibility determinations. Even based on the law of uneven scrutiny as it exists in appellate courts today, there is no basis for this Court to do so: *Aird (A.)*, at para. 39.

III. Conclusion

[102] The trial judge's reasons were not perfect. They did not have to be. The trial judge did not err in addressing consent and capacity together throughout his reasons. Capacity is a precondition to consent, and as such there was no need for the trial judge to consider capacity separately from or after the issue of factual consent. It was open to the trial judge to find that the complainant was both incapable of consenting and factually did not consent and convict the respondents on either or both routes.

[103] Nor did the trial judge equate *any* degree of intoxication with incapacity. The trial judge explained what he found and why, and what he found was that the respondents committed a sexual assault upon the extremely intoxicated complainant, who was passed out when the assault commenced. Their convictions were safe and the trial judge made no error.

[104] For these reasons, I would allow the Crown's appeal, set aside the order of the Court of Appeal, and restore the respondents' convictions.

The following are the reasons delivered by

BROWN AND ROWE JJ. —

[105] There is much in the reasons of our colleague Justice Karakatsanis to endorse, including the result (at which we also arrive, but via a different path). We agree, for example, that capacity to consent should be understood as a precondition to consent under s. 273.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. We also agree that it is possible to find that a complainant lacked capacity to consent *while* being capable of withholding consent (see J. Benedet and I. Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007), 52 *McGill L.J.* 243, at p. 270).

[106] Subject to the observations we make below, we also accept much of our colleague’s recounting of the law regarding appellate review for sufficiency of reasons. What divides us, above all, is its application to the trial judge’s reasons in this case. In convicting the respondents on the basis of the complainant’s incapacity to consent, he explained neither the standard by which he decided incapacity, nor its application to these circumstances in which, significantly, the complainant’s evidence was not determinative of the issue. This was, in our respectful view, an error.

[107] That said, the evidence that the complainant did not consent is overwhelming. We would therefore apply the curative proviso, allow the appeal and restore the respondents’ convictions.

I. Sufficiency of Reasons

[108] It is by now well established that a trial judge's reasons in a criminal case, read as a whole in the context of the evidence and the arguments at trial, must be sufficient to explain the verdict to the accused, to provide public accountability and to permit effective appellate review (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 15-16; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 12; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 24-25 and 52). Where an appellate court cannot discern the basis for the verdict such that meaningful appellate review is impossible, this constitutes an error of law (*Sheppard*, at paras. 28 and 46; *R.E.M.*, at para. 17). This is a highly context-specific inquiry. Whether an appellate court can be said to have appropriately reviewed or inappropriately “parsed” a trial judge's reasons in a search for error will depend entirely on the reasons and record in each case.

[109] As our colleague Karakatsanis J. generally recounts, in the criminal justice system the mandate of an appellate court is to review trial decisions, and trial judges must provide reasons sufficient for this purpose. She cautions that appellate reviewers must not “finely parse” the judge's reasons in a search for error, and laments “appellate court decisions that scrutinize the text of trial reasons” on “the basis of parsing imperfect or summary expression on the part of the trial judge” (paras. 69 and 76 (emphasis added)). It remains, however, the case — and we do not take our colleague as disagreeing — that an appellate reviewer's role is not discharged by giving trial

reasons for judgment a once-over-lightly perusal, but by *reading* and *considering* the trial judgment in order to assess whether, in light of the evidence and arguments at trial, it shows that the trial judge discerned and decided the live issues so as to permit meaningful appellate review (*Sheppard*, at para. 28; *R.E.M.*, at para. 57). Seen in that light, abstract warnings about “parsing” and “scrutinizing” are not, in our respectful view, particularly helpful as concrete guidance to appellate reviewers. Rather, the degree of scrutiny that appellate courts should bring to bear follows from the purposes of that scrutiny, which is to ensure that the trial judge’s reasons are (as noted above) sufficient to explain the verdict to the accused, to provide public accountability and to permit effective appellate review.

[110] A further problem is presented by our colleague’s statement that, despite this Court’s guidance in *Sheppard*, “we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error” where “safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge” (para. 76). Of course, safe convictions free from legal error should not be overturned. But, and with respect, this is an unhelpful observation, since it is not possible to conclude that convictions are “safe” or that trials were “fair” where the reasons are insufficient to permit appellate review. Our colleague’s critique assumes the conclusion. While a trial judge’s reasons need not be letter-perfect, we do not consider scrutiny of a trial judge’s reasons to be inconsistent with this Court’s guidance in *Sheppard*. To the contrary, appellate courts are tasked with reviewing a trial judge’s reasons on appeal, and an

appellant from a conviction has a statutorily granted right to have the trial verdict “properly scrutinized” (*Sheppard*, at para. 46 (emphasis in original)).

[111] Similarly, while we accept that trial judges are presumed to know the law with which they regularly work and that they are not required to “expound on features of criminal law that are not controversial in the case before them” (Karakatsanis J.’s reasons, at para. 74), this does not obviate the importance of the appellate reviewer properly and carefully discharging its role. As this Court has noted, the presumption cited by our colleague “is of limited relevance”, since “it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court” (*Sheppard*, at para. 55, point 9). Meaning, the presumption that trial judges know the law does not negate the appellate reviewer’s duty to insist upon trial reasons for judgment that, read together with the record, show that the law was correctly applied in a particular case (*Sheppard*, at para. 55, points 2 and 9; *R.E.M.*, at para. 47).

[112] That said, our central point of departure arises from our colleague’s statement:

Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. [para. 79]

Respectfully, this statement departs from settled precedent.

[113] Accused persons and their lawyers have to make informed decisions about whether to appeal and on what grounds (*R.E.M.*, at para. 11, point 3; *Sheppard*, at para. 24). They are, therefore, entitled to know not only *that* the trial judge was left with no reasonable doubt, but also *why* this was so (*Dinardo*, at para. 35, citing *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 21; *R.E.M.*, at para. 17). As McLachlin C.J. said in *R.E.M.*, at para. 37:

The question is whether, viewing the reasons in their entire context, the foundations for the trial judge’s conclusions — the “why” for the verdict — are discernable.

[114] Since the “why” for the verdict matters, it follows that, where a trial judge’s reasons remain obscure or uncertain when read in light of the record, the reasons are insufficient. For this reason, “where the appeal court considers itself unable to determine whether the decision is vitiated by error”, this Court’s answer in *Sheppard* was *not* to give the reasons a pass, but instead to hold them to be insufficient (para. 28). Significantly, in *Sheppard* this included circumstances where “there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error” (para. 46). Our colleague does not account for this.

[115] It is therefore inaccurate to say, as our colleague says, that reasons are sufficient even where ambiguities therein leave open the possibility that the judge “may or might have erred”. Insufficiency arises precisely where an appellate court finds itself unable to determine whether a judge’s reasoning is tainted by error. Nor do we accept

that the presumption that trial judges know the law can be used as a tool for holding reasons to be sufficient when the reasons are obscure or uncertain. Not only does this fail to fulfill the proper role of the appellate reviewer; it effectively leaves accused persons ignorant of the reasons for their conviction.

[116] In this case, the trial judge's reasons make clear that he convicted on the basis of incapacity alone. His reasons conclude as follows:

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged. [Emphasis added.]

(2016 ONSC 3465, at paras. 72-73 (CanLII))

He confirmed this sole basis for convicting the respondents on two further occasions: in his decision on the mistrial application and in his reasons for sentence. In the former, he reiterated that “[t]he court accepted the Crown’s evidence that [the complainant] was impaired due to excessive alcohol consumption and was unable to provide the requisite consents”. In sentencing the respondents, he repeated: “The Crown satisfied the court beyond a reasonable doubt that [the complainant] was impaired due to excessive alcohol consumption and was unable to provide the required consent” (2017 ONSC 5203, at para. 1 (CanLII)).

[117] The difficulty is that, while it is clear that the trial judge convicted on the basis of the complainant's incapacity to consent, his reasons do not disclose *what standard* he applied in deciding that the complainant *was* incapable of consenting. This was a critical omission, since the complainant's evidence was unclear as to capacity, and certainly did not lead unavoidably to a finding of incapacity. She did not testify, for example, that she was unable to understand the physical act, that the act was sexual in nature, the specific identity of the accused, or that she had the choice to refuse to participate in the sexual activity. Nor did she testify to unconsciousness during the sexual acts, such that a finding of incapacity necessarily followed. Rather, her testimony was that she was very intoxicated, and that her ability to resist the accused was correspondingly impaired.

[118] We do not dispute that a finding of incapacity was certainly available on this evidence. The problem is that this evidence could also support the conclusion that the complainant had the cognitive capacity to consent throughout the interaction, notwithstanding her intoxication, *and* that the trial judge's reasons are ambiguous as to the threshold he applied in determining that the complainant lacked capacity. Without any reference to the threshold for a finding of incapacity, or findings of fact that demonstrate an appreciation of that threshold, it remains possible — and, indeed, from his reasons it is difficult to conclude otherwise — that the trial judge simply accepted that the complainant was intoxicated and ended his analysis at that point, without considering the further question of whether that intoxication was such as to result in incapacity. While our colleague emphasizes (at paras. 86-89) that the trial judge

believed the complainant's evidence that she was intoxicated and did not consent, this is not dispositive. Not every instance of intoxication will result in incapacity. In order to convict the respondents, as he did, on the basis that the complainant was incapable of consenting, it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent.

[119] Our colleague says “[a]ll parties agreed at trial that the complainant’s evidence, if accepted, established incapacity” (para. 67). This is not accurate. The respondents did not concede that a finding of incapacity would inevitably flow from a finding that the complainant was credible. More fundamentally, the issue of incapacity cannot be resolved by an appellate reviewer simply having regard as our colleague does to the trial judge’s credibility finding. The absence of consent is an element of the *actus reus* of sexual assault (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 25). To say that the trial judge believed the complainant does not resolve the issue of whether the trial judge applied the proper yardstick in determining capacity to consent.

II. The Curative Proviso

[120] Notwithstanding the insufficiency of the trial judge’s reasons, we would uphold the convictions via the curative proviso. In light of the overwhelming evidence that the complainant did not consent, no other verdict was possible. The trial judge, having accepted that the complainant was credible, could not plausibly have believed her to be lying about her subjective state of mind at the material time. And in that regard, her evidence of non-consent (irrespective of incapacity) was categorical: the

sexual activity was not consensual, and she wanted it to stop. Indeed, she testified that she went so far as to communicate this to the respondents by saying stop and by trying to push them away.

[121] Conversely, the trial judge disbelieved G.F., whose evidence was that he repeatedly asked the complainant whether she consented to engaging in sex with him and R.B. and that she did consent. R.B. did not testify. This left no evidence available to raise a reasonable doubt about whether the complainant consented.

[122] The respondents resist application of the curative proviso, saying, first, that the complainant's evidence relating to her lack of capacity conflicted with her evidence that she did not consent, and, secondly, that the trial judge should have analyzed each issue separately in order to reconcile those (alleged) conflicts. Specifically, the respondents point to the following:

- a) On the one hand, the complainant said she was unable to say stop or scream for help. On the other hand, she testified that she did say stop multiple times and was able to scream if she wanted to, but did not do so out of fear.
- b) On the one hand, the complainant said she was physically incapable of pushing or pulling away because of her intoxication. On the other hand, she testified that she did push or pull away on several occasions during the sexual activity.

- c) On the one hand, the complainant said that G.F. was dragging her by the hips and manipulating her body into various positions for intercourse (effectively implying that her body was limp). On the other hand, she testified that she herself got onto her hands and knees and bent over R.B.'s body as G.F. penetrated her because she was going along with it and did not know what else to do.

[123] When the record is reviewed as a whole, none of this reveals inconsistencies in the complainant's evidence. She estimated that the sexual activity lasted between half an hour and an hour, during which time she "kept blacking out and going in and out of it". In the circumstances of someone experiencing varying degrees of awareness, there is nothing inconsistent about feeling unable to say stop or physically resist at some moments of the encounter, and being able to do these things at other moments.

III. Conclusion

[124] The trial judge's reasons are insufficient to allow appellate review of his finding that the complainant did not have the capacity to consent. In view of the overwhelming evidence that the complainant did not consent to the sexual activity in question, however, no verdict other than guilt was possible. We would allow the appeal and restore the convictions.

The following are the reasons delivered by

CÔTÉ J. —

[125] I agree with the position taken by my colleagues Justices Brown and Rowe on the law regarding appellate review for sufficiency of reasons. Moreover, my colleagues would find that the trial judge erred in convicting the respondents on the basis of the complainant's incapacity to consent without explaining both the standard by which he decided incapacity as well as its application to the complainant's evidence. I agree, and I outline below a further error with respect to the trial judge's conflation of consent and capacity.

[126] However, I must depart from my colleagues with respect to their view that "a finding of incapacity was certainly available on th[e] evidence" (Brown and Rowe JJ.'s reasons, at para. 118) and that the convictions can therefore be saved by the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. In my view, the trial judge's errors were not harmless or trivial, nor do I think that the evidence is so overwhelming that the trier of fact would inevitably convict. Given that credibility was the central issue at trial and that I do not find the Crown's case to be otherwise "staggering" (*R. v. L.K.W.* (1999), 126 O.A.C. 39, at para. 101), I do not believe that this is an appropriate case in which to apply the curative proviso. Therefore, I would dismiss the appeal and uphold the Court of Appeal's order for a new trial.

I. Sufficiency of Reasons

[127] In her reasons, my colleague Justice Karakatsanis acknowledges that “[o]bviously, equating *any* degree of intoxication with incapacity would be wrong in law” (para. 84 (emphasis in original)), but states that no such reading of the trial judge’s reasons is appropriate in the instant case. With respect, my colleague supplants the trial judge’s clear statements with an interpretation that is not supported by the record.

[128] The sole paragraph in the trial judge’s reasons that shows any reasoning whatsoever on this point is as follows: “Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated” (2016 ONSC 3465, at para. 72 (CanLII)).

[129] I agree with Brown and Rowe JJ. that “while it is clear that the trial judge convicted on the basis of the complainant’s incapacity to consent, his reasons do not disclose *what standard* he applied in deciding that the complainant was incapable of consenting. This was a critical omission, since the complainant’s evidence was unclear as to capacity, and certainly did not lead unavoidably to a finding of incapacity” (para. 117 (emphasis in original)). I am also in agreement that “[i]n order to convict the respondents, as he did, on the basis that the complainant was incapable of consenting, it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent” (para. 118).

[130] I would add the following. The record shows that the trial judge was led to the conclusion that incapacity is automatically established if the complainant was

intoxicated. The Crown explicitly stated in its closing submissions that any level of intoxication amounts to incapacity:

[THE CROWN]:

. . . So your Honour doesn't really have to, in the Crown's submission, delve into degrees of intoxication versus sobriety, at least, insofar as, as it applies to applying 273.1. Rather, in the Crown's submission, you're presented with a starker choice, of either accepting [the complainant's] evidence, which was that she was quite intoxicated – in the Crown's submission, if you accept her evidence, it's, it's pretty much a given that 273.1 will apply on the basis that she was incapable. On the other hand, the other stark choice you've been given is [G.F.] telling the court that she was as sober as when she appeared here in court. So by that assessment of things, if you do conclude that that's the case, then 273.1 would have no application whatsoever. So I just thought I'd mention that, Your Honour, in terms of framing the legal analysis in this case.

THE COURT:

So you're saying it's more an issue of credibility?

[THE CROWN]:

Very much so, as, as opposed to assessing degree of how drunk or not drunk she was.

(A.R., vol. VII, at p. 51)

The trial judge applied this flawed reasoning and found incapacity without assessing the complainant's level of intoxication.

[131] While trial judges are presumed to know the basic legal principles with which they engage on a regular basis (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664), there must be an intelligible foundation for their verdicts. In the instant case, it cannot be presumed that the trial judge both knew and applied the law based solely on one

conclusory statement. I strongly echo the Court of Appeal's concern that the trial judge's statement that s. 273.1(2)(b) "applies in instances where a complainant is intoxicated" suggests that his view was that any level of intoxication is sufficient to vitiate consent, and it is not clear that this belief did not constitute the basis for his statement that there was no consent. Therefore, the presumption of correct application is not relevant.

[132] With the greatest of respect, it is simply conjecture for the majority to say that the trial judge was referring to a degree of extreme intoxication when discussing whether the complainant was so intoxicated as to be incapable of consenting. The record indicates that the trial judge was erroneously told not to delve into degrees of intoxication, and he did not do so. The only reasonable conclusion from the trial judge's reasons is that so long as the complainant was intoxicated, as she claimed, then she was incapable of consenting. This is a clear error in law.

[133] The trial judge's credibility-centred analysis led him to equate consent and capacity; therefore, his decision rests on a legally incorrect presumption. The majority is of the view that when both factual consent and capacity are at issue, the trial judge is not necessarily required to address them separately or in any particular order. With respect, I disagree.

[134] In my view, the proper framework for analyzing consent to sexual activity was succinctly set out in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 4:

The Criminal Code sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant’s ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)). [Emphasis added.]

[135] While I acknowledge that this Court in *Hutchinson* did not specifically address consent vitiated by incapacity and was instead focused on resolving the challenges created by the intersection of misinformation on the part of the complainant (including as a result of fraud or mistake) and consent, in my view, it is not *Hutchinson*, but the *Criminal Code*, which establishes the requirement of a two-step analysis of consent to sexual activity.

[136] The first step in the statutory framework is to determine whether the complainant voluntarily agreed to the “sexual activity in question” (s. 273.1(1)). If the complainant voluntarily agreed to the sexual activity within the meaning of s. 273.1(1) (or a reasonable doubt is raised in this regard), the court should then turn to the second step and consider whether this agreement was obtained in circumstances vitiating consent (ss. 265(3) and 273.1(2)). As noted in *Hutchinson* (at para. 25), “[t]he scheme of the provisions — a basic definition of ‘consent’ in s. 273.1(1), coupled with circumstances vitiating such agreement in s. 265(3) and s. 273.1(2) — also supports a

narrow interpretation of ‘voluntary agreement . . . to . . . the sexual activity in question’”.

[137] Section 273.1(2)(b) of the *Criminal Code* plainly shows that incapacity is a circumstance that may vitiate a complainant’s apparent consent. Contrary to the majority’s view, s. 273.1(2) does not distinguish between para. (c) (“the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”), as a vitiating factor, and the other factors set out in that section, including incapacity, which the majority contends simply clarify what subjective consent requires. I echo the concern of the Criminal Lawyers’ Association of Ontario that the approach affirmed by the majority would shift all non-fraud concerns into an assessment of whether consent has been established, thereby undermining the balancing act described in *Hutchinson*. Rather than accepting the steps of the analysis as outlined in the *Criminal Code*, the majority adopts an understanding of the relationship between consent and capacity that renders the incapacity provision in s. 273.1(2)(b) redundant in many cases, which is “contrary to the principle that every word and provision in a statute has a meaning and a function” (*Hutchinson*, at para. 26).

[138] The trial judge’s blending of the issues is apparent in his reasons for judgment (at paras. 51-52 and 71-73):

The main issue in this case is one of credibility. The parties agree that Mr. G.F. and Ms. R.B. engaged in sexual relations with [the] 16 year old [complainant]. If I find, beyond a reasonable doubt, that [the complainant] was unable to provide her consent to this sexual activity because she was impaired by alcohol consumption, and that Mr. G.F. and Ms. R.B. knew or

should have known that she was unable to give her consent, then they are guilty of the charges against them. If I find that [the complainant]’s ability to give consent was not impaired by alcohol consumption and that she freely gave her consent, then the two accused persons are not guilty.

I have considered the evidence and the submissions of counsel, and after doing so I have concluded that [the complainant] did not consent to the sexual activity, and that Mr. G.F. and Ms. R.B. are guilty of the offence of Sexual Assault. . . .

. . .

Ms. R.B. did not testify. I find Mr. G.F.’s evidence to be unbelievable. It does not leave me with reasonable doubt as to his or Ms. R.B.’s guilt and in my view, the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex.

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged.

[139] In my view, in accordance with the *Criminal Code*’s provisions, the trial judge was first required to determine whether the evidence established that there was no consent and then, if the complainant did consent or her conduct raised a reasonable doubt in this regard, whether her apparent consent was vitiated by incapacity. The trial judge did not do so, which is an error of law. His statement that “the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex” is unclear as to whether the conviction could be sustained on the basis that the complainant did not consent, regardless of her capacity.

[140] While findings of incapacity or non-consent are not tainted by error simply because of the order in which they are made, the absence of analysis to substantiate the trial judge's conclusory statement does not provide the basis for meaningful appellate review.

II. Curative Proviso

[141] The conclusion that the trial judge committed an error is not immediately dispositive of the appeal. The curative proviso set out in s. 686(1)(b)(iii) permits an appellate court to dismiss an appeal from conviction where there is "no substantial wrong or miscarriage of justice" despite an error of law. As outlined in *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34, "The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error." In *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, this Court held that applying the curative proviso is appropriate in two circumstances: (i) where the error is so harmless or trivial that it could not have had any impact on the verdict; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict (paras. 29-31).

[142] Consideration as to the seriousness of any error and, related to the issue of trial fairness, an assessment as to the potential impact of that error are required. In my opinion, such an examination leads to the conclusion that this is not an appropriate case in which to apply the curative proviso.

[143] The trial judge's error cannot be said to be so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial that any reasonable judge could not possibly have rendered a different verdict if the error had not been made (*Van*, at para. 35). The complainant's incapacity was a live issue at trial, and acceptance of her evidence as credible is insufficient to ground a conviction. I agree with the Court of Appeal that "the trier of fact must consider all the evidence to make the factual determination of the complainant's capacity at the relevant time" (2019 ONCA 493, 146 O.R. (3d) 289, at para. 38 (emphasis added)).

[144] Had the trial judge considered all of the evidence of the complainant's capacity at the relevant time, I find that there is a reasonable possibility that he would have concluded that she was capable of consenting. This is particularly so given the toxicology evidence indicating that no alcohol was detected in the complainant's blood or urine approximately 24 hours after the sexual activity, thus increasing the likelihood that alcohol absorption did not occur. Read fully, the complainant's evidence cut both ways on incapacity. She was able to recall the events in question in considerable detail, including that she said "stop" several times; that she was able to physically push and pull the respondents; and that she understood G.F.'s direction to perform cunnilingus on R.B. but refused to do so.

[145] This case turned on credibility. As noted in *R. v. Perkins (T.)*, 2016 ONCA 588, 352 O.A.C. 149, at para. 32, "while there is no rule excluding the *proviso* in cases turning upon credibility, . . . the hurdle is a difficult one and caution should be

exercised prior to its application” (see also *R. v. Raghunauth (G.)* (2005), 203 O.A.C. 54, at para. 9; *L.K.W.*, at para. 97). Where credibility is the central issue at trial, the curative proviso has been applied where the Crown’s case is otherwise “staggering” (see *L.K.W.*, at para. 101).

[146] Applying these principles here, I do not believe that this is an appropriate case in which to apply the curative proviso. The trial judge’s errors were not harmless or trivial, nor do I think that the evidence is so overwhelming that the trier of fact would inevitably convict. It is not possible to precisely gauge the impact of the error of law committed by the trial judge. His reasons are unclear as to whether he considered the issue of consent separately from the issue of capacity, and whether his incorrect view that any level of intoxication was sufficient to vitiate consent constituted the basis for his statement that there was no consent. In my view, the convictions cannot be upheld based on the simple statement, prior to his analysis of the case, that “[the complainant] did not consent to the sexual activity” and on a general conclusion that “the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex”. Not only did the trial Crown not invite the trial judge to convict on this basis, but these two statements do not make it clear that the trial judge convicted the respondents on the basis of non-consent irrespective of incapacity.

[147] Given that the Crown’s case against the respondents depended largely on the credibility of the complainant’s evidence, I cannot say that the Crown’s case is otherwise “staggering”. This difficult hurdle has not been cleared.

III. Conclusion

[148] Accordingly, I would dismiss the appeal and uphold the Court of Appeal’s order for a new trial.

Appeal allowed, CÔTÉ J. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondents: Lockyer Campbell Posner, Toronto.

Solicitors for the intervener: Bottos Law Group, Edmonton.

Tab 14:

R. v. Goddard, 2019 BCCA 164

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Goddard*,
2019 BCCA 164

Date: 20190510
Docket: CA45684

Between:

Regina

Respondent

And

Jeffrey Alan Goddard

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Fitch

On appeal from: An order of the Provincial Court of British Columbia, dated
October 1, 2018 (*R. v. Goddard*, 2018 BCPC 335, Surrey Docket 208040-4B).

Counsel for the Appellant: G.J. Barriere
B.R. Anderson

Counsel for the Respondent: C.E. Tomusiak

Place and Date of Hearing: Vancouver, British Columbia
April 15, 2019

Place and Date of Judgment: Vancouver, British Columbia
May 10, 2019

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury

Summary:

The appellant pleaded guilty to breaching a condition of his probation order and was sentenced to one day of imprisonment in addition to time served and three years' probation. He appeals from six conditions of his probation order, alleging that they are unreasonable, overbroad, vague, or unconstitutional. Held: leave to appeal granted; appeal allowed in part. Two conditions are struck. These conditions authorized broad searches of the appellant's home and electronic devices with his consent. If the appellant withheld consent, he was required to report daily to his probation officer. Conditions of this kind should be avoided because they may be seen as coercing the giving of consent and call into question the validity of any waiver of the constitutional right to be free from unreasonable searches. Three other conditions are varied, two by consent, to address concerns about overbreadth and vagueness. A condition requiring electronic supervision is upheld.

Reasons for Judgment of the Honourable Mr. Justice Fitch:**Overview**

[1] The appellant pleaded guilty to breaching a condition of his probation that prohibited him from possessing a cell phone capable of accessing the internet contrary to s. 733.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [Code]. He was sentenced to one day of imprisonment, in addition to eleven months' credit for pre-sentence custody, to be followed by a three-year probation order. He applies for leave to appeal and, if leave is granted, appeals a number of conditions of the probation order, arguing they are unreasonable, overbroad, vague, or unconstitutional.

Background

[2] The appellant, who is 29 years old, has a criminal record dating back to 2010. His substantive offences include sexual offending against vulnerable individuals, including minors. He also has a history of breaching conditions of his probation.

[3] On June 2, 2011, the appellant was sentenced for three substantive offences committed in 2010: personating a police officer, communicating via a computer to lure a child under the age of 16, and invitation to sexual touching. In the first two offences, the appellant used social media to communicate with boys and girls aged 12 to 16 while pretending to be a police officer. He asked to meet with some of those children. The third offence involved a 14-year-old ward of the state. The appellant

invited the child to have a shower with him, stood in front of him naked and asked him for sex. For these offences, the appellant was sentenced to a term of imprisonment and three years' probation.

[4] At the same time, the appellant was sentenced for two breaches of his bail conditions. One of those breaches involved using social media to communicate with children under the false pretense of being a woman whose cousin, a news reporter, wanted to do a commercial with them. He met with some of those children, posing as the news reporter. The other breach was related to his possession or use of an electronic device capable of accessing the internet.

[5] On July 13, 2012, the appellant breached his probation order by posing as a landscaper and using social media to hire three teenage boys to work for him. He was sentenced to 12 days' jail in addition to time served.

[6] The appellant breached his probation order again on June 11, 2013, and October 29, 2013, by failing to report and failing to seek employment. On October 23, 2014, he was sentenced to a further three years of probation for those breaches.

[7] On August 13, 2015, the appellant was sentenced to a further three years of probation for sexually assaulting his cellmate at the Surrey Pretrial Services Centre in October 2014. The victim was 18 years old and particularly vulnerable due to a medical condition. The appellant forced the victim to masturbate him in the cell, telling the victim that if he did not comply, he would "smash his face into the wall and call friends outside of jail to beat him up if he told anyone about it."

[8] On January 12, 2017, the appellant was sentenced to one day in jail in addition to what was described as a "considerable period of time" served for breaching his probation. A neighbor reported that the appellant, who was prohibited from possessing a computer, had an iPhone, a computer, and an internet router in his residence. The police discovered that, contrary to another condition of his probation order, he also had an active internet account.

[9] On July 30, 2017, the date of the offence that is the subject of this appeal, the appellant was subject to two probation orders. He left his residence and contacted the police to inform them that he planned on staying at a homeless shelter. He said he was leaving the residence because death threats had been made against him. The police found the appellant and tried to help him find housing for the night so he would not be in breach of his curfew. The appellant called his mother on his cell phone and asked to stay with her. She refused. He handed his phone to a police officer, asking the officer to speak with his mother. The officer saw that the phone was displaying a 3G data connection, which suggested that it was capable of accessing the internet. The appellant was arrested. A further search revealed that the contract for the appellant's cell phone, which he had purchased less than two weeks previously, included internet access. The search indicated that the appellant had made contact over social media with three males representing themselves to be under 18. The appellant pleaded guilty to one count of breaching his probation order by possessing a cell phone capable of accessing the internet.

Positions at Sentencing

[10] At the sentencing hearing, the Crown and defence agreed that the appellant should be sentenced to one day of jail in addition to his eleven months of pre-sentence custody, and three years' probation. They disagreed on some of the conditions of the probation order.

[11] The Crown's position was that the appellant posed a significant risk of committing serious offences against vulnerable young persons and had a history of failing to comply with court orders. Strict terms were therefore necessary to protect the public against the commission of further offences.

[12] The position of the defence was that some of the conditions sought by the Crown were overbroad, unconnected to the offence for which the appellant was being sentenced, vague, or unconstitutional.

[13] The sentencing judge had before him a psychiatric assessment dated February 14, 2011, a pre-sentence report dated February 17, 2011, and an update to the 2011 pre-sentence report dated January 21, 2013. Unfortunately, no updated pre-sentence report was before the court in relation to this matter.

[14] The author of the 2011 pre-sentence report noted that the appellant appeared to accept little, if any, responsibility for the offences. The probation officer recommended that conditions be imposed to restrict the appellant's access to the internet and to minors. The author of the 2011 psychiatric assessment opined that the appellant was a moderate to high risk to reoffend. She identified circumstances in which the appellant would be at an elevated risk to commit a sexual offence in the future, including if he fostered relationships with teenage boys or possessed a computer or device with access to the internet.

[15] The author of the 2013 update reported that the appellant was struggling with his sexual identity and desired further counselling and treatment. The appellant admitted that he struggled with telling the truth and abiding by court orders:

[Jeffrey] admits he struggles with being truthful and often develops elaborate explanations for his behaviours which are often deceiving. His risk factors include inappropriate sexual behaviours, and he states he realizes he needs further counselling and programming, especially sex offender treatment in order to explore his sexuality. ...

[Jeffrey] struggles to abide by the Conditions of Community Supervision Orders, violating them on several occasions. His lack of honesty and integrity make it a challenge for any meaningful intervention and he acknowledges in order for him to avoid being further involvement [*sic*] in the criminal justice system, he needs to make significant changes in his behaviours.

[16] With respect to the appellant's behavior around technology, the author reported:

[Jeffrey] admits he is not able to manage himself and set boundaries around technical equipment and cannot trust himself around it. He proposed that he not be given permission to have a cell phone stating that he can access the internet without anyone finding out. [Jeffrey] reports it is too much of a risk factor for him to own one and suggests he be limited to a landline. Jeffrey also states he has more knowledge and expertise with computers and technical equipment, more than the regular individual and can easily manipulate devices in order to allow him to access the internet and commence interactions with others.

...

[Jeffrey] has an overly boastful view of his current offences stating that Corrections and Police were unable to meet his level of technical expertise. He stated criminal justice agencies were unable to stop him from having access to the internet, mostly because he is so capable of technical manipulation. He recalled a home visit conducted by Corrections and laughed when citing the story, noting he had access to an internet cable through the floor but was not caught with it, making him feel in his deception, he was more clever than others.

[17] The sentencing judge found that all 23 probation conditions sought by the Crown were necessary either to facilitate the appellant's rehabilitation or to protect the public from the risk posed by the appellant. Condition 16, which has not been appealed, prohibits the appellant from possessing, using or accessing any computers, cellular telephones, communication devices, data storage devices, game consoles, or any device capable of accessing the internet, except with the written permission of his probation officer.

Issues

[18] The appellant submits that the sentencing judge erred in law by imposing conditions of probation that are unauthorized by the governing legislation and that infringe his *Charter* rights. In addition, he submits that the judge erred in principle by imposing conditions that are vague and overbroad or otherwise unreasonable because there is an insufficient nexus between those conditions and the protection of the public or the appellant's rehabilitation. He takes issue with six of the 23 conditions.

Analysis

Standard of Review

[19] Sentencing judges have considerable latitude in crafting appropriate conditions of probation: *R. v. Shoker*, 2006 SCC 44 at para. 14; *R. v. Knott*, 2012 SCC 42 at para. 1. An appellate court will intervene in this exercise of discretion only where the judge erred in principle or imposed a condition that is clearly unreasonable, or if the order is manifestly inappropriate or renders the sentence unfit: *R. v. Bourque*, 2013 BCCA 447 at para. 25; *Knott* at para. 61.

Legal Principles

[20] Section 732.1(3)(h) of the *Code*, the so-called residual clause, provides that in addition to the enumerated conditions, a sentencing court may impose other reasonable probation conditions that are considered to be desirable for protecting society and for facilitating the offender's successful reintegration into the community. All of the conditions at issue on appeal were imposed pursuant to s. 732.1(3)(h).

[21] A probation order permits the offender to live in the community subject to certain restraints on his freedom, which are imposed for the purpose of rehabilitating him and protecting society: *Shoker* at para. 10. The primary purpose of a probation order was reiterated recently in *R. v. Duguay*, 2019 BCCA 53:

[60] As explained in *R. v. Proulx*, 2000 SCC 5 at para. 32, probation has traditionally been viewed as a rehabilitative sentencing tool. A probation order may have punitive effects or aspects. But punishment is not the dominant purpose of such an order nor is it an inherent aspect of that order.

[61] While the primary purpose of a probation order is rehabilitative rather than punitive, its conditions will inevitably entail some restriction of liberty. As Bennett J.A. noted in *R. v. Voong*, 2015 BCCA 285 at para. 37, probation orders are designed not only to reintegrate offenders into the community but to protect society. The conditions imposed in pursuit of that goal will frequently be experienced by the offender as entailing "negative consequences". What is prohibited is the imposition of a term of probation for a primarily punitive purpose: *Shoker* at paras. 10, 13.

[22] In *Duguay*, this Court addressed the interpretive principles relevant to the scope of s. 732.1(3)(h):

[65] First, while "reasonable conditions" will generally be linked to the particular offence, this is not an absolute requirement. What is required is a nexus between the offender, the protection of the community and the offender's reintegration into the community: [*Shoker*] at para. 13.

[66] Second, the broad power to craft conditions of probation under the residual clause is an important tool in a sentencing judge's arsenal. The Court recognized in *Shoker* that it would be impossible for Parliament to contemplate and spell out every possible condition that might serve to advance identified rehabilitative and public protection goals: at para. 14. In *R. v. Knott*, 2012 SCC 42, the Court confirmed that sentencing judges must retain as much flexibility as the *Code* permits in crafting individualized sentences that reflect the principles of sentencing, including reliance on community-based sanctions as an alternative to incarceration in appropriate cases: at paras. 1-2, 10, 43; ss. 718.2 (d)-(e) of the *Code*. There are, in fact, only a few judicially-recognized limits on the kinds of conditions that can be imposed under the residual clause. These limits include the rule against

delegation of a judicial function. They also include the need for probation conditions to be clear, unambiguous and enforceable. In addition, in accordance with the language of the residual clause, the conditions must be “reasonable” in the circumstances and “desirable” to achieve the purposes of a probation order. Finally, they must be compliant with other provincial and federal legislation, including the *Charter*: *Shoker* at para. 14; *R. v. Traverse*, 2006 MBCA 7, at para. 24.

[67] Third, just as the wording of the residual clause can inform the sentencing judge’s exercise of discretion in imposing one of the enumerated optional conditions, those enumerated conditions can, in turn, assist in interpreting the scope of the “other reasonable conditions” that can be imposed under the residual clause: *Shoker*, per Charron J., for the majority, at paras. 14, 22; per LeBel J., concurring in the result, at para. 30.

[23] Probation conditions may serve one or both of the stated purposes of rehabilitation and public protection: *R. v. Timmins*, 2006 BCCA 354 at para. 9. In addition, the conditions must be clear, unambiguous, enforceable, and compliant with federal and provincial laws and the *Charter*.

[24] With these principles in mind, I turn to the impugned conditions.

Discussion

Condition 10

[25] Condition 10 states:

Condition 10: You must not go to any public park, public swimming area, or community centre where persons under the age of 18 years are present or can reasonably be expected to be present, or a daycare centre, school ground or playground. This condition is to be monitored by electronic supervision.

[26] The appellant submits that Condition 10 should be amended to permit him to attend these locations while accompanied by an adult approved of in advance by his probation officer. The Crown consented to this exception at the sentencing hearing and agrees that it should be modified as the appellant suggests. I would amend Condition 10 accordingly but require the appellant to obtain the required approval in writing.

Condition 12

[27] Condition 12 states:

Condition 12: You will not be found wearing or in possession of any clothing, hats, or any insignia, patch or emblem that represents you falsely as an employee or representative of that business or company. If you are employed by a business or a company you are to provide proof of such employment to your probation officer.

[28] The appellant says that Condition 12 is unreasonable. He says that the condition has no connection to the offence for which he was sentenced. He submits that the only offence on his record that has a bearing on this condition – the breach of his probation by pretending to be a landscaper – was committed more than six years before sentencing. Moreover, he says that there was no evidence that he had ever worn any kind of clothing or hat to facilitate a false representation that he was an employee or representative of a company.

[29] The appellant also says that the condition is overbroad. He argues that he could be in breach of the condition – and therefore be guilty of a criminal offence – simply by wearing a sports jersey. In addition, the appellant says the condition is vague in that it is not clear what behaviour would constitute falsely representing himself as an employee of a company. He suggests, for example, that by wearing a Nike hat, he could be taken as falsely representing himself to be an employee of Nike.

[30] The Crown submits that Condition 12 is neither overbroad nor vague and is appropriate given that the appellant has misrepresented his employment to gain access to young persons in the past. The Crown says that wearing a sports jersey would not give rise to a reasonable inference that the appellant was representing himself as an employee or representative of a sports team. The Crown submits that the phrase “represents you falsely as an employee or representative of that business or company” is not vague, but provides a meaningful standard for assessing the appellant’s conduct.

[31] I do not agree with the appellant's position that Condition 12 is inappropriate because it is not directly related to the offence for which he was being sentenced. As noted in *Shoker*, reasonable conditions will generally be linked to the particular offence but need not be: at para. 13. I am satisfied that the required nexus between the condition and the protection of the community is present here. The appellant has held himself out as being a law enforcement officer or employed by a business in order to gain access to minors not once, but three times – by posing as a police officer, a news reporter, and a landscaper.

[32] However, the condition is arguably overbroad and vague in its current form. Obviously, it is not the purpose of the order to subject the appellant to criminal liability for wearing a T-shirt or cap bearing the logo of a business. In my view, the condition should be refined to more narrowly target the type of manipulative behavior that motivated its imposition. I would amend the condition as follows:

Condition 12: You will not deliberately hold yourself out as being an employee or representative of any business or company that does not in fact employ you or that you do not in fact represent, or as being self-employed in a business in which you are not legitimately self-employed, whether by your words, clothing, other visual symbol, or in any other manner. If you are employed by or a representative of any business or company, or if you are self-employed, you are to provide proof of that employment to your probation officer.

Conditions 17 and 18

[33] Condition 17 provides:

Condition 17: You shall, upon your consent, allow any peace officer and/or probation officer to examine any device in your possession and permit any peace officer to bring any device in your possession to the police department to verify compliance with this order. You shall provide any peace officer and/or probation officer any passwords, access codes and manuals associated to any device in your possession to enable examination of the device. If you do not consent, you shall forthwith report to your probation officer and thereafter report daily to him or her until the probation officer decides that daily reporting is not necessary.

[Emphasis added.]

[34] Condition 18 provides:

Condition 18: You shall, upon your consent, allow any peace officer and/or probation officer to access your residence to confirm your compliance with the conditions of this order. If you do not consent to allow a peace officer and/or probation officer access to your residence to confirm compliance with conditions of this order, you shall forthwith report to your probation officer and thereafter report daily to him or her until the probation officer determines that daily reporting is no longer necessary.

[Emphasis added.]

[35] Condition 17 authorizes much more than a cursory search of a device found in the appellant's possession for the limited purpose of determining whether it is capable of accessing the internet. With the appellant's consent, Condition 17 authorizes the seizure of the device and forensic examination of the data it stores to ensure compliance with the terms of the order. With the appellant's consent, Condition 18 similarly permits a search of his home, a place in which he obviously has a significant privacy interest.

[36] The appellant, who opposed Conditions 17 and 18 and has not consented to the searches contemplated by those conditions, submits that they: (1) are enforcement conditions not authorized under the residual clause; and (2) infringe the *Charter* by coercing him to consent to privacy-invasive searches of his electronic devices and his home that would otherwise be unreasonable and violate his s. 8 rights. On this latter point, the appellant submits that any such consent would not be valid as it would be obtained by the threat of daily reporting to his probation officer. The appellant argues that daily reporting would be particularly onerous for him, noting that at the time of the offence he was homeless and reliant on public transportation.

[37] The Crown says that Conditions 17 and 18 do not authorize unconstitutional searches because no search can occur without the appellant's consent. The conditions do not compel the appellant to consent to what would otherwise be unconstitutional searches. The Crown submits that the default requirement of daily reporting is an alternative means of protecting the public if the appellant chooses not to consent. The Crown says daily reporting is not unduly harsh or coercive because

it is only mandatory so long as the probation officer considers it appropriate. The Crown points out that judges frequently delegate to probation officers the authority to require offenders to report to them as often as they deem necessary.

[38] The appellant and the Crown devoted much of their argument on this issue to the significance of the Supreme Court of Canada's decision in *Shoker*. While *Shoker* is instructive, I do not see it as being dispositive of the issue that arises in this case.

[39] In *Shoker*, the issue was whether s. 732.1(3)(c) or (h) authorized a condition of probation that required the offender to provide, on demand by a probation officer, samples of breath, urine, or blood for analysis to determine his compliance with an abstention condition. The majority of the Court found that there was no authority in the *Code* for the imposition of such a condition. Justice Charron remarked in *obiter* that a probation order could not "compel" an offender to submit to searches of his home:

[22] ... Section 732.1(3)(h) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(h). It would be up to Parliament, if it saw fit, to enact any such scheme.

[Emphasis added.]

[40] Justice Charron concluded that "it is up to Parliament, not the courts, to balance the probationers' *Charter* rights as against society's interest in effectively monitoring their conduct": at paras. 23-26. Justice LeBel, concurring in the result, concluded that the authority to impose monitoring conditions exists, but that the condition in issue would breach s. 8 in the absence of a statutory framework consistent with *Charter* standards: at paras. 40, 42-43.

[41] What distinguishes *Shoker* from this case is that Conditions 17 and 18 do not require the appellant to submit to searches of his electronic devices or his home. He can refuse to provide consent to these searches. Significantly, however, his refusal comes at the price of daily reporting to his probation officer for as long as the probation officer deems necessary.

[42] The sentencing judge justified the imposition of these two conditions on two bases.

[43] First, the judge sought to distinguish *Shoker* on the ground that it only applies to searches of bodily samples. While it is true that the issue before the Court in *Shoker* concerned the propriety of a probation condition authorizing the compelled seizure of bodily samples as an enforcement mechanism, I cannot endorse the sentencing judge's narrow reading of that case. The paragraph quoted above makes clear that the principles underlying the majority's decision were intended to be applicable to searches of an offender's residence. In my view, those principles must also apply to the sort of intrusive searches of electronic devices that Condition 17 contemplates. The judge relied on *R. v. Unruh*, 2012 SKCA 72, in support of his narrow reading of *Shoker*. If *Unruh* stands for the proposition that the reasoning in *Shoker* applies only to the compelled seizure of bodily samples as an enforcement mechanism, I respectfully disagree. In any event, *Unruh* is distinguishable from this case because the offender "wholeheartedly consented" to searches of his residence and person during the currency of the probation order. Further, I do not understand the Crown to argue that Conditions 17 and 18 could authorize searches of the appellant's home or devices in the absence of his consent. Rather, the Crown argues that the conditions authorizing searches are constitutionally compliant because they only come into effect upon the consent of the appellant.

[44] Second, the judge concluded that Conditions 17 and 18 were justified on the authority of this Court's decision in *Bourque*. I note that conditions somewhat similar to Conditions 17 and 18 were imposed by the sentencing judge in *Bourque*. One of the conditions provided:

Condition 16: You are not to possess any computer or device or telecommunication device capable of accessing the internet. You will allow your Probation Officer or a Police Officer acting on behalf of your probation officer access to your residence to ensure compliance with this term.

Importantly, the propriety of that condition was not in issue on appeal. As a consequence, this Court's judgment does not speak to the issue that arises in this case. With respect, the sentencing judge erred in suggesting during an interchange with the appellant's counsel on the sentencing hearing and in his reasons for sentence that this condition was "upheld" on appeal in *Bourque*.

[45] Two other conditions of probation imposed by the sentencing judge in *Bourque* provided:

Condition 38: You are prohibited from owning, having custody or control of, or residing in any premises where animals or birds are present.

Condition 39: Having consented, a probation officer or peace officer acting on behalf of a probation officer may attend any place where you are residing to ensure compliance with this condition.

[46] Condition 39 was appealed, apparently on the sole basis that the words "this condition" were unclear. It was amended to clarify that it related to Condition 38. This Court noted that the appellant had apparently consented to the condition and no issue appears to have been raised with respect to the validity of her consent: at para 45. Importantly, no consequence was imposed for refusing to consent. In my view, this Court's judgment in *Bourque* cannot be read as authorizing the imposition of Conditions 17 and 18 and provides little guidance for the resolution of this appeal.

[47] The appellant's argument that the sentencing judge did not have jurisdiction under the residual clause to impose Conditions 17 and 18 was raised for the first time in oral argument. The point was not well developed and counsel for the Crown had no meaningful opportunity to respond. It is, in any event, unnecessary to address the point in this case as I have come to the conclusion that the language used in Conditions 17 and 18 raises serious constitutional concerns and should be avoided.

[48] To put this issue in context, I begin by noting that the threat of daily reporting was not imposed as an alternative means of ensuring compliance with conditions designed to prevent the appellant from using the internet to prey upon children. It appears to me to be wholly unrelated to the community safety concerns that motivated Conditions 17 and 18. There is no evidence before us that it would do anything to ameliorate the risk that the appellant will use the internet for nefarious purposes. Rather, it is, in its effect, a retaliatory and punitive measure that appears to be designed to pressure the appellant to waive his constitutional rights.

[49] The central difficulty with the way in which Conditions 17 and 18 are drawn stems from the fact that the appellant is subject to an additional and onerous condition should he refuse to consent to searches being conducted of his electronic devices and home. The validity of any ostensible consent conferred in these circumstances would be open to challenge. I say this for the following reasons. By consenting to a search of his residence or his electronic devices in the absence of any grounds to believe that he was committing or had committed an offence, the appellant would effectively be waiving his constitutional right to be free from unreasonable search and seizure. For a waiver of constitutional rights to be valid it must, among other things, be voluntary, meaning that the individual can choose one course of conduct over another, free from coercion: *Goldman v. The Queen*, [1980] 1 S.C.R. 976 at 1005; *R. v. Reeves*, 2018 SCC 56 at paras. 13, 49-52. From a constitutional perspective, the problem with the conditions is that a refusal by the appellant to consent to the searches entails a significant consequence: the threat of daily reporting.

[50] I find particularly instructive on this point the reasons for judgment of Justice Doherty in *R. v. Wills* (1992), 12 C.R. (4th) 58 (Ont. C.A.), cited with approval in *R. v. Borden*, [1994] 3 S.C.R. 145, and *Reeves*. At issue in *Wills* was whether the appellant's consent to provide a breath sample to a police officer investigating a fatal accident was valid in law. In addressing that point Doherty J.A. made these observations:

46. The danger to constitutionally protected individual rights implicit in the equating of consent with acquiescence or compliance is self-evident and does not require detailed elaboration. When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise consent becomes a euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests: see Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (1983), at pp. 158-163.

47. While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that valid consents reinforce the principle of individual autonomy which underlies the rights set out in the *Charter*: see *R. v. Turpin*, [1989] 1 S.C.R. 1296 [at 1316] Individuals are free to define their own privacy interests and to yield those interests when so inclined. In recognizing that a valid consent must be an answer to any subsequent claim of a s. 8 violation, our law recognizes that autonomy ... [citations omitted].

48. When one consents to the police taking something that they otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s. 8 of the *Charter*. The force of the consent given must be commensurate with the significant effect which it produces.

49. The Supreme Court of Canada has applied a stringent waiver test where the Crown contends that an accused has yielded a constitutional right in the course of a police investigation. According to that doctrine the onus is on the Crown to demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequence of waiving that right ... [citations omitted].

...

51. The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another. ...

...

69. In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary in the sense that that word is used in *Goldman* [[1980] 1 S.C.R. 976 at p. 1005] and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- (vi) the giver of the consent was aware of the potential consequences of giving the consent.

[Emphasis added.]

[51] Given the manner in which Conditions 17 and 18 are drawn, any consent given by the appellant pursuant to those conditions would be susceptible to an argument that because such consent was obtained through coercion (in the form of the threat of daily reporting), the alleged waiver of constitutional rights was involuntary and, thus, invalid. In my view, sentencing courts should avoid imposing terms that are likely to give rise to a violation of constitutional rights.

[52] As Doherty J.A. noted in *Wills* at para. 48, the “force” (or legitimacy) of the waiver must also be commensurate with the effect it produces. Here, the consequences of the appellant’s waiver are serious. By conferring his consent, the appellant would be authorizing his probation officer and any police officer to search his personal electronic devices and home at a time of their choosing. The appellant would effectively surrender to the state his most fundamental privacy interests for a period of three years. Further, the discovery of evidence that he is in breach of his probation order could expose him to criminal liability and a maximum penalty of four years in prison pursuant to s. 733.1(1)(a).

[53] For the foregoing reasons, I would strike out Conditions 17 and 18 in their entirety. While the conditions would likely be unobjectionable without the daily reporting proviso, no purpose would be served by striking out this part of each condition and leaving the rest. The conditions would then provide that the appellant may consent to a search, which is simply a statement of the law (see *Reeves* at para. 13) and not a condition that should form part of a probation order.

[54] I recognize that cases like this raise particular challenges for probation officers and law enforcement officials attempting to supervise and enforce compliance with court orders designed to protect the public from high-risk offenders. I also recognize that probationers have a reduced expectation of privacy: *Shoker* at para. 25. Where, as here, public safety concerns are pronounced, a more limited

search condition intended to monitor compliance with a term prohibiting the possession of internet-capable devices might be found to pass constitutional muster. Such a condition might, for example, be drafted to require a probationer to show a device in his possession to a police officer or probation officer for the limited purpose of permitting that officer to conduct a cursory search to determine whether the device is capable of accessing the internet. I wish to be clear that I am not deciding that issue in this case. In my view, it would be inappropriate to do so in circumstances where the issue has not been raised by the parties and the Court does not have the benefit of either an evidentiary record or full submissions on the point, including on whether such a condition would, absent a legislative amendment, run afoul of *Shoker*.

[55] In addition, I wish to be clear that my reasons extend only to the language used in Conditions 17 and 18. Probation conditions of this kind are formulated in many different ways in response to a variety of different contexts. The differences are sometimes nuanced but may well have both constitutional and jurisdictional implications. In my view, the propriety of other formulations of similarly-motivated conditions should be left to be determined on a case-by-case basis.

Condition 21

[56] Condition 21 provides:

Condition 21: This order will be electronically supervised. You must comply with the electronic supervision regulations, including the wearing of and care for the electronic supervision equipment.

[57] The appellant argues that Condition 21 unreasonably infringes on his privacy and should be deleted. He says that there is an insufficient nexus between this term and his circumstances as there was no evidence before the court that he had ever attended a place such as a park or swimming pool in order to facilitate the commission of an offence, and the last substantive offence that involved sexual offending against a minor occurred on August 26, 2010, eight years before the sentencing for this offence. At the time of the offence underlying this appeal, the appellant emphasizes that he was forthcoming with the police and alerted them to

his whereabouts. As such, he says the condition is unreasonable and renders his sentence unfit.

[58] The Crown submits that electronic supervision is reasonable. It says that the order is directly related to the concern at the heart of the order: managing the risk that the appellant poses to young boys. It also says that the condition is relevant to the offence in this case, which involved not only accessing the internet but engaging in some measure of contact with teenage boys via social media.

[59] I see no error in the sentencing judge's decision to impose this condition. The appellant has demonstrated an entrenched pattern of manipulative behaviour and has gone to extraordinary lengths to lure children in the past. The required nexus between the offender and the protection of the community is present: *Shoker* at para. 13. I would not disturb this condition.

Condition 23

[60] Condition 23 provides:

Condition 23: You must not engage in activities, volunteer work or employment that could bring you in contact with persons under the age of 18 years without the written permission of you probation officer and when so engaged, you must carry that permission on your person.

[61] The appellant submits that Condition 23 is overbroad, unreasonable, and detrimental to his rehabilitation and re-integration into society. He submits that engaging in almost any employment or activity could potentially bring him into contact with minors, other than working in an establishment such as a bar or liquor store. He says that Condition 9, which prohibits him from having contact or communication with anyone under the age of 18, is sufficient to protect the public.

[62] The Crown submits that this condition is reasonable given the appellant's fixation on young boys and the judge's finding that the appellant poses a risk to others. I agree. Some restriction on the appellant's ability to engage with minors through his employment, volunteer work, or other activities is appropriate given his history and demonstrated ability to manipulate and deceive vulnerable young people with whom he comes into contact. However, the Crown is not opposed in this case

to a variation of the term to ensure that it is not vague, overbroad, or unduly restrictive.

[63] I note that the language of Condition 23 is recommended in a “Probation Picklist” developed for use by judges in British Columbia. While I do not wish to be taken as ruling on the propriety of the condition as framed by the judge below, given the position the Crown has taken on this appeal, I would amend the condition to read as follows:

Condition 23: You must not seek, obtain or continue any employment, whether or not the employment is remunerated, or become or be a volunteer in any capacity that involves being in a position of trust or authority towards a person under the age of 18 years.

Conclusion

[64] I would grant leave to appeal and allow the appeal to the extent of striking out Conditions 17 and 18 and making the amendments I have described to Conditions 10, 12, and 23.

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Chief Justice Bauman”

I AGREE:

“The Honourable Madam Justice Newbury”

Tab 15:

R. v. Greif, 2021 BCCA 187

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Greif*,
2021 BCCA 187

Date: 20210510
Docket: CA45991

Between:

Regina

Respondent

And

Kevin Jeremy Greif

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Pursuant to s. 16(4) of the *Sex Offender Information Registration Act* [SOIRA], no person shall disclose any information that is collected pursuant to an order under the SOIRA or the fact that information relating to a person is collected under the SOIRA.

Before: The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Dickson
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated March 5, 2019 (conviction) (*R. v. Greif*, 2019 BCSC 288, Campbell River Docket 41240).

Counsel for the Appellant
(via videoconference):

S.R. Wright

Counsel for the Respondent
(via videoconference):

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia
April 16, 2021

Place and Date of Judgment:

Vancouver, British Columbia
May 10, 2021

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Voith

Summary:

The appellant challenges his conviction for sexual assault on the grounds the trial judge erred by: (1) reversing the burden of proof; (2) misapprehending photographic evidence that conflicted with the complainant's testimony; (3) placing weight on the complainant's post-event behaviour in assessing her credibility; and (4) applying uneven scrutiny to the evidence of the Crown and the defence. Held: Appeal dismissed. The judge's reasons for finding the complainant credible and the appellant not credible did not demonstrate a reversal of the burden of proof. The judge did not require the appellant to point to a reason why the complainant was allegedly lying. Rather, his reasons explain why the appellant's evidence and theory of the case did not raise a reasonable doubt. Nor did the judge misapprehend the evidence when he rejected the submission that the complainant's testimony was contradicted by a photograph of the appellant's back that did not depict scratches the complainant testified were visible after she scratched the appellant during the assault. The judge recognized the importance of the scratches to the defence theory and addressed the inconsistency. As to the complainant's post-event behaviour, the judge's treatment of this evidence aligns with settled law on the relevance of post-event conduct and demeanor. His credibility assessment was not tainted by improper speculation or stereotypical reasoning. Finally, the appellant failed to show the judge subjected the defence evidence to more rigorous scrutiny than the Crown's evidence or gave insufficient reasons.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:**Introduction**

[1] Kevin Jeremy Greif appeals his conviction for sexual assault, contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46, after trial by judge alone in the Supreme Court of British Columbia where the primary issue was credibility. The appellant denied the non-consensual sexual activity alleged by the complainant.

[2] On appeal, the appellant argues the trial judge erred by: (1) reversing the burden of proof; (2) misapprehending photographic evidence that conflicted with the complainant's testimony; (3) placing weight on the complainant's post-event behaviour in assessing her credibility; and (4) applying uneven scrutiny to the evidence of the Crown and the defence.

[3] For the reasons that follow, I would dismiss the appeal. The appellant has not demonstrated any of the errors alleged in the trial judge's reasons.

The Evidence

[4] Given the nature of the grounds of appeal, I will set out the evidence in detail.

The Complainant

[5] The complainant worked as a hairdresser in her home. She testified that she and the appellant began talking over Facebook Messenger a few days before the alleged assault. They had not socialized in person before, but had some mutual friends. They engaged in some flirtatious banter and the appellant set up an appointment for a haircut with the complainant on June 30, 2017, at 11:00 a.m.

[6] On the morning of June 30, the complainant tried to cancel the appointment as she did not feel well, but could not contact the appellant in time. When he arrived, the complainant was leaving to buy cigarettes, so he took her to a nearby store on his motorcycle. They returned to the complainant's home, had a cigarette together on her deck, and discussed the appellant's vehicles, his work, his girlfriend, and his young son.

[7] The complainant then began setting up her hairdressing equipment in the kitchen. She testified that for male clients, she gives them the option of removing their shirt to prevent cut hair from going down their back. The appellant removed his shirt, and the complainant put a hairdresser's cape on him. As she was cutting his hair, the appellant grabbed her thigh. This made the complainant feel uncomfortable; she told him it was inappropriate and not to do it again. Despite this warning, the appellant again touched her thigh. The complainant flicked him on the head with a comb and told him she would stop the haircut if he did it again. She recalled telling the appellant, "You have a girlfriend. This is inappropriate and I'm not -- I'm not like that".

[8] After she finished the haircut, the complainant went to her ensuite bathroom to wash up as she was out of towels in the kitchen. She told the appellant the haircut was done, she would be back in a minute, and he could put on his shirt. As the complainant was leaving the bathroom, the appellant appeared, grabbed her waist,

and threw her on the bed. The complainant testified she is five feet, eight inches tall and weighed 130 pounds. She estimated the appellant was about six feet, two inches tall and 180 pounds. (The appellant testified that he is in fact six feet, three inches tall, and weighed about 200 pounds.)

[9] The complainant asked the appellant “what the hell” he was doing and told him in a raised voice to get off her. He said, “You like it. You want this.” The complainant was lying on her back and the appellant stood over top of her. He put his hands up her skirt and lifted her shirt over her head. She testified the appellant was “quite strong” and at one point, he pinned her hands behind her head. With his other hand, the appellant touched her buttocks, thighs, and vagina. He started sucking on her breasts. He told her he was the “alpha dog”, that she “wanted this”, and “variety is the spice of life”.

[10] The complainant tried to fight off the appellant, screaming and telling him, “Get off me” and “I’m not into this.” He said, “Your pussy’s so wet” and put his fingers in her vagina. The appellant was straddling the complainant. She tried to free a hand to hit him, scratch him, or do whatever she could to get him off her. At one point, the complainant grabbed the appellant’s throat with one hand. He then turned her onto her hands and knees and told her he wanted to “watch himself fuck [her]” in the mirrors on her closet doors. He started spanking her buttocks “pretty hard.” The complainant estimated he did so about five times. After 15 to 30 minutes, the appellant suddenly stopped, put his shirt back on, and left \$20 on the kitchen table.

[11] The complainant testified she felt shocked by what had taken place. She walked the appellant to the front door. They may have shared a cigarette, then they hugged goodbye. The complainant testified, “In my mindset, I was just trying to get him to leave my residence like in a graceful manner.” After he left, the complainant felt disgusted, scared, and in a state of disbelief.

[12] Shortly after the event, the complainant left her home, went to a friend's house and then to her mother's house. Her mother asked what was wrong. The complainant told her what had happened. Her mother convinced her to report the matter to the police, although the complainant was afraid to do so. Her mother made the call instead.

[13] The complainant testified that after the event, she felt pain in her wrists and buttocks. At her mother's house, she asked her mother to examine her. Her mother took pictures of the complainant's right buttock and wrist, which showed bruising. The police also took photographs of her wrists and right buttock. The complainant identified bruises in the photographs and testified they were the result of the appellant having assaulted her. The photographs were entered as exhibits at trial.

[14] After the complainant's cross-examination, the Crown raised the fact the defence theory had not been put to her. The complainant was recalled and defence counsel put to her that: the incident in the bedroom lasted only for a few minutes; the appellant stopped when she told him to; the touching had been consensual; and the events to which she testified were made up. The complainant disagreed.

The Complainant's Mother

[15] The complainant's mother testified that the complainant called her about half an hour before arriving at her home. The complainant explained she felt unwell and needed to see her. The complainant's voice was shaking on the phone. When the complainant arrived, she was shaking and looked very upset and on the verge of tears. She did not seem like her usual self. The complainant explained what had happened and started to cry. The complainant's mother told her she should report the matter to the police. After some convincing, the complainant agreed and her mother called the police.

[16] The complainant told her mother that her buttocks hurt. Her mother noticed a red bruise forming on the complainant's right buttock. The complainant's mother also noticed some little red marks on the complainant's wrists. The complainant's mother

took photographs of the injuries on the complainant's right wrist and right buttock. In cross-examination, the complainant's mother disagreed that the bruise in the photograph of the complainant's right buttock was yellow. She said instead that the bruise was "[a] reddish colour" or "pinky-reddish", while the complainant's skin looked yellow.

The Appellant

[17] The appellant testified that he and the complainant started talking over Facebook Messenger six to eight weeks before the day of the haircut. The complainant messaged him over Facebook and asked if he had a girlfriend. He said he did, and they had a child together. The complainant replied that was too bad because she wanted to be his girlfriend. The complainant mentioned she worked as a hairdresser, and the appellant made an appointment to get his hair cut at her house. Before these communications, the two had met briefly about a year before the incident when the complainant attended at his business.

[18] On the morning of June 30, the complainant messaged the appellant to say she was feeling unwell, but as he was already leaving, she did not cancel the appointment. When the appellant arrived, the complainant greeted him with a hug and he took her to the store on his motorcycle to get cigarettes. They discussed his motorcycles and cars. When they returned to the complainant's house, they had a cigarette on her deck and made small talk.

[19] The two then went inside, and the complainant began to set up for the haircut. She told the appellant to take off his shirt so he did not get hair down the back and she put a hairdresser's cape on him. The complainant cut the appellant's hair, removed the cape, and left. The appellant did not know where she had gone. He put \$20 on the kitchen table and went towards her bedroom to look for her.

[20] The appellant saw the complainant in the ensuite bathroom looking at herself in the mirror. He told her he left the money on the table and was going back to work. The complainant followed him to the kitchen and they hugged. After the hug, as the

appellant was reaching for his shirt, the complainant tried to scratch at him. He thought this was strange. In cross-examination, he agreed, “I guess you could say that she was trying to assault me”. The complainant then walked the appellant to the door and they had another cigarette. They hugged goodbye, and he left. The complainant was in good spirits.

[21] Shortly thereafter, the police arrested the appellant at his workplace. An officer took photographs of him at the police station and took swabs from under his fingernails. (One photograph was taken of the appellant’s front, and one photograph was taken of the appellant’s back.) The photographs were entered as exhibits at trial. The Crown admitted the photographs did not show scratch marks on his back. The appellant testified the photographs were taken about three hours after he left the complainant’s house, but agreed in cross-examination they were actually taken about six hours after the alleged assault.

[22] The appellant denied attempting to inappropriately touch the complainant or to digitally penetrate or attack her, or take off her clothes. He denied throwing the complainant on the bed, smacking her buttocks, pushing himself on her, or committing any of the acts alleged by the complainant. The appellant testified he had never heard or used the expression “variety is the spice of life”, and did not know what it meant. The appellant agreed in cross-examination that there was a bruise on the complainant’s buttock, but said it was an old bruise because it was yellow.

Closing Addresses of Counsel

The Defence

[23] In closing submissions, counsel for the appellant (not counsel on appeal) acknowledged the case was primarily about credibility. His position was that based on the evidence, there was a reasonable doubt about whether the assault occurred. He submitted the appellant was a credible witness who maintained his composure and gave a clear version of events, especially in comparison with the complainant,

whose evidence was inconsistent for a number of reasons. In particular, counsel submitted the following points demonstrated frailties in the Crown's case:

1. The complainant gave three versions of the duration of the assault. At trial, she said it took 15 minutes to half an hour; in her police statement, she said it took 15 minutes; and at the preliminary inquiry, the complainant said the assault took half an hour. In addition, counsel submitted it was unrealistic for an assault of the intensity described by the complainant to endure for 15 minutes to half an hour.
2. The complainant gave evidence that she scratched the appellant hard on his back. The photographs showed she had long fingernails. However, the photographs of the appellant post-arrest showed no injuries.
3. When it was suggested to the complainant in cross-examination that she had told the appellant she wanted to be his girlfriend, she gave vague answers and refused to answer in the affirmative.
4. The reason the complainant said she was in the bathroom after the haircut—because she did not have a towel in the kitchen—was “somewhat suspect” because (a) the appellant was a difficult customer, based on her evidence, and (b) the photographs of the complainant's kitchen in evidence showed a towel on the kitchen table.
5. The complainant's evidence was inconsistent about the number of times the appellant touched her thigh during the haircut. In her police statement, she said he did it three times; at the preliminary inquiry, she said he did it twice and she yelled, “Don't fucking touch me”; and at trial, she said it happened twice.
6. The complainant mentioned the appellant repeated the phrase “variety is the spice of life” several times during the alleged assault. This is a peculiar phrase, but the complainant did not mention it in her police statement; it came up for the first time in her evidence at the preliminary inquiry.

7. The complainant could not remember whether the photographs of her injuries taken by her mother were taken on the day of the alleged assault or the following morning. Further, the photographs did not show injuries consistent with the level of aggression she described in the assault.
8. The police took swabs from under the appellant's fingernails, but the swabs were never tested. Counsel urged the court to draw an adverse inference that the results would not have supported the complainant's evidence that digital penetration occurred.
9. The complainant went to a friend's house and then to her mother's house after the alleged assault, and did not phone the police right away.
10. The complainant's mother could not remember "key facts" about the complainant's visit, such as whether the complainant had phoned her before coming over, until she was taken to her police statement.

[24] Counsel for the appellant asked the court to take judicial notice that it was inconceivable a person would be asked to take off their shirt for a haircut. The defence theory was that this was done to "set the stage" for the complainant to scratch the appellant because "that was the mark that was going to make [the appellant] culpable." In support of this theory, counsel relied on the complainant's evidence that she told her mother the police would need to check the appellant's back if they were going to proceed with charges against him. At the time, the complainant did not know that no scratches would appear on the appellant's back.

The Crown

[25] The Crown agreed this case would come down to assessments of credibility and reliability, submitting:

1. Contrary to the defence suggestion, the complainant's evidence did not change over time, particularly with respect to the core elements of the offence. The inconsistencies pointed out by the defence were not significant and were to be expected when a witness is asked about an

event on numerous occasions. Further, some of the issues with her evidence that the defence relied on were not put to the complainant. For example, the questions of the colour of the bruise on her right buttock and whether the complainant assaulted the appellant were not put to her.

2. The complainant's version of events was supported by the bruising in the photographs and her emotional upset after the event, while the appellant's story that the complainant was the one who attacked him was incredible. The complainant had no motive to fabricate the story or to set him up.
3. The lack of a scratch mark on the appellant's back in the photograph was not necessarily inconsistent with the complainant's evidence. It may have disappeared between the attack and the taking of the photographs at the police station. The complainant never said she pierced the skin or saw it bleed.

[26] The Crown relied on *R. v. A.R.D.*, 2017 ABCA 237, aff'd 2018 SCC 6, for authority that avoidant behaviour after the event, or lack thereof, is not relevant to the credibility of a complainant. The Crown further submitted the appellant's suggestion that the complainant would have reported the offence immediately had she experienced a sexual assault would constitute an error of law.

The Trial Reasons

[27] At the outset of his reasons, indexed as *R. v. Greif*, 2019 BCSC 288 [RFJ], the trial judge recognized this case revolved around the credibility of the witnesses. He instructed himself on the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and the need to ensure the burden of proof remains with the Crown when assessing the credibility and reliability of defence-led evidence. He then summarized the evidence of the witnesses, the positions of the parties, and the elements of sexual assault.

[28] The judge began his analysis, citing *A.R.D.*, by dismissing the appellant's argument that the complainant's behaviour of stopping by a friend's home, failing to immediately report the alleged offence to the police, having a cigarette with the appellant, and giving him a hug after the alleged assault was inconsistent with the behaviour of someone who had just experienced sexual assault.

[29] The judge then considered whether the complainant's evidence about scratching the appellant was inconsistent with the photograph of his back, which did not show scratches. The judge first noted, citing s. 274 of the *Code*, that the testimony of a sexual assault complainant need not be corroborated. He found in any event the corroborative potential of the photograph was low as the scratches may have faded over time, or the complainant may have overestimated the force with which she scratched as she struggled to free her hands.

[30] In assessing the complainant's credibility and reliability, the judge began by setting out the principles relating to prior consistent statements. He noted the complainant's consistent accounts did not make her evidence at trial more credible, but these accounts could be admissible to illustrate the narrative of events, or as circumstantial evidence relevant to assessing the credibility and reliability of her testimony in court. The judge concluded the "timing, affect, and narrative progression" of the complainant's reporting of the events "mitigate in favour of belief", and the "logical flow of the narrative suggests that [the complainant] is an accurate and complete historian concerning the day in question: a quality central to her reliability" (RFJ at para. 67).

[31] The judge found the inconsistencies in the complainant's evidence to be insignificant, minimal, and unrelated to the actual assault. He noted the complainant appeared nervous, but concluded this was to be expected of a witness and may have been worsened by the appellant's behaviour, which included "smirking" and smiling at the complainant during her testimony. The judge also found the photographs of the complainant's wrist and buttock indicated some force or pressure was likely applied. He rejected the suggestion that the bruise was old.

[32] As to the appellant, the judge had “considerable doubt” about his credibility. The appellant’s theory that the complainant would seek revenge by framing him for sexual assault did not make sense as they had only been in communication for a few days before the assault (the judge did not accept they were in communication for a number of weeks) and the evidence did not disclose a motive to “set up” the appellant. The judge believed the complainant’s evidence that she was no longer interested in the appellant once she found out he had a girlfriend. In addition, it would not make sense for the complainant to assault or scratch the appellant without provocation, particularly when she had been feeling unwell.

[33] The judge declined to draw an adverse inference from the fact the Crown had not presented DNA evidence of the complainant from under the appellant’s fingernails. The judge referred to a letter entered by agreement of counsel showing the lab had declined to receive the swabs for processing as it would be unable to determine whether DNA was deposited from incidental contact during the haircut or from a sexual assault.

[34] The judge found the appellant’s testimony was not believable, nor did it raise a reasonable doubt. The judge concluded the evidence of the complainant, which he accepted, established the elements of sexual assault beyond a reasonable doubt. Accordingly, he found the appellant guilty.

Grounds of Appeal

[35] The appellant asserts the judge erred by:

1. reversing the burden of proof;
2. misapprehending photographic evidence that conflicted with the complainant’s testimony;
3. placing weight on the complainant’s post-event behaviour; and
4. subjecting the defence evidence to more rigorous scrutiny than the Crown evidence (“uneven scrutiny”).

[36] Although the grounds of appeal were set out in a different order in the factums, I will address them as outlined above to reflect the order in which counsel addressed the issues in oral submissions and because certain grounds of appeal are interconnected.

The Standard of Review

[37] In *R. v. S.S.S.*, 2020 BCCA 180, Justice Groberman set out the standard of review as it applies to cases turning on credibility assessments:

[24] It is important to emphasize that while an appellate court is tasked with scrutinizing the reasons given by the trial judge, considerable deference is owed to the trial judge on issues of fact-finding and credibility assessment. In *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) Doherty J.A. outlined the rationale for the limited role of an appellate court:

[46] Careful scrutiny of the trial judge's reasoning process is not ... to be equated with re-trying the case. An appellate court must always bear in mind the significant advantage enjoyed by the trial judge when it comes to assessing credibility. ... A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial. Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations: see *R. v. Francois* (1994), 91 C.C.C. (3d) 289 at 296 (S.C.C.).

[25] In *R. v. Gagnon*, 2006 SCC 17 at para. 20, the Court recognized that the bases for credibility assessments are not always easy to express, and re-emphasized the need for appellate courts to give deference to the findings of trial judges:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in [*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401], that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[26] The need for deference, however, does not mean that appellate review is abandoned altogether. Where a judge's reasons demonstrate an error of principle in the assessment of credibility, or show that credibility has been assessed arbitrarily or using irrelevant criteria, appellate intervention may be required.

[38] Reversing the burden of proof and applying uneven scrutiny to the evidence are errors of law reviewable on a correctness standard: *R. v. Quartey*, 2018 ABCA 12 at para. 15 (per the majority), *aff'd* 2018 SCC 59; *R. v. Roth*, 2020 BCCA 240 at paras. 47–48.

Did the judge err by reversing the burden of proof?

The Appellant's Argument

[39] The appellant contends the judge erred by rejecting his evidence “solely because [the complainant] had no reason to have any animosity towards him”, particularly at paras. 74–77 of the reasons for judgment. It is an error of law to require an accused to identify a reason the complainant would lie because it reverses the burden of proof.

[40] The appellant relies on *R. v. L.L.*, 2009 ONCA 413, in support of his argument. He points in particular to the statement at para. 53 that the accused has no obligation to prove a motive to fabricate. In *L.L.*, the Ontario Court of Appeal set aside the appellant's conviction on the basis that the trial judge had failed to provide a corrective instruction in his charge to the jury to correct Crown counsel's misleading statements about the complainant's motive to fabricate.

Legal Principles

[41] Although a trier of fact is entitled to consider the absence of evidence suggesting a reason to make a false allegation in assessing a witness's credibility, it is a reversal of the burden of proof to require an accused to show why a complainant would have a motive to lie: *R. v. Krack* (1990), 56 C.C.C. (3d) 555 at 561–62 (Ont. C.A.); *R. v. Batte* (2000), 49 O.R. (3d) 321 at paras. 120–21 (C.A.). There is no onus on the accused to prove their innocence or to explain the complainant's allegations. Further, it does not logically follow that because a witness has no *apparent* motive to lie that they *in fact* have no motive to lie, or that they are telling the truth. This distinction between lack of apparent motive and lack of proven motive is well established in the case law: see *Batte* at para. 121; *R. v. R.W.B.* (1993),

24 B.C.A.C. 1 at para. 28; *R. v. Ignacio*, 2021 ONCA 69 at para. 29 (leave to appeal to SCC requested), quoting *R. v. John*, 2017 ONCA 622; *R. v. Singh*, 2021 BCCA 172 at paras. 50–51.

Analysis

[42] The passages of the judge’s reasons impugned under this ground of appeal are these:

[73] The court finds considerable doubt as to the credibility of the [appellant].

[74] First, his testimony to the effect that it was [the complainant] who assaulted him by attempting to scratch his back is unworkable in the circumstances.

[75] These people had never met in person save for a very brief exchange alleged by [the appellant] at his business and after some exchanges over Facebook Messenger. I accept that [the complainant] and [the appellant] were in communication on Facebook for a short number of days. I do not accept that they were in communication for a number of weeks. In any event, an extended period of contact does not support a theory of [the complainant’s] revenge.

[76] There would be no reason for [the complainant] to “set him up” on a charge of sexual assault. The evidence does not disclose any animosity between [the complainant] and [the appellant] developing during that correspondence. There would be no reason to attempt to set up [the appellant] so as to “get even”. Even if [the complainant] had said to [the appellant] that she wanted to be his girlfriend, I accept that upon finding he already had a girlfriend with whom he had a child, she was honest when she said she was “not that kind of girl”. [The complainant] could not have been seeking to “get even” and achieve retribution against [the appellant] as there was no reason nor time to do so.

[77] Second, it is very unlikely that [the complainant] had tried to scratch the accused. The complainant testified and the accused agreed that [the complainant] had tried to cancel the appointment for a haircut because she was feeling ill. It would be very unlikely that she would attempt to scratch his back if the incident had been uneventful and no sexual assault provoked her physical protest. It would be more likely that if [the complainant] was attempting to scratch his back, that she would be doing so to attempt to fight him off.

[Emphasis added by the appellant.]

[43] To consider the above reasoning in context, it must be recalled the defence theory at trial was the complainant had premeditated the attack on the appellant as a way of setting up a sexual assault allegation against him.

[44] In my view, the judge's reasons for finding the complainant credible and the appellant not credible do not demonstrate a reversal of the burden of proof. Rather, the judge properly tested the credibility of the appellant's testimony (that the complainant scratched him without provocation) against the probabilities affecting the case as a whole and shown to exist at the time. The judge did not require the appellant to point to a reason why the complainant was lying. Rather, his reasons explain why the appellant's evidence and theory of the case did not raise a reasonable doubt. The judge did so in accordance with the principles in *W.(D.)*, on which he properly instructed himself many times throughout the reasons for judgment: see RFJ at paras. 4–5, 60, 83–85.

[45] This case is unlike *L.L.* In that case, the Crown had improperly questioned defence witnesses about the complainant's motive to lie and in closing submissions, repeatedly emphasized, as a reason for the jury to convict, that the complainant had no motive to fabricate the alleged events. The Ontario Court of Appeal held the Crown's submissions suggested a proven lack of motive, which the evidence was not capable of supporting, and created a risk that the jury would conclude an absence of demonstrated motive to lie meant the complainant must be telling the truth: *L.L.* at para. 42.

[46] Here, the trial judge considered the absence of evidence of a motive to lie in response to the appellant's suggestion that the complainant was motivated to "set him up" for sexual assault because he did not want to be her boyfriend. The judge's reasons are responsive to this attack on the complainant's credibility. Although this point was not the focus of the appellant's submissions, in this context, I do not read the reasons as suggesting the judge found a proven absence of motive to lie, or that he used such a finding to conclude the complainant must be telling the truth (and therefore that the appellant was lying).

[47] As the appellant concedes, the judge was entitled to consider, in making his assessments of credibility, that there was an absence of evidence suggesting a reason the complainant would make a false allegation. I see no basis on which to impugn his decision. I would not give effect to this ground of appeal.

Did the judge err by misapprehending the photographic evidence?

The Appellant's Argument

[48] The appellant argues the judge's conclusion that the scratches may have faded or the complainant may have overestimated the force she used is inconsistent with the complainant's testimony that she saw scratches on the appellant's back. The appellant submits the judge erred by misapprehending the evidence when he rejected the submission that the complainant's testimony was contradicted by the photographic evidence. In relying on the principle that a complainant's evidence need not be corroborated, the judge misunderstood the appellant's argument. A complainant's evidence, shown to be inconsistent with objectively verifiable evidence, raises a separate issue from corroboration. This led to a failure to give proper effect to the evidence and a failure to understand the importance of the evidence to the defence theory.

Legal Principles

[49] A judge's credibility finding, while generally owed significant deference, may be disturbed on appeal when it rests on a misapprehension of evidence that results in a miscarriage of justice. Misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence. Determining whether a misapprehension of evidence has caused a miscarriage of justice requires that the appellate court assess the nature and extent of the error and its significance to the verdict. It is a stringent standard, met only where the misapprehension could have affected the outcome: *R. v. Smith*, 2021 SCC 16, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.), and *R. v. Lohrer*, 2004 SCC 80 at para. 7. Merely suggesting a different interpretation of the evidence or pointing to some

evidence that arguably weighs against the trial judge's finding is not sufficient:
R. v. Swales, 2014 BCCA 350 at para. 49.

Analysis

[50] In my opinion, the appellant has not met the stringent test required to demonstrate a misapprehension of evidence. The trial judge was clearly alive to the inconsistency alleged by the appellant, but found it did not detract from the complainant's credibility. The fact the appellant takes a different view of the evidence is not a basis for establishing a misapprehension of evidence.

[51] I agree with the appellant that although a complainant's evidence need not be corroborated, a different issue arises when a complainant testifies as to corroborating evidence but in fact, no such evidence exists. This could affect the credibility and/or reliability of the complainant's evidence. Noting such a discrepancy is quite distinct from requiring corroborating evidence.

[52] However, I do not agree the alleged inconsistency here was as clear as the appellant suggests. The complainant's evidence was that she was unsure whether the appellant suffered any injuries from the assault, but she knew she had scratched him. She "believe[d] that [she] left some scratch marks on his back from what [she] could see", but she was unsure whether she broke the skin, as she explained in cross-examination:

Q Okay. So, again, to take you to page 9 of the preliminary inquiry, if we could, My Lord, at line 41, [trial Crown] asking, in chief, what you were doing. Just to paraphrase, "Screaming, 'No. Stop. I'm not into this. Get off me,'" etc. etc. At line 41:

Are you. . .

-- 40 --

Are you resisting?

A Absolutely. I'm fighting for my life.

A Mm-hmm. Yes.

Q For half an hour is your evidence --

A Yes.

Q -- potentially. Okay. So you're fighting for your life. I think your evidence today was that you were, at one point, had a hand free and you were attempting to claw out [the appellant's] --

A Claw him, scratch him, anything to get him off me, yes.

Q Okay. And were there any injuries to [the appellant] from that half hour altercation where you were fighting for your life?

A I have no idea.

Q You didn't observe any injuries on him?

A I know that I scratched his back. I don't know if I broke skin. I have -- I also have fake nails, so I don't know how sharp they are, but I -- I definitely know that I scratched his back.

Q Okay. And you have the nails that you have today? Did you have those type of nails on?

A They were more round, but same.

[Defence counsel]: Just bear with me, My Lord. Perhaps I could just have one minute, My Lord. My Lord, if I could take -- if I take you, please, to page 22 of the preliminary inquiry?

Q At line 2 or line 3, I ask you:

And you scratched him during this time?

Your answer:

Yes, I did.

I ask again:

You scratched him really hard?

Yes, I did.

Okay. On the back?

[One --] On the back.

How many times?

Once, as far as I know. Maybe more.

Correct?

A Yes.

Q Okay. So your evidence today and at the preliminary inquiry is that you scratched [the appellant's] back.

A Yes.

...

[Defence counsel]:

Q From what you could see, did [the appellant] suffer any injuries at all while you were struggling, trying to claw out his eyes, fighting for your life for the half hour?

A I believe that I left some scratch marks on his back from what I could see.

Q Okay, just a sec.

 And during this time, your evidence was he was trying to rip off your panties as well?

A Yes.

[Defence counsel]: And I'll just take you back to your statement with the police.

 Again, just bear with me, My Lord. The trouble is I haven't. . .

Q First page, your page 4, My Lord, your page 4, [the complainant], at -
- at line 46 [as read in]:

 I was able to get a hand free and try to push him off. I then scratched his back to try and get him off me.

 Correct?

A Yes.

[Emphasis added.]

[53] On this evidence, it was open to the judge to find that it was not inconsistent for the complainant to have seen scratch marks at the time of the assault, but for no scratch marks to be visible some six hours later when the photographs of the appellant were taken. This was the import of his conclusion that any possible inconsistency between the complainant's evidence and the image of the appellant's back depicted in the photograph was not significant because "[t]he scratches may have faded after six hours, or [the complainant] could have overestimated the force with which she scratched, particularly if she was struggling to get her hands free": RFJ at para. 59.

[54] Accordingly, even if the trial judge did mischaracterize the appellant's argument with respect to corroboration, it was not central to the judge's reasoning because he went on to consider the probative value of the inconsistency and found it

minimal. The appellant's argument effectively amounts to a complaint about how the judge weighed the evidence.

