



CA48145

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA,
FROM THE JUDGMENT OF THE HONOURABLE JUDGE DENHOFF,
PRONOUNCED ON THE 25th DAY OF FEBRUARY 2022

REX

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

BAN ON PUBLICATION CCC 486.5 (1)

RESPONDENT'S BOOK OF AUTHORITIES

The Appellant:

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Tab 1:

Barendregt v. Grebliunas, 2022 SCC 22



SUPREME COURT OF CANADA

CITATION: Barendregt v.
Grebliunas, 2022 SCC 22

APPEAL HEARD: December 1
and 2, 2021

JUDGMENT RENDERED:
December 2, 2021

REASONS FOR JUDGMENT:
May 20, 2022

DOCKET: 39533

BETWEEN:

Ashley Suzanne Barendregt
Appellant

and

Geoff Bradley Grebliunas
Respondent

- and -

**Office of the Children's Lawyer, West Coast Legal Education and Action
Fund Association and Rise Women's Legal Centre**
Intervenors

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

REASONS FOR JUDGMENT: Karakatsanis J. (Wagner C.J. and Moldaver, Brown, Rowe,
Martin, Kasirer and Jamal JJ. concurring)
(paras. 1 to 190)

REASONS Côté J.
DISSENTING IN
PART:
(paras. 191 to 231)

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

Ashley Suzanne Barendregt

Appellant

v.

Geoff Bradley Grebliunas

Respondent

and

**Office of the Children’s Lawyer,
West Coast Legal Education and Action Fund Association and
Rise Women’s Legal Centre**

Interveners

Indexed as: Barendregt v. Grebliunas

2022 SCC 22

File No.: 39533.

Appeal heard: December 1, 2, 2021.

Judgment rendered: December 2, 2021.

Reasons delivered: May 20, 2022.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Custody — Change of residence — Best interests of child — Primary residence of children awarded to mother at trial, allowing children to relocate some ten hours away from father's residence — Father successfully appealing relocation order — Whether trial judge erred in relocation analysis such that appellate intervention was warranted — Framework governing determination as to whether relocation in child's best interests.

Evidence — Additional evidence on appeal — Father appealing relocation order awarding primary residence of children to mother — Court of Appeal admitting new evidence adduced by father about financial situation — Whether Court of Appeal erred in admitting new evidence — Test governing admission of additional evidence on appeal.

The mother met the father in northern British Columbia in 2011, and followed him to Kelowna in 2012. Soon after, they got married, bought a house, and had two boys. The home purchase proved to be a project, as significant money was needed to bring it into livable condition. When the relationship ended in 2018, the house remained an ongoing construction project. After the father assaulted the mother during an argument, the mother brought the boys to her parents' home in Telkwa, some 10 hours away from Kelowna. A parenting arrangement emerged, splitting parenting time alternately between Telkwa and Kelowna, before it was agreed that the children would remain in Kelowna with the father. The parents were to alternate weekly parenting time when the mother returned to Kelowna, which never occurred. Rather,

the mother applied to the court to relocate the children to Telkwa. She indicated that she was willing to move to Kelowna if her application was unsuccessful, but the father was unwilling to move to Telkwa under any circumstances.

The trial judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. He found that two key issues favoured the move: the more significant issue was the parents' acrimonious relationship and its implications for the children; and the less significant issue was the father's financial situation, particularly with respect to his ability to make the Kelowna home habitable. The father appealed and sought to adduce additional evidence about his finances and the renovations he had made to the house since trial. The Court of Appeal characterized this as "new" evidence because it had not existed at the time of trial. The court applied a different test than that set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In its view, *Palmer* — and in particular, the due diligence criterion — did not strictly govern the admission of new evidence on appeal. The court then admitted the evidence on the basis that it undermined a primary underpinning of the trial decision and the assumptions that the father might not be able to remain in the Kelowna home had been displaced. As one of trial judge's two main considerations no longer applied, the court held that relocation could no longer be justified. The court thus concluded that the children's best interests were best served by staying in Kelowna with both parents.

Held (Côté J. dissenting in part): The appeal should be allowed.

Per Wagner C.J. and Moldaver, **Karakatsanis**, Brown, Rowe, Martin, Kasirer and Jamal JJ.: Regardless of whether the evidence relates to facts that occurred before or after trial, the test laid out in *Palmer* governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The *Palmer* test is sufficiently flexible to respond to any unique concerns that arise with “new” evidence. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice. Moreover, the trial judge did not err in his relocation analysis, which was consonant with the mobility framework set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children’s best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

Appellate courts have the discretion to admit additional evidence to supplement the record on appeal. When parties seek to adduce such evidence, the four criteria in *Palmer* typically apply: (a) the evidence could not, by the exercise of due diligence, have been available for the trial; (b) the evidence is relevant in that it bears upon a decisive or potentially decisive issue; (c) the evidence is credible in the sense that it is reasonably capable of belief; and (d) the evidence is such that, if believed, it could have affected the result at trial. This framework applies when evidence is

adduced on appeal for the purpose of asking the court to review the proceedings in the court below. The test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties narrow rather than expand as a case proceeds up the appellate ladder. The test strikes a balance between two foundational principles: finality and order in the justice system, and reaching a just result in the context of the proceedings.

The first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been available for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial, which ensures finality and order for the parties and the integrity of the judicial system. On an individual level, the principle of finality speaks to the profound unfairness in providing a party the opportunity to make up for deficiencies in his or her case at trial. On a systemic level, it preserves the distinction between the roles of trial and appellate courts: evaluating evidence and making factual findings are the responsibilities of trial judges, while appellate courts are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction. Accordingly, evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal. With respect to post-trial evidence, the reason why the evidence was unavailable for trial may very well have its roots in the parties' pre-trial conduct. Courts should

accordingly consider whether the party's conduct could have influenced the timing of the fact they seek to prove.