[55] In my opinion, the appellant has not shown a misapprehension of evidence in the manner in which the judge addressed this alleged inconsistency. The judge clearly understood the importance of the scratches to the defence theory because, as discussed above, he considered the theory that the complainant planted the scratches on the appellant's back to set him up for sexual assault and found it to be unworkable. I would not accede to this ground of appeal.

Did the judge err by placing weight on the complainant's post-event behaviour?

The Appellant's Argument

[56] The appellant accepts the judge properly rejected trial counsel's argument that the complainant's behaviour following the alleged assault was inconsistent with the behaviour that would be expected of a victim of sexual assault. However, the appellant submits it was improper for the judge to rely on the complainant's post-event behaviour in disclosing the alleged assault to her mother and, eventually, to the police to bolster her credibility and reliability. In particular, the appellant takes issue with the following passage in the judge's reasons:

[67] The timing, affect, and narrative progression of [the complainant's] reporting the alleged events to her mother and to the police militate in favour of belief. Her account of the events that unfolded, including disclosure to her mother and the process of reporting to the police, makes sense in the circumstances. It is conceivable that if she was sexually assaulted, she would be confused, and sit at home wondering what just happened. I believe that she would then go, distraught, to her mother. It is understandable that she would be reluctant to report her experiences to the police. It makes sense that her mother would describe [the complainant] as being very emotional. The logical flow of the narrative suggests that [the complainant] is an accurate and complete historian concerning the day in question: a quality central to her reliability.

[57] In the appellant's submission, the judge relied on the complainant's "conformity with what he perceived to be behaviour that made sense in the aftermath of a sexual assault". This, he argues, runs counter to the principle that

stereotypical behaviour is never a legitimate anchor on which to tie credibility assessments.

[58] The appellant further submits that placing weight on complainants' post-event conduct *inevitably requires* an assessment of their behaviour against a certain stereotype. He suggests the timing of disclosure and the emotional condition of a complainant after an alleged assault should be removed entirely as factors in the credibility analysis. An unfair imbalance exists where these factors cannot be used by the defence to critique the complainant's credibility, but they can be used by the Crown to bolster it.

[59] In addition, the appellant submitted in oral argument that the trial judge erred by relying *solely* on the timing and circumstances of disclosure as the basis for accepting the complainant's evidence.

Legal Principles

[60] In Canadian criminal law, triers of fact may rely on "reason and common sense", "life experience", and "logic" in making credibility assessments: *R. v. Delmas*, 2020 ABCA 152 at para. 31, *aff'd* 2020 SCC 39. However, it is an error of law to draw an adverse inference about a witness's credibility based on stereotypes, generalizations, or assumptions about how individuals would behave in a particular circumstance that are not (a) grounded in the evidence, or (b) so uncontroversial that they could properly be the subject of judicial notice: *Roth* at paras. 64–65, 73, 132; *R. v. J.C.*, 2021 ONCA 131 at paras. 58, 63; *R. v. Pastro*, 2021 BCCA 149 at paras. 40–48, 52.

[61] Credibility assessments tainted by improper speculation or stereotypical reasoning have been particularly problematic in the context of sexual offences, where cases (like the one at bar) often turn on credibility findings. Triers of fact must be aware "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave": *R. v. D.D.*, 2000 SCC 43 at paras. 63, 65. Reliance on myths, stereotypes, or unfounded inferences to ground credibility

assessments is an error, whether it is applied against a complainant or an accused: *Quartey* at paras. 2, 21 (per the majority); *R. v. Thompson*, 2019 BCCA 1; *R. v. C.M.M.*, 2020 BCCA 56 at para. 139. It is an error whether it is applied to undermine or to support the witness's credibility. (For cases in which stereotypes or unfounded inferences were erroneously relied upon to support a complainant's testimony, see, e.g., *R. v. J.L.*, 2018 ONCA 756 at paras. 46–47; *R. v. Paulos*, 2018 ABCA 433 at para. 34, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 336; *R. v. Cepic*, 2019 ONCA 541 at paras. 14–15; see also *Pastro* at paras. 50–51.)

[62] While avoiding reliance on myths and stereotypes is essential to the pursuit of a more just criminal justice system, it is not the case that evidence *capable* of being relied upon to support a stereotypical assumption is *necessarily* being used for that purpose. Where the evidence is adduced to support a permissible inference, it is not an error for a trier of fact to rely on that evidence in assessing a witness's credibility.

[63] Consider, for example, evidence regarding the timing of a complainant's disclosure of sexual abuse. It would be impermissible for a trier of fact to draw an adverse inference against a complainant's credibility by relying on the stereotype that a true victim of sexual abuse would not delay in reporting, so a complainant who delayed reporting is less likely to be telling the truth. However, in the appropriate circumstance, it would not be improper for the trier of fact to consider whether the timing of disclosure supports a defence argument that the complainant had a motive to fabricate the events, which would be relevant to their credibility.

[64] As this example demonstrates, it is not the case that certain categories of evidence can only be considered when the evidence bolsters the complainant's credibility, but not when it detracts from it. What matters is not the *type* of evidence, but the *inference* it is being relied upon to support: *Roth* at paras. 129–132; *J.C.* at paras. 68–69 (both citing Professor Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 *Queen's L.J.* 316).

[65] Nor is it an error for a judge to come to a conclusion that may align with a stereotypical expectation where that conclusion is drawn from the evidence in the record, rather than an unsupported assumption or generalization about how an individual would be expected to behave: *Quartey* at para. 21 (per the majority); *Paulos* at paras. 33, 35–37; *J.C.* at para. 70; *Pastro* at para. 41. Such a finding does not invoke the dangers associated with reasoning based on myths and stereotypes outlined by Justice Martin (as she then was) in *R. v. C.M.G.*, 2016 ABQB 368 at para. 60:

Broadly speaking, myths and stereotypes rest on untested and unstated assumptions about how the world works or how certain people behave in particular situations. They often involve an idealized standard of conduct against which particular individuals are measured. Sometimes general, assumed or attributed characteristics are applied to a particular individual or circumstance, often without an analysis of whether there is any merit in the general assumption or whether it truly applies in a particular situation.

[66] The same principles that apply to the timing of disclosure also apply to other aspects of a complainant's post-event conduct, including demeanour. It is an error for a trier of fact to assess a complainant's credibility based primarily on how their actions accord with stereotypes about how a victim would be expected to react after sexual abuse: see, e.g., *A.R.D.*; *Roth* at para. 132. But it is not improper for a judge to assess—and draw inferences from—the complainant's post-event conduct in the context of the facts of the case if the judge is doing so for a proper purpose and is not relying on an unfounded inference, stereotype, or generalization: see, e.g., *R. v. F.B.P.*, 2019 ONCA 157 at para. 7; *Roth* at para. 136. Accordingly, I reject the appellant's submission that placing weight on complainants' post-event conduct inevitably requires an assessment of their behaviour using stereotypes.

[67] This leaves the question of whether the judge improperly relied on stereotypes or unfounded inferences in this particular case, to which I turn now.

Analysis

[68] In my view, the judge's reasons do not offend the rule against relying on stereotypes or unfounded inferences in assessing a witness's credibility. There is

nothing to indicate the judge found the complainant's evidence to be credible for the impermissible reason that it accorded with the way he would generally expect a victim of sexual assault to behave. Rather, he properly relied on the evidence of the complainant and her mother about the complainant's post-event behaviour—including the circumstances of her prior consistent statement to her mother and her demeanour—to draw permissible inferences that supported the truthfulness and reliability of the complainant's testimony. He explained why, contrary to the appellant's suggestion, the complainant's delay in disclosing the matter to police and her post-event demeanour did not cause him concern in accepting her evidence.

[69] In the paragraphs leading to para. 67 (the paragraph most impugned by the appellant), the judge was careful to set out the permissible uses of the complainant's prior consistent statement. He noted in particular that prior consistent statements can be used to provide context about how the matter came to the attention of the police, and as circumstantial evidence relevant to assessing the credibility and reliability of the complainant's testimony. He stated several times that the statement could not be used for the truth of its contents or to corroborate the complainant's testimony. In my opinion, his statement of the law and his use of the statement in this context accorded with the law as set out by Chief Justice Bauman in his dissenting reasons in *R. v. Langan*, 2019 BCCA 467, later adopted by the Supreme Court of Canada in reasons indexed as 2020 SCC 33:

[99] It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" (*R. v. Khan*, 2017 ONCA 114] at para. 43[, leave to appeal ref'd [2017] S.C.C.A. No. 139]); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her truthfulness" (*R. v. F. (J.E.)*, 1993 CanLII 3384 (Ont. C.A.) at 476, cited in *[R. v. Dinardo*, 2008 SCC 24] at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (*R. v. Stirling*, 2008 SCC 10 at para. 12).

(See also *Singh* at paras. 32–34, and *R. v. Steele*, 2021 ONCA 186 at paras. 89–95 (per van Rensburg J.A., concurring), finding the trial judge had erred by failing to consider the admissibility of the complainant’s prior consistent statements under the narrative as circumstantial evidence exception and as post-event demeanour evidence. The majority agreed with Justice van Rensburg on this point: *Steele* at para. 44.)

[70] Similarly, it is well established that a complainant’s post-event emotional condition may be considered in evaluating their credibility: *R. v. Varcoe*, 2007 ONCA 194 at para. 33; *R. v. Daley*, 2008 BCCA 257 at para. 10; *R. v. Munt*, 2012 BCCA 180 at para. 22; *R. v. Lopez*, 2015 BCCA 294 at para. 29; *R. v. J.S.S.*, 2016 BCCA 411 at para. 47.

[71] Nor do I accept the suggestion that the circumstances of the disclosure was the sole basis on which the judge accepted the complainant’s evidence. The judge also considered that the evidence of bruising on the wrist and buttock was consistent with the complainant’s testimony, the absence of evidence of any apparent motive for the complainant to lie, and the fact that her evidence was consistent apart from some minor variations that were not significant.

[72] In my view, the judge properly considered the complainant’s disclosure to her mother and eventually to the police in evaluating the context and sequence of events in which the complaint arose. The judge assessed the evidence as to the complainant’s post-event conduct, not on the basis of stereotypes or generalizations about how he expected a complainant to react, but by drawing permissible inferences from the evidence before him. I see no fault in his analysis.

Did the judge err by applying uneven scrutiny to the evidence?

The Appellant’s Argument

[73] The appellant submits the judge erred by applying uneven scrutiny to the complainant’s evidence as compared to the evidence of the appellant. The complainant’s evidence, he argues, had serious internal and external

inconsistencies that the judge either failed to resolve or explained as being insignificant and minimal. In particular, the appellant says the judge failed to resolve (a) the lack of corroboration of the violent assault the complainant described, and (b) the complainant's testimony given for the first time at trial that she stopped at a friend's house before going to her mother's house. The appellant further contends the judge erred by considering that the inconsistencies did not go to "the happening of the alleged assault", asserting that "[r]educing the scope of relevance for an inconsistency strictly to the happening of the alleged assault inevitably leads to an uneven scrutiny of the evidence".

[74] In addition, the appellant says the judge gave insufficient reasons for reconciling the inconsistencies in the complainant's evidence, which also indicates he applied uneven scrutiny. By contrast, the appellant contends the judge took an especially critical view of the appellant's evidence, rejecting it for the sole reason that the appellant failed to provide a motive for the complainant to lie.

Legal Principles

Uneven Scrutiny

[75] This Court and other provincial appellate courts have recognized uneven scrutiny—which involves subjecting defence evidence to more rigorous scrutiny than Crown evidence—is an error of law warranting appellate intervention, albeit one that is notoriously difficult to make out: *Roth* at paras. 47–52; *R. v. Mehari*, 2020 SKCA 37 at paras. 29–34 (per the majority) and paras. 87–89, 97–99 (per the dissent) [*Mehari* SKCA], rev'd in the result 2020 SCC 40 [*Mehari* SCC]; *R. v. Wanihadie*, 2019 ABCA 402 at paras. 34–43; *R. v. Willis*, 2019 NSCA 64 at paras. 40–45; *R. v. Rhayel*, 2015 ONCA 377 at paras. 95–98; *R. v. C.A.M.*, 2017 MBCA 70 at paras. 33–37.

[76] The reason for the difficulty, as explained in *R. v. Murray*, 2020 BCCA 42 at para. 82, is that credibility assessments are the province of trial judges. Such assessments are owed a high degree of deference on appeal due to the superior

vantage point of the trial judge and the difficulty of articulating “the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events”: *R. v. Gagnon*, 2006 SCC 17 at para. 20. Findings of credibility will not be disturbed on appeal absent palpable and overriding error: *Gagnon* at paras. 10, 20; *R. v. R.E.M.*, 2008 SCC 51 at paras. 48–49.

[77] Appellate courts are skeptical of arguments that invite a reassessment of the trial judge’s findings of credibility: *Murray* at para. 82. An appellant will not succeed on the uneven scrutiny ground unless they can show an error in the judge’s methodological approach or the reasoning process that affected the credibility assessment. A complaint about the judge’s interpretation of the evidence or the mere fact the judge did not find the appellant to be credible will not suffice: *Roth* at paras. 50–52.

[78] In *Mehari* SCC, the Court recently overturned a conclusion that the trial judge had erred by applying uneven scrutiny. A majority of the Saskatchewan Court of Appeal found the trial judge had taken a “tolerant and relaxed” approach to scrutinizing the complainant’s evidence as compared to the appellant’s evidence. In particular, the trial judge had found that gaps in the complainant’s memory and her inability to recall certain details enhanced her credibility, but found the appellant’s credibility was undermined by his failure to provide extraneous detail when answering questions. The trial judge had also accepted the complainant’s evidence on material points despite “clear contradictory evidence that [the trial judge] did not reject, reconcile, or otherwise explain”: *Mehari* SKCA at para. 35. Justice Leurer, in dissent, found the appellant’s argument that the trial judge had “glossed over or failed to consider a number of significant inconsistencies and contradictions” in the complainant’s evidence was effectively a request that the court conduct its own credibility assessment: *Mehari* SKCA at paras. 91, 100. In his view, the trial judge did not make any methodological error in scrutinizing the evidence.

[79] The Supreme Court of Canada allowed the appeal on the basis there was no error of uneven scrutiny that would have warranted appellate intervention. It remitted the matter to the Saskatchewan Court of Appeal to decide the grounds of appeal left unaddressed. Although it was unnecessary to decide this issue to dispose of the appeal, Justice Martin also commented that, “[t]his Court has not decided whether uneven scrutiny, if it exists, can amount to an independent ground of appeal or a separate and distinct error of law.” (See also *R. v. Drydgen*, 2021 BCCA 125 at para. 47.)

[80] Justice Martin may have been alluding to the fact that cases in which uneven scrutiny has succeeded as a ground of appeal have tended to involve other errors in the trial judge’s credibility assessment: see *Roth* at para. 51, citing *Wanihadie* at para. 38. In *Roth*, for example, Justice DeWitt-Van Oosten noted the trial judge’s credibility assessment was “rendered uneven by three errors in principle”: at para. 54. In particular, the trial judge in *Roth* had used speculative reasoning in adversely assessing the appellant’s evidence, relied on the fruits of improper cross-examination in her credibility assessment, and failed to appreciate (and resolve) significant inconsistencies and contradictions in the complainant’s evidence before relying on the complainant’s evidence as proof of non-consent.

[81] In *R. v. Awer*, 2017 SCC 2, the Court allowed an appeal and ordered a new trial on the basis the trial judge had subjected evidence from Crown and defence DNA experts to “materially different levels of scrutiny” in a manner that “tended to shift the burden of proof onto the appellant”: at para. 5.

[82] It may be that “uneven scrutiny” is merely another way of expressing that the judge erred in principle in some manner in making an assessment of credibility. In my opinion, until the Supreme Court of Canada has the opportunity to address this issue, it remains the law in British Columbia that in those rare circumstances where it can be successfully demonstrated, uneven scrutiny is an error of law warranting appellate intervention. In any event, it is not necessary to resolve the issue on this appeal because in my view, no such error has been identified.

Insufficient Reasons

[83] The appellant's argument also raises the issue of whether the judge gave sufficient reasons for his decision. An allegation of inadequate reasons is not a stand-alone ground of appeal. An appellate court will not intervene unless the reasons do not explain the basis for the verdict or do not allow for meaningful appellate review of the correctness of the decision: *R. v. Sheppard*, 2002 SCC 26 at paras. 25–26, 55; *R.E.M.* at para. 25.

[84] Courts should take a functional approach to reviewing the sufficiency of reasons. The assessment should be directed at whether the reasons respond to the issues in the case, having regard to the evidence as a whole and counsel's submissions: *R. v. Dinardo*, 2008 SCC 24 at para. 25; *R.E.M.* at paras. 15–17, 37. However, there is no requirement for trial judges to prove they were alive to and considered all the evidence, answer each and every argument of counsel, set out every finding or conclusion in the process of arriving at the verdict, or expound on uncontroversial matters: *Dinardo* at para. 30; *R.E.M.* at paras. 18–20. A trial judge's reasons for judgment should not be "read or analyzed as if they were an instruction to a jury": *R. v. Villaroman*, 2016 SCC 33 at para. 15, quoting *Morrissey* at 525.

[85] As to credibility assessments, appellate courts are again skeptical of claims of insufficient reasons that in reality amount to a mere disagreement with the trial judge's findings. Reviewing courts start from a position of deference to the trial judge's perception of the facts: *R.E.M.* at para. 54. Reasons will be sufficient if, as a whole, they disclose the rationale behind the judge's conclusions on credibility and reasonable doubt: *Gagnon* at para. 22; *R.E.M.* at paras. 50–51. Reasons may be insufficient if they fail to sufficiently articulate how credibility concerns were resolved or how important inconsistencies were reconciled: *Dinardo* at paras. 26–27.

Analysis

[86] In my opinion, the appellant has not demonstrated either that the trial judge erred by applying uneven scrutiny to the evidence or by providing insufficient

reasons. The judge's reasons reflect that he was alive to the issues in the case and responsive to defence counsel's closing submissions. The reasons explain why the judge did not believe the appellant's evidence, why it did not raise a reasonable doubt, and why the judge accepted that the complainant's evidence proved the essential elements of the offence beyond a reasonable doubt. The appellant has not identified anything in the reasons to indicate an error in the judge's methodological approach or reasoning process.

[87] I disagree that the trial judge failed to resolve a lack of corroboration of the violent assault described by the complainant. In closing submissions, defence counsel argued the photographs of the complainant and the appellant did not show injuries consistent with the level of aggression she described, or reflect her testimony that she had scratched the appellant's back. The judge addressed these submissions in his reasons when he: (1) found the photographs of the complainant's wrist and buttock indicated some force or pressure was applied to those parts of her body, rejecting the appellant's argument that the bruise in the photograph was old (RFJ at para. 52); (2) noted there is no requirement for a complainant's version of events to be corroborated (RFJ at para. 57); and (3) found the scratches may have faded in the six hours between the incident and the time the photograph of the appellant's back was taken, or that the complainant may have overestimated the force with which she scratched as she struggled to get her hands free (RFJ at para. 59). In my view, these conclusions were all reasonable and open to the trial judge.

[88] There is no merit to the submission that the judge should have found the complainant's evidence to be unbelievable because she testified she was screaming at the appellant during the attack and the windows were open, yet no one heard and came to her assistance. The complainant testified her children were not home and the downstairs tenant left while she was cutting the appellant's hair. There was no evidence to suggest there was anyone nearby who would have heard the complainant.

[89] The trial judge also dealt with the submission that the complainant's evidence was inconsistent because she mentioned for the first time at trial that she stopped at a friend's house during their lunch break before she went to see her mother. The judge explained:

[68] In [the complainant's] cross-examination, some inconsistencies were pointed out between her testimony at the preliminary inquiry and at trial. Those inconsistencies primarily relate to omissions during her testimony at the preliminary inquiry compared to her evidence at trial. However, the inconsistencies were not significant. For example, at the preliminary inquiry, no mention was made of her having flipped her comb on [the appellant's] head after he touched her thigh as she testified at trial.

[69] She also made inconsistent reports between the preliminary inquiry and the statement she gave to police on June 30, 2017. [The complainant] reports the number of times [the appellant] touched her thigh, i.e., twice or on three occasions, and regarding her yelling "don't fucking touch me" to [the appellant]. She made other mix-ups which, while somewhat inconsistent, were not significant departures from her previous statements or testimony.

[70] Whether evidence of a complainant being touched a "couple of times" or three times, whether a particular question was even asked and a response therefore given on different occasions, does not represent significant inconsistencies in a person's evidence as was the case in [the complainant's] cross-examination.

[71] Generally, the Court finds that the inconsistencies in the testimony of [the complainant] were not significant as they related to the underlying events giving rise to the alleged sexual incident and comprising the alleged sexual assault. The inconsistencies in her testimony were insignificant and minimal. The inconsistencies did not go to the happening of the alleged sexual assault. Inconsistencies in testimony as to the duration of any act are to be expected. Word-for-word, completely consistent evidence from a witness at a preliminary inquiry and at trial is the exception and is not indicative of a lack of credibility. In this case, the inconsistencies in the testimony of [the complainant] did not relate to the core facts necessary to prove a sexual assault.

[90] This passage explains the reasons the judge found the inconsistencies identified by defence counsel in closing submissions to be minor and insignificant to the complainant's credibility. The judge was not required to reconcile every frailty in the evidence or answer every argument of counsel.

[91] While I agree it would be an error to find inconsistencies in the complainant's evidence are *irrelevant* because they do not go to the happening of the alleged assault (see *Roth* at para. 125; *R. v. Clayton*, 2021 BCCA 24 at paras. 57, 63–65), the trial judge did not make that error here. Rather, he found the inconsistencies raised by the defence to be unimportant in the context of the evidence as a whole and assigned them little weight in assessing the complainant's credibility. He was entitled to do so, and it is not the role of this Court to interfere absent palpable and overriding error. In my opinion, none has been demonstrated.

[92] Finally, I disagree with the appellant's suggestion the trial judge rejected the appellant's evidence for the "sole reason" that he failed to provide a motive for the complainant to lie. Instead, the judge found the appellant's evidence that the complainant attacked him unprovoked to be unbelievable and unworkable in the circumstances. The fact the judge did not note any inconsistencies in the appellant's evidence does not mean he was obliged to accept it. Again, this finding was reasonable and available on the evidence.

[93] In my opinion, this ground of appeal fails whether framed as uneven scrutiny or insufficient reasons. In either case, it amounts to an invitation for this Court to improperly interfere with the trial judge's assessment of credibility. The judge explained why he found the complainant to be a credible and reliable witness and why the inconsistencies in her evidence did not detract from her credibility. He considered the appellant's version of events and found it was not believable and did not raise a reasonable doubt. The reasons were sufficient: they explained why the judge convicted the appellant and allowed for meaningful appellate review. Nothing in the reasons indicates the judge applied a stricter level of scrutiny to the defence evidence as compared to the Crown evidence.

Disposition

[94] In the result, I would dismiss the appeal.

I AGREE: “The Honourable Madam Justice MacKenzie”

“The Honourable Madam Justice Dickson”

I AGREE:

“The Honourable Mr. Justice Voith”

Tab 16:

R. v. J.S.M., 2006 BCCA 377

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. J.S.M.***,
2006 BCCA 377

Date: 20060815
Docket: CA033814

Between:

Regina

Respondent

And

J.S.M.

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Madam Justice Kirkpatrick

Oral Reasons for Judgment

R. C. Peck, Q.C.

Counsel for the Appellant

S. Brown

Counsel for the (Crown) Respondent

Place and Date:

Vancouver, British Columbia
15 August 2006

[1] **LEVINE, J.A.:** J.S.M. applies for leave to appeal, and if leave is granted, appeals the sentence of two years and two months in jail (after credit of ten months for pre-sentence custody) imposed in Provincial Court on February 20, 2006, after the appellant pleaded guilty to three charges: criminal harassment, assault and threatening. The offences occurred between July and September 2005. The victim was his wife, S.J..

[2] The appellant claims that the sentencing judge gave insufficient consideration to the principle of rehabilitation by making three errors in his analysis: he placed too much weight on the appellant's diagnosis as a psychopath; he relied on the victim's opinion about the appellant's potential for change; and in particular, gave insufficient weight to the appellant's recent efforts to rehabilitate himself.

[3] The circumstances directly giving rise to the charges derive from the marriage breakdown of the appellant and his wife. They met and were married within twelve days in August 2003. They later discovered the marriage was illegal, and remarried in February 2004. The marriage began to deteriorate, and by January 2005 the wife's pregnancy had ended, the appellant was unable to work, and the appellant's 15 year old son had come to live with them, creating stresses between them. The appellant began consuming cocaine. Eventually, the appellant moved out of the family home, on July 15, 2005.

[4] After leaving the home, the appellant began to harass Ms. S.J.. He telephoned her daily, sometimes twenty times, sometimes leaving messages or hanging up. On August 2, the appellant called her from her home while she was

driving to the mall. She told him she was coming home and would call 911 if he was still in the house. As she was driving back to the house, she saw him driving towards her. She stopped, but he did not. He drove directly into the front of her car, causing damage to both vehicles. Fortunately, neither of them was hurt. The police were called and the appellant was charged with driving without due care and attention. The police officer told the appellant to stay away from Ms. S.J..

[5] On August 6, Constable Wong called the appellant and told him again to stay away from Ms. S.J..

[6] On August 8, the appellant went to the car dealership and asked questions about Ms. S.J.'s vehicle.

[7] On August 10, the appellant called Ms. S.J.'s friend and told her he was going to buy a gun.

[8] On August 26, the appellant called Constable Wong and told him that he had told Ms. S.J.'s friend that he was going to buy a gun. He told Constable Wong that he was going to kill himself.

[9] On September 13, the appellant went to Ms. S.J.'s home and asked for their honeymoon photos. Ms. S.J. gave them to him with her picture cut out. The appellant threw the book of photos and two decorative planters at the door.

[10] In recorded telephone conversations in September 2005, the appellant told Ms. S.J. that he would never leave her alone, would get her fired from her job, injure any man in her company, and find her wherever she moved.

[11] The assault occurred on July 31. The appellant went to Ms. S.J.'s home to retrieve some of his belongings. She asked him to come back later. He refused and pushed his way through the door. As Ms. S.J. began collecting his belongings, the appellant grabbed two wedding rings off Ms. S.J.'s fingers and a chain necklace off her neck.

[12] The threats were made on August 28. The appellant telephoned Ms. S.J.. After a brief conversation, Ms. S.J. hung up. The appellant called back and told her he was going to kill her and members of her family. He called her a "dead woman walking". Ms. S.J. called 911. She was told to call 911 again if the appellant came near her house. As she got off the phone with 911, the appellant called again. He said he was in front of her house; he honked his car horn.

[13] The sentencing judge had before him a risk assessment prepared before the appellant was released from prison in November 2002; a psychological assessment prepared by Dr. LaTorre for the purpose of sentencing on December 30, 2005; and a pre-sentence report prepared January 24, 2006. These reports detailed the appellant's criminal, psychological and social history. They provide context for the frightening behaviour that underlies the charges for which he was sentenced, and for the assessment of the risk of further violence that the appellant presented.

[14] The appellant's background, psychological profile, and social history combined to produce a volatile, unpredictable, violent, threatening individual. He was the product of a broken marriage. As a child he was sexually assaulted by a male babysitter and emotionally and physically assaulted by his stepfather. He had

learning and behavioural difficulties in school, and has a grade six literacy level. He was put in a foster home at age 12 because of his behavioural difficulties, but returned to his mother's home after about seven months. He was on his own at age 16. He began abusing drugs at age seven; as an adult, he has primarily used steroids and cocaine. He has had little employment; at times he has lived off the avails of prostitution and various partners. He has had several relationships, and has fathered a number of children. He sees at least one son regularly. His mother has remained supportive throughout.

[15] The appellant has a serious criminal record: six previous convictions for assault; six for threatening, and two for criminal harassment. He has also been convicted of aggravated assault, twice of pointing a firearm, and possession of a prohibited weapon. The LaTorre report details the circumstances of some of these offences. In 1991, the appellant was fined for assault of a male outside a bar, where he knocked the victim to the ground, kicking him to unconsciousness, breaking his collarbone and leaving him in the street. In 1992, he was again fined for assault, after holding a knife to a night club bouncer's stomach after being refused entry. In 1996, he was sentenced to 18 months in jail and two years probation for aggravated assault, after he struck a woman with a beer bottle that broke, leaving the victim requiring 50 stitches to her face. In 1998, a peace bond was issued under s. 810 of the **Criminal Code**. Later that year, in November, the appellant received a four-year sentence and a lifetime firearms prohibition for pointing a firearm, criminal harassment, assault and uttering threats. The threats were made to a female video store clerk after a dispute over late fees. He came to the store every day for a

month. He eventually confronted her saying, "I'm going to skin you alive and not the easy way..." He also threatened the male clerk. While on bail for these offences, he developed a relationship with a prostitute. Within weeks he was threatening her, including banging his own head with a gun until it bled if she ever suggested she might leave him. He threatened to kill her, her friends and himself, and held the gun to her head during the threats. He physically assaulted her and another woman, throwing them against the wall. The other woman was choked into unconsciousness while holding a two year old child. After the prostitute left him, he stalked and harassed her. In January 2003, another peace bond was issued.

[16] Both the risk assessment and the LaTorre report reviewed a psychological assessment prepared by a Dr. Dercole in 1999. Dr. Dercole concluded that the appellant met the criteria for a Borderline Personality Disorder, and tests showed that he met the criteria for psychopathy and was at a "very high risk for future violent recidivism". Dr. Dercole referred the appellant for further psychiatric assessment, which appears not to have been completed. Although the appellant has used anti-depressant medication at times, he also indicated that he did not wish to take it. The LaTorre report concluded that the appellant's "primary problem appears to be severe personality disorders...compounded by the use of various substances over the years thus making his already tenuous hold on self-control even less likely." Dr. LaTorre noted in particular:

Mr. J.S.M. appears to be an individual at relatively very high risk of future violence. His attitude and behaviour toward women make them a particular target of violence although he has engaged in violence also against men. He appears to need little provocation and, even without provocation, can devise his own rationale for engaging in such

violence...My prognosis in this particular case, at this particular time, is relatively poor.

[17] The pre-sentence report detailed the appellant's poor response to community supervision and previous treatment interventions. The probation officer noted that while incarcerated before 2002, the appellant refused to participate in the Intensive Violent Offender Program while in prison, though he had completed other programs, including Emotion and Anger Management, Cognitive Skills and Breaking Barriers. Reports from facilitators in these programs noted the appellant's "negative attitudes towards women".

[18] In submissions at sentencing, defence counsel outlined the appellant's more recent attempts at rehabilitation. In 2003, he began seeing a family physician on a regular basis and began taking mood stabilizers (anti-depressants). He secured employment in January 2004 and was also employed in 2005. He attended Narcotics Anonymous. For a year before the events giving rise to the charges, he attended counselling with a clinical psychologist. The appellant's physician wrote a letter to the Court advising that, in his opinion, the counselling session helped the appellant gain insight and take responsibility for his behaviour.

[19] While in prison awaiting disposition of these charges, the appellant applied for the Violent Offenders Program and the Anger Management Program. He completed the Breaking Barriers Program and Corrections advised that he would be an effective facilitator if inmate facilitators were used for that program. Also while in prison, the appellant sought out and received support from Tony Niles, a spiritual

advisor and aboriginal support worker. Mr. Niles advised the Court in a letter that the appellant showed initiative and a desire to change.

[20] The appellant also had prepared a release plan that included a placement at Kinghaven Treatment Centre in Abbotsford to treat his cocaine addiction; and his mother's commitment to assist him in finding housing and employment in her landscaping business. His mother, friends and Mr. Niles indicated their continued support for him.

[21] In lengthy reasons for sentence, the sentencing judge reviewed the reports provided to him, the victim impact statement, and the principles of sentencing, particularly as stated in the following cases: **R. v. Bates** (2000), 146 C.C.C. (3d) 321 (Ont. C.A.); **R. v. Finnessey**, [2000] O.J. No. 3316 (C.A.), and **R. v. D.H.W.**, 2005 BCSC 247. In these cases, the courts emphasized the seriousness of the offence of criminal harassment, although not accompanied by physical violence, and the need for the courts to impose sentences that send a "forceful and effective" message of denunciation and specific and general deterrence. (See also this Court's decision in **R. v. Khemhus**, [1994] B.C.J. No. 3050 (C.A.) at para. 9)

[22] In mitigation, the sentencing judge noted the appellant's guilty plea and stated (at para. 153):

... I am also mindful of the positive steps that the accused has taken in the immediate past, as reflected in the document submitted by his counsel, and am also mindful of the comments made by Mr. Niles and submitted with reference to his assisting the accused in the intake process for the Kinghaven Treatment Centre.

[23] The sentencing judge summarized his reasons for concluding (at para. 156) that the aggravating circumstances far outweigh any mitigating circumstances and that deterrence, both specific and general, as well as denunciation are the overriding sentencing principles that should govern (at paras. 154-55):

In my view, however, given the extent and depth of the various shortcomings that the accused faces, and the opinions of the knowledgeable experts in their diagnosis, it seems that any real change in Mr. J.S.M.'s behaviour or attitude remains, at this time, untested by time and is uncertain. His past history clearly indicated that he has not rehabilitated himself, despite being given that opportunity time and time again.

At this time, accordingly, the prognosis must remain guarded based on that record and history. I note his most recent opinions or interpretations of the events of the index offences are consistent with what the psychologists have observed and noted in their reports. He has continued in his recidivist behaviour, which again falls in line with the earlier prognosis that he is at high risk for re-offending. Considering also his length criminal record, he remains, in my view, a risk to the public with, in fact, a continuing high risk of re-offending.

[24] The sentencing judge was of the view that a sentence of four years would be fully justified (the same sentence the appellant received for the previous conviction for criminal harassment), but sentenced the appellant to three years (less credit for time served) in recognition of "the positive efforts he has recently made".

[25] From my review of the materials and submissions considered by the sentencing judge, the reasons for sentence, and despite counsel's very able submissions on this appeal, in my view there is no basis to find that the sentencing judge erred by giving insufficient consideration to the principle of rehabilitation in any of the three ways claimed by the appellant, or at all. The sentencing judge

considered and balanced the aggravating and mitigating factors, and applied the proper legal principles. In doing so, he made no error of principle, and fashioned a sentence that cannot in any way be said to be demonstrably unfit.

[26] I would grant leave to appeal, and dismiss the appeal.

[27] **NEWBURY, J.A.:** I agree.

[28] **KIRKPATRICK, J.A.:** I agree.

[29] **NEWBURY, J.A.:** Thank you, counsel. The appeal is dismissed.

“The Honourable Madam Justice Levine”

Tab 17:

R. v. Manca, 2019 BCCA 280

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Manca*,
2019 BCCA 280

Date: 20190718
Docket: CA46013

Between:

Regina

Respondent

And

Shawn Lorne Manca

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Griffin
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated
January 9, 2019 (*R. v. Manca*, New Westminster Dockets 81552-1K, 81552-3KAC).

Oral Reasons for Judgment

Counsel for the Appellant: B. Zargarian

Counsel for the Respondent: E.A. Campbell

Place and Date of Hearing: Vancouver, British Columbia
July 18, 2019

Place and Date of Judgment: Vancouver, British Columbia
July 18, 2019

Summary:

Appeal from sentence for assault and breach of a court order. The appellant submits that the sentencing judge erred in principle by departing from a joint submission on the length of custody as well as the conditions of a probation order. Held: appeal from sentence allowed, in part. The ten-month term of imprisonment is reduced to nine months to reflect the joint submission. The probationary conditions imposed by the sentencing judge are left intact.

[1] **DEWITT-VAN OOSTEN J.A.:** On January 9, 2019, the appellant pleaded guilty in the Provincial Court of British Columbia to assault and breach of an order prohibiting communication. He appeals from sentence on both offences.

[2] The Crown proceeded by indictment on the assault and summarily on the breach. This Court can hear an appeal on the summary matter because the offences were tried together: *Criminal Code*, R.S.C. 1985, c. C-46, s. 675(1.1) [Code].

[3] The sentencing proceeded by way of a joint submission, but only in part. The parties agreed that a global nine months' imprisonment was a fit custodial sentence, minus credit for pre-sentence custody. They also agreed on a probation order. However, the length of probation was in dispute. The Crown sought a three-year order under s. 731(1)(b) of the Code. The appellant submitted that 18 months of probation would be sufficient.

[4] The sentencing judge imposed a global 10 months' imprisonment, exceeding the joint recommendation by one month. He accepted the Crown's position on the length of probation.

[5] The appellant contends that the sentencing judge erred in exceeding the nine-month prison term. He does not contest the length of probation. However, he asks that a specific condition of the order be deleted because it was not jointly recommended.

Circumstances of the Offences**Assault**

[6] The assault occurred on October 18, 2018. The appellant and the victim were involved in an intimate relationship and, from time to time, the appellant lived with her. There were three children in the home. The youngest was the child of the appellant and the victim.

[7] Police were called to the home at approximately 1:20 a.m. The victim told them she was asleep on the couch when the appellant arrived at the residence and accused her of using heroin. She denied using drugs. He pushed the victim into the bedroom and to the ground. He placed his hands around her neck, applying pressure. At some point, the victim lost consciousness. She tried to get the appellant off her by scratching, hitting and attempting to bite him. When police arrived, they observed injuries to the appellant consistent with this description.

[8] While the incident was unfolding in the bedroom, the victim's 16-year old son entered the room. He pleaded with the appellant to stop choking his mother. The appellant and victim moved into the living room. There was further yelling and pushing between them. In the interim, the son was texting with his aunt and requested that she call police. The aunt did so and police arrived.

[9] Police saw red marks on the victim's neck as well as her upper left arm. There was dried blood on her face and some of her fingernails were broken. She was later examined by a nurse. There was bruising to the front of the victim's neck; a red linear abrasion on the left side of her neck; she had abrasions on one of her forearms; and abrasions on both wrists.

[10] The victim's 16-year old son told police he had to tell the appellant three times to stop choking his mother before he ceased. The appellant justified his behaviour to the son by saying that he caught the victim using drugs. He offered this same rationale at sentencing:

...Yeah, I -- I did do what I did, but it was the fact that I did catch her with drugs with my three-year-old running around while she's passed out on heroin because when people are on heroin they nod off and [indiscernible] and that's how I caught her nodded off. ...

Failure to Comply with an Order

[11] The appellant was arrested for the assault. While in custody, an order was imposed under s. 516(2) of the *Code*, prohibiting him from contacting the victim.

[12] Between the start of the order and October 23, 2018, the victim spoke with the appellant by telephone. The call came from a correctional centre. The appellant asked about their child and money he left at the residence. The victim insisted that their relationship was over. The appellant protested. He apologized for the choking. The victim told him to stop calling and blocked the number from which he was calling.

Appellant's Antecedents

[13] At the time of sentencing, the appellant was 43 years old and employed in Richmond. The employer has indicated a willingness to continue the appellant's employment on his release from custody.

[14] The appellant has a criminal record with over 25 prior convictions as an adult. The record includes convictions for assault, sexual assault, assault causing bodily harm, assault of a police officer, uttering threats, unlawful confinement, and overcoming resistance by attempting to choke, suffocate or strangle another person.

[15] Crown counsel informed the sentencing judge of the circumstances surrounding some of the prior offences. The appellant took no issue with the facts.

[16] This included the fact that in October 2013, the appellant was sentenced in Cranbrook for offences involving his then-girlfriend. The appellant punched her in the face with a closed fist. The victim told police that the appellant kicked her, punched her, broke her nose, smashed her cell phone when she said she was going to call 9-1-1 and choked her six times, to the point that she could no longer breathe. He

was holding a knife and waving it around. The appellant was drinking, having consumed 12 to 15 beers.

[17] In January 2014, the appellant was sentenced for assaulting a stranger at a bus station. He tried to initiate contact of a sexual nature, despite the victim's repeated attempts to push him off.

[18] Also in January 2014, the appellant received a 14-month jail term for assault causing bodily harm against the same girlfriend who was the victim on the October 2013 matter. The appellant grabbed her by the throat three times and said he was "going to choke her out".

[19] In January 2016, the appellant received a 24-month prison sentence for various offences arising out of Alberta. These included offences of violence against a woman he met on a dating website. They got into an argument. She told him to leave. He punched and pushed her. She fell and he kicked her in the stomach and back. She tried to escape and the appellant choked her until she passed out. When she regained consciousness, the appellant was still punching and kicking her. It was 24 hours before the victim was able to reach out to a friend and seek assistance. She sustained two broken ribs, numerous bruises and a swollen throat.

Reasons of the Sentencing Judge

[20] The sentencing judge's reasons are brief.

[21] He began his analysis by stating that the joint submission for a global nine months' imprisonment was a "gift at such an extreme low end of things" that he was "having trouble" in deciding whether to accept it.

[22] The judge was concerned about the gravity of the physical conduct that underlay the assault, particularly the choking. He noted that choking "ranks right in there with wounding, maiming and all the other definitions of what constitutes an aggravated assault", the most serious form of assault under the *Code*.

[23] The judge was also concerned about the appellant's history of assaultive behaviour, including a propensity for choking:

[4] With your record of at least I think it is two sexual assaults, one in 2005, one I believe in 2013, if my memory serves me right, the number of assaults, the variety of the assaults, many of which also involve choking another human being, you are hardly in a position to be the white knight on a charger saving other people's lives. You are a fulltime project in and of yourself.

[5] I have no idea what [sic] in your background, whether it was in your childhood or other parts of your background, you came across the reflex that the way to control another person is to subdue them by choking them, but it is an ingrained pattern in you and one of these days somebody, probably unintentionally by yourself, will either have a heart attack or die or be otherwise very seriously injured by that kind of activity and then you will come to court and say, well, I didn't really mean that consequence, I only meant to have the person quieten down or stop using drugs. But you know, dead is dead.

[Emphasis added.]

[24] The judge noted that a sentencing court must "really pay attention" to joint submissions. However, he was of the view that the "appropriate sentence [for these offences], although very much at the bottom end, [was] 10 months." He gave the appellant 126 days credit for pre-sentence custody and ordered that while the appellant is serving his custodial sentence, he is not to have contact with the victim or her children: *Code*, s. 743.21. Finally, the judge imposed three years of probation. The probation order includes the following condition:

You are not to enter into any other intimate relationships without first advising your Probation Officer with the name, address and phone number of your proposed partner.

[25] The judge acknowledged that this condition was not "suggested by either counsel", but felt it was necessary because "other women have to be aware ... of what they are getting into".

Grounds for Appeal

[26] The appellant contends that the sentencing judge erred by exceeding the recommended nine-month prison term and including an "intimate relationships"

condition on the probation order. He asks that the custodial term be reduced to nine months and the impugned condition be deleted.

[27] The respondent Crown agrees that the prison term should be reduced by one month “to reflect the joint submission”. However, it submits that the probation order should remain intact. The conditions of that order were not the subject of a joint submission and the impugned condition is reasonable in light of the appellant’s history for domestic violence.

Analysis

Standard of Review

[28] This Court will only interfere with a sentence in the face of material error, or where the sentence is shown to be demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at paras. 56–57.

Joint Submissions on Sentence

[29] The principles governing joint submissions are well established. Where the Crown and defence agree to recommend a particular sentence in exchange for a guilty plea, the sentencing judge may only depart from the recommendation where the “proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest”: *R. v. Dunkers*, 2018 BCCA 363 at para. 38, citing *R. v. Anthony-Cook*, 2016 SCC 43 at para. 32.

Application of Principles — Prison Term

[30] The respondent agrees that the appellant’s imprisonment should be reduced from 10 to nine months. The concession is well founded.

[31] It is incontrovertible that violence in domestic relationships constitutes a serious offence. Indeed, s. 718.2(a)(ii) of the *Code* deems this form of assault an aggravating factor for the purpose of sentencing. In *R. v. Cuthbert*, 2007 BCCA 585, the Court made clear that violence against one’s spouse presents a serious societal concern, rendering denunciation and deterrence the primary principles applicable at

sentencing: at para. 57, citing *R. v. Edwards* (1996), 28 O.R. (3d) 54 (Ont. C.A.) at paras. 38–40.

[32] However, it is not apparent from the judge’s reasons how the proposed nine-month custodial term would bring the administration of justice into disrepute, or is otherwise contrary to the public interest. The judge expressed concern about the nature of the violence perpetrated by the appellant and his history of like-behaviour. However, he did not specify his reasons for departing from the joint submission. The judge also imposed a prison term that was only one month longer than the recommendation. This is not a substantial difference.

[33] The appellant entered guilty pleas, accepting responsibility for his offences, providing certainty in resolution and avoiding the necessity of a trial. Crown counsel told the sentencing judge that the victim was anxious about testifying and, in particular, concerned about her 16-year old son having to participate in the process. The guilty pleas spared the son from having to tell his story in open court. The victim was similarly relieved of this burden.

[34] Within this overall context, it is my view that the sentencing judge committed errors in principle in rejecting the joint submission for a nine-month prison term.

[35] First, as required by *Anthony-Cook* (at para. 58), he was obliged to give counsel an opportunity to make further submissions on the rationale behind their joint recommendation when he determined that he was “having trouble” accepting it. He did not do so.

[36] Second, the judge imposed a custodial sentence that exceeded the joint submission on custody by only one month. Respectfully, this amounted to “little more than tinkering”: *Anthony-Cook* at para. 63. The judge considered a 10-month prison term to be “at the bottom end” of the accepted range for the two offences. The parties’ recommendation was only one month lower. Generally, a one-month difference will not provide a sufficient basis to depart from a joint submission.

[37] I agree with the sentencing judge that nine months' imprisonment is a lenient sentence for this assault, given the nature of the underlying conduct and, importantly, the appellant's criminal history. His attitude towards the victim, as displayed at the sentencing hearing, is also troubling. He continued to blame her for what transpired.

[38] However, notwithstanding these features, a one-month difference between the perceived "bottom end" of the available range, and the joint recommendation, cannot reasonably be said to have rendered the proposed sentence "so unhinged from the circumstances of the offence and the offender that its acceptance would leave reasonable and informed persons ... to believe that the proper functioning of the justice system had broken down": *Anthony-Cook* at para. 34.

Application of Principles — Probation Order

[39] When imposing a probation order, sentencing judges have broad authority under s. 732.1(3)(h) of the *Code* to direct that the offender "comply with such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community."

[40] The principles governing this "residual clause" were addressed by Justice Fitch in *R. v. Duguay*, 2019 BCCA 53. Sentencing judges must ensure there is a "nexus" between any residual condition and "the offender, the protection of the community and the offender's reintegration into the community": at para. 65, citing *R. v. Shoker*, 2006 SCC 44 at para. 13.

[41] At the same time, judges must be allowed sufficient flexibility to craft sentences that are tailored to the circumstances of the case: *Duguay* at para. 66, citing *R. v. Knott*, 2012 SCC 42 at paras. 1–2, 10, 43. As a result, there are "only a few judicially-recognized limits on the kinds of conditions that can be imposed under the residual clause": *Duguay* at para. 66. The judge cannot delegate a judicial function. The conditions of the probation order must be "clear, unambiguous and enforceable". They must also be "reasonable" and "desirable" in light of the objectives of the particular order. Finally, probationary conditions must comply with

provincial and federal legislation, as well as the *Charter: Duguay* at para. 66, citing *Shoker* at para. 14, and *R. v. Traverse*, 2006 MBCA 7 at para. 24; see also *R. v. Goddard*, 2019 BCCA 164 at paras. 20–23.

[42] Deciding what residual conditions to include in a probation order involves an exercise of discretion. As such, an appellate court will intervene only where a sentencing judge has erred in principle, imposed a clearly unreasonable condition, or the probation order is manifestly inappropriate or renders the sentence unfit: *Goddard* at para. 19, citing *R. v. Bourque*, 2013 BCCA 447 at para. 25, and *Knott* at para. 61.

[43] The appellant does not argue that the condition in this case was clearly unreasonable, led to a manifestly inappropriate order, or rendered the sentence unfit. Instead, he says the sentencing judge erred by imposing a condition that was not recommended by the parties.

[44] Having reviewed the record, I am not persuaded that the probationary conditions suggested to the sentencing judge formed part of a joint submission, such that the *Dunkers* and *Anthony-Cook* principles apply.

[45] At the start of the hearing, Crown counsel told the judge that the parties agreed on a specific custodial term, but not the length of probation:

Your Honour, my friend and I are in agreement that an appropriate sentence is nine months of custody. Where we differ is the length of probation to follow. The Crown is seeking three years of probation to follow and I'm not entirely sure what my friend's position is but gather that it [is] less than that ...

[46] When it was time to speak to the content of the probation order, Crown counsel presented a set of conditions, describing them as ones that were sought by the Crown. The defence made no submissions on the proposed list. Instead, counsel for the defence focused his efforts on the length of probation. The conditions were not put before the Provincial Court as ones that were agreed upon in exchange for a guilty plea, or crafted between counsel:

[Crown counsel]: So I've typed up some conditions and I've given a copy to my friend. [The victim] has served Mr. Manca with family court documents, that was done here in court not long ago, and so hopefully that process will be well under way by the time Mr. Manca gets out and there will be no need to figure out contact with their child beyond that, that will already hopefully be in place by the time he's released, but the Crown is seeking no contact conditions with her and her children, no go contact conditions with her and her children, other than according to any family court order, no weapons, no alcohol, no drugs and counselling as directed by the probation officer.

[Emphasis added.]

[47] In light of the manner in which the process unfolded, I agree with the respondent that it was only the length of the custodial term that was presented as a joint submission. At best, the parties shared a common view on appropriate probationary conditions, but standing alone, this does not amount to the equivalent of a joint submission. As noted in para. 10 of *R. v. Smith*, 2004 BCCA 657, when matters proceed by way of joint submission, it is incumbent upon counsel to make clear to the sentencing judge what falls within the scope of the agreement.

[48] The type of condition complained of by the appellant has been previously endorsed by this Court. See, for example, *R. v. Joy*, 2011 BCCA 189, and *Bourque* at paras. 39–40.

[49] In the latter case, the appellant was required to “immediately advise” her probation officer “of any close, intimate, familiar, or familial relationships” and “refrain from continuing such a relationship” until that person was told of the appellant’s “criminal record and background” in the presence of the probation officer.

Justice Bennett held that the condition was logically connected to the risk presented by the appellant’s conduct and not too vague to be understood:

[39] These conditions prevent Ms. Bourque from forming relationships with or being around individuals who are unaware of her predilection for violence and may therefore be vulnerable. These conditions are designed to achieve maximum protection of the public. They also contribute to her rehabilitation since they minimize her opportunities to reoffend and reduce her potential for developing relationships that would negatively impact her rehabilitation.

[40] Ms. Bourque also submits that the term “familiar” is too vague to understand and therefore compliance will be difficult. In my view, this term is used in common parlance and means “well-acquainted with” in the context of personal relationships. This term is understandable and not vague.

[50] On the record in this case, I am satisfied it was reasonable for the sentencing judge to impose a condition requiring disclosure of the appellant's intimate relationships, to ensure that a probation officer has the opportunity to inform these persons of the appellant's criminal history for violence and the exposure to risk. Furthermore, similar to the situation in *Bourque*, including this condition on the order supports the appellant's rehabilitation by minimizing opportunities to re-offend.

[51] The appellant has been convicted of domestic violence-related offences on more than one occasion. The violence perpetrated by him was not insignificant. It has resulted in bodily harm. In one of the prior incidents, the appellant prevented a victim from reaching out for assistance by smashing her cell phone. He has convictions for confinement and overcoming resistance to his offending behaviour. In the present case, the victim's son had to ask the appellant three times to stop choking his mother before the appellant ceased. Choking is a form of violence the appellant has previously engaged in, causing his victims to lose consciousness. Although the appellant acknowledged responsibility for his assaultive behaviour at sentencing, he continued to justify it with reference to alleged conduct on the part of the victim.

[52] In my view, there is a logical and, indeed, compelling nexus between the residual probationary condition imposed by the sentencing judge, the nature of the appellant's offending, its entrenchment and the protection of society.

[53] Having said that, I consider it appropriate that the wording of the condition be clarified to make it more precise. In this regard, I find the language upheld in *Bourque* (at paras. 39–40) to be instructive, as it captures co-habitation and dating relationships. The appellant has offended in both contexts. However, as will be seen below, some modification is required to fit the appellant's circumstances.

Disposition

[54] For the reasons provided, I would grant the appellant an extension of time to apply for leave to appeal from sentence, grant leave to appeal, and allow the appeal in part.

[55] I would vary the sentence of 10 months' imprisonment on each of the two convictions by reducing it to nine months imprisonment (273 days), minus 126 days of credit for time spent in pre-sentence custody. This results in 147 days of imprisonment to serve on each offence, concurrent.

[56] I would not vary the length of the three-year probation orders. However, I would clarify the "intimate relationships" condition on the orders, substituting the current condition with this wording:

Upon release from the custodial portion of your sentence, you shall not continue with, or enter into, any dating, marriage or common law relationship until the other person in that relationship has been advised of your criminal record and background in the presence of your probation officer.

[57] At the hearing of the appeal, in response to a question posed by the Court, the respondent confirmed that the sentencing judge was obliged under the *Code* to impose a lifetime firearms prohibition in this case, but did not do so. It is appropriate for this Court to ensure that the mandatory order is in place.

[58] As such, pursuant to s.109(1)(a.1) of the *Code*, I would also order that:

- a) the appellant be prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life after release from his term of imprisonment; and
- b) the appellant be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life, running from the date of sentence.

[59] **NEWBURY J.A.:** I agree.

[60] **GRIFFIN J.A.:** I agree.

[61] **NEWBURY J.A.:** The appeal is allowed to the extent indicated.

Tab 18:

R. v. Osinde, 2021 BCCA 124

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Osinde*,
2021 BCCA 124

Date: 20210329
Docket: CA45911

Between:

Regina

Respondent

And

James Osinde

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant, referred to in this judgment by the initial X. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated April 12, 2018 (*R. v. Osinde*, Surrey Docket 217037-1).

Counsel for the Appellant: B.V. Bagnall

Counsel for the Respondent: M.A. Mereigh
S. Wan

Place and Date of Hearing: Vancouver, British Columbia
March 3, 2021

Place and Date of Judgment: Vancouver, British Columbia
March 29, 2021

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant challenges his conviction for sexual assault. He argues the judge materially misapprehended the evidence, unevenly evaluated his and the complainant's credibility, and failed to consider inconsistencies in the complainant's evidence. Held: Appeal allowed. The judge materially misapprehended evidence relating to a confrontation between the appellant and the complainant's friend. That misapprehension formed part of the judge's adverse credibility finding against the appellant, which played a critical role in the conviction. Based on this error alone, the appeal is allowed and a new trial ordered.

Reasons for Judgment of the Honourable Mr. Justice Frankel:**Introduction**

[1] James Osinde appeals his conviction on a charge of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46, following a trial in the Provincial Court of British Columbia before Judge La Prairie. Mr. Osinde was charged with sexually assaulting X. He testified that there was no sexual activity. Applying the principles in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, the trial judge did not believe Mr. Osinde or find that his evidence raised a reasonable doubt.

[2] Mr. Osinde argues that the trial judge erred by:

- (a) materially misapprehending the evidence relating to a confrontation between him and X's friend, Y;
- (b) unevenly evaluating his evidence and that of X; and
- (c) failing to consider inconsistencies in X's evidence.

[3] For the reasons that follow, I would allow this appeal on the first ground and, therefore, do not find it necessary to address the other grounds.

General Background

[4] On the night of September 5, 2015, X went for dinner and drinks with a friend before meeting Y at a bar in downtown Vancouver. At that time, X was living at Y's apartment. Due to a policy at Y's building, X could stay there only if Y was present. X and Y met Mr. Osinde and his roommate, Candy. Mr. Osinde and Candy had just

arrived downtown, and Mr. Osinde had a bottle of vodka. Mr. Osinde and Y were friends and occasionally intimate partners. X had never met Mr. Osinde before.

[5] As the bar was closing, Mr. Osinde, Candy, X, and Y decided to go to Mr. Osinde's residence in Surrey for some drinks. X agreed because she could not go to Y's apartment. They took a bus to Metrotown in Burnaby where they waited for a bus to Surrey. At this point, they were joined by a man that Candy appeared to know. As the buses had stopped running they took two taxis to Mr. Osinde's residence. They arrived there around 3:00 or 3:30 a.m.

[6] The group continued drinking and socializing. X testified that although she was not feeling drunk, she began to feel woozy and fell asleep on one of the couches in the living room. Mr. Osinde and Y were still awake and chatting. Candy had gone to her room. By this point, the man who had accompanied them to the residence had left.

[7] X testified that when she woke up, she was in Mr. Osinde's bed. Her pants and underwear were partially removed, and he was digitally penetrating her and kissing her vagina. She testified that she told him to stop and pushed him away. She managed to get out of bed and put her clothes back on. She then lay back down in the bed and went back to sleep.

[8] Next, X testified that she woke up to Mr. Osinde having sexual intercourse with her without her consent. She again told him no and pushed him off. She got up, gathered her clothing and dressed, and went to the living room where she fell asleep on a couch.

[9] Mr. Osinde testified there was no sexual activity. Although the testimony of both Mr. Osinde and X was largely similar up until the point that X went to sleep, their diametrically different accounts about the allegations led the trial judge to observe that "[t]he main issue, in this case, is one of credibility": at para. 5.

[10] X testified that when she woke up on the couch the next morning she wanted to leave. After food, more drinks, and additional sleep for some of the people in the

residence, X convinced Y to leave, and the two of them left Mr. Osinde's residence in the afternoon. Once outside, X told Y she had been sexually assaulted. Y then went back inside and confronted Mr. Osinde. Y testified that she threw a beer can at Mr. Osinde, and then a girl who was there (presumably Candy) asked her "What the hell?", and Y said "Fucking ask him." Mr. Osinde testified that Y came in and shouted either "What did you do?" or "Why did you do that?", and that he replied "Do what?" In neither of these accounts did Y say she confronted Mr. Osinde about a sexual assault. The Crown cross-examined Mr. Osinde on the confrontation with Y. He denied that Y accused him of having "raped" X, or told him that X said he had sexually assaulted her. Mr. Osinde was consistent in his testimony that he did not know the reason for the confrontation.

[11] Following this confrontation, Y rejoined X and the two of them returned to Vancouver. They attended at Vancouver General Hospital where X underwent a sexual assault examination. X later reported the assault to the police.

[12] During his testimony, Mr. Osinde gave inconsistent answers with respect to whether he had been drinking alcohol on the way back to Surrey.

Analysis

[13] As noted above, Mr. Osinde submits that the trial judge materially misapprehended the evidence relating to the confrontation, namely, that the judge concluded Y had specifically confronted Mr. Osinde about a sexual assault. Mr. Osinde submits this influenced the judge's decision with respect to his credibility.

[14] The trial judge's findings with respect to the confrontation are as follows:

[27] ... I place little reliance upon [Y's] evidence, other than she confirmed that [X] told her that day that she had been raped by Mr. Osinde. [Y] confronted Mr. Osinde about this prior to leaving the residence with [X].

[28] Mr. Osinde acknowledges in his evidence that he was confronted by [Y] prior to her leaving the residence with [X], but he denies knowing what she was upset about. I do not accept his testimony on this and I am satisfied that he was confronted by [Y] about having raped [X].

[Emphasis added.]

[15] Immediately after, the judge went on to discuss Mr. Osinde's credibility:

[29] I do not find Mr. Osinde to be a credible witness. He was inconsistent in his testimony and became argumentative with the Crown in cross-examination. An example of his inconsistent testimony concerns whether he had anything to drink prior to arriving home early in the morning of September 6, 2015. In direct examination, he testified that he did not have anything to drink before arriving home from downtown Vancouver. In cross-examination he was asked if he had a bottle of alcohol with him when he was in downtown Vancouver and he testified that he had one, stating, "I was drinking". When this inconsistency was pointed out to him, Mr. Osinde testified that he considers a drink to be a shot out of a glass.

[30] Mr. Osinde confirmed that he was carrying a bag with a bottle of alcohol, but he denied that he drank from the bottle and explained that he thought the Crown was referring to cans of Coke when asked if he had been drinking. Further, he feigned knowing what a sip was when the Crown asked if he had sipped any of the vodka in his possession. He again stated that he did not have a drop of alcohol prior to arriving home in Surrey that morning. Mr. Osinde clearly testified that he had a bottle of alcohol in his possession when he was returning home to Surrey from downtown Vancouver. He testified he was drinking.

[31] When he realized that he had contradicted his direct evidence on this issue, he tried to backtrack and explained that he was confused about the questions he was asked by the Crown. His response that he thought the Crown was referring to Coke and backtracking on his clear response that he was drinking was an attempt to mislead the court. [X] testified that Mr. Osinde was drinking on the way back to Surrey. [Y] also testified that Mr. Osinde was drinking on the way back to Surrey.

[32] I find that Mr. Osinde was drinking alcohol while he was in downtown Vancouver and while travelling to Surrey with a group of people. I am satisfied that he lied to the court concerning whether he had consumed alcohol prior to arriving home in Surrey that morning. This is but one example of Mr. Osinde being inconsistent in his testimony. It is also an example of his being untruthful under oath. Thus, I reject Mr. Osinde's testimony, other than those portions that corroborate the testimony of [X] concerning the events leading up to the sexual assault. Mr. Osinde is not a credible witness.

[16] The Crown submits there was no misapprehension of the evidence concerning the confrontation between Y and Mr. Osinde, but that if there was, then para. 28 can be "excised" from the judgment, as it served only as narrative background and was not material to any credibility findings. The Crown says this would leave the trial judge's findings with respect to Mr. Osinde's credibility unaffected.

[17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes “as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction”: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence “may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence”: *Morrissey* at 218.

[18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge’s reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.

[19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.

[20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: “[t]he plain language or the thrust of the reasons must disclose an actual mistake”: *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56–57, 59, 61–62. If so, then the reasoning that led to a conviction is based

on “unsteady ground”: *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge’s reasoning process.

[21] Bearing those principles in mind, I find that Mr. Osinde has met this high bar. In my view, the trial judge materially misapprehended the evidence with respect to the confrontation between Y and Mr. Osinde. Neither testified that Y specifically accused Mr. Osinde of sexual assault and Mr. Osinde testified he did not know why Y confronted him. However, the judge was “satisfied that [Mr. Osinde] was confronted by [Y] about having raped [X]” (emphasis added): at para. 28. Additionally, in the previous paragraph, the judge said that “I place little reliance upon [Y’s] evidence, other than she confirmed that [X] told her that day that she had been raped by Mr. Osinde. [Y] confronted Mr. Osinde about this prior to leaving the residence with [X]” (emphasis added): at para. 27. When these two sentences are read together, “this” can only be taken to refer to Mr. Osinde sexually assaulting X. In other words, the judge disbelieved Mr. Osinde’s testimony about the confrontation because he mistakenly believed Y had testified she specifically confronted Mr. Osinde about a sexual assault.

[22] The Crown submits para. 28 of the reasons can be excised as immediately thereafter the trial judge stated he did not find Mr. Osinde to be a credible witness because “[h]e was inconsistent in his testimony and became argumentative with the Crown in cross-examination”: at para. 29. The judge then referred in some detail to the inconsistent evidence Mr. Osinde had given with respect to whether he had been drinking on the way back to Surrey, finding that Mr. Osinde had lied when he denied he had been drinking. The judge stated the drinking issue was “but one example of Mr. Osinde being inconsistent in his testimony ... [and] also an example of his being untruthful under oath” (emphasis added): at para. 32.

[23] The Crown says there are other inconsistencies in Mr. Osinde’s testimony that the judge could have been referring to, such as: (1) Mr. Osinde’s assertions that the weekend in question was like any other weekend (which the Crown says should be taken to mean he had no independent memory of the weekend) compared to his

claim that he remembered specific times and was good at remembering numbers; (2) Mr. Osinde's assertions that he would return from the bar to drink at home compared to his claim that there was a lock on the fridge so he could not take alcohol out of it; and (3) Mr. Osinde's assertions that only one side of the bed could be the "right" side of the bed compared to photographs demonstrating that what is the "right" side will be relative to which way one is facing.

[24] I do not see the matters referred to by the Crown as amounting to internal inconsistencies in Mr. Osinde's testimony. An inconsistency in testimony occurs when a witness gives evidence that is not in accordance with their previous evidence in the proceedings or is at odds with what they said on a prior occasion.

[25] In my view, when the reasons are read in their entirety, it is apparent that the trial judge regarded Mr. Osinde's evidence concerning the confrontation with Y as a lie and an example of his being dishonest in his testimony. That finding, which was based on a misapprehension of the evidence, was one of the building blocks on which the judge rested his conclusion that Mr. Osinde was not credible. Credibility was a critical issue at the trial.

[26] The trial judge found X to be a credible witness and that there was support for her evidence, including the photographs of the layout of Mr. Osinde's bedroom. However, the judge's rejection of Mr. Osinde's denial of sexual activity with X was predicated, at least in part, on a finding that he lied about not knowing the reason behind the confrontation initiated by Y. The judge erroneously understood Y had explicitly accused Mr. Osinde of sexually assaulting X. That was the very subject matter of the charge. Disbelieving Mr. Osinde on that issue was not insignificant and the reasons for judgment reveal a clear link between the perceived lie, the assessment of Mr. Osinde's credibility, and the rejection of his denial of sexual activity with X. It cannot be said with confidence that had the material misapprehension not occurred, the trial judge would have found that Mr. Osinde's testimony did not raise a reasonable doubt. Accordingly, it follows that there has been a miscarriage of justice and the conviction cannot stand.

Disposition

[27] I would allow this appeal, set aside the conviction, and order a new trial.

“The Honourable Mr. Justice Frankel”

I AGREE:

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

Tab 19:

R. v. Spencer, 2014 SCC 43

Matthew David Spencer *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Alberta,
Privacy Commissioner of Canada,
Canadian Civil Liberties Association and
Criminal Lawyers' Association
of Ontario** *Interveners*

INDEXED AS: R. v. SPENCER

2014 SCC 43

File No.: 34644.

2013: December 9; 2014: June 13.*

Present: McLachlin C.J. and LeBel, Abella, Rothstein,
Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
SASKATCHEWAN

Constitutional law — Charter of Rights — Search and seizure — Privacy — Police having information that IP address used to access or download child pornography — Police asking Internet service provider to voluntarily provide name and address of subscriber assigned to IP address — Police using information to obtain search warrant for accused's residence — Whether police conducted unconstitutional search by obtaining subscriber information matching IP address — Whether evidence obtained as a result should be excluded — Whether fault element of making child pornography available requires proof of positive facilitation — Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014(1) — Personal Information Protection and Electronic Documents Act,

Matthew David Spencer *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

**Directeur des poursuites pénales,
procureur général de l'Ontario,
procureur général de l'Alberta,
commissaire à la protection de la vie
privée du Canada, Association canadienne
des libertés civiles et Criminal Lawyers'
Association of Ontario** *Intervenants*

RÉPERTORIÉ : R. c. SPENCER

2014 CSC 43

N° du greffe : 34644.

2013 : 9 décembre; 2014 : 13 juin*.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA
SASKATCHEWAN

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Protection des renseignements personnels — Police détenant des renseignements selon lesquels une adresse IP a été utilisée pour avoir accès à de la pornographie juvénile ou pour la télécharger — Demande de la police au fournisseur de services Internet de lui fournir volontairement le nom et l'adresse de l'abonnée à qui appartient l'adresse IP — Utilisation de ces renseignements par la police pour obtenir un mandat lui permettant de perquisitionner dans la résidence de l'accusé — La police a-t-elle effectué une fouille ou une perquisition inconstitutionnelle lorsqu'elle a obtenu les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP? — La preuve ainsi obtenue devrait-elle être

* A motion to amend the reasons was granted on November 6, 2014, amending para. 12. The amendments are included in these reasons.

* Une requête en modification des motifs a été accordée le 6 novembre 2014 modifiant le par. 12. Les modifications ont été incorporées dans les présents motifs.

S.C. 2000, c. 5, s. 7(3)(c.1)(ii) — Canadian Charter of Rights and Freedoms, s. 8.

The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. The request was purportedly made pursuant to s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. This led them to the accused. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available. The Court of Appeal upheld the conviction, however set aside the acquittal on the making available charge and ordered a new trial.

Held: The appeal should be dismissed.

Whether there is a reasonable expectation of privacy in the totality of the circumstances is assessed by considering and weighing a large number of interrelated factors. The main dispute in this case turns on the subject matter of the search and whether the accused's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

When defining the subject matter of a search, courts have looked not only at the nature of the precise information sought, but also at the nature of the information that it reveals. In this case, the subject matter of the search was not simply a name and address of someone in a contractual relationship with the ISP. Rather, it was the

écartée? — L'élément de faute de l'infraction qui consiste à rendre accessible la pornographie juvénile exige-t-il la preuve d'un appui délibéré? — Code criminel, L.R.C. 1985, ch. C-46, art. 163.1(3), (4), 487.014(1) — Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5, art. 7(3)(c.1)(ii) — Charte canadienne des droits et libertés, art. 8.

La police a découvert l'adresse de protocole Internet (IP) de l'ordinateur qu'une personne avait utilisé pour accéder à de la pornographie juvénile et pour la stocker à l'aide d'un programme de partage de fichiers. Elle a ensuite obtenu auprès du fournisseur de services Internet (FSI), sans autorisation judiciaire préalable, les renseignements relatifs à l'abonnée à qui appartenait cette adresse IP. Il s'agit d'une demande qui aurait été fondée sur le sous-al. 7(3)(c.1)(ii) de la *Loi sur la protection des renseignements personnels et les documents électroniques (LPRPDE)*. Les policiers ont ainsi découvert l'accusé. Celui-ci avait téléchargé de la pornographie juvénile à partir d'Internet avant de sauvegarder les fichiers en question dans un répertoire qui était accessible à d'autres internautes utilisateurs du même programme de partage de fichiers. L'accusé a été inculpé et déclaré coupable au procès de possession de pornographie juvénile, mais il a été acquitté de l'accusation de la rendre accessible. La Cour d'appel a confirmé la déclaration de culpabilité; elle a cependant annulé l'acquittement et ordonné la tenue d'un nouveau procès.

Arrêt : Le pourvoi est rejeté.

On détermine s'il existe une attente raisonnable en matière de respect de la vie privée, compte tenu de l'ensemble des circonstances, en examinant et en soulevant un grand nombre de facteurs interreliés. Dans la présente affaire, le litige porte principalement sur l'objet de la fouille ou de la perquisition et sur la question de savoir si l'attente subjective de l'accusé en matière de vie privée était raisonnable. Les deux éléments pertinents pour déterminer le caractère raisonnable de son attente au respect de sa vie privée sont, d'une part, la nature de l'intérêt en matière de vie privée qui est en jeu et, d'autre part, le cadre législatif et contractuel régissant la communication par le FSI des renseignements relatifs à l'abonnée.

Pour définir l'objet d'une fouille ou d'une perquisition, les tribunaux examinent non seulement la nature des renseignements précis recherchés, mais aussi la nature des renseignements qui sont ainsi révélés. En l'espèce, la fouille ou la perquisition n'avait pas simplement pour objet le nom et l'adresse d'une personne qui était liée

identity of an Internet subscriber which corresponded to particular Internet usage.

The nature of the privacy interest engaged by the state conduct turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. In this case, the primary concern is with informational privacy. Informational privacy is often equated with secrecy or confidentiality, and also includes the related but wider notion of control over, access to and use of information. However, particularly important in the context of Internet usage is the understanding of privacy as anonymity. The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. Subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual's identity as the source, possessor or user of that information. Some degree of anonymity is a feature of much Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure. In this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized in other circumstances as engaging significant privacy interests.

There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. In this case, the contractual and statutory frameworks overlap and the relevant provisions provide little assistance in evaluating the reasonableness of the accused's expectation of privacy. Section 7(3)(c.1)(ii) of *PIPEDA* cannot be used as a factor to weigh against the

par contrat au FSI. Il s'agissait plutôt de l'identité d'une abonnée aux services Internet à qui correspondait une utilisation particulière de ces services.

La nature de l'intérêt en matière de vie privée visé par l'action de l'État tient au caractère privé du lieu ou de l'objet visé par la fouille ou la perquisition ainsi qu'aux conséquences de cette dernière pour la personne qui en fait l'objet, et non à la nature légale ou illégale de la chose recherchée. En l'espèce, on s'intéresse principalement au caractère privé des renseignements personnels. Ce dernier est souvent assimilé à la confidentialité. Il comprend également la notion connexe, mais plus large, de contrôle sur l'accès à l'information et sur l'utilisation des renseignements. L'anonymat en tant que facette du droit à la vie privée revêt cependant une importance particulière dans le contexte de l'utilisation d'Internet. Il faut reconnaître que l'identité d'une personne liée à son utilisation d'Internet donne naissance à un intérêt en matière de vie privée qui a une portée plus grande que celui inhérent à son nom, à son adresse et à son numéro de téléphone qui figurent parmi les renseignements relatifs à l'abonné. En établissant un lien entre des renseignements particuliers et une personne identifiable, les renseignements relatifs à l'abonné peuvent compromettre les droits en matière de vie privée quant à l'identité d'une personne en tant que source, possesseur ou utilisateur des renseignements visés. Un certain degré d'anonymat est propre à beaucoup d'activités menées sur Internet et l'anonymat pourrait donc, compte tenu de l'ensemble des circonstances, servir de fondement au droit à la vie privée visé par la protection constitutionnelle contre les fouilles, les perquisitions et les saisies abusives. En l'espèce, la demande de la police, dans le but d'établir un lien entre une adresse IP donnée et les renseignements relatifs à l'abonnée, visait en fait à établir un lien entre une personne précise et des activités en ligne précises. Ce genre de demande concerne, en ce qui a trait aux renseignements personnels, le droit à la vie privée relatif à l'anonymat puisqu'elle vise à établir un lien entre le suspect et des activités entreprises en ligne sous le couvert de l'anonymat, activités qui, comme on l'a reconnu dans d'autres circonstances, mettent en jeu d'importants droits en matière de vie privée.

Il ne fait aucun doute que les cadres législatif et contractuel peuvent aussi être pertinents, mais pas nécessairement déterminants, quant à la question de savoir s'il existe une attente raisonnable en matière de vie privée. En l'espèce, les cadres contractuel et législatif se chevauchent et les dispositions applicables ne sont guère utiles pour évaluer le caractère raisonnable de l'attente de l'accusé au respect de sa vie privée. Le sous-al. 7(3)c.1(ii)

existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. It would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent. The contractual provisions in this case support the existence of a reasonable expectation of privacy. The request by the police had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. In the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. Therefore, the request by the police that the ISP voluntarily disclose such information amounts to a search.

Whether the search in this case was lawful will be dependent on whether the search was authorized by law. Neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries. *PIPEDA* is a statute whose purpose is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, the police do not gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information. The conduct of the search in this case therefore violated the *Charter*. Without the subscriber information obtained by the police, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant and the search of the residence was therefore unlawful and violated the *Charter*.

de la *LPRPDE* ne peut être considéré comme un des facteurs défavorables à l'existence d'une attente raisonnable en matière de vie privée puisque l'interprétation juste de la disposition applicable dépend elle-même de l'existence d'une telle attente raisonnable en matière de vie privée. Il serait raisonnable que l'internaute s'attende à ce qu'une simple demande faite par la police n'entraîne pas l'obligation de communiquer les renseignements personnels en question ou n'écarte pas l'interdiction générale prévue par la *LPRPDE* quant à la communication de renseignements personnels sans le consentement de l'intéressé. Les dispositions du contrat en l'espèce justifient l'existence d'une attente raisonnable en matière de vie privée. La demande de renseignements n'était pas étayée par la source de l'autorité légitime de la police, en ce sens que cette dernière pouvait formuler une demande, mais ne détenait pas l'autorité pour obliger le fournisseur à s'y conformer. Compte tenu de l'ensemble des circonstances de la présente affaire, il existe une attente raisonnable en matière de vie privée à l'égard des renseignements relatifs à l'abonnée. La demande faite par la police visant la communication volontaire par le FSI de renseignements de cette nature constitue donc une fouille.

La question de savoir si la fouille effectuée en l'espèce était légitime est subordonnée à celle de savoir si elle était autorisée par la loi. Ni le par. 487.014(1) du *Code criminel*, ni la *LPRPDE* n'ont pour effet de conférer à la police des pouvoirs en matière de fouilles, de perquisitions ou de saisies. Le paragraphe 487.014(1) est une disposition déclaratoire qui confirme les pouvoirs de common law permettant aux policiers de formuler des questions. La *LPRPDE* est une loi qui a pour objet d'accroître la protection des renseignements personnels. Puisque, en l'espèce, les policiers n'avaient pas le pouvoir d'effectuer une fouille ou une perquisition pour obtenir des renseignements relatifs à l'abonnée en l'absence de circonstances contraignantes ou d'une loi qui n'a rien d'abusif, ils ne peuvent obtenir un nouveau pouvoir en matière de fouille ou de perquisition par l'effet combiné d'une disposition déclaratoire et d'une disposition adoptée afin de favoriser la protection des renseignements personnels. L'exécution de la fouille ou de la perquisition en l'espèce violait donc la *Charte*. Si les renseignements relatifs à l'abonnée ne lui avaient pas été communiqués, la police n'aurait pas pu obtenir le mandat. Par conséquent, si ces renseignements sont écartés (ce qui doit être le cas, parce qu'ils ont été obtenus d'une façon inconstitutionnelle), il n'y avait aucun motif valable justifiant la délivrance d'un mandat. La fouille ou la perquisition à la résidence était donc abusive et violait la *Charte*.

The police, however, were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute. While the impact of the *Charter*-infringing conduct on the *Charter*-protected interests of the accused weighs in favour of excluding the evidence, the offences here are serious. Society has a strong interest in the adjudication of the case and also in ensuring the justice system remains above reproach in its treatment of those charged with these serious offences. Balancing the three factors, the exclusion of the evidence rather than its admission would bring the administration of justice into disrepute. The admission of the evidence is therefore upheld.

There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require however, that the accused must knowingly, by some positive act, facilitate the availability of the material. The offence is complete once the accused knowingly makes pornography available to others. Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, the error could reasonably be thought to have had a bearing on the trial judge's decision to acquit. The order for a new trial is affirmed.

Cases Cited

Referred to: *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dymnt*, [1988] 2 S.C.R. 417; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Collins*, [1987] 1 S.C.R. 265;

Les policiers se sont toutefois servi de ce qu'ils croyaient raisonnablement être des moyens légitimes pour poursuivre un objectif important visant l'application de la loi. Par sa nature, la conduite des policiers en l'espèce ne serait pas susceptible de déconsidérer l'administration de la justice. Bien que l'incidence de la conduite attentatoire sur les droits de l'accusé garantis par la *Charte* favorise l'exclusion de la preuve, les infractions reprochées en l'espèce sont graves. La société a un intérêt manifeste à ce que l'affaire soit jugée et à ce que le fonctionnement du système de justice demeure irréprochable au regard des individus accusés de ces infractions graves. Une mise en balance de ces trois facteurs permet de conclure que c'est l'exclusion de la preuve, et non son admission, qui serait susceptible de déconsidérer l'administration de la justice. L'admission de la preuve est donc confirmée.

Il n'est pas contesté que, dans le cadre d'une poursuite sous le régime du par. 163.1(3) du *Code criminel*, il faut prouver que l'accusé avait connaissance du fait que le matériel pornographique était rendu accessible à d'autres personnes. Il n'est toutefois pas nécessaire que l'accusé doive sciemment, par une certaine action délibérée, faciliter l'accessibilité au matériel. Les éléments de l'infraction sont tous réunis lorsque l'accusé rend sciemment la pornographie accessible à d'autres personnes. Puisque l'aveuglement volontaire était une question en litige et que l'erreur du juge du procès — lorsqu'il a conclu qu'il était nécessaire d'accomplir une action délibérée pour satisfaire à l'exigence de la *mens rea* de l'infraction de rendre accessible — lui a fait omettre l'examen de cette question, il serait raisonnable de penser que cette erreur a eu une incidence sur le verdict d'acquiescement. L'ordonnance prescrivant la tenue d'un nouveau procès est confirmée.

Jurisprudence

Arrêts mentionnés : *R. c. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Dymnt*, [1988] 2 R.C.S. 417; *R. c. Plant*, [1993] 3 R.C.S. 281; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733; *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34; *R. c. Gomboc*, 2010 CSC 55, [2010] 3 R.C.S. 211; *R. c. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456; *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *McInerney c. MacDonald*, [1992] 2 R.C.S. 138; *R. c. Duarte*, [1990] 1 R.C.S. 30; *R. c. Wise*, [1992] 1 R.C.S. 527; *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253; *R. c. Vu*, 2013 CSC 60, [2013] 3 R.C.S.

R. v. McNeice, 2010 BCSC 1544 (CanLII); *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).
Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014.

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01, s. 29(2)(g).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, ss. 3, 5(3), 7, Sch. 1, cl. 4.3.

Authors Cited

Canada. Report of the Task Force established by the Department of Communications/Department of Justice. *Privacy and Computers*. Ottawa: Information Canada, 1972.

Gleicher, Nathaniel. “Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web” (2009), 118 *Yale L.J.* 1945.

Guterman, Melvin. “A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance” (1988), 39 *Syracuse L. Rev.* 647.

Hubbard, Robert W., Peter DeFreitas and Susan Magotiaux. “The Internet — Expectations of Privacy in a New Context” (2002), 45 *Crim. L.Q.* 170.

Hunt, Chris D. L. “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2011), 37 *Queen’s L.J.* 167.

Paton-Simpson, Elizabeth. “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305.

Slane, Andrea, and Lisa M. Austin. “What’s In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations” (2011), 57 *Crim. L.Q.* 486.

Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1970.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Cameron, Ottenbreit and Caldwell JJ.A.), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, affirming the accused’s conviction for

657; *R. c. Collins*, [1987] 1 R.C.S. 265; *R. c. McNeice*, 2010 BCSC 1544 (CanLII); *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411; *R. c. Graveline*, 2006 CSC 16, [2006] 1 R.C.S. 609.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 24(2).

Code criminel, L.R.C. 1985, ch. C-46, art. 163.1(3), (4), 487.014.

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, ch. F-22.01, art. 29(2)(g).

Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5, art. 3, 5(3), 7, ann. 1, art. 4.3.

Doctrine et autres documents cités

Canada. Rapport du groupe d’étude établi conjointement par le ministère des Communications et le ministère de la Justice. *L’ordinateur et la vie privée*. Ottawa : Information Canada, 1972.

Gleicher, Nathaniel. « Neither a Customer Nor a Subscriber Be : Regulating the Release of User Information on the World Wide Web » (2009), 118 *Yale L.J.* 1945.

Guterman, Melvin. « A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance » (1988), 39 *Syracuse L. Rev.* 647.

Hubbard, Robert W., Peter DeFreitas and Susan Magotiaux. « The Internet — Expectations of Privacy in a New Context » (2002), 45 *Crim. L.Q.* 170.

Hunt, Chris D. L. « Conceptualizing Privacy and Elucidating its Importance : Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort » (2011), 37 *Queen’s L.J.* 167.

Paton-Simpson, Elizabeth. « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305.

Slane, Andrea, and Lisa M. Austin. « What’s In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations » (2011), 57 *Crim. L.Q.* 486.

Westin, Alan F. *Privacy and Freedom*. New York : Atheneum, 1970.

POURVOI contre un arrêt de la Cour d’appel de la Saskatchewan (les juges Cameron, Ottenbreit et Caldwell), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, qui a confirmé la déclaration de culpabilité

possession of child pornography and setting aside the accused's acquittal for making available child pornography entered by Foley J., 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, and ordering a new trial. Appeal dismissed.

Aaron A. Fox, Q.C., and Darren Kraushaar, for the appellant.

Anthony B. Gerein, for the respondent.

Ronald C. Reimer and David Schermbrucker, for the intervener the Director of Public Prosecutions.

Susan Magotiaux and Allison Dellandrea, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Mahmud Jamal, Patricia Kosseim, Daniel Caron and Sarah Speevak, for the intervener the Privacy Commissioner of Canada.

Anil K. Kapoor and Lindsay L. Daviau, for the intervener the Canadian Civil Liberties Association.

Jonathan Dawe and Jill R. Presser, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The Internet raises a host of new and challenging questions about privacy. This appeal relates to one of them.

[2] The police identified the Internet Protocol (IP) address of a computer that someone had been

de l'accusé quant à l'infraction de possession de pornographie juvénile et annulé son acquittement quant à l'infraction de rendre accessible la pornographie juvénile prononcés par le juge Foley, 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, et ordonné la tenue d'un nouveau procès. Pourvoi rejeté.

Aaron A. Fox, c.r., et Darren Kraushaar, pour l'appellant.

Anthony B. Gerein, pour l'intimée.

Ronald C. Reimer et David Schermbrucker, pour l'intervenant le directeur des poursuites pénales.

Susan Magotiaux et Allison Dellandrea, pour l'intervenant le procureur général de l'Ontario.

Jolaine Antonio, pour l'intervenant le procureur général de l'Alberta.

Mahmud Jamal, Patricia Kosseim, Daniel Caron et Sarah Speevak, pour l'intervenant le commissaire à la protection de la vie privée du Canada.

Anil K. Kapoor et Lindsay L. Daviau, pour l'intervenante l'Association canadienne des libertés civiles.

Jonathan Dawe et Jill R. Presser, pour l'intervenante Criminal Lawyers' Association of Ontario.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] L'existence d'Internet remet en question la protection de la vie privée et soulève une multitude de questions inédites et épineuses à cet égard. Le présent pourvoi porte sur une de ces questions.

[2] La police a découvert l'adresse de protocole Internet (IP) de l'ordinateur qu'une personne avait

using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. This led them to the appellant, Mr. Spencer. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available.

[3] At trial, Mr. Spencer claimed that the police had conducted an unconstitutional search by obtaining subscriber information matching the IP address and that the evidence obtained as a result should be excluded. He also testified that he did not know that others could have access to the shared folder and argued that he therefore did not knowingly make the material in the folder available to others. The trial judge concluded that there had been no breach of Mr. Spencer's right to be secure against unreasonable searches and seizures. However, he was of the view that the "making available" offence required some "positive facilitation" of access to the pornography, which Mr. Spencer had not done, and further he believed Mr. Spencer's evidence that he did not know that others could access his folder so that the fault element (*mens rea*) of the offence had not been proved. The judge therefore convicted Mr. Spencer of the possession offence, but acquitted him of the making available charge.

[4] The Court of Appeal upheld the conviction for possession of child pornography, agreeing with the trial judge that obtaining the subscriber information was not a search and holding that even if it were a search, it would have been reasonable. The court, however, set aside the acquittal on the making available charge on the basis that the trial judge had been wrong to require proof of positive facilitation

utilisé pour accéder à de la pornographie juvénile et pour la stocker à l'aide d'un programme de partage de fichiers. Les policiers ont ensuite obtenu auprès du fournisseur de services Internet (FSI), sans autorisation judiciaire préalable, les renseignements relatifs à l'abonnée à qui appartenait cette adresse IP. Ils ont ainsi découvert l'appellant, M. Spencer. Celui-ci avait téléchargé de la pornographie juvénile dans un répertoire qui était accessible à d'autres internautes utilisateurs du même programme de partage de fichiers. M. Spencer a été inculpé, puis, au procès, déclaré coupable de possession de pornographie juvénile et acquitté de l'infraction de rendre accessible de la pornographie juvénile.

[3] Au procès, M. Spencer a fait valoir que la police avait effectué une fouille ou une perquisition inconstitutionnelle lorsqu'elle a obtenu les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP et que la preuve ainsi obtenue devait être écartée. Il a également déclaré dans son témoignage qu'il ignorait que d'autres personnes pouvaient avoir accès au répertoire partagé et qu'il n'a donc pas sciemment rendu les fichiers accessibles. Le juge du procès a conclu qu'il n'y avait pas eu de violation du droit de M. Spencer à la protection contre les fouilles, les perquisitions et les saisies abusives. Il a toutefois estimé que pour être déclaré coupable de l'infraction de « rendre accessible » il faut avoir donné un certain [TRADUCTION] « appui délibéré » à l'accès à la pornographie, ce que M. Spencer n'avait pas fait. Il a également jugé que la déposition de M. Spencer selon laquelle il ignorait que d'autres personnes pouvaient avoir accès à son répertoire était véridique, de sorte que l'élément de faute de cette infraction (*mens rea*) n'avait pas été établi. Le juge a donc déclaré M. Spencer coupable de l'infraction de possession, mais l'a acquitté de l'accusation de rendre accessible.

[4] La Cour d'appel a confirmé la déclaration de culpabilité pour possession de pornographie juvénile, souscrivant à la conclusion du juge du procès selon laquelle le fait d'obtenir les renseignements relatifs à l'abonnée ne constituait pas une fouille ou une perquisition et concluant que, même s'il y en avait eu une, elle aurait été raisonnable. La cour a cependant annulé l'acquiescement quant à l'accusation

of access by others to the material. A new trial was ordered on this charge.

de rendre accessible au motif que le juge du procès avait eu tort d'exiger la preuve d'un appui délibéré à l'accès aux fichiers par d'autres personnes et elle a ordonné la tenue d'un nouveau procès quant à ce chef d'accusation.

[5] The appeal to this Court raises four issues which I would resolve as follows:

[5] Le présent pourvoi soulève quatre questions auxquelles je suis d'avis de répondre comme suit :

1. Did the police obtaining the subscriber information matching the IP address from the ISP constitute a search?

1. L'obtention par la police, auprès du FSI, des renseignements sur l'abonnée à qui appartenait l'adresse IP constitue-t-elle une fouille ou une perquisition?

In my view, it did.

Je suis d'avis que oui.

2. If so, was the search authorized by law?

2. Si oui, la fouille ou la perquisition était-elle autorisée par la loi?

In my view, it was not.

Je suis d'avis que non.

3. If not, should the evidence obtained as a result be excluded?

3. Sinon, la preuve ainsi obtenue devrait-elle être écartée?

In my view, the evidence should not be excluded.

J'estime que la preuve ne devrait pas être écartée.

4. Did the trial judge err with respect to the fault element of the "making available" offence?

4. Le juge du procès a-t-il commis une erreur relativement à l'élément de faute de l'infraction qui consiste à « rendre accessible »?

The judge did err and I would uphold the Court of Appeal's order for a new trial.

Le juge a effectivement commis une erreur et je suis d'avis de confirmer l'ordonnance de la Cour d'appel visant la tenue d'un nouveau procès.

II. Analysis

II. Analyse

- A. *Did the Police Obtaining the Subscriber Information Matching the IP Address From the ISP Constitute a Search?*

- A. *L'obtention par la police, auprès du FSI, des renseignements sur l'abonnée à qui appartenait l'adresse IP constitue-t-elle une fouille ou une perquisition?*

[6] Mr. Spencer maintains that the police were conducting a search when they obtained the subscriber information associated with the IP address from the ISP, Shaw Communications Inc. The respondent Crown takes the opposite view. I agree with Mr. Spencer on this point. I will first set out a

[6] Monsieur Spencer soutient que la police effectuait une fouille ou une perquisition lorsqu'elle a obtenu, auprès du FSI, Shaw Communications Inc., les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP en cause en l'espèce. Le ministère public intimé adopte le point de vue

summary of the relevant facts then turn to the legal analysis.

(1) Facts and Judicial History

[7] Mr. Spencer, who lived with his sister, connected to the Internet through an account registered in his sister's name. He used the file-sharing program LimeWire on his desktop computer to download child pornography from the Internet. LimeWire is a free peer-to-peer file-sharing program that, at the time, anyone could download onto their computer. Peer-to-peer systems such as LimeWire allow users to download files directly from the computers of other users. LimeWire does not have one central database of files, but instead relies on its users to share their files directly with others. It is commonly used to download music and movies and can also be used to download both adult and child pornography. It was Mr. Spencer's use of the file-sharing software that brought him to the attention of the police and which ultimately led to the search at issue in this case.

[8] Det. Sgt. Darren Parisien (then Cst.) of the Saskatoon Police Service, by using publicly available software, searched for anyone sharing child pornography. He could access whatever another user of the software had in his or her shared folder. In other words, he could "see" what other users of the file-sharing software could "see". He could also obtain two numbers related to a given user: the IP address that corresponds to the particular Internet connection through which a computer accesses the Internet at the time and the globally unique identifier (GUID) number assigned to each computer using particular software. The IP address of the computer from which shared material is obtained is displayed as part of the file-sharing process. There is little information in the record about the nature of IP addresses in general or the IP addresses provided

contraire. Je suis d'accord avec M. Spencer sur ce point. Je présenterai tout d'abord un résumé des faits pertinents; je procéderai ensuite à l'analyse juridique.

(1) Les faits et l'historique judiciaire

[7] Monsieur Spencer, qui habitait avec sa sœur, se connectait à Internet à partir d'un compte ouvert au nom de cette dernière. Il utilisait le programme de partage de fichiers LimeWire sur son ordinateur pour télécharger de la pornographie juvénile à partir d'Internet. LimeWire est un logiciel gratuit de partage de fichiers poste à poste que chacun pouvait télécharger à l'époque sur son ordinateur. Les systèmes poste à poste, comme LimeWire, permettent aux utilisateurs de télécharger des fichiers directement à partir des ordinateurs d'autres utilisateurs. LimeWire ne comporte pas de base de données centrale. Il compte plutôt sur ses utilisateurs qui partagent directement leurs fichiers avec d'autres utilisateurs. Le logiciel est couramment utilisé pour télécharger de la musique et des films, mais il peut aussi servir à télécharger de la pornographie tant adulte que juvénile. C'est l'utilisation du programme de partage de fichiers par M. Spencer qui a retenu l'attention de la police et qui a finalement mené à la fouille ou à la perquisition qui fait l'objet du présent litige.

[8] À l'aide d'un logiciel accessible au public, l'agent Darren Parisien (nommé sergent-détective depuis), du Service de police de Saskatoon, a recherché des personnes qui partageaient des fichiers de pornographie juvénile. Il pouvait accéder au contenu des répertoires partagés appartenant à d'autres utilisateurs du logiciel. Autrement dit, il pouvait [TRADUCTION] « voir » ce que d'autres utilisateurs du programme de partage de fichiers pouvaient « voir ». Il pouvait également obtenir deux numéros associés à un utilisateur donné : l'adresse IP correspondant à la connexion Internet établie par un ordinateur et l'identificateur global unique (GUID), soit le numéro associé à chaque ordinateur qui utilise un logiciel donné. L'adresse IP de l'ordinateur à partir duquel on obtient des fichiers partagés est affichée dans le cadre du processus de partage de

by Shaw to its subscribers. There is a description in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 21-26, which also notes some of the differences that may exist among IP addresses. For the purposes of this case, what we know is that the IP address obtained by Det. Sgt. Parisien matched computer activity at the particular point in time that he was observing that activity.

[9] Det. Sgt. Parisien generated a list of IP addresses for computers that had shared what he believed to be child pornography. He then ran that list of IP addresses against a database which matches IP addresses with approximate locations. He found that one of the IP addresses was suspected to be in Saskatoon, with Shaw as the ISP.

[10] Det. Sgt. Parisien then determined that Mr. Spencer's computer was online and connected to LimeWire. As a result, he (along with any LimeWire user) was able to browse the shared folder. He saw an extensive amount of what he believed to be child pornography. What he lacked was knowledge of where exactly the computer was and who was using it.

[11] To connect the computer usage to a location and potentially a person, investigators made a written "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using that IP address. The request, which was purportedly made pursuant to s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*), indicated that police were investigating an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to child pornography and the Internet and that the subscriber information was being sought as part of an ongoing investigation. (The full text of the relevant statutory provisions is set out in an Appendix.) Investigators

fichiers. Il y a peu de renseignements au dossier sur la nature des adresses IP en général ou des adresses IP que Shaw fournit à ses abonnés. Dans l'arrêt *R. c. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, par. 21-26, on trouve une description de certaines des différences qui existent entre les adresses IP. Pour les besoins de l'espèce, une chose est certaine : l'adresse IP qu'a obtenue le sergent-détective Parisien correspondait aux activités informatiques qui se déroulaient au moment précis où il les observait.

[9] Le sergent-détective Parisien a dressé une liste des adresses IP correspondant aux ordinateurs qui avaient été utilisés pour le partage de ce qu'il estimait être de la pornographie juvénile. Il a ensuite comparé cette liste aux renseignements figurant dans une base de données qui permet d'associer des adresses IP à des emplacements approximatifs. Il a découvert qu'une des adresses IP semblait se trouver à Saskatoon et que Shaw était le FSI.

[10] Le sergent-détective Parisien a ensuite déterminé que l'ordinateur de M. Spencer était connecté à Internet ainsi qu'à LimeWire. Par conséquent, le sergent-détective (ainsi que tout autre utilisateur du logiciel LimeWire) pouvait parcourir le répertoire partagé du suspect. Il a vu une grande quantité de ce qu'il estimait être de la pornographie juvénile. Il ne connaissait cependant pas l'emplacement exact de l'ordinateur ni l'identité de son utilisateur.

[11] Pour établir un lien entre les activités informatiques en question et un emplacement précis, et potentiellement une personne, les enquêteurs ont présenté par écrit à Shaw une [TRADUCTION] « demande de la part des autorités d'application de la loi » en vue d'obtenir des renseignements relatifs à l'abonnée qui utilisait cette adresse IP, soit, notamment, son nom, son adresse et son numéro de téléphone. La demande — qui aurait été fondée sur le sous-al. 7(3)c.1(ii) de la *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, ch. 5 (*LPRPDE*) — indiquait que la police enquêtait sur une infraction prévue au *Code criminel*, L.R.C. 1985, ch. C-46, relative à la pornographie juvénile et à Internet et

did not have or try to obtain a production order (i.e. the equivalent of a search warrant in this context).

[12] Shaw complied with the request and provided the name, address and telephone number of the customer associated with the IP address, Mr. Spencer's sister. With this information in hand, the police obtained a warrant to search Ms. Spencer's home (where Mr. Spencer lived) and seize his computer, which they did. The search of Mr. Spencer's computer revealed about 50 child pornography images and two child pornography videos.

[13] Mr. Spencer was charged with possessing child pornography contrary to s. 163.1(4) of the *Criminal Code* and making child pornography available over the Internet contrary to s. 163.1(3). There is no dispute that the images found in his shared folder were child pornography.

[14] At trial, Mr. Spencer sought to exclude the evidence found on his computer on the basis that the police actions in obtaining his address from Shaw without prior judicial authorization amounted to an unreasonable search contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge rejected this contention and convicted Mr. Spencer of the possession count. On appeal, the Saskatchewan Court of Appeal upheld the judge's decision with respect to the search issue.

(2) Was the Request to Shaw a Search?

[15] Under s. 8 of the *Charter*, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need

que les renseignements relatifs à l'abonnée étaient demandés aux fins d'une enquête qui était en cours. (Les dispositions législatives pertinentes sont reproduites en annexe.) Les enquêteurs n'avaient pas obtenu ni tenté d'obtenir une ordonnance de communication (c.-à-d. l'équivalent d'un mandat de perquisition dans ce contexte).

[12] Shaw a donné suite à la demande et a fourni le nom, l'adresse et le numéro de téléphone de la sœur de M. Spencer, la cliente à qui appartenait l'adresse IP. À l'aide de ces renseignements, la police a obtenu un mandat permettant de perquisitionner dans la résidence de M^{me} Spencer, où habitait M. Spencer, et de saisir l'ordinateur de celui-ci, ce que les policiers ont fait. La fouille de l'ordinateur de M. Spencer a permis de découvrir environ 50 images et deux vidéos de pornographie juvénile.

[13] Monsieur Spencer a été accusé de possession de pornographie juvénile, infraction décrite au par. 163.1(4) du *Code criminel*, et de rendre accessible de la pornographie juvénile sur Internet, en contravention du par. 163.1(3). Le fait que les images trouvées dans son répertoire partagé constituaient de la pornographie juvénile n'est pas contesté.

[14] Au procès, M. Spencer a tenté de faire écarter les éléments de preuve découverts sur son ordinateur au motif que les mesures prises sans autorisation judiciaire préalable par les policiers, en vue d'obtenir son adresse auprès de Shaw, correspondaient à une fouille ou à une perquisition abusive et contrevenaient à l'art. 8 de la *Charte canadienne des droits et libertés*. Le juge du procès a rejeté cette prétention et déclaré M. Spencer coupable de l'infraction de possession. La Cour d'appel de la Saskatchewan a confirmé la décision du juge relativement à la question de la fouille ou de la perquisition.

(2) La demande adressée à Shaw constituait-elle une fouille ou une perquisition?

[15] Suivant l'article 8 de la *Charte*, « [c]haque personne a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. » La Cour insiste

for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Plant*, [1993] 3 S.C.R. 281, at pp. 292-93; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the *Charter*. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., *Tessling*, at para. 38; *Ward*, at para. 65. The fact that these considerations must be looked at in the “totality of the circumstances” underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

depuis longtemps sur la nécessité d’adopter, à l’égard de l’art. 8, une approche téléologique axée principalement sur la protection de la vie privée considérée comme une condition préalable à la sécurité individuelle, à l’épanouissement personnel et à l’autonomie ainsi qu’au maintien d’une société démocratique prospère : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 156-157; *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428; *R. c. Plant*, [1993] 3 R.C.S. 281, p. 292-293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 12-16; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733, par. 22.

[16] En premier lieu, il s’agit de savoir si cette protection contre les fouilles, les perquisitions et les saisies abusives s’applique en l’espèce. Pour le savoir, il faut déterminer si les mesures prises par la police en vue d’obtenir les renseignements sur l’abonnée à qui appartenait l’adresse IP constituaient une fouille, une perquisition ou une saisie au sens de l’art. 8 de la *Charte*. Pour ce faire, il faut déterminer si, compte tenu de l’ensemble des circonstances, M. Spencer s’attendait raisonnablement au respect du caractère privé des renseignements fournis par Shaw à la police. Si tel était le cas, l’obtention de ces renseignements constituait une fouille ou une perquisition.

[17] On détermine s’il existe une attente raisonnable en matière de respect de la vie privée, compte tenu de l’ensemble des circonstances, en examinant et en soupesant un grand nombre de facteurs interreliés qui comprennent à la fois des facteurs relatifs à la nature des droits en matière de vie privée visés par l’action de l’État et des facteurs qui ont trait plus directement à l’attente en matière de respect de la vie privée, considérée tant subjectivement qu’objectivement, par rapport à ces droits : voir, p. ex., *Tessling*, par. 38; *Ward*, par. 65. La nécessité d’examiner ces éléments compte tenu de « l’ensemble des circonstances » fait ressortir le fait qu’ils sont souvent interdépendants, qu’ils doivent être adaptés aux circonstances de chaque cas, et qu’ils doivent être considérés dans leur ensemble.

[18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and *Ward*, at paras. 81-85.

[19] I can deal quite briefly with two aspects of the appeal. The trial judge in this case held that there was no subjective expectation of privacy in this case: 2009 SKQB 341, 361 Sask. R. 1, at para. 18. However, as I will explain below, the trial judge reached this conclusion by incorrectly defining the subject matter of the search. On the proper understanding of the scope of the search, Mr. Spencer's subjective expectation of privacy in his online activities can readily be inferred from his use of the network connection to transmit sensitive information: *Cole*, at para. 43. Mr. Spencer's direct interest in the subject matter of the search is equally clear. Though he was not personally a party to the contract with the ISP, he had access to the Internet with the permission of the subscriber and his use of the Internet was by means of his own computer in his own place of residence.

[18] La grande variété et le nombre important de facteurs pouvant être pris en considération pour évaluer les attentes raisonnables en matière de respect de la vie privée peuvent être regroupés, par souci de commodité, en quatre grandes catégories : (1) l'objet de la fouille ou de la perquisition contestée; (2) le droit du demandeur à l'égard de l'objet; (3) l'attente subjective du demandeur en matière de respect de sa vie privée relativement à l'objet; et (4) la question de savoir si cette attente subjective en matière de respect de la vie privée était objectivement raisonnable, eu égard à l'ensemble des circonstances : *Tessling*, par. 32; *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579, par. 27; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 40. Il ne s'agit toutefois pas d'un examen purement factuel. L'attente raisonnable en matière de vie privée est de nature normative et non simplement descriptive : *Tessling*, par. 42. Ainsi, même si l'analyse du droit au respect de la vie privée tient compte du contexte factuel, elle « abonde [inévitavelmente] en jugements de valeur énoncés du point de vue indépendant de la personne raisonnable et bien informée, qui se soucie des conséquences à long terme des actions gouvernementales sur la protection du droit au respect de la vie privée privée » : *Patrick*, par. 14; voir aussi *R. c. Gomboc*, 2010 CSC 55, [2010] 3 R.C.S. 211, par. 34, et *Ward*, par. 81-85.

[19] Quelques brefs commentaires suffiront pour traiter deux aspects du pourvoi. Selon le juge du procès, il n'y avait pas d'attente subjective en matière de vie privée dans la présente affaire : 2009 SKQB 341, 361 Sask. R. 1, par. 18. Toutefois, comme je vais l'expliquer ultérieurement, la conclusion du juge du procès reposait sur une définition inexacte de l'objet de la fouille ou de la perquisition. Selon une interprétation juste de cet objet, l'attente subjective de M. Spencer au respect du caractère privé de ses activités en ligne peut aisément être déduite de son utilisation de la connexion réseau pour transmettre des renseignements sensibles : *Cole*, par. 43. L'intérêt direct de M. Spencer à l'égard de l'objet de la fouille ou de la perquisition est également manifeste. Même s'il n'était pas personnellement parti au contrat conclu avec le FSI, il avait accès à Internet avec la permission de l'abonnée et il l'utilisait au moyen de son propre ordinateur, à son lieu de résidence.

[20] The main dispute in this case thus turns on the subject matter of the search and whether Mr. Spencer's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

[21] In this case, I have found it helpful to look first at the subject matter of the search, then at the nature of the privacy interests implicated by the state actions and then finally at the governing contractual and statutory framework. While these subjects are obviously interrelated, approaching the analysis under these broad headings provides a degree of focus while permitting full examination of the "totality of the circumstances".

(a) *The Subject Matter of the Search*

[22] Mr. Spencer alleges that the police request to Shaw is a state action that constitutes a search or seizure for the purposes of s. 8 of the *Charter*. We must therefore consider what the subject matter of that request was in order to be able to identify the privacy interests that were engaged by it.

[23] In many cases, defining the subject matter of the police action that is alleged to be a search is straightforward. In others, however, it is not. This case falls into the latter category. The parties and the courts below have markedly divergent perspectives on this important issue, a divergence which is reflected in the jurisprudence: see, for example, the authorities reviewed in *Ward*, at para. 3.

[24] Mr. Spencer contends that the subject matter of the alleged search was core biographical data, revealing intimate and private information about the people living at the address provided by Shaw which matched the IP address. The Crown, on the

[20] Dans la présente affaire, le litige porte donc principalement sur l'objet de la fouille ou de la perquisition et sur la question de savoir si l'attente subjective de M. Spencer en matière de vie privée était raisonnable. Les deux éléments pertinents pour déterminer le caractère raisonnable de son attente au respect de sa vie privée sont, d'une part, la nature de l'intérêt en matière de vie privée qui est en jeu et, d'autre part, le cadre législatif et contractuel régissant la communication par le FSI des renseignements relatifs à l'abonnée.

[21] En l'espèce, j'ai jugé utile d'examiner d'abord l'objet de la fouille ou de la perquisition, ensuite la nature des droits en matière de vie privée que mettent en jeu les actes de l'État et, enfin, le cadre législatif et contractuel applicable. Il s'agit manifestement d'éléments interreliés, mais l'analyse axée sur ces vastes catégories assure une certaine précision tout en permettant d'examiner de manière exhaustive « l'ensemble des circonstances ».

a) *L'objet de la fouille ou de la perquisition*

[22] Selon M. Spencer, c'est la demande faite à Shaw par la police qui constitue l'action de l'État correspondant à une fouille, à une perquisition ou à une saisie aux fins de l'application de l'art. 8 de la *Charte*. Nous devons donc examiner l'objet de cette demande pour pouvoir déterminer quels étaient les droits en jeu en matière de vie privée.

[23] Dans bien des cas, il est facile de définir l'objet de l'action de la police qui, selon les allégations, constitue une fouille ou une perquisition. Ce n'est par contre pas toujours ainsi; et la présente espèce appartient à cette seconde catégorie. Les parties et les tribunaux de juridiction inférieure ont adopté des positions nettement divergentes sur cette question importante, situation qui se retrouve également dans la jurisprudence : voir, par exemple, les décisions mentionnées dans l'arrêt *Ward*, par. 3.

[24] Monsieur Spencer fait valoir que l'objet de la fouille ou de la perquisition contestée comportait des renseignements d'ordre biographique, soit des renseignements personnels et confidentiels sur les personnes habitant à l'adresse fournie par Shaw

other hand, maintains that the subject matter of the alleged search was simply a name, address and telephone number matching a publicly available IP address.

[25] These divergent views were reflected in the decisions of the Saskatchewan courts. The trial judge adopted the Crown's view that what the police sought and obtained was simply generic information that does not touch on the core of Mr. Spencer's biographical information. Ottenbreit J.A. in the Court of Appeal was of largely the same view. For him, the information sought by the police in this case simply established the identity of the contractual user of the IP address. The fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the Internet was, for him, "neither here nor there": 2011 SKCA 144, 377 Sask. R. 280, at para. 110 (see also *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, at paras. 119-24 and 134). In contrast to this approach, Caldwell J.A. (Cameron J.A. concurring on this point) held that in characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address (para. 22). The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered: see also *Trapp*, per Cameron J.A., at paras. 33-37.

[26] I am in substantial agreement with Caldwell and Cameron J.A. on this point. While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.

qui correspondait à l'adresse IP. Pour sa part, le ministère public soutient que la fouille ou la perquisition contestée visait plutôt simplement le nom, l'adresse et le numéro de téléphone correspondant à une adresse IP accessible au public.

[25] Les tribunaux de la Saskatchewan ont exprimé les mêmes opinions divergentes. Le juge du procès a adopté le point de vue du ministère public selon lequel la police n'avait recherché et obtenu que des renseignements d'ordre général qui ne correspondent pas à des données d'ordre biographique relatives à M. Spencer. Le juge Ottenbreit de la Cour d'appel a partagé en grande partie la même opinion. À son avis, les renseignements recherchés par la police en l'espèce ne faisaient qu'établir l'identité de l'utilisateur de l'adresse IP qui était désigné dans le contrat. La possibilité que ces renseignements finissent par révéler plusieurs aspects des activités menées par des personnes identifiables sur Internet était [TRADUCTION] « sans importance » : 2011 SKCA 144, 377 Sask. R. 280, par. 110 (voir également *R. c. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, par. 119-124 et 134). Par contre, selon le juge Caldwell (le juge Cameron a souscrit à son opinion à ce sujet), lorsqu'il s'agit de qualifier l'objet d'une fouille ou d'une perquisition contestée, il faut aller au-delà des renseignements [TRADUCTION] « banals » relatifs à l'abonné, tels son nom et son adresse (par. 22). Il faut aussi tenir compte de la possibilité que ces renseignements révèlent des détails intimes sur le mode de vie et les choix personnels de l'individu : voir également l'arrêt *Trapp*, le juge Cameron, par. 33-37.

[26] Je souscris pour l'essentiel aux conclusions formulées sur ce point par les juges Caldwell et Cameron de la Cour d'appel. Dans bien des cas, la définition de l'objet de la fouille ou de la perquisition fait l'unanimité. Cependant, dans les cas qui posent davantage de difficultés à cet égard, la Cour a adopté dans le passé une approche large et fonctionnelle, en examinant le lien entre la technique d'enquête utilisée par la police et l'intérêt en matière de vie privée qui est en jeu. La Cour a examiné non seulement la nature des renseignements précis recherchés, mais aussi la nature des renseignements qui sont ainsi révélés.

[27] A number of decisions of the Court reflect this approach. I begin with *Plant*. There, the Court, dealing with informational privacy, stressed the strong claim to privacy in relation to information that is at the “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state”: p. 293. Importantly, the Court went on to make clear that s. 8 protection is accorded not only to the information which is itself of that nature, but also to “information which tends to reveal intimate details of the lifestyle and personal choices of the individual”: *ibid.* (emphasis added).

[28] *Tessling* took the same approach, although it led to a different conclusion. The subject matter of the alleged search was held to be the heat emitted from the surface of a building. The Forward Looking Infra-Red (FLIR) imaging technique was used to help assess the activities that transpired inside a house, but the heat emissions by themselves could not distinguish between one heat source and another. In short, the heat emanations were, on their own, meaningless because they did not permit any inferences about the precise activity giving rise to the heat: paras. 35-36. The critical question was: what inferences about activity inside the home — admittedly a highly private zone — did the FLIR images support?

[29] I turn next to *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and the companion appeal in *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. While the Court divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown’s bag constituted a search. As explained by both Deschamps and Bastarache JJ., the dog sniffing at the air in the vicinity of the bag functioned as an investigative procedure that allowed for a “strong, immediate and direct inference” about what was or was not inside the bag: Deschamps J., at paras. 174-75; Bastarache J., at para. 227. Thus, while the “information” obtained by the sniffer dog was simply the smell of the air outside the bag, the dog’s

[27] Plusieurs arrêts de la Cour reflètent cette approche. J’examinerai d’abord l’arrêt *Plant*. Dans cette affaire concernant des aspects informationnels de la vie privée, la Cour a insisté sur le droit garanti au respect de la vie privée relativement à des renseignements « biographiques d’ordre personnel que les particuliers pourraient, dans une société libre et démocratique, vouloir constituer et soustraire à la connaissance de l’État » : p. 293. Fait important, la Cour a ensuite précisé que la protection garantie par l’art. 8 vise non seulement les renseignements de cette nature, mais aussi les « renseignements tendant à révéler des détails intimes sur le mode de vie et les choix personnels de l’individu » : *ibid.* (je souligne).

[28] La Cour a suivi la même approche dans l’arrêt *Tessling*, mais elle a tiré une conclusion différente. Dans cette affaire, il a été conclu que l’objet de la perquisition contestée était la chaleur émanant de la surface d’un édifice. La technique d’imagerie FLIR (système infrarouge à vision frontale) a servi à évaluer les activités qu’il y avait à l’intérieur d’une résidence, mais les émanations de chaleur ne permettaient pas, à elles seules, de distinguer les sources de chaleur. Bref, les émanations de chaleur n’avaient, en elles-mêmes, aucune signification, parce qu’elles ne permettaient pas de déduire quelle activité précise produisait la chaleur : par. 35-36. La question cruciale portait sur la nature des activités que permettaient de déduire les images FLIR et qui se déroulaient à l’intérieur de la résidence — nous en conviendrons, un lieu de nature éminemment privée.

[29] Je passe maintenant à l’arrêt *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456, et au pourvoi connexe *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569. La Cour était divisée sur d’autres points, mais elle a conclu à l’unanimité que la vérification du sac de M. Kang-Brown à l’aide d’un chien renifleur constituait une fouille. Comme l’ont expliqué les juges Deschamps et Bastarache, en décelant ce qu’il y avait dans l’air à proximité du sac, le chien a servi d’outil d’enquête et son intervention a « immédiatement et directement permis [aux policiers] de faire une forte inférence » quant au contenu du sac : la juge Deschamps, par. 174-175; le juge Bastarache, par. 227. Ainsi,

reaction to it provided the police with a strong inference as to what was inside. As Binnie J. put it in *A.M.* (which concerned a dog sniff of the accused's backpack), "[b]y use of the dog, the policeman could 'see' through the concealing fabric of the backpack": para. 67.

[30] How to characterize the subject matter of an alleged search was addressed by the Court most recently in *Gomboc*. While the Court was divided on other matters, it was unanimous about the framework that must be applied in considering the subject matter of a "search". The Court considered the strength of the inference between data derived from a digital recording ammeter (DRA) and particular activities going on in a residence in assessing whether use of the DRA constituted a search. Abella J. (Binnie and LeBel JJ. concurring) took into account "the strong and reliable inference that can be made from the patterns of electricity consumption . . . as to the presence within the home of one particular activity": para. 81 (emphasis added). The Chief Justice and Fish J. referred to the fact that the DRA data "sheds light on private activities within the home": para. 119. Deschamps J. (Charron, Rothstein and Cromwell JJ. concurring) spoke in terms of the extent to which the DRA data was revealing of activities in the home: para. 38.

[31] Thus, it is clear that the tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. The correct approach was neatly summarized by Doherty J.A. in *Ward*, at para. 65. When identifying the subject matter of an alleged search, the court must not do so "narrowly in terms of the physical acts involved or the physical space invaded,

bien que les « informations » recueillies par le chien renifleur tenaient simplement de l'odeur qu'il y avait dans l'air à l'extérieur du sac, la réaction du chien a permis aux policiers de faire une forte inférence quant au contenu du sac. Comme l'a indiqué le juge Binnie dans l'arrêt *A.M.* (qui portait sur l'intervention d'un chien renifleur pour vérifier le sac à dos de l'accusé), « [e]n se servant du chien, le policier a pu "voir" à travers le tissu opaque du sac à dos » : par. 67.

[30] La façon de définir l'objet d'une fouille ou d'une perquisition contestée a été examinée pour la dernière fois par la Cour dans l'arrêt *Gomboc*. Bien qu'elle fût divisée sur d'autres questions, elle s'est prononcée à l'unanimité sur le cadre d'analyse à appliquer pour déterminer l'objet d'une « fouille ou [d'une] perquisition ». Dans cette affaire, la Cour a examiné la fiabilité des inférences qu'il est possible de tirer à partir des données enregistrées à l'aide d'un ampèremètre numérique muni d'un enregistreur (AN) au sujet d'activités données se déroulant à l'intérieur d'une résidence pour déterminer si l'utilisation de l'ampèremètre constituait une fouille ou une perquisition. La juge Abella (avec l'accord des juges Binnie et LeBel) a tenu compte « de la solidité et de la fiabilité des inférences pouvant être tirées à partir des cycles de consommation d'électricité [. . .] relativement à la tenue d'une activité particulière à une adresse » : par. 81 (je souligne). La Juge en chef et le juge Fish ont affirmé que les données enregistrées par l'AN « éclairent sur les activités privées se déroulant à l'intérieur de la maison » : par. 119. La juge Deschamps (avec l'accord des juges Charron, Rothstein et Cromwell) s'est demandé dans quelle mesure les données enregistrées par l'AN révèlent les activités qui se déroulent à l'intérieur de la maison : par. 38.

[31] Ainsi, il est évident que, pour définir l'objet de la fouille ou de la perquisition, il faut tenir compte de la tendance qui consiste à chercher à obtenir des renseignements pour permettre d'en tirer des inférences au sujet d'autres renseignements qui, eux, sont de nature personnelle. La méthode qu'il convient d'adopter a été clairement résumée par le juge Doherty au par. 65 de l'arrêt *Ward*. Lorsqu'elle est appelée à identifier l'objet

but rather by reference to the nature of the privacy interests potentially compromised by the state action”: *ibid.*

[32] Applying this approach to the case at hand, I substantially agree with the conclusion reached by Cameron J.A. in *Trapp* and adopted by Caldwell J.A. in this case. The subject matter of the search was not simply a name and address of someone in a contractual relationship with Shaw. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage. As Cameron J.A. put it, at para. 35 of *Trapp*:

To label information of this kind as mere “subscriber information” or “customer information”, or nothing but “name, address, and telephone number information”, tends to obscure its true nature. I say this because these characterizations gloss over the significance of an IP address and what such an address, once identified with a particular individual, is capable of revealing about that individual, including the individual’s online activity in the home.

[33] Here, the subject matter of the search is the identity of a subscriber whose Internet connection is linked to particular, monitored Internet activity.

(b) *Nature of the Privacy Interest Potentially Compromised by the State Action*

[34] The nature of the privacy interest engaged by the state conduct is another facet of the totality of the circumstances and an important factor in assessing the reasonableness of an expectation of privacy. The Court has previously emphasized an understanding of informational privacy as confidentiality and control of the use of intimate information about oneself. In my view, a somewhat

d’une fouille ou d’une perquisition contestée, une cour ne doit pas adopter une approche [TRADUCTION] « restrictive qui porte sur les actions commises ou sur l’espace envahi, mais plutôt une approche fondée sur la nature des droits en matière de vie privée auxquels l’action de l’État pourrait porter atteinte » : *ibid.*

[32] Si on applique cette méthode en l’espèce, je souscris pour l’essentiel à la conclusion tirée par le juge Cameron dans l’arrêt *Trapp* et adoptée par le juge Caldwell de la Cour d’appel dans la présente affaire. La fouille n’avait pas simplement pour objet le nom et l’adresse d’une personne qui était liée par contrat à Shaw. Il s’agissait plutôt de l’identité d’une abonnée aux services Internet à qui correspondait une utilisation particulière de ces services. Comme l’a affirmé le juge Cameron au par. 35 de l’arrêt *Trapp* :

[TRADUCTION] Qualifier de tels renseignements de simples « renseignements relatifs à l’abonné » ou de « renseignements sur le client » ou encore de rien d’autre que de « renseignements sur le nom, l’adresse et le numéro de téléphone » tend à occulter leur véritable nature. Je tiens à le préciser, parce que ces qualifications font abstraction de l’importance d’une adresse IP et des renseignements que cette adresse, une fois liée à une personne en particulier, peut révéler sur cette personne, notamment les activités en ligne que celle-ci pratique dans sa résidence.

[33] En l’espèce, la fouille avait pour objet l’identité de l’abonnée dont la connexion à Internet correspondait à une activité informatique particulière sous surveillance.

b) *La nature de l’intérêt en matière de vie privée auquel l’action de l’État pourrait porter atteinte*

[34] La nature de l’intérêt en matière de vie privée visé par l’action de l’État constitue un autre aspect de l’ensemble des circonstances et un facteur important pour apprécier le caractère raisonnable d’une attente en matière de vie privée. Dans le passé, la Cour a souligné l’importance, lorsqu’il est question de renseignements personnels, d’interpréter le droit à la vie privée de telle sorte qu’il

broad understanding of the privacy interest at stake in this case is required to account for the role that anonymity plays in protecting privacy interests online.

[35] Privacy is admittedly a “broad and somewhat evanescent concept”: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 67. Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits: see, e.g., C. D. L. Hunt, “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2011), 37 *Queen’s L.J.* 167, at pp. 176-77. Notwithstanding these challenges, the Court has described three broad types of privacy interests — territorial, personal, and informational — which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations: see, e.g., *Dyment*, at pp. 428-29; *Tessling*, at paras. 21-24. These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.

[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

protège tant la confidentialité que le contrôle des renseignements en question. À mon avis, il est nécessaire en l’espèce d’élargir quelque peu cette interprétation de manière à tenir compte du rôle que joue l’anonymat dans la protection des droits en matière de vie privée sur Internet.

[35] Certes, la vie privée est « une notion générale quelque peu évanescence » : *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 67. Certains auteurs ont souligné la confusion à ce sujet, sur le plan théorique, et l’absence de consensus apparent quant à ses nature et limites : voir, p. ex., C. D. L. Hunt, « Conceptualizing Privacy and Elucidating its Importance : Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort » (2011), 37 *Queen’s L.J.* 167, p. 176-177. Nonobstant ces enjeux, la Cour a décrit trois grandes catégories de droits en matière de vie privée, qui regroupent notamment les aspects qui ont trait aux lieux, à la personne et à l’information, et qui, malgré leur chevauchement fréquent, ont permis de préciser la nature des droits en matière de vie privée en jeu dans des situations particulières : voir, p. ex., *Dyment*, p. 428-429; *Tessling*, par. 21-24. Il s’agit d’outils d’analyse, et non de catégories strictes ou mutuellement exclusives.

[36] La nature de l’intérêt en matière de vie privée ne dépend pas de la question de savoir si, dans un cas particulier, le droit à la vie privée masque une activité légale ou une activité illégale. En effet, l’analyse porte sur le caractère privé du lieu ou de l’objet visé par la fouille ou la perquisition ainsi que sur les conséquences de cette dernière pour la personne qui en fait l’objet, et non sur la nature légale ou illégale de la chose recherchée. Pour reprendre les propos du juge Binnie dans l’arrêt *Patrick*, il ne s’agit pas de savoir si l’appelant possédait un droit légitime au respect de la vie privée à l’égard de la dissimulation de son utilisation d’Internet dans le but d’accéder à de la pornographie juvénile, mais plutôt de savoir si, d’une manière générale, les citoyens ont droit au respect de leur vie privée à l’égard des renseignements concernant les abonnés de services Internet relativement aux ordinateurs qu’ils utilisent dans leur domicile à des fins privées : *Patrick*, par. 32.

[37] We are concerned here primarily with informational privacy. In addition, because the computer identified and in a sense monitored by the police was in Mr. Spencer's residence, there is an element of territorial privacy in issue as well. However, in this context, the location where the activity occurs is secondary to the nature of the activity itself. Internet users do not expect their online anonymity to cease when they access the Internet outside their homes, via smartphones, or portable devices. Therefore, here as in *Patrick*, at para. 45, the fact that a home was involved is not a controlling factor but is nonetheless part of the totality of the circumstances: see, e.g., *Ward*, at para. 90.

[38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

[39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g., *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149.

[40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting from *Privacy and Computers*, the Report of the Task Force established by the Department of

[37] En l'espèce, nous nous intéressons principalement au caractère privé des renseignements personnels. En outre, puisque l'ordinateur repéré et, en quelque sorte, surveillé par la police se trouvait dans la résidence de M. Spencer, un aspect du droit à la vie privée lié aux lieux est aussi en jeu. Dans le présent contexte, le lieu de l'activité est toutefois accessoire à la nature de l'activité elle-même. En effet, les internautes ne s'attendent pas à perdre leur anonymat en ligne lorsqu'ils accèdent à Internet ailleurs que chez eux au moyen d'un téléphone intelligent ou d'un appareil portable. En l'espèce, tout comme dans l'arrêt *Patrick*, par. 45, le fait qu'une résidence soit en cause ne constitue donc pas un facteur déterminant, mais fait néanmoins partie de l'ensemble des circonstances : voir, p. ex., *Ward*, par. 90.

[38] Pour revenir à la question du droit à la vie privée en ce qui a trait aux renseignements personnels, j'estime qu'il englobe au moins trois facettes qui se chevauchent, mais qui se distinguent sur le plan conceptuel. Il s'agit de la confidentialité, du contrôle et de l'anonymat.

[39] Le caractère privé des renseignements personnels est souvent assimilé à la confidentialité. Par exemple, le patient s'attend raisonnablement à ce que ses renseignements d'ordre médical demeurent confidentiels : voir, p. ex., *McInerney c. MacDonald*, [1992] 2 R.C.S. 138, p. 149.

[40] Or, le droit à la vie privée comprend également la notion connexe, mais plus large, de contrôle sur l'accès à l'information et sur l'utilisation des renseignements, c'est-à-dire [TRADUCTION] « le droit revendiqué par des particuliers, des groupes ou des institutions de déterminer eux-mêmes à quel moment les renseignements les concernant sont communiqués, de quelle manière et dans quelle mesure » : A. F. Westin, *Privacy and Freedom* (1970), p. 7, cité dans *Tessling*, par. 23. Le juge La Forest a d'ailleurs souligné ce point dans l'arrêt *Dyment* en affirmant que la facette du droit à la vie privée en ce qui a trait aux renseignements personnels qui porte sur le contrôle « découle du postulat selon lequel l'information de caractère

Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential, “situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected” (pp. 429-30); see also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46.

[41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

[42] The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or in which the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual’s name, but the link between the identified individual and the personal information provided anonymously. As the intervener the Canadian Civil Liberties Association urged in its submissions,

personnel est propre à l’intéressé, qui est libre de la communiquer ou de la taire comme il l’entend » (*Dyment*, p. 429, citant *L’ordinateur et la vie privée*, le Rapport du groupe d’étude établi conjointement par le ministère des Communications et le ministère de la Justice (1972), p. 13). Même si les renseignements seront divulgués et qu’ils ne peuvent être considérés comme confidentiels, « les cas abondent où on se doit de protéger les attentes raisonnables de l’individu que ces renseignements seront gardés confidentiellement par ceux à qui ils sont divulgués, et qu’ils ne seront utilisés que pour les fins pour lesquelles ils ont été divulgués » (p. 429-430); voir également *R. c. Duarte*, [1990] 1 R.C.S. 30, p. 46.

[41] Il existe aussi une troisième conception de l’aspect informationnel du droit à la vie privée qui revêt une importance particulière dans le contexte de l’utilisation d’Internet. Il s’agit de l’anonymat. À mon avis, le droit à la vie privée que garantirait l’art. 8 doit inclure cette conception de la vie privée.

[42] L’élément « anonymat » de la vie privée n’est pas nouveau. Il est présent dans un large éventail de contextes allant de sondages anonymes à la protection de l’identité des indicateurs de police. La personne qui répond à un sondage accepte volontiers de fournir ce qui peut fort bien être des renseignements de nature très personnelle. L’indicateur de police fournit des renseignements sur la perpétration d’un crime. Les renseignements en tant que tel ne sont pas privés — leur communication vise expressément la divulgation à d’autres personnes. Cela dit, cette communication tient compte du fait que l’identité de la personne qui fournit les renseignements demeurera confidentielle. Prenons, par exemple, des cas où la police veut obtenir la liste des noms correspondant aux numéros d’identification relativement aux résultats d’un sondage ou des cas où la partie défenderesse dans une affaire criminelle veut obtenir l’identité de l’indicateur ayant fourni les renseignements qui lui ont été communiqués. L’intérêt en matière de vie privée qui est en jeu dans ces exemples ne vise pas uniquement le nom d’une personne, mais

“maintaining anonymity can be integral to ensuring privacy”: factum, at para. 7.

aussi le lien entre la personne désignée et les renseignements personnels fournis de façon anonyme. Comme l’a fait valoir l’Association canadienne des libertés civiles, intervenante en l’espèce, dans ses observations, [TRADUCTION] « le maintien de l’anonymat peut être essentiel pour garantir la protection de la vie privée » : mémoire, par. 7.

[43] Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance: pp. 31-32; see A. Slane and L. M. Austin, “What’s In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations” (2011), 57 *Crim. L.Q.* 486, at p. 501. The Court’s decision in *R. v. Wise*, [1992] 1 S.C.R. 527, provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle’s whereabouts on public highways amounted to a violation of the suspect’s reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach.

[43] Le professeur Westin présente l’anonymat comme une des facettes fondamentales de la vie privée. Selon lui, il permet aux personnes d’avoir des activités publiques tout en préservant la confidentialité de leur identité et en se protégeant contre la surveillance : p. 31-32; voir A. Slane et L. M. Austin, « What’s In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations » (2011), 57 *Crim. L.Q.* 486, p. 501. L’arrêt *R. c. Wise*, [1992] 1 R.C.S. 527, donne un exemple du droit à la vie privée dans un endroit public. Dans cette affaire, la Cour a statué que la surveillance omniprésente des déplacements d’un véhicule sur la voie publique déjouait les attentes raisonnables du suspect en matière de vie privée. On aurait évidemment pu affirmer que le dispositif électronique ne constituait qu’un moyen pratique de suivre les déplacements en voiture du suspect, qu’il faisait d’ailleurs à la vue de tous. Mais la Cour n’a pas adopté cette approche.

[44] La Forest J. (who, while dissenting on the issue of exclusion of the evidence under s. 24(2), concurred with respect to the existence of a reasonable expectation of privacy), explained that “[i]n a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the ‘situational landscape’”: p. 558 (emphasis added), quoting M. Gutterman, “A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance” (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a

[44] Le juge La Forest (qui, bien que dissident sur la question de l’exclusion de la preuve en application du par. 24(2), a souscrit à l’existence d’une attente raisonnable en matière du respect de la vie privée), a expliqué que, « [s]’il est normal, dans divers contextes publics, d’être observé fortuitement, nous aurions par contre toutes les raisons d’être choqués par des regards insistants. Dans ces activités publiques, nous ne nous attendons pas à être identifiés personnellement et soumis à une surveillance intensive, mais nous cherchons plutôt à passer inaperçus » : p. 558 (je souligne), citant M. Gutterman, « A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance » (1988), 39 *Syracuse L. Rev.* 647, p. 706. Le simple fait qu’une personne quitte l’intimité de sa résidence et pénètre dans un lieu public ne signifie

person may not be able to control who observes him or her in public. Thus, in order to uphold the protection of privacy rights in some contexts, we must recognize anonymity as one conception of privacy: see E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305, at pp. 325-26; Westin, at p. 32; Gutterman, at p. 706.

[45] Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage. One form of anonymity, as Westin explained, is what is claimed by an individual who wants to present ideas publicly but does not want to be identified as their author: p. 32. Here, Westin, publishing in 1970, anticipates precisely one of the defining characteristics of some types of Internet communication. The communication may be accessible to millions of people but it is not identified with its author.

[46] Moreover, the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users. Browsing logs, for example, may provide detailed information about users’ interests. Search engines may gather records of users’ search terms. Advertisers may track their users across networks of websites, gathering an overview of their interests and concerns. “Cookies” may be used to track consumer habits and may provide information about the options selected within a website, which web pages were visited before and after the visit to the host website and any other personal information provided: see N. Gleicher, “Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web” (2009), 118 *Yale L.J.* 1945, at pp. 1948-49; R. W. Hubbard, P. DeFreitas and S. Magotiaux, “The Internet — Expectations of Privacy in a New Context” (2002), 45 *Crim. L.Q.* 170, at pp. 189-91. The user cannot fully control or even necessarily be aware of who

pas qu’elle renonce à tous ses droits en matière de vie privée, même si, en pratique, il se peut qu’elle ne soit pas en mesure d’exercer un contrôle à l’égard des personnes qui l’observent en public. Par conséquent, pour protéger les droits en matière de vie privée dans certains contextes, il nous faut reconnaître l’anonymat comme une des conceptions de la vie privée : voir E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 325-326; Westin, p. 32; Gutterman, p. 706.

[45] S’agissant de l’utilisation d’Internet, il me semble particulièrement important de reconnaître que l’anonymat s’inscrit parmi les conceptions de l’aspect informationnel du droit à la vie privée. Comme l’explique le professeur Westin, l’anonymat porte entre autres sur le droit revendiqué par une personne qui veut présenter publiquement ses idées sans être identifiée comme leur auteur : p. 32. Le professeur Westin, dont l’ouvrage a été publié en 1970, avait anticipé précisément une des caractéristiques déterminantes de certains types de communication par Internet. En effet, des millions de personnes peuvent avoir accès à une communication qui n’est toutefois pas associée à son auteur.

[46] De plus, Internet a augmenté de façon exponentielle la qualité et la quantité des renseignements stockés concernant les internautes. L’historique de navigation, par exemple, permet d’obtenir des renseignements détaillés sur les intérêts des utilisateurs. Les moteurs de recherche peuvent recueillir des renseignements sur les termes recherchés par les utilisateurs. Les annonceurs peuvent suivre leurs utilisateurs à travers les réseaux de sites Web et obtenir un aperçu de leurs intérêts et de leurs pré-occupations. Les fichiers témoins peuvent être utilisés pour suivre les habitudes de consommation et peuvent fournir des renseignements sur les options sélectionnées dans un site Web, sur les pages Web consultées avant et après avoir visité le site d’accueil et tout autre renseignement personnel fourni : voir N. Gleicher, « Neither a Customer Nor a Subscriber Be : Regulating the Release of User Information on the World Wide Web » (2009), 118 *Yale L.J.* 1945, p. 1948-1949; R. W. Hubbard, P. DeFreitas et S. Magotiaux, « The Internet — Expectations of

may observe a pattern of online activity, but by remaining anonymous — by guarding the link between the information and the identity of the person to whom it relates — the user can in large measure be assured that the activity remains private: see Slane and Austin, at pp. 500-3.

Privacy in a New Context » (2002), 45 *Crim. L.Q.* 170, p. 189-191. L'utilisateur n'est pas en mesure d'exercer un contrôle total à l'égard de la personne qui peut observer le profil de ses activités en ligne et il n'est pas toujours informé de l'identité de celle-ci. Or, sous le couvert de l'anonymat — en protégeant le lien entre l'information et l'identité de la personne qu'elle concerne —, l'utilisateur peut en grande partie être assuré que ses activités demeurent confidentielles : voir Slane et Austin, p. 500-503.

[47] In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. A sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents. DRA readings provide information about what is going on inside a home and therefore may engage the privacy interests relating to those activities. Similarly, subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating not simply to the person's name or address but to his or her identity as the source, possessor or user of that information.

[47] À mon avis, il faut reconnaître que l'identité d'une personne liée à son utilisation d'Internet donne naissance à un intérêt en matière de vie privée qui a une portée plus grande que celui inhérent à son nom, à son adresse et à son numéro de téléphone qui figurent parmi les renseignements relatifs à l'abonné. Un chien renifleur fournit de l'information sur le contenu d'un sac et met donc en jeu des droits en matière de vie privée relativement à ce contenu. Les enregistrements de l'AN fournissent de l'information sur les activités qui se déroulent à l'intérieur d'une résidence et peuvent donc mettre en jeu des droits en matière de vie privée concernant ces activités. Dans le même ordre d'idées, en établissant un lien entre des renseignements particuliers et une personne identifiable, les renseignements relatifs à l'abonné peuvent compromettre les droits en matière de vie privée de cette personne non seulement parce qu'ils révèlent son nom et son adresse, mais aussi parce qu'ils l'identifient en tant que source, possesseur ou utilisateur des renseignements visés.

[48] Doherty J.A. made this point with his usual insight and clarity in *Ward*. "Personal privacy" he wrote "protects an individual's ability to function on a day-to-day basis within society while enjoying a degree of anonymity that is essential to the individual's personal growth and the flourishing of an open and democratic society": para. 71. He concluded that some degree of anonymity is a feature of much Internet activity and that, "[d]epending on the totality of the circumstances, . . . anonymity may enjoy constitutional protection under s. 8": para. 75. I agree. Thus, anonymity may, depending on the

[48] Dans *Ward*, le juge Doherty, clair et lucide comme à son habitude, a fourni des explications semblables. [TRADUCTION] « Le droit à la vie privée », a-t-il écrit, « permet à une personne de fonctionner au quotidien dans la société tout en bénéficiant d'un certain degré d'anonymat indispensable à son épanouissement personnel ainsi qu'à l'épanouissement d'une société ouverte et démocratique » : para. 71. Il a conclu qu'un certain degré d'anonymat est propre à beaucoup d'activités exercées sur Internet et que, « [e]u égard à l'ensemble des circonstances, [. . .] l'anonymat peut bénéficier de

totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.

[49] The intervener the Director of Public Prosecutions raised the concern that recognizing a right to online anonymity would carve out a crime-friendly Internet landscape by impeding the effective investigation and prosecution of online crime. In light of the grave nature of the criminal wrongs that can be committed online, this concern cannot be taken lightly. However, in my view, recognizing that there *may* be a privacy interest in anonymity depending on the circumstances falls short of recognizing any “right” to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet. In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained.

[50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 3; *Cole*, at para. 47; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 40-45.

la protection constitutionnelle prévue à l’art. 8 » : par. 75. Je suis d’accord. L’anonymat pourrait donc, compte tenu de l’ensemble des circonstances, servir de fondement au droit à la vie privée visé par la protection constitutionnelle contre les fouilles, les perquisitions et les saisies abusives.

[49] Le directeur des poursuites pénales, intervenant, a fait valoir que la reconnaissance du droit à l’anonymat en ligne transformerait Internet en un endroit favorable aux actes criminels en faisant obstacle aux enquêtes et aux poursuites efficaces des cybercrimes. Compte tenu de la gravité des actes criminels qui peuvent être perpétrés en ligne, cette préoccupation ne peut être prise à la légère. J’estime toutefois que la reconnaissance de la *possibilité* qu’il existe un intérêt en matière de vie privée à l’égard de l’anonymat, selon les circonstances, ne suffit pas pour reconnaître le « droit » à l’anonymat et n’a pas pour effet de menacer l’efficacité des autorités d’application de la loi relativement aux infractions commises sur Internet. En l’espèce, par exemple, il semble évident que la police disposait de renseignements détaillés permettant d’obtenir une ordonnance de communication enjoignant à Shaw de fournir les renseignements sur l’abonnée à qui appartenait l’adresse IP qu’elle avait obtenue.

[50] L’application de ce cadre d’analyse aux faits de la présente affaire est simple. Dans les circonstances de l’espèce, la demande de la police dans le but d’établir un lien entre une adresse IP donnée et les renseignements relatifs à l’abonnée visait en fait à établir un lien entre une personne précise (ou un nombre restreint de personnes dans le cas des services Internet partagés) et des activités en ligne précises. Ce genre de demande porte sur l’aspect informationnel du droit à la vie privée relatif à l’anonymat en cherchant à établir un lien entre le suspect et des activités entreprises en ligne, sous le couvert de l’anonymat, activités qui, comme la Cour l’a reconnu dans d’autres circonstances, mettent en jeu d’importants droits en matière de vie privée : *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253, par. 3; *Cole*, par. 47; *R. c. Vu*, 2013 CSC 60, [2013] 3 R.C.S. 657, par. 40-45.

[51] I conclude therefore that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy. I agree with Caldwell J.A.'s conclusion on this point:

... a reasonable and informed person concerned about the protection of privacy would expect one's activities on one's own computer used in one's own home would be private. . . . In my judgment, it matters not that the personal attributes of the Disclosed Information pertained to Mr. Spencer's sister because Mr. Spencer was personally and directly exposed to the consequences of the police conduct in this case. As such, the police conduct *prima facie* engaged a personal privacy right of Mr. Spencer and, in this respect, his interest in the privacy of the Disclosed Information was direct and personal. [para. 27]

(c) *Reasonable Expectation of Privacy*

[52] The next question is whether Mr. Spencer's expectation of privacy was reasonable. The trial judge found that there could be no reasonable expectation of privacy in the face of the relevant contractual and statutory provisions (para. 19), a conclusion with which Caldwell J.A. agreed on appeal: para. 42. Cameron J.A., however, was doubtful that the contractual and statutory terms had this effect in the context of this case: para. 98.

[53] In this Court, Mr. Spencer maintains that the contractual and statutory terms did not undermine a reasonable expectation of privacy with respect to the subscriber information. He submits that the contractual provisions do nothing more than suggest that the information will not be provided to police unless required by law and that *PIPEDA*, whose purpose is to protect privacy rights, supports rather than negates the reasonableness of an expectation of privacy in this case. The Crown

[51] Par conséquent, je conclus que la demande de la police auprès de Shaw — visant à obtenir des renseignements relatifs à l'abonnée qui correspondaient à des activités entreprises sur Internet de façon anonyme et observées en particulier — fait intervenir, dans une grande mesure, l'aspect informationnel du droit à la vie privée. Je souscris à la conclusion du juge Caldwell sur ce point :

[TRADUCTION] . . . une personne raisonnable et bien informée, qui se soucie de la protection de la vie privée, s'attendrait à ce que les activités qu'une personne effectue sur son propre ordinateur et dans son domicile soient confidentielles. [. . .] À mon avis, il n'importe nullement que les renseignements communiqués concernaient la sœur de M. Spencer parce que, en l'espèce, M. Spencer a, personnellement et directement, subi les conséquences des actes de la police. À première vue, ces actes font intervenir le droit de M. Spencer à la vie privée et, de ce fait, son intérêt en matière de vie privée relativement à la confidentialité des renseignements communiqués était direct et personnel. [par. 27]

c) *L'attente raisonnable en matière de respect de la vie privée*

[52] Il s'agit maintenant de savoir si l'attente de M. Spencer en matière de respect de sa vie privée était raisonnable. Selon le juge du procès, il ne pouvait pas y avoir d'attente raisonnable en matière de respect de la vie privée compte tenu des dispositions contractuelles et législatives applicables (par. 19), conclusion à laquelle le juge Caldwell a souscrit en appel : par. 42. Le juge Cameron a affirmé douter pour sa part que les dispositions du contrat et celles de la loi aient cet effet dans le contexte de la présente affaire : par. 98.

[53] Devant la Cour, M. Spencer a fait valoir que les dispositions du contrat et de la loi n'ont pas pour effet de compromettre une attente raisonnable en matière de vie privée relativement aux renseignements relatifs à l'abonné. Selon lui, les dispositions du contrat ne font rien d'autre qu'indiquer qu'il n'y aura pas de communication des renseignements à la police, à moins que cela ne soit requis par la loi, et que la *LPRPDE* — qui vise à protéger les droits en matière de vie privée — tend

disagrees and supports the position taken on this point by Caldwell J.A. in the Court of Appeal.

[54] There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. So, for example in *Gomboc*, Deschamps J. writing for four members of the Court, found that the terms governing the relationship between the electricity provider and its customer were “highly significant” to Mr. Gomboc’s reasonable expectation of privacy, but treated it as “one factor amongst many which must be weighed in assessing the totality of the circumstances”: paras. 31-32. She also emphasized that when dealing with contracts of adhesion in the context of a consumer relationship, it was necessary to “proceed with caution” when determining the impact that such provision would have on the reasonableness of an expectation of privacy: para. 33. The need for caution in this context was pointedly underlined in the dissenting reasons of the Chief Justice and Fish J. in that case: paras. 138-42.

[55] The contractual and statutory frameworks overlap in the present case because the Shaw Joint Terms of Service make reference to *PIPEDA*, and the scope of permitted disclosure under *PIPEDA* turns partly on whether the customer has consented to the disclosure of personal information. I must first set out the details of these schemes before turning to their impact on the reasonable expectations analysis. In doing so, it becomes apparent that the relevant provisions provide little assistance in evaluating the reasonableness of Mr. Spencer’s expectation of privacy.

[56] Shaw provides Internet services to its customers under a standard form “Joint Terms of

à confirmer plutôt qu’à nier le caractère raisonnable d’une attente en matière de vie privée en l’espèce. Le ministère public ne souscrit pas à cet argument et appuie la position adoptée sur ce point par le juge Caldwell de la Cour d’appel.

[54] Il ne fait aucun doute que les cadres législatif et contractuel peuvent être pertinents, mais pas nécessairement déterminants, quant à la question de savoir s’il existe une attente raisonnable en matière de vie privée. Dans l’arrêt *Gomboc*, par exemple, s’exprimant au nom de quatre juges de la Cour, la juge Deschamps a conclu que les dispositions régissant les rapports entre le fournisseur d’électricité et son client revêtent une « grande importance » quant à l’attente raisonnable de M. Gomboc en matière de vie privée, mais a considéré qu’il s’agissait d’« un des nombreux facteurs dont il faut tenir compte pour apprécier l’ensemble des circonstances » : par. 31-32. La juge Deschamps a également souligné que, dans le cadre de contrats d’adhésion qui régissent les relations avec les clients, « la prudence est évidemment de mise » lorsqu’il s’agit de juger des conséquences que peuvent avoir les dispositions de ces contrats sur le caractère raisonnable d’une attente en matière de respect de la vie privée : par. 33. Dans leurs motifs dissidents, la Juge en chef et le juge Fish ont mis l’accent sur le besoin de faire preuve de prudence dans ce contexte : par. 138-142.

[55] En l’espèce, les cadres contractuel et législatif se chevauchent parce que les conditions de service de Shaw renvoient à la *LPRPDE* et que la portée de la communication autorisée de renseignements personnels sous le régime de la *LPRPDE* repose en partie sur la question de savoir si le client a donné son consentement à cet égard. Avant d’examiner les conséquences de ces régimes sur l’analyse relative aux attentes raisonnables en matière de vie privée, je dois en préciser les modalités. Lorsque je le fais, il devient clair que les dispositions applicables ne sont guère utiles pour évaluer le caractère raisonnable de l’attente de M. Spencer au respect de sa vie privée.

[56] Shaw fournit des services Internet à ses clients conformément à une entente type relative

Service” agreement. Additional terms and conditions are provided in Shaw’s “Acceptable Use Policy” and its “Privacy Policy”. The terms of these agreements are posted online on Shaw’s website and change from time to time. The investigators sought the subscriber information for the IP address used on August 31, 2007 in their request to Shaw.

[57] Mr. Spencer was not personally a party to these agreements, as he accessed the Internet through his sister’s subscription. It is common practice for multiple users to share a common Internet connection. A reasonable user would be aware that the use of the service would be governed by certain terms and conditions, and those terms and conditions were readily accessible through Shaw’s website. This case does not require us to decide whether Mr. Spencer was bound by the terms of the contract with Shaw. Quite apart from contractual liability, the terms on which he gained access to the Internet are a relevant circumstance in assessing the reasonableness of his expectation of privacy. There are three relevant sets of provisions which, taken as a whole, provide a confusing and unclear picture of what Shaw would do when faced with a police request for subscriber information. The Joint Terms of Service at first blush appear to permit broad disclosure because they provide, among other things, that “Shaw may disclose any information as is necessary to . . . satisfy any legal, regulatory or other governmental request”. This general provision, however, must be read in light of the more specific provision relating to disclosure of IP addresses and other identifying information in the Acceptable Use Policy, which in turn is subject to the Privacy Policy.

[58] The Acceptable Use Policy (last updated on June 18, 2007) provides that Shaw is authorized

aux « Conditions de service » (« *Joint Terms of Service* »). Sa [TRADUCTION] « Politique relative à l’utilisation acceptable » (« *Acceptable Use Policy* ») et sa « Politique sur la protection de la vie privée » (« *Privacy Policy* ») prévoient des modalités et conditions supplémentaires. Les dispositions de ces ententes sont affichées en ligne sur le site Web de Shaw et font périodiquement l’objet de modifications. Les enquêteurs ont demandé à Shaw des renseignements sur l’abonnée à qui appartenait l’adresse IP utilisée le 31 août 2007.

[57] Monsieur Spencer n’était pas lui-même partie à ces ententes, puisqu’il avait accès à Internet au moyen de l’abonnement de sa sœur. Il est d’ailleurs très courant que plusieurs utilisateurs partagent une connexion Internet. L’usager raisonnable sait que l’utilisation du service Internet est régie par certaines modalités, qui étaient d’ailleurs facilement accessibles sur le site Web de Shaw. Nous n’avons toutefois pas à décider en l’espèce si M. Spencer était lié par les modalités du contrat avec Shaw. Cependant, indépendamment de la responsabilité contractuelle, les conditions auxquelles il a pu accéder à Internet sont pertinentes pour évaluer le caractère raisonnable de son attente quant au respect de sa vie privée. Il existe trois séries de dispositions applicables qui, dans leur ensemble, prêtent à confusion quant à la manière de Shaw de répondre à une demande de renseignements relatifs à un abonné adressée par la police. À première vue, les Conditions de service semblent conférer à Shaw un vaste pouvoir discrétionnaire parce qu’elles prévoient, entre autres, qu’[TRADUCTION] « [elle] peut communiquer les renseignements nécessaires pour [. . .] satisfaire à toute demande fondée sur une loi ou un règlement ou toute autre demande du gouvernement ». Il convient toutefois d’interpréter cette disposition générale en fonction de la disposition plus spécifique concernant la communication d’adresses IP et d’autres renseignements personnels dans le contexte d’enquêtes criminelles qui figure dans la Politique relative à l’utilisation acceptable qui, elle-même, est assujettie à la Politique sur la protection de la vie privée.

[58] Suivant la Politique relative à l’utilisation acceptable (dont la mise à jour la plus récente date

to cooperate with law enforcement authorities in the investigation of criminal violations, including supplying information identifying a subscriber *in accordance with its Privacy Policy*. The provision reads as follows:

You hereby authorize Shaw to cooperate with (i) law enforcement authorities in the investigation of suspected criminal violations, and/or (ii) system administrators at other Internet service providers or other network or computing facilities in order to enforce this Agreement. Such cooperation may include Shaw providing the username, IP address, or other identifying information about a subscriber, in accordance with the guidelines set out in Shaw's Privacy Policy. [Emphasis added.]

[59] The Privacy Policy in the record (last updated on November 12, 2008) states that Shaw is committed to protecting personal information, which is defined as information about an identifiable individual. One of the ten principles set out in the Privacy Policy deals with limiting the disclosure of personal information (principle 5). The policy limits the circumstances under which personal information will be disclosed without the customer's knowledge or consent to "exceptional circumstances, as permitted by law". Shaw may disclose information to its partners in order to provide its services and, in such cases, the information is governed by "strict confidentiality standards and policies" to keep the information secure and to ensure it is treated in accordance with *PIPEDA*. The Privacy Policy also provides that "Shaw may disclose Customer's Personal Information to: . . . a third party or parties, where the Customer has given Shaw Consent to such disclosure or if disclosure is required by law, in accordance with *The Personal Information Protection and Electronic Documents Act*" (emphasis added).

du 18 juin 2007), Shaw est autorisée à collaborer avec les autorités d'application de la loi dans le cadre d'enquêtes sur des infractions criminelles, notamment en fournissant des renseignements personnels sur un abonné, *conformément à sa Politique sur la protection de la vie privée*. Cette disposition est ainsi libellée :

[TRADUCTION] Par la présente, vous autorisez Shaw à collaborer avec (i) les autorités d'application de la loi dans le cadre d'enquêtes sur des infractions criminelles présumées, et avec (ii) les administrateurs du système d'autres fournisseurs de services Internet ou d'autres réseaux ou installations informatiques afin de faire appliquer la présente entente. Cette collaboration peut comprendre la communication du nom d'utilisateur, de l'adresse IP ou d'autres renseignements personnels concernant un abonné, conformément aux lignes directrices énoncées dans sa Politique sur la protection de la vie privée. [Je souligne.]

[59] Suivant la Politique sur la protection de la vie privée qui figure au dossier (dont la mise à jour la plus récente date du 12 novembre 2008), Shaw s'engage à protéger les renseignements personnels, définis comme des renseignements concernant un individu identifiable. Un des dix principes énoncés dans la Politique sur la protection de la vie privée a pour effet de restreindre la communication de renseignements personnels (principe n° 5). Cette politique limite les circonstances dans lesquelles les renseignements personnels seront communiqués à l'insu du client ou sans son consentement à des [TRADUCTION] « circonstances exceptionnelles, conformément à la loi ». Shaw peut communiquer des renseignements à ses partenaires afin de fournir ses services, et, dans de tels cas, ces renseignements sont régis par des « normes et politiques strictes en matière de confidentialité » pour assurer leur sécurité et pour veiller à ce qu'ils soient traités conformément à la *LPRPDE*. La Politique sur la protection de la vie privée prévoit également que « Shaw peut communiquer des renseignements personnels concernant un client : [. . .] à une partie ou à plusieurs tierces parties lorsque le client visé a donné son consentement à cet égard ou lorsque la communication des renseignements est exigée par la loi, conformément à la *Loi sur la protection des renseignements personnels et les documents électroniques* » (je souligne).

[60] Whether or not disclosure of personal information by Shaw is “permitted” or “required by law” in turn depends on an analysis of the applicable statutory framework. The contractual provisions, read as a whole, are confusing and equivocal in terms of their impact on a user’s reasonable expectation of privacy in relation to police initiated requests for subscriber information. The statutory framework provided by *PIPEDA* is not much more illuminating.

[61] Shaw’s collection, use, and disclosure of the personal information of its subscribers is subject to *PIPEDA*, which protects personal information held by organizations engaged in commercial activities from being disclosed without the knowledge or consent of the person to whom the information relates: Sch. 1, clause 4.3. Section 7 contains several exceptions to this general rule and permits organizations to disclose personal information without consent. The exception relied on in this case is s. 7(3)(c.1)(ii). It permits disclosure to a government institution that has requested the disclosure for the purpose of law enforcement and has stated its “lawful authority” for the request. The provisions of *PIPEDA* are not of much help in determining whether there is a reasonable expectation of privacy in this case. They lead us in a circle.

[62] Section 7(3)(c.1)(ii) allows for disclosure without consent to a government institution where that institution has identified its *lawful authority* to obtain the information. But the issue is whether there was such lawful authority which in turn depends in part on whether there was a reasonable expectation of privacy with respect to the subscriber information. *PIPEDA* thus cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the

[60] Ainsi, la réponse à la question de savoir si la communication des renseignements personnels par Shaw est « autorisée » ou « exigée par la loi » repose sur l’analyse du cadre législatif applicable. Les dispositions du contrat, lues conjointement, sont équivoques et prêtent à confusion quant à leurs conséquences sur l’attente raisonnable de l’utilisateur en matière de vie privée relativement aux demandes de la police visant à obtenir des renseignements relatifs à l’abonné. Le cadre législatif prévu par la *LPRPDE* ne permet pas d’en apprendre davantage.

[61] La collecte, l’utilisation et la communication par Shaw de renseignements personnels concernant ses abonnés sont assujetties à la *LPRPDE*, laquelle protège les renseignements personnels que possèdent les organisations qui exercent des activités commerciales contre leur communication à l’insu de l’intéressé et sans son consentement : ann. 1, art. 4.3. L’article 7 prévoit plusieurs exceptions à cette règle générale, permettant ainsi aux organisations de communiquer des renseignements personnels sans le consentement de l’intéressé. L’exception invoquée en l’espèce figure au sous-al. 7(3)c.1(ii), qui autorise la communication de renseignements à une institution gouvernementale qui a demandé à obtenir les renseignements visés aux fins du contrôle d’application du droit en mentionnant la « source de l’autorité légitime » étayant la demande. En l’espèce, les dispositions de la *LPRPDE* ne sont pas très utiles pour déterminer s’il existe une attente raisonnable en matière de vie privée puisqu’après les avoir examinées, on se retrouve au point de départ.

[62] Le sous-alinéa 7(3)c.1(ii) autorise la communication de renseignements, sans le consentement de l’intéressé, faite à une institution gouvernementale lorsque cette dernière mentionne la *source de l’autorité légitime* étayant son droit à obtenir les renseignements demandés. Il s’agit toutefois de savoir s’il existe une telle source d’autorité légitime, question dont la réponse dépend, en partie, de l’existence d’une attente raisonnable en matière de vie privée à l’égard des renseignements concernant

proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. Given that the purpose of *PIPEDA* is to establish rules governing, among other things, disclosure “of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information” (s. 3), it would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*’s general prohibition on the disclosure of personal information without consent.

[63] I am aware that I have reached a different result from that reached in similar circumstances by the Ontario Court of Appeal in *Ward*, where the court held that the provisions of *PIPEDA* were a factor which weighed against finding a reasonable expectation of privacy in subscriber information. This conclusion was based on two main considerations. The first was that an ISP has a legitimate interest in assisting in law enforcement relating to crimes committed using its services: para. 99. The second was the grave nature of child pornography offences, which made it reasonable to expect that an ISP would cooperate with a police investigation: paras. 102-3. While these considerations are certainly relevant from a policy perspective, they cannot override the clear statutory language of s. 7(3)(c.1)(ii) of *PIPEDA*, which permits disclosure only if a request is made by a government institution with “lawful authority” to request the disclosure. It is reasonable to expect that an organization bound by *PIPEDA* will respect its statutory obligations with respect to personal information. The Court of Appeal in *Ward* held that s. 7(3)(c.1)(ii) must be read in light of s. 5(3), which states that “[a]n organization may collect, use or disclose personal information only for purposes

l’abonné. La *LPRPDE* ne peut donc être considérée comme un des facteurs défavorables à l’existence d’une attente raisonnable en matière de vie privée puisque l’interprétation juste de la disposition applicable dépend elle-même de l’existence d’une telle attente raisonnable en matière de vie privée. Puisque la *LPRPDE* a pour objet de fixer des règles régissant, entre autres, la communication de « renseignements personnels d’une manière qui tient compte du droit des individus à la vie privée à l’égard des renseignements personnels qui les concernent » (art. 3), il serait raisonnable que l’internaute s’attende à ce qu’une simple demande faite par la police n’entraîne pas l’obligation de communiquer les renseignements personnels en question ou qu’elle n’écarte pas l’interdiction générale prévue par la *LPRPDE* quant à la communication de renseignements personnels sans le consentement de l’intéressé.

[63] Certes, je suis arrivé à une conclusion différente que celle formulée, dans des circonstances semblables, dans l’arrêt *Ward*, où la Cour d’appel de l’Ontario a statué que les dispositions de la *LPRPDE* constituaient un facteur qui pesait contre la reconnaissance de l’existence d’une attente raisonnable en matière de vie privée à l’égard des renseignements concernant l’abonné. Cette conclusion reposait sur deux considérations principales. Premièrement, le fait que le FSI a un intérêt légitime à collaborer avec les autorités d’application de la loi relativement à des crimes commis lors de l’utilisation de ses services : par. 99. Deuxièmement, la gravité des infractions de pornographie juvénile, compte tenu de laquelle il était raisonnable de s’attendre à ce que le FSI collabore avec la police dans le cadre d’une enquête : par. 102-103. Bien qu’elles soient certainement pertinentes sur le plan des principes, ces considérations ne sauraient avoir priorité sur le libellé clair du sous-al. 7(3)c.1(ii) de la *LPRPDE*, qui n’autorise la communication de renseignements que lorsqu’une institution gouvernementale mentionne la « source de l’autorité légitime » étayant sa demande. En effet, il est raisonnable de s’attendre à ce qu’une organisation assujettie à la *LPRPDE* respecte les

that a reasonable person would consider are appropriate in the circumstances”. This rule of “reasonable disclosure” was used as a basis to invoke considerations such as allowing ISPs to cooperate with the police and preventing serious crimes in the interpretation of *PIPEDA*. Section 5(3) is a guiding principle that underpins the interpretation of the various provisions of *PIPEDA*. It does not allow for a departure from the clear requirement that a requesting government institution possess “lawful authority” and so does not resolve the essential circularity of using s. 7(3)(c.1)(ii) as a factor in determining whether a reasonable expectation of privacy exists.

[64] I also note with respect to an ISP’s legitimate interest in preventing crimes committed through its services that entirely different considerations may apply where an ISP itself detects illegal activity and of its own motion wishes to report this activity to the police. Such a situation falls under a separate, broader exemption in *PIPEDA*, namely s. 7(3)(d). The investigation in this case was begun as a police investigation and the disclosure of the subscriber information arose out of the request letter sent by the police to Shaw.

[65] The overall impression created by these terms is that disclosure at the request of the police would be made only where required or permitted by law. Such disclosure is only permitted by *PIPEDA* in accordance with the exception in s. 7, which in this case would require the requesting police to have “lawful authority” to request the disclosure. For reasons that I will set out in the next section, this request had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. I conclude

obligations que celle-ci lui impose à l’égard des renseignements personnels. La Cour d’appel a statué dans l’arrêt *Ward* qu’il convient d’interpréter le sous-al. 7(3)c.1)(ii) en tenant compte du par. 5(3), suivant lequel « [l’]organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu’à des fins qu’une personne raisonnable estimerait acceptables dans les circonstances ». Cette règle de la « communication raisonnable » a permis de prendre en considération, pour interpréter la *LPRPDE*, des facteurs comme l’autorisation des FSI à collaborer avec la police et la lutte contre les crimes graves. Le paragraphe 5(3) énonce un principe directeur sur lequel repose l’interprétation des diverses dispositions de la *LPRPDE*. Il ne permet pas d’écarter l’exigence claire concernant la « source de l’autorité légitime » qui étaye la demande d’une institution gouvernementale et ne règle donc pas l’impasse que crée le sous-al. 7(3)c.1)(ii) pour juger de l’existence ou non d’une attente raisonnable en matière de vie privée.

[64] Je fais en outre remarquer, au sujet de l’intérêt légitime du FSI dans la lutte contre les crimes commis en utilisant ses services, que des considérations tout à fait différentes peuvent s’appliquer si le FSI détecte lui-même une activité illégale et, de sa propre initiative, souhaite la signaler à la police. Une telle situation tombe sous le coup d’une exemption distincte, plus large, prévue par la *LPRPDE*, à savoir celle énoncée à l’al. 7(3)d). En l’espèce, l’enquête a été commencée par la police et la communication des renseignements relatifs à l’abonnée a été faite par suite de la lettre de demande envoyée à Shaw par la police.

[65] De ces modalités se dégage l’impression générale que la communication faite à la demande de la police n’aurait lieu que lorsqu’elle est exigée ou autorisée par la loi. Or, la *LPRPDE* n’autorise une telle communication que suivant l’exception prévue à l’art. 7. Il faudrait donc que la police qui formule la demande de communication détienne « l’autorité légitime » à cet égard. Pour les motifs que j’énoncerai dans la prochaine partie, la demande en cause n’était pas étayée par la source de l’autorité légitime de la police, en ce sens que

that, if anything, the contractual provisions in this case support the existence of a reasonable expectation of privacy, since the Privacy Policy narrowly circumscribes Shaw's right to disclose the personal information of subscribers.

[66] In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

[67] The intervener the Attorney General of Alberta raised a concern that if the police were not permitted to request disclosure of subscriber information, then other routine inquiries that might reveal sensitive information about a suspect would also be prohibited, and this would unduly impede the investigation of crimes. For example, when the police interview the victim of a crime, core biographical details of a suspect's lifestyle might be revealed. I do not agree that this result follows from the principles set out in these reasons. Where a police officer requests disclosure of information relating to a suspect from a third party, whether there is a search depends on whether, in light of the totality of the circumstances, the suspect has a reasonable expectation of privacy in that information: *Plant*, at p. 293; *Gomboc*, at paras. 27-30, *per* Deschamps J. In *Duarte*, the Court distinguished between a person repeating a conversation with a suspect to the police and the police procuring an audio recording of the same conversation. The Court held that the danger is "not the risk that someone will repeat our words but the

cette dernière pouvait formuler une demande, mais ne détenait pas l'autorité pour obliger le fournisseur à s'y conformer. Je conclus que les dispositions du contrat en l'espèce justifient l'existence d'une attente raisonnable en matière de vie privée, si un quelconque effet doit être donné à ces termes en cette matière, puisque la Politique sur la protection de la vie privée a pour effet de limiter strictement le droit de Shaw de communiquer des renseignements personnels concernant ses abonnés.

[66] À mon avis, compte tenu de l'ensemble des circonstances de la présente affaire, il existe une attente raisonnable en matière de vie privée à l'égard des renseignements relatifs à l'abonnée. La communication de ces renseignements permettra souvent d'identifier l'utilisateur qui mène des activités intimes ou confidentielles en ligne en tenant normalement pour acquis que ces activités demeurent anonymes. La demande faite par un policier visant la communication volontaire par le FSI de renseignements de cette nature constitue donc une fouille.

[67] Le procureur général de l'Alberta, intervenant en l'espèce, a dit craindre que, si la police n'était pas autorisée à demander la communication de renseignements relatifs à un abonné donné, d'autres demandes courantes pouvant révéler des renseignements confidentiels sur un suspect risquent d'être également interdites, ce qui aurait pour effet d'entraver indûment l'enquête sur des crimes. Par exemple, lorsque les policiers interrogent la victime d'un crime, des renseignements biographiques d'ordre personnel concernant le mode de vie du suspect pourraient être révélés. Je ne suis pas d'accord pour dire que cette conclusion découle des principes énoncés dans les présents motifs. Pour déterminer si la demande faite par un policier à un tiers de communiquer des renseignements concernant un suspect constitue une fouille ou une perquisition, il faut se demander si, compte tenu de l'ensemble des circonstances, le suspect a une attente raisonnable en matière de vie privée à l'égard de ces renseignements : *Plant*, p. 293; *Gomboc*, par. 27-30, la juge Deschamps. Dans l'arrêt *Duarte*, la Cour a établi une distinction entre une personne

much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words”: at pp. 43-44. Similarly in this case, the police request that the ISP disclose the subscriber information was in effect a request to link Mr. Spencer with precise online activity that had been the subject of monitoring by the police and thus engaged a more significant privacy interest than a simple question posed by the police in the course of an investigation.

B. *Was the Search Lawful?*

[68] A warrantless search, such as the one that occurred in this case, is presumptively unreasonable: *R. v. Collins*, [1987] 1 S.C.R. 265. The Crown bears the burden of rebutting this presumption. A search will be reasonable if (a) it was authorized by law, (b) the law itself was reasonable, and (c) the search was carried out in a reasonable manner: p. 278. Mr. Spencer has not challenged the constitutionality of the laws that purportedly authorized the search. He did raise concerns about the reasonableness of the manner, but in my view, these are groundless. Accordingly, we need only consider whether the search was authorized by law.

[69] The Crown supports the conclusions of Caldwell and Cameron J.J.A. in the Court of Appeal that any search was lawful, relying on the combined effect of s. 487.014 of the *Criminal Code* and s. 7(3)(c.1)(ii) of *PIPEDA*. I respectfully do not agree.