The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the due diligence criterion, which focuses on the conduct of the party, these three criteria focus on the evidence adduced and are conditions precedent to the evidence being adduced. Evidence that falls short of any of them cannot be admitted on appeal. These criteria reflect the importance of reaching a just result in the context of the proceedings, a principle that is directly linked to the correctness of the trial decision and the truth-seeking function of the trial process.

In the family law context, evidence that does not satisfy the due diligence criterion should generally not be admitted on an appeal of a best interests of the child determination. Finality and order are particularly important in such cases. Children should be afforded the comfort of knowing, with some degree of certainty, where they will live and with whom. Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Only in rare instances should an absence of due diligence be superseded by the interests of justice, such as in urgent matters requiring an immediate decision. This could also be the case where admitting the additional evidence does not offend the principle of finality despite the failure to meet the due diligence criterion, such as where the appellate court has already identified a material error in the trial judgment below and

further evidence may help determine an appropriate order. Such exceptional circumstances do not dispense with the other *Palmer* criteria. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal.

In family law cases, the admission of post-trial evidence on appeal may be unnecessary because legislative variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. The interest in reaching a just result can therefore be fostered through means other than an appeal and admission of post-trial evidence on appeal can therefore unnecessarily undermine finality and order in family law decisions. Courts must be wary of litigants using the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding nor to seek a fresh determination after remedying gaps in a trial strategy with the assistance of the trial judge's reasons. Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is in substance a disguised application to vary, a court may refuse to admit additional evidence without considering the *Palmer* criteria.

The Court's decision in *Gordon* sets out a two-stage inquiry for determining whether to vary a parenting order and permit a custodial parent to relocate

with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications. As the first stage of the *Gordon* inquiry will likely not raise a contentious issue in relocation cases, determining the child's best interests will often constitute the crucial question.

For the past 25 years, case law has refined the *Gordon* framework. The 2019 amendments to the *Divorce Act* largely codified these refinements. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors. While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement (s. 16.93). And although *Gordon* restricted whether courts could consider a moving party's reasons for relocating, this is now an express consideration in the best interests of the child analysis (s. 16.92(1)(a)).

The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades. The language in s. 16(6) now expressly recognizes that the so-called maximum contact principle is only significant to the extent that it is in the child's best interests. This principle is better referred to as the parenting time factor, and must not be used to detract from the child-centric nature of the inquiry. Section 16.92(2) provides that trial judges shall not consider a parent's testimony that

they would move with or without the child, and ss. 16(3)(j) and 16(4) instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child. This consideration is especially important in mobility cases.

In light of these refinements, the common law relocation framework can be restated as follows: courts must determine whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary, and the scope of appellate review is narrow. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. How the outcome of an application would affect either parties' relocation plans should not be considered.

In the instant case, there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna, and the mother needed her family's support to care for the children, which was only

available in Telkwa. Moreover, the mother was more willing to facilitate a positive relationship between the children and the father than the converse, and there were findings of family violence. Accordingly, there was no reason to set aside the trial judge's decision that relocation was in the children's best interests.

Per Côté J. (dissenting in part): The appeal should be allowed in part. The new evidence should be admitted, and the appeal should be remanded to the trial court for reconsideration of the children's best interests in light of the new evidence.

There is agreement with the majority that the test laid out in *Palmer* governs, as it applies to both fresh and new evidence, yet there is disagreement with the majority's application of *Palmer* to the facts of the appeal. The Court of Appeal's ultimate conclusion that the evidence is admissible should be upheld, but its treatment of *Palmer* and its decision to reassess the best interests of the children should be rejected. The *Gordon* framework is not properly before the Court, as the parties did not raise the issue. It should be left for another day.

The *Palmer* test must be applied flexibly in all cases involving the welfare of children. A child's welfare is ongoing and fluid, and an accurate assessment of their current situation is of crucial importance on appeal. Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, the best interests of a child may provide a compelling reason to admit evidence on appeal. An application to vary may in some circumstances be the appropriate procedure, but it remains

adversarial in nature; as such, it would also cause strains on the parties' resources and delays.

Narrowing *Palmer's* flexibility to exceptional cases is unduly rigid and undermines the specificity needed in cases involving children's welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case. Additionally, a rigid view of the *Palmer* criterion of due diligence focuses inordinately and narrowly on the litigant's conduct. The mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child. To be sure, a failure to meet the due diligence criterion is not always fatal, as it is not a condition precedent to admission. When this occurs, it must be determined whether the strength of the other *Palmer* criteria is such that failure to satisfy the due diligence requirement is overcome.

Appellate courts are not entitled to overturn trial court decisions simply because they would have made a different decision or balanced the factors differently. While the Court of Appeal was correct to admit the new evidence, it should not have used it as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

In this case, the new evidence could have affected the result at trial, as it bore on a critical aspect of the trial judge's reasoning. Finality, although important,

should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. The matter should be remitted to the trial judge because of his extensive knowledge of the family and the children. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess the best interests of the children in light of their father's current circumstances.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, DeWitt-Van Oosten and Voith JJ.A.), 2021 *BCCA* 11, 45 B.C.L.R. (6th) 14, 50 *R.F.L.* (8th) 1, [2021] B.C.J. No. 38 (QL), 2021 CarswellBC 46 (WL), setting aside in part a decision of Saunders J., 2019 BCSC 2192, 34 *R.F.L.* (8th) 331, [2019] B.C.J. No. 2460 (QL), 2019 CarswellBC 3770 (WL). Appeal allowed, Côté J. dissenting in part.