[70] Section 487.014(1) of the *Criminal Code* provides that a peace officer does not need a production order “to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from

qui rapporte à la police une conversation avec un suspect et l’enregistrement par la police de la même conversation. Selon la Cour, il s’agit « non plus [du] risque que quelqu’un répète nos propos, mais [du] danger bien plus insidieux qu’il y a à permettre que l’État, à son entière discrétion, enregistre et transmette nos propos » : p. 43-44. De même, dans l’affaire qui nous occupe, la demande par la police que le FSI communique les renseignements relatifs à l’abonnée constituait en fait une demande d’établir un lien entre M. Spencer et des activités précises menées en ligne qui avaient été surveillées par police, et mettait donc en jeu un droit en matière de vie privée beaucoup plus important qu’une simple question formulée lors d’une enquête policière.

B. *La fouille était-elle légitime?*

[68] Une fouille sans mandat, comme celle qui a été effectuée en l’espèce, est présumée abusive : *R. c. Collins*, [1987] 1 R.C.S. 265. Il incombe au ministère public de réfuter cette présomption. Une fouille ne sera pas abusive si a) elle est autorisée par la loi, b) la loi elle-même n’a rien d’abusif, et c) la fouille n’a pas été effectuée d’une manière abusive : p. 278. M. Spencer ne conteste pas la constitutionnalité des lois qui auraient autorisé la fouille. Il a toutefois soulevé des objections quant à la manière, qu’il estime abusive, dont a été effectuée la fouille. À mon avis, ces objections sont mal fondées. Il ne reste donc qu’à examiner si la fouille était autorisée par la loi.

[69] Le ministère public appuie les conclusions tirées par les juges Caldwell et Cameron de la Cour d’appel selon lesquelles la fouille était légitime, compte tenu de l’effet combiné de l’art. 487.014 du *Code criminel* et du sous-al. 7(3)c.1(ii) de la *LPRPDE*. En toute déférence, je ne souscris pas à cette opinion.

[70] Suivant le par. 487.014(1) du *Code criminel*, une ordonnance de communication n’est pas nécessaire pour qu’un agent de la paix « demande à une personne de lui fournir volontairement des documents, données ou renseignements qu’aucune

disclosing”. *PIPEDA* prohibits disclosure of the information unless the requirements of the law enforcement provision are met, including that the government institution discloses a lawful authority *to obtain*, not simply to ask for the information: s. 7(3)(c.1)(ii). On the Crown’s reading of these provisions, *PIPEDA*’s protections become virtually meaningless in the face of a police request for personal information: the “lawful authority” is a simple request without power to compel and, because there was a simple request, the institution is no longer prohibited by law from disclosing the information.

[71] “Lawful authority” in s. 7(3)(c.1)(ii) of *PIPEDA* must be contrasted with s. 7(3)(c), which provides that personal information may be disclosed without consent where “required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records”. The reference to “lawful authority” in s. 7(3)(c.1)(ii) must mean something other than a “subpoena or [search] warrant”. “Lawful authority” may include several things. It may refer to the common law authority of the police to ask questions relating to matters that are not subject to a reasonable expectation of privacy. It may refer to the authority of police to conduct warrantless searches under exigent circumstances or where authorized by a reasonable law: *Collins*. As the intervener the Privacy Commissioner of Canada submitted, interpreting “lawful authority” as requiring more than a bare request by law enforcement gives this term a meaningful role to play in the context of s. 7(3) and should be preferred over alternative meanings that do not do so. In short, I agree with the Ontario Court of Appeal in *Ward* on this point that neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA*

règle de droit n’interdit à celle-ci de communiquer ». La *LPRPDE* interdit la communication de renseignements à moins que les autorités d’application de la loi ne respectent les exigences les concernant, notamment l’exigence selon laquelle une institution gouvernementale doit mentionner la source de l’autorité légitime étayant son droit *d’obtenir* les renseignements, et non seulement de les demander : sous-al. 7(3)c.1(ii). Selon l’interprétation que donne le ministère public de ces dispositions, une demande de renseignements personnels faite par la police rendrait pratiquement sans effet les protections prévues par la *LPRPDE* : l’exigence relative à la « source de l’autorité légitime » ne constitue qu’une simple demande sans aucun pouvoir de contrainte, mais, par suite d’une simple demande, la communication de renseignements par l’institution en question n’est plus prohibée par la loi.

[71] Il faut distinguer la « source de l’autorité légitime » à laquelle réfère le sous-al. 7(3)c.1(ii) de la *LPRPDE* et l’al. 7(3)c), selon lequel la communication des renseignements personnels peut être faite sans le consentement de l’intéressé lorsqu’« elle est exigée par assignation, mandat ou ordonnance d’un tribunal, d’une personne ou d’un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents ». Le renvoi à la « source de l’autorité légitime » au sous-al. 7(3)c.1(ii) doit viser autre chose qu’une « assignation » ou un « mandat » de perquisition. La « source de l’autorité légitime » peut avoir plusieurs sens. Cette notion peut désigner le pouvoir conféré par la common law aux policiers de poser des questions portant sur des éléments qui ne font pas l’objet d’une attente raisonnable en matière de vie privée. Elle peut renvoyer au pouvoir de la police d’effectuer une fouille ou une perquisition sans mandat dans des circonstances contraignantes ou dans des cas où une loi qui n’a rien d’abusif le permet : *Collins*. Comme le fait valoir la commissaire à la protection de la vie privée du Canada, intervenante en l’espèce, si on tient pour acquis que la « source de l’autorité légitime »

creates any police search and seizure powers: para. 46.

nécessite davantage qu'une simple demande faite par les autorités d'application de la loi, cette notion arrive à jouer un rôle significatif dans le contexte du par. 7(3), au détriment d'autres interprétations qui n'ont pas cet effet. Bref, je suis d'accord avec la Cour d'appel de l'Ontario dans l'arrêt *Ward* sur ce point, pour dire que ni le par. 487.014(1) du *Code criminel* ni la *LPRPDE* n'ont pour effet de conférer à la police des pouvoirs en matière de fouilles, de perquisitions ou de saisies : par. 46.

[72] I recognize that this conclusion differs from that of the Saskatchewan Court of Appeal in *Trapp*, at para. 66, and the British Columbia Supreme Court in *R. v. McNeice*, 2010 BCSC 1544 (CanLII), at para. 43. The Court of Appeal in *Trapp* read s. 487.014(1) together with s. 29(2)(g) of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, an analogous provision to s. 7(3)(c.1)(ii) of *PIPEDA*, although one from which the “lawful authority” requirement is absent. The court held that s. 487.014(1) gave the police a power to make any inquiries that were not otherwise prohibited by law. The court in *McNeice* took the same approach, although that case concerned s. 7(3)(c.1)(ii) of *PIPEDA*, the same provision at issue in this case.

[72] Je reconnais que cette conclusion diffère de celle tirée par la Cour d'appel de la Saskatchewan dans *Trapp*, par. 66, et par la Cour suprême de la Colombie-Britannique dans *R. c. McNeice*, 2010 BCSC 1544 (CanLII), par. 43. Dans l'arrêt *Trapp*, la Cour d'appel a interprété le par. 487.014(1) de concert avec l'al. 29(2)(g) de la *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, ch. F-22.01, disposition analogue à celle énoncée au sous-al. 7(3)c.1(ii) de la *LPRPDE*, même si l'exigence relative à la « source de l'autorité légitime » y est absente. La cour a affirmé que le par. 487.014(1) conférait aux policiers le pouvoir de faire toute demande qui n'était pas prohibée par la loi. La Cour suprême de la Colombie-Britannique a adopté la même approche dans l'affaire *McNeice*, même si celle-ci portait sur le sous-al. 7(3)c.1(ii) de la *LPRPDE*, disposition qui est en cause dans le présent pourvoi.

[73] With respect, I cannot accept that this conclusion applies to s. 7(3)(c.1)(ii) of *PIPEDA*. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries, as indicated by the fact that the section begins with the phrase “[f]or greater certainty”: see *Ward*, at para. 49. *PIPEDA* is a statute whose purpose, as set out in s. 3, is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, I do not see how they could gain a new search power through the combination of a declaratory provision and

[73] En toute déférence, je ne peux accepter que cette conclusion s'applique au sous-al. 7(3)c.1(ii) de la *LPRPDE*. Le paragraphe 487.014(1) est une disposition déclaratoire qui confirme les pouvoirs de common law permettant aux policiers de formuler des questions, comme l'indique les premiers mots de son libellé en français « [i]l demeure entendu qu[e] » ou de son libellé en anglais « [f]or greater certainty » : voir *Ward*, par. 49. La *LPRPDE* est une loi qui a pour objet, comme il est indiqué à l'art. 3, d'accroître la protection des renseignements personnels. Puisque, en l'espèce, les policiers n'avaient pas le pouvoir d'effectuer une fouille ou une perquisition pour obtenir des renseignements relatifs à l'abonnée en l'absence de circonstances

a provision enacted to promote the protection of personal information.

[74] The subscriber information obtained by police was used in support of the Information to Obtain which led to the issuance of a warrant to search Ms. Spencer's residence. Without that information, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant, and the search of the residence was therefore unlawful. I conclude, therefore, that the conduct of the search of Ms. Spencer's residence violated the *Charter: Plant*, at p. 296; *Hunter v. Southam*, at p. 161. Nothing in these reasons addresses or diminishes any existing powers of the police to obtain subscriber information in exigent circumstances such as, for example, where the information is required to prevent imminent bodily harm. There were no such circumstances here.

C. *Should the Evidence Have Been Excluded*

[75] Neither the trial judge nor the Court of Appeal found a breach of s. 8 in this case and, therefore, did not have to consider the question of whether the evidence obtained in a manner that violated Mr. Spencer's *Charter* rights should be excluded under s. 24(2) of the *Charter*. The question is whether the admission of the evidence would bring the administration of justice into disrepute. I accept, as both Mr. Spencer and the Crown agree, that we can determine this issue on the record before us. However, I disagree with Mr. Spencer's submission that the evidence should be excluded. In my view, it should not.

contraignantes ou d'une loi qui n'a rien d'abusif, je ne vois pas comment ils pourraient obtenir un nouveau pouvoir en matière de fouille ou de perquisition par l'effet combiné d'une disposition déclaratoire et d'une disposition adoptée afin de favoriser la protection des renseignements personnels.

[74] La police a utilisé les renseignements relatifs à l'abonnée pour étayer la dénonciation qui a conduit à la délivrance d'un mandat l'autorisant à perquisitionner dans la résidence de M^{me} Spencer. En l'absence de ces renseignements, la police n'aurait pas pu obtenir le mandat. Par conséquent, si ces renseignements sont écartés (ce qui doit être le cas, parce qu'ils ont été obtenus d'une façon inconstitutionnelle), il n'y avait aucun motif valable justifiant la délivrance d'un mandat et la fouille ou la perquisition à la résidence était abusive. Je conclus donc que l'exécution de la fouille ou de la perquisition à la résidence de M^{me} Spencer violait la *Charte : Plant*, p. 296; *Hunter c. Southam*, p. 161. Rien dans les présents motifs ne porte sur les pouvoirs dont disposent les policiers pour obtenir des renseignements relatifs à un abonné dans des circonstances contraignantes, par exemple, lorsqu'il est nécessaire d'obtenir de tels renseignements pour prévenir un préjudice physique imminent, ce qui n'était pas le cas en l'espèce. Rien non plus, dans les présents motifs, ne restreint ces pouvoirs.

C. *La preuve aurait-elle dû être écartée?*

[75] Ni le juge du procès ni la Cour d'appel n'ont conclu qu'il y avait violation de l'art. 8 en l'espèce. Ils n'avaient donc pas à se demander si les éléments de preuve obtenus d'une façon qui portait atteinte aux droits de M. Spencer garantis par la *Charte* devraient être écartés en application du par. 24(2) de la même *Charte*. Il s'agit de savoir si l'admission de la preuve serait susceptible de déconsidérer l'administration de la justice. J'admets, comme M. Spencer et le ministère public intimé en conviennent, que nous pouvons trancher cette question sur la foi du dossier dont nous sommes saisis. Toutefois, je ne souscris pas à l'argument de M. Spencer selon lequel la preuve devrait être écartée. En effet, j'estime qu'il n'y a pas lieu qu'elle le soit.

[76] The test for applying s. 24(2) is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The court must “assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct . . ., (2) the impact of the breach on the *Charter*-protected interests of the accused . . ., and (3) society’s interest in the adjudication of the case on its merits”: para. 71.

[77] Turning first to the seriousness of the state conduct, my view is that it cannot be characterized as constituting either “[w]ilful or flagrant disregard of the *Charter*”: *Grant*, at para. 75. Det. Sgt. Parisien testified that he believed the request to Shaw was authorized by law and that Shaw could consent to provide the information to him. He also testified, however, that he was aware that there were decisions both ways on the issue of whether this was a legally acceptable practice. While I would not want to be understood to be encouraging the police to act without warrants in “gray areas”, in light of the fact that the trial judge and three judges of the Court of Appeal concluded that Det. Sgt. Parisien had acted lawfully, his belief was clearly reasonable. In short, the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. There is no challenge to any other aspect of the information to obtain the search warrant. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute.

[78] The second *Grant* factor is the impact of the *Charter*-infringing conduct on Mr. Spencer’s *Charter*-protected interests. That impact here was serious. As discussed above, anonymity is an important safeguard for privacy interests online. The violation of that anonymity exposed personal choices made by Mr. Spencer to be his own and subjected them to police scrutiny as such. This weighs in favour of excluding the evidence.

[76] Le critère relatif à l’application du par. 24(2) est énoncé dans l’arrêt *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353. Le tribunal doit « évaluer et mettre en balance l’effet que l’utilisation des éléments de preuve aurait sur la confiance de la société envers le système de justice en tenant compte de : (1) la gravité de la conduite attentatoire de l’État [. . .], (2) l’incidence de la violation sur les droits de l’accusé garantis par la *Charte* [. . .] et (3) l’intérêt de la société à ce que l’affaire soit jugée au fond » : par. 71.

[77] En ce qui concerne la gravité de la conduite de l’État, j’estime qu’il n’y a pas lieu de qualifier cette dernière de « non-respect délibéré ou manifeste de la *Charte* » : *Grant*, par. 75. Le sergent-détective Parisien a déclaré qu’il croyait que la demande adressée à Shaw était autorisée par la loi et que Shaw consentirait à lui fournir l’information. Il a toutefois ajouté qu’il connaissait l’existence de décisions contradictoires quant à la question de savoir si cette pratique était légale. Bien que je ne voudrais pas qu’on comprenne des présents motifs que j’encourage les policiers à agir sans mandat dans les « zones grises », vu que le juge du procès et les trois juges de la Cour d’appel ont conclu que le sergent-détective Parisien avait agi légalement, sa conviction était manifestement raisonnable. Bref, les policiers se sont servi de ce qu’ils croyaient raisonnablement être des moyens légitimes pour poursuivre un objectif important visant l’application de la loi. Les autres aspects relatifs à la dénonciation justifiant l’obtention du mandat de perquisition ne sont pas contestés. Par sa nature, la conduite des policiers en l’espèce ne serait pas susceptible de déconsidérer l’administration de la justice.

[78] Le deuxième facteur énoncé dans l’arrêt *Grant* porte sur l’incidence de la conduite attentatoire sur les droits de M. Spencer garantis par la *Charte*. L’incidence était très grave en l’espèce. Rappelons que l’anonymat constitue une protection importante des droits en matière de vie privée à l’égard des activités en ligne. La violation de l’anonymat a exposé les choix personnels de M. Spencer et les a soumis à l’examen de la police. Ce facteur favorise l’exclusion de la preuve.

[79] That brings me to the final factor, society's interest in an adjudication on the merits. As explained in *Grant*,

while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high. [para. 84]

[80] The offences here are serious and carry minimum prison sentences. Society has both a strong interest in the adjudication of the case and also in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences. If the evidence is excluded, the Crown will effectively have no case. The impugned evidence (the electronic files containing child pornography) is reliable and was admitted by the defence at trial to constitute child pornography. Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children.

[81] Balancing the three factors, my view is that exclusion of the evidence rather than its admission would bring the administration of justice into disrepute, and I would uphold its admission.

D. *The Fault Element of the "Making Available" Offence*

[82] The Court of Appeal ordered a new trial on the "making available" count on the basis that the trial judge had erred in his analysis of the fault requirement for the offence. It found that the trial judge had erred by finding that the making available offence required that Mr. Spencer knew that some positive act on his part facilitated access by others to the pornography. This error, in the Court of Appeal's view, led the judge to fail to consider whether Mr. Spencer had been wilfully blind to the fact that the pornography was being made available to others

[79] Je passe maintenant au dernier facteur, à savoir l'intérêt de la société à ce que l'affaire soit jugée au fond. Comme il est expliqué dans l'arrêt *Grant*,

si la gravité d'une infraction accroît l'intérêt du public à ce qu'il y ait un jugement au fond, l'intérêt du public en l'irréprochabilité du système de justice n'est pas moins vital, particulièrement lorsque l'accusé encourt de lourdes conséquences pénales. [par. 84]

[80] Les infractions reprochées en l'espèce sont graves et sont punissables de peines minimales d'emprisonnement. La société a un intérêt manifeste à la fois à ce que l'affaire soit jugée et à ce que le fonctionnement du système de justice demeure irréprochable au regard des individus accusés de ces infractions graves. Si la preuve est écartée, le ministère public n'aura effectivement aucun recours à faire valoir. Les éléments de preuve contestés (les fichiers électroniques contenant de la pornographie juvénile) sont fiables et la défense a admis lors du procès qu'ils constituaient de la pornographie juvénile. La société a sans doute un intérêt à ce que l'affaire soit jugée dans le cadre d'un procès juste et équitable, fondé sur une preuve fiable, et encore plus dans le cas d'un crime qui vise la sécurité des enfants.

[81] Après avoir mis en balance les trois facteurs, j'estime que c'est l'exclusion de la preuve, et non son admission, qui serait susceptible de déconsidérer l'administration de la justice et je suis d'avis de confirmer l'admission de cette preuve.

D. *L'élément de faute de l'infraction de « rendre accessible »*

[82] La Cour d'appel a ordonné la tenue d'un nouveau procès sur le chef d'accusation de « rendre accessible », au motif que le juge du procès avait commis une erreur dans son analyse relative à l'exigence de faute de l'infraction. Selon la Cour, le juge du procès a commis une erreur en concluant que l'infraction de rendre accessible exigeait que M. Spencer ait connaissance que certaines de ses actions délibérées avaient facilité l'accès d'autres personnes à la pornographie. De l'avis de la Cour, le juge a ainsi omis de se demander si M. Spencer

through the shared folder. I respectfully agree with the Court of Appeal on both points and would affirm the order for a new trial.

[83] There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require, however, as the trial judge suggested, that the accused must knowingly, by some positive act, facilitate the availability of the material. I accept Caldwell J.A.'s conclusion that the offence is complete once the accused knowingly makes pornography available to others. As he put it,

[i]n the context of a file sharing program, the *mens rea* element of making available child pornography under s. 163.1(3) requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge that the file sharing program makes files available to others. [para. 87]

While the trial judge's reasons may perhaps be open to more than one interpretation on this point, reading his reasons as a whole, I also agree with Caldwell J.A. that the trial judge erred in deciding that a positive act was required to satisfy the *mens rea* component of the making available offence: para. 81.

[84] I further agree with Caldwell J.A. that wilful blindness was a live issue on the evidence and that it was because of the trial judge's error in relation to positive facilitation that he did not turn his mind to the evidence that could support an inference of wilful blindness. Wilful blindness is a substitute for knowledge. As explained by Charron J. in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21,

avait fait preuve d'aveuglement volontaire quant à l'accessibilité de la pornographie à d'autres personnes au moyen du répertoire partagé. Je souscris à l'opinion de la Cour d'appel sur ces deux points et je suis d'avis de confirmer l'ordonnance prescrivant la tenue d'un nouveau procès.

[83] Il n'est pas contesté que, dans le cadre d'une poursuite sous le régime du par. 163.1(3) du *Code criminel*, il faut prouver que l'accusé avait connaissance du fait que le matériel pornographique était rendu accessible à d'autres personnes. Il n'est toutefois pas nécessaire, comme l'a suggéré le juge du procès, que l'accusé doive sciemment, par une certaine action concrète, faciliter l'accès au matériel. J'accepte la conclusion du juge Caldwell selon laquelle les éléments de l'infraction sont tous réunis lorsque l'accusé rend sciemment accessible la pornographie à d'autres personnes. Selon le juge :

[TRADUCTION] S'agissant d'un programme de partage de fichiers, l'élément de *mens rea* relatif à l'infraction de rendre accessible de la pornographie juvénile prévue au par. 163.1(3) exige une preuve de l'intention de rendre les fichiers informatiques contenant de la pornographie juvénile accessibles à d'autres personnes en utilisant ce logiciel ou une connaissance réelle que le programme de partage de fichiers rend les fichiers accessibles à d'autres personnes. [par. 87]

Bien que les motifs formulés par le juge du procès se prêtent probablement à plusieurs interprétations sur ce point, compte tenu de leur ensemble, je partage également l'avis du juge Caldwell selon lequel le juge du procès a commis une erreur en décidant que la *mens rea* de l'infraction de rendre accessible exigeait l'accomplissement d'un geste délibéré : par. 81.

[84] À l'instar du juge Caldwell, j'estime aussi que l'aveuglement volontaire était une question en litige compte tenu de la preuve et qu'en raison de son erreur relative au geste délibéré le juge du procès ne s'est pas penché sur les éléments de preuve susceptibles d'étayer une conclusion d'aveuglement volontaire. L'aveuglement volontaire remplace la connaissance. Comme l'a expliqué la juge Charron dans l'arrêt *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411, par. 21 :

[w]ilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?” [Emphasis added.]

[85] The evidence calling for consideration of wilful blindness included, for example, evidence that in Mr. Spencer’s statement to police he acknowledged the following: that LimeWire is a file-sharing program; that he had changed at least one default setting in LimeWire; that when LimeWire is first installed on a computer, it displays information notifying the user that it is a file-sharing program; that at the start of each session, LimeWire notifies the user that it is a file-sharing program and warns of the ramifications of file-sharing; and that LimeWire contains built-in visual indicators that show the progress of the uploading of files by others from the user’s computer: paras. 88-89.

[86] Given that wilful blindness was a live issue and that the trial judge’s error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, I agree with Caldwell J.A. that the error could reasonably be thought to have had a bearing on his decision to acquit: para. 93; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

III. Disposition

[87] I would dismiss the appeal, affirm the conviction on the possession count and uphold the

L’ignorance volontaire ne définit pas la *mens rea* requise d’infractions particulières. Au contraire, elle peut remplacer la connaissance réelle chaque fois que la connaissance est un élément de la *mens rea*. La doctrine de l’ignorance volontaire impute une connaissance à l’accusé qui a des doutes au point de vouloir se renseigner davantage, mais qui choisit délibérément de ne pas le faire. Voir *Sansregret c. La Reine*, [1985] 1 R.C.S. 570, et *R. c. Jorgensen*, [1995] 4 R.C.S. 55. Comme l’a dit succinctement le juge Sopinka dans *Jorgensen* (par. 103), « [p]our conclure à l’ignorance volontaire, il faut répondre par l’affirmative à la question suivante : L’accusé a-t-il fermé les yeux parce qu’il savait ou soupçonnait fortement que s’il regardait, il saurait? » [Je souligne.]

[85] Parmi les éléments de preuve commandant l’examen de la question de l’aveuglement volontaire, mentionnons entre autres le fait que M. Spencer a reconnu dans sa déclaration à la police ceci : que LimeWire est un programme de partage de fichiers; qu’il avait modifié au moins un réglage par défaut de ce logiciel; que, lorsqu’il est installé la première fois sur un ordinateur, LimeWire affiche un message d’avertissement pour aviser l’utilisateur qu’il s’agit d’un programme de partage de fichiers; que, au début de chaque session, LimeWire avise l’utilisateur que c’est un programme de partage de fichiers et le met en garde contre les répercussions du partage de fichiers; que LimeWire contient des indicateurs visuels qui montrent la progression du téléchargement des fichiers par d’autres personnes à partir de l’ordinateur de l’utilisateur : par. 88-89.

[86] Puisque l’aveuglement volontaire était une question en litige et que l’erreur du juge du procès — lorsqu’il a conclu qu’un geste délibéré était nécessaire pour satisfaire à l’exigence de la *mens rea* de l’infraction de rendre accessible — lui a fait omettre l’examen de cette question, je conviens avec le juge Caldwell qu’il serait raisonnable de penser que cette erreur a eu une incidence sur le verdict d’acquiescement : par. 93; *R. c. Graveline*, 2006 CSC 16, [2006] 1 R.C.S. 609, par. 14.

III. Dispositif

[87] Je suis d’avis de rejeter le pourvoi, de confirmer la déclaration de culpabilité relative au chef

Court of Appeal's order for a new trial on the making available count.

d'accusation de possession ainsi que l'ordonnance de Cour d'appel enjoignant la tenue d'un nouveau procès sur le chef d'accusation de rendre accessible.

APPENDIX

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

7. . . .

(3) [Disclosure without knowledge or consent] For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

. . . .

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

. . . .

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

. . . .

(d) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province

ANNEXE

Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5

7. . . .

(3) [Communication à l'insu de l'intéressé et sans son consentement] Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut communiquer de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

. . . .

c) elle est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents;

c.1) elle est faite à une institution gouvernementale — ou à une subdivision d'une telle institution — qui a demandé à obtenir le renseignement en mentionnant la source de l'autorité légitime étayant son droit de l'obtenir et le fait, selon le cas :

. . . .

(ii) que la communication est demandée aux fins du contrôle d'application du droit canadien, provincial ou étranger, de la tenue d'enquêtes liées à ce contrôle d'application ou de la collecte de renseignements en matière de sécurité en vue de ce contrôle d'application,

. . . .

d) elle est faite, à l'initiative de l'organisation, à un organisme d'enquête, une institution gouvernementale ou une subdivision d'une telle institution et l'organisation, selon le cas, a des motifs raisonnables de croire que le renseignement est afférent à la violation d'un accord ou à une contravention au droit fédéral, provincial ou étranger qui a été commise ou est en

or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

. . .

Criminal Code, R.S.C. 1985, c. C-46

163.1 . . .

(3) [Distribution, etc. of child pornography] Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

. . .

487.014 (1) [Power of peace officer] For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

Appeal dismissed.

Solicitors for the appellant: McDougall Gauley, Regina.

Solicitor for the respondent: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Edmonton and Halifax.

train ou sur le point de l'être ou soupçonne que le renseignement est afférent à la sécurité nationale, à la défense du Canada ou à la conduite des affaires internationales;

. . .

Code criminel, L.R.C. 1985, ch. C-46

163.1 . . .

(3) [Distribution de pornographie juvénile] Quiconque transmet, rend accessible, distribue, vend, importe ou exporte de la pornographie juvénile ou en fait la publicité, ou en a en sa possession en vue de la transmettre, de la rendre accessible, de la distribuer, de la vendre, de l'exporter ou d'en faire la publicité, est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

. . .

487.014 (1) [Pouvoir de l'agent de la paix] Il demeure entendu qu'une ordonnance de communication n'est pas nécessaire pour qu'un agent de la paix ou un fonctionnaire public chargé de l'application ou de l'exécution de la présente loi ou de toute autre loi fédérale demande à une personne de lui fournir volontairement des documents, données ou renseignements qu'aucune règle de droit n'interdit à celle-ci de communiquer.

Pourvoi rejeté.

Procureurs de l'appelant : McDougall Gauley, Regina.

Procureur de l'intimée : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le directeur des poursuites pénales : Service des poursuites pénales du Canada, Edmonton et Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Solicitors for the intervener the Privacy Commissioner of Canada: Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intervenant le commissaire à la protection de la vie privée du Canada : Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Kapoor Barristers, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Dawe & Dineen, Toronto; Schreck Presser, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association of Ontario : Dawe & Dineen, Toronto; Schreck Presser, Toronto.

Tab 20:

R. v. Vu, 2012 SCC 40

Sam Tuan Vu *Appellant*

v.

Her Majesty The Queen *Respondent***INDEXED AS: R. v. VU****2012 SCC 40**

File No.: 34286.

2012: February 15; 2012: July 26.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Offences — Kidnapping — Whether kidnapping is a continuing offence encompassing subsequent confinement of victim — Whether persons who willingly or knowingly choose to participate in subsequent confinement become parties to the offence of kidnapping — Criminal Code, R.S.C. 1985, c. C-46, ss. 21(1), 279(1).

M was abducted and held for eight days in three different houses. There was circumstantial evidence which connected the appellant V to all three houses where M was confined, but based on the trial judge's findings, it is accepted that V neither participated in M's initial taking nor knew of it at the time it occurred. At trial, the appellant was convicted of unlawful confinement and acquitted of kidnapping. The Court of Appeal held that the appellant was liable as a party to kidnapping under s. 21(1) of the *Criminal Code* and substituted a conviction for that offence.

Held: The appeal should be dismissed.

Kidnapping is a continuing offence that includes the victim's ensuing confinement. So long as the victim of the kidnapping remains unlawfully confined, the crime of kidnapping continues. Here, M's unlawful confinement following the taking continued for the next eight days. The kidnapping came to an end only when M was set free by the police. Parliament has never defined the word "kidnapping" in the *Criminal Code*. There is nothing in the legislative history to suggest that Parliament intended to abandon the common law definition of kidnapping which remained an aggravated

Sam Tuan Vu *Appellant*

c.

Sa Majesté la Reine *Intimée***RÉPERTORIÉ : R. c. VU****2012 CSC 40**

N° du greffe : 34286.

2012 : 15 février; 2012 : 26 juillet.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Rothstein, Cromwell et Moldaver.

EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE

Droit criminel — Infractions — Enlèvement — L'infraction d'enlèvement est-elle une infraction continue qui englobe la séquestration subséquente de la victime? — Les personnes qui choisissent volontairement et sciemment de prendre part à la séquestration subséquente participent-elles à l'infraction d'enlèvement? — Code criminel, L.R.C. 1985, ch. C-46, art. 21(1), 279(1).

M a été enlevé puis séquestré durant huit jours dans trois différentes maisons. Des éléments de preuve circonstancielle reliaient l'appellant V aux trois maisons où M a été séquestré. Cependant, compte tenu des conclusions du juge du procès, tous conviennent que V n'a ni participé au rapt initial ni été au courant du fait qu'il se déroulait au moment où il est survenu. Au procès, l'appellant a été déclaré coupable de séquestration et acquitté d'enlèvement. La Cour d'appel a conclu que l'appellant a été coupable d'enlèvement à titre de partie en application du par. 21(1) du *Code criminel* et a substitué une déclaration de culpabilité à l'acquittement pour ce crime.

Arrêt : Le pourvoi est rejeté.

L'enlèvement est une infraction continue qui englobe la séquestration subséquente de la victime. Tant que la victime est séquestrée, le crime d'enlèvement se poursuit. En l'espèce, la séquestration de M, après le rapt initial, s'est poursuivie pendant les huit jours suivants. L'enlèvement a pris fin uniquement lorsque la police l'a libéré. Le législateur n'a jamais défini le terme « enlèvement » dans le *Code criminel*. L'historique législatif ne renferme rien qui permette de penser que le législateur a voulu abandonner la définition d'enlèvement — établie par la common law — qui est restée une forme aggravée

form of unlawful confinement. It was aggravated by the additional element of movement, which increased the risk of harm to the victim by isolating him or her from a place where detection and rescue were more likely. It is the element of movement that differentiated kidnapping from the lesser included offence of false imprisonment and made kidnapping an aggravated form of false imprisonment. This interpretation is consonant with the intention of Parliament as expressed in the *Code*, the crime's common law origins and legislative history, modern jurisprudence of Canadian appellate courts, and common sense. Parliament did not intend to restrict the offence of kidnapping to the victim's initial taking and movement, while leaving the victim's ensuing captivity to the comparably less serious crime of unlawful confinement. Parliament intended to include the offence of unlawful confinement in the offence of kidnapping so as to capture, under the crime of kidnapping, the victim's ensuing captivity. The penalty scheme reflects Parliament's view that kidnapping is a much more serious offence than unlawful confinement.

Where an accused — with knowledge of the principal's intention to see a continuing offence through to its completion — does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established. The well-established principles of s. 21(1) of the *Criminal Code* party liability apply with equal force to continuing offences that have been completed in law but not in fact. The crime of kidnapping continues until the victim is freed, and a person who chooses to participate in the victim's confinement — after having learned that the victim has been kidnapped — may be held responsible for the offence of kidnapping under s. 21(1) of the *Code*. Here, V was a party to the offence of kidnapping under s. 21(1) of the *Code*. V participated in the confinement of M. Accepting that V was initially unaware of and took no part in the taking and carrying away of M, he became aware of it while M remained confined against his will and chose thereafter to take part in the kidnapping enterprise. V joined the kidnapping enterprise with the intent to aid the kidnappers and with the knowledge that M was a victim of kidnapping — or, at a minimum, he was wilfully blind to that fact. V took steps, of his own free will, to assist the kidnappers and further their objectives.

Cases Cited

Referred to: *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Click v. The State*, 3 Tex. 282 (1848); *Smith v. The*

d'emprisonnement illégal. L'aggravation découle de l'élément de déplacement qui s'y ajoute et qui fait croître le risque de préjudice pour la victime en l'isolant de tout lieu où elle aurait plus de chances d'être secourue. C'est l'élément de déplacement qui différencie l'enlèvement de l'infraction moindre et incluse d'emprisonnement illégal et qui en fait une forme aggravée de cette dernière infraction. Cette interprétation est conforme à l'intention du législateur telle qu'elle s'exprime dans le *Code*, à l'origine de ce crime dans la common law, à l'historique législatif, à la jurisprudence moderne des juridictions d'appel et au bon sens. Le législateur ne voulait pas limiter l'infraction d'enlèvement à la capture initiale et au déplacement de la victime, tout en faisant en sorte que la captivité subséquente de la victime devienne l'objet du crime relativement moins grave qu'est la séquestration. Le législateur voulait inclure l'infraction de séquestration dans celle d'enlèvement de sorte que le crime d'enlèvement comprend la captivité subséquente de la victime. Le régime de peines indique que, pour le législateur, l'enlèvement est une infraction beaucoup plus grave que la séquestration.

La responsabilité en tant que participant est établie lorsqu'un accusé, connaissant l'intention de l'auteur principal de mener une infraction continue à son terme, accomplit quelque chose (ou omet de l'accomplir), en vue d'aider ou d'encourager la perpétration de l'infraction continue en question. Les principes bien établis de la responsabilité criminelle à titre de partie au sens du par. 21(1) du *Code criminel* s'appliquent avec la même force aux infractions continues qui sont complètes en droit, mais non en fait. Étant entendu que le crime d'enlèvement se poursuit tant que la victime n'est pas libérée, la personne qui décide de participer à la séquestration de la victime, après avoir appris que celle-ci a été enlevée, peut être tenue responsable de l'infraction d'enlèvement en application du par. 21(1) du *Code*. En l'espèce, V a participé, au sens du par. 21(1) du *Code*, à l'infraction d'enlèvement. V a aussi participé à la séquestration de M. En supposant que V n'ait pris aucune part au rapt et au déplacement initiaux de M et qu'il en ait été ignorant, il en a appris l'existence lorsque M est demeuré séquestré contre son gré. Il a néanmoins décidé de participer à l'entreprise d'enlèvement dans l'intention d'aider les ravisseurs, en sachant que M avait été enlevé ou, à tout le moins, en s'aveuglant volontairement à cet égard. De son propre gré, V a posé des gestes pour aider les ravisseurs et favoriser l'atteinte de leurs objectifs.

Jurisprudence

Arrêts mentionnés : *Kienapple c. La Reine*, [1975] 1 R.C.S. 729; *Click c. The State*, 3 Tex. 282 (1848);

State, 63 Wis. 453 (1885); *Midgett v. State*, 139 A.2d 209 (1958); *People v. Adams*, 205 N.W.2d 415 (1973); *U.S. v. Garcia*, 854 F.2d 340 (1988); *Davis v. R.*, [2006] NSWCCA 392 (AustLII); *R. v. Tremblay* (1997), 117 C.C.C. (3d) 86; *R. v. Oakley* (1977), 4 A.R. 103; *R. v. Metcalfe* (1983), 10 C.C.C. (3d) 114; *R. v. Reid*, [1972] 2 All E.R. 1350; *Bell v. The Queen*, [1983] 2 S.C.R. 471; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Thatcher*, [1987] 1 S.C.R. 652; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183; *R. v. Whynott* (1975), 12 N.S.R. (2d) 231; *R. v. Tanney* (1976), 31 C.C.C. (2d) 445.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21(1), 279(1), (2).
Criminal Code, S.C. 1953-54, c. 51, s. 233.
Criminal Code, 1892, S.C. 1892, c. 29, s. 264.
Criminal Code Amendment Act, 1900, S.C. 1900, c. 46, s. 3.

Authors Cited

Aickin, K. A. "Kidnapping at Common Law" (1936), 1 *Res Judicatae* 130.
 Anderson, Ronald A. *Wharton's Criminal Law and Procedure*, vol. I. Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1957.
 Bishop, Joel Prentiss. *Bishop on Criminal Law*, vol. II, 9th ed. by John M. Zane and Carl Zollmann. Chicago: T. H. Flood and Co., 1923.
 Blackstone, William. *Commentaries on the Laws of England*, Book IV. Oxford: Clarendon Press, 1769.
 Crankshaw, James. *The Criminal Code of Canada and the Canada Evidence Act: With Their Amendments, Including the Amending Acts of 1900 and 1901, and Extra Appendices*, 2nd ed. Montreal: C. Theoret, 1902.
 Diamond, John L. "Kidnapping: A Modern Definition" (1985), 13 *Am. J. Crim. L.* 1.
 East, Sir Edward Hyde. *A Treatise of the Pleas of the Crown*, vol. I. London: J. Butterworth, 1803.
 Hawkins, William. *A Treatise of the Pleas of the Crown; Or, A System of the Principal Matters Relating to That Subject, Digested Under Proper Heads*, vol. I, 8th ed. by John Curwood. London: S. Sweet, 1824.
 Hochheimer, Lewis. *The Law of Crimes and Criminal Procedure: Including Forms and Precedents*, 2nd ed. Baltimore: Baltimore Book Co., 1904.
 Roscoe, Henry. *A Digest of the Law of Evidence in Criminal Cases*, 2nd ed. Philadelphia: T. & J. W. Johnson, 1840.
 Russell, Sir William Oldnall. *A Treatise on Crimes and Misdemeanors*, vol. I, 3rd ed. by Charles Sprengel Greaves. London: Saunders and Benning, 1843.

Smith c. The State, 63 Wis. 453 (1885); *Midgett c. State*, 139 A.2d 209 (1958); *People c. Adams*, 205 N.W.2d 415 (1973); *U.S. c. Garcia*, 854 F.2d 340 (1988); *Davis c. R.*, [2006] NSWCCA 392 (AustLII); *R. c. Tremblay*, 1997 CanLII 10526; *R. c. Oakley* (1977), 4 A.R. 103; *R. c. Metcalfe* (1983), 10 C.C.C. (3d) 114; *R. c. Reid*, [1972] 2 All E.R. 1350; *Bell c. La Reine*, [1983] 2 R.C.S. 471; *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609; *R. c. Thatcher*, [1987] 1 R.C.S. 652; *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411; *R. c. Hijazi* (1974), 20 C.C.C. (2d) 183; *R. c. Whynott* (1975), 12 N.S.R. (2d) 231; *R. c. Tanney* (1976), 31 C.C.C. (2d) 445.

Lois et règlements cités

Acte modificatif du Code criminel, 1900, S.C. 1900, ch. 46, art. 3.
Code criminel, L.R.C. 1985, ch. C-46, art. 21(1), 279(1), (2).
Code criminel, S.C. 1953-54, ch. 51, art. 233.
Code criminel, 1892, S.C. 1892, ch. 29, art. 264.

Doctrine et autres documents cités

Aickin, K. A. « Kidnapping at Common Law » (1936), 1 *Res Judicatae* 130.
 Anderson, Ronald A. *Wharton's Criminal Law and Procedure*, vol. I. Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1957.
 Bishop, Joel Prentiss. *Bishop on Criminal Law*, vol. II, 9th ed. by John M. Zane and Carl Zollmann. Chicago: T. H. Flood and Co., 1923.
 Blackstone, William. *Commentaries on the Laws of England*, Book IV. Oxford: Clarendon Press, 1769.
 Crankshaw, James. *The Criminal Code of Canada and the Canada Evidence Act: With Their Amendments, Including the Amending Acts of 1900 and 1901, and Extra Appendices*, 2nd ed. Montreal: C. Theoret, 1902.
 Diamond, John L. « Kidnapping: A Modern Definition » (1985), 13 *Am. J. Crim. L.* 1.
 East, Sir Edward Hyde. *A Treatise of the Pleas of the Crown*, vol. I. London: J. Butterworth, 1803.
 Hawkins, William. *A Treatise of the Pleas of the Crown; Or, A System of the Principal Matters Relating to That Subject, Digested Under Proper Heads*, vol. I, 8th ed. by John Curwood. London: S. Sweet, 1824.
 Hochheimer, Lewis. *The Law of Crimes and Criminal Procedure: Including Forms and Precedents*, 2nd ed. Baltimore: Baltimore Book Co., 1904.
 Roscoe, Henry. *A Digest of the Law of Evidence in Criminal Cases*, 2nd ed. Philadelphia: T. & J. W. Johnson, 1840.
 Russell, Sir William Oldnall. *A Treatise on Crimes and Misdemeanors*, vol. I, 3rd ed. by Charles Sprengel Greaves. London: Saunders and Benning, 1843.

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Prowse and Saunders JJ.A.), 2011 BCCA 112, 302 B.C.A.C. 187, 511 W.A.C. 187, 270 C.C.C. (3d) 546, 83 C.R. (6th) 162, [2011] B.C.J. No. 399 (QL), 2011 CarswellBC 541, setting aside the acquittal entered by Silverman J., 2008 BCSC 1376, [2008] B.C.J. No. 1953 (QL), 2008 CarswellBC 2200, and entering a conviction. Appeal dismissed.

Howard Rubin, Q.C., and Chandra L. Corriveau,
for the appellant.

Jennifer Duncan and Kathleen Murphy, for the
respondent.

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] In April 2006, Graham McMynn was kidnapped at gunpoint and held in captivity in three different houses in the Lower Mainland area of Vancouver. His ordeal ended when he was rescued by the police eight days later. Five adult persons, including the appellant Sam Tuan Vu, were charged with kidnapping and unlawful confinement of Mr. McMynn under s. 279(1) and (2) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”).

[2] Fingerprint, footprint, and DNA evidence connected the appellant to all three houses where Mr. McMynn was confined, but the trial judge found no evidence to place the appellant at the scene of the initial taking or to prove that the appellant had prior knowledge of the taking. The appellant was convicted of unlawful confinement and acquitted of kidnapping (2008 BCSC 1376 (CanLII)).

[3] A majority of the British Columbia Court of Appeal held that kidnapping is a continuing offence that includes both the initial taking and the ensuing

POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (le juge en chef Finch et les juges Prowse et Saunders), 2011 BCCA 112, 302 B.C.A.C. 187, 511 W.A.C. 187, 270 C.C.C. (3d) 546, 83 C.R. (6th) 162, [2011] B.C.J. No. 399 (QL), 2011 CarswellBC 541, qui a infirmé l’acquittement prononcé par le juge Silverman, 2008 BCSC 1376, [2008] B.C.J. No. 1953 (QL), 2008 CarswellBC 2200, et consigné une déclaration de culpabilité. Pourvoi rejeté.

Howard Rubin, c.r., et Chandra L. Corriveau,
pour l’appellant.

Jennifer Duncan et Kathleen Murphy, pour l’in-
timée.

Version française du jugement de la Cour rendu
par

LE JUGE MOLDAVER —

I. Introduction

[1] En avril 2006, Graham McMynn a été enlevé sous la menace d’un pistolet et séquestré dans trois maisons du Lower Mainland, à Vancouver. Son cauchemar a pris fin huit jours plus tard, quand des policiers l’ont libéré. Cinq adultes, dont l’appellant Sam Tuan Vu, ont été accusés d’avoir enlevé et séquestré M. McMynn, des infractions décrites aux par. 279(1) et (2) du *Code criminel*, L.R.C. 1985, ch. C-46 (« *Code* »).

[2] Des empreintes digitales, des empreintes de pieds et de la preuve génétique reliaient l’appellant aux trois maisons où M. McMynn a été séquestré. Le juge du procès n’a toutefois trouvé aucune preuve établissant la présence de l’appellant au lieu de l’enlèvement initial ou démontrant que l’appellant savait d’avance que M. McMynn allait être enlevé. L’appellant a été reconnu coupable de séquestration et acquitté d’enlèvement (2008 BCSC 1376 (CanLII)).

[3] Les juges majoritaires de la Cour d’appel de la Colombie-Britannique ont jugé que l’enlèvement est une infraction continue qui englobe à la

confinement. It therefore substituted a conviction for the offence of kidnapping on the basis that all of the facts necessary to convict the appellant as a party to that offence under s. 21(1) of the *Code* had been established (2011 BCCA 112, 302 B.C.A.C. 187). The appellant seeks to have his conviction for kidnapping set aside.

[4] This appeal raises two issues. The first relates to the nature of the offence of kidnapping. The appellant submits that kidnapping is not a continuing offence, in other words, that kidnapping ends the moment the victim is seized and carried away, at which point the offence of unlawful confinement begins. Only this ensuing phase of confinement, the appellant argues, is a continuing offence. The Crown maintains that kidnapping is an ongoing offence that continues from the time the victim is apprehended and carried away until the time he or she is freed (or otherwise consents to being detained).

[5] The second issue is tied to the first and need only be addressed if kidnapping is found to be a continuing offence. Specifically, it concerns the liability of persons who, while not involved in the victim's apprehension, decide to participate in the ensuing confinement of the victim with full knowledge that the victim has been kidnapped — in other words, persons who willingly and knowingly choose to join the kidnapping enterprise. Do such latecomers become parties to the offence of kidnapping under s. 21(1) of the *Code*, as the Crown maintains, or are they solely liable for the offence of unlawful confinement, as the appellant contends?

[6] For reasons that follow, I am not persuaded that Parliament intended to restrict the offence of kidnapping to the victim's initial taking and movement, while leaving the victim's ensuing captivity to the comparably less serious crime of unlawful confinement. On the contrary, I am satisfied that Parliament intended to include the offence of

fois le rapt initial et la séquestration qui s'ensuit. Ils ont donc déclaré l'appelant coupable d'enlèvement parce que, selon eux, tous les faits nécessaires pour le reconnaître coupable à titre de partie à cette infraction aux termes du par. 21(1) du *Code* avaient été établis (2011 BCCA 112, 302 B.C.A.C. 187). L'appelant demande l'annulation de sa déclaration de culpabilité pour enlèvement.

[4] Le pourvoi soulève deux questions. La première concerne la nature de l'infraction d'enlèvement. L'appelant soutient que l'enlèvement n'est pas une infraction continue, autrement dit, que l'enlèvement se termine au moment où la victime est capturée et emmenée ailleurs, et que c'est alors que débute l'infraction de séquestration. Pour l'appelant, seul ce stade subséquent de la séquestration est une infraction continue. Le ministère public affirme plutôt que l'enlèvement est une infraction continue qui commence au moment où la victime est capturée et emmenée ailleurs, et qui prend fin lorsque cette dernière est libérée (ou consent par ailleurs à sa détention).

[5] La deuxième question se rapporte à la première et ne doit être examinée que si l'on conclut que l'enlèvement est une infraction continue. Plus précisément, elle porte sur la responsabilité des personnes qui, bien que n'ayant pas participé au rapt de la victime, décident de prendre part à sa séquestration subséquente en sachant pertinemment que cette victime a été enlevée — autrement dit, des personnes qui choisissent volontairement et sciemment de se joindre à l'entreprise d'enlèvement. Ces complices tardifs participent-ils à l'infraction d'enlèvement au sens du par. 21(1) du *Code*, comme l'affirme le ministère public, ou sont-ils susceptibles d'être déclarés coupables uniquement de l'infraction de séquestration, comme le prétend l'appelant?

[6] Pour les motifs qui suivent, je ne suis pas persuadé que le législateur voulait limiter l'infraction d'enlèvement au rapt initial et au déplacement de la victime, tout en faisant en sorte que la captivité subséquente de la victime devienne l'objet du crime relativement moins grave qu'est la séquestration. Je suis plutôt convaincu que le législateur

unlawful confinement in the offence of kidnapping so as to capture, under the crime of kidnapping, the victim's ensuing captivity. Therefore, while the crime of kidnapping may be complete in law when the victim is initially apprehended and moved, the crime will not be complete in fact until the victim is freed.

[7] In view of my conclusion that kidnapping is a continuing offence that includes the victim's ensuing confinement, I am satisfied that latecomers who join the kidnapping enterprise while the victim remains unlawfully confined may be found guilty as parties to the offence of kidnapping if they otherwise meet the requirements for party liability under s. 21(1) of the *Code*.

II. Background

[8] The pertinent facts are not in issue. On the morning of April 4, 2006, Mr. McMynn and his passenger were intercepted by two cars. Several men got out, holding what appeared to be handguns, and ordered Mr. McMynn to get into one of the vehicles. Mr. McMynn was driven to a van some 10 minutes away and he was duct-taped so that he could not see his captors. He was then taken to a house in the Lower Mainland area, where he was kept in a closet. On or around April 7, Mr. McMynn was transported to a second house. On April 10 or 11, he was moved to a third house. Mr. McMynn was threatened from time to time by different captors, sometimes using what appeared to be a gun. He was either blindfolded or he covered his eyes so that he could not see his captors. Mr. McMynn was rescued on April 12 in a simultaneous police raid on many Lower Mainland houses, including the three houses he had been confined in. The police also found several persons in the third house, including the appellant, whose citizenship papers were also found on the premises.

[9] Upon his arrest, the appellant was charged, along with four others, with the offences of kidnapping and unlawful confinement of Mr. McMynn.

voulait inclure l'infraction de séquestration dans celle d'enlèvement de sorte que le crime d'enlèvement comprend la captivité subséquente de la victime. Par conséquent, même si le crime d'enlèvement peut être complet en droit lorsque la victime est capturée initialement et déplacée, le crime ne sera complet en fait qu'à la libération de la victime.

[7] Vu ma conclusion que l'enlèvement est une infraction continue qui englobe la séquestration subséquente de la victime, je suis convaincu que les complices tardifs qui se joignent à l'entreprise d'enlèvement pendant que la victime demeure séquestrée peuvent être reconnus coupables à titre de parties à l'infraction d'enlèvement s'ils répondent autrement aux exigences prévues au par. 21(1) du *Code* en matière de responsabilité du participant.

II. Contexte

[8] Les faits pertinents ne sont pas contestés. Le matin du 4 avril 2006, M. McMynn et sa passagère ont été interceptés par deux voitures. Plusieurs hommes en sont sortis, tenant ce qui semblait être des pistolets, et ont ordonné à M. McMynn d'entrer dans une des voitures. On lui a bandé les yeux avec du ruban adhésif pour qu'il ne puisse pas voir ses ravisseurs puis il a été conduit à une fourgonnette à quelque 10 minutes de là. Il a ensuite été emmené à une maison du Lower Mainland, où on l'a détenu dans un placard. Le ou vers le 7 avril, M. McMynn a été emmené à une deuxième maison, puis à une troisième le 10 ou le 11 avril. Différents ravisseurs l'ont menacé à l'occasion, parfois au moyen de ce qui semblait être un fusil. Il avait les yeux bandés ou se les cachait pour ne pas être en mesure de voir ses ravisseurs. M. McMynn a été libéré le 12 avril à l'occasion de descentes de police simultanées dans un grand nombre de maisons du Lower Mainland, notamment les trois où il avait été séquestré. Les policiers ont aussi trouvé, à l'intérieur de la troisième maison, plusieurs personnes, dont l'appelant, ainsi que les documents de citoyenneté de ce dernier.

[9] Lors de son arrestation, l'appelant a été inculpé, avec quatre autres personnes, d'avoir enlevé et séquestré M. McMynn. Les extraits

The salient portions of the indictment upon which the appellant was tried are reproduced below:

Count 1

[that] Sam Tuan VU . . . between the 3rd day of April, 2006, and the 13th day of April, 2006, at or near Vancouver, in the Province of British Columbia, kidnapped Graham Lee McMYNN, with intent to cause Graham Lee McMYNN to be confined against his will, contrary to Section 279(1) of the Criminal Code of Canada.

Count 2

[that] Sam Tuan VU . . . between the 3rd day of April, 2006, and the 13th day of April, 2006, at or near Vancouver, in the Province of British Columbia, without lawful authority, confined Graham Lee McMYNN, contrary to Section 279(2) of the Criminal Code of Canada.

III. Decision at Trial, 2008 BCSC 1376 (CanLII)

[10] The appellant and his co-accused were tried by Justice Silverman of the Supreme Court of British Columbia sitting alone. The appellant was convicted of unlawful confinement and acquitted of kidnapping.

[11] In his reasons for judgment, after reviewing the surveillance evidence, cell phone location evidence, intercepted calls, DNA evidence, fingerprint and footprint evidence, and location of various exhibits with respect to the appellant, the trial judge found that

[t]he accidental occurrence of such a combination of events and items would require a confluence of coincidences too fantastic to be reasonably possible. There is no rational inference that can be drawn from the evidence other than that [the appellant] was involved, with full knowledge, in the wrongdoing against [Mr.] McMynn. I am satisfied of that beyond a reasonable doubt. [Emphasis added; para. 369.]

While the remark that the appellant “was involved, with full knowledge, in the wrongdoing against [Mr.] McMynn” would seem clear, it is accepted for present purposes that it is not to be taken as a

pertinents de l’acte d’accusation sur la base duquel l’appelant a été jugé sont reproduits ci-après :

[TRADUCTION]

Premier chef

[que] entre le 3 et le 13 avril 2006, à Vancouver ou dans ses environs, en la province de la Colombie-Britannique, Sam Tuan Vu a enlevé Graham Lee McMYNN dans l’intention de le faire séquestrer contre son gré, infraction décrite au paragraphe 279(1) du Code criminel du Canada.

Deuxième chef

[que] entre le 3 et le 13 avril 2006, à Vancouver ou dans ses environs, en la province de la Colombie-Britannique, Sam Tuan Vu a séquestré Graham Lee McMYNN sans autorisation légitime, infraction décrite au paragraphe 279(2) du Code criminel du Canada.

III. Décision de première instance, 2008 BCSC 1376 (CanLII)

[10] L’appelant et son coaccusé ont été jugés par le juge Silverman de la Cour suprême de la Colombie-Britannique qui siégeait seul. L’appelant a été reconnu coupable de séquestration et acquitté d’enlèvement.

[11] Après avoir examiné les rapports de surveillance, de localisation de téléphones cellulaires, d’interception d’appels et d’analyse génétique, les empreintes digitales et les empreintes de pied mis en preuve ainsi que l’emplacement de diverses pièces ayant un lien avec l’appelant, le juge a indiqué :

[TRADUCTION] Il faudrait, pour qu’une telle combinaison d’événements et d’objets se produise fortuitement, un concours de circonstances trop fantastique pour être raisonnablement envisageable. La seule déduction logique que permet la preuve est que [l’appelant] était impliqué, en toute connaissance de cause, dans le crime perpétré contre M. McMynn. Je suis convaincu de cela hors de tout doute raisonnable. [Je souligne; par. 369.]

En dépit de la clarté apparente des mots « était impliqué, en toute connaissance de cause, dans le crime perpétré contre M. McMynn », je tiens pour acquis aux fins du présent raisonnement qu’il ne

finding that the appellant either participated in Mr. McMynn's initial taking or knew of it at the time it occurred.

[12] The appellant was found to have taken part in Mr. McMynn's confinement in each of the three houses. The evidence further established that he was involved in the purchase of a tarp and duct tape four days before Mr. McMynn's rescue. He and a co-accused were also found to have discussed the issue of ransom in Mr. McMynn's presence and to have threatened to kill Mr. McMynn if the ransom was not paid. Finally, the appellant was arrested in the third house when the police rescued Mr. McMynn from his eight-day ordeal.

[13] With respect to the charge of kidnapping, the trial judge observed that movement forms an indispensable element of the offence: it was "the movement of [Mr.] McMynn which separates it from the [charge of] confinement". In his view, the element of movement was not restricted to the "initial abduction on April 4", but also included the movement of Mr. McMynn from house to house during the period of confinement. Those movements, the trial judge found, "were part of a continuing offence of kidnapping" (para. 345).

[14] However, the trial judge was not satisfied that the appellant had physically assisted in the movement of Mr. McMynn from house to house even though the appellant had knowledge of the transfers:

While there is evidence connecting [the appellant] to all three houses, I am not satisfied that the evidence indicates that he had anything more than knowledge about the movement of [Mr.] McMynn. [para. 375]

In the trial judge's view, knowledge of these movements alone was not sufficient to find the appellant guilty of kidnapping. Therefore, he acquitted the appellant on that count.

[15] As to the unlawful confinement charge, the trial judge was satisfied beyond a reasonable doubt that the appellant had knowledge and was a direct participant in the confinement of

faut en conclure que l'appelant a participé au rapt initial de M. McMynn ou qu'il en était au courant au moment où il est survenu.

[12] Le juge a conclu que l'appelant avait participé à la séquestration de M. McMynn dans chacune des trois maisons. La preuve a en outre établi sa participation à l'achat d'une bâche et de ruban adhésif quatre jours avant que M. McMynn ne soit délivré. Le juge a aussi conclu qu'un co-accusé et l'appelant avaient discuté de rançon devant M. McMynn et qu'ils avaient menacé de le tuer si elle n'était pas versée. Enfin, l'appelant a été arrêté dans la troisième maison lorsque la police a tiré M. McMynn du cauchemar qu'il vivait depuis huit jours.

[13] S'agissant de l'accusation d'enlèvement, le juge du procès a signalé que le déplacement en constitue un élément essentiel : c'est [TRADUCTION] « le déplacement de [M.] McMynn qui la distingue de [l'accusation de] séquestration ». Selon lui, cet élément ne se limitait pas au [TRADUCTION] « rapt initial le 4 avril », mais englobait le déplacement de M. McMynn de maison en maison pendant la séquestration. Toujours selon le juge du procès, ces déplacements [TRADUCTION] « s'inscrivaient dans une infraction continue d'enlèvement » (par. 345).

[14] Toutefois, le juge du procès n'a pas été convaincu que l'appelant avait pris part aux déplacements de M. McMynn de maison en maison, même s'il en avait connaissance :

[TRADUCTION] Bien que la preuve place [l'appelant] dans les trois maisons, elle ne me convainc pas qu'il a fait plus qu'avoir connaissance du déplacement de [M.] McMynn. [par. 375]

Estimant que la seule connaissance des déplacements ne permettait pas de rendre un verdict de culpabilité d'enlèvement, le juge a acquitté l'appelant de ce chef d'accusation.

[15] Pour ce qui est de l'accusation de séquestration, le juge du procès s'est dit convaincu hors de tout doute raisonnable que, pendant toute la période de captivité de M. McMynn, l'appelant savait qu'il

Mr. McMynn throughout the entire period of his captivity (para. 375).

[16] The Crown appealed the acquittal on the charge of kidnapping. The appellant filed a cross-appeal, seeking to have his conviction for unlawful confinement overturned on the basis that it constituted an unreasonable verdict.

IV. British Columbia Court of Appeal, 2011 BCCA 112, 302 B.C.A.C. 187

A. *Majority Opinion*

[17] After reviewing the law of kidnapping, Finch C.J.B.C., writing for himself and Saunders J.A., concluded that kidnapping is a continuing offence that encompasses both the initial abduction and the ensuing confinement of the victim. Chief Justice Finch accepted the trial judge's findings that the appellant did not actively participate "in the initial taking or subsequent movement of [Mr.] McMynn" (para. 57). Thus, the appellant's criminal responsibility for kidnapping "would . . . have to rest on a finding that he [was] a party to the offence of kidnapping by the application of s. 21 of the *Criminal Code*" (*ibid.*).

[18] On the issue of s. 21(1) criminal responsibility, Finch C.J.B.C. reasoned that "in the context of a continuing offence [kidnapping] where the taking has already occurred, the accused must have knowledge that a kidnapping has occurred, and that the victim's confinement is the result of that act" (para. 61). In this specific case, as the charge of kidnapping was laid under s. 279(1)(a) of the *Code*, the offender "must . . . have knowledge that the principal offender abducted the victim against his will for the purpose of confining him" (para. 62).

[19] In line with these criteria, Finch C.J.B.C. was satisfied that the trial judge had found all the facts necessary to convict the appellant as a party to the offence of kidnapping under s. 21(1) (para. 69). Accordingly, he substituted a conviction for

était séquestré et avait directement pris part à la séquestration (par. 375).

[16] Le ministère public a interjeté appel de l'acquittement relatif à l'accusation d'enlèvement. L'appellant a déposé un appel incident visant à faire casser la déclaration de culpabilité pour séquestration, invoquant comme moyen que le verdict de culpabilité était déraisonnable.

IV. Cour d'appel de la Colombie-Britannique, 2011 BCCA 112, 302 B.C.A.C. 187

A. *Opinion des juges majoritaires*

[17] Après avoir passé en revue le droit applicable en matière d'enlèvement, le juge Finch, juge en chef de la Colombie-Britannique, s'exprimant en son nom et en celui de la juge Saunders, a conclu que l'infraction d'enlèvement est continue et qu'elle englobe le rapt initial et la séquestration subséquente. Il a accepté la conclusion du juge du procès selon laquelle l'appellant n'avait pas participé activement [TRADUCTION] « au rapt initial de [M.] McMynn ou à ses déplacements subséquents » (par. 57). La responsabilité criminelle de l'appellant relativement à l'enlèvement « devait [donc] reposer sur la conclusion qu'il [était] partie à l'infraction d'enlèvement en application de l'art. 21 du *Code criminel* » (*ibid.*).

[18] Sur la question de la responsabilité criminelle résultant de l'application du par. 21(1), le juge en chef Finch a tenu le raisonnement suivant : [TRADUCTION] « dans le contexte d'une infraction continue [l'enlèvement] où le rapt initial a déjà eu lieu, l'accusé doit savoir qu'il y a eu enlèvement et que la séquestration de la victime découle de cet acte » (par. 61). L'accusation, en l'espèce, étant fondée sur l'al. 279(1)a) du *Code*, le délinquant [TRADUCTION] « doit [. . .] savoir que l'auteur principal a enlevé la victime contre son gré dans l'intention de la séquestrer » (par. 62).

[19] Compte tenu de ces critères, le juge en chef Finch a estimé que le juge du procès avait tiré une conclusion à l'égard de tous les faits nécessaires pour déclarer l'appellant coupable d'enlèvement à titre de participant à l'infraction au sens du

kidnapping and stayed the unlawful confinement count pursuant to the principles in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729 (para. 83).

B. *Concurring Opinion*

[20] Prowse J.A., concurring in the result, found it unnecessary to decide whether kidnapping, by its nature, is a continuing offence. In this case, the kidnapping count should be viewed as a continuing transaction which covered the period between April 4 and 12, 2006, and “encompassed the initial taking of Mr. McMynn and the subsequent moving of him from house to house” (para. 85).

[21] According to Prowse J.A., though the appellant might not have been a party to the initial abduction, his actions in confining Mr. McMynn “aided and abetted those who moved Mr. McMynn” from house to house in circumstances where the appellant “knew and intended that his actions would assist the principals in that regard” (para. 85). Therefore, the appellant should have been found guilty of the offence of kidnapping.

[22] All three members of the court dismissed the appellant’s cross-appeal. That matter is not before us.

V. The Issues

[23] As indicated, this appeal gives rise to the following two issues:

- (1) Is the offence of kidnapping in s. 279(1) of the *Code* a continuing offence?
- (2) If kidnapping is a continuing offence, can a person who played no part in the original taking, but who learns of it and chooses thereafter to participate in the kidnapping enterprise, be found liable as a party to the offence of kidnapping under s. 21(1) of the *Code*?

par. 21(1) (par. 69). Il a donc substitué une déclaration de culpabilité pour enlèvement à l’acquittement, et il a ordonné l’arrêt des procédures à l’égard de l’accusation de séquestration, conformément aux principes énoncés dans *Kienapple c. La Reine*, [1975] 1 R.C.S. 729 (par. 83).

B. *Opinion concordante*

[20] La juge Prowse, souscrivant au résultat, a jugé inutile de déterminer si l’enlèvement est par nature une infraction continue. Elle a estimé que l’accusation d’enlèvement visait, en l’espèce, une opération continue, s’étant déroulée du 4 au 12 avril 2006, qui [TRADUCTION] « englobait le rapt initial de M. McMynn et son déplacement subséquent de maison en maison » (par. 85).

[21] Toujours selon la juge Prowse, bien qu’il fût possible que l’appellant n’ait pas participé au rapt initial, la part qu’il a prise dans la séquestration de M. McMynn a [TRADUCTION] « aidé et encouragé ceux qui ont déplacé M. McMynn » de maison en maison dans des circonstances telles que l’appellant « d’une part savait que ses actes aideraient les auteurs principaux à cet égard et, d’autre part, avait cette intention » (par. 85). Par conséquent, la juge Prowse a conclu que l’appellant aurait dû être déclaré coupable de l’infraction d’enlèvement.

[22] Les trois juges ont rejeté l’appel incident de l’appellant. Nous ne sommes pas saisis de ce rejet.

V. Les questions en litige

[23] Comme je l’ai déjà indiqué, le présent pourvoi soulève les deux questions suivantes :

- (1) L’infraction d’enlèvement décrite au par. 279(1) du *Code* est-elle une infraction continue?
- (2) Le cas échéant, une personne qui n’a joué aucun rôle dans le rapt initial, mais qui, sachant qu’il a eu lieu, décide par la suite de participer à l’entreprise d’enlèvement, peut-elle être déclarée coupable en tant que participante à l’infraction d’enlèvement en application du par. 21(1) du *Code*?

VI. Statutory Provisions

[24] The statutory provisions reproduced below reflect the offences of kidnapping and unlawful confinement in place at the time the impugned acts were committed:

279. (1) [Kidnapping] Every person commits an offence who kidnaps a person with intent

- (a) to cause the person to be confined or imprisoned against the person's will;
- (b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
- (c) to hold the person for ransom or to service against the person's will.

(1.1) [Punishment] Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

- (i) in the case of a first offence, five years, and

- (ii) in the case of a second or subsequent offence, seven years;

- (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

- (b) in any other case, to imprisonment for life.

. . .

(2) [Forcible confinement] Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

- (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

VI. Les dispositions législatives applicables

[24] Le texte des dispositions relatives à l'enlèvement et à la séquestration reproduit ci-après est celui qui était en vigueur au moment où les actes reprochés ont été posés.

279. (1) [Enlèvement] Commet une infraction quiconque enlève une personne dans l'intention :

- a) soit de la faire séquestrer ou emprisonner contre son gré;
- b) soit de la faire illégalement envoyer ou transporter à l'étranger, contre son gré;
- c) soit de la détenir en vue de rançon ou de service, contre son gré.

(1.1) [Peine] Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible :

- a) s'il y a usage d'une arme à feu à autorisation restreinte ou d'une arme à feu prohibée lors de la perpétration de l'infraction, ou s'il y a usage d'une arme à feu lors de la perpétration de l'infraction et que celle-ci est perpétrée au profit ou sous la direction d'une organisation criminelle ou en association avec elle, de l'emprisonnement à perpétuité, la peine minimale étant :

- (i) de cinq ans, dans le cas d'une première infraction,

- (ii) de sept ans, en cas de récidive;

- a.1) dans les autres cas où il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

- b) dans les autres cas, de l'emprisonnement à perpétuité.

. . .

(2) [Séquestration] Quiconque, sans autorisation légitime, séquestre, emprisonne ou saisit de force une autre personne est coupable :

- a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

VII. Issue 1 — Is the Offence of Kidnapping a Continuing Offence?

A. *Analysis*

[25] For reasons that I will expand upon, I am satisfied that kidnapping is simply an aggravated form of unlawful confinement. This interpretation is consonant with the intention of Parliament as expressed in the *Code*, the crime's common law origins and legislative history, modern jurisprudence of Canadian appellate courts, and common sense. So long as the victim of the kidnapping remains unlawfully confined, the crime of kidnapping continues. To interpret the statutory provisions as they evolved in their historical context, we must first consider how the offence of kidnapping was defined at common law.

(1) Kidnapping at Common Law

[26] At common law, the offence of kidnapping was viewed as an aggravated form of false imprisonment: W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, at p. 219; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, at pp. 429-30; W. Hawkins, *A Treatise of the Pleas of the Crown* (8th ed. 1824), vol. I, at p. 119; H. Roscoe, *A Digest of the Law of Evidence in Criminal Cases* (2nd ed. 1840), at p. 529; W. O. Russell, *A Treatise on Crimes and Misdemeanors* (3rd ed. 1843), vol. I, at p. 716. See also J. P. Bishop, *Bishop on Criminal Law* (9th ed. 1923), vol. II, at § 750; K. A. Aickin, "Kidnapping at Common Law" (1936), 1 *Res Judicatae* 130. The term kidnapping emerged in English case law in the late seventeenth century to describe the forced recruitment of labour for the American colonies: J. L. Diamond, "Kidnapping: A Modern Definition" (1985), 13 *Am. J. Crim. L.* 1, at pp. 2-3. False imprisonment, in turn, was commonly viewed as a lesser and included offence of kidnapping.

[27] In 1803, Sir Edward Hyde East described the offence of kidnapping in the following terms: "The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any

VII. Première question — L'enlèvement est-il une infraction continue?

A. *Analyse*

[25] Pour les raisons que je développerai ci-après, j'estime que l'enlèvement est simplement une forme aggravée de la séquestration. Cette interprétation est conforme à l'intention du législateur telle qu'elle s'exprime dans le *Code*, à l'origine de ce crime dans la common law, à l'historique législatif, à la jurisprudence moderne des juridictions d'appel et au bon sens. Tant que la victime est séquestrée, le crime d'enlèvement se poursuit. Pour interpréter les dispositions législatives applicables en fonction de leur évolution historique, il faut remonter à la définition que donne la common law de l'infraction d'enlèvement.

(1) L'enlèvement en common law

[26] La common law a considéré l'enlèvement (*kidnapping*) comme une forme aggravée d'emprisonnement illégal : W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, p. 219; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, p. 429-430; W. Hawkins, *A Treatise of the Pleas of the Crown* (8^e éd. 1824), vol. I, p. 119; H. Roscoe, *A Digest of the Law of Evidence in Criminal Cases* (2^e éd. 1840), p. 529; W. O. Russell, *A Treatise on Crimes and Misdemeanors* (3^e éd. 1843), vol. I, p. 716. Voir aussi J. P. Bishop, *Bishop on Criminal Law* (9^e éd. 1923), vol. II, § 750; K. A. Aickin, « Kidnapping at Common Law » (1936), 1 *Res Judicatae* 130. Le terme anglais *kidnapping* est apparu dans la jurisprudence anglaise à la fin du dix-septième siècle pour décrire le recrutement forcé de main-d'œuvre pour les colonies américaines : J. L. Diamond, « Kidnapping : A Modern Definition » (1985), 13 *Am. J. Crim. L.* 1, p. 2-3. L'emprisonnement illégal était, quant à lui, généralement considéré comme une infraction moindre et incluse dans l'enlèvement.

[27] En 1803, Sir Edward Hyde East a décrit ainsi l'infraction d'enlèvement : [TRADUCTION] « La forme la plus grave d'emprisonnement illégal est le fait de s'emparer d'une personne et de l'emmener

person, sometimes called kidnapping, which is an offence at common law, punishable by fine, imprisonment, and pillory”: *A Treatise of the Pleas of the Crown*, vol. I, at pp. 429-30. False imprisonment, in turn, was referred to as “every restraint of a man’s liberty . . . , either in a gaol, house, stocks, or in the street, whenever it is done without a proper authority” (p. 428).

[28] Other learned authors described the offences of kidnapping and false imprisonment in like terms. William Hawkins referred to the offence of kidnapping in the following terms: “. . . an aggravated species of false imprisonment is the privately carrying off any person, and keeping them secretly confined, which is generally understood by the term *kidnapping*” (p. 119 (emphasis in original)). Likewise, Henry Roscoe wrote that “[k]idnapping, which is an aggravated species of false imprisonment, is the stealing and carrying away or secreting of any person, and is an offence at common law, punishable by fine and imprisonment” (p. 529).

[29] In *Bishop on Criminal Law*, the offence of kidnapping is defined as a “false imprisonment aggravated by conveying the imprisoned person to some other place” (§ 750). Bishop, furthermore, described kidnapping as a continuous offence: “It is a continuous crime beginning with the taking and ending with the return of the kidnapped person” (*ibid.*).

[30] American jurisprudence confirms the common law meaning of the offences of kidnapping and false imprisonment. (See, e.g., *Click v. The State*, 3 Tex. 282 (1848), at p. 286; *Smith v. The State*, 63 Wis. 453 (1885); *Midgett v. State*, 139 A.2d 209 (Md. 1958); *People v. Adams*, 205 N.W.2d 415 (Mich. 1973), at p. 419; *U.S. v. Garcia*, 854 F.2d 340 (9th Cir. 1988), at pp. 343-44.) The same interpretation is found in other common law jurisdictions. (See, e.g., *Davis v. R.*, [2006] NSWCCA 392 (AustLII).)

ou de la cacher, parfois appelée enlèvement (*kidnapping*), qui est une infraction en common law punissable d’une amende, d’une peine d’emprisonnement ou du pilori » : *A Treatise of the Pleas of the Crown*, vol. I, p. 429-430. L’emprisonnement illégal, lui, a été défini comme [TRADUCTION] « toute restriction à la liberté d’une personne [. . .], dans une prison, une maison, au pilori ou dans la rue, lorsqu’elle a lieu sans avoir été dûment autorisée » (p. 428).

[28] D’autres éminents auteurs ont formulé des descriptions analogues pour ces infractions. William Hawkins s’est exprimé ainsi au sujet de l’enlèvement : [TRADUCTION] « . . . une forme aggravée d’emprisonnement illégal est le fait d’emmener à titre privé une personne et de la tenir confinée, en secret, qu’on désigne généralement par le terme *enlèvement* (*kidnapping*) » (p. 119 (en italique dans l’original)). De la même façon, Henry Roscoe a écrit : [TRADUCTION] « . . . l’enlèvement, qui est une forme aggravée d’emprisonnement illégal, est le fait de s’emparer d’une personne et de l’emmener ou de la cacher, et c’est une infraction en common law, punissable d’une amende et d’une peine d’emprisonnement » (p. 529).

[29] *Bishop on Criminal Law* définit l’infraction d’enlèvement en ces termes : [TRADUCTION] « . . . emprisonnement illégal aggravé par le déplacement de la personne emprisonnée » (§ 750). L’auteur qualifie en outre l’enlèvement d’infraction continue : « C’est un crime continu qui commence lorsqu’on se saisit de la victime et qui se termine avec le retour de celle-ci » (*ibid.*).

[30] La jurisprudence américaine a confirmé le sens donné par la common law aux infractions d’enlèvement et d’emprisonnement illégal. (Voir, p. ex., *Click c. The State*, 3 Tex. 282 (1848), p. 286; *Smith c. The State*, 63 Wis. 453 (1885); *Midgett c. State*, 139 A.2d 209 (Md. 1958); *People c. Adams*, 205 N.W.2d 415 (Mich. 1973), p. 419; *U.S. c. Garcia*, 854 F.2d 340 (9th Cir. 1988), p. 343-344.) Cette interprétation se retrouve dans d’autres ressorts de common law. (Voir, p. ex., *Davis c. R.*, [2006] NSWCCA 392 (AustLII).)

[31] As this review demonstrates, it is the element of movement that differentiated kidnapping from the lesser included offence of false imprisonment and made kidnapping an aggravated form of false imprisonment. The underlying concern was that by carrying the victim away, the kidnappers would be taking him or her beyond the protection of the country's laws: R. A. Anderson, *Wharton's Criminal Law and Procedure* (1957), vol. I, at § 371; L. Hochheimer, *The Law of Crimes and Criminal Procedure* (2nd ed. 1904), at § 317 cited in *Midgett*, at p. 215. As J. L. Diamond explains in his study of the offence:

The initial common law element of carrying a victim out of the country . . . emphasized that the victim would almost inevitably suffer a very lengthy, if not permanent, isolation from his or her normal society. From this perspective, kidnapping was an extreme form of false imprisonment because the isolation was often for the duration of the victim's life. [Emphasis added; p. 31.]

[32] Movement is insidious because it removes the victim from his or her normal surroundings. Locating the victim becomes that much more difficult. The police are deprived of the clues about the victim's whereabouts that are generally available in straightforward cases of unlawful confinement. When a kidnapping occurs, the range of possible locations where the victim might be held captive increases exponentially and the likelihood that the victim will be found and rescued diminishes accordingly. In that sense, movement is tied to the ensuing confinement and the eventual location where the victim is secreted and held captive. This argues in favour of treating kidnapping as a continuing offence. It supports the time-honoured view that kidnapping, in its essence, is simply an aggravated form of unlawful confinement.

[33] Once it is accepted that kidnapping is an aggravated form of unlawful confinement, the conclusion that kidnapping is a continuing offence is virtually axiomatic.

(2) Legislative History

[34] Since kidnapping at common law was seen as an aggravated form of false imprisonment,

[31] Comme l'indique cette recension, c'est l'élément de déplacement qui différencie l'enlèvement de l'infraction moindre et incluse d'emprisonnement illégal et qui en fait une forme aggravée de cette dernière infraction. Cela répond à la préoccupation sous-jacente qu'en emmenant la victime ailleurs, les ravisseurs peuvent faire en sorte qu'elle échappe à la protection des lois du pays : R. A. Anderson, *Wharton's Criminal Law and Procedure* (1957), vol. I, § 371; L. Hochheimer, *The Law of Crimes and Criminal Procedure* (2^e éd. 1904), § 317 cité dans *Midgett*, p. 215. Comme J. L. Diamond l'explique dans son ouvrage sur cette infraction :

[TRADUCTION] Le fait d'emmener la victime hors du pays, qui constituait en common law l'élément initial de l'infraction [. . .] rendait compte du fait que la victime risquait presque inévitablement d'être coupée longtemps, voire de façon permanente, de son milieu ordinaire. Dans cette perspective, l'enlèvement était une forme extrême d'emprisonnement illégal parce que l'isolement de la victime durait souvent toute sa vie. [Je souligne; p. 31.]

[32] Le déplacement est insidieux parce qu'il sort la victime de son environnement normal. Cela rend les recherches d'autant plus ardues; la police est privée des indices dont elle disposerait généralement, dans les affaires de simple séquestration, au sujet de l'endroit où peut se trouver la victime. L'enlèvement opère une multiplication exponentielle des lieux de captivité possibles, diminuant d'autant les chances de retrouver et de libérer la victime. En ce sens, l'élément de déplacement est lié à la séquestration subséquente et à l'endroit où la victime sera cachée et tenue captive. Cela milite en faveur du caractère continu de l'infraction d'enlèvement et confirme la conception classique selon laquelle l'enlèvement est, de par sa nature, tout simplement une forme aggravée de la séquestration.

[33] Une fois posée la prémisse que l'enlèvement est une forme aggravée de séquestration, la conclusion qu'il constitue une infraction continue relève pratiquement de l'évidence.

(2) Historique législatif

[34] Puisque la common law considérait l'enlèvement comme une forme plus grave de séquestration,

which, by definition, is a continuing crime, we need to determine whether Parliament, by codifying the offence of kidnapping in the *Criminal Code*, intended to abandon this well-established meaning of the offence, as the appellant suggests. In my view, the legislative history provides no support for the appellant's argument.

[35] The first *Criminal Code*, adopted in 1892 (c. 29), included kidnapping and unlawful confinement under the same section and provided for the same punishment. The term “kidnapping” was not defined in the first *Code* — indeed, it remains undefined to this day. The original provision read:

264. [Kidnapping] Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent —

(a.) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(b.) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(c.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

On a literal reading of the 1892 *Code*, the intent requirement in subss. (a) through (c) applied both to the offence of kidnapping and to the offence of unlawful confinement.

[36] In 1900, Parliament amended the kidnapping section to clarify that the intent requirement applied only to the offence of kidnapping: *The Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46, s. 3. The new section read:

264. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority —

(a.) kidnaps any other person with intent —

une infraction qui, par définition, est de nature continue, il nous faut déterminer si le législateur a voulu s'écarter de cet aspect établi de l'infraction lorsqu'il l'a incluse au *Code criminel*, ainsi que le soutient l'appelant. Selon moi, l'historique législatif ne permet pas d'étayer un tel argument.

[35] Le premier *Code criminel*, adopté en 1892 (ch. 29), traitait de l'enlèvement et de la séquestration dans la même disposition et prévoyait la même peine pour les deux infractions. Le terme « enlèvement » n'y était pas défini — il ne l'est d'ailleurs toujours pas. Voici le texte de cette première disposition :

264. [Enlèvement et séquestration de personnes] — Est coupable d'un acte criminel et passible de sept ans d'emprisonnement, tout individu qui, sans autorisation légale, saisit de force et séquestre ou emprisonne quelque personne en Canada, ou enlève quelque personne dans l'intention —

(a.) De faire séquestrer ou emprisonner cette personne secrètement et contre son gré en Canada; ou

(b.) De faire conduire ou transporter illégalement cette personne hors du Canada contre son gré; ou

(c.) De faire vendre ou emmener cette personne comme esclave ou en servitude, de quelque manière que ce soit et contre son gré.

Il ressort de l'interprétation littérale de l'énoncé de 1892 que l'élément intentionnel prévu aux al. a) à c) s'appliquait à la fois à l'infraction d'enlèvement et à celle de séquestration.

[36] En 1900, le législateur a modifié la disposition relative à l'enlèvement pour préciser que l'exigence relative à l'intention ne s'appliquait qu'à l'enlèvement : l'*Acte modificatif du Code criminel, 1900*, S.C. 1900, ch. 46, art. 3. La nouvelle disposition était ainsi libellée :

264. Est coupable d'un acte criminel, et passible de sept ans d'emprisonnement, tout individu qui, sans autorisation légale, —

(a) Enlève quelque personne dans l'intention

(i.) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(ii.) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(iii.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or

(b.) forcibly seizes and confines or imprisons any other person within Canada.

[37] The appellant argues that Parliament, by separating the two offences in 1900, restricted kidnapping to the act of seizing and taking away and made only unlawful confinement a continuing offence. There is no basis for this interpretation.

[38] In amending the *Criminal Code* in 1900, Parliament did not intend to reduce kidnapping to the moment of taking: it merely sought to clarify that no specific intent was required to prove unlawful confinement. In his treatise published two years after the amendments, James Crankshaw described kidnapping as an “aggravated” form of false imprisonment: *The Criminal Code of Canada and the Canada Evidence Act* (2nd ed. 1902), at pp. 269-70. As he explained:

The difference between a criminal false imprisonment and kidnapping appears to be this that the latter is not only an unlawful and forcible detention of a person against his will, but a removal of him or an intention to remove him beyond the reach of his country’s laws, by secretly confining him within his own country or by sending him away into foreign parts. [Emphasis deleted; p. 270.]

[39] Kidnapping in the *Criminal Code* after 1900, as before, remained an aggravated form of false imprisonment. It was aggravated because the additional element of movement increased the risk of harm to the victim by isolating him or her from a place where rescue was more likely.

(i) de faire séquestrer ou secrètement emprisonner cette personne, en Canada, contre son gré; ou

(ii) de la faire conduire ou transporter illégalement hors du Canada, contre son gré; ou

(iii) de la faire vendre ou emmener comme esclave ou en servitude, de quelque manière que ce soit, contre son gré; ou

(b) Saisit de force et séquestre ou emprisonne quelque personne en Canada.

[37] L’appelant soutient qu’en séparant les deux infractions en 1900, le législateur a limité l’enlèvement au fait de se saisir d’une personne et de l’emmener et qu’il n’a fait une infraction continue que de la séquestration. Cette interprétation ne repose sur aucun fondement.

[38] Lorsqu’il a modifié le *Code criminel* en 1900, le législateur n’avait nullement l’intention de restreindre l’enlèvement au moment où la victime est prise; il a simplement voulu préciser que l’infraction de séquestration n’exigeait pas la preuve d’une intention spécifique. Dans son traité, publié deux ans après les modifications, James Crankshaw a décrit l’enlèvement comme une forme [TRADUCTION] « aggravée » d’emprisonnement illégal : *The Criminal Code of Canada and the Canada Evidence Act* (2^e éd. 1902), p. 269-270. Comme il l’explique :

[TRADUCTION] La différence entre l’emprisonnement illégal criminel et l’enlèvement paraît résider dans le fait que l’enlèvement ne se limite pas au fait de détenir par la force et sans autorisation légale une personne contre son gré, mais comporte aussi le fait de la soustraire ou l’intention de la soustraire à la protection des lois de son pays en la séquestrant secrètement dans son propre pays ou en l’envoyant à l’étranger. [Italiques omis; p. 270.]

[39] L’infraction d’enlèvement prévue au *Code criminel*, après 1900, a continué d’être une forme aggravée d’emprisonnement illégal; aggravée, parce que l’élément de déplacement qui s’y ajoute fait croître le risque de préjudice pour la victime, en l’isolant de tout lieu où elle aurait plus de chances d’être secourue.

[40] In 1954, the kidnapping section was re-enacted: *Criminal Code*, S.C. 1953-54, c. 51, s. 233. Parliament again did not see fit to define the term “kidnapping”. Importantly, however, the 1954 amendments altered the sentencing scheme for kidnapping and unlawful confinement. Instead of the same seven-year sentence, kidnapping now carried a maximum penalty of life imprisonment, whereas unlawful confinement carried a maximum term of five years. Subsequent amendments to the *Code* have reinforced this distinction. At present, kidnapping is punishable by a maximum term of life imprisonment and, where aggravating circumstances exist, severe minimum sentences are imposed. Unlawful confinement, on the other hand, is treated as a hybrid offence, punishable by a maximum term of 18 months or 10 years, depending on whether the Crown proceeds by summary conviction or indictment. I find the 1954 sentencing amendments and the follow-up amendments to be instructive. The penalty scheme reflects Parliament’s view that kidnapping is a much more serious offence than unlawful confinement. This makes sense in law and logic if kidnapping is viewed as an aggravated form of unlawful confinement — and hence a continuing offence. Surely, Parliament could not have intended that the victim’s initial apprehension and movement, which will often occur in a matter of seconds, be treated more seriously than the victim’s ensuing captivity, which may last for days, months, or even years. And yet, this is where the appellant’s submission leads. With respect, I find it unconvincing.

[41] In sum, while Parliament has never defined the word “kidnapping” in the *Code*, nothing in the legislative history suggests that Parliament intended to abandon the common law definition, much less replace it with a new meaning that would dramatically alter the nature and character of the offence of kidnapping as it had come to be understood. Kidnapping remains an aggravated form of false imprisonment and, as such, a continuing offence.

[40] En 1954, la disposition relative à l’enlèvement a été édictée de nouveau : *Code criminel*, S.C. 1953-54, ch. 51, art. 233. Encore une fois, le législateur n’a pas jugé bon de définir le mot « enlèvement ». Fait important, toutefois, les modifications de 1954 établissaient un régime de peines différent pour l’enlèvement et la séquestration. Alors qu’auparavant ces infractions étaient toutes deux punies d’une peine d’emprisonnement de sept ans, l’enlèvement était dorénavant assorti d’une peine maximale d’emprisonnement à perpétuité, tandis que l’emprisonnement maximal prévu pour la séquestration était de cinq ans. Les modifications apportées par la suite au *Code* ont renforcé cette distinction. À présent, l’enlèvement est punissable d’une peine maximale d’emprisonnement à perpétuité et, lorsqu’il y a des circonstances aggravantes, de peines minimales sévères. La séquestration, quant à elle, est traitée comme une infraction mixte, punissable d’un emprisonnement maximal de 18 mois ou de 10 ans, selon que le ministère public a recours à la procédure sommaire ou à la mise en accusation. Le nouveau régime de peines adopté en 1954 et les modifications qui y ont été apportées par la suite sont instructifs. En effet, ils indiquent que, pour le législateur, l’enlèvement est une infraction beaucoup plus grave que la séquestration. Cette conclusion est sensée sur le plan du droit et de la logique si l’enlèvement est considéré comme une forme aggravée de séquestration — et, par conséquent, comme une infraction continue. Le législateur n’a certainement pas voulu que le rapt et le déplacement initiaux de la victime, qui se produisent souvent en quelques secondes, soient jugés plus graves que la captivité qui leur fait suite, qui, elle, peut durer des jours, des mois ou même des années. C’est pourtant à ce résultat que mène la thèse de l’appelant. En tout respect, elle ne me convainc pas.

[41] En somme, bien que le législateur n’ait jamais défini le mot « enlèvement » dans le *Code*, l’historique législatif ne renferme rien qui permette de penser qu’il a voulu abandonner la définition établie par la common law et encore moins la remplacer par une nouvelle modifiant radicalement la nature et le caractère de l’infraction d’enlèvement telle qu’on en était venu à la concevoir. L’enlèvement reste une forme aggravée d’emprisonnement illégal et, par suite, une infraction continue.

(3) Modern Jurisprudence

[42] Modern Canadian jurisprudence on the statutory offence of kidnapping in s. 279(1) of the *Code* and unlawful confinement (also referred to as “forcible confinement”) in s. 279(2) of the *Code* tracks the understanding of these two offences at common law.

[43] In *R. v. Tremblay* (1997), 117 C.C.C. (3d) 86 (Que. C.A.), LeBel J.A. (as he then was) stated:

[TRANSLATION] Forcible confinement deprives the individual of his liberty to move from point A to point B. As for kidnapping, it consists of the taking of control over a person and carrying him away from point A to point B. The distinction between the offences sometimes becomes rather subtle because to carry away a person from one point A to one point B prevents, at the same time, the person from moving from another point A to another point B. This is the reason why kidnapping necessarily entails forcible confinement. However, there can be forcible confinement without there being a kidnapping at the outset. [Emphasis added; p. 95.]

[44] *Tremblay* is significant in two respects: it adopts the view that unlawful confinement forms an essential component of the crime of kidnapping, as at common law, and it accepts the fundamental distinction, drawn at common law, that kidnapping involves movement, whereas unlawful confinement does not (pp. 94-95). In this respect, *Tremblay*’s interpretation of the statutory offence of kidnapping is consistent with the common law definition of kidnapping as an aggravated form of false imprisonment — or, as Bishop described it, “a false imprisonment aggravated by conveying the imprisoned person to some other place” (§ 750).

[45] In *R. v. Oakley* (1977), 4 A.R. 103, the Alberta Supreme Court, Appellate Division, engaged in a comprehensive review of the origins and evolution of the offence of kidnapping at common law and its modern-day characteristics. Notably, the court observed that kidnapping has been described as “an aggravated species of false imprisonment”, a

(3) Jurisprudence moderne

[42] La jurisprudence canadienne moderne relative aux infractions d’enlèvement et de séquestration respectivement décrites aux par. 279(1) et (2) du *Code* fait écho à la conception de ces deux infractions élaborée par la common law.

[43] Dans *R. c. Tremblay*, 1997 CanLII 10526 (C.A. Qué.), le juge LeBel (maintenant juge de notre Cour) a écrit :

La séquestration prive l’individu de sa liberté de se déplacer d’un point A à un point B. L’enlèvement, quant à lui, consiste dans la prise de contrôle d’une personne pour l’amener contre son gré d’un point A à un point B. La distinction entre les infractions devient parfois délicate car pour amener une personne d’un point A à un point B, on l’empêche par le fait même de se déplacer d’un point A à un point B. C’est la raison pour laquelle un enlèvement entraîne nécessairement une séquestration. La séquestration, cependant, peut survenir sans qu’un enlèvement ait eu lieu à l’origine. [Je souligne, p. 11.]

[44] L’arrêt *Tremblay* est important à deux égards : d’abord, il souscrit à la conception que la séquestration constitue un élément essentiel du crime d’enlèvement, comme dans la common law, puis, il admet la distinction fondamentale, faite par la common law, selon laquelle l’enlèvement suppose un déplacement tandis que cet élément est absent quand il est question de séquestration (p. 10-11). En ce sens, l’interprétation qu’on y trouve de l’infraction d’enlèvement, telle qu’elle a été codifiée, concorde avec la notion d’enlèvement en tant que forme aggravée d’emprisonnement illégal élaborée par la common law ou, pour reprendre la description faite par Bishop, en tant qu’[TRADUCTION] « emprisonnement illégal aggravé par le déplacement de la personne emprisonnée » (§ 750).

[45] Dans *R. c. Oakley* (1977), 4 A.R. 103, la Cour suprême de l’Alberta, section d’appel, a effectué une analyse exhaustive des origines et de l’évolution de l’infraction d’enlèvement dans la common law et de ses caractéristiques modernes. Elle a notamment relevé que l’enlèvement avait été décrit comme une [TRADUCTION] « forme aggravée

description that “would fit in with the manner in which the legislature has come to treat this type of offence” (para. 37). In the next paragraph, the court endorsed the common law understanding of the offence of kidnapping and the features that distinguish it from the offence of unlawful confinement:

One of the best statements is by Coffey, J., of the Supreme Court of Indiana in an 1894 case, *Eberling v. State*, 35-36 N.E.R. 1023, where at page 1023 he says:

Mr. Bishop, in his work on Criminal Law, (volume 1, S. 553) says: “Kidnapping and false imprisonment, two offences against the individual, of which ordinarily the latter is included in the former, are punishable by the common law. False imprisonment is any unlawful restraint of one’s liberty, whether in a place set apart for imprisonment generally, or used only on the particular occasion, and whether between walls or not, effected either by physical force, actually applied, or by words and an array of such forces. Kidnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place.” Taking this definition as correct, kidnapping, then, as known to the common law, was false imprisonment aggravated by carrying the imprisoned person to some other place. 2 Bish. Crim. Law, S. 750. [para. 38]

[46] Likewise, in *R. v. Metcalfe* (1983), 10 C.C.C. (3d) 114, Nemetz C.J.B.C., writing for a unanimous B.C. Court of Appeal, adopted the Supreme Court of Indiana’s observation in *Eberling v. State*, cited in *Oakley*, that “[k]idnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place” (p. 119).

[47] In my view, the Canadian courts’ interpretation of the *Code* lends considerable support to the argument that in enacting the offence of kidnapping, Parliament did not intend to abandon the meaning of the offence as it had evolved and come to be understood at common law. Based on this jurisprudence, Finch C.J.B.C. accurately summarized the basic elements of the offence of kidnapping in his reasons. For the *actus reus*, there has to be an abduction of a person and moving him or her to a place (“carrying away” or “asportation”),

d’emprisonnement illégal » et indiqué que cette description « correspond à la façon dont le législateur en est venu à considérer ce type d’infraction » (par. 37). Au paragraphe suivant, la cour a adopté l’interprétation qu’a donnée la common law à cette infraction ainsi que les caractéristiques qui la distinguent de l’infraction de séquestration :

[TRADUCTION] Un des meilleurs énoncés a été fait en 1894 par le juge Coffey, de la Cour suprême de l’Indiana, dans l’affaire *Eberling c. State*, 35-36 N.E.R. 1023, où il a écrit, à la page 1023 :

M. Bishop, dans son traité de droit criminel s’exprime comme suit (volume 1, S. 553) : « [l]’enlèvement et l’emprisonnement illégal, deux infractions contre la personne, dont la seconde est généralement incluse dans la première, sont punissables en common law. Constitue un emprisonnement illégal toute restriction illicite de la liberté individuelle, que ce soit dans un établissement de nature carcérale ou dans un endroit utilisé pour l’occasion, et dans un lieu clos ou non, avec recours à la force physique ou à des mots et à un ensemble de ces diverses forces. L’enlèvement est un emprisonnement illégal aggravé. » Si l’on tient cette définition pour exacte, l’enlèvement tel qu’il était défini par la common law était un emprisonnement illégal aggravé par le déplacement de la personne emprisonnée. 2 Bish. Crim. Law, S. 750. [par. 38]

[46] Le juge en chef Nemetz de la Cour d’appel de la Colombie-Britannique, exposant l’opinion unanime de la cour dans *R. c. Metcalfe* (1983), 10 C.C.C. (3d) 114, a lui aussi repris l’énoncé fait par la Cour suprême de l’Indiana dans *Eberling c. State* et cité dans *Oakley*, selon lequel [TRADUCTION] « [l]’enlèvement est un emprisonnement illégal aggravé par le déplacement de la personne emprisonnée » (p. 119).

[47] À mon avis, l’interprétation par les tribunaux canadiens de la disposition du *Code* relative à l’enlèvement fournit un appui substantiel à l’argument selon lequel le législateur n’a pas eu l’intention, lorsqu’il l’a édictée, de s’écarter du sens que l’infraction avait acquis en common law. En s’appuyant sur cette jurisprudence, le juge en chef Finch a résumé avec justesse les éléments fondamentaux de l’infraction. L’*actus reus* nécessite que la victime soit saisie et emmenée en un endroit contre son gré, ce qui peut s’accomplir par la violence ou par la

against the victim's will, which can be accomplished either by force or by fraud. The *mens rea* will be established if the accused has one of the intents described in s. 279(1) of the *Code*.

[48] The appellant, however, points to one statement from *Metcalfe*, which he says supports his argument that kidnapping is not a continuing offence. At p. 118, Nemetz C.J.B.C. observed that “[t]he crime [of kidnapping] is complete when the person is picked up and then transported . . . to his place of confinement.” The appellant also relies on a similar comment in *R. v. Reid*, [1972] 2 All E.R. 1350, where the English Court of Appeal said:

We can find no reason in authority or in principle why the crime [of kidnapping] should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized. [pp. 1351-52]

[49] In my view, *Metcalfe* and *Reid* do not advance the appellant's position. These cases stand for the proposition that the crime of kidnapping is complete in law at the point of the taking, irrespective of whether the victim is subsequently “secreted” or held in confinement. The converse inference — that a subsequent confinement is *not* a part of the offence of kidnapping — does not follow. Chief Justice Finch recognized this distinction in the instant case. He stated, correctly in my view, that

the comment [in *Reid*] that kidnapping need not be regarded as a “continuing offence” was made in the context of deciding whether there was a completed offence without the secreting or concealment of the victim. I do not think it can be regarded as authority for saying that a subsequent confinement may not form part of the offence. [Emphasis added; para. 45.]

[50] Faced with a similar question, the Supreme Court of New South Wales unanimously held in *Davis* that the victim's subsequent confinement did form part of the offence of kidnapping:

fraude. La *mens rea* est établie si une des intentions décrites au par. 279(1) du *Code* est prouvée.

[48] L'appellant invoque toutefois un passage de *Metcalfe* qui, selon lui, appuie son argument voulant que l'enlèvement ne soit pas une infraction continue. Le juge en chef Nemetz indique, à la p. 118, que [TRADUCTION] « [l]e crime [d'enlèvement] est complet lorsque la personne est prise puis transportée [. . .] au lieu de captivité ». L'appellant invoque aussi une observation semblable, faite dans *R. c. Reid*, [1972] 2 All E.R. 1350, par la Cour d'appel anglaise :

[TRADUCTION] Nous ne voyons rien dans la jurisprudence et la doctrine ni aucune raison de principe qui permette d'affirmer que le crime [d'enlèvement] ne serait pas complet lorsque la personne est saisie et emmenée ou qu'il faudrait considérer l'enlèvement comme une infraction continue comportant la dissimulation de la personne saisie, comme on nous l'a fait valoir. [p. 1351-1352]

[49] Selon moi, *Metcalfe* et *Reid* n'appuient pas l'argument de l'appellant. Ces arrêts établissent que le crime d'enlèvement est complet, en droit, dès le rapt initial, que la victime ait ou non été « cachée » ou tenue captive par la suite. L'inverse — à savoir que la séquestration subséquente *ne fait pas* partie de l'infraction — ne s'ensuit toutefois pas. Le juge en chef Finch a reconnu cette distinction en l'espèce. À mon avis, il a judicieusement fait remarquer que

[TRADUCTION] l'observation [dans *Reid*] selon laquelle il n'y a pas lieu de considérer l'enlèvement comme une « infraction continue » s'inscrivait dans le contexte de la question de savoir si l'on était en présence d'une infraction complète lorsque la victime n'avait pas été cachée. Je ne pense pas qu'on puisse y voir la consécration du principe selon lequel une séquestration subséquente ne peut pas faire partie de l'infraction. [Je souligne; par. 45.]

[50] Saisie d'une question semblable, la Cour suprême de la Nouvelle-Galles-du-Sud a statué à l'unanimité, dans *Davis*, que la séquestration subséquente de la victime faisait bien partie de l'infraction d'enlèvement :

Neither *Reid* nor [other case law] supports the proposition that a taking ceases to be a taking at the moment that the kidnapper becomes criminally liable for the offence. The offence might at that moment be complete in law, because the taking has been completed for the purposes of proving the offence, but it is not necessarily complete in fact. Once it has been established that a person has been “taken”, in the sense that he or she has been compelled to go where he or she did not want to go, the “taking” continues until the compulsion ceases. It does not cease merely because the person has been taken for a certain distance or for a certain time or even because the kidnapper has ceased to physically move the victim and has commenced detaining that person in the one place. In a real sense, the kidnapper is taking the victim, that is causing the victim to accompany him or her, for the entire duration of the time, however long it is, that the victim is, as a result of the kidnapper’s conduct, involuntarily detained in a place that is not the place where the victim was first detained. The taking begins with the detention and asportation of the victim, and only ends when the victim is released or ceases to withhold consent to the detention. [Emphasis added; para. 64.]

[51] The reasoning in *Davis* is persuasive on this point, even though it relies in part on the specific wording of the kidnapping section in the New South Wales *Crimes Act 1900*. The decision is instructive for another reason. As Howie J. observed, drawing a line between seizure and detention is difficult and artificial, “particularly in cases where the victim is transported repeatedly from one place to another rather than simply held in one place” (para. 57).

[52] Finally, the appellant argues that this Court’s decision in *Bell v. The Queen*, [1983] 2 S.C.R. 471, supports his position that kidnapping is not a continuing offence. With respect, I do not agree.

[53] The central issue in *Bell* was whether the crime of importing narcotics into Canada under s. 5 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, is complete once the narcotic has crossed the border or whether the crime continues until the narcotic has reached its intended final destination in Canada. McIntyre J., writing for a majority of the Court, concluded that the word “import” in s. 5 should be given its ordinary meaning, which “is

[TRADUCTION] L’affirmation selon laquelle l’enlèvement cesse d’être un enlèvement lorsque la responsabilité criminelle de son auteur est acquise n’est étayée ni par *Reid* ni par [une autre décision]. L’infraction peut alors être complète en droit parce que l’enlèvement est complet pour ce qui est de la preuve, mais elle n’est pas nécessairement complète en fait. Lorsqu’il est établi qu’une personne a été « enlevée », au sens où elle a été contrainte d’aller quelque part contre son gré, l’« enlèvement » se poursuit jusqu’à ce que cesse la contrainte. Il ne prend pas fin simplement parce qu’une certaine distance est franchie ou un certain temps écoulé ni même parce que l’auteur a cessé de déplacer la victime et a commencé à la garder à un endroit donné. En fait, l’auteur enlève la victime, c’est-à-dire qu’il fait en sorte qu’elle l’accompagne pendant tout le temps, quelle qu’en soit la durée, où la victime est, à cause de la conduite de l’auteur, détenue contre son gré en un lieu autre que celui de la détention initiale. L’enlèvement commence avec la détention et le déplacement de la victime, et il ne se termine que lorsque la victime est relâchée ou cesse de s’opposer à la détention. [Je souligne; par. 64.]

[51] C’est un raisonnement convaincant sur ce point, même s’il s’appuie en partie sur le libellé de la disposition relative à l’enlèvement du *Crimes Act 1900* de la Nouvelle-Galles-du-Sud. Cette décision est aussi instructive pour un autre motif. Comme le juge Howie l’a signalé, établir une distinction entre la phase du rapt initial et celle de la détention est difficile et artificiel [TRADUCTION] « en particulier lorsque la victime est déplacée souvent d’un endroit à un autre et non simplement détenue à un endroit » (par. 57).

[52] Enfin, l’appelant soutient que notre arrêt *Bell c. La Reine*, [1983] 2 R.C.S. 471, étaye son argument que l’enlèvement n’est pas une infraction continue. Je ne suis pas de cet avis.

[53] La principale question qui se posait, dans *Bell*, était de savoir si le crime d’importation de stupéfiants au Canada énoncé à l’art. 5 de la *Loi sur les stupéfiants*, S.R.C. 1970, ch. N-1, est complet lorsque la substance a traversé la frontière ou s’il se poursuit jusqu’à ce qu’elle soit parvenue à sa destination finale prévue au Canada. Exposant l’opinion majoritaire, le juge McIntyre a conclu qu’il fallait donner au mot « importer » employé à l’art. 5 son

simply to bring into the country or to cause to be brought into the country” (p. 489). It followed, in his view, that the offence of importing was “complete when the goods enter the country” (*ibid.*).

[54] Justice McIntyre offered some examples of offences that he considered to be “continuing” offences. After observing that murder was not a continuing offence but that conspiracy to commit murder could be, he stated the following:

Theft is not a continuing offence. It is terminated when the wrongful taking has occurred with the requisite intention. On the other hand, possession of goods knowing them to have been obtained by the commission of theft is a continuing offence. The offence of kidnapping would not be a continuing offence, but that of wrongful detention of the victim following the kidnapping would be. [Emphasis added; p. 488.]

[55] In my view, *Bell* does not assist the appellant. Much as the appellant seeks to rely on McIntyre J.’s observation that kidnapping is not a continuing offence, that observation is not authoritative. The offence of kidnapping was not before the Court. McIntyre J. did not discuss the essential features of kidnapping, nor did he cite any supporting case law. McIntyre J. merely used the offence of kidnapping as an example. As such, this observation is *obiter*. (See *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).

[56] In *Bell*, Dickson J., concurring, concluded that the offence of importing a narcotic into Canada is not “over and done with” until the goods have reached their final destination in Canada (p. 481). While his view in that respect was not shared by the majority, Dickson J.’s analysis helps to shed light on the second issue in this appeal: party liability. It is to that issue that I now turn.

VIII. Issue 2 — Party Liability

[57] Section 21(1) of the *Code* reads:

sens ordinaire soit « simplement d’introduire ou de faire introduire au pays » (p. 489). Il s’ensuivait selon lui que l’infraction « est complète dès lors que les marchandises entrent au pays » (*ibid.*).

[54] Le juge McIntyre a donné des exemples d’infractions qui, à son sens, constituaient des infractions « continues ». Après avoir fait remarquer que le meurtre n’était pas une infraction continue, mais que le complot en vue d’en commettre un pouvait l’être, il a ajouté ce qui suit :

Le vol n’est pas une infraction continue. Il est accompli lorsque, avec l’intention requise, on s’empare illégalement du bien d’autrui. Par contre, la possession de biens qu’on sait avoir été obtenus par la perpétration d’un vol est une infraction continue. L’infraction d’enlèvement ne serait pas une infraction continue, mais la séquestration de la victime après l’enlèvement le serait. [Je souligne; p. 488.]

[55] *Bell* n’est, à mon avis, d’aucun secours à l’appelant. Il a beau citer à l’appui de sa thèse l’observation du juge McIntyre selon laquelle l’enlèvement ne serait pas une infraction continue, cette observation ne fait pas autorité. La Cour n’était pas saisie de la question de l’enlèvement. Le juge McIntyre n’en a pas examiné les caractéristiques essentielles pas plus qu’il n’a cité de jurisprudence à ce sujet. Il a simplement donné l’enlèvement en exemple, de sorte que ses propos relèvent de la remarque incidente. (Voir *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 57).

[56] Dans *Bell*, le juge Dickson a conclu, dans des motifs concordants, que la perpétration de l’infraction d’importation de stupéfiants au Canada « ne prend fin » que lorsque les marchandises sont arrivées à leur destination finale prévue au Canada (p. 481). Bien que la majorité n’y ait pas souscrit, l’analyse du juge Dickson aide à mettre en lumière la deuxième question soulevée par le présent pourvoi : la responsabilité en tant que participant. C’est cette question que je vais maintenant examiner.

VIII. Deuxième question — la responsabilité en tant que participant

[57] Le paragraphe 21(1) du *Code* est ainsi libellé :

21. (1) [Parties to offence] Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[58] Under s. 21(1), a person is criminally liable, as a party to an offence, if that person, having the requisite intent, plays one of the three enumerated roles in the offence — principal, aider or abettor. An individual will bear the same responsibility for the offence regardless of which particular role he or she played: *R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 689-90. As this Court recently explained in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, a person becomes a party to an offence when that person — armed with *knowledge* of the principal's intention to commit the crime and with the intention of assisting the principal in its commission — does (or, in some circumstances, omits to do) something that assists or encourages the principal in the commission of the offence (paras. 14-18).

[59] In my view, the well-established principles of s. 21(1) criminal liability apply with equal force to continuing offences that have been completed in law but not in fact. In particular, where an accused — with knowledge of the principal's intention to see a continuing offence through to its completion — does (or omits to do) something, with the intention of aiding or abetting the commission of the ongoing offence, party liability is established.

[60] Applying that principle to this case, once it is understood that kidnapping is an aggravated form of unlawful confinement, which continues until the victim is freed, there is no reason in law or logic why a person who learns that the victim has been kidnapped and nonetheless chooses to participate in the kidnapping enterprise, should not be found liable as a party to the offence of kidnapping under s. 21(1) of the *Code*.

21. (1) [Participants à une infraction] Participant à une infraction :

- a) quiconque la commet réellement;
- b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;
- c) quiconque encourage quelqu'un à la commettre.

[58] Aux termes du par. 21(1), encourt une responsabilité criminelle comme participant à une infraction la personne qui accomplit un des trois actes décrits — commettre, aider ou encourager — en ayant l'intention requise. Quel que soit le rôle joué, la responsabilité criminelle est la même : *R. c. Thatcher*, [1987] 1 R.C.S. 652, p. 689-690. Comme notre Cour l'a récemment expliqué dans *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411, une personne participe à l'infraction lorsqu'elle accomplit (ou, dans certaines circonstances, omet d'accomplir) quelque chose qui aide ou encourage l'auteur principal d'une infraction à la commettre, en ayant *connaissance* de l'intention de ce dernier de commettre le crime et en ayant l'intention de l'aider (par. 14-18).

[59] Les principes bien établis de la responsabilité criminelle au sens du par. 21(1) s'appliquent selon moi avec la même force aux infractions continues qui sont complètes en droit, mais non en fait. Plus particulièrement, la responsabilité en tant que participant est établie lorsqu'un accusé, connaissant l'intention de l'auteur principal de mener une infraction continue à son terme, accomplit quelque chose (ou omet de l'accomplir), en vue d'aider ou d'encourager la perpétration de l'infraction continue en question.

[60] Lorsqu'on applique ce principe en l'espèce, dès lors qu'on considère l'enlèvement comme une forme aggravée de la séquestration — qui se poursuit jusqu'à la libération de la victime — il n'existe aucune raison d'ordre juridique ou logique justifiant de ne pas reconnaître la responsabilité à titre de participant à l'infraction d'enlèvement par application du par. 21(1) du *Code*, d'une personne qui, sachant que la victime a été enlevée, décide néanmoins de participer à l'entreprise d'enlèvement.

[61] A series of appellate decisions are instructive in this regard. The Ontario and Nova Scotia Courts of Appeal, having found that narcotics importation was a continuing offence, held that a person could be charged as a party to the offence under s. 21(1) at any point from the time the goods entered Canada until they reached the final destination, even though the offence could be considered complete in law at the moment the goods had crossed the border: *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183 (Ont. C.A.); *R. v. Whynott* (1975), 12 N.S.R. (2d) 231 (S.C. (App. Div.)); *R. v. Tanney* (1976), 31 C.C.C. (2d) 445 (Ont. C.A.). In *Bell*, the majority cast doubt on these decisions by adopting a narrow construction of the term “import” in s. 5 of the *Narcotic Control Act*. But the majority decision in *Bell* does not detract from the general principle articulated in the case law that a person who chooses to engage in a continuing offence with full knowledge of the offence can be held responsible as party to that offence under s. 21(1) of the *Code*.

[62] In his concurring opinion in *Bell*, Dickson J. relied on these appellate decisions in finding that the importation offence was not “over and done with” and that criminal liability could be incurred as long as the offence was ongoing in fact. As Dickson J. held:

To “actually commit” importing, an accused must bring in, or cause to be brought in, to Canada, goods from a foreign country; this, by definition, necessitates crossing the Canadian border. Someone who becomes involved only after the border crossing, however, may be aiding and abetting a person bringing the goods from outside Canada to a given destination inside Canada. [Emphasis added; pp. 478-79.]

Therefore, although not a party at the time the offence was initiated (by the principal(s)), a person may become a party to the offence as long as the offence is not “over and done with”.

[61] Des arrêts de juridictions d’appel sont instructifs à cet égard. Les cours d’appel de l’Ontario et de la Nouvelle-Écosse ont statué, après avoir conclu que l’importation de stupéfiants constituait une infraction continue, qu’une personne pouvait être accusée en tant que participant à l’infraction, en application du par. 21(1), à l’égard d’un acte ou d’une omission survenant à tout moment entre l’entrée des marchandises au Canada et leur arrivée à la destination finale, même si l’infraction pouvait être considérée comme complète en droit dès lors que les marchandises avaient traversé la frontière : *R. c. Hijazi* (1974), 20 C.C.C. (2d) 183 (C.A. Ont.); *R. c. Whynott* (1975), 12 N.S.R. (2d) 231 (C.S. (Div. app.)); *R. c. Tanney* (1976), 31 C.C.C. (2d) 445 (C.A. Ont.). Dans *Bell*, l’interprétation étroite du mot « importer » de l’art. 5 de la *Loi sur les stupéfiants* formulée par les juges majoritaires a fait naître un doute à l’égard de ces arrêts. Cependant, l’opinion majoritaire ne s’écarte pas du principe général établi par la jurisprudence selon lequel une personne qui est pleinement au courant d’une infraction continue et qui décide d’y prendre part peut être tenue criminellement responsable en tant que participant à cette infraction en application du par. 21(1) du *Code*.

[62] Dans l’opinion concordante qu’il a formulée dans *Bell*, le juge Dickson s’est appuyé sur les arrêts précités pour conclure que l’infraction d’importation n’avait pas « pr[is] fin » et que la responsabilité criminelle pouvait être retenue tant que la perpétration se poursuivait dans les faits. Comme l’a exposé le juge Dickson :

Pour qu’on puisse dire qu’il « commet réellement » l’infraction d’importation, un accusé doit introduire ou faire introduire au Canada des marchandises provenant d’un pays étranger; cela nécessite par définition qu’elles franchissent la frontière canadienne. Quelqu’un dont la participation ne commence qu’après cette étape peut toutefois être coupable d’avoir aidé et encouragé une personne à faire venir des marchandises de l’extérieur du Canada à une destination à l’intérieur du Canada. [Je souligne; p. 478-479.]

En conséquence, une personne qui n’est pas partie à une infraction lorsque l’auteur principal commence à la commettre peut le devenir tant que la perpétration de l’infraction n’a pas « pr[is] fin ».

[63] Applying this principle to the present context, once it is accepted that the crime of kidnapping continues until the victim is freed, a person who chooses to participate in the victim's confinement — after having learned that the victim has been kidnapped — may be held responsible for the offence of kidnapping under s. 21(1).

IX. Application

[64] On the appellant's thesis, once Mr. McMynn had been forcibly apprehended and taken away, the offence of kidnapping was spent and his abductors faced a possible life sentence. In contrast, Mr. McMynn's ensuing eight-day ordeal in captivity would not be considered as part of the kidnapping charge. It would, instead, be governed by the lesser offence of unlawful confinement for which a maximum penalty of 10-years' imprisonment could be imposed if the Crown proceeded by way of indictment.

[65] This case illustrates why it would be incongruous to view the worst part of Mr. McMynn's ordeal (his eight days in captivity) as a separate and less serious offence than the ordeal he underwent in the few moments it took for his captors to apprehend and remove him from his usual surroundings.

[66] Parliament intended no such thing. Under s. 279(1) of the *Code*, the offence of kidnapping was complete in law as soon as Mr. McMynn's abductors had forcibly apprehended and taken him away — assuming that in doing so it was their intention to keep him confined against his will.

[67] But, as I have mentioned before, just because the offence was complete in law at the moment of the taking does not mean that it was also complete in fact. Mr. McMynn's unlawful confinement following the taking continued for the next eight days. The kidnapping came to an end when he was set free by the police. Put differently, Mr. McMynn's status as a victim of a kidnapping did not change during his eight days of captivity.

[63] Si on applique ce principe dans notre contexte — étant entendu que le crime d'enlèvement se poursuit tant que la victime n'est pas libérée — la personne qui décide de participer à la séquestration de la victime, après avoir appris que celle-ci a été enlevée, peut être tenue responsable de l'infraction d'enlèvement en application du par. 21(1).

IX. Application

[64] Suivant le raisonnement de l'appelant, lorsque les ravisseurs se sont emparés de M. McMynn et l'ont emmené, l'infraction d'enlèvement était consommée et les ravisseurs étaient passibles de l'emprisonnement à perpétuité. Toujours selon lui, l'épreuve des huit jours de captivité que la victime a ensuite traversée, par contre, n'entraînait pas dans l'accusation d'enlèvement; elle relevait plutôt de l'infraction moindre de séquestration, punissable d'une peine maximale de 10 ans d'emprisonnement, si le ministère public optait pour la mise en accusation.

[65] Cette affaire montre bien pourquoi il serait incongru de considérer le pire aspect de l'épreuve vécue par M. McMynn (ses huit jours de captivité) comme la conséquence d'une infraction d'une part séparée de celle ayant entraîné les brefs moments où ses ravisseurs se sont emparés de lui et l'ont coupé de son milieu habituel et, d'autre part, moins grave qu'elle.

[66] Le législateur n'a jamais eu une telle intention. Suivant le par. 279(1) du *Code*, l'infraction était perpétrée dès lors que les ravisseurs de M. McMynn s'étaient saisis de lui et l'avaient emmené — dans la mesure où, ce faisant, ils avaient l'intention de le séquestrer contre son gré.

[67] Cependant, je le répète, ce n'est pas parce que l'infraction était complète juridiquement au moment du rapt qu'elle l'était factuellement. La séquestration de M. McMynn, après le rapt initial, s'est poursuivie pendant les huit jours suivants. L'enlèvement a pris fin lorsque la police l'a libéré. Autrement dit, l'état de victime d'enlèvement de M. McMynn n'a pas changé pendant les huit jours de captivité.

[68] I agree with Finch C.J.B.C. that for purposes of s. 21(1), the appellant's participation in the confinement of Mr. McMynn satisfied the *actus reus* component of the offence of kidnapping (para. 65). In this case, accepting that the appellant was initially unaware of and took no part in the taking and carrying away of Mr. McMynn, he became aware of it while Mr. McMynn remained confined against his will and chose thereafter to take part in the kidnapping enterprise.

[69] The evidence in this regard, as found by the trial judge, is overwhelming. First, the appellant was present in all three houses in which Mr. McMynn was held captive. Second, the appellant was one of Mr. McMynn's captors and was aware that Mr. McMynn was being held with a view to obtaining a ransom. Indeed, the trial judge was satisfied that the appellant and one of his co-accused had threatened to kill Mr. McMynn if the ransom was not paid. Third, the appellant had purchased duct tape and a tarp four days before the police rescued Mr. McMynn. Fourth, the appellant was arrested in the third confinement house when the police eventually freed Mr. McMynn. Finally, while the trial judge was not satisfied that the appellant had physically moved Mr. McMynn from house to house during the period of confinement, he did find that the appellant had full knowledge of those movements.

[70] Given the trial judge's findings, I agree with Finch C.J.B.C. that the appellant "would have had to be wilfully blind not to know that [Mr.] McMynn had been taken and was being held against his will in all three houses" (para. 67). The trial judge's findings in that regard can give rise to no other rational conclusion. The requisite *mens rea* element under s. 21(1) was met.

[71] The trial judge nevertheless acquitted the appellant of kidnapping because he considered movement to be an essential element of kidnapping and was not satisfied that the appellant had physically participated in moving Mr. McMynn from house to house to justify a guilty verdict for

[68] Comme le juge en chef Finch, je pense que pour l'application du par. 21(1), la participation de l'appelant à la séquestration de M. McMynn satisfait à l'*actus reus* de l'infraction d'enlèvement (par. 65). En supposant que l'appelant n'ait pris aucune part au rapt et au déplacement initiaux de M. McMynn et qu'il en ait été ignorant, il en a appris l'existence lorsque M. McMynn est demeuré séquestré contre son gré, et il a néanmoins décidé de participer à l'entreprise d'enlèvement.

[69] Comme l'a conclu le juge du procès, la preuve à cet égard est accablante. Premièrement, l'appelant s'est trouvé dans les trois maisons où M. McMynn a été séquestré. Deuxièmement, l'appelant était l'un des gardiens, et il savait que M. McMynn était détenu en vue d'obtenir une rançon. Le juge du procès s'est d'ailleurs dit convaincu que l'appelant et l'un des coaccusés avaient menacé de tuer le captif si la rançon n'était pas versée. Troisièmement, l'appelant avait acheté du ruban adhésif et une bâche quatre jours avant que la police ne libère M. McMynn. Quatrièmement, l'appelant a été arrêté au troisième lieu de captivité lorsque la police a délivré M. McMynn. Enfin, bien que le juge ne fût pas convaincu que l'appelant a déplacé M. McMynn de maison en maison pendant la séquestration, il a conclu que l'appelant était parfaitement au courant de ces déplacements.

[70] Compte tenu des conclusions du juge du procès, je partage l'avis du juge en chef Finch [TRADUCTION] « qu'il fallait que [l'appelant] ait fait preuve d'aveuglement volontaire pour ignorer que [M.] McMynn avait été enlevé puis détenu contre son gré dans chacune des trois maisons » (par. 67). Les constatations du juge du procès à cet égard ne permettent de tirer aucune autre conclusion rationnelle. Il était satisfait à l'exigence du par. 21(1) quant à l'élément intentionnel.

[71] Le juge du procès a néanmoins acquitté l'appelant de l'accusation d'enlèvement parce qu'il considérait le déplacement comme un élément essentiel de l'infraction et que, n'étant pas convaincu que l'appelant avait physiquement participé au déplacement de M. McMynn de maison

kidnapping (paras. 3, 345 and 375). With respect, I cannot agree. Movement, of course, is what distinguishes kidnapping from unlawful confinement and makes kidnapping an aggravated form of unlawful confinement. But kidnapping, as discussed above, is a continuing offence. It began when Mr. McMynn was abducted by force from his car and ended when he was freed. Mr. McMynn was not kidnapped and confined at house 1, then kidnapped again upon being moved to house 2 and then kidnapped a third time upon being moved to house 3. To treat what occurred here as three separate kidnappings and three separate cases of unlawful confinement is, in my respectful view, illogical and further underscores why kidnapping should be treated as a continuing offence.

[72] In short, the appellant joined the kidnapping enterprise while the confinement of the victim was still underway. He did so with the intent to aid the kidnappers and with the knowledge that Mr. McMynn was a victim of kidnapping — or, at a minimum, he was wilfully blind to that fact. The appellant took steps, of his own free will, to assist the kidnappers and further their objectives. By doing so, he made himself a party to the offence of kidnapping under s. 21(1) of the *Code*.

[73] For those reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Howard Rubin, Q.C., North Vancouver; Chandra L. Corriveau, Burnaby.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

en maison, il estimait qu'un verdict de culpabilité n'était pas justifié (par. 3, 345 et 375). Je ne puis souscrire à ce raisonnement. C'est, bien sûr, le déplacement qui distingue l'enlèvement de la séquestration et qui fait de l'enlèvement une forme aggravée de séquestration. Comme on l'a vu, toutefois, l'enlèvement est une infraction continue. Il a commencé lorsqu'on a fait sortir M. McMynn de force de sa voiture et a pris fin lorsque ce dernier a été délivré. M. McMynn n'a pas été enlevé et séquestré dans la première maison, puis enlevé une deuxième et une troisième fois lorsqu'il a été emmené dans la deuxième et la troisième maison. J'estime respectueusement qu'il est illogique de voir trois cas distincts d'enlèvement et trois cas distincts de séquestration dans ce qui s'est passé, et que cela met encore plus en évidence la nécessité de considérer l'enlèvement comme une infraction continue.

[72] En résumé, l'appelant s'est associé à l'entreprise d'enlèvement pendant que la séquestration de la victime se poursuivait. Il l'a fait dans l'intention d'aider les ravisseurs, en sachant que M. McMynn avait été enlevé ou, à tout le moins, en s'aveuglant volontairement à cet égard. De son propre gré, il a posé des gestes pour aider les ravisseurs et favoriser l'atteinte de leurs objectifs. En agissant ainsi, il a participé à l'infraction d'enlèvement au sens du par. 21(1) du *Code*.

[73] Pour ces motifs, je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs de l'appelant: Howard Rubin, c.r., North Vancouver; Chandra L. Corriveau, Burnaby.

Procureur de l'intimée: Procureur général de la Colombie-Britannique, Vancouver.

Tab 21:

R. v. Zora, 2020 SCC 14

Chaycen Michael Zora *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Criminal Lawyers' Association of Ontario,
Vancouver Area Network of Drug Users,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association,
Independent Criminal Defence Advocacy
Society, Pivot Legal Society and
Association québécoise des avocats et avocates
de la défense** *Interveners*

INDEXED AS: R. v. ZORA

2020 SCC 14

File No.: 38540.

2019: December 4; 2020: June 18.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Côté, Brown, Rowe, Martin and
Kasirer JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Criminal law — Failure to comply with conditions of undertaking or recognizance — Elements of offence — Mens rea — Accused convicted of failure to comply with conditions of undertaking or recognizance after failing to answer door when police attended his residence — Whether mens rea for offence of failure to comply with conditions of undertaking or recognizance is to be assessed on subjective or objective standard — Criminal Code, R.S.C. 1985, c. C-46, s. 145(3).

Z was charged with drug offences and was granted bail with conditions, including a curfew and a requirement that he present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to

Chaycen Michael Zora *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique,
Criminal Lawyers' Association of Ontario,
Vancouver Area Network of Drug Users,
British Columbia Civil Liberties Association,
Association canadienne des libertés civiles,
Independent Criminal Defence Advocacy
Society, Pivot Legal Society et
Association québécoise des avocats et avocates
de la défense** *Intervenants*

RÉPERTORIÉ : R. c. ZORA

2020 CSC 14

N° du greffe : 38540.

2019 : 4 décembre; 2020 : 18 juin.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Droit criminel — Omission de se conformer aux conditions d'une promesse ou d'un engagement — Éléments de l'infraction — Mens rea — Prévenu déclaré coupable d'omission de se conformer aux conditions d'une promesse ou d'un engagement après avoir omis de répondre à la porte lorsque la police s'est rendue à sa résidence — La mens rea pour l'infraction d'omission de se conformer aux conditions d'une promesse ou d'un engagement doit-elle être évaluée en fonction d'une norme subjective ou objective? — Code criminel, L.R.C. 1985, c. C-46, art. 145(3).

Z a été accusé d'infractions relatives aux drogues et a obtenu une mise en liberté sous conditions, notamment un couvre-feu et l'exigence de se présenter à la porte de sa résidence dans un délai de cinq minutes lorsque la police

confirm his compliance with his curfew. Z twice failed to present himself at his door when police attended, and was charged under s. 145(3) of the *Criminal Code* with two counts of breaching his curfew and two counts of breaching his condition to answer the door. Z led evidence that he was in his bedroom where it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the door. The trial judge acquitted Z on the alleged curfew violations but convicted Z on the two counts of failing to appear at the door. A summary conviction appeal judge dismissed Z's appeal, concluding that objective *mens rea* is sufficient for a conviction under s. 145(3) and that Z's behaviour was a marked departure from what a reasonable person would do to ensure they complied with their bail conditions. The Court of Appeal dismissed Z's appeal. A majority of the court concluded that s. 145(3) created a duty-based offence that only requires an objective *mens rea*.

Held: The appeal should be allowed, Z's convictions quashed and a new trial ordered on the two counts of failing to attend at the door.

Under s. 145(3) of the *Criminal Code*, the Crown is required to prove subjective *mens rea*. The Crown must establish that the accused breached a condition of an undertaking, recognizance or order knowingly or recklessly. Accordingly, a new trial is required on the two counts charging Z with failing to attend at the door of his residence, in light of the lower courts' error of applying an objective standard of fault.

The default form of bail for most crimes is release on an undertaking to attend trial, without any other conditions. Bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10): securing the accused's attendance in court, ensuring the protection or safety of the public, or maintaining confidence in the administration of justice. The setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(e) of the

ou une personne en charge de la surveillance de sa liberté sous caution se présente pour confirmer qu'il respecte le couvre-feu. À deux reprises, Z ne s'est pas présenté à sa porte lorsque la police s'est rendue à sa résidence, et il a été inculpé en vertu du par. 145(3) du *Code criminel* de deux chefs d'accusation pour ne pas avoir respecté son couvre-feu et de deux chefs relatifs au manquement à sa condition de répondre à la porte. Z a présenté une preuve démontrant qu'il était dans sa chambre à coucher et qu'il lui aurait été difficile, voire impossible, d'entendre quelqu'un sonner ou frapper à la porte d'entrée. Le juge du procès a acquitté Z relativement aux allégations de violation du couvre-feu mais l'a déclaré coupable des deux chefs d'accusation d'omission de se présenter à la porte. Le juge d'appel des poursuites sommaires a rejeté l'appel de Z et conclu qu'une *mens rea* objective était suffisante pour une déclaration de culpabilité en vertu du par. 145(3) et que son comportement constituait un écart marqué par rapport à ce qu'une personne raisonnable aurait fait pour s'assurer qu'elle respectait ses conditions de mise en liberté sous caution. La Cour d'appel a rejeté l'appel de Z. Les juges majoritaires de la cour ont conclu que le par. 145(3) créait une infraction fondée sur une obligation qui nécessitait seulement une *mens rea* objective.

Arrêt : Le pourvoi est accueilli, les déclarations de culpabilité de Z sont annulées et la tenue d'un nouveau procès sur les deux chefs relatifs à l'omission de répondre à la porte est ordonnée.

En vertu du par. 145(3) du *Code criminel*, la Couronne est tenue de prouver la *mens rea* subjective. Elle doit établir que la personne prévenue a commis un manquement à une condition d'une promesse, d'un engagement ou d'une ordonnance sciemment ou par insouciance. En conséquence, la tenue d'un nouveau procès est nécessaire concernant les deux chefs accusant Z d'avoir omis de répondre à la porte de sa résidence, en raison de l'erreur commise par les tribunaux d'instance inférieure, qui ont appliqué une norme de faute objective.

Pour la plupart des crimes, la forme de mise en liberté par défaut est la libération de la personne prévenue sur promesse d'être présente au procès, sans autres conditions. Des conditions de mise en liberté sous caution peuvent être imposées, mais seulement si elles sont clairement énoncées, les moins nombreuses possible, nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées aux risques que pose la personne prévenue au regard des motifs de détention prévus au par. 515(10) : assurer la présence de la personne prévenue au tribunal, assurer la protection ou la sécurité du public ou ne pas miner la confiance du public envers l'administration

Canadian Charter of Rights and Freedoms. In addition, s. 515 of the *Criminal Code* codifies the ladder principle, which requires that the form of release and the conditions of release imposed on an accused be no more onerous than necessary to address the risks listed in s. 515(10). Only conditions specifically tailored to the individual circumstances of the accused can meet the required criteria. Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person and are to be imposed with restraint. Restraint is required because bail conditions limit the liberty of someone who is presumed innocent of the underlying offence and, through the offence in s. 145(3), create new sources of potential criminal liability personal to that individual accused.

Section 145(3) of the *Criminal Code* creates a hybrid offence that applies to breaches of conditions imposed on an accused by a court order when the accused person is released prior to trial, while awaiting sentencing, or during an appeal. It is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any crimes for which they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. Accordingly, the fault element under s. 145(3) has far-reaching implications for civil liberties and the fair and efficient functioning of bail in this country, and there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3).

Determining the *mens rea* of s. 145(3) involves discerning the fault standard intended by Parliament. The presumption is that Parliament intends crimes to have a subjective fault element unless there is a clear legislative

de la justice. La détermination des conditions de mise en liberté sous caution doit être conforme à la présomption d'innocence et au droit de ne pas se voir privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable garanti par l'al. 11e) de la *Charte canadienne des droits et libertés*. De plus, l'art. 515 du *Code criminel* codifie le principe de l'échelle, selon lequel la forme de mise en liberté et les conditions de celle-ci imposées à la personne prévenue ne doivent pas être plus sévères que ce qui est nécessaire pour répondre aux risques énumérés au par. 515(10). Seules les conditions qui sont expressément adaptées à la situation personnelle de la personne prévenue peuvent satisfaire aux critères exigés. Les conditions de mise en liberté sous caution se veulent donc des normes de comportement particularisées conçues pour limiter les risques énoncés dans la loi que pose une personne en particulier et doivent être imposées avec retenue. La retenue est nécessaire parce que les conditions de mise en liberté sous caution restreignent la liberté d'une personne présumée innocente de l'infraction sous-jacente et, par l'infraction prévue au par. 145(3), créent de nouvelles sources de responsabilité criminelle éventuelle propre à la personne prévenue visée.

Le paragraphe 145(3) du *Code criminel* prévoit une infraction mixte qui s'applique aux manquements à des conditions imposées à une personne prévenue dans une ordonnance judiciaire lorsque celle-ci est en liberté avant le procès, en attendant la détermination de la peine ou pendant un appel. Il s'agit d'un crime contre l'administration de la justice qui entraîne une peine maximale de deux ans d'emprisonnement. Toute personne prévenue est par conséquent passible d'un emprisonnement en vertu du par. 145(3) si elle manque à une condition de sa mise en liberté sous caution, même si en fin de compte elle n'est déclarée coupable d'aucun crime pour lequel elle était initialement accusée. Dans bien des cas, la personne prévenue s'expose à des sanctions pénales pour une conduite qui, n'eût été la condition de sa mise en liberté sous caution imposée, constituerait un exercice légal de sa liberté personnelle. Par conséquent, l'élément de faute qu'exige le par. 145(3) a des conséquences d'une portée considérable sur les libertés civiles et le fonctionnement équitable et efficace de la mise en liberté sous caution dans notre pays, et il existe un lien direct entre les conditions qui peuvent être imposées dans une ordonnance de mise en liberté sous caution et l'intention législative de criminaliser le manquement à celles-ci aux termes du par. 145(3).

Afin de déterminer la *mens rea* qu'exige le par. 145(3), il faut dégager la norme de faute que voulait le Parlement. La présomption est que le Parlement veut qu'un crime s'accompagne d'une faute subjective à moins qu'il existe

intention to overturn the presumption. If the offence in the *Criminal Code* is ambiguous as to the *mens rea*, then the presumption has not been displaced. The text and context of s. 145(3) suggest that Parliament intended for subjective fault to apply. The wording in s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either the subjective or objective *mens rea*. The absence of express words indicating a subjective intent cannot on its own displace the presumption of subjective *mens rea*. Furthermore, nothing establishes a clear intention to create a duty-based offence which calls for an objective *mens rea*. Duty-based offences are directed at legal duties very different from the obligation to comply with the conditions of a judicial order. And, unlike these duty-based offences, bail conditions do not impose a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct. Parliament legislated a bail system based upon an individualized process and the bail order is expected to list personalized and precise standards of behaviour. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3). In addition, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions and the risks they address also vary dramatically among individuals on release, so it is not intelligible to refer to the concepts of a “marked” or “mere” departure from the standard of a reasonable person. The offence under s. 145(3) is not comparable to other objective fault offences, and reasonable bail cannot be compared to a regulated activity that is entered into voluntarily. Further, the offence of failure to comply with bail conditions is similar to the offence of breach of probation for which a subjective *mens rea* is required.

une intention claire de la part du Parlement d’écarter la présomption. S’il existe une ambiguïté quant à la *mens rea* requise pour une infraction criminelle prévue dans le *Code criminel*, alors la présomption n’a pas été écartée. Le texte et le contexte du par. 145(3) laissent entendre que le Parlement voulait que la norme de la faute subjective s’applique. Le texte du par. 145(3) est neutre en ce sens qu’il n’indique pas une intention claire de la part du Parlement à l’égard d’une *mens rea* subjective ou objective. L’absence de mots exprès indiquant une intention subjective ne suffit pas, à elle seule, à écarter la présomption de *mens rea* subjective. De plus, rien n’établit une intention claire de créer une infraction fondée sur une obligation qui appelle une *mens rea* objective. Les infractions fondées sur des obligations se rapportent à des obligations légales très différentes de celle de se conformer aux conditions d’une ordonnance judiciaire. De plus, contrairement à ces infractions fondées sur des obligations, les conditions de mise en liberté sous caution n’imposent pas une norme de conduite minimale uniforme en fonction d’intérêts de la société plutôt que des normes de conduite personnelles. Le Parlement a adopté un système de mise en liberté sous caution basé sur un processus individualisé et l’ordonnance de mise en liberté sous caution devrait énumérer des normes de conduite personnalisées et précises. Par conséquent, il n’est pas nécessaire de recourir à une norme sociale uniforme pour bien comprendre à quelle norme de diligence on s’attend que se conforme la personne prévenue dans le cadre du respect des conditions de sa mise en liberté sous caution, et il n’est pas nécessaire d’examiner ce qu’une personne raisonnable aurait fait dans les circonstances pour comprendre l’obligation imposée par le par. 145(3). De plus, la nature hautement individualisée des conditions de mise en liberté sous caution exclut la possibilité d’une norme sociale uniforme de conduite qui serait applicable à toutes les éventuelles infractions d’omission de se conformer à une condition. Les conditions de mise en liberté sous caution et les risques auxquels elles répondent varient aussi énormément parmi les individus faisant l’objet d’une mise en liberté, de sorte qu’il n’est pas sensé de renvoyer aux concepts d’écart « marqué » ou « simple » par rapport à la norme de la personne raisonnable. L’infraction prévue au par. 145(3) n’est pas comparable aux autres infractions dont la perpétration suppose une faute objective, et la mise en liberté assortie d’un cautionnement raisonnable ne peut être comparée à une activité réglementée que l’on entreprend volontairement. D’ailleurs, l’infraction d’omission de se conformer aux conditions de mise en liberté sous caution est similaire à celle du défaut de se conformer à une ordonnance de probation pour laquelle une *mens rea* subjective est requise.

A subjective fault requirement is consistent with the penalties and consequences which flow from conviction under s. 145(3). A conviction has profound implications for the liberty interests of the offender, including imprisonment even if the offender is acquitted of the underlying charge or further conditions imposed as part of a sentence. A conviction under s. 145(3) creates or adds to that person's criminal record. Being charged under s. 145(3) also places a reverse onus on accused persons to show why they should be released on bail again. Previous convictions under s. 145(3) inform bail hearings for future offences and may lead to the denial of bail or more stringent bail conditions for future unrelated offences. Breach charges often accumulate quickly, leading to a vicious cycle of increasingly numerous and onerous conditions, more breach charges and eventually pre-trial detention. These serious consequences presuppose that the person knowingly, rather than inadvertently, breached their bail condition.

Parliament's intention to require subjective fault is further demonstrated by the distinct purpose of s. 145(3), being to punish and deter those who knowingly or recklessly breach their bail conditions. Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. Such risks or concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk. Bail review is the primary way to challenge or change bail conditions. Bail revocation under s. 524 of the *Criminal Code* and criminal charges under s. 145(3) work together to promote compliance with conditions of bail, but they serve distinct and different legislative purposes. Section 524 fulfills a risk management role; s. 145(3) exists to punish and deter. Section 145(3) is a means of last resort when other risk management tools have not served their purposes. Specific deterrence has little or no effect if an

L'exigence d'une faute subjective cadre avec les pénalités et les conséquences qui découlent d'une déclaration de culpabilité aux termes du par. 145(3). Une déclaration de culpabilité a des répercussions profondes sur le droit à la liberté de la personne contrevenante, y compris l'emprisonnement même si la personne contrevenante est acquittée de l'infraction sous-jacente ou des conditions additionnelles imposées dans le cadre d'une peine. Une déclaration de culpabilité au titre du par. 145(3) engendre un casier judiciaire ou l'alourdit. Aussi, le fait de faire l'objet d'une accusation en vertu du par. 145(3) inverse le fardeau de la preuve en imposant aux personnes prévenues la charge de démontrer pourquoi elles devraient être à nouveau libérées sous caution. Les déclarations de culpabilité antérieures prononcées en vertu du par. 145(3) peuvent également être prises en compte lors d'enquêtes sur le cautionnement tenues relativement à des infractions ultérieures et mener à ce que la mise en liberté sous caution soit refusée ou à des conditions de mise en liberté sous caution plus sévères pour des infractions ultérieures non liées. Les accusations de manquement s'accumulent souvent rapidement, menant à un cercle vicieux de conditions de mise en liberté sous caution de plus en plus nombreuses et sévères, plus d'accusations de manquement et finalement la détention avant procès. Ces conséquences graves présupposent que la personne a violé sa condition de mise en liberté sous caution sciemment, et non par inadvertance.

L'intention du Parlement d'exiger une faute subjective ressort également de l'objectif distinct du par. 145(3), soit de punir et dissuader les personnes prévenues qui manquent sciemment ou par insouciance à leurs conditions de mise en liberté sous caution. Le Parlement ne voulait pas que les sanctions pénales soient le principal moyen de gérer les risques ou les préoccupations associés aux individus libérés sous conditions. De tels risques ou préoccupations doivent être pris en compte par l'établissement de conditions qui sont minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue; des modifications à ces conditions lorsque cela est nécessaire, au moyen de révisions de la mise en liberté sous caution et de l'annulation des ordonnances de mise en liberté sous caution; et la révocation de la mise en liberté sous caution lorsque les conditions ne sont pas respectées. Les accusations portées en vertu du par. 145(3) ne sont pas, et ne devraient pas être, le principal moyen d'atténuer le risque. La révision d'une mise en liberté sous caution constitue la principale façon de contester ou de modifier des conditions de mise en liberté sous caution. La révocation de la mise en liberté sous caution en vertu de l'art. 524 du *Code criminel* et les

accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct.

The requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused will be considered when bail is set and if bail is breached. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the imposition of bail conditions. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, indicates insufficient individualization of bail conditions. The majority of bail orders include numerous conditions of release which often do not clearly address an individual accused's risks. A culture of risk aversion contributes to courts applying excessive conditions. The expeditious nature of bail hearings generates a culture of consent which aggravates the lack of restraint in imposing excessive bail conditions and encourages accused persons to agree to onerous terms of release rather than run the risk of detention. Onerous conditions disproportionately impact vulnerable and marginalized populations, including those living in poverty or with addictions or mental illnesses, and Indigenous people. The presence of too many unnecessary, excessive and onerous conditions provides legislative context for finding no clear intention of Parliament to displace the presumed subjective fault standard for s. 145(3) and illustrates the need for restraint and careful review of bail conditions.

accusations criminelles en vertu du par. 145(3) ont pour effet combiné de favoriser le respect des conditions de mise en liberté sous caution, mais elles ont des objectifs législatifs distincts et différents. L'article 524 joue un rôle de gestion de risque; le par. 145(3) vise à punir et dissuader certaines conduites. Le paragraphe 145(3) est une mesure de dernier recours lorsque les autres outils de gestion du risque n'ont pas rempli leur fonction. L'effet de dissuasion individuelle n'existe que peu ou pas si la personne accusée ignorait qu'elle faisait quelque chose de mal. Pour être dissuadée d'adopter la conduite interdite, la personne accusée doit savoir quelle norme de comportement elle doit respecter et que sa conduite n'y répond pas.

L'exigence voulant que les conditions de mise en liberté sous caution soient adaptées à la personne prévenue indique qu'il faut une *mens rea* subjective de manière à ce que les caractéristiques individuelles de celle-ci seront prises en considération lors de l'établissement des conditions de mise en liberté sous caution et en cas de manquement à celles-ci. Exiger une *mens rea* subjective renforce, reflète et respecte l'approche individualisée que commande l'imposition des conditions de mise en liberté sous caution. En pratique, le nombre de conditions de mise en liberté sous caution inutiles et déraisonnables, et la croissance du nombre d'accusations de manquement à une condition, indiquent que les conditions de mise en liberté sous caution ne sont pas suffisamment individualisées. La majorité des ordonnances de mise en liberté sous caution prévoient de nombreuses conditions qui souvent ne tiennent manifestement pas compte des risques que pose la personne prévenue. Une culture d'aversion du risque contribue à ce que les tribunaux imposent des conditions excessives. Le caractère expéditif des enquêtes sur le cautionnement engendre aussi une culture de consentement, qui aggrave le manque de retenue dans l'imposition de conditions de mise en liberté excessives et qui incite les personnes prévenues à consentir à des conditions sévères de mise en liberté plutôt qu'à courir le risque d'être détenues. L'imposition de conditions sévères touche de façon disproportionnée les populations vulnérables et marginalisées, notamment celles vivant dans la pauvreté ou aux prises avec des problèmes de toxicomanie ou des maladies mentales, ainsi que les personnes autochtones. La présence d'un trop grand nombre de conditions inutiles, excessives et sévères fournit le contexte législatif pertinent pour conclure qu'il n'y a aucune intention claire du Parlement d'écarter la norme présumée de faute subjective pour le par. 145(3) et illustre la nécessité de faire preuve de retenue et d'examiner attentivement les conditions de mise en liberté sous caution.

The principle of restraint and the ladder principle require anyone proposing bail conditions to consider what risks might arise if the accused is released without conditions. Only conditions which target the accused's risk in relation to flight, public protection and safety, or maintaining confidence in the administration of justice are necessary. A bail condition must attenuate a risk that would otherwise prevent release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes and should not be behaviourally-based. They must be sufficiently linked to the defined statutory risks, as narrowly defined as possible to meet their objective, and reasonable. They will only be reasonable if they realistically can and will be met by the accused. They cannot contravene federal or provincial legislation or the *Charter*, and must be clear, minimally intrusive, and proportionate to any specific risk posed by the accused. The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether bail is contested or the product of consent. Some specific non-enumerated conditions are commonly included in release orders, but must be scrutinized to ensure that each condition is necessary, reasonable, least onerous and sufficiently linked to a risk in s. 515(10). All persons involved in the bail system are required to act with restraint and to carefully review bail conditions they propose or impose. The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Ultimately, the obligation to ensure appropriate bail orders lies with the judicial official. These obligations carry over to consent releases. Judicial officials should not routinely second-guess joint proposals by counsel, however, they have the discretion to reject overbroad proposals and must act with caution when reviewing and approving consent release orders.

Subjective *mens rea* under s. 145(3) can be satisfied where the Crown proves: (1) the accused had knowledge

Selon les principes de retenue et de l'échelle, quiconque propose d'ajouter des conditions de mise en liberté sous caution doit chercher à savoir quels risques se poseraient si la personne prévenue était libérée sans condition. Seules les conditions qui ciblent le risque de fuite de la personne prévenue, le risque d'atteinte à la protection ou à la sécurité du public ou le risque que le public perde confiance envers l'administration de la justice sont nécessaires. La condition de mise en liberté sous caution doit atténuer le risque qui empêcherait autrement la libération de la personne prévenue sans cette condition. Les conditions ne peuvent être imposées de façon injustifiée ou dans un but punitif et ne devraient pas être fondées sur un comportement. Elles doivent être suffisamment liées aux risques définis dans la loi, définies aussi étroitement que possible pour réaliser leur objectif et raisonnables. Elles ne seront raisonnables que si, de façon réaliste, elles peuvent être et seront respectées par la personne prévenue. Elles ne peuvent contrevenir à une loi fédérale ou provinciale ou encore à la *Charte*, et doivent être claires, peu intrusives et proportionnées à tout risque précis que pose la personne prévenue. L'établissement des conditions de mise en liberté sous caution est un processus individualisé dans le cadre duquel des conditions normalisées, systématiques ou types n'ont pas leur place, peu importe que la mise en liberté sous caution soit contestée ou qu'elle résulte d'un consentement. Certaines conditions précises non énumérées sont couramment incluses dans les ordonnances de mise en liberté, mais il faut qu'elles soient examinées afin de s'assurer que chaque condition est nécessaire, raisonnable, le moins sévère possible et suffisamment lié à un risque mentionné au par. 515(10). Toutes les personnes qui jouent un rôle dans le système de mise en liberté sous caution sont tenues d'agir avec retenue et d'examiner attentivement les conditions de mise en liberté sous caution qu'elles proposent ou imposent. La Couronne, la défense et les tribunaux ont l'obligation de respecter les principes de la retenue et de la révision. En dernier ressort, l'obligation de s'assurer que les ordonnances de mise en liberté sous caution sont appropriées incombe aux entités judiciaires. Ces obligations s'appliquent aussi aux mises en liberté avec consentement. Les entités judiciaires ne devraient pas systématiquement remettre en question les propositions conjointes, mais elles ont toutefois le pouvoir discrétionnaire de rejeter les propositions trop larges et doivent agir avec prudence dans l'examen et l'approbation des ordonnances de mise en liberté sous caution obtenues avec consentement.

La *mens rea* subjective de l'infraction prévue au par. 145(3) peut être établie lorsque la Couronne prouve :

of the conditions of their bail order or were wilfully blind to those conditions; and (2) either the accused knowingly failed to act according to the bail conditions or they were wilfully blind to those circumstances and failed to comply despite that knowledge, or the accused recklessly failed to act according to the conditions, meaning they perceived a substantial and unjustified risk that their conduct would likely fail to comply with the conditions and persisted in this conduct. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*. The accused need not have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. Knowledge in the second component of the *mens rea* means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act or refrain from acting. The second component of the *mens rea* can also be met by showing that the accused was reckless. Knowledge of risk is key to recklessness — the accused must know of their bail conditions and the risk of factual circumstances arising that would require them to act (or refrain from acting) to comply with their bail conditions. Recklessness is a subjective standard and the accused must be aware that their conduct created a substantial risk of non-compliance with their bail conditions and aware of any factors that contributed to that risk being unjustified.

In the instant case, a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3). This is not a case where the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code* applies — identifying the wrong fault standard is not a harmless or trivial error. A subjective *mens rea* would have required the trial judge to consider Z's state of mind, which clearly could have had an impact on the verdict. The evidence is not so overwhelming that a conviction is inevitable. A new

(1) que la personne prévenue connaissait les conditions de sa mise en liberté sous caution ou faisait preuve d'aveuglement volontaire à leur égard; et (2) que la personne prévenue a sciemment omis d'agir conformément aux conditions de sa mise en liberté sous caution, ou qu'elle faisait preuve d'aveuglement volontaire face aux circonstances et qu'elle a omis de se conformer aux conditions malgré le fait qu'elle les connaissait, ou la personne prévenue a par insouciance omis d'agir conformément aux conditions, c'est-à-dire qu'elle était consciente qu'il y avait un risque important et injustifié que sa conduite ne respecte pas les conditions mais qu'elle n'a pas cessé d'agir de la sorte. L'oubli véritable d'une condition pourrait constituer une erreur de fait qui écarterait la *mens rea*. La personne prévenue n'est pas tenue d'être au courant des conséquences juridiques ou de la portée de la condition à laquelle elle est assujettie, mais elle doit savoir qu'elle est liée par la condition. La connaissance dans ce deuxième élément de la *mens rea* signifie que la personne prévenue doit être consciente des circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions, ou fasse preuve d'aveuglement volontaire à leur égard. Ce deuxième élément de la *mens rea* peut aussi être prouvé en démontrant que la personne prévenue a fait preuve d'insouciance. La connaissance du risque est essentielle pour qu'il y ait insouciance — la personne prévenue doit connaître les conditions de sa mise en liberté sous caution et le risque que se présentent les circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions de sa mise en liberté sous caution. L'insouciance est une norme subjective et la personne prévenue doit être consciente que sa conduite créait un risque important de manquement aux conditions de sa mise en liberté sous caution ainsi que de tout facteur faisant en sorte que le risque n'était pas justifié.

En l'espèce, il convient d'ordonner la tenue d'un nouveau procès en raison de l'erreur de droit commise par les tribunaux d'instance inférieure, qui ont appliqué une norme de faute objective plutôt que subjective pour l'infraction prévue au par. 145(3). Il ne s'agit pas en l'espèce d'une situation où la disposition réparatrice prévue au sous-al. 686(1)(b)(iii) du *Code criminel* s'applique — le fait d'arrêter la mauvaise norme de faute ne constitue pas une erreur inoffensive ou négligeable. La *mens rea* subjective aurait obligé le juge du procès à tenir compte

trial is therefore needed to address whether Z knowingly or recklessly breached his conditions.

de l'état d'esprit de Z, ce qui aurait de toute évidence pu avoir une incidence sur le verdict. La preuve n'est pas à ce point accablante qu'une déclaration de culpabilité est inévitable. Un nouveau procès est donc nécessaire pour déterminer si Z a omis sciemment ou par insouciance de se conformer à ses conditions.

Cases Cited

Referred to: *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509; *R. v. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194; *R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105; *R. v. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48; *R. v. Prychitko*, 2010 ABQB 563, 618 A.R. 146; *R. v. Penunsi*, 2019 SCC 39, [2019] 3 S.C.R. 91; *R. v. McCormack*, 2014 ONSC 7123; *R. v. Burdon*, 2010 ABCA 171, 487 A.R. 220; *R. v. Rowan*, 2018 ABPC 208; *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Naglik*, [1993] 3 S.C.R. 122; *R. v. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. v. Legere* (1995), 22 O.R. (3d) 89; *R. v. Lemay*, 2018 QCCS 1956; *R. v. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. v. Howe*, 2014 NBQB 259, 430 N.B.R. (2d) 202; *R. v. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. v. Selamio*, 2002 NWTSC 15; *R. v. Josephie*, 2010 NUCJ 7; *R. v. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. v. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. v. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. v. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. v. A.M.Y.*, 2017 NSSC 99; *R. v. L.T.W.*, 2004 CanLII 2897; *R. v. Companion*, 2019 CanLII 119787; *R. v. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. v. Qadir*, 2016 ABPC 27; *R. v. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. v. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. v. Foote*, 2018 CanLII 38297; *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Holmes*, [1988] 1 S.C.R. 914; *R. v. Moser* (1992), 7 O.R. (3d) 737; *R. v. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, aff'd 2015 SCC 6, [2015] 1 S.C.R. 399; *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35; *R. v. Docherty*, [1989] 2 S.C.R. 941; *R. v. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. v. Bingley*, 2008 BCPC 245; *R. v. Laferrière*, 2013 QCCA 944; *R. v. John*, 2015 ONSC 2040; *R. v. Bremmer*, 2006 ABPC 93; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v.*

Jurisprudence

Arrêts mentionnés : *R. c. Antic*, 2017 CSC 27, [2017] 1 R.C.S. 509; *R. c. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194; *R. c. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221; *R. c. Pearson*, [1992] 3 R.C.S. 665; *R. c. Morales*, [1992] 3 R.C.S. 711; *R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328; *R. c. Oland*, 2017 CSC 17, [2017] 1 R.C.S. 250; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Myers*, 2019 CSC 18, [2019] 2 R.C.S. 105; *R. c. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48; *R. c. Prychitko*, 2010 ABQB 563, 618 A.R. 146; *R. c. Penunsi*, 2019 CSC 39, [2019] 3 R.C.S. 91; *R. c. McCormack*, 2014 ONSC 7123; *R. c. Burdon*, 2010 ABCA 171, 487 A.R. 220; *R. c. Rowan*, 2018 ABPC 208; *R. c. Hundal*, [1993] 1 R.C.S. 867; *R. c. Creighton*, [1993] 3 R.C.S. 3; *R. c. Naglik*, [1993] 3 R.C.S. 122; *R. c. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. c. Legere* (1995), 22 O.R. (3d) 89; *R. c. Lemay*, 2018 QCCS 1956; *R. c. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. c. Howe*, 2014 NBQB 259, 430 R.N.-B. (2e) 202; *R. c. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. c. Selamio*, 2002 NWTSC 15; *R. c. Josephie*, 2010 NUCJ 7; *R. c. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. c. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. c. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. c. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. c. A.M.Y.*, 2017 NSSC 99; *R. c. L.T.W.*, 2004 CanLII 2897; *R. c. Companion*, 2019 CanLII 119787; *R. c. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. c. Qadir*, 2016 ABPC 27; *R. c. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. c. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. c. Foote*, 2018 CanLII 38297; *R. c. A.D.H.*, 2013 CSC 28, [2013] 2 R.C.S. 269; *R. c. Sault Ste-Marie*, [1978] 2 R.C.S. 1299; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Holmes*, [1988] 1 R.C.S. 914; *R. c. Moser* (1992), 7 O.R. (3d) 737; *R. c. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, conf. par 2015 CSC 6, [2015] 1 R.C.S. 399; *R. c. Santeramo* (1976), 32 C.C.C. (2d) 35; *R. c. Docherty*, [1989] 2 R.C.S. 941; *R. c. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. c. Bingley*, 2008 BCPC 245; *R. c. Laferrière*, 2013 QCCA 944; *R. c. John*, 2015 ONSC 2040; *R. c. Bremmer*, 2006 ABPC 93; *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089; *R. c.*

Omeasoo, 2013 ABPC 328, 94 Alta. L.R. (5th) 244; *R. v. Parsons* (1997), 161 Nfld. & P.E.I.R. 145; *R. v. Morris*, 2013 ONCA 223, 305 O.A.C. 47; *R. v. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273; *R. v. T.J.J.*, 2011 BCPC 155; *R. v. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1; *R. v. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL); *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215; *R. v. Murphy*, 2017 YKSC 34; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165; *R. v. S.K.*, 1998 CanLII 13344; *R. v. McDonald*, 2010 ABQB 770; *R. v. K. (R.)*, 2014 ONCJ 566; *R. v. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL); *R. v. Pammett*, 2014 ONSC 5597; *R. v. Clarke*, [2000] O.J. No. 5738 (QL); *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399; *R. v. Manseau*, [1997] AZ-51286266; *R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49; *R. v. Grey* (1993), 19 C.R. (4th) 363; *R. v. D.R.* (1999), 178 Nfld. & P.E.I.R. 200; *R. v. Gosai*, [2002] O.J. No. 359 (QL); *R. v. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331; *R. v. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134; *R. v. Delacruz*, 2015 MBQB 32; *R. v. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL); *R. v. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107; *R. v. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389; *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL); *R. v. A.D.M.*, 2017 NSPC 77; *R. v. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL); *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Edgar*, 2019 QCCQ 1328; *R. v. Smith*, 2008 ONCA 101, 233 O.A.C. 145; *R. v. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. v. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181; *R. v. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160; *R. v. Syblis*, 2015 ONCJ 73; *R. v. Blazevic* (1997), 31 O.T.C. 10; *R. v. Hutchinson* (1994), 160 A.R. 58; *R. v. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432; *Leary v. The Queen*, [1978] 1 S.C.R. 29; *R. v. Seymour*, [1996] 2 S.C.R. 252; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.

Statutes and Regulations Cited

Bail Reform Act, S.C. 1970-71-72, c. 37, s. 133(3) [in R.S.C. 1970, c. 2 (2nd Supp.), s. 4].
Canadian Charter of Rights and Freedoms, ss. 7, 11(e).
Controlled Drugs and Substances Act, S.C. 1996, c. 19.
Criminal Code, R.S.C. 1985, c. C-46, ss. 2, “justice”, 19, Part IV, 145(2), (3) [ad. 2018, c. 29, s. 9(7)], (4), (5) [ad. 2019, c. 25, s. 47(1)], (5.1), 161(1) to (4), 215 to

Omeasoo, 2013 ABPC 328, 94 Alta. L.R. (5th) 244; *R. c. Parsons* (1997), 161 Nfld. & P.E.I.R. 145; *R. c. Morris*, 2013 ONCA 223, 305 O.A.C. 47; *R. c. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273; *R. c. T.J.J.*, 2011 BCPC 155; *R. c. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1; *R. c. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL); *R. c. Coombs*, 2004 ABQB 621, 369 A.R. 215; *R. c. Murphy*, 2017 YKSC 34; *Ewert c. Canada*, 2018 CSC 30, [2018] 2 R.C.S. 165; *R. c. S.K.*, 1998 CanLII 13344; *R. c. McDonald*, 2010 ABQB 770; *R. c. K. (R.)*, 2014 ONCJ 566; *R. c. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL); *R. c. Pammett*, 2014 ONSC 5597; *R. c. Clarke*, [2000] O.J. No. 5738 (QL); *R. c. Shoker*, 2006 CSC 44, [2006] 2 R.C.S. 399; *R. c. Manseau*, [1997] AZ-51286266; *R. c. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49; *R. c. Grey* (1993), 19 C.R. (4th) 363; *R. c. D.R.* (1999), 178 Nfld. & P.E.I.R. 200; *R. c. Gosai*, [2002] O.J. No. 359 (QL); *R. c. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331; *R. c. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134; *R. c. Delacruz*, 2015 MBQB 32; *R. c. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL); *R. c. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107; *R. c. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44; *R. c. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389; *R. c. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL); *R. c. A.D.M.*, 2017 NSPC 77; *R. c. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL); *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120; *R. c. Edgar*, 2019 QCCQ 1328; *R. c. Smith*, 2008 ONCA 101, 233 O.A.C.; *R. c. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. c. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181; *R. c. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160; *R. c. Syblis*, 2015 ONCJ 73; *R. c. Blazevic* (1997), 31 O.T.C. 10; *R. c. Hutchinson* (1994), 160 A.R. 58; *R. c. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361; *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411; *R. c. Buzzanga* (1979), 25 O.R. (2d) 705; *Sansregret c. La Reine*, [1985] 1 R.C.S. 570; *R. c. Hamilton*, 2005 CSC 47, [2005] 2 R.C.S. 432; *Leary c. La Reine*, [1978] 1 R.C.S. 29; *R. c. Seymour*, [1996] 2 R.C.S. 252; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 11e).
Code criminel, L.R.C. 1985, c. C 46, art. 2, « juge de paix », 19, Partie IV, 145(2), (3) [aj. 2018, c. 29, art. 9(7)], (4), (5) [aj. 2019, c. 25, art. 4(7)], (5.1), 161(1) à (4), 215 à 217.1, 469, 493, « juge », 493.1, 493.2, 515, 518(1)c(iii), 520, 521, 522(4), 523(2), 523.1, 524, 680, 686(1)b(iii), 733.1, Partie XXV, 811a), b).

217.1, 469, 493, “judge”, 493.1, 493.2, 515, 518(1)(c) (iii), 520, 521, 522(4), 523(2), 523.1, 524, 680, 686(1) (b)(iii), 733.1, Part XXV, 811(a), (b).

Authors Cited

- Ashworth, Andrew, and Lucia Zedner. *Preventive Justice*. Oxford: Oxford University Press, 2014.
- Beattie, Karen, André Solecki and Kelly E. Morton Bourgon. *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study*. Ottawa: Government of Canada, 2013.
- Berger, Benjamin L., and James Stribopoulos. “Risk and the Role of the Judge: Lessons from Bail”, in Benjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg*. Toronto: Thomson Reuters, 2017.
- British Columbia. Prosecution Service. *Crown Counsel Policy Manual*, “Bail — Adult”, April 2019 (online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_1_eng.pdf).
- Canada. Canadian Committee on Corrections. *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections*. Ottawa: Queen’s Printer, 1969.
- Canada. Department of Justice. *Research and Statistics Division. Research in Brief: Assessments and Analyses of Canada’s Bail System*, by Kyle Coady. Government of Canada, 2018.
- Canada. House of Commons. *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, p. 3117.
- Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, pp. 19603 and 19606.
- Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, vol. 1, No. 8, 3rd Sess., 28th Parl., February 23, 1971, pp. 12 and 29.
- Canada. Public Prosecution Service. *Public Prosecution Service of Canada Deskbook*, Part III, c. 19, “Bail Conditions to Address Opioid Overdoses”, updated April 1, 2019 (online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_2_eng.pdf).

Loi réglementant certaines drogues et autres substances, L.C. 1996, c. 19.

Loi sur la réforme du cautionnement, S.C. 1970 71-72, c. 37, art. 133(3) [dans S.R.C. 1970, c. 2 (2^e suppl.), art. 4].