Darius Bossé, Mark Power and Ryan Beaton, for the appellant.

Georgiale A. Lang, for the respondent.

Ian Ross, Caterina E. Tempesta and Samantha Wisnicki, for the intervener the Office of the Children’s Lawyer.

Claire E. Hunter, Q.C., Kate Feeney, Kimberley Hawkins and Diana C. Sepúlveda, for the interveners the West Coast Legal Education and Action Fund Association and the Rise Women's Legal Centre.

The reasons for judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[1] An appeal is not a retrial. Nor is it licence for an appellate court to review the evidence afresh. When appellate courts stray beyond the proper bounds of review, finality and order in our system of justice is compromised. But not every trial decision can weather a dynamic and unpredictable future. Once it is rendered, lives go on and circumstances may change. When additional evidence is put forward, how should appellate courts reconcile the need for finality and order in our legal system with the need for decisions that reflect the just result in the proceedings before the court? And conversely, what framework should guide trial judges when they determine whether relocation is in a child's best interests, to ensure a just result that can navigate what lies ahead? This appeal raises both questions.

[2] The Court must first determine the test that applies to the admission of additional evidence on appeal. The Court is asked to decide whether a legal distinction should be drawn between admitting “fresh evidence” (concerning events that occurred before trial) and “new evidence” (concerning events that occurred after trial).

[3] In my view, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, regardless of whether the evidence relates to facts that occurred before or after trial. Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[4] In cases where the best interests of the child are the primary concern, the *Palmer* test is sufficiently flexible to recognize that it may be in the interests of justice for a court to have more context before rendering decisions that could profoundly alter the course of a child’s life. At the same time, finality and order are critically important in family proceedings, and factual developments that occur subsequent to trial are usually better addressed through variation procedures.

[5] In this case, the Court of Appeal for British Columbia held that *Palmer* did not strictly govern the admission of new evidence on appeal. Instead, it applied a different test and admitted the evidence. It erred in doing so.

[6] In my view, the evidence did not satisfy the *Palmer* criteria. The respondent sought to overturn an unfavourable trial outcome by adducing evidence on appeal that could have been available at first instance, had he acted with due diligence. Effectively, he was allowed to remedy the deficiencies in his trial evidence on appeal — with the benefit, and guidance, of the trial reasons. This gave rise to considerable unfairness. And in any event, evidence in family law appeals that is tendered for the purpose of showing a material change of circumstances is more appropriately raised at a variation hearing. *Palmer* should not be used to circumvent a variation scheme that Parliament specifically designed to address such developments. Admission of this evidence on appeal was not in the interests of justice.

[7] The second broad issue in this case relates to the legal framework for determining whether it is in a child's best interests to allow a parent to relocate with the child, away from the other parent. It concerns the application of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined by the case law over the past two decades and viewed in light of the recent amendments of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[8] Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult — the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child. The challenge is even greater in mobility cases. Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child. The forward-

looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity.

[9] The law relating to the best interests of the child has long emphasized the need for individualized and discretionary decision making. But children also need predictability and certainty. To balance these competing interests, the law provides a framework and factors to structure a judge's discretion. This case calls on the Court to examine how some of those considerations apply in mobility cases. In particular, I clarify that a moving parent's reasons for relocation and the "maximum contact factor" are relevant only to the extent they bear upon the best interests of the child; a parent's testimony about whether they will move regardless of the outcome of the relocation application should not be considered; and family violence is a significant factor impacting the best interests of the child.

[10] Here, the trial judge did not err in his conclusion that relocation was in the best interests of the children. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. In the absence of any reviewable error, the Court of Appeal was wrong to intervene.

[11] At the conclusion of the hearing, the Court (Côté J. dissenting in part) allowed the appeal and restored the trial judge's order, for reasons to follow. These are the reasons.

II. Background

[12] Ashley Barendregt, the mother, met Geoff Grebliunas, the father, in 2011 in the Bulkley Valley, in northern British Columbia. She followed him to Kelowna in 2012, where he had moved for a change of scenery. Soon after, they got married. They bought a house and had two boys, who were aged three and five at the time of trial in 2019. They shared parenting duties throughout the marriage.

[13] The home purchase, already a burden on their modest finances, proved to be a project. An electrical fire shortly after they moved in exposed underlying problems — “rodents, water ingress, mould, and compromise of a structural floor joist” (2019 BCSC 2192, 34 R.F.L. (8th) 331, at para. 6) — that the father, with his background in carpentry, pledged to repair. He tore out drywall, planning to proceed room by room. But progress was slow. By trial, six years later, the house remained an “ongoing construction project” (trial reasons, at para. 5), with a makeshift kitchen and an only recently completed upstairs bathroom. The father’s own expert witness described it as “a working environment, not a living environment”: para. 33. Significant money was needed to bring it to marketable condition — funds the couple lacked, being well into six figures of debt by trial.

[14] Their relationship ended in November 2018, when the father “likely” assaulted the mother during an argument. That night, she drove the 2 boys some 10 hours to her parents’ home in Telkwa, a village in the Bulkley Valley. The parenting arrangement that emerged in the aftermath was formalized in an interim order, splitting

parenting time between the parents, alternately in Telkwa and Kelowna, before they agreed to keep the children in Kelowna with the father. When the mother returned to Kelowna, they were to alternate weekly parenting time. But she did not return. A court order gave her parenting time with the boys in Telkwa in August 2019, but she had no further parenting time before the trial, which was held later that year.

[15] The central issue at trial was whether the children should be relocated to Telkwa with the mother or remain in Kelowna. She was willing to move to Kelowna if the father prevailed; he was unwilling to move to the Bulkley Valley under any circumstances.