Doctrine et autres documents cités

- Ashworth, Andrew, and Lucia Zedner. *Preventive Justice*, Oxford, Oxford University Press, 2014.
- Beattie, Karen, André Solecki et Kelly E. Morton Bourgon. *Les caractéristiques de la détention et de la mise en liberté par la police et par le tribunal : Données tirées de l’Étude de l’Efficacité du Système de Justice*, Ottawa, Gouvernement du Canada, 2013.
- Berger, Benjamin L., and James Stribopoulos. « Risk and the Role of the Judge : Lessons from Bail », in Benjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds., *To Ensure that Justice is Done : Essays in Memory of Marc Rosenberg*, Toronto, Thomson Reuters, 2017.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 3, 3^e sess., 28^e lég., 5 février 1971, p. 3117.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 148, n^o 300, 1^{re} sess., 42^e lég., 24 mai 2018, p. 19603 et 19606.
- Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent de la justice et des questions juridiques*, vol. 1, n^o 8, 3^e sess., 28^e lég., 23 février 1971, p. 12 et 29.
- Canada. Comité canadien de la réforme pénale et correctionnelle. *Rapport du Comité canadien de la réforme pénale et correctionnelle: justice pénale et correction: un lien à forger*, Ottawa, Imprimeur de la Reine, 1969.
- Canada. Comité sénatorial permanent des affaires juridiques et constitutionnelles. *Justice différée, justice refusée : L’urgence de réduire les longs délais dans le système judiciaire au Canada*. Ottawa, juin 2017 (en ligne : https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_f.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_3_fra.pdf).
- Canada. Ministère de la Justice. Division de la recherche et de la statistique. *Évaluation et analyses du système de mise en liberté sous caution du Canada*, par Kyle Coady, Gouvernement du Canada, 2018.
- Canada. Service des poursuites pénales. *Guide du Service des poursuites pénales du Canada*, Partie III, c. 19, « Conditions de libération provisoire visant les surdoses d’opioïdes », mis à jour 1^{er} avril 2019 (en ligne :

- Canada. Standing Senate Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*. Ottawa, June 2017 (online: https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_3_eng.pdf).
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Adult criminal and youth court statistics in Canada, 2016/2017*, by Zoran Miladinovic. Ottawa: Statistics Canada, January 2019.
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Trends in offences against administration of justice*, by Maria Burczycka and Christopher Munch. Ottawa: Statistics Canada, October 2015.
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Trends in the Use of Remand in Canada*, by Lindsay Porter and Donna Calverly. Ottawa: Statistics Canada, May 2011.
- Canada. Statistics Canada. *Table 35-10-0177-01 — Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas* (online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_4_eng.pdf).
- Canadian Civil Liberties Association and Education Trust. *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers, 2014 (online: <https://ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_5_eng.pdf).
- Friedland, Martin L. *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto: University of Toronto Press, 1965.
- Friedland, Martin L. "Reflections on Criminal Justice Reform in Canada" (2017), 64 *Crim. L.Q.* 274.
- Friedland, Martin L. "The Bail Reform Act Revisited" (2012), 16 *Can. Crim. L.R.* 315.
- John Howard Society of Ontario. *Reasonable Bail?* September 2013 (online: <https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_6_eng.pdf).
- Manikis, Marie, and Jess De Santi. "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019), 60 *C. de D.* 873.
- <https://www.ppsc-sppc.gc.ca/fra/pub/sfpg-fpsd/sfp-fps/tpd/d-g-fra.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_2_fra.pdf).
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Statistiques sur les tribunaux de juridiction criminelle pour adultes et les tribunaux de la jeunesse au Canada, 2016-2017*, par Zoran Miladinovic, Ottawa, Statistique Canada, janvier 2019.
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Tendances de l'utilisation de la détention provisoire au Canada*, par Maria Burczycka et Christopher Munch, Ottawa, Statistique Canada, octobre 2015.
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Tendances des infractions contre l'administration de la justice*, par Lindsay Porter et Donna Calverly, Ottawa, Statistique Canada, mai 2011.
- Canada. Statistique Canada. *Tableau 35-10-0177-01 — Statistiques des crimes fondés sur l'affaire, par infractions détaillées, Canada, provinces, territoires et régions métropolitaines de recensement* (en ligne : https://www150.statcan.gc.ca/t1/tbl1/fr/tv.action?pid=3510017701&request_locale=fr; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_4_fra.pdf).
- Canadian Civil Liberties Association and Education Trust. *Set Up to Fail : Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers, 2014 (en ligne : <https://ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_5_eng.pdf).
- Colombie-Britannique. Prosecution Service. *Crown Counsel Policy Manual*, « Bail — Adult », April 2019 (en ligne : <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_1_eng.pdf).
- Friedland, Martin L. *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*, Toronto, University of Toronto Press, 1965.
- Friedland, Martin L. « Reflections on Criminal Justice Reform in Canada » (2017), 64 *Crim. L.Q.* 274.
- Friedland, Martin L. « The Bail Reform Act Revisited » (2012), 16 *Rev. can. D.P.* 315.
- John Howard Society of Ontario. *Reasonable Bail?* September 2013 (en ligne : <https://johnhoward.on.ca/wp-content/uploads/2014/07/>

- Manning, Morris, and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed., Markham, Ont.: LexisNexis, 2015.
- Myers, Nicole Marie. “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017), 57 *Brit. J. Criminol.* 664.
- Ontario. Ministry of the Attorney General. *Ontario Prosecution Directive*, “Judicial Interim Release (Bail)”, November 2017 (online: https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_7_eng.pdf).
- Pivot Legal Society. *Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, by Darcie Bennett and D.J. Larkin, 2019 (online: <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3297/attachments/original/1543970419/project-inclusion-digital.pdf?1543970419>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_8_eng.pdf).
- Rankin, Micah B. “Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach” (2018), 65 *C.L.Q.* 280.
- Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5^e éd. Montréal: Wilson & Lafleur, 2015, “omission”.
- Rogin, Jillian. “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017), 95 *Can. Bar Rev.* 325.
- Scollin, John A. *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest*. Toronto: Carswell, 1972.
- Stuart, Don. *Canadian Criminal Law: A Treatise*, 6th ed. Scarborough, Ont.: Thomson/Carswell, 2011.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.
- Sylvestre, Marie-Eve, Nicholas K. Blomley and Céline Bellot. *Red Zones: Criminal Law and the Territorial Governance of Marginalized People*. Cambridge: Cambridge University Press, 2019.
- Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed. Toronto: Carswell, 2010 (loose-leaf updated 2019, release 1).
- Webster, Cheryl Marie. “Broken Bail” in *Canada: How We Might Go About Fixing It*. Ottawa: Government of Canada, June 2015.
- JHSO-Reasonable-Bail-report-final.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_6_eng.pdf).
- Manikis, Marie, and Jess De Santi. « Punishing while Presuming Innocence : A Study on Bail Conditions and Administration of Justice Offences » (2019), 60 *C. de D.* 873.
- Manning, Morris, and Peter Sankoff. *Manning, Mewett & Sankoff : Criminal Law*, 5th ed., Markham (Ont.), LexisNexis, 2015.
- Myers, Nicole Marie. « Eroding the Presumption of Innocence : Pre-Trial Detention and the Use of Conditional Release on Bail » (2017), 57 *Brit. J. Criminol.* 664.
- Ontario. Ministère du Procureur général. *Directive sur les poursuites*, « Mise en liberté provisoire par voie judiciaire (cautionnement) », novembre 2017 (en ligne : https://files.ontario.ca/books/crown_prosecution_manual_french_1.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_7_fra.pdf).
- Pivot Legal Society. *Project Inclusion : Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, by Darcie Bennett and D.J. Larkin, 2019 (en ligne : <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3297/attachments/original/1543970419/project-inclusion-digital.pdf?1543970419>; version archive : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_8_eng.pdf).
- Rankin, Micah B. « Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders : A Rights-Based Approach » (2018), 65 *C.L.Q.* 280.
- Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5^e éd., Montréal, Wilson & Lafleur, 2015, « omission ».
- Rogin, Jillian. « Gladue and Bail : The Pre-Trial Sentencing of Aboriginal People in Canada » (2017), 95 *R. du B. Can.* 325.
- Scollin, John A. *The Bail Reform Act : An Analysis of Amendments to the Criminal Code Related to Bail and Arrest*, Toronto, Carswell, 1972.
- Stuart, Don. *Canadian Criminal Law : A Treatise*, 6th ed., Scarborough (Ont.), Thomson/Carswell, 2011.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed., Markham (Ont.), LexisNexis, 2014.
- Sylvestre, Marie-Eve, Nicholas K. Blomley and Céline Bellot. *Red Zones : Criminal Law and the Territorial Governance of Marginalized People*, Cambridge, Cambridge University Press, 2019.

Yule, Carolyn, and Rachel Schumann. “Negotiating Release? Analysing Decision Making in Bail Court” (2019), 61 *Can. J. Crimin. & Crim. Just.* 45.

Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed., Toronto, Carswell, 2010 (loose-leaf updated 2019, release 1).

Webster, Cheryl Marie. *Lacunes relatives à la mise en liberté sous caution au Canada : comment y remédier?* Ottawa, Gouvernement du Canada, juin 2015.

Yule, Carolyn, and Rachel Schumann. « Negotiating Release? Analysing Decision Making in Bail Court » (2019), 61 *Rev. can. crim. just. pén.* 45.

APPEAL from a judgment of the British Columbia Court of Appeal (Stromberg-Stein, Willcock, Savage, Fenlon and Fisher JJ.A.), 2019 BCCA 9, 370 C.C.C. (3d) 111, 53 C.R. (7th) 373, [2019] B.C.J. No. 18 (QL), 2019 CarswellBC 19 (WL Can.), affirming a decision of Thompson J., 2017 BSCS 2070, [2017] B.C.J. No. 2298 (QL), 2017 CarswellBC 3175 (WL Can.), affirming the convictions of the accused for failure to comply with a condition of a recognizance. Appeal allowed.

POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (les juges Stromberg-Stein, Willcock, Savage, Fenlon et Fisher), 2019 BCCA 9, 370 C.C.C. (3d) 111, 53 C.R. (7th) 373, [2019] B.C.J. No. 18 (QL), 2019 CarswellBC 19 (WL Can.), qui a confirmé une décision du juge Thompson, 2017 BSCS 2070, [2017] B.C.J. No. 2298 (QL), 2017 CarswellBC 3175 (WL Can.), qui a confirmé les déclarations de culpabilité pour omission de se conformer à une condition d’un engagement prononcées contre l’accusé. Pourvoi accueilli.

Sarah Runyon, Garth Barriere and Michael Sobkin, for the appellant.

Sarah Runyon, Garth Barriere et Michael Sobkin, pour l’appellant.

Éric Marcoux and Ryan Carrier, for the respondent.

Éric Marcoux et Ryan Carrier, pour l’intimée.

Susan Reid, for the intervener the Attorney General of Ontario.

Susan Reid, pour l’intervenant le procureur général de l’Ontario.

Susanne Elliott, for the intervener the Attorney General of British Columbia.

Susanne Elliott, pour l’intervenant le procureur général de la Colombie-Britannique.

Christine Mainville, for the intervener the Criminal Lawyers’ Association of Ontario.

Christine Mainville, pour l’intervenante Criminal Lawyers’ Association of Ontario.

Jason B. Gratl and Toby Rauch-Davis, for the intervener the Vancouver Area Network of Drug Users.

Jason B. Gratl et Toby Rauch-Davis, pour l’intervenant Vancouver Area Network of Drug Users.

Alexandra Luchenko, Roy W. Millen and Danny Urquhart, for the intervener the British Columbia Civil Liberties Association.

Alexandra Luchenko, Roy W. Millen et Danny Urquhart, pour l’intervenante British Columbia Civil Liberties Association.

Danielle Glatt, for the intervener the Canadian Civil Liberties Association.

Danielle Glatt, pour l’intervenante l’Association canadienne des libertés civiles.

Matthew Nathanson and Chantelle van Wiltenburg,
for the intervener the Independent Criminal Defence
Advocacy Society.

David N. Fai and Caitlin Shane, for the intervener
the Pivot Legal Society.

Nicholas St-Jacques and Pauline Lachance, for
the intervener Association québécoise des avocats
et avocates de la défense.

The judgment of the Court was delivered by

MARTIN J. —

I. Introduction

[1] When individuals are charged with a crime, they are presumed innocent and have the right not to be denied reasonable bail without just cause. Most accused are not held in custody between the date of the charge and the time of trial because the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”), and the *Canadian Charter of Rights and Freedoms* (“*Charter*”) typically require that accused be released on what is known as “bail”.¹ Accused who are not released from custody by the police will be brought before a justice of the peace or a judge (“judicial official”)² for a bail hearing. For most crimes, the default form of bail is to release accused persons based on an undertaking to attend trial, without any conditions restricting their activities or actions (s. 515(1) of the *Code*). However, conditions of release can be imposed if the Crown satisfies the judicial official that particular restrictions are required to secure the accused’s attendance in court, ensure the protection or safety of the public, or maintain confidence in

Matthew Nathanson et Chantelle van Wiltenburg,
pour l’intervenante Independent Criminal Defence
Advocacy Society.

David N. Fai et Caitlin Shane, pour l’intervenante
Pivot Legal Society.

Nicholas St-Jacques et Pauline Lachance, pour
l’intervenante l’Association québécoise des avocats
et avocates de la défense.

Version française du jugement de la Cour rendu
par

LA JUGE MARTIN —

I. Introduction

[1] Tout individu accusé d’avoir commis un crime est présumé innocent et a le droit de ne pas être privé sans juste cause d’une mise en liberté assortie d’un cautionnement raisonnable. La plupart des personnes prévenues ne sont pas détenues sous garde entre la date de l’accusation et le procès parce que le *Code criminel*, L.R.C. 1985, c. C-46 (« *Code* »), et la *Charte canadienne des droits et libertés* (« *Charte* ») exigent en règle générale qu’elles fassent l’objet d’une libération communément appelée « mise en liberté sous caution »¹. Les personnes prévenues qui ne sont pas remises en liberté par la police sont conduites devant une entité judiciaire (c.-à-d. juge de paix ou juge)² pour une enquête sur le cautionnement. Pour la plupart des crimes, la forme de mise en liberté par défaut est la libération de la personne prévenue sur promesse d’être présente au procès, sans conditions restreignant ses activités ou actions (par. 515(1) du *Code*). Toutefois, l’entité judiciaire peut imposer des conditions de mise en liberté si la

¹ My use of the word “bail” encompasses all forms of judicial interim release or pre-trial release in the *Code*.

² I use “judicial official” to refer to both a justice and a judge. A “justice” in the *Code* refers to justices of the peace or provincial court judges (s. 2). A “judge” refers to a judge of a superior court in the jurisdiction, except in Nunavut where it refers to a judge of the unified Nunavut Court of Justice (s. 493).

¹ Par l’expression « mise en liberté sous caution », je renvoie à toutes les formes de mise en liberté provisoire par voie judiciaire ou de mise en liberté avant le procès prévues dans le *Code*.

² J’utilise le terme « entité judiciaire » pour désigner à la fois les juges de paix et les juges. Dans le *Code*, « juge de paix » s’entend de juges de paix ou de juges d’une cour provinciale (art. 2), alors que « juge » s’entend de juges d’une cour supérieure d’une province ou d’un territoire, sauf au Nunavut, où le terme renvoie aux juges de la Cour de justice unifiée du Nunavut (art. 493).

the administration of justice (s. 515(10); *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at paras. 21, 34 and 67(j)).

[2] Parliament made it a separate criminal offence to breach bail conditions under s. 145(3) of the *Code*.³ This is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any of the crimes for which they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. As the gravamen of the offence is a failure to comply with a court order, there is often no victim, no violence, or no direct harm to the public or property.

Couronne la convainc que des restrictions particulières doivent être prises pour assurer la présence de la personne prévenue au tribunal, pour assurer la protection ou la sécurité du public ou pour ne pas miner la confiance du public envers l'administration de la justice (par. 515(10); *R. c. Antic*, 2017 CSC 27, [2017] 1 R.C.S. 509, par. 21, 34 et 67j)).

[2] Le Parlement a créé une infraction criminelle distincte pour le manquement aux conditions de mise en liberté sous caution au par. 145(3) du *Code*.³ Il s'agit d'un crime contre l'administration de la justice qui entraîne une peine maximale de deux ans d'emprisonnement. Toute personne prévenue est par conséquent passible d'un emprisonnement en vertu du par. 145(3) si elle manque à une condition de sa mise en liberté sous caution, même si en fin de compte elle n'est déclarée coupable d'aucun crime pour lequel elle était initialement accusée. Dans bien des cas, la personne prévenue s'expose à des sanctions pénales pour une conduite qui, n'eût été les conditions de sa mise en liberté sous caution, constituerait un exercice légal de sa liberté personnelle. Comme l'élément essentiel de l'infraction est l'omission de se conformer à une ordonnance judiciaire, il n'y a souvent pas de victime ni de violence, ni de préjudice direct au public ou de dommages directs causés à des biens.

³ I will refer to the offence created by s. 145(3) as the "failure to comply" offence and will refer to "bail conditions" to include all conditions arising from the undertakings, recognizances, directions, and orders listed in s. 145(3), although I note that someone can also be subject to conditions arising from release from custody by the police. An accused can also be charged under s. 145(3) for breaching no-communication conditions in directions and orders imposed if the accused is detained prior to trial; however, for the sake of simplicity, I will refer to all of these conditions as "bail conditions" as they still refer to conditions imposed prior to conviction to manage the accused's risks. For the purposes of these reasons, I will refer to the relevant sections of the *Code* as they were when Mr. Zora was charged in October 2015, unless otherwise stated. The bail provisions of the *Code* were significantly revised as of December 18, 2019, and I will address the significance of these changes after reviewing the bail structure as it stood when Mr. Zora was charged and sentenced.

³ Dans les présents motifs, l'infraction créée au par. 145(3) sera appelée l'infraction d'« omission de se conformer à une condition » et l'expression « conditions de mise en liberté sous caution » renverra à toutes les conditions découlant d'une promesse, d'un engagement, d'une directive ou d'une ordonnance mentionnées au par. 145(3), même si je note qu'une personne peut aussi être assujettie à des conditions après avoir été libérée par la police. Une personne prévenue peut également être inculpée en vertu du par. 145(3) pour avoir manqué à des conditions de non-communication prévues dans des directives et des ordonnances imposées si la personne prévenue est détenue avant le procès; cependant, par souci de simplicité, je vais employer l'expression « conditions de mise en liberté sous caution » pour désigner toutes ces conditions puisqu'il s'agit de conditions imposées avant la déclaration de culpabilité en vue de gérer les risques que pose la personne prévenue. À moins d'indication contraire, je renverrai aux dispositions pertinentes du *Code* dans leur version en vigueur au moment où M. Zora a été accusé en octobre 2015. Les dispositions du *Code* relatives à la mise en liberté sous caution ont fait l'objet d'une révision importante le 18 décembre 2019, et je traiterai de la portée de ces modifications après avoir examiné la structure de la mise en liberté sous caution qui existait au moment où M. Zora a été accusé et condamné.

[3] The appellant, Mr. Zora, appeals his convictions under s. 145(3) for twice failing to comply with his bail condition to answer the door when police went to his residence to check that he was complying with his bail conditions. He committed the guilty act, or the *actus reus*, by failing to answer the door when police attended. We are asked to determine what fault or mental element the Crown must prove to secure a conviction under s. 145(3): is the *mens rea* for this offence to be assessed on a subjective or objective standard?

[4] I conclude that the Crown is required to prove subjective *mens rea* and no lesser form of fault will suffice. Under s. 145(3), the Crown must establish that the accused committed the breach knowingly or recklessly. Nothing in the text or context of s. 145(3) displaces the presumption that Parliament intended to require a subjective *mens rea*. Further, this intention is supported by this Court's jurisprudence on the interpretation of the breach of probation offence, the consequences of charges and convictions under s. 145(3), the role of s. 145(3) within the constitutional and legislative scheme of bail, and the practical operation of the bail system. A subjective *mens rea* standard for breach under s. 145(3), like Parliament's recent amendments to the bail scheme, keeps the focus on the individual accused, where it belongs.

[5] The parties and interveners recognize that the question of the *mens rea* requirement for s. 145(3) raises broader considerations about the functioning of our complex bail system. The breach of a bail condition reaches back to, and is based upon, the conditions imposed at the beginning of the bail process. In *Antic*, this Court endorsed principles for reasonable bail based on documented concerns over how the bail system operates across Canada. Three

[3] L'appelant, M. Zora, interjette appel de ses déclarations de culpabilité fondées sur le par. 145(3) pour avoir, à deux reprises, omis de se conformer à une condition de sa mise en liberté, soit celle de répondre à la porte lorsque la police se rend à sa résidence pour vérifier s'il respecte ses conditions de mise en liberté. Il a commis l'acte coupable (*actus reus*) en ne répondant pas à la porte lorsque la police s'est rendue chez lui. Nous devons déterminer quelle faute ou quel élément mental la Couronne doit prouver pour obtenir une déclaration de culpabilité au titre du par. 145(3) : la *mens rea* pour cette infraction doit-elle être évaluée en fonction d'une norme subjective ou objective?

[4] Je conclus que la Couronne est tenue de prouver la *mens rea* subjective, et qu'aucune forme de faute moindre ne suffit. En vertu du par. 145(3), la Couronne doit établir que la personne prévenue a commis le manquement sciemment ou par insouciance. Rien dans le texte ou le contexte du par. 145(3) n'écarter la présomption selon laquelle le Parlement entendait exiger une *mens rea* subjective. Cette intention législative est également appuyée par la jurisprudence de la Cour sur l'interprétation de l'infraction du défaut de se conformer à une ordonnance de probation, les conséquences des accusations et des déclarations de culpabilité fondées sur le par. 145(3), le rôle du par. 145(3) au sein du régime constitutionnel et législatif de mise en liberté sous caution et l'application pratique du système de mise en liberté sous caution. Comme les modifications récentes du Parlement apportées au régime de la mise en liberté sous caution, une norme de *mens rea* subjective pour un manquement en vertu du par. 145(3) focalise l'attention sur la personne prévenue, comme il se doit.

[5] Les parties et les parties intervenantes reconnaissent que la question de la *mens rea* requise pour l'infraction prévue au par. 145(3) soulève des considérations plus larges au sujet du fonctionnement de notre système complexe de mise en liberté sous caution. Pour conclure qu'il y a eu un manquement à une condition de mise en liberté sous caution, il faut se reporter aux conditions imposées au début du processus de mise en liberté sous caution et se fonder

years after *Antic*, and with the same goal of providing guidance, I address the imposition of non-monetary bail conditions and the criminal offences that result from their breach. A similarly wide-angle lens is required. Offences under s. 145(3) are very common, on the rise, and often involve questionable conditions imposed upon vulnerable and marginalized persons. Parliament has recently acted to address how numerous and onerous bail conditions interact with s. 145(3) to create a cycle of incarceration, especially among the most vulnerable in our population. This Court cannot ignore the current context in which the bail system operates, and in response provides guidance on both the interpretation of s. 145(3) and the imposition of the bail conditions that lead to these charges.

sur celles-ci. Dans l'arrêt *Antic*, la Cour a confirmé les principes sous-tendant la mise en liberté assortie d'un cautionnement raisonnable, se fondant sur des préoccupations rapportées concernant le fonctionnement du système de mise en liberté sous caution au Canada. Trois ans après l'arrêt *Antic*, et avec le même objectif d'orienter les tribunaux, je traiterai de l'imposition de conditions de mise en liberté sous caution de nature non pécuniaire et des infractions criminelles qui découlent du manquement à ces conditions. Pour ce faire, il faut, comme dans l'arrêt *Antic*, adopter une vision d'ensemble. Les infractions prévues au par. 145(3) sont très courantes, sont en hausse et mettent souvent en jeu des conditions discutables imposées à des personnes vulnérables et marginalisées. Le Parlement a récemment pris des mesures pour s'attaquer à la façon dont les nombreuses et lourdes conditions de mise en liberté sous caution interagissent avec le par. 145(3) pour créer un cycle d'incarcération, particulièrement parmi les membres les plus vulnérables de la population. La Cour ne peut faire abstraction du contexte actuel dans lequel fonctionne le système de mise en liberté sous caution et propose, en réponse à cette réalité, une orientation concernant tant l'interprétation à donner au par. 145(3) que l'imposition des conditions de mise en liberté sous caution menant à de telles accusations.

[6] All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions

[6] Quiconque participe au système de mise en liberté sous caution doit suivre les principes de retenue et de révision au moment d'imposer ou d'appliquer des conditions de mise en liberté sous caution. Le principe de la retenue exige que les conditions de mise en liberté sous caution soient clairement énoncées, qu'elles soient les moins nombreuses possible et qu'elles soient nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées aux risques que pose la personne prévenue au regard des motifs de détention prévus au par. 515(10). Le principe de la révision requiert que tout le monde, et particulièrement les entités judiciaires, examine attentivement les conditions de mise en liberté sous caution à l'étape de la libération, peu importe que la mise en liberté sous caution fasse l'objet d'une contestation ou d'un consentement. La

into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions. Requiring subjective *mens rea* to affix criminal liability under s. 145(3) reflects the principles of restraint and review and mirrors the individualized approach mandated for the imposition of bail conditions.

plupart des conditions de mise en liberté sous caution restreignent la liberté d'une personne qui est présumée innocente. Le manquement à une condition peut mener à de graves conséquences juridiques pour la personne prévenue, et le grand nombre d'accusations de manquement a des conséquences importantes sur le système de justice déjà surchargé. Avant de transformer les conditions de mise en liberté sous caution en sources personnelles d'une potentielle responsabilité criminelle, les entités judiciaires devraient être conscientes des problèmes que pourraient causer les conditions. Le fait d'exiger une *mens rea* subjective pour que la responsabilité criminelle soit engagée en vertu du par. 145(3) tient compte des principes de retenue et de révision et reflète l'approche individualisée requise pour l'imposition de conditions de mise en liberté sous caution.

[7] I approach these reasons as follows. First, I outline the factual background and judicial history of this appeal. Second, I review the legislative and constitutional framework of bail, which provides necessary background for interpreting the failure to comply offence in s. 145(3). Third, I set out why my interpretation of s. 145(3) leads me to conclude that the offence requires subjective *mens rea*. Fourth, I provide broader guidance on what is required for a bail condition to be necessary, reasonable, least onerous, and sufficiently linked to the risks listed in s. 515(10). Fifth, I explain what will be required to prove subjective *mens rea* for the failure to comply offence. Lastly, I describe why I would order a new trial in this case.

[7] J'articulerai les présents motifs comme suit. Premièrement, je présenterai le contexte factuel et l'historique judiciaire du pourvoi. Deuxièmement, j'examinerai le cadre législatif et constitutionnel de la mise en liberté sous caution, lequel fournit le contexte nécessaire pour interpréter l'infraction d'omission de se conformer à une condition prévue au par. 145(3). Troisièmement, j'énoncerai pourquoi mon interprétation du par. 145(3) me mène à conclure que l'infraction exige une *mens rea* subjective. Quatrièmement, je fournirai des indications générales sur ce qui est requis pour qu'une condition de mise en liberté sous caution soit considérée comme nécessaire, raisonnable, la moins sévère possible et suffisamment liée aux risques énumérés au par. 515(10). Cinquièmement, j'expliquerai ce qui est nécessaire pour prouver la *mens rea* subjective qu'exige l'infraction d'omission de se conformer à une condition. Enfin, j'explicitai pourquoi je suis d'avis d'ordonner la tenue d'un nouveau procès dans la présente affaire.

II. Factual Background and Judicial History

[8] Mr. Zora was charged with three counts of possession for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and was granted bail on his own

II. Contexte factuel et historique judiciaire

[8] Monsieur Zora a été accusé de trois chefs de possession de substances en vue d'en faire le trafic, infraction prévue dans la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19, et a

recognizance⁴ with conditions and with his mother as surety.⁵ His twelve bail conditions required that he “keep the peace and be of good behaviour”, report to his bail supervisor as directed, remain in the province of British Columbia unless consent was granted by his bail supervisor, obey all rules and regulations of his residence, remain in his residence except during the day in the company of his mother or father or a person approved by his bail supervisor and with the consent of his bail supervisor (referred to as the curfew or house arrest condition), present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his house arrest condition, not possess any non-prescribed controlled substances, not possess drug paraphernalia, not possess or have a cell phone, attend a residential treatment facility if he consented, and not possess any weapon (A.R., at p. 137).

obtenu une mise en liberté sur son propre engagement⁴ et sous caution⁵, sa mère ayant accepté d’agir à ce titre. Aux termes des douze conditions de sa mise en liberté sous caution, il était tenu de [TRADUCTION] « ne pas troubler l’ordre public et d’avoir une bonne conduite », de se présenter sur demande à la personne en charge de la surveillance de sa liberté sous caution conformément aux directives données, de rester dans la province de la Colombie-Britannique sauf si la personne en charge de la surveillance de sa liberté sous caution a consenti à ce qu’il en sorte, d’obéir aux règles et règlements de sa résidence, de rester chez lui à moins de sortir le jour en étant accompagné par sa mère ou son père ou une personne approuvée par la personne en charge de la surveillance de sa liberté sous caution et d’avoir obtenu le consentement de celle-ci (condition appelée le couvre-feu ou la condition de détention à domicile), de se présenter à la porte de sa résidence dans un délai de cinq minutes lorsque la police ou une personne en charge de la surveillance de sa liberté sous caution se présente pour confirmer qu’il respecte la condition de détention à domicile, de ne pas être en possession de substances désignées non prescrites, d’accessoires facilitant la consommation de drogues ou d’un téléphone cellulaire, de prendre part à un programme de traitement en établissement s’il y consent et de n’être en possession d’aucune arme (d.a., p. 137).

[9] The police came almost every day, at different times in the evening, to check his compliance with the curfew in the approximately one month between his release from custody on September 17, 2015, and his alleged breaches in October 2015. The trial judge found that due to the nature of the charges, the RCMP “were quite diligent in investigating any possible violation” of Mr. Zora’s bail conditions (B.C. Prov. Ct., Nos. 38980-6-CAC, 38980-7-CAC,

[9] Au cours de la période d’environ un mois entre la mise en liberté de M. Zora le 17 septembre 2015, et les manquements qu’il aurait commis en octobre 2015, la police est allée chez lui presque tous les jours, à différentes heures de la soirée, pour vérifier s’il respectait le couvre-feu. Le juge du procès a conclu qu’en raison de la nature des accusations, la GRC [TRADUCTION] « a fait preuve de beaucoup de diligence en enquêtant sur toute possible

⁴ As defined in *Antic*, a recognizance “is the ‘formal record of an acknowledgement of indebtedness to the Crown’ that is usually nullified when the accused attends in court for trial” (fn 2).

⁵ As also described in *Antic*, a “surety is an individual who supervises the accused and ensures that the accused remains faithful to his or her pledge to the court to appear for trial” (fn 1).

⁴ Selon la définition donnée dans l’arrêt *Antic*, un engagement « est la “reconnaissance formelle d’une dette envers le ministère public”, reconnaissance étant généralement annulée lorsque [la personne accusée] se présente devant le tribunal pour son procès » (note 2).

⁵ L’arrêt *Antic* comprend également une définition du terme « caution » : « [u]ne caution est une personne qui supervise [la personne accusée] et qui s’assure que [celle]-ci respecte son engagement envers le tribunal de comparaître au procès » (note 1).

March 29, 2017, at para. 2 (“Trial Judge reasons”), reproduced in A.R., at p. 2).

[10] On two evenings on Thanksgiving weekend, October 9 and 11, 2015, Mr. Zora failed to present himself at his door when police attended his residence around 10:30 p.m. Mr. Zora did not know that he had missed the police at his door until two weeks later when informed that he was being charged with two counts of breaching his curfew condition and two counts of breaching his condition to answer the door. Following his breach charges, Mr. Zora was released on bail on a similar recognizance, but with the added condition that he personally and immediately answer the phone at his residence when any peace officer or bail supervisor called the residence. Mr. Zora testified that he subsequently set up an audio-visual system at his front door and moved his bedroom so that he would not miss future police checks.

[11] Mr. Zora, his mother, and his girlfriend testified that they were all at home during the Thanksgiving weekend. Mr. Zora said it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the front door from his bedroom. His bedroom was downstairs on the far side of the residence, and he was tired and retiring early because he was withdrawing from heroin and in a methadone treatment program. The trial judge raised concerns with the credibility and reliability of the defence witnesses, but did not make clear findings of fact, however, on whether Mr. Zora knew that he was unable to hear his doorbell from his room when police attended his door that weekend (Trial Judge reasons, at paras. 11-14).

[12] The trial judge acquitted Mr. Zora on the alleged curfew violations as he was not satisfied beyond

violation » des conditions de mise en liberté sous caution de M. Zora (C. prov. C.-B., Nos. 38980-6-CAC, 38980-7-CAC, 29 mars 2017, par. 2 (« motifs du procès »), reproduits dans le d.a., p. 2).

[10] Deux soirs au cours de la fin de semaine de l’Action de grâces, les 9 et 11 octobre 2015, M. Zora ne s’est pas présenté à sa porte lorsque la police s’est rendue à sa résidence vers 22 h 30. Monsieur Zora a appris qu’il avait raté les visites de la police seulement deux semaines plus tard lorsqu’il a été informé des deux chefs d’accusation dont il faisait l’objet pour ne pas avoir respecté sa condition de couvre-feu et des deux chefs relatifs au manquement à sa condition de répondre à la porte. À la suite de ces accusations, M. Zora a été libéré sous caution aux termes d’un engagement semblable, mais avec la condition supplémentaire qu’il réponde personnellement et immédiatement au téléphone de sa résidence lorsqu’il appelle la police ou une personne en charge de la surveillance de sa liberté sous caution. M. Zora a témoigné qu’il avait par la suite installé un système audiovisuel à sa porte d’entrée et qu’il avait changé de chambre à coucher pour s’assurer de ne pas manquer les prochaines vérifications de la police.

[11] Monsieur Zora, sa mère et sa petite amie ont témoigné que les trois se trouvaient à la maison la fin de semaine de l’Action de grâces. Monsieur Zora a déclaré qu’il lui aurait été difficile, voire impossible, d’entendre quelqu’un sonner ou frapper à la porte d’entrée à partir de sa chambre à coucher. Celle-ci se trouvait au sous-sol, à l’autre extrémité de la maison, et il était fatigué ce soir-là et était allé se coucher tôt parce qu’il était en sevrage d’héroïne et suivait un programme de traitement à la méthadone. Le juge du procès a exprimé certains doutes quant à la crédibilité et à la fiabilité des personnes témoignant pour la défense, mais n’a toutefois tiré aucune conclusion de fait claire sur la question de savoir si M. Zora savait qu’il était incapable d’entendre de sa chambre la sonnette de la porte quand la police s’est présentée chez lui cette fin de semaine-là (motifs du juge du procès, par. 11-14).

[12] Le juge du procès a acquitté M. Zora relativement aux allégations de violation du couvre-feu,

a reasonable doubt that Mr. Zora had been outside of his house at the time. He convicted Mr. Zora on the two counts of failing to appear at the door for curfew compliance checks. The trial judge analogized s. 145(3) offences to strict liability offences and therefore found that Mr. Zora was guilty of breach of his conditions as he had not “arrange[d his] life to comply with the terms of bail” (Trial Judge reasons, at para. 16). Mr. Zora was fined a total of \$920.

[13] The summary conviction appeal judge dismissed the appeal and concluded that objective *mens rea* was sufficient for a conviction under s. 145(3) because the British Columbia Court of Appeal decision in *R. v. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194, adopted an objective fault standard for these types of offences (2017 BCSC 2070, at para. 7 (CanLII)). This meant that Mr. Zora’s convictions were upheld because his behaviour was a marked departure from what a reasonable person would do to ensure they complied with their conditions.

[14] A five-judge panel of the British Columbia Court of Appeal dismissed the appeal (2019 BCCA 9, 53 C.R. (7th) 373). Stromberg-Stein J.A., writing for the majority of four, concluded that s. 145(3) only requires an objective *mens rea*. The majority found that the text, context, and purpose of s. 145(3) created a duty-based offence grounded in the specific legal duty to comply with bail conditions, which demonstrated Parliament’s intention to create an offence with an objective *mens rea* (paras. 53-58).

[15] Fenlon J.A., concurring in the result, found that s. 145(3) required subjective fault. In her view, this was not a duty-based offence and neither the

car il n’était pas convaincu hors de tout doute raisonnable que M. Zora était à l’extérieur de la maison à ce moment. Il a déclaré M. Zora coupable des deux chefs d’accusation d’omission de se présenter à la porte lors des vérifications du respect du couvre-feu. Il a assimilé les infractions prévues au par. 145(3) à des infractions de responsabilité stricte et a par conséquent conclu que M. Zora était coupable de manquement à ses conditions étant donné qu’il n’avait pas [TRADUCTION] « organisé sa vie de manière à respecter les conditions de sa mise en liberté sous caution » (motifs du juge du procès, par. 16). M. Zora a été condamné à payer une amende de 920 \$.

[13] Le juge d’appel des poursuites sommaires a rejeté l’appel et conclu qu’une *mens rea* objective était suffisante pour une déclaration de culpabilité en vertu du par. 145(3) parce que, dans l’arrêt *R. c. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194, la Cour d’appel de la Colombie-Britannique a retenu une norme de faute objective pour ces types d’infractions (2017 BCSC 2070, par. 7 (CanLII)). Cela signifiait que les déclarations de culpabilité de M. Zora ont été confirmées parce que son comportement constituait un écart marqué par rapport à ce qu’une personne raisonnable aurait fait pour s’assurer qu’elle respectait ses conditions.

[14] La Cour d’appel de la Colombie-Britannique, composée d’une formation de cinq juges, a rejeté l’appel (2019 BCCA 9, 53 C.R. (7th) 373). La juge Stromberg-Stein, qui a rédigé les motifs des quatre juges majoritaires, a conclu que le par. 145(3) exige seulement une *mens rea* objective. Selon les juges majoritaires, le texte, le contexte et l’objet du par. 145(3) créaient une infraction fondée sur une obligation, laquelle reposait sur l’obligation légale expresse de se conformer aux conditions de la mise en liberté sous caution, ce qui démontrait l’intention du Parlement de créer une infraction nécessitant une *mens rea* objective (par. 53-58).

[15] La juge Fenlon, qui a souscrit au résultat, a quant à elle conclu que le par. 145(3) exigeait une faute subjective. À son avis, il ne s’agissait pas d’une

words nor the scheme nor purpose of the offence supported a clear legislative intent to displace the presumptive subjective fault element. Fenlon J.A. nevertheless dismissed the appeal as she concluded that the Crown had established subjective fault by showing that Mr. Zora was reckless since he knew that there were parts of his house where he would not hear the doorbell and yet he made no effort to address the situation (paras. 95-96).

infraction fondée sur une obligation, et ni les mots utilisés, ni le régime établi par la disposition, ni l'objet de l'infraction ne permettaient de conclure à une intention législative claire voulant écarter la présomption de l'élément de faute subjective. La juge Fenlon a néanmoins rejeté l'appel au motif que la Couronne avait établi une faute subjective en démontrant que M. Zora avait fait preuve d'insouciance puisqu'il savait qu'il y avait des parties de sa maison où il n'entendrait pas la sonnette de la porte et il n'avait pourtant fait aucun effort pour régler la situation (par. 95-96).

III. Legislative Background and the Context of Section 145(3)

[16] Section 145(3) is a hybrid offence that applies to breaches of conditions imposed on an accused by a court order prior to trial, while awaiting sentencing, or during an appeal. The offence falls under Part IV of the *Code*, which deals with offences against the administration of law and justice. There are similarly worded offences for accused persons who fail to attend court when required (s. 145(2), (4), and (5)) or fail to comply with conditions of undertakings issued by peace officers (s. 145(5.1)). Given these offences are substantively similar in text and context, I see no reason why these offences should carry a different fault standard from s. 145(3).

[17] The predecessor to s. 145(3), s. 133(3), was introduced in 1972 through the *Bail Reform Act*, S.C. 1970-71-72, c. 37. It created an offence where a person bound by conditions of an undertaking or recognizance on bail “fails, without lawful excuse, the proof of which lies upon him, to comply with that condition” (R.S.C. 1970, c. 2 (2nd Supp.), s. 4). Prior to this, there was no offence for failure to comply with bail conditions and the *Code* provided

III. Cadre législatif et contexte du par. 145(3)

[16] Le paragraphe 145(3) prévoit une infraction mixte qui s'applique aux manquements à des conditions imposées à une personne prévenue dans une ordonnance judiciaire avant le procès, en attendant la détermination de la peine ou pendant un appel. L'infraction figure à la partie IV du *Code*, qui traite des infractions contre l'application de la loi et l'administration de la justice. Il existe des infractions au libellé semblable visant les personnes prévenues qui omettent d'être présentes au tribunal lorsqu'elles sont tenues de le faire (par. 145(2), (4) et (5)) ou qui omettent de se conformer à une condition d'une promesse imposée par la personne autorisée à le faire selon le par. 145(5.1). Étant donné que ces infractions sont essentiellement semblables pour ce qui est du texte et du contexte, je ne vois aucune raison pour laquelle ces infractions devraient être assorties d'une norme de faute différente de l'infraction prévue au par. 145(3).

[17] L'ancêtre du par. 145(3), le par. 133(3), a été adopté en 1972 au moyen de la *Loi sur la réforme du cautionnement*, S.C. 1970-71-72, c. 37. Il créait une infraction pour les cas où une personne assujettie aux conditions d'une promesse ou d'un engagement dans le cadre d'une mise en liberté sous caution « omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition » (S.R.C. 1970, c. 2 (2^e suppl.), art. 4). Avant cette disposition,

no guidance for imposing bail conditions (*Antic*, at para. 23).

[18] Section 145(3) was amended in 2018 to remove the reverse onus on the accused to prove lawful excuse (S.C. 2018, c. 29, s. 9(7)). On December 18, 2019, as part of larger amendments to the bail scheme, the offence under s. 145(3) was split into two subsections to separately address the failure to comply with an undertaking under s. 145(4) and a release order or a no-communication order under s. 145(5) (S.C. 2019, c. 25, s. 47(1)). While these changes do not really alter the failure to comply offence, Parliament also made significant changes to address mounting concerns about the imposition of excessive and unfair bail terms and the overuse of criminal sanctions for the failure to comply with conditions of bail (see *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at pp. 19603 and 19606, Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General).

[19] The parties and interveners recognize that the particular question before the Court needs to be situated within the complex legal and factual context in which bail operates in Canada. Not only does the fault element under s. 145(3) have far-reaching implications for civil liberties and the fair and efficient functioning of bail in this country, there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3). Before looking to how s. 145(3) should be interpreted, it is necessary to provide a brief overview of the factors and framework which structure how bail conditions are established. The release conditions to which s. 145(3) applies are imposed in a bail system bounded by the *Charter*,

il n'existait pas d'infraction pour l'omission de se conformer à une condition de mise en liberté sous caution et le *Code* ne fournissait aucune indication pour ce qui est de l'imposition de telles conditions (*Antic*, par. 23).

[18] Le paragraphe 145(3) a été modifié en 2018 pour supprimer le fardeau inversé qui incombait à la personne prévenue de prouver qu'elle avait une excuse légitime (L.C. 2018, c. 29, par. 9(7)). Le 18 décembre 2019, dans le cadre d'un ensemble de changements apportés au régime de mise en liberté sous caution, l'infraction prévue au par. 145(3) a été divisée en deux paragraphes pour traiter séparément l'omission de se conformer à une promesse au par. 145(4), et l'omission de se conformer à une ordonnance de mise en liberté ou de non-communication au par. 145(5) (L.C. 2019, c. 25, par. 47(1)). Bien que ces changements ne modifient pas réellement l'infraction d'omission de se conformer à une condition, le Parlement a aussi apporté des changements importants pour répondre aux préoccupations croissantes concernant l'imposition de conditions de mise en liberté excessives et inéquitables et le recours abusif à des sanctions pénales pour le non-respect de conditions de mise en liberté sous caution (voir *Débats de la Chambre des communes*, vol. 148, n° 300, 1^{re} sess., 42^e lég., 24 mai 2018, p. 19603 et 19606, l'hon. Jody Wilson-Raybould, ministre de la Justice et procureure générale).

[19] Les parties et les parties intervenantes reconnaissent que la question particulière dont est saisie la Cour doit être située dans le contexte juridique et factuel complexe de mise en liberté sous caution au Canada. Non seulement l'élément de faute qu'exige le par. 145(3) a des conséquences d'une portée considérable sur les libertés civiles et le fonctionnement équitable et efficace de la mise en liberté sous caution dans notre pays, mais il existe un lien direct entre les conditions qui peuvent être imposées dans une ordonnance de mise en liberté sous caution et l'intention législative de criminaliser le manquement à celles-ci aux termes du par. 145(3). Avant de regarder de quelle façon le par. 145(3) devrait être interprété, il est nécessaire de donner un aperçu des facteurs et

governed by the *Code*, and informed by the jurisprudence.

[20] From a constitutional perspective, most bail conditions restrict the liberty of persons who are presumed innocent and impose a risk of further criminal liability on those persons because of the failure to comply offence under s. 145(3). Therefore, the setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(e) of the *Charter* (see *Antic*, at para. 67; *R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221, at para. 36). Section 11(e) protects both the right not to be denied bail without “just cause” and the right to bail on reasonable terms and conditions (*R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 689; *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 735; *Antic*, at paras. 36-41). The s. 11(e) right is “an essential element of an enlightened criminal justice system” that “entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons” (*Antic*, at para. 1).⁶ The presumption of innocence is “a hallowed principle lying at the very heart of criminal law [that] confirms our faith in humankind” (*Antic*, at paras. 66-67(a), quoting *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20; see also *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105, at para. 1). The presumption of innocence is only satisfied in the bail process when the requirements of s. 11(e) are met (*Pearson*, at pp. 688-89; *Morales*, at p. 748). As described by Andrew Ashworth and Lucia Zedner, the presumption of innocence and the protection of liberty rights mean that “the state should presume each person to be harmless . . . therefore it is in principle wrong to take coercive measures

du cadre qui structurent la façon dont les conditions de mise en liberté sous caution sont établies. Les conditions de mise en liberté auxquelles s’applique le par. 145(3) sont imposées dans le cadre d’un système de mise en liberté sous caution circonscrit par la *Charte*, régi par le *Code* et reposant sur la jurisprudence.

[20] D’un point de vue constitutionnel, la plupart des conditions de mise en liberté sous caution restreignent la liberté des personnes qui sont présumées innocentes et leur font courir le risque que leur responsabilité criminelle soit engagée en raison de l’infraction d’omission de se conformer à une condition, aux termes du par. 145(3). Par conséquent, la détermination des conditions de mise en liberté sous caution doit être conforme à la présomption d’innocence et au droit de ne pas se voir priver sans juste cause d’une mise en liberté assortie d’un cautionnement raisonnable garanti par l’al. 11e) de la *Charte* (voir *Antic*, par. 67; *R. c. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221, par. 36). L’alinéa 11e) protège à la fois le droit de ne pas se voir privé « sans juste cause » d’une mise en liberté sous caution et le droit à des conditions de mise en liberté raisonnables (*R. c. Pearson*, [1992] 3 R.C.S. 665, p. 689; *R. c. Morales*, [1992] 3 R.C.S. 711, p. 735; *Antic*, par. 36-41). Le droit prévu à l’al. 11e) est « un élément essentiel d’un système de justice pénale éclairé » qui « consacre l’effet de la présomption d’innocence à l’étape préalable au procès criminel et protège la liberté des [personnes accusées] » (*Antic*, par. 1)⁶. La présomption d’innocence est « un principe consacré qui se trouve au cœur même du droit criminel [qui] confirme notre foi en l’humanité » (*Antic*, par. 66-67a), citant *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 119-120; voir aussi *R. c. Myers*, 2019 CSC 18, [2019] 2 R.C.S. 105, par. 1). Dans le cadre du processus de mise en liberté sous caution, la présomption d’innocence n’est respectée que lorsque les exigences de l’al. 11e) sont satisfaites (*Pearson*,

⁶ With the exception of bail conditions for bail following conviction, as is the case for bail between conviction and sentencing or bail on appeal (see *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 117; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 35).

⁶ Exception faite des conditions de mise en liberté sous caution imposées à la suite d’une déclaration de culpabilité, par exemple dans le cas de la mise en liberté sous caution entre la déclaration de culpabilité et la détermination de la peine ou dans l’attente de l’issue d’un appel (voir *R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328, par. 117; *R. c. Oland*, 2017 CSC 17, [2017] 1 R.C.S. 250, par. 35).

against people for preventive reasons unless there are very strong justifications for doing so” (*Preventive Justice* (2014), at p. 53). The *Charter* therefore protects accused persons from unreasonable terms and conditions of bail.

p. 688-689; *Morales*, p. 748). Pour reprendre les mots d’Andrew Ashworth et de Lucia Zedner, la présomption d’innocence et la protection des droits à la liberté signifient que [TRADUCTION] « l’État devrait présumer que les personnes sont inoffensives [. . .] par conséquent, on aurait en principe tort de prendre des mesures coercitives contre des personnes à titre préventif à moins qu’il y ait des justifications impérieuses de le faire » (*Preventive Justice* (2014), p. 53). La *Charte* protège donc les personnes prévenues de l’imposition de conditions déraisonnables de mise en liberté sous caution.

[21] Section 515 of the *Code* governs how judicial officials are to exercise their discretion to grant bail, establishes the legal forms of bail, and requires that the conditions of bail are only as onerous as necessary to address the risks listed in s. 515(10): being, the risk of the accused not attending court, harm to public protection and safety, and loss of confidence in the administration of justice. Subsections 515(1) to (3) codify the “ladder principle”, a principle premised on restraint, which “requires that the form of release imposed on an accused be no more onerous than necessary” (*Antic*, at para. 44). A judicial official is only permitted to impose a more onerous form of release “if the Crown shows why a less onerous form of release is inappropriate” (*Antic*, at para. 47). Therefore, the default form of release for an accused charged with an offence, other than the very serious offences listed in s. 469, is release on an undertaking *without conditions* (s. 515(1)). Under s. 515(2) (a), if the Crown shows that an accused should not be released on an undertaking without conditions, the judicial official should consider releasing the accused on an undertaking with conditions.

[21] L’article 515 du *Code* régit la façon dont les entités judiciaires exercent leur pouvoir discrétionnaire pour accorder la mise en liberté sous caution, prévoit les formes juridiques que celle-ci peut revêtir et exige que les conditions imposées ne soient pas plus sévères que nécessaire pour répondre aux risques énumérés au par. 515(10), à savoir le risque que la personne prévenue ne se présente pas au tribunal, le risque pour la protection ou la sécurité du public et le risque que le public perde confiance envers l’administration de la justice. Les paragraphes 515(1) à (3) codifient le « principe de l’échelle », fondé sur la retenue, selon lequel « la forme de mise en liberté imposée à [la personne accusée] ne doit pas être plus sévère que ce qui est nécessaire » (*Antic*, par. 44). L’entité judiciaire n’est autorisée à imposer une forme de mise en liberté plus sévère que si la Couronne « démontre pourquoi une forme qui l’est moins serait inappropriée » (*Antic*, par. 47). Par conséquent, la forme de mise en liberté par défaut qui devrait être imposée à une personne prévenue inculpée d’une infraction, autre que les infractions très graves énumérées à l’art. 469, est la mise en liberté sur remise d’une promesse *sans conditions* (par. 515(1)). Aux termes de l’al. 515(2)a), si la Couronne démontre que la personne prévenue ne devrait pas être mise en liberté sur remise d’une promesse sans conditions, l’entité judiciaire devrait envisager de la mettre en liberté sur remise d’une promesse assortie de conditions.

[22] The *Code* provides for enumerated and non-enumerated conditions of bail. The enumerated conditions in s. 515(4) to (4.2) provide guidance

[22] Le *Code* prévoit certaines conditions précises ainsi que d’autres conditions non précisées de mise en liberté sous caution. Les conditions énumérées

regarding the individualized nature of conditions and the expected degree of connection between the condition and the risks listed in s. 515(10). Most discretionary conditions enumerated in s. 515(4) address an individual accused's flight risk or risk of not attending their court date: reporting to a peace officer (s. 515(4)(a)), remaining within a territorial jurisdiction (s. 515(4)(b)), notifying a peace officer of a change in address and employment (s. 515(4)(c)), and depositing a passport (s. 515(4)(e)) (see G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 6-27 to 6-32). Enumerated conditions related to no-communication orders (ss. 515(4)(d) and 515(4.2)), geographical restrictions (s. 515(4)(d)), and mandatory weapons prohibitions for specific offences (s. 515(4.1)) are directly linked to the second ground of detention: public safety and security. In fact, even mandatory weapons prohibitions give the judicial official some leeway to not impose the weapons prohibition if they consider that the condition is not necessary to protect the safety of the accused, or the safety and security of a victim or any other person (s. 515(4.1)).

[23] Under s. 515(4)(f),⁷ judicial officials are also given flexibility to impose non-enumerated conditions, defined as: “. . . such other reasonable conditions . . . as the justice considers desirable”. As shown by Mr. Zora's twelve, and then thirteen, release conditions, non-enumerated bail conditions often cover a broad range of activities. It is common for conditions to range from requiring an accused to keep the peace and be of good behaviour, prohibiting cellphone use and internet access, controlling alcohol and drug consumption, imposing a curfew, limiting where an accused can go over large areas of a city, requiring compliance with random searches, and even restricting the accused's ability to exercise

aux par. 515(4) à (4.2) donnent des indications quant à la nature individualisée des conditions et le degré attendu de lien entre la condition imposée et les risques énumérés au par. 515(10). La plupart des conditions discrétionnaires énumérées au par. 515(4) visent le risque de fuite de la personne prévenue ou le risque qu'elle ne se présente pas au tribunal au moment indiqué : se présenter à la personne responsable (al. 515(4)a)), demeurer dans le ressort de la juridiction (al. 515(4)b)), aviser la personne responsable de tout changement d'adresse et d'emploi (al. 515(4)c)) et remettre son passeport (al. 515(4)e)) (voir G. T. Trotter, *The Law of Bail in Canada* (3^e éd. (feuilles mobiles)), p. 6-27 à 6-32). Les conditions énumérées relatives aux ordonnances de non-communication (al. 515(4)d) et par. 515(4.2)), aux restrictions géographiques (al. 515(4)d)) et aux interdictions impératives de possession d'armes pour des infractions précises (par. 515(4.1)) sont directement liées au deuxième motif de détention : la sécurité publique. En fait, même dans le cas des interdictions impératives de possession d'armes, l'entité judiciaire dispose d'une certaine marge de manœuvre pour ne pas imposer de telles interdictions si elle considère que la condition n'est pas nécessaire pour protéger la sécurité de la personne prévenue, de la victime ou de toute autre personne (art. 515(4.1)).

[23] Aux termes de l'alinéa 515(4)f)⁷, les entités judiciaires ont aussi une certaine marge de manœuvre pour imposer des conditions non énumérées, définies de la façon suivante : « . . . telles autres conditions raisonnables [. . .] que le juge de paix estime opportunes ». Comme il ressort des douze, et ensuite treize, conditions de mise en liberté imposées à M. Zora, les conditions de mise en liberté sous caution non énumérées couvrent souvent un vaste éventail d'activités. L'éventail des conditions fréquemment imposées inclut l'exigence que la personne prévenue ne trouble pas l'ordre public et ait une bonne conduite, l'interdiction d'utiliser un téléphone cellulaire et d'avoir accès à l'Internet, le contrôle de la consommation

⁷ This is now s. 515(4)(h) as of December 18, 2019. Although the other enumerated conditions have been numbered differently, their content has not changed.

⁷ Cette disposition se trouve à l'al. 515(4)h) depuis le 18 décembre 2019. Les autres conditions énumérées sont numérotées différemment, mais leur contenu n'a pas changé.

their rights to freedom of expression and peaceful assembly (see, e.g., Trotter, at p. 6-44.1).

d'alcool et de drogue, l'imposition d'un couvre-feu, l'imposition de restrictions de déplacement dans de grandes parties d'une ville, l'exigence de se soumettre à des fouilles effectuées au hasard, et même des restrictions quant à l'exercice par la personne prévenue de son droit à la liberté d'expression et de son droit de réunion pacifique (voir, p. ex., Trotter, p. 6-44.1).

[24] The jurisprudence mandates that judicial officials respect the ladder principle, meaning that they must consider release with fewer and less onerous conditions before release on more onerous ones (see *R. v. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48, at para. 29; *R. v. Prychitko*, 2010 ABQB 563, 618 A.R. 146, at para. 14). The case law is clear that non-enumerated conditions imposed under s. 515(4)(f), like enumerated conditions, must be minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in s. 515(10) (*Antic*, at para. 67(j); see also *R. v. Penunsi*, 2019 SCC 39, [2019] 3 S.C.R. 91, at paras. 78-80). The ladder principle applies to conditions of release just as it applies to forms of release. There is a link between the ladder principle and the number and content of bail conditions. Without a restrained approach to bail conditions, a less onerous form of bail, such as an undertaking with conditions, can become just as or more onerous than other steps up the bail ladder or, in some cases, even more restrictive than conditional sentence and probation orders issued after conviction (*R. v. McCormack*, 2014 ONSC 7123, at para. 23 (CanLII); *R. v. Burdon*, 2010 ABCA 171, 487 A.R. 220, at para. 8).

[24] La jurisprudence exige que les entités judiciaires respectent le principe de l'échelle : elles doivent d'abord considérer une mise en liberté sous caution assortie de peu de conditions, peu sévères, avant de considérer une mise en liberté sous caution assortie de conditions plus sévères (voir *R. c. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48, par. 29; *R. c. Prychitko*, 2010 ABQB 563, 618 A.R. 146, par. 14). La jurisprudence indique clairement que les conditions non énumérées imposées au titre de l'al. 515(4)f), comme les conditions énumérées, doivent être minimales, nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées au risque indiqué au par. 515(10) (*Antic*, par. 67j); voir aussi *R. c. Penunsi*, 2019 CSC 39, [2019] 3 R.C.S. 91, par. 78-80). Le principe de l'échelle s'applique aux conditions de mise en liberté tout comme il s'applique aux formes de mise en liberté. Il existe un lien entre le principe de l'échelle et le nombre et le contenu des conditions de mise en liberté sous caution. Sans une approche empreinte de retenue dans l'imposition des conditions, une forme moins sévère de mise en liberté sous caution, comme une promesse assortie de conditions, peut devenir tout aussi sinon plus sévère que d'autres mesures à des échelons plus élevés de la mise en liberté sous caution, voire, dans certains cas, encore plus restrictive qu'une ordonnance de sursis et une ordonnance de probation rendues à la suite d'une déclaration de culpabilité (*R. c. McCormack*, 2014 ONSC 7123, par. 23 (CanLII); *R. c. Burdon*, 2010 ABCA 171, 487 A.R. 220, par. 8).

[25] Only conditions that are specifically tailored to the individual circumstances of the accused can meet these criteria. Bail conditions are thus intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person. They are to be imposed with restraint not

[25] Seules les conditions qui sont expressément adaptées à la situation personnelle de la personne prévenue peuvent satisfaire à ces critères. Les conditions de mise en liberté sous caution se veulent donc des normes de comportement particularisées conçues pour limiter les risques énoncés dans la loi que pose

only because they limit the liberty of someone who is presumed innocent of the underlying offence, but because the effect of s. 145(3) is often to criminalize behaviour that would otherwise be lawful. In effect, each imposed bail condition creates a new source of potential criminal liability personal to that individual accused.

[26] Many interveners drew attention to the widespread problems which continue to exist, even after this Court's decision in *Antic*, with the ongoing imposition of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail. Any such practice offends the principle of restraint which has always been at the core of the law governing the setting of bail conditions. Restraint has a constitutional dimension, a legislative footing, and is not only recognized in case law, but was also recently expressly reinforced by the amendments that came into force on December 18, 2019. Section 493.1 now explicitly sets out a "principle of restraint" for any interim release decisions, requiring a peace officer or judicial official to "give primary consideration" to imposing release on the "least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with". Section 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are Indigenous or who belong to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release.

[27] Parliament also acted to address concerns regarding the over-criminalization of bail breaches, which is in part explained by the initial imposition of numerous and onerous bail conditions. Besides

une personne en particulier. Elles doivent être imposées avec retenue, non seulement parce qu'elles restreignent la liberté d'une personne présumée innocente de l'infraction sous-jacente, mais aussi parce que le par. 145(3) a souvent pour effet de criminaliser un comportement qui serait autrement légal. En fait, chaque condition de mise en liberté sous caution imposée crée une nouvelle source de responsabilité criminelle éventuelle propre à la personne prévenue visée.

[26] Beaucoup de parties intervenantes ont attiré l'attention sur les problèmes répandus qui persistent, même après la publication de l'arrêt *Antic* de la Cour, en raison du fait que les personnes prévenues continuent de se voir imposer des conditions de mise en liberté sous caution inutiles, déraisonnables, indûment restrictives, trop nombreuses ou qui, dans les faits, vouent la personne prévenue à l'échec. Une telle pratique contrevient au principe de la retenue qui a toujours été la pierre angulaire du droit régissant l'établissement des conditions de mise en liberté sous caution. La retenue comporte une dimension constitutionnelle et une assise législative, et est non seulement reconnue dans la jurisprudence, mais a aussi été expressément confirmée par les modifications récentes qui sont entrées en vigueur le 18 décembre 2019. L'article 493.1 énonce maintenant explicitement le « principe de la retenue » applicable à toutes les décisions de mise en liberté provisoire. Ce principe implique de « cherche[r] en premier lieu » à accorder à la personne prévenue une mise en liberté aux « conditions les moins sévères possible dans les circonstances, notamment celles qu'[elle] peut raisonnablement respecter ». L'article 493.2 exige que les entités judiciaires qui prennent des décisions sur la mise en liberté sous caution accordent une attention particulière aux circonstances propres aux personnes prévenues autochtones ou aux personnes prévenues appartenant à des populations vulnérables qui sont surreprésentées au sein du système de justice pénale et qui souffrent d'un désavantage lorsqu'il s'agit d'obtenir une mise en liberté.

[27] Le Parlement a aussi pris des mesures pour dissiper les préoccupations concernant la surcriminalisation des manquements aux conditions de mise en liberté sous caution, qui s'explique en partie par

changes to bail revocation under s. 524, Parliament has enacted a new procedure for managing failure to comply charges under s. 145(3), called a “judicial referral hearing” (s. 523.1). If an accused has failed to comply with their conditions of release, and has not caused harm to a victim, property damage, or economic loss, the Crown can opt to direct the accused to a judicial referral hearing. If satisfied that the accused failed to comply with their court order or failed to attend court, a judicial official must review the accused’s conditions of bail while taking special note of the accused’s particular circumstances. The judicial official can then decide to take no action, release the accused on new conditions, or detain the accused. If the accused was charged with a failure to comply offence, the judicial official must dismiss the charge after making their decision (s. 523.1; *R. v. Rowan*, 2018 ABPC 208, at paras. 39-40 (CanLII)).

l’imposition initiale de conditions nombreuses et sévères. En plus des changements apportés à la révocation de la mise en liberté sous caution à l’art. 524, le Parlement a adopté une nouvelle procédure pour gérer les accusations relatives aux omissions de se conformer aux conditions de mise en liberté visées au par. 145(3), appelée la « comparution pour manquement » (art. 523.1). Si une personne prévenue a omis de se conformer aux conditions de sa mise en liberté sous caution, et qu’elle n’a pas causé de dommage à une victime, de dommages matériels ou de pertes économiques, la Couronne peut choisir de la renvoyer à une comparution pour manquement. Si elle est convaincue que la personne prévenue a omis de se conformer à l’ordonnance du tribunal ou d’être présente au tribunal, l’entité judiciaire doit examiner les conditions de mise en liberté sous caution imposées à la personne prévenue tout en tenant spécialement compte de la situation particulière de celle-ci. L’entité judiciaire peut alors décider de ne pas agir, de remettre la personne prévenue en liberté sous de nouvelles conditions ou de la détenir. Si la personne prévenue a été inculpée d’une infraction d’omission de se conformer à une condition, l’entité judiciaire doit rejeter l’accusation après avoir pris sa décision (art. 523.1; *R. c. Rowan*, 2018 ABPC 208, par. 39-40 (CanLII)).

[28] Although these amendments occurred after Mr. Zora was charged, I note that my interpretation of the *mens rea* in s. 145(3), based on the relevant statutory context of the bail scheme, is consistent with the concerns acknowledged and addressed in Parliament’s recent amendments.

[28] Même si ces modifications ont été apportées après que M. Zora a été accusé, je remarque que mon interprétation de la *mens rea* exigée par le par. 145(3), basée sur le contexte législatif pertinent du régime de mise en liberté sous caution, cadre avec les préoccupations dont a pris acte le Parlement et auxquelles il a répondu récemment par ces modifications.

IV. Interpretation of the *Mens Rea* of Section 145(3)

IV. Interprétation de la *mens rea* qu’exige le par. 145(3)

A. *Subjective and Objective Mens Rea*

A. *Mens rea subjective et objective*

[29] The main issue in this appeal is whether the *mens rea* for s. 145(3) is subjective or objective. A subjective fault standard would focus on what was in the accused’s mind at the time they breached their bail condition. It directs a court to consider whether the accused “actually intended, knew or foresaw the

[29] La principale question dans le présent pourvoi est de savoir si la *mens rea* qu’exige le par. 145(3) est subjective ou objective. La norme de la faute subjective serait axée sur ce qu’avait à l’esprit la personne prévenue au moment où elle a manqué à la condition de mise en liberté sous caution. Elle commande au

consequence and/or circumstance as the case may be. Whether [they] ‘could’, ‘ought’ or ‘should’ have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability” (*R. v. Hundal*, [1993] 1 S.C.R. 867, at pp. 882-83, quoting D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 123-24). In applying a subjective *mens rea*, courts can consider personal circumstances and challenges of the accused in a manner which mirrors the individualized manner in which bail conditions are to be imposed.

[30] Under objective *mens rea*, the question would be whether the accused’s behaviour was a marked departure from the behaviour of a reasonable person subject to the accused’s bail conditions (C.A. reasons, at para. 68). The standard is based on what the reasonable person would know or do or have foreseen in the circumstances and it does not matter if the accused does not know they were breaching their condition. Objective fault is premised on uniform societal standards of behavior and therefore does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused, short of an incapacity or virtual inability to comply (C.A. reasons, at para. 87 (Fenlon J.A. concurring), citing *R. v. Creighton*, [1993] 3 S.C.R. 3, at pp. 58-74 (per McLachlin J.) and pp. 38-39 (per La Forest J.); *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 148 (per McLachlin J.) and p. 149 (per L’Heureux-Dubé J.)).

[31] This is the first time this Court has been asked to consider the *mens rea* for this offence. Courts across the country have divided on whether the mental element for the crime of breaching a bail condition, or similar offences under s. 145(2), (4), (5) and (5.1), are to be assessed subjectively or objectively. Courts in Manitoba, Ontario, Quebec, Saskatchewan, New Brunswick, and the territories usually require subjective *mens rea* for these offences (see, e.g., *R. v.*

tribunal de se demander si la personne prévenue « voulait, connaissait ou prévoyait réellement les conséquences ou les circonstances, selon le cas, ou les deux. Quant à savoir [si elle] “aurait pu” ou “aurait dû” les prévoir ou si une personne raisonnable les aurait prévues, ce n’est pas le critère pertinent aux fins de décider de la culpabilité » (*R. c. Hundal*, [1993] 1 R.C.S. 867, p. 882-883, citant D. Stuart, *Canadian Criminal Law* (2^e éd. 1987), p. 123-124). En appliquant une norme de *mens rea* subjective, les tribunaux peuvent tenir compte des circonstances et des difficultés personnelles de la personne prévenue d’une manière qui fait écho à l’individualisation des conditions de mise en liberté sous caution imposées.

[30] Selon la norme de la *mens rea* objective, la question serait de savoir si le comportement de la personne prévenue constituait un écart marqué par rapport au comportement d’une personne raisonnable assujettie aux conditions de mise en liberté sous caution de la personne prévenue (motifs de la C.A., par. 68). La norme repose sur ce que la personne raisonnable saurait, ferait ou aurait prévu dans les circonstances, et il importe peu que la personne prévenue ne sache pas qu’elle manque à une condition. La faute objective est fondée sur des normes sociétales uniformes de comportement et ne permet donc pas de tenir compte de l’inexpérience, du manque d’éducation, de la jeunesse, de l’expérience culturelle ni d’aucune autre circonstance propre à la personne prévenue qui ne constitue pas une incapacité ou une quasi-incapacité de respecter la condition (motifs de la C.A., par. 87 (la juge Fenlon, motifs concordants), citant *R. c. Creighton*, [1993] 3 R.C.S. 3, p. 58-74 (la juge McLachlin), et p. 38-39 (le juge La Forest); *R. c. Naglik*, [1993] 3 R.C.S. 122, p. 148 (la juge McLachlin) et p. 149 (la juge L’Heureux-Dubé)).

[31] C’est la première fois que la Cour est appelée à examiner la *mens rea* rattachée à cette infraction. Les tribunaux canadiens sont divisés sur la question de savoir si l’élément mental du crime de manquement à une condition de mise en liberté sous caution, ou d’infractions similaires prévues aux par. 145(2), (4), (5) et (5.1), doit être évalué subjectivement ou objectivement. Au Manitoba, en Ontario, au Québec, en Saskatchewan, au Nouveau-Brunswick et dans

Custance, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. v. Legere* (1995), 22 O.R. (3d) 89 (C.A.); *R. v. Lemay*, 2018 QCCS 1956; *R. v. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. v. Howe*, 2014 NBQB 259, 430 N.B.R. (2d) 202; *R. v. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. v. Selamio*, 2002 NWTSC 15; *R. v. Josephie*, 2010 NUCJ 7). In contrast, as shown by this case, British Columbia appellate courts have adopted an objective *mens rea* (see also *Ludlow*). Courts in Alberta, Nova Scotia, and Newfoundland and Labrador have adopted varying and modified approaches to the *mens rea* for these offences (subjective: e.g., *R. v. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. v. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. v. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. v. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. v. A.M.Y.*, 2017 NSSC 99; *R. v. L.T.W.*, 2004 CanLII 2897 (N.L. Prov. Ct.); *R. v. Companion*, 2019 CanLII 119787 (N.L. Prov. Ct.); objective: e.g., *R. v. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. v. Qadir*, 2016 ABPC 27; *R. v. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. v. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. v. Foote*, 2018 CanLII 38297 (N.L. Prov. Ct.)).

B. *Statutory Interpretation and the Presumption of Subjective Fault*

[32] Determining the *mens rea* of s. 145(3) involves an exercise in statutory interpretation to discern the fault standard intended by Parliament. A key part of the context in interpreting s. 145(3) is the long-standing presumption that Parliament intends crimes to have a subjective fault element (*R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at para. 23, citing *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1303 and 1309-10, per Dickson J.).

[33] As described by this Court in *A.D.H.*, this presumption of subjective fault reflects the underlying value in criminal law that the “morally innocent should not be punished” (*A.D.H.*, at para. 27). This

les territoires, les tribunaux exigent habituellement une *mens rea* subjective pour ces infractions (voir, p. ex., *R. c. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. c. Legere* (1995), 22 O.R. (3d) 89 (C.A.); *R. c. Lemay*, 2018 QCCS 1956; *R. c. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. c. Howe*, 2014 NBQB 259, 430 R.N.-B. (2e) 202; *R. c. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. c. Selamio*, 2002 NWTSC 15; *R. c. Josephie*, 2010 NUCJ 7). En revanche, comme le montre la présente affaire, les cours d’appel de la Colombie-Britannique ont retenu une *mens rea* objective (voir aussi l’arrêt *Ludlow*). Les tribunaux en Alberta, en Nouvelle-Écosse et à Terre-Neuve-et-Labrador ont adopté des approches diverses et modifiées en ce qui concerne la *mens rea* rattachée à ces infractions (subjective : p. ex., *R. c. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. c. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. c. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. c. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. c. A.M.Y.*, 2017 NSSC 99; *R. c. L.T.W.*, 2004 CanLII 2897 (C. prov. T.-N.-L.); *R. c. Companion*, 2019 CanLII 119787 (C. prov. T.-N.-L.); objective : p. ex., *R. c. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. c. Qadir*, 2016 ABPC 27; *R. c. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. c. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. c. Foote*, 2018 CanLII 38297 (C. prov. T.-N.-L.)).

B. *Interprétation législative et présomption de faute de nature subjective*

[32] Afin de déterminer la *mens rea* qu’exige le par. 145(3), il faut procéder à une opération d’interprétation législative pour dégager la norme de faute qu’avait à l’esprit le Parlement. L’un des éléments importants du contexte de l’interprétation du par. 145(3) est la présomption de longue date selon laquelle le Parlement veut qu’un crime s’accompagne d’une faute subjective (*R. c. A.D.H.*, 2013 CSC 28, [2013] 2 R.C.S. 269, par. 23, citant *R. c. Sault Ste. Marie*, [1978] 2 R.C.S. 1299, p. 1303 et 1309-1310, le juge Dickson).

[33] Comme l’a décrit la Cour dans l’arrêt *A.D.H.*, cette présomption selon laquelle la faute doit être subjective traduit l’une des valeurs qui sous-tendent le droit criminel, à savoir que « la personne moralement

starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26). The presumption of subjective fault will only be overridden by “clear expressions of a different legislative intent” (paras. 27-29). Courts must read the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and objects of the statute to discern whether there is a clear legislative intention to overturn the presumption of subjective fault (at paras. 19-21, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41 (quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)). If a criminal offence in the *Code* is ambiguous as to the *mens rea*, then the presumption of subjective fault has not been displaced.

[34] Subsection 145(3) is a criminal offence, as indicated by its enactment in the *Code*, its purposes of deterrence and punishment (as is further described below), and the serious criminal consequences that flow from conviction, including up to two years’ imprisonment (see D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 202; *Hammoud*, at paras. 11-15). Accordingly, the presumption is that s. 145(3) requires subjective fault. The question then becomes whether the text, context, scheme and purpose of s. 145(3) evince a clear intention of Parliament to enact an objective *mens rea* standard.

[35] In my view, they do not. Not only is there no reason in the text or context of the offence to suggest that Parliament intended to depart from requiring subjective fault, I conclude that Parliament intended for subjective fault to apply to s. 145(3). The wording in s. 145(3) is neutral and does not create a duty-based offence with objective *mens rea* as defined in *A.D.H.* All the other relevant factors support a subjective fault element. This Court has previously decided that subjective intent is required for the similar offence of breach of probation. Further, the legislative history, context, and purpose of s. 145(3)

innocente ne doit pas être punie » (*A.D.H.*, par. 27). Ce point de départ n’est pas une règle absolue, mais représente plutôt une idée qu’on peut supposer présente à l’esprit du Parlement lorsqu’il a adopté la disposition (par. 26). La présomption de la faute de nature subjective ne sera écartée qu’en présence d’une « intention différente clairement exprimée par le [Parlement] » (par. 27-29). Les tribunaux doivent interpréter les termes utilisés dans la loi dans leur contexte global, en suivant le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi et son objet pour déterminer s’il existe une intention claire de la part du Parlement d’écarter la présomption de la faute subjective (par. 19-21, citant *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, p. 41 (citant E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87)). S’il existe une ambiguïté quant à la *mens rea* requise pour une infraction criminelle prévue dans le *Code*, alors la présomption de la faute de nature subjective n’a pas été écartée.

[34] Le paragraphe 145(3) prévoit une infraction criminelle, comme l’indiquent le texte adopté se trouvant dans le *Code*, ses objectifs de dissuasion et de punition (décrits en détail plus loin) et les conséquences criminelles graves en cas de déclaration de culpabilité, lesquelles peuvent aller jusqu’à un emprisonnement de deux ans (voir D. Stuart, *Canadian Criminal Law : A Treatise* (6^e éd. 2011), p. 202; *Hammoud*, par. 11-15). Par conséquent, il faut présumer que le par. 145(3) exige une faute subjective. La question devient donc de savoir si le texte, le contexte, l’économie et l’objet du par. 145(3) témoignent d’une intention claire du Parlement de créer une norme de *mens rea* objective.

[35] À mon avis, ce n’est pas le cas. Non seulement il n’y a pas de raison dans le texte ni le contexte de l’infraction laissant entendre que le Parlement a voulu écarté la norme de faute subjective, mais je conclus que celui-ci voulait que la norme de la faute subjective s’applique au par. 145(3). Le libellé du par. 145(3) est neutre et ne crée pas une infraction fondée sur une obligation qui requiert une *mens rea* objective telle qu’elle est définie dans l’arrêt *A.D.H.* Tous les autres facteurs pertinents appuient l’élément de faute subjective. La Cour a déjà jugé que l’intention subjective est requise pour l’infraction similaire

within the larger legislative scheme, as well as the significant consequences associated with a charge or conviction under s. 145(3), call for a subjective *mens rea* element. The realities of the bail system further support Parliament's intention to require subjective fault to ensure that the individual characteristics of the accused are considered throughout the bail process. Considering this social and practical context affirms that the consequences that would flow from requiring only an objective *mens rea* for the failure to comply offence would not uphold the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 643 and 648).

C. *The Text of Section 145(3) Is Neutral and Does Not Create a Duty-Based Offence*

[36] The text of s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either subjective or objective *mens rea*. When Mr. Zora was charged in 2015, the failure to comply offence read:

[145] (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

[37] I start by noting that the inclusion of the statutory defence of a "lawful excuse" in s. 145(3) plays no role in the interpretation of the *mens rea* of the

de défaut de se conformer à une ordonnance de probation. De plus, l'historique législatif, le contexte et l'objet du par. 145(3) au regard de l'ensemble du régime législatif, ainsi que les conséquences importantes associées à une accusation ou une déclaration de culpabilité en vertu du par. 145(3), commandent une *mens rea* subjective. Les réalités du système de mise en liberté sous caution vont également dans le sens de l'intention du Parlement d'exiger une faute subjective pour faire en sorte que les caractéristiques individuelles de la personne prévenue soient prises en compte tout au long du processus de mise en liberté sous caution. La prise en compte de ce contexte social et pratique confirme que les conséquences qui découleraient du fait d'exiger seulement une *mens rea* objective pour l'infraction d'omission de se conformer à une condition ne respecterait pas l'intention du Parlement (R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 643 et 648).

C. *Le texte du par. 145(3) est neutre et ne crée pas une infraction fondée sur une obligation*

[36] Le texte du par. 145(3) est neutre en ce sens qu'il n'indique pas une intention claire de la part du Parlement à l'égard d'une *mens rea* subjective ou objective. Lorsque M. Zora a été accusé en 2015, l'infraction d'omission de se conformer à une condition était rédigée comme suit :

[145] (3) Quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement, ou étant tenu de se conformer à une ordonnance prise en vertu des paragraphes 515(12), 516(2) ou 522(2.1), omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition ou ordonnance est coupable :

- a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;
- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[37] Je note d'emblée que l'inclusion du moyen de défense de l'« excuse légitime » prévu au par. 145(3) ne joue aucun rôle dans l'interprétation

offence. Lawful excuse provides an additional defence that would not otherwise be available to the accused (see *R. v. Holmes*, [1988] 1 S.C.R. 914, at pp. 948-49, see also interpretations of “reasonable excuse” in *R. v. Moser* (1992), 7 O.R. (3d) 737 (C.A.), at pp. 748-50, per Doherty J.A., concurring; *R. v. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, aff’d 2015 SCC 6, [2015] 1 S.C.R. 399). It should not be confused with *mens rea* (M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 805; Trotter, at p. 12-16). The availability of the defence does not change the burden on the Crown to prove all elements of the offence, including *mens rea*, beyond a reasonable doubt (*Legere*, at pp. 99-100, citing *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.), at p. 44; *Custance*, at para. 24; *Josephie*, at para. 28 (CanLII)). Therefore, it is not material to the issue of whether the *mens rea* element of the offence is subjective or objective.

[38] In evaluating whether there is an expression of legislative intent that displaces the presumption of subjective fault, courts look both to the words included in the provision as well as the words that were not (*A.D.H.*, at para. 42). It is true that s. 145(3) does not contain express words indicating a subjective intent, like “wilful” or “knowing”. However, this absence cannot, on its own, displace the presumption. In fact, it is precisely when the words and context are neutral that the presumption of subjective *mens rea* operates with full effect.

[39] The majority of the Court of Appeal emphasized that the words “undertaking”, “recognizance”, “[b]ound to comply”, and “[f]ails” indicate that the accused has a binding legal obligation to meet an objectively determined standard of conduct (para. 53). They looked to the five categories of objective *mens rea* offences outlined by this Court in *A.D.H.*, at paras. 57-63: dangerous conduct offences; careless conduct offences; predicate offences; criminal negligence offences; and duty-based offences. The majority, at para. 54, found that this language meant that s. 145(3) fell within the last category, namely

de la *mens rea* de l’infraction. L’excuse légitime constitue un moyen de défense supplémentaire que la personne prévenue ne pourrait autrement pas invoquer (voir *R. c. Holmes*, [1988] 1 R.C.S. 914, p. 948-949, voir aussi des interprétations de l’expression « excuse raisonnable » dans *R. c. Moser* (1992), 7 O.R. (3d) 737 (C.A.), p. 748-750, le juge Doherty, motifs concordants; *R. c. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, conf. par 2015 CSC 6, [2015] 1 R.C.S. 399). Il ne faudrait pas la confondre avec la *mens rea* (M. Manning et P. Sankoff, *Manning, Mewett & Sankoff : Criminal Law* (5^e éd. 2015), p. 805; Trotter, p. 12-16). La possibilité d’invoquer ce moyen de défense ne change pas le fardeau de la Couronne de prouver tous les éléments de l’infraction, y compris la *mens rea*, hors de tout doute raisonnable (*Legere*, p. 99-100, citant *R. c. Santeramo* (1976), 32 C.C.C. (2d) 35 (C.A. Ont.), p. 44; *Custance*, par. 24; *Josephie*, par. 28 (CanLII)). Par conséquent, ce moyen de défense n’est pas pertinent pour la question de savoir si la *mens rea* de l’infraction est subjective ou objective.

[38] Pour évaluer s’il y a une intention législative manifeste qui écarte la présomption de la faute subjective, les tribunaux doivent regarder à la fois les mots utilisés dans la disposition et ceux qui n’y figurent pas (*A.D.H.*, par. 42). Il est vrai que le par. 145(3) ne contient pas de mots exprès indiquant une intention subjective, comme « volontaire » ou « conscient ». Toutefois, cette absence ne suffit pas, à elle seule, à écarter la présomption. En fait, c’est précisément lorsque les mots et le contexte sont neutres que la présomption d’une *mens rea* subjective s’applique pleinement.

[39] Les juges majoritaires de la Cour d’appel ont souligné que les mots « promesse », « engagement », « [t]enu de se conformer » et « [o]met » indiquent que la personne prévenue a l’obligation juridique exécutoire de satisfaire à une norme de conduite déterminée de façon objective (par. 53). Ces juges ont examiné les cinq catégories d’infractions nécessitant une *mens rea* objective recensées par la Cour dans l’arrêt *A.D.H.* aux par. 57-63 : les infractions de conduite dangereuse; les infractions axées sur le comportement négligent; les infractions sous-jacentes; les infractions relatives à la négligence

duty-based offences. Duty-based offences, such as failing to provide the necessities of life under s. 215, are offences based on a failure to perform specific “legal duties arising out of defined relationships” (*A.D.H.*, at para. 67, citing *Naglik*, at p. 141).

criminelle; et les infractions fondées sur une obligation. Au paragraphe 54, les juges majoritaires ont conclu qu’il ressortait du libellé du par. 145(3) que cette disposition tombait sous le coup de la dernière catégorie, soit les infractions fondées sur une obligation. Ces dernières, comme l’omission de s’acquitter de l’obligation de fournir les choses nécessaires à l’existence prévue à l’art. 215, reposent sur l’omission de s’acquitter d’« obligations [légales] en fonction de l’existence de liens déterminés » (*A.D.H.*, par. 67, citant *Naglik*, p. 141).

[40] The Crown also argues that the legislative history of s. 145(3) supports this interpretation, since when it was enacted, the then Minister of Justice referred to the “responsibility” or “duty” of a person on bail to attend court and comply with conditions to ensure that the bail system can rely on voluntary appearance rather than pre-trial custody (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, vol. 1, No. 8, 3rd Sess., 28th Parl., February 23, 1971, at pp. 12 and 29; *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3117 (Hon. John Turner)).

[40] La Couronne fait aussi valoir que l’historique législatif du par. 145(3) appuie cette interprétation. En effet, le ministre de la Justice de l’époque a mentionné, lors de l’adoption de cette disposition, la « responsabilité » ou l’« obligation » des personnes en liberté sous caution de se présenter au tribunal et de se conformer aux conditions pour faire en sorte que le système de mise en liberté sous caution puisse compter sur la comparution volontaire plutôt que sur la détention préventive (Chambre des communes, *Procès-verbaux et témoignages du Comité permanent de la justice et des questions juridiques*, vol. 1, n° 8, 3^e sess., 28^e lég., 23 février 1971, p. 12 et 29; *Débats de la Chambre des communes*, vol. 3, 3^e sess., 28^e lég., 5 février 1971, p. 3117 (l’hon. John Turner)).

[41] With respect, I disagree that either the text of s. 145(3) or the Minister’s comments establish a clear intention to create a duty-based offence which calls for the uniform normative standard associated with objective *mens rea*. First, the text of s. 145(3) does not contain any of the language typically used by Parliament when it intends to create an offence involving objective fault (see *A.D.H.*, at para. 73). Unlike the duties in ss. 215, 216, 217 and 217.1 of the *Code*, s. 145(3) does not expressly include the word “duty”, a word which may suggest objective fault (*A.D.H.*, at para. 71; *Naglik*, at p. 141). I agree with Fenlon J.A. that “the omission is a significant one” (C.A. reasons, at para. 80) when we are looking for a clear intention of Parliament to rebut the presumption of subjective fault. I also accept that the word “fails” in this context is neutral:

[41] En toute déférence, je ne crois pas que le texte du par. 145(3) ou les commentaires du ministre démontrent qu’il y a une intention claire de créer une infraction fondée sur une obligation qui appelle une norme uniforme associée à une *mens rea* objective. Premièrement, le libellé du par. 145(3) ne renferme aucun des termes dont se sert habituellement le Parlement pour créer une infraction dont la perpétration exige une faute objective (voir *A.D.H.*, par. 73). Contrairement aux obligations prévues aux art. 215, 216, 217 et 217.1 du *Code*, le par. 145(3) n’inclut pas expressément les mots « obligation » ou « devoir », mots qui suggèrent une faute objective (*A.D.H.*, par. 71; *Naglik*, p. 141). Je suis d’accord avec la juge Fenlon pour dire que [TRADUCTION] « l’omission est importante » (motifs de la C.A., par. 80) lorsqu’on recherche une intention législative claire d’écarter la présomption de faute subjective. J’accepte aussi que le mot « *fails* » dans ce contexte est neutre :

“Fails” can connote neglect, but as my colleague notes, also means acting contrary to the agreed legal duty or obligation and being unable to meet set standards or expectations: *The Oxford English Dictionary*, 11th ed, *sub verbo* “fail”. That definition is equally compatible with intentional conduct or inadvertence.

(C.A. reasons, at para. 78)

Similarly, the word “omet” in the French version of s. 145(3) can refer to neglecting, but also refraining, from acting in accordance with a duty (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015)), at pp. 446-47, “omission”). Neither the words “fails” or “omet” demonstrate a clear intention of Parliament to establish objective fault.

[42] Second, there is a danger in putting too much weight on the word choice of one minister, especially when his statement does not clearly evince an intention of Parliament to create an objective *mens rea* offence. For example, contemporaneous commentary described that the aim of these offences were to “ensure an accused [did] not disregard the new system with impunity”, which seems to suggest a subjective *mens rea* (J. Scollin, Q.C., *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 19). There is no clear indication from the legislative history that Parliament intended to create an objective *mens rea* offence.