[16] After a nine-day trial, the judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. The father appealed and sought to adduce additional evidence. The Court of Appeal admitted the evidence, set aside the trial decision, and ordered the children to be returned to Kelowna. That decision was stayed pending appeal to this Court.

III. Decisions Below

- A. *Supreme Court of British Columbia, 2019 BCSC 2192, 34 R.F.L. (8th) 331 (Saunders J.)*

[17] The trial judge found that both parents played active parts in raising the children, and relocation to Telkwa would have a significant impact on the children's relationship with their father. Two key issues, however, favoured the move.

[18] The more significant issue was the parties' acrimonious relationship and its implications for the children. He doubted they could collaborate to promote the children's best interests. Their marriage had involved "possibly some degree of emotional abuse"; the father had assaulted and emotionally traumatized the mother; and his conduct at trial was "abusive, and profoundly offensive": para. 41. There was, he found, "compelling evidence of [the father's] continuing animosity towards [the mother]": para. 42.

[19] He concluded that granting the mother primary care of the children would be in their best interests. She was more likely than the father to promote a positive attitude in the boys toward the other parent, and distancing the parents would help isolate the children from their discord. It was also unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future. The children would furthermore benefit indirectly from the mother living in Telkwa, where she had a stronger support network.

[20] The "less significant" issue was the parties' financial situation: para. 31. The house needed an influx of money to make it habitable. The father said he would accelerate the renovations but had not prepared a budget for the ongoing work. His plan to live in the house with the boys depended on his parents paying off the mortgage and

line of credit, an arrangement they had yet to confirm by trial. The judge concluded that the father's ability to remain in the house, or even in West Kelowna, was less than certain.

[21] The trial judge concluded that relocation would best promote the children's interests. He awarded the mother primary residence and granted her application.

B. *Court of Appeal for British Columbia, 2021 BCCA 11, 45 B.C.L.R. (6th) 14 (Newbury, DeWitt-Van Oosten and Voith JJ.A.)*

[22] The appeal proceeded, and the hearing had nearly ended, when the father's counsel informed the court that her client's financial situation had suddenly changed. The father later elaborated in an affidavit: he had taken steps to purchase the mother's interest in the property; his parents had purchased a half interest in the home and had increased their personal line of credit to finance renovations; the three of them had refinanced the home, nearly halving the monthly mortgage payments; he had completed the bathroom and master bedroom; and a contractor had been hired to finish the kitchen. He sought to admit evidence of all of these developments in the appeal.

[23] Voith J.A., for the court, characterized this as "new" evidence because it had not existed at the time of trial. As such, it was not subject to the *Palmer* test, and the due diligence criterion did not strictly govern its admission. Instead, "new evidence" could be admitted if it established "that a premise or underpinning or

understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered”: para. 43.

[24] The court admitted the evidence, finding that it undermined a primary underpinning of the trial decision, namely, the judge’s findings on the parties’ finances. Specifically, the father had done almost exactly what he had said he would; and the “assumption[s]” that he might not be able to remain in the family home and might not “possibly even [be] able to remain in West Kelowna” had been displaced: para. 57. One of trial judge’s two main considerations no longer applied.

[25] And given this, the other consideration — the parties’ acrimonious relationship — could “no longer support the ultimate result arrived at by the trial judge”: para. 69. The mother’s need for emotional support could not justify relocation, even at the cost of “some friction between the parties”: paras. 74-75. And the trial judge should have considered whether the children could have stayed with their father in Kelowna. The court concluded that the children’s best interests were best served by staying in Kelowna with both parents and ordered accordingly.

IV. Issues

[26] This appeal raises two broad issues:

- (i) What test governs the admission of additional evidence on appeal, and did the Court of Appeal err in admitting the evidence in this case?
- (ii) Did the trial judge err in his relocation analysis, warranting appellate intervention?

[27] In brief, I answer as follows. Regardless of whether the evidence relates to facts that occurred before or after trial, the *Palmer* test governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice.

[28] Moreover, the trial judge did not err in his relocation analysis. His analysis of the best interests of the children is consonant with the mobility framework set out in *Gordon* as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

V. Analysis

A. *The Test for Admitting Additional Evidence on Appeal*

[29] Appellate courts have the discretion to admit additional evidence to supplement the record on appeal: *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at p. 188; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at para. 43. Whether in criminal or non-criminal matters (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107), courts have typically applied the four criteria set out by this Court in *Palmer* when parties seek to adduce evidence on appeal:

- (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);
- (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence is such that, if believed, it could have affected the result at trial.

[30] *Palmer* applies when evidence is adduced on appeal “for the purpose of asking the court to review the proceedings in the court below”: *Shulman*, at para. 44. *Palmer* does not, however, apply to evidence going to the validity of the trial process itself (*R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 76-77), nor to evidence adduced “as a basis for requesting an original remedy in the Court of Appeal”, such as a stay of proceedings for an abuse of process (*Shulman*, at paras. 44-46).

[31] The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties should “narrow rather than expand as [a] case proceeds up the appellate ladder”: *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44, at para. 10.

[32] The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be relevant, credible and could have affected the outcome — are concerned with reaching a just result.

[33] While the interest in the finality of a trial decision and order in the justice system must sometimes give way to reach a just result, as I will explain, a proper

application of *Palmer* reflects and safeguards both principles, as well as fairness to the parties.

[34] For the reasons that follow, I conclude that the *Palmer* test applies to all evidence tendered on appeal for the purpose of reviewing the decision below. In my view, the *Palmer* test ensures the proper balance and is sufficiently flexible to respond to any unique concerns that arise when considering whether to admit evidence regarding facts or events that occurred after the trial.