[43] The Minister saying that a provision that establishes a criminal offence imposes a responsibility or duty in a general sense does not make it the type of duty-based offence at issue in *Naglik*. The wording in s. 145(3) speaks only of being bound to comply and failing to do so. This wording does not displace the presumption of subjective intent. All criminal prohibitions impose obligations to act or not in particular ways and inflict sanctions when people fail to comply. If accepted, the Crown’s argument and the Court of Appeal’s conclusion would make all

[TRADUCTION] Le mot « *fails* » [omet] peut avoir une connotation de négligence mais, comme le fait remarquer ma collègue, cela veut aussi dire agir de façon contraire à l’obligation ou au devoir légal convenu et être incapable de respecter les normes ou attentes fixées : *The Oxford English Dictionary*, 11^e éd., *sub verbo* « *fail* ». Cette définition est aussi compatible avec une conduite intentionnelle ou l’inadvertance.

(motifs de la C.A., par. 78)

De façon similaire, le mot « omet » dans la version française du par. 145(3) peut renvoyer à la négligence, mais aussi au fait de s’abstenir d’agir conformément à un devoir (H. Reid, avec S. Reid, *Dictionnaire de droit québécois et canadien* (5^e éd. 2015), p. 446-447, « omission »). Ni le mot « *fails* » ni le mot « omet » n’indiquent une intention législative claire d’établir une faute objective.

[42] Deuxièmement, il est dangereux d’accorder trop de poids au choix de mots d’un seul ministre, particulièrement lorsque son affirmation ne révèle pas clairement l’intention du Parlement de créer une infraction exigeant une *mens rea* objective. Par exemple, selon des commentaires formulés à la même époque, l’objectif de ces infractions était de [TRADUCTION] « veiller à ce que la personne accusée ne passe pas outre au nouveau système en toute impunité », ce qui semble suggérer une *mens rea* subjective (J. Scollin, c.r., *The Bail Reform Act : An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), p. 19). L’historique législatif ne comporte aucun indice clair que le Parlement entendait créer une infraction exigeant une *mens rea* objective.

[43] Ce n’est pas parce que le ministre dit qu’une disposition qui crée une infraction criminelle impose une responsabilité ou une obligation au sens général qu’il s’agit du type d’infraction fondée sur une obligation qui était en cause dans l’arrêt *Naglik*. Le libellé du par. 145(3) ne renvoie qu’au fait d’être tenu de se conformer à une obligation et à l’omission de le faire. Il n’écarte pas la présomption d’intention subjective. Toutes les interdictions criminelles imposent des obligations d’agir ou de ne pas agir de façons précises et sont assorties de sanctions à infliger aux

compliance obligations into “duties” and all crimes into duty-based offences. However, the duty-based offences discussed in *A.D.H.* are a far more limited category and are directed at legal duties very different from the obligation of an accused to comply with the conditions of a judicial order.

[44] Section 145(3) simply does not share the defining characteristics of those duty-based offences requiring objective fault that were at issue in *Naglik* and discussed in *A.D.H.* The points of distinction include the different nature of the relationships to which these legal duties attach, the varying levels of risk to the public when duties are not met, whether the duty must be defined according to a uniform, societal standard of conduct, and whether applying such a uniform standard is possible and appropriate in the circumstances.

[45] Legal duties, like those in ss. 215 to 217.1, tend to impose a positive obligation to act in certain identifiable relationships, address a duty of a more powerful party towards a weaker party, and involve a direct risk to life or health if a uniform community standard of behaviour is not met (*A.D.H.*, at para. 67). An obligation to not breach a bail condition is not comparable to the power imbalance and risks to public health and safety addressed by the duties imposed by ss. 215 to 217.1: providing the necessities of life to certain defined persons (s. 215), undertaking medical procedures that may endanger the life of another person (s. 216), or undertaking to do an act or direct work where there is a danger to life or risk of bodily harm (ss. 217 and 217.1).

personnes qui ne les respectent pas. Si on les accepte, l’argument de la Couronne et la conclusion de la Cour d’appel transformeraient toutes les obligations de se conformer à des conditions en des « devoirs » ou « obligations » et tous les crimes en des infractions fondées sur des obligations. Toutefois, les infractions fondées sur des obligations dont il était question dans l’arrêt *A.D.H.* constituent une catégorie beaucoup plus limitée et se rapportent à des obligations légales très différentes de celle d’une personne prévenue de se conformer aux conditions d’une ordonnance judiciaire.

[44] L’infraction prévue au par. 145(3) ne comporte tout simplement pas les caractéristiques distinctives de ces infractions fondées sur une obligation exigeant une faute objective qui étaient en cause dans l’arrêt *Naglik* et examinées dans l’arrêt *A.D.H.* Parmi les points de distinction, mentionnons la nature différente des relations à l’origine des obligations légales, les niveaux variables de risque pour le public advenant le non-respect des obligations, la question de savoir si l’obligation doit être définie en fonction d’une norme sociale uniforme de conduite et celle de savoir s’il est possible et approprié dans les circonstances d’appliquer une telle norme uniforme.

[45] Les devoirs légaux, comme ceux prévus aux art. 215 à 217.1, tendent à imposer une obligation positive d’agir découlant de l’existence de certains liens identifiables, visent une obligation d’une partie plus puissante envers une partie plus vulnérable et comportent un risque direct pour la vie ou la santé si une norme sociale uniforme de conduite n’est pas respectée (*A.D.H.*, par. 67). L’obligation de ne pas manquer à une condition de mise en liberté sous caution n’est pas comparable au déséquilibre de pouvoir et aux risques pour la santé et la sécurité publiques que visent à empêcher les devoirs imposés par les art. 215 à 217.1 : fournir les choses nécessaires à l’existence de certaines personnes définies (art. 215), entreprendre des procédures médicales qui peuvent mettre en danger la vie d’une autre personne (art. 216) ou entreprendre d’accomplir un acte ou de diriger l’accomplissement d’un travail lorsque la vie humaine est en danger ou qu’il existe un risque de blessure corporelle pour autrui (art. 217 et 217.1).

[46] Further, the duty-based offence in *Naglik* and other types of objective *mens rea* offences involve legal standards that would be “meaningless if every individual defined its content for [themselves] according to [their] subjective beliefs and priorities” (p. 141). The majority of the Court of Appeal thought that bail conditions impose just such “a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct” (para. 57). With respect, I disagree. Although societal interests can be at play when bail conditions are set, there is no uniform standard of care for abiding by bail conditions, as there is for driving a car, storing a firearm, or providing the necessities of life to a dependant. Parliament legislated a bail system based upon an individualized process, which only permits conditions which address risks specific to the accused to ensure their attendance in court, protect public safety, or maintain confidence in the administration of justice. The bail order is expected to list personalized and precise standards of behavior. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3).

[47] In addition, the lack of a uniform standard from which to assess the breach of these conditions means that it is also not obvious what degree of breach would attract criminal liability if an objective standard applied to s. 145(3). Only a marked departure from the conduct of a reasonable person would draw criminal liability under an objective standard of *mens rea*. However, unlike an activity like driving where there is a spectrum of conduct ranging from prudent to careless to criminal based on

[46] De plus, l’infraction fondée sur une obligation dont il était question dans l’arrêt *Naglik* et d’autres types d’infractions qui requièrent une *mens rea* objective comportent des normes légales qui seraient « vide[s] de sens si [chaque personne] en définissait le contenu selon ses croyances et ses priorités personnelles » (p. 141). Selon les juges majoritaires de la Cour d’appel, les conditions de mise en liberté sous caution imposent une telle [TRADUCTION] « norme de conduite minimale uniforme en fonction d’intérêts de la société, et non de normes de conduite personnelles » (par. 57). En toute déférence, je ne suis pas de cet avis. Bien que des intérêts sociaux puissent entrer en jeu lorsque des conditions de mise en liberté sous caution sont fixées, il n’existe pas de norme de diligence uniforme pour le respect de ces conditions, comme il en existe pour la conduite automobile, l’entreposage d’une arme à feu ou le devoir de fournir les choses nécessaires à l’existence d’une personne à charge. Le Parlement a adopté un système de mise en liberté sous caution basé sur un processus individualisé, qui ne permet l’imposition que de conditions qui répondent aux risques précis que pose la personne prévenue et qui visent à assurer sa présence au tribunal, protéger la sécurité du public ou maintenir la confiance du public envers l’administration de la justice. L’ordonnance de mise en liberté sous caution devrait énumérer des normes de conduite personnalisées et précises. Par conséquent, il n’est pas nécessaire de recourir à une norme sociale uniforme pour bien comprendre à quelle norme de diligence on s’attend que se conforme la personne prévenue dans le cadre du respect des conditions de sa mise en liberté sous caution, et il n’est pas nécessaire d’examiner ce qu’une personne raisonnable aurait fait dans les circonstances pour comprendre l’obligation imposée par le par. 145(3).

[47] De plus, en raison de l’absence de norme uniforme à partir de laquelle on pourrait évaluer le manquement aux conditions, il n’est pas non plus facile de savoir quel degré de gravité du manquement entraînerait une responsabilité criminelle si une norme objective s’appliquait au par. 145(3). Seul un écart marqué par rapport à la conduite d’une personne raisonnable engagerait une responsabilité criminelle selon une norme objective de *mens rea*. Toutefois, contrairement à une activité comme la

the foreseeable risks of the conduct to a reasonable person, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions may restrict normal activities like travelling and communicating with other people and are specifically tailored to address the *individual* risks posed by each accused. Bail conditions and the risks they address vary dramatically among individuals on release, so that it is not intelligible to refer to the concepts of a “marked” or “mere” departure from the standard of a reasonable person. In the absence of a bail condition, the regulated conduct would usually not be a departure from any uniform societal standard of behaviour. Without this ability to distinguish a marked departure from a mere departure, there is a risk that the objective fault standard slips into absolute liability for s. 145(3).

conduite automobile pour laquelle il existe toute une gamme de conduites, allant de la conduite prudente à la conduite criminelle, en passant par la conduite négligente, basées sur les risques prévisibles de la conduite d’une personne raisonnable, la nature hautement individualisée des conditions de mise en liberté sous caution exclut la possibilité d’une norme sociale uniforme de conduite qui serait applicable à toutes les éventuelles infractions d’omission de se conformer à une condition. Les conditions de mise en liberté sous caution peuvent restreindre les activités normales comme les déplacements et la communication avec autrui et sont spécifiquement conçues pour répondre aux risques *particuliers* que pose chaque personne prévenue. Ces conditions et les risques auxquels elles répondent varient énormément parmi les individus faisant l’objet d’une mise en liberté, de sorte qu’il n’est pas sensé de renvoyer aux concepts d’écart « marqué » ou « simple » par rapport à la norme de la personne raisonnable. En l’absence d’une condition de mise en liberté sous caution, la conduite réglementée ne constituerait normalement pas un écart par rapport à une norme sociale uniforme de conduite. Sans cette capacité de faire la distinction entre un écart marqué et un simple écart, il existe un risque que la norme de la faute objective entraîne insidieusement une responsabilité absolue pour l’infraction prévue au par. 145(3).

[48] Similarly, the offence in s. 145(3) is not comparable to other objective fault offences listed in *A.D.H.* Although a risk assessment is involved in the setting of bail conditions, this individualized risk will rarely be the same as the broad societal risks posed by objective fault offences like dangerous driving or careless firearms storage. As stated by the Standing Senate Committee on Legal and Constitutional Affairs, failure to comply offences, like many offences against the administration of justice, differ from other criminal offences because they rarely involve harm to a victim, they usually do not involve behaviour that would otherwise be considered criminal without a court order, and they are secondary offences that only arise after someone has been charged with an underlying offence (*Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (June 2017) (online), at p. 139 (“Senate Committee

[48] De même, l’infraction prévue au par. 145(3) n’est pas comparable aux autres infractions dont la perpétration suppose une faute objective énumérées dans l’arrêt *A.D.H.* Bien qu’une évaluation du risque soit effectuée lors de l’établissement des conditions de mise en liberté sous caution, ce risque individualisé sera rarement le même que les risques sociaux généraux que posent les infractions dont la perpétration suppose une faute objective comme la conduite dangereuse ou l’entreposage négligent d’armes à feu. Comme l’a déclaré le Comité sénatorial permanent des affaires juridiques et constitutionnelles, les infractions d’omission de se conformer à une condition, à l’instar de beaucoup d’infractions contre l’administration de la justice, diffèrent des autres infractions criminelles parce qu’elles causent rarement du tort à une victime, elles ne visent habituellement pas un comportement qui serait par ailleurs considéré comme criminel en l’absence d’une ordonnance

Report’’)). A departure from many bail conditions would not automatically lead to a threat to public health and safety.

[49] Finally, reasonable bail is a right under s. 11(e) of the *Charter* and cannot be compared to a regulated activity that is voluntarily entered into like driving or firearm ownership where an objective fault standard for related offences is further justified (*Hundal*, at p. 884). An accused person who is presumed innocent has a right to regain their liberty following their arrest subject to the least onerous measures to address their individual risk of not attending their court date, risk to public protection and safety, and risk to the administration of justice. The fact that accused persons consent to bail conditions in order to be released does not mean that they have chosen to enter into a regulated activity comparable to driving or owning firearms.

D. *Subjective Mens Rea Is Required for Breaches of Probation*

[50] This Court’s jurisprudence requiring subjective *mens rea* for the breach of probation offence further supports a subjective *mens rea* for the failure to comply offence. The offences of breach of probation (s. 733.1) and failure to comply with bail conditions (s. 145(3)) are similar offences, which both arise from an accused’s breach of conditions set out in a court order. In *R. v. Docherty*, [1989] 2 S.C.R. 941, the Court determined that a subjective *mens rea* was required for the breach of probation offence. That offence used the words “wilfully” and “refuses”, which reinforced the presumption of subjective fault,

judiciaire, et elles constituent des infractions secondaires qui ne peuvent survenir qu’après que la personne a été accusée d’une infraction sous-jacente (*Justice différée, justice refusée : L’urgence de réduire les longs délais dans le système judiciaire au Canada* (juin 2017) (en ligne), p. 156 (« Rapport du Comité sénatorial »)). Un manquement à de nombreuses conditions de mise en liberté sous caution n’entraînerait pas automatiquement un risque pour la santé et la sécurité du public.

[49] Enfin, la mise en liberté assortie d’un cautionnement raisonnable est un droit que garantit l’al. 11e) de la *Charte* et ne peut être comparée à une activité réglementée que l’on entreprend volontairement, comme la conduite automobile ou la possession d’armes à feu pour laquelle une norme de faute objective pour des infractions connexes est encore plus justifiée (*Hundal*, p. 884). La personne prévenue qui est présumée innocente a le droit de recouvrer sa liberté après son arrestation sous réserve des mesures les moins sévères possible pour répondre au risque particulier qu’elle pose en ce qui concerne l’omission d’être présente au tribunal au moment demandé, la protection et la sécurité du public et l’administration de la justice. Le fait que la personne prévenue consente aux conditions de sa mise en liberté sous caution pour être libérée ne signifie pas qu’elle a choisi de se livrer à une activité réglementée comparable à la conduite automobile ou à la possession d’armes à feu.

D. *Une mens rea subjective est requise pour le défaut de se conformer à une ordonnance de probation*

[50] La jurisprudence de la Cour exigeant une *mens rea* subjective pour l’infraction de défaut de se conformer à une ordonnance de probation tend également à confirmer que l’infraction d’omission de se conformer à une condition de mise en liberté exige une *mens rea* subjective. Les infractions de défaut de se conformer à une ordonnance de probation (art. 733.1) et d’omission de se conformer à une condition de mise en liberté sous caution (par. 145(3)) sont des infractions semblables, qui découlent toutes deux d’un manquement par la personne prévenue à des conditions énoncées dans une

and are not in s. 145(3). However, even after the word “wilfully” was removed from the current breach of probation offence, most courts continue to interpret the offence to require subjective *mens rea*, based on this Court’s reasoning in *Docherty* and the fact that the removal of the word “wilfully” does not on its own indicate an intent to create an objective *mens rea* offence (see, e.g., *R. v. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. v. Bingley*, 2008 BCPC 245, at para. 18 (CanLII); *R. v. Laferrière*, 2013 QCCA 944, at paras. 82-83 (CanLII); *R. v. John*, 2015 ONSC 2040, at para. 16 (CanLII); *contra*, *R. v. Bremmer*, 2006 ABPC 93, at paras. 3-7 (CanLII)).

ordonnance judiciaire. Dans *R. c. Docherty*, [1989] 2 R.C.S. 941, la Cour a statué que l’infraction de défaut de se conformer à une ordonnance de probation exige une *mens rea* subjective. Le libellé de cette infraction comportait les mots « volontairement » et « refuse », qui renforcent la présomption de faute subjective, et ne se retrouvent pas au par. 145(3). Toutefois, même après le retrait du mot « volontairement » du libellé de l’infraction actuelle de défaut de se conformer à une ordonnance de probation, la plupart des tribunaux continuent à interpréter l’infraction comme exigeant une *mens rea* subjective en se fondant sur le raisonnement de la Cour dans l’arrêt *Docherty* et sur le fait que le retrait du mot « volontairement » n’indique pas, à lui seul, l’intention de créer une infraction exigeant une *mens rea* objective (voir, p. ex., *R. c. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. c. Bingley*, 2008 BCPC 245, par. 18 (CanLII); *R. c. Laferrière*, 2013 QCCA 944, par. 82-83 (CanLII); *R. c. John*, 2015 ONSC 2040, par. 16 (CanLII); *contra*, *R. c. Bremmer*, 2006 ABPC 93, par. 3-7 (CanLII)).

[51] Beyond the text of s. 733.1, the Court in *Docherty* found that subjective *mens rea* was supported by the presumption of subjective fault, the possibility of imprisonment if an accused was convicted, and the purpose of the provision to deter people from breaching their probation orders (pp. 950-52). These factors similarly favour a subjective *mens rea* for s. 145(3). And the point of differentiation, that a probation order governs the behaviour of someone who has already been convicted of a crime while bail conditions primarily restrict the civil liberties of those who are presumed innocent of the underlying offence, further supports a subjective fault element for s. 145(3) (see, e.g., M. Manikis and J. De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences” (2019), 60 *C. de D.* 873, at pp. 879-80).

[51] Allant au-delà du texte du par. 733.1, la Cour a conclu dans l’arrêt *Docherty* que l’exigence d’une *mens rea* subjective était étayée par la présomption de faute subjective, la possibilité d’emprisonnement advenant une déclaration de culpabilité et l’objectif de la disposition de dissuader les gens de ne pas se conformer aux ordonnances de probation (p. 950-952). De la même façon, ces facteurs militent en faveur d’une *mens rea* subjective pour l’infraction prévue au par. 145(3). De plus, la différence entre les deux situations, à savoir qu’une ordonnance de probation régit le comportement d’une personne qui a déjà été déclarée coupable d’un crime alors que les conditions de mise en liberté sous caution restreignent principalement les libertés civiles de personnes présumées innocentes de l’infraction sous-jacente, tend également à confirmer que la faute doit être subjective pour l’infraction prévue au par. 145(3) (voir, p. ex., M. Manikis et J. De Santi, « Punishing while Presuming Innocence : A Study on Bail Conditions and Administration of Justice Offences » (2019), 60 *C. de D.* 873, p. 879-880).

E. Section 145(3) in the Legislative Scheme

[52] A subjective fault requirement for s. 145(3) is consistent with: (1) the penalties and consequences which flow from conviction under s. 145(3); (2) the role of s. 145(3) within the legislative framework for reviewing and enforcing bail conditions; and (3) the restrained and individualized approach to granting bail and imposing bail conditions.

(1) The Consequences of Charges and Conviction of Failure to Comply

[53] While in general the “range of punishments says little about the required fault element” for most offences (*A.D.H.*, at para. 72), s. 145(3) is different from other offences as it may criminalize otherwise lawful conduct, charges can accumulate quickly, and convictions, and even charges, impact the accused’s ability to obtain bail in the future. Therefore, the multiple serious consequences which flow from a conviction, or even a charge under s. 145(3), demonstrate Parliament’s acceptance of subjective fault for this crime.

[54] A conviction under s. 145(3) has profound implications for the liberty interests of the offender. Parliament has imposed up to a two-year term of imprisonment for conduct, which in many cases was not otherwise criminal, was without violence or a victim, and not only occurred when the accused was presumed innocent of the underlying offence, but may result in criminal liability even if the accused is acquitted of that underlying charge. In addition to possible imprisonment for up to two years for each offence, there is the real prospect of further conditions being imposed as part of the sentence. A conviction under s. 145(3) creates or adds to that person’s criminal record, with the associated stigma

E. Le paragraphe 145(3) dans le régime législatif

[52] L’exigence d’une faute subjective pour l’infraction prévue au par. 145(3) cadre avec : (1) les pénalités et conséquences qui découlent d’une déclaration de culpabilité aux termes du par. 145(3); (2) le rôle du par. 145(3) en matière de révision et d’application des conditions de mise en liberté sous caution au sein du cadre législatif; (3) l’approche individualisée et empreinte de retenue qui doit guider l’octroi d’une mise en liberté sous caution et l’imposition de conditions.

(1) Les conséquences d’une accusation et d’une déclaration de culpabilité relatives à l’omission de se conformer à une condition

[53] Si « l’échelle des peines est [généralement] peu révélatrice de l’élément de faute requis » pour la plupart des infractions (*A.D.H.*, par. 72), l’infraction prévue au par. 145(3) est différente des autres pour les raisons suivantes : elle peut criminaliser une conduite par ailleurs légale, les accusations peuvent s’accumuler rapidement et les déclarations de culpabilité (et même les accusations) peuvent avoir une incidence sur la capacité de la personne prévenue à obtenir une mise en liberté sous caution dans le futur. Par conséquent, les graves et nombreuses conséquences qui découlent d’une déclaration de culpabilité, voire d’une accusation en vertu du par. 145(3), démontrent que le Parlement a accepté que ce crime exige une faute subjective.

[54] Une déclaration de culpabilité fondée sur le par. 145(3) a des répercussions profondes sur le droit à la liberté de la personne contrevenante. Le Parlement a prévu une peine pouvant aller jusqu’à deux ans d’emprisonnement pour une conduite qui, dans bien des cas, n’était par ailleurs pas criminelle, ne comportait pas de violence, n’a pas fait de victime et non seulement a eu lieu à un moment où la personne prévenue était présumée innocente de l’infraction sous-jacente, mais peut aussi entraîner une responsabilité criminelle même si la personne prévenue est acquittée de cette accusation. Outre un éventuel emprisonnement d’une durée maximale de deux ans pour chaque infraction, il existe une

and difficulties this can bring in respect of employment, housing, and family responsibilities.

[55] A charge under s. 145(3) also has serious negative consequences for the legal position of a person on further bail hearings prior to conviction. The mere fact of being charged under s. 145(3) places a reverse onus on accused persons to show why they should be released on bail again, whether prior to their hearing for their s. 145(3) charge or the underlying charge (s. 515(6)(c)). As a result, the accused who fails to discharge the reverse onus may not receive bail on the breach charge, may lose their freedom, and await their trial(s) in detention.

[56] Previous convictions under s. 145 may also inform bail hearings for any future offences (see s. 518(1)(c)(iii)). Convictions for failure to comply under s. 145(3) are treated by Parliament and the courts as often indicating that an accused has a history of intentionally disobeying court orders, and therefore is more likely to breach their court orders again. A failure to comply conviction can result in assumptions that an accused has a “lack of respect . . . for court orders and for the law”, which may affect future sentencing and release decisions (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 118; see also *Schab*, at para. 24; *R. v. Omeasoo*, 2013 ABPC 328, 94 Alta. L.R. (5th) 244, at para. 47). A Department of Justice study of closed cases from 2008 found that 43.9 percent of accused persons with a prior history of convictions for s. 145 offences were denied bail, which is a remand rate significantly higher than accused persons with no such history, and even slightly higher than the remand rate for accused persons who were previously convicted of violent offences (39.9 percent) or sexual

possibilité bien réelle que des conditions additionnelles soient imposées dans le cadre de la détermination de la peine. Une déclaration de culpabilité au titre du par. 145(3) engendre un casier judiciaire ou l'alourdit, avec tous les stigmates et les difficultés que cela peut entraîner sur les plans de l'emploi, du logement et des responsabilités familiales.

[55] Une accusation fondée sur le par. 145(3) a aussi de graves conséquences négatives sur la situation juridique de la personne prévenue lors d'enquêtes ultérieures sur le cautionnement avant la déclaration de culpabilité. Le simple fait de faire l'objet d'une accusation en vertu du par. 145(3) inverse le fardeau de la preuve en imposant aux personnes prévenues la charge de démontrer pourquoi elles devraient être libérées sous caution, que ce soit avant leur audience concernant une accusation portée en vertu du par. 145(3) ou avant celle concernant l'accusation sous-jacente (al. 515(6)c)). Par conséquent, la personne prévenue qui ne s'acquitte pas du fardeau de preuve inversé risque de ne pas obtenir une mise en liberté sous caution à la suite de l'accusation de manquement, pourrait perdre sa liberté et devoir attendre son ou ses procès en détention.

[56] Les déclarations de culpabilité antérieures prononcées en vertu de l'art. 145 peuvent également être prises en compte lors d'enquêtes sur le cautionnement tenues relativement à des infractions ultérieures (voir sous-al. 518(1)c)(iii)). Le Parlement et les tribunaux considèrent souvent les déclarations de culpabilité pour omission de se conformer à une condition fondées sur le par. 145(3) comme indiquant que la personne prévenue a des antécédents de désobéissance délibérée aux ordonnances judiciaires et qu'elle est donc plus susceptible de violer à nouveau les ordonnances rendues à son égard. Une déclaration de culpabilité pour omission de se conformer à une condition peut donner lieu à des suppositions selon lesquelles la personne prévenue a fait preuve de « manque de respect [. . .] à l'égard des ordonnances des tribunaux et de la loi », ce qui pourrait avoir une incidence sur les décisions ultérieures concernant la détermination de la peine et la libération (*R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089, par. 118; voir aussi *Schab*, par. 24; *R. c. Omeasoo*, 2013 ABPC 328, 94 Alta. L.R. (5th)

offences (39.5 percent): K. Beattie, A. Solecki and K. E. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study* (2013), at pp. 17-18. Thus, conviction under s. 145(3) may lead to the denial of bail or the increased likelihood of more stringent bail conditions for future unrelated offences.

244, par. 47). Une étude du ministère de la Justice sur des dossiers fermés de 2008 a révélé que 43,9 p. 100 des personnes prévenues ayant été déclarées coupables d'une infraction prévue au par. 145 dans le passé se voyaient refuser la mise en liberté sous caution, ce qui constitue un taux de détention provisoire beaucoup plus élevé que celui associé aux personnes prévenues qui n'ont pas de tels antécédents, et même légèrement plus élevé que le taux de détention provisoire des personnes prévenues qui ont déjà été déclarées coupables d'une infraction avec violence (39,9 p. 100) ou d'une infraction d'ordre sexuel (39,5 p. 100) : K. Beattie, A. Solecki et K. E. Morton-Bourgon, *Les caractéristiques de la détention et de la mise en liberté par la police et par le tribunal : Données tirées de l'Étude sur l'Efficacité du Système de Justice* (2013), p. 17-18. Ainsi, une déclaration de culpabilité au titre du par. 145(3) peut mener à ce que la mise en liberté sous caution soit refusée ou à ce qu'il y ait une probabilité accrue que des conditions de mise en liberté sous caution plus sévères soient imposées en cas d'infractions ultérieures non liées.

[57] This is problematic because breach charges often accumulate quickly: Mr. Zora's failure to answer a door twice on one weekend resulted in four separate charges under s. 145(3). People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention (C. M. Webster, "Broken Bail" in *Canada: How We Might Go About Fixing It* (June 2015), at p. 8 ("Webster Report"); Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by A. Deshman and N. Myers (2014) (online), at pp. 49 and 66 ("CCLA Report"); M.-E. Sylvestre, N. K. Blomley and C. Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (2019), at p. 132; Pivot Legal Society, *Project Inclusion: Confronting Anti-Homelessness*

[57] Ce constat pose problème parce que les accusations de manquement s'accumulent souvent rapidement : l'omission de M. Zora de répondre à la porte deux fois pendant la même fin de semaine a donné lieu à quatre accusations distinctes au titre du par. 145(3). Les personnes ayant des dépendances ou des handicaps et celles vivant dans des conditions précaires peuvent se retrouver avec un casier judiciaire comptant plus de 10 déclarations de culpabilité pour manquement. Les déclarations de culpabilité pour des infractions d'omission de se conformer à une condition peuvent par conséquent mener à un cercle vicieux où des conditions de mise en liberté sous caution de plus en plus nombreuses et sévères sont imposées lors de la déclaration de culpabilité, ce qui rend le respect desdites conditions encore plus difficile, menant ainsi la personne prévenue à faire l'objet de plus d'accusations de manquement et à se voir imposer des conditions de mise en liberté sous caution plus restrictives, voire une détention avant procès (C. M. Webster, *Lacunes relatives à la mise en liberté sous caution au Canada : comment y remédier?* (juin 2015), p. 8 (« rapport Webster »); Association canadienne des libertés civiles et le

& *Anti-Substance User Stigma in British Columbia*, by D. Bennett and D.J. Larkin (2019) (online), at p. 101 (“Pivot Report”).

Fidécimmis canadien d’éducation en libertés civiles, *Set Up to Fail : Bail and the Revolving Door of Pre-trial Detention*, A. Deshman et N. Myers (2014) (en ligne), p. 49 et 66 (« rapport de l’ACLC »); M.-E. Sylvestre, N. K. Blomley et C. Bellot, *Red Zones : Criminal Law and the Territorial Governance of Marginalized People* (2019), p. 132; Pivot Legal Society, *Project Inclusion : Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, D. Bennett et D. J. Larkin (2019) (en ligne), p. 101 (« rapport Pivot »).

[58] The significant and long-lasting legal consequences of a charge or conviction under s. 145(3) support the existence of a subjective *mens rea* requirement. If a subjectively guilty mind was not required for a conviction under s. 145(3), there would be considerably less logic in Parliament’s choice to deem someone who failed to comply with certain bail conditions as having “a lack of respect . . . for court orders and the law” and as being less likely to comply again with different bail conditions (*Lacasse*, at para. 118; *Code*, s. 518(1)(c)(iii)). The fact that a charge of breach of bail creates serious consequences for the accused by reversing the onus of proof on release and making bail for other offences more difficult to obtain presupposes that the person knowingly, rather than inadvertently, breached their bail condition.

[58] Les conséquences juridiques importantes et de longue durée d’une accusation ou d’une déclaration de culpabilité fondée sur le par. 145(3) militent en faveur d’une exigence de *mens rea* subjective. Si une intention subjectivement coupable n’était pas requise pour une déclaration de culpabilité en vertu du par. 145(3), il serait beaucoup moins justifié sur le plan de la logique que le Parlement choisisse de présumer que la personne qui a omis de se conformer à certaines conditions de mise en liberté sous caution a « manqué de respect [. . .] à l’égard des ordonnances des tribunaux et de la loi » et est moins susceptible de se conformer dans le futur à des conditions différentes de mise en liberté sous caution (*Lacasse*, par. 118; *Code*, sous-al. 518(1)c)(iii)). Le fait qu’une accusation de manquement à une ordonnance de mise en liberté sous caution crée de graves conséquences pour la personne prévenue en inversant le fardeau de la preuve lors de la libération et en rendant plus difficile l’obtention d’une mise en liberté sous caution à l’égard d’autres infractions présuppose que la personne a violé sa condition de mise en liberté sous caution sciemment, et non par inadvertance.

(2) The Role of Section 145(3) Within the Legislative Framework

[59] Parliament’s intention to require subjective fault for s. 145(3) is further demonstrated by examining the role of this offence in the *Code*. Parliament understood that bail takes place as part of an expedited process and is often based on limited information and so it created many mechanisms to review and enforce bail conditions once imposed. When it

(2) Le rôle du par. 145(3) au sein du cadre législatif

[59] L’intention du Parlement d’exiger une faute subjective pour l’infraction prévue au par. 145(3) ressort également de l’examen du rôle de cette infraction au sein du *Code*. Le Parlement a compris que la mise en liberté sous caution fait partie d’un processus accéléré et est souvent fondée sur des renseignements limités, et a ainsi créé de nombreux

appears that an accused should not be bound by a condition or is not complying with a bail condition, there may be applications by the Crown or the accused to review or vacate the bail order, or a decision by the Crown to seek bail revocation or lay a criminal charge under s. 145(3). Considering the availability of these other mechanisms that manage risk from an accused's inability or failure to comply with conditions of bail, it is clear that s. 145(3) serves a distinct purpose: to punish and deter those who knowingly or recklessly breach their bail conditions.

mécanismes pour assurer la révision et l'application des conditions de mise en liberté sous caution une fois imposées. Lorsqu'il appert que la personne prévenue ne devrait pas être assujettie à une condition ou ne respecte pas une condition de sa mise en liberté sous caution, celle-ci ou la Couronne, selon le cas, peut demander une révision ou une annulation de l'ordonnance de mise en liberté sous caution. La Couronne peut aussi demander la révocation de la mise en liberté sous caution ou porter une accusation criminelle en vertu du par. 145(3). Vu l'existence de ces autres mécanismes qui gèrent le risque découlant de l'incapacité ou de l'omission de la personne prévenue de se conformer aux conditions de mise en liberté sous caution, il est manifeste que le par. 145(3) a un objectif distinct : punir et dissuader les personnes prévenues qui manquent sciemment ou par insouciance à leurs conditions de mise en liberté sous caution.

[60] The respondent argued that s. 145(3) has become “a prime means of enforcing release conditions in order to mitigate the risks and concerns that would otherwise have justified detaining a person” (R.F., at paras. 63-67). Criminal charges under s. 145(3) are common, increasing, and often result in the loss of liberty. Statistics Canada reports that the charging and prosecuting of breaches of court orders, including bail conditions, has risen since 2004, and in 2008/2009 it was estimated that one in five people in pre-trial detention were there because they failed to comply with conditions in a court order or probation order (*Trends in the Use of Remand in Canada* (May 2011); *Trends in offences against administration of justice* (October 2015), at p. 13 (“Statistics Canada Report”); *Table 35-10-0177-01—Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas* (online)).

[60] L'intimée a fait valoir que le par. 145(3) est devenu [TRADUCTION] « un excellent moyen de faire exécuter les conditions de mise en liberté pour atténuer les risques et répondre aux préoccupations qui auraient autrement justifié la détention d'une personne » (m.i., par. 63-67). Les accusations criminelles portées en vertu du par. 145(3) sont courantes, en hausse et entraînent souvent une perte de liberté. Selon Statistique Canada, le nombre d'accusations et de poursuites pour des violations d'ordonnances judiciaires, y compris les conditions de mise en liberté sous caution, a augmenté depuis 2004, et on estime qu'en 2008-2009 une personne sur cinq en détention avant le procès l'était en raison d'un manquement à des conditions d'une ordonnance judiciaire ou d'une ordonnance de probation (*Tendances de l'utilisation de la détention provisoire au Canada* (mai 2011); *Tendances des infractions contre l'administration de la justice* (octobre 2015), p. 13 (« rapport de Statistique Canada »); *Tableau 35-10-0177-01 : Statistiques des crimes fondés sur l'affaire, par infractions détaillées, Canada, provinces, territoires et régions métropolitaines de recensement* (en ligne)).

[61] Offences relating to the administration of justice represented about 1 in 10 police reported crimes in 2014 (Statistics Canada Report, at p. 6).

[61] Les infractions relatives à l'administration de la justice représentaient environ un dixième des crimes déclarés par la police en 2014 (rapport de

Offences for failure to comply with a court order, including the offence under s. 145(3),⁸ represented 57 percent of those administration of justice offences reported in 2014 (Statistics Canada Report, at p. 7). In 2016/2017, failure to comply with an order was the most serious offence charged in 9 percent of all completed adult criminal cases (Statistics Canada, *Adult criminal and youth court statistics in Canada, 2016/2017* (January 2019)). The rate of all persons charged for failure to comply with an order continued to increase between 2017 and 2018 (*Table 35-10-0177-01*). While rates of failure to comply charges also vary across the country, between 2005/2006 and 2013/2014, most provinces reported an increase in the proportion of completed adult criminal cases that included at least one offence against the administration of justice (Statistics Canada Report, at pp. 13-14).

Statistique Canada, p. 6). Les infractions d'omission de se conformer à une ordonnance judiciaire, y compris l'infraction prévue au par. 145(3)⁸, représentaient 57 p. 100 des infractions relatives à l'administration de la justice déclarées en 2014 (Rapport de Statistique Canada, p. 7). En 2016-2017, l'omission de se conformer à une ordonnance était l'infraction la plus grave reprochée dans 9 p. 100 de toutes les affaires criminelles réglées visant des délinquants adultes (Statistique Canada, *Statistiques sur les tribunaux de juridiction criminelle pour adultes et les tribunaux de la jeunesse au Canada, 2016-2017* (janvier 2019)). Le taux global des personnes accusées d'avoir omis de se conformer à une ordonnance a continué d'augmenter entre 2017 et 2018 (*Tableau 35-10-0177-01*). Bien que les taux d'accusations relatives à une omission de se conformer à une condition varient aussi dans l'ensemble du pays, entre 2005-2006 et 2013-2014, la plupart des provinces ont rapporté une augmentation de la proportion des affaires criminelles closes visant des personnes délinquantes adultes qui comprenaient au moins une infraction contre l'administration de la justice (Rapport de Statistique Canada, p. 13-14).

[62] Professor Friedland, whose study *Detention Before Trial* contributed to significant reform of the bail system in the 1970s, has suggested that the growth in failure to comply charges has likely contributed to the increase in people held in pre-trial custody (M. L. Friedland, "Reflections on Criminal Justice Reform in Canada" (2017), 64 *Crim. L.Q.* 274; M. L. Friedland, "The Bail Reform Act Revisited" (2012), 16 *Can. Crim. L.R.* 315, at p. 321; M. L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965)). Pre-trial detention can result in negative impacts on accused persons' employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations (Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections* (1969),

[62] Le professeur Friedland, dont l'étude intitulée *Detention Before Trial* a été utilisée pour la réalisation de l'importante réforme du système de mise en liberté sous caution dans les années 1970, a affirmé que l'augmentation du nombre d'accusations d'omission de se conformer à une condition de mise en liberté sous caution avait probablement contribué à la croissance du nombre de personnes détenues avant le procès (M. L. Friedland, « Reflections on Criminal Justice Reform in Canada » (2017), 64 *Crim. L.Q.* 274; M. L. Friedland, « The Bail Reform Act Revisited » (2012), 16 *Rev. can. D.P.* 315, p. 321; M. L. Friedland, *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965)). La détention avant le procès peut avoir des conséquences négatives sur l'emploi et les revenus de la personne prévenue ainsi que sur

⁸ Failure to comply offences in the Statistics Canada Report include s. 145(3) to (5.1), but also offences related to failure to comply with conditional sentences or probation orders (s. 161(1) to (4)), or peace bonds (s. 811(a) and (b)).

⁸ Dans le rapport de Statistique Canada, ces infractions comprennent les infractions prévues aux par. 145(3) à (5.1), mais aussi les infractions relatives à l'omission de se conformer à une peine avec sursis ou à une ordonnance de probation (par. 161(1) à (4)), ou à un engagement à ne pas troubler l'ordre public (al. 811a) et b)).

at pp. 101-2 (“Ouimet Report”); CCLA Report, at pp. 8-10; Pivot Report, at p. 81). The Standing Senate Committee on Legal and Constitutional Affairs also found that failure to comply offences were clogging the courts despite being offences that are not “strictly indictable” and “involve no harm to a victim” (Senate Committee Report, at pp. 138-40).

[63] In my view, despite high rates of criminal charges for failure to comply, Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. The scheme of the *Code* illustrates that such concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused’s risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached, which may result in release on the same conditions with altered behaviour expected of the accused, changed conditions, or detention. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk.

[64] A bail review under ss. 520 and 521 is the primary way to challenge or change bail conditions which are not, or which are no longer, minimal, reasonable, necessary, least onerous, and sufficiently linked to risks posed by the accused (except for accused charged with very serious offences under

sa possibilité de trouver un logement, sa santé et son accès aux médicaments, ses relations, ses possessions personnelles et sa capacité à s’acquitter de ses obligations parentales (Comité canadien de la réforme pénale et correctionnelle, *Rapport du Comité canadien de la réforme pénale et correctionnelle* (1969), p. 101-102 (« rapport Ouimet »); rapport de l’ACLC, p. 8-10; rapport Pivot, p. 81). Le Comité sénatorial permanent des affaires juridiques et constitutionnelles a aussi conclu que les infractions d’omission de se conformer à une condition congestionnaient les cours malgré qu’il ne s’agisse pas d’« actes criminels au sens strict » et qu’elles « ne causent de tort à aucune victime » (rapport du Comité sénatorial, p. 154-157).

[63] À mon avis, malgré les hauts taux d’accusations criminelles pour omission de se conformer à une condition, le Parlement ne voulait pas que les sanctions pénales soient le principal moyen de gérer les risques ou les préoccupations associés aux individus libérés sous conditions. Le régime établi par le *Code* indique que de telles préoccupations doivent être prises en compte par l’établissement de conditions qui sont minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue; des modifications peuvent être apportées à ces conditions lorsque cela est nécessaire au moyen de révisions de la mise en liberté sous caution et de l’annulation des ordonnances de mise en liberté sous caution; et la mise en liberté sous caution peut être révoquée lorsque les conditions ne sont pas respectées, ce qui peut donner lieu à une libération aux mêmes conditions avec un comportement différent attendu de la part de la personne prévenue, une modification des conditions ou une détention. Les accusations portées en vertu du par. 145(3) ne sont pas, et ne devraient pas être, le principal moyen d’atténuer le risque.

[64] La révision d’une mise en liberté sous caution effectuée conformément aux art. 520 et 521 constitue la principale façon de contester ou de modifier des conditions de mise en liberté sous caution qui ne sont pas, ou ne sont plus, minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment

s. 469).⁹ Conditions set in the bustle of a busy bail court with limited information can, and when necessary should, be fine-tuned through bail review. A bail review involves a hybrid process, rather than a *de novo* proceeding (*St-Cloud*, at paras. 92 and 118). A reviewing judge may intervene if the judicial official has erred in law, if the impugned decision was clearly inappropriate, or if new evidence shows a material and relevant change in the circumstances (para. 121). In addition, s. 523(2) allows for the judicial official, in certain circumstances, to vacate a previous release order and make a different order, including when the accused and the Crown consent to vacating the order (s. 523(2)(c)).

liées aux risques que pose la personne prévenue (sauf pour la personne prévenue inculpée d'infractions très graves prévues à l'art. 469)⁹. Les conditions imposées dans l'agitation d'une séance occupée de libération sous caution, à l'aide de renseignements limités, peuvent, et devraient lorsque cela est nécessaire, être peaufinées au moyen d'une révision de la mise en liberté sous caution. Une telle révision suppose un processus hybride, et non une instance *de novo* (*St-Cloud*, par. 92 et 118). Les juges en révision peuvent intervenir si l'entité judiciaire a commis une erreur de droit, si la décision contestée était manifestement inappropriée ou si la nouvelle preuve démontre un changement important et pertinent dans les circonstances (par. 121). De plus, le par. 523(2) permet à l'entité judiciaire, dans certaines circonstances, d'annuler une ordonnance de libération antérieure et de rendre une ordonnance différente, notamment lorsque la personne prévenue et la Couronne consentent à l'annulation de l'ordonnance (al. 523(2)c)).

[65] Parliament also enacted two tools to address breaches of bail conditions: bail revocation under s. 524 and criminal charges under s. 145(3). These two provisions work together to promote compliance with conditions of bail, along with forfeiture provisions for monetary amounts set out in a recognizance (see Part XXV of the *Code*). However, these two mechanisms serve distinct and different legislative purposes. Whereas revocation under s. 524 fulfills a risk management role, criminal liability under s. 145(3) exists to punish and deter.

[65] Le Parlement a aussi prévu deux outils pour répondre aux manquements aux conditions de mise en liberté sous caution : la révocation de la mise en liberté sous caution en vertu de l'art. 524 et les accusations criminelles en vertu du par. 145(3). Ces deux dispositions ont pour effet combiné de favoriser le respect des conditions de mise en liberté sous caution, de pair avec les dispositions relatives à la confiscation pour les sommes d'argent prévues dans un engagement (voir la partie XXV du *Code*). Toutefois, ces deux mécanismes ont des objectifs législatifs distincts et différents. Alors que la révocation au titre de l'art. 524 joue un rôle de gestion de risque, la responsabilité criminelle dont il est question au par. 145(3) vise à punir et dissuader certaines conduites.

[66] Revocation of bail occurs under s. 524. An accused may be arrested where there are reasonable grounds to believe that the accused has contravened or is about to contravene any summons, appearance

[66] La révocation de la mise en liberté sous caution se fait en vertu de l'art. 524. Une personne prévenue peut être arrêtée lorsqu'il existe des motifs raisonnables de croire qu'elle a violé ou est sur le

⁹ Offences listed under s. 469 have a different mechanism of bail review under ss. 522(4) and 680 of the *Code*.

⁹ Les infractions indiquées à l'art. 469 sont assorties d'un mécanisme différent de révision de la mise en liberté sous caution aux termes du par. 522(4) et de l'art. 680 du *Code*.

notice, promise to appear, undertaking, or recognizance issued to them or has committed an indictable offence after being released (s. 524(1) and (2)). The Crown can then decide whether to proceed with a revocation hearing before a judicial official (Trotter, at pp. 11-9 to 11-10). Where the judicial official finds, on a balance of probabilities, that the accused contravened or was about to contravene the relevant order or that there are reasonable grounds to believe that the accused committed another indictable offence while on bail, the judicial official must cancel the order and detain the accused (s. 524(4) and (8); see *R. v. Parsons* (1997), 161 Nfld. & P.E.I.R. 145 (N.L.C.A.), at para. 21; *R. v. Morris*, 2013 ONCA 223, 305 O.A.C. 47, at para. 18). The accused then has the onus to show why their detention is not justified. If the accused establishes that the detention is not justified, the judicial official can order release with any of the options available under s. 515, including changing the conditions of the undertaking or recognizance (s. 524(4) to (9)). This means that the judicial official has the ability to consider the appropriateness of the original release order and may remove or narrow conditions from the release order where the accused shows that they are no longer necessary, reasonable, least onerous, or sufficiently linked to the statutory criteria in s. 515(10) (Trotter, at p. 11-1).

[67] Revocation under s. 524 ensures that those who do not follow bail conditions can be arrested to re-assess whether, and on what conditions, they should be released into the community, where it becomes apparent that the accused will not or cannot abide by the conditions originally set. Revocation provides the court with greater flexibility in determining whether, despite a contravention of bail, the accused has shown cause that they should be released again either on the same conditions or different conditions (see, e.g., *R. v. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273, at para. 36; *R. v. T.J.J.*, 2011 BCPC 155, at paras. 57-59 (CanLII); *R. v. Mehan*, 2016

point de violer une sommation, une citation à comparaître, une promesse de comparaître ou autre promesse ou un engagement dont elle fait l'objet ou si elle a commis un acte criminel après avoir été libérée (par. 524(1) et (2)). La Couronne peut alors décider si elle procédera à une audience sur la révocation devant une entité judiciaire (Trotter, p. 11-9 à 11-10). Lorsque l'entité judiciaire conclut, selon la prépondérance des probabilités, que la personne prévenue a violé ou était sur le point de violer l'ordonnance applicable ou qu'il existe des motifs raisonnables de croire que la personne prévenue a commis un autre acte criminel pendant qu'elle était en mise en liberté sous caution, elle doit annuler l'ordonnance et ordonner la détention de la personne prévenue (par. 524(4) et (8); voir *R. c. Parsons* (1997), 161 Nfld. & P.E.I.R. 145 (C.A. T.-N.-L.), par. 21; *R. c. Morris*, 2013 ONCA 223, 305 O.A.C. 47, par. 18). La personne prévenue a alors le fardeau de démontrer pourquoi sa détention n'est pas justifiée. Si elle parvient à le faire, l'entité judiciaire peut ordonner sa libération et l'assortir d'une ou de plusieurs des options prévues à l'art. 515, et peut notamment changer les conditions de la promesse ou de l'engagement (par. 524(4) à (9)). Cela signifie que l'entité judiciaire est habilitée à examiner si l'ordonnance de mise en liberté originale était appropriée et elle peut retirer ou restreindre des conditions de cette ordonnance lorsque la personne prévenue démontre qu'elles ne sont plus nécessaires, raisonnables, les moins sévères possible ou suffisamment liées aux critères prévus au par. 515(10) (Trotter, p. 11-1).

[67] La révocation aux termes de l'art. 524 fait en sorte que la personne prévenue qui ne respecte pas les conditions de sa mise en liberté sous caution peut être arrêtée pour qu'on réévalue si elle devrait être libérée dans la collectivité, et à quelles conditions, dans le cas où il est évident qu'elle ne se conformera pas, ou ne pourra se conformer, aux conditions initialement imposées. La révocation fournit au tribunal plus de souplesse pour établir si, malgré le manquement aux conditions de mise en liberté sous caution, la personne prévenue a démontré qu'elle devrait être à nouveau libérée, que ce soit selon les mêmes conditions ou des conditions différentes

BCCA 129, 386 B.C.A.C. 1). Conditions can be revised to address the risk of further breach while ensuring the accused can reasonably comply.

(voir, p. ex., *R. c. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273, par. 36; *R. c. T.J.J.*, 2011 BCPC 155, par. 57-59 (CanLII); *R. c. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1). Il peut y avoir révision des conditions pour répondre au risque qu'il y ait un nouveau manquement tout en faisant en sorte que la personne prévenue puisse raisonnablement se conformer à ces conditions.

[68] If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. Bail revocation was the process designed for determining whether a person's risk factors are such that their failure to abide by bail conditions means they ought to be detained rather than released on different conditions. Revocation can therefore address negligent and careless breaches of bail conditions without creating additional criminal liability. While revocation carries the threat of detention and should be sought only when the negative impacts that can arise from detention are justified, it can address risks arising from breaches of bail conditions without adding offences against the administration of justice to the criminal record of the accused.

[68] Si la détention constitue le résultat proportionné à la violation par la personne prévenue des conditions de mise en liberté sous caution, alors la révocation aux termes de l'art. 524 est la bonne façon de procéder. La révocation de la mise en liberté sous caution est le processus qui a été conçu pour établir si les facteurs de risque associés à une personne prévenue faisaient en sorte que son omission de se conformer aux conditions de mise en liberté sous caution signifiait qu'elle devait être détenue plutôt que libérée selon des conditions différentes. La révocation peut donc être une réponse aux manquements aux conditions de mise en liberté sous caution commis par négligence ou insouciance, sans créer de responsabilité criminelle supplémentaire. Bien que la révocation s'accompagne de la menace de détention et qu'elle ne devrait être sollicitée que lorsque les répercussions négatives pouvant découler de la détention sont justifiées, elle permet aussi de répondre aux risques qui découlent des manquements aux conditions de mise en liberté sous caution sans ajout de nouvelles infractions contre l'administration de la justice au casier judiciaire de la personne prévenue.

[69] In addition to revocation, Parliament enacted s. 145(3) of the *Code*, making it a separate crime against the administration of justice to breach bail conditions, which carries a maximum penalty of two years' imprisonment and has other important consequences for the accused (as discussed above). It is a criminal offence which requires the Crown to prove all constituent elements of the offence beyond a reasonable doubt. Charges for breach of bail conditions under s. 145(3) can be brought in addition to an application for bail revocation (*Parsons*, at paras. 28 and 37). Section 145(3) adds criminal liability on top

[69] En plus de prévoir la révocation, le Parlement a adopté le par. 145(3) du *Code*, qui fait du manquement aux conditions de mise en liberté sous caution un crime distinct contre l'administration de la justice, passible d'une peine maximale de deux ans d'emprisonnement et comportant d'autres conséquences importantes pour la personne prévenue (comme nous l'avons vu). Il s'agit d'une infraction criminelle qui exige que la Couronne prouve hors de tout doute raisonnable tous les éléments constitutifs de l'infraction. Des accusations de manquement aux conditions de mise en liberté sous caution portées en vertu du

of the possibility of an accused losing their ability to be out on bail prior to trial. Therefore criminal charges are intended as a means of last resort to punish harmful behaviors when other risk management tools have not served their purposes.

[70] This legislative framework indicates that Parliament intended for the Crown to primarily use bail review and revocation, rather than criminal charges, to manage accused persons who cannot or will not comply with their bail conditions, especially when those bail conditions address conduct that would not otherwise be criminal. Of course, different considerations apply for a breach of condition that involves conduct that is otherwise criminal or which harms or threatens people, for example, where an accused breaches a no-communication condition by threatening or intimidating a victim. In those circumstances, criminal charges may be justified. Parliament has now created a judicial referral hearing process under s. 523.1 to allow prosecutors to divert charges under s. 145(3) that involve no physical or emotional harm to a victim, property damage, or economic loss. This further emphasizes that prosecutions and conviction under s. 145(3) should be a last resort measure to primarily address harmful intentional breaches of bail conditions where the remedies available through bail review and revocation would not be sufficient.

par. 145(3) peuvent s'ajouter à une demande de révocation de la mise en liberté sous caution (*Parsons*, par. 28 et 37). En plus de pouvoir perdre la mise en liberté sous caution avant le procès, la personne prévenue pourrait voir sa responsabilité criminelle engagée aux termes du par. 145(3). Par conséquent, les accusations criminelles doivent être considérées comme une mesure de dernier recours pour sanctionner des comportements répréhensibles lorsque les autres outils de gestion du risque n'ont pas rempli leur fonction.

[70] Ce cadre législatif indique que le Parlement entendait que la Couronne recoure principalement à la révision et à la révocation de la mise en liberté sous caution, plutôt qu'aux accusations criminelles, pour gérer les personnes prévenues qui ne peuvent ou ne pourront se conformer à leurs conditions de mise en liberté sous caution, particulièrement lorsque ces conditions concernent une conduite qui ne serait par ailleurs pas criminelle. Évidemment, différentes considérations s'appliquent au manquement à une condition visant une conduite qui est par ailleurs criminelle ou qui cause du tort ou constitue une menace à autrui, par exemple, lorsqu'une personne prévenue viole une condition d'interdiction de communiquer en menaçant ou en intimidant une victime. Dans de telles circonstances, les accusations criminelles peuvent être justifiées. Le Parlement a créé un processus de comparution pour manquement à l'art. 523.1 afin de permettre à la poursuite d'écarter les accusations fondées sur le par. 145(3) lorsque le manquement n'a pas causé de dommages — matériels, corporels ou moraux — ou de pertes économiques à une victime. Cela vient étayer encore davantage la thèse selon laquelle les poursuites et la déclaration de culpabilité au titre du par. 145(3) devraient constituer une mesure de dernier recours, conçue pour répondre avant tout aux manquements préjudiciables et intentionnels à des conditions de mise en liberté sous caution lorsque les mesures possibles dans le cadre des processus de révision et de révocation de la mise en liberté sous caution seraient insuffisantes.

[71] Even with this new process, a bail variation or revocation application should be among the responses seriously considered by the Crown when faced with certain types of alleged breaches in an effort to reduce the number of criminal breach charges burdening the courts. Where the accused's failure to comply with a condition might justify detention, revocation may be appropriate. The benefits of this option can be seen by examining Mr. Zora's charges for allegedly breaching his curfew and failing to answer his door — charges that resulted in no harm to anyone else and relate to conduct that would not have been criminal but for his bail conditions. If the Crown had sought bail revocation instead of bringing charges, Mr. Zora would have been arrested and he would have had to show cause why he should be released again despite his breach. (He was in a comparable position to show cause why he should be released when he was charged under s. 145(3).) The bail revocation procedure, however, expressly permits the judicial official to release him on modified conditions. These modified conditions might have managed the same risk in a more focussed and feasible way, without Mr. Zora facing the serious consequences of additional criminal convictions for failing to answer his door.

[72] Given this, the primary purpose of s. 145(3) is not to manage future risk, but to sanction past behaviour and deter further breaches. As noted by Wilson J. in *Docherty*, at pp. 951-52, regarding breach of probation conditions, specific deterrence has little or no effect if an accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct. If the purpose of s. 145(3) is to deter and punish those who breach bail conditions, the same logic in

[71] Malgré l'existence de ce nouveau processus, la Couronne devrait examiner sérieusement la possibilité de demander une modification ou une révocation de la mise en liberté sous caution pour certains types de manquements allégués afin de réduire le nombre d'accusations criminelles de manquements à des conditions qui encombrant les tribunaux. Lorsque l'omission de la personne prévenue de se conformer à une condition peut justifier la détention, la révocation pourrait être appropriée. On peut voir les avantages de cette possibilité en examinant les accusations dont fait l'objet M. Zora parce qu'il aurait violé le couvre-feu et omis de répondre à la porte — accusations qui n'ont pas causé de préjudice à autrui et qui concernent une conduite qui n'aurait pas été criminelle n'eût été ses conditions de mise en liberté sous caution. Si la Couronne avait cherché à obtenir la révocation de la mise en liberté sous caution au lieu de porter des accusations, M. Zora aurait été arrêté et aurait eu à démontrer pourquoi il devrait être à nouveau libéré malgré son manquement. (Il se trouvait dans une situation comparable quand il a été accusé en vertu du par. 145(3) et devait démontrer pourquoi il devrait être libéré.) Toutefois, la procédure de révocation de la mise en liberté sous caution permet expressément à l'entité judiciaire de le libérer selon des conditions modifiées. Celles-ci pourraient permettre de gérer le même risque d'une façon plus ciblée et viable, sans exposer M. Zora aux graves conséquences découlant des déclarations de culpabilité additionnelles pour ne pas avoir répondu à la porte.

[72] Compte tenu de ce qui précède, l'objectif principal du par. 145(3) n'est pas la gestion d'un risque futur, mais la sanction d'un comportement passé et la dissuasion d'autres manquements. Comme l'a fait remarquer la juge Wilson dans l'arrêt *Docherty*, aux p. 951-952, concernant les manquements à des conditions de probation, l'effet de dissuasion individuelle n'existe que peu ou pas si la personne accusée ignorait qu'elle faisait quelque chose de mal. Pour être dissuadée d'adopter la conduite interdite, la personne accusée doit savoir quelle norme de comportement elle doit respecter et que sa conduite n'y

Docherty supports a subjective *mens rea* element for s. 145(3).

(3) Setting Bail Conditions and Their Breach Under Section 145(3)

[73] There is a strong, indeed inexorable, connection between the setting of bail conditions and the operation of s. 145(3), including its *mens rea* element. In this section, I address the argument that because bail conditions are tailored to the individual, Parliament intended an objective *mens rea* for breaches under s. 145(3). In my view, this argument lacks a sound conceptual basis and fails to take into account the manner in which bail conditions continue to be imposed despite the principles articulated in the *Charter*, the *Code*, and by this Court in *Antic*. I conclude that the opposite is true: the requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused are considered both when bail is set and if bail is breached.

[74] The respondent and the intervenor Attorney General of British Columbia (“AGBC”) submit that the *mens rea* for s. 145(3) can be satisfied on proof of an objective fault standard. They argue that bail conditions, set at the beginning of the bail process, are carefully tailored to the accused and would lead to only minimal criminal liability for the accused. The AGBC links the various phases of the bail system, but claims that the “[l]egitimate concern about marginalized people whose breach of bail pose an attenuated risk is effectively tackled at the front-end

répond pas. Si le paragraphe 145(3) a pour objet de dissuader et de punir les personnes qui manquent à leurs conditions de mise en liberté sous caution, la même logique que celle exposée dans l’arrêt *Docherty* étaye l’existence d’une *mens rea* subjective pour le par. 145(3).

(3) Établissement des conditions de mise en liberté sous caution et manquement à celles-ci aux termes du par. 145(3)

[73] Il existe un lien puissant, et même inexorable, entre l’établissement des conditions de mise en liberté sous caution et l’application du par. 145(3), notamment en matière de *mens rea*. Dans la présente section, j’examinerai l’argument selon lequel le Parlement entendait que les infractions prévues au par. 145(3) requièrent une *mens rea* objective parce que les conditions de mise en liberté sous caution sont adaptées à la personne visée. À mon avis, cet argument est dénué d’un fondement conceptuel solide et ne tient pas compte de la façon dont les conditions de mise en liberté sous caution continuent d’être imposées malgré les principes exposés dans la *Charte*, dans le *Code* et par la Cour dans l’arrêt *Antic*. Je conclus que l’opposé est vrai : l’exigence voulant que les conditions de mise en liberté sous caution soient adaptées à la personne prévenue indique qu’il faut une *mens rea* subjective de manière à ce que les caractéristiques individuelles de celle-ci soient prises en considération tant lors de l’établissement des conditions de mise en liberté sous caution qu’en cas de manquement à celles-ci.

[74] L’intimée et l’intervenant le procureur général de la Colombie-Britannique (« PGCB ») soutiennent que la *mens rea* requise au par. 145(3) peut être établie par la preuve d’une norme de faute objective. L’intimée et l’intervenant font valoir que les conditions de mise en liberté sous caution, fixées au début du processus, sont soigneusement adaptées à la personne prévenue et ne devraient entraîner qu’une responsabilité criminelle minimale pour celle-ci. Le PGCB établit un lien entre les divers stades du système de mise en liberté sous caution,

of the process” (I.F. (AGBC), at para. 3). In other words, concerns about the treatment of marginalized individuals are factored into the conditions themselves, which obviates the need for a subjective fault standard if those conditions are breached.

[75] I do not accept this line of reasoning. This proposition is premised on a false dichotomy which assumes that a focus on the individual accused may occur only at one stage or the other. Conceptually, there is no reason why the rights and interests of the accused should be bargained away in an either/or formulation. Nothing prevents an individualized focus both at the time when the conditions are imposed and at the time of breach. The ethos of *Antic* favours a consistent and complementary approach under which the relevant rights in the *Charter* and the salient protections in the *Code* animate all aspects of the bail system: from imposition to breach. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the impositions of any bail conditions.

[76] I would also reject the position put forward by the AGBC because of the prevalence of bail conditions that fail to reflect the requirements for bail under the *Charter*, the *Code*, and this Court’s principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions. Many interveners described how, despite the fact that the default form of release should be an undertaking without conditions under s. 515(1), studies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an

mais soutient qu’on [TRADUCTION] « répond efficacement, au stade initial du processus, à la préoccupation légitime concernant les personnes marginalisées pour lesquelles le manquement aux conditions de mise en liberté sous caution pose un risque atténué » (m. interv. (PGCB), par. 3). Autrement dit, les préoccupations concernant le traitement des personnes marginalisées sont prises en compte dans les conditions mêmes qui sont imposées, ce qui écarte la nécessité d’une norme de faute subjective s’il y a un manquement à ces conditions.

[75] Je ne souscris pas à ce raisonnement. Cet argument repose sur une fausse dichotomie qui suppose qu’une analyse de la situation de la personne prévenue ne peut avoir lieu qu’à un seul stade du processus. Sur le plan conceptuel, il n’y a aucune raison pour laquelle les droits et intérêts de la personne prévenue devraient être abandonnés à l’une ou l’autre des étapes. Rien n’empêche une appréciation individualisée tant au moment où les conditions sont imposées qu’au moment du manquement. Les valeurs prônées dans l’arrêt *Antic* militent en faveur d’une approche cohérente et complémentaire selon laquelle les droits applicables garantis par la *Charte* et les principales protections conférées par le *Code* sous-tendent tous les aspects du système de mise en liberté sous caution : de l’imposition des conditions au manquement à celles-ci. Exiger une *mens rea* subjective renforce, reflète et respecte l’approche individualisée que commande l’imposition de toute condition de mise en liberté sous caution.

[76] Je rejetterais aussi la thèse avancée par le PGCB en raison de la prépondérance des conditions de mise en liberté sous caution qui ne reflètent pas les exigences de la mise en liberté sous caution prévues par la *Charte*, le *Code* et les principes qu’a énoncés la Cour dans l’arrêt *Antic*. En pratique, le nombre de conditions de mise en liberté sous caution inutiles et déraisonnables, et la croissance du nombre d’accusations de manquement à une condition mettent à mal l’argument selon lequel les conditions de mise en liberté sous caution sont suffisamment individualisées. Bon nombre de parties intervenantes ont expliqué qu’il ressort d’études effectuées partout au pays que, malgré le fait que la forme de mise en liberté par

individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice (see Sylvestre, Blomley and Bellot, at pp. 67-68; N. M. Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017), 57 *Brit. J. Criminol.* 664, at p. 677; Webster Report, at p. 7; John Howard Society of Ontario, *Reasonable Bail?* (September 2013) (online), at p. 11; CCLA Report, at pp. 48-49; Department of Justice, Research and Statistics Division, *Research in Brief: Assessments and Analyses of Canada's Bail System* (2018)). Research into bail conditions in Vancouver and Montreal suggests that the likelihood of an accused person being charged with breaching their bail conditions increases when they are subject to a greater number of conditions and a longer court order (Sylvestre, Blomley and Bellot, at pp. 67-68).

défaut devrait être une promesse sans condition en vertu du par. 515(1), la majorité des ordonnances de mise en liberté sous caution prévoient de nombreuses conditions, qui souvent ne tiennent manifestement pas compte des risques que pose la personne prévenue quant à son éventuelle omission d'être présente au tribunal, quant à la sécurité du public ou à la confiance envers l'administration de la justice (voir Sylvestre, Blomley et Bellot, p. 67-68; N. M. Myers, « Eroding the Presumption of Innocence : Pre-Trial Detention and the Use of Conditional Release on Bail » (2017), 57 *Brit. J. Criminol.* 664, p. 677; rapport Webster, p. 7; Société John Howard de l'Ontario, *Reasonable Bail?* (septembre 2013) (en ligne), p. 11; rapport de l'ACLC, p. 48-49; Ministère de la Justice, Division de la recherche et de la statistique, *Recherche en bref : Évaluations et analyses du système de mise en liberté sous caution du Canada* (2018)). Selon des recherches effectuées sur les conditions de mise en liberté sous caution à Vancouver et à Montréal, la probabilité qu'une personne prévenue soit accusée d'avoir manqué à ses conditions augmente lorsqu'elle est assujettie à un grand nombre de conditions et à une longue ordonnance judiciaire (Sylvestre, Blomley et Bellot, p. 67-68).

[77] Several factors contribute to the imposition of numerous and onerous bail conditions. Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions (*Tunney*, at para. 29; see also pp. 223-24 (Comment by T. Quigley); *Schab*, at para. 15; Friedland (2017); B. L. Berger and J. Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail", in B. L. Berger, E. Cunliffe and J. Stribopolous, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (2017), at pp. 308 and 323-24). In *Tunney*, Di Luca J. emphasized that this culture continues despite the directions of *Antic*. He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail" (para. 29).

[77] Plusieurs facteurs contribuent à l'imposition de conditions de mise en liberté nombreuses et sévères. Les tribunaux et les commentaires ont invariablement fait état d'une culture d'aversion du risque qui contribue à ce que les tribunaux imposent des conditions excessives (*Tunney*, par. 29; voir aussi p. 223-224 (commentaire de T. Quigley); *Schab*, par. 15; Friedland (2017); B. L. Berger et J. Stribopoulos, « Risk and the Role of the Judge : Lessons from Bail », dans B. L. Berger, E. Cunliffe et J. Stribopolous, dir., *To Ensure that Justice is Done : Essays in Memory of Marc Rosenberg* (2017), p. 308 et 323-324). Dans la décision *Tunney*, le juge Di Luca a souligné que cette culture se poursuit malgré les directives données dans l'arrêt *Antic*. Il a déclaré, avec raison selon moi, que [TRADUCTION] « la culture de l'aversion du risque doit être tempérée par les principes constitutionnels qui sous-tendent le droit à une mise en liberté assortie d'un cautionnement raisonnable » (par. 29).

[78] The expeditious nature of bail hearings also generates a culture of consent, which aggravates the lack of restraint in imposing excessive bail conditions. This is the practical reality of bail courts, which must work efficiently to minimize the time accused persons spend unnecessarily in pre-trial detention. As this Court has previously recognized, the timing and speed of bail hearings impacts accused persons by making it difficult to find counsel, resulting in many accused who are self-represented or reliant on duty counsel who are often given little time to prepare (*St-Cloud*, at para. 109). This process encourages accused persons to agree to onerous terms of release rather than run the risk of detention both before and after a contested bail hearing (see CCLA Report, at pp. 46-47; Pivot Report, at p. 79; Myers, at pp. 667 and 676-77; Sylvestre, Blomley and Bellot, at p. 118; Berger and Stribopolous, at p. 319; *R. v. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL), at para. 29). Where joint submissions are made, some observers have gone so far as to suggest that the Crown is rarely asked to justify the proposed conditions of release, which is “arguably a key contributing factor to the higher number of conditions imposed in consent release cases than would be expected based on the law” (C. Yule and R. Schumann, “Negotiating Release? Analysing Decision Making in Bail Court” (2019), 61 *Can. J. Crimin. & Crim. Just.* 45, at pp. 57-60).

[79] A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report, at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-25; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, “Using Court Orders to

[78] Le caractère expéditif des enquêtes sur le cautionnement engendre aussi une culture de consentement, qui aggrave le manque de retenue dans l'imposition de conditions de mise en liberté excessives. Il s'agit de la réalité pratique des tribunaux chargés des mises en liberté sous caution, qui doivent travailler efficacement pour réduire au minimum le temps que les personnes prévenues passent inutilement en détention avant le procès. Comme l'a déjà reconnu la Cour, le moment où ont lieu les enquêtes sur le cautionnement et la rapidité à laquelle elles se déroulent ont des conséquences sur les personnes prévenues du fait que cela rend difficile pour elles de se trouver de la représentation juridique. Ainsi, beaucoup d'entre elles ne sont pas représentées ou se fient au service de représentation du tribunal, qui ne dispose souvent que de peu de temps pour se préparer (*St-Cloud*, par. 109). Ce processus incite les personnes prévenues à consentir à des conditions sévères de mise en liberté plutôt qu'à courir le risque d'être détenues avant et après une enquête sur le cautionnement contestée (voir le rapport de la CCLA, p. 46-47; rapport Pivot, p. 79; Myers, p. 667 et 676-677; Sylvestre, Blomley et Bellot, p. 118; Berger et Stribopolous, p. 319; *R. c. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL), par. 29). Lorsque des propositions conjointes sont présentées, il a même été affirmé qu'on demande rarement à la Couronne de justifier les conditions de mise en liberté proposées, ce qui est [TRADUCTION] « peut-être un facteur clé qui contribue au grand nombre de conditions imposées dans les cas de libération sur consentement par rapport à ce à quoi on pourrait s'attendre selon la loi » (C. Yule et R. Schumann, « Negotiating Release? Analysing Decision Making in Bail Court » (2019), 61 *Rev. can. crim. just. pén.* 45, p. 57-60).

[79] Une troisième constatation en ce qui concerne la mise en liberté sous caution est que l'imposition de conditions sévères touche de façon disproportionnée les populations vulnérables et marginalisées (rapport de l'ACLC, p. 72-79). Les personnes vivant dans la pauvreté ou aux prises avec des problèmes de toxicomanie ou des maladies mentales ont souvent de la difficulté à respecter les conditions auxquelles elles ne sont pas raisonnablement en mesure

Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach” (2018), 65 *C.L.Q.* 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (see, e.g., *R. v. Murphy*, 2017 YKSC 34, at paras. 31-34 (CanLII); *Omeasoo*, at para. 44; CCLA Report, at pp. 75-79; J. Rogin, “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017), 95 *Can. Bar. Rev.* 325; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 57-60; also s. 493.2, as of December 18, 2019). The oft-cited CCLA Report provides the following trenchant summary:

Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime. [p. 1]

[80] The presence of too many unnecessary conditions and the prevalence of breach charges resulting from the imposition of excessive and onerous conditions is part of the relevant legislative context in interpreting s. 145(3) (Sullivan, at pp. 648-49). It is the same context to which Parliament has recently responded by amending the bail scheme. Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is functioning perfectly, when it clearly is not. There is no basis in theory or practice to accept that an individualized imposition of bail conditions

de se conformer (voir, p. ex., *Schab*, par. 24-25; *Omeasoo*, par. 33 et 37; *R. c. Coombs*, 2004 ABQB 621, 369 A.R. 215, par. 8; M. B. Rankin, « Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders : A Rights-Based Approach » (2018), 65 *C.L.Q.* 280). Les personnes autochtones, surreprésentées au sein du système de justice criminelle, sont aussi touchées de façon disproportionnée par l'imposition de conditions de mise en liberté sous caution inutiles et déraisonnables et des accusations pour manquement qui en découlent (voir, p. ex., *R. c. Murphy*, 2017 YKSC 34, par. 31-34 (CanLII); *Omeasoo*, par. 44; rapport de l'ACLC, p. 75-79; J. Rogin, « Gladue and Bail : The Pre-Trial Sentencing of Aboriginal People in Canada » (2017), 95 *R. du B. can.* 325; *Ewert c. Canada*, 2018 CSC 30, [2018] 2 R.C.S. 165, par. 57-60; voir aussi la version de l'art. 493.2 en vigueur en date du 18 décembre 2019). On retrouve dans le rapport souvent cité de l'ACLC le résumé percutant suivant :

[TRADUCTION] Les tribunaux canadiens chargés des mises en liberté sous caution imposent régulièrement l'abstinence à des personnes alcooliques ou toxicomanes, des conditions de résidence à des sans-abri, des exigences de contrôle strictes dans des lieux difficiles d'accès, des conditions interdisant les contacts entre des membres d'une même famille et des couvre-feux stricts qui perturbent l'emploi et la vie quotidienne. De nombreuses conditions restrictives, imposées pour de longues périodes de temps, font en sorte que les personnes échouent; or, l'omission de se conformer à une condition de mise en liberté sous caution est une infraction criminelle, même si le comportement qui sous-tend cette infraction ne constitue pas par ailleurs un acte criminel. [p. 1]

[80] La présence d'un trop grand nombre de conditions inutiles et le caractère généralisé des accusations de manquement découlant de l'imposition de conditions excessives et sévères font partie du contexte législatif pertinent pour l'interprétation du par. 145(3) (Sullivan, p. 648-649). Il s'agit du même contexte pour lequel le Parlement est récemment intervenu en modifiant le régime de mise en liberté sous caution. On ne peut présumer que les conditions de mise en liberté sous caution sont suffisamment individualisées et la Cour ne prétendra pas que le régime actuel fonctionne parfaitement, alors que ce

at the front end shows a clear intent to displace the presumed subjective fault standard. Indeed, the consistent and convincing studies presented to the Court illustrate the need to articulate, with greater precision and increased urgency, how Parliament's intent to punish those who intentionally breach their bail conditions under s. 145(3), while ensuring their right to reasonable bail on the least onerous terms necessary, requires those in the bail system to exercise restraint and carefully review conditions for compliance with the *Charter*, the *Code*, and *Antic*. It is to that task that I now turn.

V. Restraint and Review: Necessary and Reasonable Bail Conditions and Section 145(3)

[81] In *Antic*, this Court set out the proper approach to the *Code*'s bail provisions when it addressed the overuse of cash bail and sureties. As issues concerning bail are particularly evasive of review (see *Penunsi*, at para. 11), it has become necessary to build upon the *Antic* framework and provide guidance on non-monetary conditions of bail and the serious consequences which flow from their breach.

[82] We can learn a great deal about how to set bail conditions upon seeing how they become criminal offences under s. 145(3). Each condition added onto a release order not only limits the freedom of someone presumed to be innocent, it creates a new risk of criminal liability, particular to the accused, and may result in the loss of liberty, whether through bail revocation or imprisonment. The direct connection between the behaviour addressed in bail conditions and

n'est manifestement pas le cas. Il n'y a aucun fondement théorique ou pratique justifiant d'accepter qu'une imposition individualisée de conditions de mise en liberté sous caution dès le départ démontre une intention claire d'écarter la norme présumée de faute subjective. De fait, les études concordantes et convaincantes présentées à la Cour illustrent la nécessité d'exposer, avec davantage de précision et d'insistance, comment l'intention du Parlement de sanctionner les personnes qui manquent intentionnellement à leurs conditions de mise en liberté sous caution aux termes du par. 145(3), tout en garantissant leur droit à une mise en liberté assortie d'un cautionnement raisonnable et des conditions nécessaires les moins sévères possible, exige que les acteurs du système de mise en liberté sous caution agissent avec retenue et examinent attentivement les conditions pour s'assurer qu'elles sont conformes à la *Charte*, au *Code* et à l'arrêt *Antic*. C'est ce que je vais maintenant faire.

V. Retenue et révision : conditions de mise en liberté sous caution nécessaires et raisonnables et par. 145(3)

[81] Dans l'arrêt *Antic*, lorsqu'elle s'est penchée sur le recours excessif au cautionnement en espèces et aux cautions, la Cour a énoncé l'approche à adopter pour l'application des dispositions relatives à la mise en liberté sous caution du *Code*. Comme les questions concernant ce sujet sont particulièrement susceptibles d'échapper à l'examen judiciaire (voir *Penunsi*, par. 11), il est devenu nécessaire de reprendre le cadre énoncé dans l'arrêt *Antic* pour donner des indications sur l'imposition de conditions non pécuniaires de mise en liberté sous caution et les graves conséquences qui découlent du manquement à celles-ci.

[82] Nous pouvons en apprendre beaucoup sur la façon de fixer des conditions de mise en liberté sous caution lorsqu'on voit comment elles peuvent devenir des infractions criminelles aux termes du par. 145(3). Chaque condition ajoutée à une ordonnance de mise en liberté non seulement limite la liberté d'une personne présumée innocente, mais crée un nouveau risque de responsabilité criminelle, propre à la personne prévenue, et peut conduire à une

the conduct which is criminalized under s. 145(3) flows both ways. The individualized process of setting bail conditions moves forward into and informs the subjective fault standard for breach. Conversely, understanding how s. 145(3) gives rise to potential criminal liability reinforces that the principles of restraint and review must guide the initial decision to impose bail conditions in practice. Section 145(3) therefore provides an essential perspective through which we can consider the general bail principles; concerns over specific conditions; and how all those involved in the bail system have responsibilities in respect of restraint and review.

A. *General Principles Governing Bail Conditions*

[83] All those involved in setting bail terms must turn their minds to the general principles for setting bail, which restrain how bail conditions are set. As the default position in the *Code* is bail without conditions, the first issue is whether a need for any condition has been demonstrated. Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?

perte de liberté, que ce soit en raison de la révocation de la mise en liberté sous caution ou d'un emprisonnement. Le lien direct entre le comportement visé dans les conditions de mise en liberté sous caution et la conduite qui est criminalisée au par. 145(3) peut s'établir dans les deux sens. Le processus individualisé d'établissement des conditions de mise en liberté sous caution donne lieu à la norme de faute subjective applicable au manquement et sert de base à celle-ci. À l'inverse, le fait de comprendre la façon dont le par. 145(3) pourrait entraîner une responsabilité criminelle renforce la règle selon laquelle les principes de retenue et de révision doivent dans les faits orienter la décision initiale d'imposer des conditions de mise en liberté sous caution. Le paragraphe 145(3) apporte donc une perspective essentielle par laquelle nous pouvons prendre en considération les principes généraux de mise en liberté sous caution; les préoccupations concernant des conditions précises; et la façon dont toutes les personnes jouant un rôle dans le système de mise en liberté sous caution ont des responsabilités en matière de retenue et de révision.

A. *Principes généraux régissant les conditions de mise en liberté sous caution*

[83] Toutes les personnes qui jouent un rôle dans l'établissement des conditions de mise en liberté sous caution doivent se reporter aux principes généraux en cette matière, qui restreignent la façon dont les conditions sont établies. Comme le *Code* prévoit par défaut la mise en liberté sans condition, la première question consiste à savoir s'il a été démontré que l'imposition de conditions est nécessaire. Selon les principes de retenue et de l'échelle, quiconque propose d'ajouter des conditions de mise en liberté sous caution doit chercher à savoir si l'un des risques mentionnés au par. 515(10) est en cause et comprendre quels risques précis se poseraient si la personne prévenue était libérée sans condition : cette personne présente-t-elle un risque de fuite, sa mise en liberté pose-t-elle un risque pour la protection ou la sécurité du public ou est-elle susceptible de miner la confiance du public envers l'administration de la justice?

[84] Only conditions which target those specific s. 515(10) risk(s) are necessary. If an accused is a flight risk, but poses no other risks, only those conditions that minimize their risk of absconding should be imposed. Similarly, if an accused poses a risk to public safety and protection, only the least onerous conditions to address that specific threat should be imposed (*R. v. S.K.*, 1998 CanLII 13344 (Sask. Prov. Ct.), at paras. 16-19). Further, such conditions will not be necessary for public protection and safety merely because an accused poses a risk of committing another offence while on bail, unless they pose a “substantial likelihood” of committing an offence that endangers public protection and safety (*Morales*, at pp. 736-37; s. 515(10)(b)). Any condition imposed to maintain confidence in the administration of justice must be based on a consideration of the combined effect of all the relevant circumstances from the perspective of a reasonable member of the public, especially the four factors set out in s. 515(10)(c): the apparent strength of the prosecution’s case, the gravity of the offence, the circumstances surrounding the commission of the offence, and whether the accused is liable for a potential lengthy term of imprisonment (*St-Cloud*, at paras. 55-71 and 79).

[85] The requirement of necessity also means that the particular condition must attenuate risks that would otherwise prevent the accused’s release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes (*Antic*, at para. 67(j); *Birtchnell*, at paras. 27-28; *R. v. McDonald*, 2010 ABQB 770, at paras. 34-36 (CanLII)). A condition that may be suitable for a sentencing purpose, like rehabilitation, will not be appropriate unless it is directed towards the risks in s. 515(10) (*Omeasoo*, at para. 31). Conditions should not be behaviourally-based (*R. v. K. (R.)*, 2014 ONCJ 566, at paras. 14-19 (CanLII); *J.A.D.*, at paras. 9 and 11). A condition that merely seems “good to have”, but is not necessary for the accused’s release, is not appropriate (*Birtchnell*, at para. 40). Even if some condition is thought to be therapeutic, intended to help, or “couldn’t hurt”, the prospect of additional criminal

[84] Seules les conditions qui ciblent les risques précis mentionnés au par. 515(10) sont nécessaires. Si la personne prévenue pose un risque de fuite, mais aucun autre risque, seules les conditions qui réduisent ce risque au minimum devraient être imposées. De même, si la personne prévenue pose un risque pour la sécurité ou la protection du public, seules les conditions les moins sévères possible pour répondre à cette menace précise devraient être imposées (*R. c. S.K.*, 1998 CanLII 13344 (C. prov. Sask.), par. 16-19). De plus, de telles conditions ne seront pas nécessaires pour la protection ou la sécurité du public simplement du fait qu’il est possible que la personne prévenue commette une autre infraction pendant sa mise en liberté sous caution, à moins qu’il n’y ait une « probabilité marquée » qu’elle commette une infraction compromettant la protection ou la sécurité du public (*Morales*, p. 736-737; al. 515(10)(b)). Toute condition imposée pour ne pas miner la confiance du public envers l’administration de la justice doit être fondée sur l’examen, du point de vue d’un membre raisonnable du public, de l’effet combiné de toutes les circonstances pertinentes, et tout particulièrement des quatre facteurs énoncés à l’al. 515(10)(c) : le fait que l’accusation paraît fondée, la gravité de l’infraction, les circonstances entourant sa perpétration et la question de savoir si la personne prévenue encourt une longue peine d’emprisonnement (*St-Cloud*, par. 55-71 et 79).

[85] L’exigence de nécessité signifie aussi que la condition particulière doit atténuer les risques qui empêcheraient autrement la libération de la personne prévenue sans cette condition. Les conditions ne peuvent être imposées de façon injustifiée ou dans un but punitif (*Antic*, par. 67(j); *Birtchnell*, par. 27-28; *R. c. McDonald*, 2010 ABQB 770, par. 34-36 (CanLII)). Une condition qui peut convenir en vue d’un objectif de détermination de la peine, comme la réadaptation, ne sera pas appropriée à moins qu’elle ne vise à répondre aux risques prévus au par. 515(10) (*Omeasoo*, par. 31). Les conditions ne devraient pas être fondées sur un comportement (*R. c. K. (R.)*, 2014 ONCJ 566, par. 14-19 (CanLII); *J.A.D.*, par. 9 et 11). Une condition qui semble simplement [TRADUCTION] « bonne à avoir », mais qui n’est pas nécessaire pour la mise en liberté de la personne prévenue, n’est pas appropriée (*Birtchnell*, par. 40). Même si une

liability under s. 145(3) means any such limits on otherwise lawful behavior may also attract criminal penalties. Restraint was emphasized by the Court in *Antic*, at para. 67(j):

Terms of release imposed under s. 515(4) may “only be imposed to the extent that they are necessary” to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person. [Footnote omitted.]