[35] My analysis proceeds as follows. First, I discuss the four *Palmer* criteria. Second, I address the unique challenges that arise when litigants seek to adduce “new” evidence. Third, I consider how *Palmer* applies in the family law context. Finally, I address the use of properly admitted evidence, before turning to the merits of the fresh evidence motion in this case.

(1) The *Palmer* Criteria

(a) *Due Diligence*

[36] Functionally, the first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been obtained for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial. This ensures finality and order in the judicial process: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 130; *R. v. G.D.B.*,

2000 SCC 22, [2000] 1 S.C.R. 520, at para. 19; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 15.

[37] The relationship between due diligence, and finality and order are deeply rooted in our common law. The law generally “requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so”: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. This animates, for example, the cause of action estoppel doctrine, which safeguards “the interest of an individual in being protected from repeated suits and prosecutions for the same cause” and “the finality and conclusiveness of judicial decisions”: K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at pp. 3-4. This doctrine achieves these ends through a due diligence component: it precludes a party from bringing an action against another party where the basis of the cause of action was argued or could have been argued in the prior action if the party in question had exercised reasonable diligence (*Grandview (Town of) v. Doering*, [1976] 2 S.C.R. 621, at pp. 634-38, citing *Henderson v. Henderson* (1843), 3 Hare 100).

[38] The *Palmer* test’s due diligence criterion plays a similar role: it ensures that litigants put their best foot forward when first called upon to do so.

[39] The principle of finality and order has both individual and systemic dimensions in this setting. On an individual level, it speaks to the profound unfairness in providing “a party the opportunity to make up for deficiencies in [their] case at trial”: *Stav v. Stav*, 2012 BCCA 154, 31 B.C.L.R. (5th) 302, at para. 32. A party who has not

acted with due diligence should not be afforded a “second kick at the can”: *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177, at para. 24. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.

[40] On a systemic level, this principle preserves the distinction between the roles of trial and appellate courts. Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contrast, are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.

[41] By requiring litigants to call all evidence necessary to present their best case at first instance, the due diligence criterion protects this distinction. This, in turn, sustains the proper functioning of our judicial architecture (*R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 30), and ensures the efficient and effective use of judicial resources (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 16).

[42] The importance of the due diligence criterion may vary, however, depending on the proposed use of the evidence. Evidence sought to be adduced as a basis for intervention — to demonstrate the first instance decision was wrong — raises

greater concerns for finality and order than evidence that may help determine an appropriate order *after* the court has found a material error. Since appellate intervention is justified on the basis of a reviewable error in the decision below, there is less concern for finality and order. Accordingly, in such cases, the due diligence criterion has less bearing on the interests of justice.

[43] In sum, the due diligence criterion safeguards the importance of finality and order for the parties and the integrity of the judicial system. The focus at this stage of *Palmer* is on the *conduct* of the party. This is why evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal.

(b) *The Criteria That the Evidence Be Relevant, Credible and Could Have Affected the Result*

[44] The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the first criterion, which focuses on the *conduct* of the party, these three criteria focus on the *evidence* adduced. And unlike due diligence, the latter three criteria are “conditions precedent” — evidence that falls short of them cannot be admitted on appeal: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 14.

[45] These criteria reflect the other principle that animates the *Palmer* test: the importance of reaching a just result in the context of the proceedings (*Sipos*, at

paras. 30-31; *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 56). This principle is directly linked to the correctness of the trial decision and the truth-seeking function of our trial process. Evidence that is unreliable, not credible, or not probative of the issues in dispute may hinder, rather than facilitate, the search for the truth. And as Cory J. observed in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 13, “[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth.”

[46] After a court has decided to admit evidence on appeal, it should remain mindful that the evidence has not been put to the test of cross-examination or rebuttal at trial, and the adverse party may not have had the ability to verify its accuracy: *Lévesque*, at para. 25. If the evidence is challenged or its probative value is in dispute, appellate courts may, among other things, provide the opposing party an opportunity to respond, allow cross-examination of a witness, permit the submission of expert evidence in response to additional expert evidence, or remit the matter to the court of first instance: *Lévesque*, at para. 25; see also *Child and Family Services of Winnipeg v. J.M.F.*, 2000 MBCA 145, 153 Man. R. (2d) 90, at para. 27; *Children’s Aid Society of Windsor-Essex (County) v. B. (Y.)* (2004), 5 R.F.L. (6th) 269 (Ont. C.A.), at paras. 12 and 19.

(c) *Palmer Resolves the Tension Between the Need for Finality and Order, and the Interest in Reaching a Just Result*

[47] The *Palmer* test reconciles the tension between these two foundational principles — the need for finality and order, and the interest in reaching a just result —

to determine the interests of justice in the circumstances of each case: *Sipos*, at para. 31. It is against this backdrop that I address whether the *Palmer* test applies to what has been called “new” evidence (more accurately referred to as evidence of facts or events that occurred after trial).

(2) The *Palmer* Test Applies to Evidence of Facts that Arise After Trial

[48] The primary issue in this appeal is whether and how the *Palmer* test applies to “new” evidence. According to the Court of Appeal, evidence is “new” if it pertains to facts that occurred after trial; “fresh” evidence pertains to facts that occurred before trial, but which, for one reason or another, could not be put before the court.

[49] Appellate courts across the country have differed in their approaches to “new” evidence. Some have applied the *Palmer* criteria (*J.W.S. v. C.J.S.*, 2019 ABCA 153, at para. 37 (CanLII); *Sheikh (Re)*, 2019 ONCA 692, at para. 7 (CanLII); *Riel v. Riel*, 2017 SKCA 74, 99 R.F.L. (7th) 367, at para. 16; *Hellberg v. Netherclift*, 2017 BCCA 363, 2 B.C.L.R. (6th) 126, at paras. 53-54), while others have applied a different or modified test (*North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (C.A.), at paras. 25-26; *Jens v. Jens*, 2008 BCCA 392, 300 D.L.R. (4th) 136, at paras. 24-29; *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5, at paras. 159-61 and 166 (CanLII); *Miller v. White*, 2018 PECA 11, 10 R.F.L. (8th) 251, at para. 19; *Beauchamp v. Beauchamp*, 2021 SKCA 148, at para. 36 (CanLII)).

[50] This dissonance in the jurisprudence reflects two apparent paradoxes that arise in applying the first and fourth *Palmer* criteria to “new” evidence. Courts have queried whether new evidence could ever fail the due diligence criterion, since it relates to facts not yet in existence at the time of trial: see *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.), at paras. 21 and 28-29; *J.M.F.*, at para. 21. Others have asked how such evidence could possibly have affected a trial outcome that it postdated: *North Vancouver (District)*, at para. 25; *Radcliff v. Radcliff* (2000), 7 R.F.L. (5th) 425 (Ont. C.A.), at para. 10; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), at p. 211.

[51] In the face of conflicting British Columbia case law, the Court of Appeal concluded that the *Palmer* test only applies to fresh evidence, and the due diligence criterion did not strictly govern the admission of new evidence. It outlined the following test:

... depending on the circumstances, new evidence may be admitted if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered. [para. 43]

[52] The mother takes issue with the Court of Appeal’s approach: she submits that the *Palmer* criteria apply to both fresh and new evidence. The father argues that the test applied below was appropriate because the new evidence “falsified” the trial decision.

[53] I conclude that the Court of Appeal erred by applying a different test to “new” evidence.

[54] Applying a different test for admitting new evidence — which dispensed with the due diligence criterion — failed to safeguard the delicate balance between finality and order, and the interest in a just result. It is also inconsistent with this Court’s *Palmer* jurisprudence. Indeed, this Court has consistently applied *Palmer* to evidence pertaining to events that occurred between the trial and appeal: see, for example, *Catholic Children’s Aid Society*, at p. 188; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 50-51; *Sipos*, at paras. 29-30. The evidence in *Palmer* concerned facts that occurred both before and after trial and thus included both “fresh” and “new” evidence. The additional evidence included sworn declarations made by one of the key trial witnesses who recanted his testimony after trial, declaring that the RCMP promised him money before trial and made the payment after trial.

[55] The *Palmer* test is sufficiently flexible to deal with both types of evidence. As I will explain, the core inquiries under all four criteria remain the same regardless of when the evidence, or the specific fact, came into existence. Because the same test applies, it is unnecessary to distinguish between “fresh” and “new” evidence. *Palmer* applies to the admission of all additional evidence tendered on appeal for the purpose of reviewing the decision below.

(a) *The Due Diligence Criterion*

[56] A common thread running through the parties' submissions and the Court of Appeal's decision is that conceptual difficulties arise when applying the due diligence criterion to evidence about facts arising after trial. The mother accepts that due diligence should be eased in instances where it was impossible to adduce the evidence at trial. For the father, it is "by definition . . . not an appropriate consideration" in such cases: R.F., at para. 75. Similarly, the Court of Appeal decided that the due diligence criterion does not strictly govern the admission of new evidence.

[57] But under such a formalistic approach, the timing of events — and not the litigant's conduct — would dictate the application of the due diligence criterion. For events occurring subsequently, the criterion would effectively be eliminated. This would run counter to our jurisprudence, ignore the litigant's conduct and would fail to safeguard finality and order within the *Palmer* test. That is precisely what happened in this case. Focusing exclusively on whether the decision would be different gives undue weight to the interest in reaching a just result — and distorts the delicate balance that the *Palmer* test seeks to maintain.

[58] The due diligence criterion is sufficiently flexible to adapt to any unique concerns raised by evidence of facts that occurred subsequent to trial. As this Court held in *Bent v. Platnick*, 2020 SCC 23, at para. 60, the due diligence criterion is not a rigid one and has been held to be a practical concept that is context-sensitive.

[59] Ultimately, this criterion seeks to determine whether the party could — with due diligence — have acted in a way that would have rendered the evidence

available for trial. The due diligence inquiry should focus on the *conduct* of the party seeking to adduce such evidence rather than on the evidence itself. And in doing so, a court should determine, quite simply, why the evidence was not available at the trial: *G.D.B.*, at para. 20.

[60] The reason why “new” evidence was unavailable for trial may have its roots in the parties’ pre-trial conduct. For facts arising after trial, courts should consider whether the party’s conduct could have influenced the timing of the fact they seek to prove. Consider this case. If finances are at issue and a party does not take steps to obtain a financing commitment until after trial, the court may ask why the evidence could not have been obtained for trial. Parties cannot benefit from their own inaction when the existence of those facts was partially or entirely within their control. Again, litigants must put their best foot forward at trial. In the end, what matters is that this criterion properly safeguards finality and order in our judicial process.

[61] In sum, the focus of the due diligence criterion is on the litigant’s conduct in the particular context of the case. Considering whether the evidence could have been *available* for trial with the exercise of due diligence is tantamount to the requirement that the evidence could not, with the exercise of due diligence, have been *obtained* for trial. Where a party seeks to adduce additional evidence on appeal, yet failed to act with due diligence, the *Palmer* test will generally foreclose admission.

(b) *The Other Palmer Criteria*

[62] There is no suggestion by the parties that the remaining *Palmer* criteria should operate differently depending on when the fact the evidence seeks to prove occurred. Needless to say, the evidence must be relevant and credible regardless of when it arose. The interest in reaching a just result requires nothing less.