[86] Moreover, bail conditions must be sufficiently linked to the defined statutory risks. They should be as narrowly defined as possible to meet their objective of addressing the risks under s. 515(10) (*R. v. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL), at paras. 14-17; *R. v. Pammett*, 2014 ONSC 5597, at paras. 10-12 (CanLII); *R. v. Clarke*, [2000] O.J. No. 5738 (QL) (Sup. Ct.), at paras. 9 and 12; *K. (R.)*, at paras. 14-19; *J.A.D.*, at paras. 9 and 11). As with the setting of probation conditions, the level of connection between a non-enumerated condition and a risk under s. 515(10) should be comparable to the clear linkages between the enumerated conditions in s. 515(4) and the risks under s. 515(10) (*R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, at paras. 13-14). This Court in *Penunsi* recently emphasized this in relation to conditions on peace bonds:

Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach . . . Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail. [Citations omitted; para. 80.]

[87] A bail condition must be reasonable. As with probation conditions, bail conditions cannot contravene federal or provincial legislation or the *Charter* (*Shoker*, at para. 14). The enumerated bail

condition donnée se veut thérapeutique, vise à aider ou « ne pourrait pas faire de mal », la possibilité qu’une responsabilité criminelle additionnelle soit engagée en vertu du par. 145(3) signifie que de telles limites à un comportement qui serait autrement légal pourraient aussi entraîner des sanctions pénales. La Cour insiste sur la retenue dans l’arrêt *Antic*, au par. 67j) :

Les conditions de mise en liberté visées au par. 515(4) ne peuvent [TRADUCTION] « être imposées que dans la mesure où elles sont nécessaires » pour dissiper les préoccupations liées aux critères légaux de détention et pour permettre la mise en liberté de [la personne accusée]. Elles ne doivent pas être imposées pour modifier le comportement de [la personne accusée] ou pour [la] punir. [Note en bas de page omise.]

[86] De plus, les conditions de mise en liberté sous caution doivent être suffisamment liées aux risques définis dans la loi. Elles devraient être définies aussi étroitement que possible pour réaliser leur objectif de répondre aux risques prévus au par. 515(10) (*R. c. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL), par. 14-17; *R. c. Pammett*, 2014 ONSC 5597, par. 10-12 (CanLII); *R. c. Clarke*, [2000] O.J. No. 5738 (QL) (C.S.), par. 9 et 12; *K. (R.)*, par. 14-19; *J.A.D.*, par. 9 et 11). Comme pour l’établissement des conditions de probation, le lien entre une condition non énumérée et un risque prévu au par. 515(10) devrait être comparable aux liens évidents entre les conditions énumérées au par. 515(4) et les risques prévus au par. 515(10) (*R. c. Shoker*, 2006 CSC 44, [2006] 2 R.C.S. 399, par. 13-14). Récemment, dans l’arrêt *Penunsi*, la Cour l’a souligné en ce qui a trait aux conditions relatives aux engagements de ne pas troubler l’ordre public :

Lorsqu’elle n’est pas manifestement rattachée à la crainte alléguée, la condition risque davantage d’amener [la partie défenderesse] à ne pas la respecter [. . .] Aucune condition ne devrait être sévère au point de constituer dans les faits une ordonnance de détention en vouant [la partie défenderesse] à l’échec. [Références omises; par. 80.]

[87] Les conditions de mise en liberté sous caution doivent être raisonnables. Comme pour les conditions de probation, les conditions de mise en liberté sous caution ne peuvent contrevenir à une

conditions in s. 515(4) to (4.2) help inform the extent of discretion a judicial official has in imposing other reasonable non-enumerated bail conditions (*Shoker*, at para. 14). Conditions must be clear, minimally intrusive, and proportionate to any risk. Conditions will also only be reasonable if they realistically can and will be met by the accused, as “[r]equiring the accused to perform the impossible is simply another means of denying judicial interim release” by setting them up to fail, as well as adding the risk that the accused will be criminally charged for failing to comply (*Omeasoo*, at paras. 33 and 37-38; see also *Penunsi*, at para. 80). As noted by Rosborough J. in *Omeasoo*, removing an unreasonable condition will not cause any more risk to the community than imposing a condition that is impossible for the accused to respect (para. 39). Reasonable conditions also must not limit the *Charter* rights of an accused, such as their freedom of expression or association, unless that condition is reasonably connected and necessary to address the accused’s risk of absconding, harming public safety, or causing loss of confidence in the administration of justice (*R. v. Manseau*, [1997] AZ-51286266 (Que. Sup. Ct.); *Clarke*).

[88] Bail conditions are to be tailored to the individual risks posed by the accused. There should not be a list of conditions inserted by rote. The only bail condition that should be routinely added is the condition to attend court (*Birtchnell*, at para. 6), as well as those conditions that must be considered for certain offences under s. 515(4.1) to (4.3). There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behavior modification is viewed

loi fédérale ou provinciale ou encore à la *Charte* (*Shoker*, par. 14). Les conditions de mise en liberté sous caution énumérées aux par. 515(4) à (4.2) aident à déterminer l’étendue du pouvoir discrétionnaire dont dispose l’entité judiciaire pour imposer d’autres conditions raisonnables non énumérées de mise en liberté sous caution (*Shoker*, par. 14). Les conditions doivent être claires, peu intrusives et proportionnées à tout risque posé. Aussi, elles ne seront raisonnables que si, de façon réaliste, elles peuvent être et seront respectées par la personne prévenue, car [TRADUCTION] « [e]xiger que la personne prévenue soit tenue à l’impossible ne constitue qu’un autre moyen de la priver d’une mise en liberté provisoire par voie judiciaire » en faisant en sorte qu’elle échoue, en plus de lui faire courir le risque d’engager sa responsabilité criminelle si elle omet de se conformer à une condition (*Omeasoo*, par. 33 et 37-38; voir aussi *Penunsi*, par. 80). Comme l’a noté le juge Rosborough dans la décision *Omeasoo*, le retrait d’une condition déraisonnable n’exposera pas la collectivité à plus de risques que l’imposition d’une condition impossible à respecter pour la personne prévenue (par. 39). Les conditions raisonnables ne doivent pas non plus restreindre les droits garantis par la *Charte* à la personne prévenue, comme la liberté d’expression ou d’association, à moins que la condition soit raisonnablement liée aux risques que pose la personne prévenue, soit le risque de fuite, le risque d’atteinte à la sécurité du public ou le risque que le public perde confiance envers l’administration de la justice, ou qu’elle soit nécessaire pour répondre à de tels risques (*R. c. Manseau*, [1997] AZ-51286266 (C.S. Qc); *Clarke*).

[88] Les conditions de mise en liberté sous caution doivent être adaptées aux risques individuels que pose la personne prévenue. On ne devrait pas imposer machinalement une liste de conditions. La seule condition de mise en liberté sous caution qui devrait être systématiquement imposée est celle qui exige la présence au tribunal de la personne prévenue (*Birtchnell*, par. 6), ainsi que celles qui doivent être envisagées pour certaines infractions aux termes des par. 515(4.1) à (4.3). Le recours à des listes de vérification pour passer en revue les conditions possibles ne pose aucun problème. Il n’y a problème que si

as desirable. Bail conditions may be easy to list, but hard to live.

[89] In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?
- Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?
- Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?
- Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?

des conditions sont simplement ajoutées, non parce qu'elles sont strictement nécessaires, mais simplement par habitude, parce que la personne prévenue y a consenti ou parce qu'un changement de comportement serait considéré comme souhaitable. Les conditions de mise en liberté sous caution peuvent être faciles à imposer, mais difficiles à vivre.

[89] En résumé, les questions suivantes peuvent aider à structurer l'analyse afin que les principes de retenue et de révision fassent réellement partie intégrante de l'élaboration de conditions de mise en liberté sous caution appropriées :

- Si elle était libérée sans condition, la personne prévenue poserait-elle un risque précis prévu par la loi qui justifie l'imposition de conditions de mise en liberté sous caution? Si la personne prévenue est libérée sans condition, existe-t-il un risque qu'elle ne se présente pas au tribunal au moment exigé, qu'il y ait atteinte à la sécurité ou à la protection du public ou que soit minée la confiance du public envers l'administration de la justice?
- La condition est-elle nécessaire? Si la condition n'était pas imposée, y aurait-il un risque de fuite de la part de la personne prévenue, un risque d'atteinte à la protection ou à la sécurité du public ou un risque que le public perde confiance envers l'administration de la justice, qui empêcherait le tribunal de libérer la personne prévenue sur remise d'une promesse sans condition?
- La condition est-elle raisonnable? La condition est-elle claire et proportionnelle au risque que pose la personne prévenue? Peut-on s'attendre à ce que la personne prévenue respecte la condition de façon sécuritaire et raisonnable? Sur le fondement de ce que l'on sait de la personne prévenue, est-il probable que ses conditions de vie, sa dépendance, son handicap ou sa maladie fassent en sorte qu'elle serait incapable de se conformer à la condition?
- La condition est-elle suffisamment liée aux motifs de détention prévus à l'al. 515(10)c)? Se limite-t-elle à répondre au risque précis que pose la libération de la personne prévenue?

- What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

[90] When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail?

- Quel est l'effet cumulatif de toutes les conditions? Prises ensemble, constituent-elles les conditions les moins nombreuses et les moins sévères nécessaires dans les circonstances?

Ces questions sont interreliées et n'ont pas besoin d'être abordées dans un ordre particulier, ni d'être posées et de recevoir une réponse concernant chaque condition dans tous les cas. Compte tenu des considérations d'ordre pratique des tribunaux chargés des remises en liberté sous caution, qui sont très occupés, il n'est ni réaliste ni souhaitable d'exiger que les entités judiciaires se penchent sur les conditions qui ne soulèvent pas de préoccupations particulières. Ce qui importe est que quiconque participe à l'établissement des conditions de mise en liberté sous caution recoure à ce type de questions pour orienter les politiques et évaluer quelles conditions devraient être visées et imposées.

[90] Lorsque l'on examine le caractère approprié des conditions de mise en liberté sous caution, il faut garder à l'esprit que l'infraction criminelle créée au par. 145(3) non seulement recommande la retenue et la révision, mais fournit un cadre de référence additionnel qui intègre des considérations de proportionnalité dans l'évaluation. Étant donné la relation directe entre l'imposition de conditions et le manquement, les évaluations de la nécessité et du caractère raisonnable dont il est question dans l'arrêt *Antic* devraient aussi tenir compte du fait que les omissions de se conformer aux conditions imposées deviennent des crimes distincts contre l'administration de la justice. Par conséquent, la question est la suivante : est-il nécessaire et raisonnable d'imposer cette condition susceptible d'entraîner une responsabilité criminelle, alors que l'on sait que le manquement peut donner lieu à une privation de liberté en raison d'une accusation ou d'une déclaration de culpabilité au titre du par. 145(3)? En résumé, lors de l'examen de la question de savoir si une condition proposée répond à un risque établi et précis, il faut chercher à savoir s'il serait proportionné qu'un manquement à cette condition constitue une infraction criminelle ou devienne une raison de révoquer la mise en liberté sous caution.

B. *Specific Conditions*

[91] I now address some specific non-enumerated conditions commonly included in release orders. Many of these types of conditions were in Mr. Zora's release order. As stated above, the criminalization of non-compliance with conditions under s. 145(3) means the principles of restraint and review call for increased scrutiny to determine if a particular type of condition is necessary, reasonable, least onerous, and sufficiently linked to a risk listed in s. 515(10). The discussion of specific conditions below demonstrates how these common types of conditions must be scrutinized.

[92] First, judicial officials should be wary of conditions that may be directed to symptoms of mental illness. This includes alcohol and drug abstinence conditions for an accused with an alcohol or drug addiction. If an accused cannot possibly abide by such a condition, then it will not be reasonable (*Penunsi*, at para. 80; *Omeasoo*, at para. 37-38). In addition, rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition — a condition will only be appropriate if it is necessary to address the accused's specific risks. Subjecting individuals who are presumed innocent to abstinence conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstinence may present substantial risk to the health and well-being of that person" and even "give rise to potentially lethal withdrawal effects" (*R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, at paras. 14-15; see also John Howard Society of Ontario, at pp. 12-13). If an abstinence condition is necessary, the condition must be fine-tuned to target the actual risk to public safety, for example, by prohibiting the accused from drinking alcohol outside of their home if their alleged offences occurred when they were drunk outside of their house (*Omeasoo*, at para. 42). Those seeking and imposing bail conditions should also be aware that an accused's substance use disorder, or any other mental illness, may

B. *Conditions précises*

[91] Je me penche maintenant sur certaines conditions précises non énumérées couramment incluses dans les ordonnances de mise en liberté. Bon nombre de ces types de conditions se retrouvaient dans l'ordonnance de mise en liberté de M. Zora. Comme je l'ai déjà indiqué, en raison de la criminalisation des manquements aux conditions aux termes du par. 145(3), les principes de retenue et de révision commandent un examen approfondi pour établir si un type particulier de condition est nécessaire, raisonnable, le moins sévère possible et suffisamment lié à un risque mentionné au par. 515(10). L'analyse de conditions précises qui suit montre de quelle façon ces types courants de conditions doivent être examinés.

[92] Premièrement, les entités judiciaires doivent être prudentes pour ce qui est des conditions pouvant viser des symptômes de maladie mentale, comme les conditions interdisant de consommer à des personnes prévenues ayant un problème d'alcoolisme ou de toxicomanie. Si la personne prévenue ne peut respecter une telle condition, alors celle-ci n'est pas raisonnable (*Penunsi*, par. 80; *Omeasoo*, par. 37-38). De plus, la réadaptation ou le traitement d'une dépendance ou d'une autre maladie ne constitue pas un objectif approprié pour une condition de mise en liberté sous caution — une condition ne sera appropriée que si elle est nécessaire pour répondre aux risques précis que pose la personne prévenue. Assujettir des personnes qui sont présumées innocentes à des conditions d'abstinence pourrait dans les faits les punir pour ce qui est reconnu comme étant un problème de santé : [TRADUCTION] « si l'individu souffre d'alcoolisme, l'abstinence absolue pourrait présenter un risque important pour sa santé et son bien-être » et même « avoir éventuellement des effets de sevrage létaux » (*R. c. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, par. 14-15; voir aussi la Société John Howard de l'Ontario, p. 12-13). S'il est nécessaire d'imposer une condition d'abstinence, celle-ci doit être rédigée avec soin pour viser le risque réel pour la sécurité publique, par exemple, en interdisant à la personne prévenue de consommer de l'alcool à l'extérieur de son domicile si les infractions reprochées

yet be undiagnosed. And, where necessary, liberal use should be made of the bail review and variation provisions under ss. 520, 521 and 523 to accommodate these circumstances. Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve.

[93] Second, other behavioural conditions that are intended to rehabilitate or help an accused person will not be appropriate unless the conditions are necessary to address the risks posed by the accused. As described by Cheryl Webster in her report for the Department of Justice, “conditions such as ‘attend school’ or ‘attend counselling/treatment’ may serve broader social welfare objectives but are [usually] unrelated to the actual offence alleged to have been committed” (Webster Report, at p. 7). There may be exceptions, such as in *S.K.*, where the judge found that an “attend school” condition was sufficiently linked to the accused’s risks. However, even if a condition seems sufficiently linked to an accused’s risks, the question is also whether the condition is proportional: imposing such conditions means that the accused could be convicted of a criminal offence for skipping a day of school.

[94] Third, the condition to “keep the peace and be of good behaviour” is a required condition in probation orders, conditional sentence orders, and peace bonds, but is not a required condition for bail (*S.K.*, at para. 39). It should be rigorously reviewed when proposed as a condition of bail. This generic condition is

ont eu lieu alors qu’elle était ivre et qu’elle ne se trouvait pas chez elle (*Omeasoo*, par. 42). Quiconque sollicite ou impose des conditions de mise en liberté sous caution devrait aussi tenir compte du fait qu’il est possible que le problème de la personne prévenue lié à la consommation d’une substance, ou toute autre maladie mentale dont elle pourrait souffrir, n’ait pas encore été diagnostiqué. De plus, au besoin, on devrait recourir abondamment aux dispositions relatives à la révision et à la modification de la mise en liberté sous caution prévues aux art. 520, 521 et 523 pour tenir compte de telles circonstances. La mise en liberté sous caution est un processus dynamique d’évaluation continue, une collaboration entre toutes les parties qui jouent un rôle dans l’élaboration des conditions les plus raisonnables et les moins sévères possible, même au fil de l’évolution de la situation.

[93] Deuxièmement, d’autres conditions liées au comportement qui visent à réadapter ou aider la personne prévenue ne seront pas appropriées à moins qu’elles soient nécessaires pour répondre aux risques que pose cette dernière. Comme l’a expliqué Cheryl Webster dans son rapport pour le ministère de la Justice, « des conditions comme l’obligation de “fréquenter l’école” ou “de suivre une thérapie ou un traitement” peuvent s’inscrire dans l’atteinte d’objectifs sociaux plus vastes, mais elles n’ont [généralement] aucun lien avec l’infraction alléguée » (rapport Webster, p. 11). Il peut y avoir des exceptions, comme dans la décision *S.K.*, où la juge a conclu que la condition de [TRADUCTION] « fréquenter l’école » était suffisamment liée aux risques que posait la personne prévenue. Toutefois, même si une condition semble suffisamment liée aux risques que pose la personne prévenue, la question est aussi de savoir si la condition est proportionnelle : l’imposition de telles conditions a pour conséquence que la personne prévenue pourrait être déclarée coupable d’une infraction criminelle pour avoir manqué une journée d’école.

[94] Troisièmement, la condition de [TRADUCTION] « ne pas troubler l’ordre public et avoir une bonne conduite » est obligatoire pour les ordonnances de probation, les ordonnances de sursis et les engagements à ne pas troubler l’ordre public, mais pas pour une mise en liberté sous caution (*S.K.*,

usually understood as prohibiting the accused from breaching the peace or violating any federal, provincial, or municipal statute (*R. v. Grey* (1993), 19 C.R. (4th) 363 (Ont. C.J.); *R. v. D.R.* (1999), 178 Nfld. & P.E.I.R. 200 (Nfld. C.A.); *R. v. Gosai*, [2002] O.J. No. 359 (QL) (Sup. Ct.), at paras. 18-28). Because a breach of a bail condition is a criminal offence, this condition “adds a new layer of sanction, not just to criminal behavior, but to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality” and “is not in harmony with the presumption of innocence” that usually applies when an accused is on bail (*R. v. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331, at paras. 16-17; see also *R. v. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134, at paras. 17 and 20; Trotter at pp. 6-41 to 6-44). Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary, least onerous, and sufficiently linked to an accused’s flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice (see *S.K.*, at para. 39).

[95] Fourth, broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth. In *J.A.D.*, the Court of Queen’s Bench for Saskatchewan found that such a condition was void for vagueness and an improper delegation of the judicial function (para. 11). These types of conditions prevent the accused from understanding what they must do to avoid violating their condition, as the rules of the house can change based on the whims of

par. 39). Il faudrait sérieusement l’examiner lorsqu’elle est proposée comme condition de mise en liberté sous caution. Cette condition générique est habituellement considérée comme une interdiction pour la personne prévenue de troubler la paix ou de violer toute loi fédérale ou provinciale ou tout règlement municipal (*R. c. Grey* (1993), 19 C.R. (4th) 363 (C.J. Ont.); *R. c. D.R.* (1999), 178 Nfld. & P.E.I.R. 200 (C.A. T.-N.); *R. c. Gosai*, [2002] O.J. No. 359 (QL) (C.S.), par. 18-28). Comme un manquement à une condition de mise en liberté sous caution constitue une infraction criminelle, cette condition [TRA-DUCTION] « ajoute un nouveau niveau de sanction, pas seulement à l’égard d’un comportement criminel, mais aussi de toute violation de règlement, pouvant aller du non-respect de la limite de vitesse sur les biens fonciers fédéraux, comme les aéroports, au non-respect d’un règlement municipal sur le port de la laisse pour les chiens » et « n’est pas compatible avec la présomption d’innocence » qui s’applique habituellement lorsque la personne prévenue est en liberté sous caution (*R. c. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331, par. 16-17; voir aussi *R. c. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134, par. 17 et 20; Trotter, par. 6-41 à 6-44). Étant donné la large portée de la condition, il est difficile de voir en quoi l’imposition à la personne prévenue d’une interdiction additionnelle pour la violation de toute règle de droit substantiel, que ce soit une contravention routière ou l’omission d’enregistrer un chien, pourrait être raisonnable, nécessaire, le moins sévère possible et suffisamment liée au risque de fuite de la personne prévenue, au risque pour la sécurité ou la protection du public ou au risque que la confiance du public envers l’administration de la justice soit minée (voir *S.K.*, par. 39).

[95] Quatrièmement, les conditions larges qui exigent que la personne prévenue suive les règles de la maison ou y soit assujettie, ou qu’elle suive les instructions légitimes du personnel dans une résidence, peuvent poser problème, particulièrement pour les jeunes personnes prévenues. Dans *J.A.D.*, la Cour du Banc de la Reine de la Saskatchewan a conclu qu’une telle condition était nulle pour cause d’imprécision et délégation irrégulière de la fonction judiciaire (par. 11). Ces types de conditions empêchent la personne prévenue de comprendre ce qu’elle doit faire

the person who sets them (*K. (R.)*, at paras. 19-22). Imposing a condition that delegates the creation of bail rules to a surety or anyone else bypasses the judicial official's obligation to uphold the principles of restraint and review and assess whether the rules of the house truly address any of the risks posed by the accused.

pour éviter de manquer à la condition, étant donné que les règles de la maison peuvent changer au gré de la personne qui les fixe (*K. (R.)*, par. 19-22). Imposer une condition qui délègue la création de règles de mise en liberté sous caution à une caution (ou à quiconque) contourne l'obligation de l'entité judiciaire de respecter les principes de retenue et de révision et d'évaluer si les règles de la maison répondent véritablement aux risques que pose la personne prévenue.

[96] Fifth, certain conditions may cause perverse consequences or unintended negative impacts on the safety of the accused or the public. These unintended effects underscore the need for careful and rigorous review of each bail condition. For example, a condition that prevents an accused person from using a cellphone may prevent them from calling for help in the event of an emergency or inhibit their ability to work or care for dependents (*Prychitko*, at paras. 19-25; Trotter, at pp. 6-44 to 6-45). Other conditions may hinder the administration of justice by punishing accused persons who are otherwise the victims of crime. In *Omeasoo*, police responded to a complaint of domestic assault where Ms. Omeasoo was the victim. However, she was arrested and charged for failure to comply because she had consumed alcohol contrary to her bail condition (para. 6). She was therefore charged for the offence of being intoxicated while being the victim of an assault. While one hopes that prosecutorial discretion would help prevent these types of unintended consequences, such conditions may become a disincentive to reporting serious crime and significantly increase the vulnerability of certain people.

[96] Cinquièmement, certaines conditions peuvent avoir des conséquences malencontreuses ou des incidences négatives non voulues sur la sécurité de la personne prévenue ou du public. Ces effets non voulus mettent en évidence la nécessité de réviser attentivement et rigoureusement chacune des conditions de mise en liberté sous caution. Par exemple, une condition qui empêche la personne prévenue d'utiliser un téléphone cellulaire peut l'empêcher d'appeler à l'aide en cas d'urgence ou faire obstacle à sa capacité de travailler ou de s'occuper de personnes à charge (*Prychitko*, par. 19-25; Trotter, p. 6-44 à 6-45). D'autres conditions peuvent entraver l'administration de la justice en punissant des personnes prévenues qui sont par ailleurs victimes d'actes criminels. Dans la décision *Omeasoo*, la police a répondu à une plainte de violence familiale, dont M^{me} Omeasoo était la victime. Cependant, cette dernière a été arrêtée et inculpée d'omission de se conformer à une condition parce qu'elle avait consommé de l'alcool, ce qui était contraire à sa condition de mise en liberté sous caution (par. 6). Elle a donc été accusée de l'infraction d'être en état d'ébriété alors qu'elle était victime d'une agression. Certes, on espère que le pouvoir discrétionnaire de la poursuite aide à empêcher ce type de conséquences non voulues, mais de telles conditions peuvent décourager la dénonciation de crimes graves et augmenter considérablement la vulnérabilité de certaines personnes.

[97] Further examples of conditions with perverse consequences include "red zone" conditions which prevent an accused from entering a certain geographical area and "no drug paraphernalia" conditions. These conditions may have especially significant impacts on marginalized accused persons. "Red zone" conditions can isolate people

[97] Mentionnons comme autres exemples de conditions ayant des conséquences malencontreuses les conditions relatives à une « zone rouge », qui empêchent la personne prévenue d'entrer dans une région géographique précise, et celles relatives à l'« interdiction de posséder des accessoires facilitant la consommation de drogues ». De telles conditions

from essential services and their support systems (Sylvestre, Blomley and Bellot). Paraphernalia prohibitions can encourage the sharing of needles if accused persons are not able to carry their own clean needles (Pivot Report, at pp. 89-95). In fact, a guideline for bail conditions for accused persons with substance use disorders released in 2019 by the Public Prosecution Service of Canada has acknowledged that these types of conditions “should generally not be imposed” (*Public Prosecution Service of Canada Deskbook*, Part. III, c. 19, “Bail Conditions to Address Opioid Overdoses” (updated April 1, 2019) (online)). Overall, the impacts of these conditions emphasize that any proposed bail condition needs to be carefully considered and limited to addressing flight risk, public safety, or confidence in the administration of justice, otherwise the condition may have negative unintended consequences on the accused and the public.

peuvent avoir des incidences particulièrement importantes sur les personnes prévenues marginalisées. Les conditions relatives à une « zone rouge » peuvent empêcher les gens d’avoir accès à des services essentiels et à leur réseau de soutien (Sylvestre, Blomley et Bellot). Les interdictions de posséder des accessoires facilitant la consommation de drogues peuvent encourager le partage de seringues si les personnes prévenues ne peuvent pas avoir sur elles leurs propres seringues propres (rapport Pivot, p. 89-95). En outre, les lignes directrices sur les conditions de mise en liberté sous caution imposées aux personnes prévenues ayant des troubles liés à la consommation d’une substance, publiées en 2019 par le Service des poursuites pénales du Canada, reconnaissent que ces types de conditions « ne devraient pas, en règle générale, être imposées » (*Guide du Service des poursuites pénales du Canada*, Partie III, c. 19, « Conditions de libération provisoire visant les surdoses d’opioïdes » (mis à jour le 1^{er} avril 2019) (en ligne)). De façon générale, les incidences de ces conditions font ressortir la nécessité que toute condition de mise en liberté proposée soit attentivement examinée et ne vise qu’à répondre au risque de fuite de la personne prévenue et à protéger la sécurité du public ou la confiance de celui-ci envers l’administration de la justice. Autrement, la condition pourrait avoir des conséquences négatives non voulues sur la personne prévenue et le public.

[98] Finally, I note that some bail conditions may impact additional *Charter* rights of the accused, beyond their right to be presumed innocent, liberty rights (s. 7), and right to reasonable bail (s. 11(e)). Principles of restraint and review require that judicial officials rigorously examine these conditions and determine whether they do infringe the *Charter*. For example, some accused are subject to bail conditions that require them to submit to searches of their person, vehicle, phone, or residence on demand without a warrant (see, e.g., *R. v. Delacruz*, 2015 MBQB 32; *R. v. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL), at para. 14; *R. v. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107). As noted by this Court in *Shoker*, in the context of probation conditions, a judge does not have jurisdiction to impose a condition that subjects an accused to a lower standard for a search than would otherwise be required, unless

[98] Enfin, je note que certaines conditions de mise en liberté sous caution peuvent avoir une incidence sur d’autres droits que garantit la *Charte* à la personne prévenue outre son droit d’être présumée innocente, son droit à la liberté (art. 7) et son droit à une mise en liberté assortie d’un cautionnement raisonnable (al. 11e)). Les principes de retenue et de révision exigent que les entités judiciaires examinent rigoureusement ces conditions et établissent si elles contreviennent à la *Charte*. Par exemple, certaines personnes prévenues font l’objet de conditions de mise en liberté sous caution aux termes desquelles elles sont tenues de se soumettre, sur demande et sans qu’il y ait de mandat, à des fouilles sur leur personne ainsi qu’à des fouilles de leur véhicule, de leur téléphone ou de leur résidence (voir, p. ex., *R. c. Delacruz*, 2015 MBQB 32; *R. c. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL), par. 14; *R. c.*

Parliament creates a *Charter*-compliant statutory scheme for the search or the accused consents to the search (paras. 22 and 25; see also *R. v. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44, at para. 53; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389, at para. 128). These types of conditions are effectively enforcement mechanisms that “facilitate the gathering of evidence”, “do not simply monitor the [accused’s] behaviour”, and are not linked to an accused’s risk under s. 515(10) (*Shoker*, at para. 22). As such conditions are not supported by the enumerated conditions for bail in s. 515, nor is there a scheme set by Parliament for the searches, they are constitutionally suspect.

Sabados, 2015 SKCA 74, 327 C.C.C. (3d) 107). Comme l’a mentionné la Cour dans l’arrêt *Shoker*, dans le contexte des conditions de probation, les juges n’ont pas compétence pour imposer une condition qui assujettit la personne accusée à une norme inférieure en matière de fouilles et de perquisitions à celle qui serait autrement requise, à moins que le Parlement ne crée un régime législatif conforme à la *Charte* pour les fouilles et les perquisitions ou que la personne accusée ne consente à la fouille ou à la perquisition (par. 22 et 25; voir aussi *R. c. Goddard*, 2019 BCCA 164, 37 C.C.C. (3d) 44, par. 53; *R. c. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389, par. 128). Ces types de conditions constituent en fait des mécanismes d’application de la loi qui « facilit[ent] l’obtention d’éléments de preuve », « ne permettent pas simplement de surveiller le comportement [de la personne prévenue] » et ne sont pas liés au risque que pose la personne prévenue aux termes du par. 515(10) (*Shoker*, par. 22). Comme de telles conditions ne relèvent pas des conditions de mise en liberté sous caution énumérées à l’art. 515 et qu’il n’existe pas non plus de régime établi par le Parlement pour les fouilles et perquisitions, elles sont suspectes sur le plan constitutionnel.

[99] Other conditions can also affect an accused’s freedom of expression or freedom of association (see, e.g., *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL), at paras. 41-47; *Manseau*, at p. 10; *Clarke*). Such conditions that restrict additional *Charter* rights must be rigorously assessed to determine whether such a restriction is justified and proportional to the risk posed by the accused. It must always be remembered that by making such a condition on bail, the judicial official is criminalizing the accused’s exercise of their *Charter* rights at a time when they are presumed innocent prior to trial.

[99] D’autres conditions peuvent aussi avoir une incidence sur la liberté d’expression ou la liberté d’association de la personne prévenue (voir, p. ex., *R. c. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL), par. 41-47; *Manseau*, p. 10; *Clarke*). Il convient d’évaluer rigoureusement de telles conditions restreignant d’autres droits garantis par la *Charte* pour établir si cette restriction est justifiée et proportionnelle au risque que pose la personne prévenue. Il ne faut jamais oublier qu’en assortissant la mise en liberté sous caution d’une telle condition, l’entité judiciaire criminalise l’exercice par la personne prévenue des droits que lui garantit la *Charte* à un moment où cette dernière est présumée innocente avant la tenue du procès.

C. Responsibilities

[100] All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core

C. Responsabilités

[100] Toutes les personnes jouant un rôle dans le système de mise en liberté sous caution sont tenues d’agir avec retenue et d’examiner attentivement les conditions de mise en liberté sous caution qu’elles

of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice (Trotter, at p. 1-59; *Antic*, at para. 67(j); see also s. 493.1 of the *Code* as of December 18, 2019). The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent. The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

proposent ou imposent. La retenue est requise par la loi, elle constitue la pierre angulaire du principe de l'échelle et est étayée par l'exigence que toute condition de mise en liberté sous caution soit nécessaire, raisonnable, la moins sévère possible dans les circonstances et suffisamment liée aux facteurs de risque précis que prévoit le par. 515(10), soit le risque que la personne prévenue ne se présente pas au tribunal au moment exigé, le risque pour la protection ou la sécurité du public ou le risque de perte de confiance du public envers l'administration de la justice (Trotter, p. 1-59; *Antic*, par. 67j); voir aussi l'art. 493.1 du *Code* dans sa version en vigueur le 18 décembre 2019). L'établissement des conditions de mise en liberté sous caution est un processus individualisé dans le cadre duquel des conditions normalisées, systématiques ou types n'ont pas leur place, peu importe que la mise en liberté sous caution soit contestée ou qu'elle résulte d'un consentement. Le principe de la révision signifie que quiconque joue un rôle dans l'élaboration des conditions de la mise en liberté sous caution devrait prendre le temps de se demander si la condition pertinente satisfait à toutes les exigences constitutionnelles, législatives et jurisprudentielles.

[101] All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail (see Berger and Stribopolous, at pp. 323-24). This is because the “automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence” (*R. v. A.D.M.*, 2017 NSPC 77, at para. 29 (CanLII), citing *Antic*). The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Other than in reverse onus situations, the Crown should understand, and if asked, be able to explain why proposed bail conditions are necessary, reasonable, least onerous, and sufficiently linked to the risks in s. 515(10). This prosecutorial responsibility of restraint when considering bail conditions is reflected in both Crown counsel policy documents put before us by interveners (Ontario, Ministry of the Attorney General, *Ontario Prosecution Directive*, “Judicial Interim Release (Bail)” (November 2017) (online); and British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, “Bail — Adult” (April 2019)

[101] Quiconque participe au système de mise en liberté sous caution a aussi le devoir de respecter la présomption d'innocence et le droit à une mise en liberté assortie d'un cautionnement raisonnable (voir Berger et Stribopolous, p. 323-324). En effet, [TRANSDUCTION] « l'imposition automatique de conditions de mise en liberté sous caution qui ne peuvent se rattacher rationnellement à un besoin lié à la mise en liberté sous caution n'est pas compatible avec la présomption d'innocence » (*R. c. A.D.M.*, 2017 NSPC 77, par. 29 (CanLII), citant l'arrêt *Antic*). La Couronne, la défense et les tribunaux ont l'obligation de respecter les principes de la retenue et de la révision. Sauf dans des situations où le fardeau de la preuve est inversé, la Couronne devrait comprendre, et si on le lui demande, être en mesure d'expliquer, pourquoi les conditions proposées de mise en liberté sous caution sont nécessaires, raisonnables, les moins sévères possible et suffisamment liées aux risques prévus au par. 515(10). Cette responsabilité de retenue qui incombe à la poursuite lorsqu'elle envisage des conditions de mise en liberté sous caution

(online)). Defence counsel also should be alive to bail conditions that are not minimal, necessary, reasonable, least onerous, and sufficiently linked to an accused's risk for both contested and consent release, especially when a client may simply be prepared to agree to excessive and overbroad conditions to gain release. That said, it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested hearing, which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered.

[102] Ultimately, the obligation to ensure that accused persons are released on appropriate bail orders lies with the judicial official. As with the setting of cash deposits in *Antic*, if a judicial official does not understand how a condition is appropriate, "a justice or a judge setting bail is under a positive obligation" to make inquiries into whether the suspect bail condition is necessary, reasonable, least onerous, and sufficiently linked to the accused's risks (paras. 56 and 67(i)). Before transforming bail conditions into personal sources of potential criminal liability, judicial officials are asked to use their discretion with care and review the proposed conditions to make sure they are focussed, narrow, and tightly-framed to address the accused's risks.

se dégage des deux documents de politique des juristes de la Couronne que nous ont présentés les parties intervenantes (Ontario, ministère du Procureur général, *Directives de l'Ontario sur les poursuites*, « Mise en liberté provisoire par voie judiciaire (cautionnement) » (novembre 2017) (en ligne); et British Columbia Prosecution Service, *Crown Counsel Policy Manual*, « Bail — Adult » (avril 2019) (en ligne)). La défense devrait aussi être à l'affût des conditions de mise en liberté sous caution qui ne sont pas minimales, nécessaires, raisonnables, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue, tant en cas de mise en liberté contestée que de mise en liberté avec consentement, particulièrement lorsque la personne cliente peut simplement être prête à consentir à des conditions excessives et trop générales pour obtenir une mise en liberté. Cela dit, il n'est pas inhabituel que la défense accepte une condition qui semble quelque peu sévère mais ne justifie pas la tenue d'une audience avec contestation, ce qui pourrait faire en sorte que la personne prévenue aurait à rester détenue quelques jours supplémentaires. Dans de tels cas, la défense peut aussi demander un examen de la condition après un laps de temps raisonnable et demander qu'elle soit modifiée.

[102] En dernier ressort, l'obligation de faire en sorte que les personnes prévenues soient libérées aux termes d'ordonnances de mise en liberté sous caution appropriées incombe aux entités judiciaires. Comme pour la fixation du montant des dépôts d'argent dans l'arrêt *Antic*, si une entité judiciaire ne comprend pas en quoi une condition est appropriée, « [l'entité judiciaire appelée] à fixer le cautionnement a l'obligation positive » de chercher à savoir si la condition suspecte de mise en liberté sous caution est nécessaire, raisonnable, le moins sévère possible et suffisamment liée aux risques que pose la personne prévenue (par. 56 et 67i)). Avant de transformer les conditions de mise en liberté sous caution en sources personnelles de responsabilité criminelle éventuelle, les entités judiciaires doivent exercer leur pouvoir discrétionnaire avec sérieux et examiner les conditions proposées pour s'assurer qu'elles sont ciblées, bien circonscrites et formulées de façon précise en vue de répondre aux risques que pose la personne prévenue.

[103] Judicial officials have adequate tools to ensure that bail orders are generally appropriate while conserving judicial resources. They can and should question conditions that seem unusual or excessive. They should also be alert for any pattern that might suggest that conditions are being imposed routinely or unduly.

[104] These obligations carry over to consent releases, where special considerations apply. There are many compelling reasons a person in custody would “accept” suggested restrictions to secure release, even if such restrictions were overbroad. In addition to the universal human impulse towards freedom, individuals are concerned with the effects continued detention would have on their families, their income, their employment, their ability to keep their home, and their ability to access medication and necessary services, as described above. When presented with a promise of release on what may appear to be “take it or leave it conditions” many accused simply acquiesce to avoid continued detention and/or a contested bail hearing. This is why alcohol-addicted persons would agree to a bail term which prohibits them from drinking alcohol, knowing full well that they have previously been unable to overcome their addiction. These factors, and others, exert pressure and have contributed to a culture of consent in which accused persons, who often represent themselves at bail hearings, frequently agree to be bound by conditions which are unnecessary, unreasonable, and even potentially unconstitutional.

[105] The ladder principle and the rigorous assessment of bail conditions will be more strictly applicable when bail is contested, but joint proposals must still be premised on the criteria for bail conditions established by the guarantees in the *Charter*, the provisions of the *Code*, and this Court’s jurisprudence (*Antic*, at para. 44). Judicial officials “should

[103] Les entités judiciaires disposent d’outils adéquats pour faire en sorte que les ordonnances de mise en liberté sous caution soient généralement appropriées, mais aussi que les ressources judiciaires ne soient pas gaspillées. Elles peuvent et devraient remettre en question les conditions qui semblent inhabituelles ou excessives. Elles devraient aussi être à l’affût de tout signe laissant croire que des conditions sont imposées de façon routinière ou abusive.

[104] Ces obligations s’appliquent aussi aux mises en liberté avec consentement, qui appellent des considérations particulières. Il peut exister de nombreuses raisons impérieuses qui pousseraient une personne sous garde à « accepter » les restrictions proposées pour obtenir une libération, même si ces restrictions sont trop larges. En plus de l’aspiration universelle de l’être humain à la liberté, il y a le fait que les individus s’inquiètent des effets de la détention continue sur leur famille, leurs revenus, leur emploi et leur aptitude à conserver leur résidence et à avoir accès à des médicaments et aux services nécessaires, comme je l’ai déjà indiqué. Lorsqu’on leur présente une promesse de mise en liberté qui semble assortie « de conditions à prendre ou à laisser », bon nombre de personnes prévenues se contentent d’acquiescer pour éviter le maintien en détention ou une enquête sur le cautionnement avec contestation. C’est la raison pour laquelle des personnes alcooliques, qui savent pertinemment qu’elles ont déjà échoué à sortir de leur dépendance, consentiraient à une condition qui leur interdit de consommer de l’alcool. Ces facteurs, entre autres, exercent de la pression et ont contribué à une culture de consentement dans le cadre de laquelle des personnes prévenues, qui ne bénéficient pas de représentation juridique aux enquêtes sur le cautionnement, acceptent fréquemment d’être liées par des conditions qui ne sont ni nécessaires ni raisonnables, et qui pourraient même être inconstitutionnelles.

[105] On appliquera plus strictement les principes de l’échelle et de l’évaluation rigoureuse des conditions de mise en liberté sous caution en cas de contestation de celle-ci, mais les propositions conjointes doivent néanmoins reposer sur les critères applicables à ces conditions établis en fonction des droits garantis par la *Charte*, des dispositions

not routinely second-guess joint proposals” given that consent release remains an efficient method of release in busy bail courts (*Antic*, at para. 68). However, everyone should also be aware that judicial officials have the discretion to reject overbroad proposals, and judicial officials must keep top of mind the identified concerns with consent releases. In *R. v. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL), Hill J. noted that, even post-*Antic*, counsel sometimes do not appear aware of this judicial discretion:

Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a “consent” bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong. [para. 24]

[106] I agree. Although bail courts are busy places, where consent releases can encourage efficiency, little efficiency is achieved if an accused person is released on conditions by which they cannot realistically abide, which will inevitably lead to greater use of court time and resources through applications for bail review, bail revocation, or breach charges. Judicial officials must therefore act with caution, with their eyes wide open to the consequences of imposing bail conditions, when reviewing and approving consent release orders.

du *Code* et de la jurisprudence de la Cour (*Antic*, par. 44). Les entités judiciaires « ne devr[ai]ent pas systématiquement remettre en question les propositions conjointes » étant donné que les mises en liberté avec consentement demeurent une méthode efficace pour obtenir une mise en liberté dans le contexte où les tribunaux chargés des mises en liberté sous caution sont occupés (*Antic*, par. 68). Toutefois, l’on devrait aussi savoir que les entités judiciaires ont le pouvoir discrétionnaire de rejeter les propositions trop larges, et elles devraient garder à l’esprit les préoccupations relevées concernant les mises en liberté avec consentement. Dans *R. c. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL), le juge Hill a fait remarquer que, même depuis l’arrêt *Antic*, les parties ne semblent parfois pas être conscientes de l’existence de ce pouvoir discrétionnaire :

[TRADUCTION] Comme il ressort de certaines transcriptions d’audiences de justification, les parties agissent trop souvent comme si une mise en liberté sous caution obtenue « avec consentement » régit le résultat de la libération ou de la détention et que la signature du tribunal n’est qu’une formalité. Parfois, celles-ci vont jusqu’à manifester de l’hostilité pure et simple à l’endroit des juges de paix qui président l’audience et qui osent poser des questions, exiger plus d’information ou contester raisonnablement le bien-fondé de la proposition. Cette attitude est fondamentalement inappropriée. [par. 24]

[106] Je suis de cet avis. Les tribunaux chargés des mises en liberté sous caution sont effectivement très occupés, et les mises en liberté avec consentement peuvent favoriser l’efficacité, mais force est de constater que peu est réalisé en matière d’efficacité si la personne prévenue est libérée sous des conditions qu’elle n’est pas dans les faits en mesure de respecter, ce qui mène inévitablement à une utilisation accrue du temps et des ressources du tribunal en raison des demandes de révision ou de révocation des conditions de mise en liberté sous caution ou des accusations pour manquement qui y sont portées. Les entités judiciaires doivent donc agir avec prudence, en gardant à l’esprit les conséquences de l’imposition des conditions de mise en liberté sous caution, dans l’examen et l’approbation des ordonnances de mise en liberté sous caution obtenues avec consentement.

D. *Conclusion on How Section 145(3) Informs the Imposition of Bail Conditions*

[107] In conclusion, the s. 145(3) offence requires subjective *mens rea*. Not only is this conclusion consistent with the presumption of subjective fault for crimes like s. 145(3), it is supported by its place and purpose in the overall bail system, the serious consequences which flow from its breach, and how the consideration of individual circumstances is the proper focus both for setting conditions and determining the mental element for their breach. Understanding that s. 145(3) is designed to criminalize the risk-based conduct proscribed in bail conditions provides guidance on how much the fair and efficient functioning of our bail system depends upon restraint and review to ensure that only suitable conditions are imposed and only intentional failures to comply are prosecuted.

VI. Components of Subjective *Mens Rea* for Section 145(3)

[108] Having concluded that subjective *mens rea* is required for the failure to comply offence, I now describe what the Crown must establish to prove the subjective *mens rea* for s. 145(3).

[109] Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

D. *Conclusion sur la façon dont le par. 145(3) oriente l'imposition des conditions de mise en liberté sous caution*

[107] En conclusion, l'infraction prévue au par. 145(3) exige une *mens rea* subjective. Non seulement cette conclusion est compatible avec la présomption de faute subjective pour des crimes comme celui visé au par. 145(3), mais elle est aussi étayée par la place et l'objet de cette disposition au sein de l'ensemble du système de mise en liberté sous caution, par les graves conséquences qui découlent d'un manquement et par la façon dont la situation personnelle de la personne prévenue doit fonder l'établissement des conditions et la détermination de l'élément mental nécessaire à leur violation. Le fait de comprendre que le par. 145(3) vise à criminaliser une conduite associée à un risque, conduite qui est interdite dans les conditions de mise en liberté sous caution, donne des indications sur la mesure dans laquelle le bon fonctionnement de notre système de mise en liberté sous caution repose sur la retenue et la révision, afin que seules des conditions convenables soient imposées et que seules les omissions intentionnelles de se conformer à ces conditions fassent l'objet de poursuites.

VI. Éléments constitutifs de la *mens rea* subjective pour l'infraction prévue au par. 145(3)

[108] Ayant conclu qu'une *mens rea* subjective est requise pour l'infraction d'omission de se conformer à une condition, j'expliquerai maintenant ce que la Couronne doit établir pour prouver la *mens rea* subjective requise au par. 145(3).

[109] La *mens rea* subjective doit généralement être prouvée à l'égard de toutes les circonstances et conséquences qui font partie de l'*actus reus* de l'infraction (*Sault Ste. Marie*, p. 1309-1310; *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120, p. 139, le juge Dickson, dissident, mais pas sur ce point). Par conséquent, la *mens rea* subjective de l'infraction prévue au par. 145(3) peut être établie lorsque la Couronne prouve les éléments suivants :

1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and
2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

[110] These elements accord with the *mens rea* required in jurisdictions recognizing a subjective *mens rea* for failure to comply offences by requiring that the Crown show beyond a reasonable doubt that the accused knowingly or recklessly breached the condition (*Legere*, at p. 100; *Custance*, at para. 10).

[111] However, the jurisprudence divides somewhat on the first element: the extent to which the accused must know the terms of their bail conditions, and therefore know that they are breaching a condition. Some cases follow the Manitoba Court of Appeal in *Custance*, which simply required that the accused “knowingly and voluntarily performed or failed to perform the act or omission which constitutes the [*actus reus*] of the offence”, which appears to mean the Crown only needs to prove that the accused intentionally committed the act or omission, but does not need to show that the accused knew their conditions while committing that act or omission (paras. 10 and 12; see, e.g., *Al Khatib*, at para. 27;

1. La personne prévenue connaissait les conditions de sa mise en liberté sous caution ou faisait preuve d’aveuglement volontaire à leur égard;
2. La personne prévenue a sciemment omis d’agir conformément aux conditions de sa mise en liberté sous caution, c’est-à-dire qu’elle connaissait les circonstances qui exigeaient qu’elle se conforme aux conditions de l’ordonnance dont elle faisait l’objet, ou qu’elle faisait preuve d’aveuglement volontaire face aux circonstances, et qu’elle a omis de se conformer aux conditions malgré le fait qu’elle les connaissait; ou

La personne prévenue a par insouciance omis d’agir conformément aux conditions de sa mise en liberté sous caution, c’est-à-dire qu’elle était consciente qu’il y avait un risque important et injustifié que sa conduite ne respecte pas les conditions de sa mise en liberté sous caution mais qu’elle n’a pas cessé d’agir de la sorte.

[110] Ces éléments concordent avec la *mens rea* requise dans les ressorts qui reconnaissent la *mens rea* subjective pour les infractions d’omission de se conformer à des conditions en exigeant que la Couronne démontre hors de tout doute raisonnable que la personne prévenue a manqué sciemment ou par insouciance à la condition (*Legere*, p. 100; *Custance*, par. 10).

[111] La jurisprudence est toutefois quelque peu partagée sur le premier élément : la mesure dans laquelle la personne prévenue doit connaître les conditions de sa mise en liberté sous caution, et donc savoir qu’elle manque à une condition. Certaines décisions suivent l’arrêt *Custance*, où la Cour d’appel du Manitoba a simplement exigé que la personne prévenue ait [TRADUCTION] « sciemment et volontairement accompli ou omis d’accomplir un acte ou de commettre une omission qui constitue [*l’actus reus*] de l’infraction », ce qui semble signifier que la Couronne a uniquement besoin de prouver que la personne prévenue a intentionnellement commis l’acte ou l’omission, mais n’a pas besoin de

Companion, at para. 48; *R. v. Edgar*, 2019 QCCQ 1328, at para. 109 (CanLII); *L.T.W.*, at para. 22).

[112] I prefer the alternative approach. An accused must know or be wilfully blind to their conditions in order to be convicted, although the accused does not need to know the legal consequences or the scope of the condition: see, e.g., *R. v. Smith*, 2008 ONCA 101, 233 O.A.C. 145 (Doherty, Borins, Lang J.J.A., *per curiam*); *R. v. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. v. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181, at para. 36; *Ritter*, at para. 11; *R. v. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160, at paras. 13 and 16; *R. v. Syblis*, 2015 ONCJ 73, at paras. 18 and 25 (CanLII)). A number of failure to appear cases also require that the accused know of their court date such that an accused's genuine forgetfulness can negate *mens rea* (*Josephie*, at paras. 30-31; *Loutitt*, at paras. 15 and 22-23; *R. v. Blazevic* (1997), 31 O.T.C. 10 (C.J.); *Mullin*, at para. 6; *R. v. Hutchinson* (1994), 160 A.R. 58; *R. v. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361, at para. 62). I accept the position of the Court of Appeal for Ontario in *Smith*, which held that the fact that the accused misheard the terms of his recognizance and failed to review those terms meant that he did not knowingly breach his condition, nor was he wilfully blind. The accused must know the conditions of their release in order to possess the *mens rea* for the failure to comply offence.

[113] Wilful blindness is a substitute for the accused's knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 21 and 24). For a court to find that an accused was wilfully blind in the

démontrer que la personne prévenue connaissait les conditions auxquelles elle était assujettie au moment de la commission de l'acte ou de l'omission (par. 10 et 12; voir, p. ex., *Al Khatib*, par. 27; *Companion*, par. 48; *R. c. Edgar*, 2019 QCCQ 1328, par. 109 (CanLII); *L.T.W.*, par. 22).

[112] Je préfère l'autre approche. La personne prévenue doit connaître les conditions auxquelles elle est tenue ou faire preuve d'aveuglement volontaire à leur égard pour pouvoir être déclarée coupable. Elle n'a toutefois pas besoin de connaître les conséquences juridiques ou la portée des conditions (voir, p. ex., *R. c. Smith*, 2008 ONCA 101, 233 O.A.C. 145 (les juges Doherty, Borins et Lang, *per curiam*); *R. c. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. c. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181, par. 36; *Ritter*, par. 11; *R. c. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160, par. 13 et 16; *R. c. Syblis*, 2015 ONCJ 73, par. 18 et 25 (CanLII)). Dans plusieurs affaires portant sur des omissions de comparaître, les tribunaux ont aussi exigé que la personne prévenue connaisse la date de son audience de manière à ce que le véritable oubli de la part de la personne prévenue puisse écarter la *mens rea* (*Josephie*, par. 30-31; *Loutitt*, par. 15 et 22-23; *R. c. Blazevic* (1997), 31 O.T.C. 10 (C.J.); *Mullin*, par. 6; *R. c. Hutchinson* (1994), 160 A.R. 58; *R. c. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361, par. 62). Je souscris à la position de la Cour d'appel de l'Ontario dans l'arrêt *Smith*, où elle a jugé que le fait que la personne prévenue avait mal entendu les modalités de son engagement et omis d'examiner ces modalités signifiait qu'elle n'avait pas sciemment manqué à sa condition ni qu'elle avait fait preuve d'aveuglement volontaire à son égard. La personne prévenue doit connaître les conditions de sa mise en liberté pour avoir la *mens rea* de l'infraction d'omission de se conformer à une condition.

[113] L'aveuglement volontaire remplace la connaissance des faits par la personne prévenue chaque fois que la connaissance est un élément de la *mens rea* et que la personne prévenue reste délibérément dans l'ignorance (*R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411, par. 21 et 24). Pour qu'un

context of a failure to comply offence, the accused has to know there was a need for inquiry, and deliberately decline to make the inquiries necessary to confirm their exact bail condition (*Smith*, at para. 5; *Withworth*, at para. 13).

[114] Requiring that an accused person has knowledge of, or is wilfully blind to, their conditions of bail does not mean that the accused must have knowledge of the law, which would be contrary to the rule that ignorance of the law is no excuse (s. 19 of the *Code*). While subjective *mens rea* for s. 145(3) means that an accused person who has an honest but mistaken belief about the conditions of their bail order cannot be found liable, this does not mean that an accused must know and understand their legal obligations to fulfill those conditions. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*, whereas a mistake regarding the legal scope or effect of a condition is a mistake of law and would not be an excuse for non-compliance with the condition (see *Withworth*, at paras. 16-19, per Trotter J.). In *Custance*, for example, the accused knew he had to stay at a certain apartment, but when he could not get into that apartment he chose to sleep in his car as he thought this would meet his condition. The accused was aware of his bail condition, but made a mistake as to what the law required to meet that condition. This was a mistake of law that did not negate *mens rea*.

[115] The conclusion that an accused must have knowledge of their conditions of bail, or be wilfully blind to their conditions, in order to have the requisite *mens rea* under s. 145(3), also accords with Wilson J.'s reasoning in *Docherty*, which emphasized the importance of knowledge in finding that an accused breached a condition. In that case, she found that proof of breach of a probation order requires

tribunal conclue que la personne prévenue a fait preuve d'aveuglement volontaire dans le contexte de l'infraction d'omission de se conformer à une condition, celle-ci doit savoir qu'elle devait se renseigner et refuser délibérément de faire les démarches nécessaires pour confirmer la nature exacte de la condition de mise en liberté sous caution à laquelle elle était assujettie (*Smith*, par. 5; *Withworth*, par. 13).

[114] Exiger que la personne prévenue connaisse les conditions de sa mise en liberté sous caution, ou qu'elle fasse preuve d'aveuglement volontaire à leur égard, ne veut pas dire qu'elle doit connaître la loi, ce qui serait contraire à la règle voulant que l'ignorance de la loi n'excuse pas la perpétration de l'infraction (art. 19 du *Code*). Bien que la *mens rea* subjective pour l'infraction prévue au par. 145(3) signifie que la personne prévenue qui a une croyance sincère mais erronée quant aux conditions de sa mise en liberté sous caution ne peut être tenue responsable, cela ne veut pas dire que la personne prévenue doit connaître et comprendre son obligation juridique de respecter ces conditions. L'oubli véritable d'une condition pourrait constituer une erreur de fait qui écarterait la *mens rea*, alors qu'une erreur au sujet de la portée ou de l'effet juridique d'une condition constitue une erreur de droit qui n'excuserait pas le non-respect de la condition (voir *Withworth*, par. 16-19, le juge Trotter). Dans l'arrêt *Custance*, par exemple, le prévenu savait qu'il devait rester dans un appartement donné mais comme il ne pouvait y entrer, il a choisi de dormir dans son automobile, pensant qu'il respecterait ainsi la condition qui lui avait été imposée. Le prévenu était au courant de la condition de sa mise en liberté sous caution, mais il s'est trompé sur ce que la loi exigeait pour le respect de cette condition. Il s'agissait d'une erreur de droit qui n'écarterait pas la *mens rea*.

[115] La conclusion selon laquelle la personne prévenue doit connaître les conditions de sa mise en liberté sous caution, ou faire preuve d'aveuglement volontaire à leur égard, pour avoir la *mens rea* qu'exige le par. 145(3) est aussi compatible avec le raisonnement de la juge Wilson dans l'arrêt *Docherty*, qui a souligné l'importance de la connaissance pour conclure que la personne prévenue a manqué à une

evidence that an accused knew they were bound by the probation order, knew there was a term that would be breached by their proposed conduct, and went ahead and engaged in the conduct anyway (pp. 957-58). The reasoning is still helpful even though the condition breached in *Docherty* required that the accused knew he was committing a criminal offence, which meant the accused had to know of the legal consequences of his actions (pp. 960-61). In contrast, s. 145(3) does not require that the accused must have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. The purpose of s. 145(3), like the breach of probation offence, is to punish and deter failures to comply with bail conditions. As previously mentioned, knowledge and deterrence are linked: an accused will only be deterred from breaching their conditions if they know they are doing something wrong, meaning they must know that they are bound by a particular bail condition (*Docherty*, at pp. 951-52).

[116] The second component of the *mens rea* for s. 145(3) can be met by showing that the accused acted knowingly or recklessly in breaching their condition. Knowledge in this second component means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act (or refrain from acting) to comply with their conditions at the time of breach (e.g., in Mr. Zora's case, knowing that the police were at his door).

[117] This second component can also be met by showing that the accused was reckless. Where, as here, a higher requirement of "wilfulness" or "intent" is not indicated by the text or nature of an

condition. Dans cette affaire, la juge a conclu que pour prouver qu'il y a eu violation de l'ordonnance de probation, il faut démontrer que la personne accusée savait qu'elle était soumise à l'ordonnance de probation et que celle-ci contenait une condition à laquelle elle dérogerait si elle adoptait une certaine conduite, et qu'elle est quand même allée de l'avant et a adopté la conduite (p. 957-958). Le raisonnement est utile même si la condition violée dont il était question dans l'arrêt *Docherty* exigeait que la personne accusée sache qu'elle commettait une infraction criminelle, ce qui signifiait qu'elle était au courant des conséquences juridiques de ses actes (p. 960-961). À l'inverse, le par. 145(3) n'exige pas que la personne prévenue soit au courant des conséquences juridiques ou de la portée de la condition à laquelle elle est assujettie, mais elle doit savoir qu'elle est liée par la condition. À l'instar de l'infraction de violation d'une ordonnance de probation, le par. 145(3) a pour objet de punir et de dissuader l'omission de se conformer aux conditions de mise en liberté sous caution. Comme je l'ai mentionné précédemment, la connaissance et la dissuasion sont liées : la personne prévenue ne sera dissuadée de manquer à ses conditions que si elle sait qu'elle fait quelque chose de mal, c'est-à-dire qu'elle doit savoir qu'elle est assujettie à une condition particulière de mise en liberté sous caution (*Docherty*, p. 951-952).

[116] Le deuxième élément constitutif de la *mens rea* de l'infraction prévue au par. 145(3) peut être prouvé en démontrant que la personne prévenue agissait sciemment ou par insouciance lorsqu'elle a manqué à sa condition. La connaissance dans ce deuxième élément signifie que la personne prévenue doit, au moment du manquement, être consciente des circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions, ou fasse preuve d'aveuglement volontaire à leur égard (p. ex., dans l'affaire qui nous occupe, M. Zora devait savoir que la police se trouvait à sa porte).

[117] Ce deuxième élément peut aussi être prouvé en démontrant que la personne prévenue a fait preuve d'insouciance. Lorsque, comme en l'espèce, le texte ou la nature de l'infraction n'indique pas d'exigence

offence, recklessness is generally included in subjective *mens rea* (see *Sault Ste. Marie*, at pp. 1309-10; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), at p. 71). Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk (*Josephie*, at para. 30; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584). Knowledge of risk is key to recklessness. Therefore, the accused must still know of their bail conditions in order to be aware of any risk of non-compliance. The accused must also be aware of the risk that the factual circumstances requiring them to act (or refrain from acting) to comply with their bail conditions could arise and continue with their course of conduct despite the risk. Recklessness is not, and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

[118] Given that s. 145(3) can operate to criminalize otherwise lawful day-to-day behaviour, I would conclude that knowledge of *any* risk of non-compliance is not sufficient to establish that an accused was reckless. Instead, the accused must be aware that their continued conduct creates a *substantial and unjustified risk* of non-compliance with their bail conditions. This Court has previously adopted this standard of risk in describing recklessness for certain offences (see *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at paras. 27-29; *Leary v. The Queen*, [1978] 1 S.C.R. 29, at p. 35 (per Dickson J. dissenting, but not on this point)). The risk cannot be far-fetched, trivial, or *de minimis*. The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with which the risk could be avoided, are all relevant considerations (Manning and Sankoff, at p. 229). Although the trial judge will assess whether a risk is unjustified based on the above considerations, because recklessness is

plus élevée quant à un caractère « délibéré » ou « intentionnel », l'insouciance est généralement comprise dans la *mens rea* subjective (voir *Sault Ste. Marie*, p. 1309-1310; *R. c. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), p. 71). L'insouciance exige que la personne prévenue soit consciente du risque qu'elle omette de se conformer à sa condition et agisse malgré ce risque (*Josephie*, par. 30; *Sansregret c. La Reine*, [1985] 1 R.C.S. 570, p. 584). La connaissance du risque est essentielle pour qu'il y ait insouciance. Par conséquent, la personne prévenue doit tout de même connaître les conditions de sa mise en liberté sous caution pour être consciente de tout risque de manquement. Elle doit aussi être consciente du risque que se présentent les circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions de sa mise en liberté sous caution et elle doit continuer à avoir cette conduite malgré le risque. L'insouciance ne peut, et ne devrait pas en raison d'une mauvaise application, être assimilée à la négligence. L'insouciance n'a rien à voir avec la question de savoir si la personne prévenue *aurait dû* voir le risque en question, mais porte plutôt sur la question de savoir si la personne prévenue a subjectivement vu le risque et a continué à agir sans en tenir compte.

[118] Étant donné que l'application du par. 145(3) peut criminaliser un comportement quotidien par ailleurs légal, je suis d'avis que la connaissance de *n'importe quel* risque de manquement ne suffit pas pour établir qu'une personne prévenue a fait preuve d'insouciance. La personne prévenue doit plutôt être consciente que le fait qu'elle continue d'avoir cette conduite crée un *risque injustifié et important* de manquement aux conditions de sa mise en liberté sous caution. La Cour a déjà adopté cette norme de risque pour décrire l'insouciance concernant certaines infractions (voir *R. c. Hamilton*, 2005 CSC 47, [2005] 2 R.C.S. 432, par. 27-29; *Leary c. La Reine*, [1978] 1 R.C.S. 29, p. 35 (le juge Dickson, dissident, mais pas sur ce point)). Le risque ne peut être invraisemblable, négligeable ou minime. L'étendue du risque, ainsi que la nature du préjudice, la valeur sociale se rattachant au risque et la facilité avec laquelle le risque pourrait être évité sont toutes des considérations pertinentes (Manning et Sankoff,

a subjective standard, the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.

[119] Requiring this standard of risk for recklessness is warranted because the offence may criminalize everyday activities and have unforeseen consequences on people's everyday lives. For example, in the context of a condition requiring an accused to answer the door to police during their curfew, an accused would not be reckless if they took the minimal and justified risk of taking a short shower during their curfew whereas they could be reckless if they disconnected their doorbell or wore earplugs around their house. As with this Court's decision in *Hamilton*, at paras. 32-33, these reasons should not be interpreted as changing the general principles of recklessness as a fault element set out in *Sansregret*, as my description of recklessness is specific to the offence under s. 145(3).

[120] Finally, I do not accept that a subjective fault requirement would make it too difficult for the Crown to prove an accused's knowing or reckless failure to comply with bail conditions. If the Crown chooses to lay a criminal charge under s. 145(3), when the possibility of a bail variation and bail revocation also exist, it will do so only when it has a reasonable prospect of conviction based on a full appreciation of all constituent elements of the offence. Many crimes have a subjective fault standard and there are recognized ways to marshal sufficient evidence to convince a judge beyond a reasonable doubt that the accused acted knowingly or recklessly. Courts may infer subjective fault for failure to comply charges, whether or not the accused decides to testify. After considering all the evidence, the trier of fact may be able to conclude beyond a reasonable doubt that the accused had the state of mind required for conviction

p. 229). Même si les juges du procès évalueront si un risque est injustifié en fonction de ces considérations, puisque l'insouciance est une norme subjective, l'accent doit être mis sur la question de savoir si la personne prévenue avait conscience du risque important qu'elle prenait et de tout facteur faisant en sorte que le risque n'était pas justifié.

[119] Il est justifié d'exiger cette norme de risque pour l'insouciance parce que l'infraction peut criminaliser des activités de tous les jours et avoir des conséquences imprévues sur la vie quotidienne des gens. Par exemple, dans le contexte d'une condition exigeant que la personne prévenue réponde à la porte si la police se présente après son couvre-feu, la personne prévenue n'aurait pas fait preuve d'insouciance si elle avait pris le risque minime et justifié de prendre une courte douche après son couvre-feu, alors qu'elle aurait fait preuve d'insouciance si elle avait débranché la sonnette de sa porte ou porté des bouchons d'oreille dans la maison. Comme l'a énoncé la Cour dans l'arrêt *Hamilton* aux par. 32-33, il ne faut pas interpréter les présents motifs comme modifiant les principes généraux relatifs à l'insouciance en tant qu'élément fautif, exposés dans l'arrêt *Sansregret*, car ma description de l'insouciance se rapporte précisément à l'infraction prévue au par. 145(3).

[120] Enfin, je ne peux accepter l'argument selon lequel l'exigence d'une faute subjective rendrait trop difficile pour la Couronne de prouver que la personne prévenue a omis sciemment ou par insouciance de se conformer aux conditions de sa mise en liberté sous caution. Si la Couronne choisit de porter une accusation criminelle en vertu du par. 145(3), alors qu'il est aussi possible de faire modifier ou révoquer la mise en liberté sous caution, c'est parce qu'il existe une possibilité raisonnable d'obtenir une déclaration de culpabilité compte tenu d'une pleine appréciation de tous les éléments constitutifs de l'infraction. De nombreux crimes sont assortis d'une norme de faute subjective et il existe des façons reconnues de présenter une preuve suffisante pour convaincre les tribunaux hors de tout doute raisonnable que la personne prévenue a agi sciemment ou par insouciance. Les tribunaux peuvent inférer qu'une faute subjective

based on the common sense inference that individuals “intend the natural and probable consequences of their actions” (*R. v. Seymour*, [1996] 2 S.C.R. 252, at paras. 19 and 23; *Docherty*, at p. 958; *Loutitt*, at para. 18). As noted by the intervener Attorney General of Ontario a subjective fault requirement has not prevented convictions on s. 145(3) charges in Ontario.

a été commise pour ce qui est des accusations pour omission de se conformer à une condition, que la personne prévenue décide ou non de témoigner. Les juges des faits, après examen de l’ensemble de la preuve, peuvent être en mesure de conclure hors de tout doute raisonnable que la personne prévenue avait l’état d’esprit requis pour qu’il y ait déclaration de culpabilité, sur le fondement d’une inférence conforme au bon sens que les personnes « veulent les conséquences naturelles et probables de leurs actes » (*R. c. Seymour*, [1996] 2 R.C.S. 252, par. 19 et 23; *Docherty*, p. 958; *Loutitt*, par. 18). Comme l’a fait remarquer l’intervenant le procureur général de l’Ontario, l’exigence de la faute subjective n’a pas empêché que des déclarations de culpabilité fondées sur le par. 145(3) soient prononcées en Ontario.

[121] The Crown’s concern that accused persons may simply say they forgot about their bail conditions to escape criminal liability for breaching their bail is addressed because judges “will no doubt act sensibly in assessing the authenticity of claims of forgotten court dates and overlooked bail conditions. Effect need not be given to forgetfulness merely because it has been asserted” (*Withworth*, at para. 14).

[121] La préoccupation de la Couronne, selon laquelle les personnes prévenues peuvent simplement dire qu’elles ont oublié leurs conditions de mise en liberté sous caution pour échapper à la responsabilité criminelle découlant d’un manquement à ces conditions, est prise en compte parce que les juges [TRADUCTION] « agiront sans aucun doute judicieusement dans leur évaluation de l’authenticité des prétentions concernant les oublis des dates de comparution et des conditions de mise en liberté sous caution. Ce n’est pas parce qu’on invoque l’oubli qu’il faut accueillir cette affirmation » (*Withworth*, par. 14).

[122] In conclusion, as accepted by the respondent and the AGBC, “[t]he sky will not fall if the Crown has to prove a mental element” (*Loutitt*, at para. 17; transcript, at p. 64; I.F. (AGBC), at para. 23).

[122] En conclusion, comme l’ont accepté l’intimée et le PGCB, [TRADUCTION] « [l]e ciel ne nous tombera pas sur la tête si la Couronne doit prouver un élément mental » (*Loutitt*, par. 17; transcription, p. 64; m. interv. (PGCB), par. 23).

VII. A New Trial Should Be Ordered

VII. Il y a lieu d’ordonner la tenue d’un nouveau procès

[123] I agree with Mr. Zora that a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3).

[123] Je suis d’accord avec M. Zora qu’il convient d’ordonner la tenue d’un nouveau procès en raison de l’erreur de droit commise par les tribunaux d’instance inférieure, qui ont appliqué une norme de faute objective plutôt que subjective pour l’infraction prévue au par. 145(3).

[124] This is not a case where the curative proviso allows this Court to dismiss an appeal under

[124] Il ne s’agit pas en l’espèce d’une situation où la disposition réparatrice permet à la Cour de rejeter

s. 686(1)(b)(iii) because there was “no substantial wrong or miscarriage of justice” despite an error of law. The curative proviso is only appropriate where the “error is harmless or trivial” or “where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict” (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53). *Mens rea* is an essential element of a criminal offence and identifying the wrong fault standard is not a “harmless or trivial” error. A subjective *mens rea* would have required the trial judge to consider Mr. Zora’s state of mind, which clearly could have had an impact on the verdict.

[125] The evidence is also not so overwhelming that a conviction is inevitable. As the trial judge was focussed on what a reasonable person would do in the circumstances, he did not need to make clear factual findings or definitive findings of credibility that would allow this Court to assess or infer Mr. Zora’s knowledge and state of mind. If established at trial, Mr. Zora’s personal circumstances, including whether he was sleeping deeply due to heroin withdrawal and methadone treatment, would be relevant to determining his state of mind. As described above, recklessness requires knowledge of the substantial and unjustified risk of circumstances leading to a prohibited breach. Without a clear finding that Mr. Zora was aware of the risk that he could not hear the police at his door, as well as other findings of fact necessary to determine whether that risk was substantial and unjustified, the Court cannot find that he was reckless in failing to answer the door.

[126] The trial judge’s negative statements concerning the credibility of the defence witnesses mean that an acquittal would also not be appropriate. A new trial is needed to address whether Mr. Zora knowingly or recklessly breached his conditions.

l’appel en vertu du sous-al. 686(1)(b)(iii) parce qu’il n’y a eu « aucun tort important ou aucune erreur judiciaire grave » malgré l’erreur de droit. Il est approprié de recourir à la disposition réparatrice uniquement lorsque « l’erreur est inoffensive ou négligeable » ou que « la preuve est à ce point accablante que, même si l’erreur n’est pas sans importance, les juges des faits concluraient forcément à la culpabilité » (*R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 53). La *mens rea* est un élément essentiel des infractions criminelles et le fait d’arrêter la mauvaise norme de faute ne constitue pas une erreur « inoffensive ou négligeable ». La *mens rea* subjective aurait obligé le juge du procès à tenir compte de l’état d’esprit de M. Zora, ce qui aurait de toute évidence pu avoir une incidence sur le verdict.

[125] De plus, la preuve n’est pas à ce point accablante qu’une déclaration de culpabilité est inévitable. Comme il s’est concentré sur ce qu’une personne raisonnable aurait fait dans les circonstances, le juge du procès n’a pas eu besoin de tirer des conclusions de fait claires ou des conclusions définitives quant à la crédibilité qui auraient permis à la Cour d’évaluer ou d’inférer la connaissance et l’état d’esprit de M. Zora. Si elles sont établies au procès, les circonstances propres à M. Zora, notamment la question de savoir s’il dormait profondément en raison de son sevrage de l’héroïne et de son traitement à la méthadone, seraient pertinentes pour déterminer son état d’esprit. Comme il a été expliqué précédemment, l’insouciance requiert la connaissance du risque important et injustifié associé aux circonstances qui mènent à un manquement interdit. Sans une conclusion claire que M. Zora était conscient du risque qu’il pourrait ne pas entendre la police à sa porte, ainsi que d’autres conclusions de fait nécessaires pour établir si le risque était important et injustifié, la Cour ne peut conclure qu’il a fait preuve d’insouciance en ne répondant pas à la porte.

[126] En raison des déclarations négatives du juge du procès concernant la crédibilité des témoins de la défense, un acquittement ne serait pas non plus approprié. Un nouveau procès est nécessaire pour déterminer si M. Zora a omis sciemment ou par insouciance de se conformer à ses conditions.

VIII. Conclusion

[127] Therefore, subjective fault is required for a conviction under s. 145(3) of the *Code*. I would allow this appeal, quash Mr. Zora's convictions, and order a new trial on the two counts of failing to attend at his door.

Appeal allowed.

Solicitors for the appellant: Marion & Runyon, Criminal Lawyers, Campbell River; Michael Sobkin, Ottawa.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Henein Hutchison, Toronto.

Solicitors for the intervener the Vancouver Area Network of Drug Users: Gratl & Company, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: Peck and Company, Vancouver.

VIII. Conclusion

[127] Par conséquent, une faute subjective est nécessaire pour qu'il y ait déclaration de culpabilité en vertu du par. 145(3) du *Code*. Je suis d'avis d'accueillir le pourvoi, d'annuler les déclarations de culpabilité de M. Zora et d'ordonner la tenue d'un nouveau procès sur les deux chefs relatifs à l'omission de répondre à la porte.

Pourvoi accueilli.

Procureurs de l'appelant : Marion & Runyon, Criminal Lawyers, Campbell River; Michael Sobkin, Ottawa.

Procureur de l'intimée : Public Prosecution Service of Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association of Ontario : Henein Hutchison, Toronto.

Procureurs de l'intervenant Vancouver Area Network of Drug Users : Gratl & Company, Vancouver.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intervenante Independent Criminal Defence Advocacy Society : Peck and Company, Vancouver.

Solicitors for the intervener the Pivot Legal Society: David N. Fai, Law Corporation, North Vancouver; Pivot Legal Society, Vancouver.

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Procureurs de l'intervenante Pivot Legal Society : David N. Fai, Law Corporation, North Vancouver; Pivot Legal Society, Vancouver.

Procureurs de l'intervenante l'Association québécoise des avocats et avocates de la défense : Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Tab 22:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 163.1**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Definition of *child pornography*

163.1 (1) In this section, ***child pornography*** means

- (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
 - (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
 - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;
- (b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
- (c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or
- (d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

Distribution, etc. of child pornography

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

Possession of child pornography

(4) Every person who possesses any child pornography is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10

years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Accessing child pornography

(4.1) Every person who accesses any child pornography is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Interpretation

(4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

Aggravating factor

(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

Defence

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Defence

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and

(b) does not pose an undue risk of harm to persons under the age of eighteen years.

Question of law

(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

1993, c. 46, s. 2; 2002, c. 13, s. 5; 2005, c. 32, s. 7; 2012, c. 1, s. 17; 2015, c. 23, s. 7.

Tab 23:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 486.4**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection

(1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Inquiry by court

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

Duty to inform

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(c) informed them of their right to apply to revoke or vary the order.

Limitation

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice

when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

Limitation — victim or witness

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

2005, c. 32, s. 15, c. 43, s. 8; 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18; 2019, c. 25, s. 190; 2023, c. 28, s. 2.

Tab 24:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 686**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.

(e) [Repealed, 1991, c. 43, s. 9]

Order to be made

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

Substituting verdict

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and

(a) affirm the sentence passed by the trial court; or

(b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Appeal from acquittal

(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

New trial under Part XIX

(5) Subject to subsection (5.01), if an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did

not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX, other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;

(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and

(d) notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

New trial under Part XIX — Nunavut

(5.01) If an appeal is taken in respect of proceedings under Part XIX and the Court of Appeal of Nunavut orders a new trial under Part XXI, the following provisions apply:

(a) if the accused, in the notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in the notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, and without a preliminary inquiry, be held before a judge, acting under Part XIX, other than a judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance;

(c) if the Court of Appeal of Nunavut orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and

(d) despite paragraph (a), if the conviction against which the accused appealed was for an indictable offence mentioned in section 553, the new trial shall be held before a judge acting under Part XIX, other than the judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance.

Election if new trial a jury trial

(5.1) Subject to subsection (5.2), if a new trial ordered by the court of appeal is to be held before a court composed of a judge and jury,

(a) the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge;

(b) the election shall be deemed to be a re-election within the meaning of subsection 561(5); and

(c) subsection 561(5) applies, with such modifications as the circumstances require, to the election.

Election if new trial a jury trial — Nunavut

(5.2) If a new trial ordered by the Court of Appeal of Nunavut is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election shall be deemed to be a re-election within the meaning of subsection 561.1(1), and subsection 561.1(6) applies, with any modifications that the circumstances require, to the election.

Where appeal allowed against verdict of unfit to stand trial

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7), order a new trial.

Appeal court may set aside verdict of unfit to stand trial

(7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

Additional powers

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F); 2019, c. 25, s. 282(E).

Tab 25:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 732.1**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Definitions

732.1 (1) In this section and section 732.2,

change, in relation to optional conditions, includes deletions and additions; (*modification*)

optional conditions means the conditions referred to in subsection (3) or (3.1).
(*conditions facultatives*)

Compulsory conditions of probation order

(2) The court shall prescribe, as conditions of a probation order, that the offender do all of the following:

(a) keep the peace and be of good behaviour;

(a.1) [Repealed, 2019, c. 25, s. 297]

(b) appear before the court when required to do so by the court; and

(c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

(2.1) [Repealed, 2019, c. 25, s. 297]

(2.2) [Repealed, 2019, c. 25, s. 297]

Optional conditions of probation order

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(a) report to a probation officer

(i) within two working days, or such longer period as the court directs, after the making of the probation order, and

(ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;

(a.1) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order or from going to any place or geographic area specified in the order, except in accordance with any specified conditions that the court considers necessary;

- (b)** remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;
- (c)** abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
- (c.1)** provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection (9) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the offender has breached a condition of the order that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance;
- (c.2)** provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by a probation officer in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance;
- (d)** abstain from owning, possessing or carrying a weapon;
- (e)** provide for the support or care of dependants;
- (f)** perform up to 240 hours of community service over a period not exceeding eighteen months;
- (g)** if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;
- (g.1)** where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;
- (g.2)** where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and
- (h)** comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

Optional conditions — organization

- (3.1)** The court may prescribe, as additional conditions of a probation order made in respect

of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

Consideration — organizations

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

Form and period of order

(4) A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force.

Obligations of court

(5) The court that makes a probation order shall

- (a) cause a copy of the order to be given to the offender and, on request, to the victim;
- (b) explain the conditions of the order set under subsections (2) to (3.1) and the substance of section 733.1 to the offender;

(c) cause an explanation to be given to the offender of the procedure for applying under subsection 732.2(3) for a change to the optional conditions and of the substance of subsections 732.2(3) and (5); and

(d) take reasonable measures to ensure that the offender understands the order and the explanations.

For greater certainty

(6) For greater certainty, a failure to comply with subsection (5) does not affect the validity of the probation order.

Notice — samples at regular intervals

(7) The notice referred to in paragraph (3)(c.2) must specify the places and times at which and the days on which the offender must provide samples of a bodily substance under a condition described in that paragraph. The first sample may not be taken earlier than 24 hours after the offender is served with the notice, and subsequent samples must be taken at regular intervals of at least seven days.

Designations and specifications

(8) For the purposes of paragraphs (3)(c.1) and (c.2) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory shall, with respect to the province or territory,

(a) designate the persons or classes of persons that may take samples of bodily substances;

(b) designate the places or classes of places at which the samples are to be taken;

(c) specify the manner in which the samples are to be taken;

(d) specify the manner in which the samples are to be analyzed;

(e) specify the manner in which the samples are to be stored, handled and destroyed;

(f) specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;

(g) designate the persons or classes of persons that may destroy the samples; and

(h) designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.

Further designations

(9) For the purpose of paragraph (3)(c.1) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory may, with respect to the

province or territory, designate persons or classes of persons to make a demand for a sample of a bodily substance.

Restriction

(10) Samples of bodily substances referred to in paragraphs (3)(c.1) and (c.2) may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under subsection (8).

Destruction of samples

(11) The Attorney General of a province or the minister of justice of a territory, or a person authorized by the Attorney General or minister, shall cause all samples of bodily substances provided under a probation order to be destroyed within the periods prescribed by regulation unless the samples are reasonably expected to be used as evidence in a proceeding for an offence under section 733.1.

Regulations

(12) The Governor in Council may make regulations

- (a)** prescribing bodily substances for the purposes of paragraphs (3)(c.1) and (c.2);
- (b)** respecting the designations and specifications referred to in subsections (8) and (9);
- (c)** prescribing the periods within which samples of bodily substances are to be destroyed under subsection (11); and
- (d)** respecting any other matters relating to the samples of bodily substances.

1995, c. 22, s. 6; 1999, c. 32, s. 6(Preamble); 2003, c. 21, s. 18; 2008, c. 18, s. 37; 2011, c. 7, s. 3; 2014, c. 21, s. 2; 2015, c. 13, s. 27; 2018, c. 21, s. 24(F); 2019, c. 25, s. 297.

Tab 26:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 732.2**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Coming into force of order

732.2 (1) A probation order comes into force

- (a) on the date on which the order is made;
- (b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or
- (c) where the offender is under a conditional sentence order, at the expiration of the conditional sentence order.

Duration of order and limit on term of order

(2) Subject to subsection (5),

- (a) where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1, or is imprisoned under paragraph 731(1)(b) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the offender for the time being to comply with the order; and
- (b) no probation order shall continue in force for more than three years after the date on which the order came into force.

Changes to probation order

(3) A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

- (a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,
- (b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or
- (c) decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the

order so endorsed.

Judge may act in chambers

(4) All the functions of the court under subsection (3) may be exercised in chambers.

Where person convicted of offence

(5) Where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1, and

(a) the time within which an appeal may be taken against that conviction has expired and the offender has not taken an appeal,

(b) the offender has taken an appeal against that conviction and the appeal has been dismissed, or

(c) the offender has given written notice to the court that convicted the offender that the offender elects not to appeal the conviction or has abandoned the appeal, as the case may be,

in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the offender to appear before it and, after hearing the prosecutor and the offender,

(d) where the probation order was made under paragraph 731(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or

(e) make such changes to the optional conditions as the court deems desirable, or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions or extends the period for which the order is to remain in force, inform the offender of its action and give the offender a copy of the order so endorsed.

Compelling appearance of person bound

(6) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) and (5).

1995, c. 22, s. 6; 2004, c. 12, s. 12(E).

Tab 27:

**Criminal Code, R.S.C. 1985, c. C-46,
s. 733.1**

Criminal Code (R.S.C. (Revised Statutes of Canada), 1985, c. C-46)

Act current to 2024-04-16 and on 2024-01-14.

Failure to comply with probation order

733.1 (1) An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than four years; or

(b) an offence punishable on summary conviction.

Where accused may be tried and punished

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

1995, c. 22, s. 6; 2015, c. 23, s. 18; 2019, c. 25, s. 298.

Date modified:

2024-04-25

Tab 28:

**Concise Oxford English Dictionary,
11th ed., 2008, p. 90, "available"**

Tab 29

**Concise Oxford English Dictionary,
11th ed. , 2008, p. 861, "make"**