[63] As for the fourth factor — whether the evidence, if believed, could have affected the result at trial — the logic remains the same: a court must approach this criterion purposively. While it is tempting to conclude that evidence of facts arising *after* trial could never have affected the result *at* trial, the inquiry is not so narrow. The question is not the evidence's timing but whether the evidence is sufficiently probative of the trial issues, had it been available. An overly formalistic approach at this stage ignores the underlying rationale of the *Palmer* criteria — here, the interest in reaching a just result in the context of the proceedings.

[64] As noted in *Palmer*, at p. 776, the fourth criterion will be satisfied if the evidence, assuming it was presented to the trier of fact and believed, possesses such strength or probative force that it might, taken with the other evidence adduced, have affected the result.

(3) The *Palmer* Test in Family Law Cases Involving the Best Interests of the Child

[65] I turn now to an underlying question raised by this appeal: the flexible application of *Palmer* in cases involving the best interests of the child.

[66] This Court has explained that these cases may require a more flexible application of the fourth *Palmer* criterion: *Catholic Children's Aid Society*, at p. 188. The Court recognized that the best interests analysis — which takes into account a broad range of considerations, including the needs, means, condition and other circumstances unique to the child before the court — widens the scope of evidence that could affect the result. This criterion, however, remains a condition precedent for the admission of evidence in family appeals. But the flexible approach to the fourth criterion is not the only aspect of *Palmer* that warrants further discussion in the family law context. Two other aspects include (i) the exceptional circumstances where a failure to meet due diligence is not fatal; and (ii) the existence of variation schemes that address factual developments that postdate trial. I address each in turn.

(a) *A Failure to Meet Due Diligence Is Not Fatal in Exceptional Circumstances*

[67] First, given both the premium placed on certainty in cases involving children and the importance of having accurate and up-to-date information when a child's future hangs in the balance (*Catholic Children's Aid Society*, at p. 188), evidence that does not meet the due diligence criterion may nonetheless be admitted in exceptional circumstances. Let me explain. Finality and order — in both their individual and systemic dimensions — are *particularly* important in cases involving the best interests of the child: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13. Children should be afforded the comfort of knowing, with some

degree of certainty, where they will live and with whom. And unfortunately, an appeal only prolongs the cloud of uncertainty and the hardship and stress a child must endure.

[68] Protracted litigation also places additional strain on the parties' resources. In the context of a spousal separation, families who resort to the adversarial process are often in crisis, with two households now in need of support. As this Court recognized in *Moge v. Moge*, [1992] 3 S.C.R. 813, family litigants, particularly women, are often already shouldering the economic consequences of a marital breakdown. Some will be unable to afford the financial and emotional cost of court proceedings at first instance, let alone the strain of relitigating the facts on appeal. Needlessly prolonging this adversarial process does little to assist parties who must find a way to restructure their relationships and cooperate for the sake of their children.

[69] Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Evidence that does not satisfy the due diligence criterion should therefore generally not be admitted, even on an appeal of a best-interests-of-the-child determination.

[70] That said, an absence of due diligence may in rare instances be superseded by the interests of justice: see *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 32 R.F.L. (6th) 7 (Ont. C.A.), at para. 56. There may be exceptional cases involving a child's best interests where the need for finality and order may need to yield in the interests of justice. The intervener the Office of the Children's Lawyer provides one such example: in urgent matters requiring an immediate decision — a pressing

medical or other issue bearing on the child's best interests — it may not serve the interests of justice to require a party to show due diligence and further prolong or delay proceedings.

[71] In other cases, admitting the additional evidence may not offend the principle of finality at all, despite the failure to meet the due diligence criterion. For instance, where the appellate court has already identified a material error in the trial judgment below, evidence that may help determine an appropriate order — whether to show the need for a new trial, support a substitute order, or otherwise — may exceptionally warrant admission: *Children's Aid Society of Halton (Region)*, at paras. 27 and 52-56; *Children's Aid Society of Toronto v. P. (D.)* (2005), 19 R.F.L. (6th) 267 (Ont. C.A.), at paras. 8-9. This may promote timely justice, consistent with a child's need to have their future determined with due dispatch: C. Leach, E. McCarty and M. Cheung, "Further Evidence in Child Protection Appeals in Ontario" (2012), 31 *C.F.L.Q.* 177.

[72] To be clear, such exceptional circumstances do not dispense with the other *Palmer* criteria — the evidence still must be relevant, credible, and have some material bearing on the outcome. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal. An appeal is not the continuation of a trial. Rather, the party must satisfy the judge that the interest of finality and order is clearly outweighed by the need to reach a just result

in the context of the proceedings. In such circumstances, the interests of justice may demand additional evidence to be admitted on appeal.

(b) *The Existence of Variation Schemes That Address Factual Developments That Postdate Trial in Parenting Cases*

[73] Turning to the second feature that arises in the family law context, the admission of post-trial evidence on appeal may be unnecessary because, unlike decisions that award damages in one final order, litigation about ongoing parenting arrangements remains subject to court oversight. Specifically, variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. As I will explain, the admission of post-trial evidence on appeal unnecessarily undercuts both finality and order in family law judgments, as well as Parliament's statutory design.

[74] Because variation procedures are available in parenting cases to address changes arising post-trial, the interest in reaching a just result can be fostered through other means. The admission of post-trial evidence on appeal therefore unnecessarily undermines finality and order in family law decisions.

[75] Moreover, courts must be wary of permitting parties to use the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal cannot serve as an indirect route of varying the original parenting

order. A variation application and an appeal are distinct proceedings based on fundamentally different premises.

[76] In a variation proceeding, “[t]he court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision”: *Gordon*, at para. 11. The applicant bears the burden of proving that a child’s best interests differ from those determined in the original decision because the circumstances on which that decision was based have materially changed since trial. Once an applicant discharges this burden, the assessment is prospective: a variation judge must enter into a fresh inquiry to determine where the best interests of the child lie, considering the findings of fact of the judge who made the previous order, together with the evidence of new circumstances (*Gordon*, at para. 17). Finality in this context respects the trial judge’s original determination of the child’s best interests: *Gordon*, at para. 17; *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 688, per Sopinka J.

[77] An appeal, in contrast, is designed to determine whether there is an error in the trial decision. In other words, the correctness of the previous decision — and not the implications of subsequent events — is the focal point in an appeal. This assessment is inherently retrospective, with the review typically circumscribed within the four corners of the judgment below. Here, finality in the original decision is preserved unless the court identifies a material error.

[78] It is essential that variation procedures and appeals remain distinct in the family law context: holding otherwise would unfairly require the opposing party to

defend the original order — absent a material error — in the wrong forum, with appellate judges effectively performing the work assigned to first instance judges in variation procedures. This would displace the corrective function of appellate courts and allow litigants to circumvent Parliament’s variation scheme.

[79] Litigants must not be permitted to game the system in this way: an appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding; nor is it an opportunity to seek a fresh determination, after remedying gaps in a trial strategy with the assistance of the trial judge’s “preliminary” reasons. Such a tactical approach in family cases will often be at the expense of the children.

[80] Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is “in substance a disguised application to vary” (*Riel*, at para. 20), a court may refuse to admit additional evidence without considering the *Palmer* criteria.

(4) The Use of Properly Admitted Evidence on Appeal

[81] As a final observation, even when evidence is properly admitted on appeal, appellate courts must defer to the trial judge’s factual findings that are unaffected by the additional evidence. While assessing the proper outcome in light of additional evidence may require a global consideration of the case (*St-Cloud*; *Gordon*), appellate

courts are not entitled to reweigh or disregard the trial judge's underlying factual findings absent palpable and overriding error.

(5) Did the Court of Appeal Err in Admitting the Additional Evidence?

[82] In this case, the Court of Appeal erred in admitting the father's evidence on appeal. It applied the wrong test and failed to consider whether the father exercised due diligence. The evidence could have been available for trial with due diligence. And in any event, this matter could have been dealt with solely on the basis that a fresh evidence motion was not in the interests of justice given the availability of a variation procedure.

[83] The father sought to adduce an affidavit at the conclusion of the appeal hearing. He deposed that he had taken steps to pay the mother her interest in the family property "to comply with the order of the trial judge": C.A. reasons, at para. 27. He also deposed that he refinanced the home and his parents increased their personal line of credit, which went towards renovations that had been partially completed.

[84] The father argues that the evidence addressed the trial judge's concerns that because of their financial position, his ability to remain in the family home, or even in West Kelowna, was "less than certain": see R.F., at para. 5; see also trial reasons, at para. 40. These preoccupations, he says, are now "demonstrably incorrect": R.F., at para. 31.

[85] In a similar vein, the Court of Appeal admitted the evidence because it was “cogent and material”, and it “directly addresse[d] one of the two primary underpinnings of the trial decision” (para. 51), since the trial judge’s “concern, or expectation, or ‘assumption’” regarding the father’s ability to remain in the family home “ha[d] been displaced” (para. 57).

[86] The trial judge’s predictions about the state of the father’s finances and his ability to remain at his residence, however, should not be mischaracterized. It was open to the trial judge to make an assessment about the future and make a finding of fact based on the evidence before him. Here, the fact that the father later moved to cure evidentiary deficiencies regarding his ability to finance and renovate the home does not mean that the trial judge erred in his findings or conclusions.

[87] More to the point, the father failed to act with due diligence. Most obviously, the facts he now seeks to prove and rely upon on appeal — that he had the necessary financing to keep his home and make it habitable for the children — were squarely at issue before the trial judge. He could have taken reasonable steps to obtain financing before trial, since he was aware that he needed to refinance to stay in the house: trial reasons, at para. 35. His plan was contingent on obtaining financing from his father, whose testimony was “less definite” (para. 36):

Mr. Grebliunas Sr. has no commitment letters regarding financing. Asked whether he was prepared to offer any more than the amount of the debt, he hedged, saying “We’ll see what the final number is”, and offered his opinion that the property would be “a good investment”. [Emphasis added; para. 38.]

As the trial judge concluded, the practicability of that arrangement remained “an open question”: para. 39.

[88] Allowing the father to resolve these concerns and redraw the factual landscape at the eleventh hour of the appeal occasioned considerable unfairness. In effect, he was allowed to relitigate the same issues on the basis of more favourable facts, displacing the corrective function of the appellate court. Nothing on the record indicates that he was prevented from obtaining the financing commitments before trial. This ran firmly against the interest in finality and order that due diligence is meant to safeguard.

[89] Further, as noted above, an alternative legislative mechanism for varying the trial order was available to deal with any material changes of circumstances arising after trial: *Divorce Act*, s. 17(5); *Gordon*, at para. 10. By successfully adducing the additional evidence, the father was able to circumvent the burden he would have faced in a variation application — that is, proving a change of circumstances from those that justified the children’s relocation to Telkwa. Instead, he received what amounted to a near fresh evaluation of the children’s best interests.

[90] A flexible approach to *Palmer* in cases involving the welfare of children must not permit what is “in substance a disguised application to vary”: *Riel*, at para. 20. And as stated above, courts should be mindful of not permitting parties to use the *Palmer* framework to circumvent and undermine parliamentary schemes that provide specific procedures for review or variation upon shifts in the factual landscape.

[91] There are no circumstances here that render the admission of this evidence necessary in the interests of justice. The Court of Appeal erred in admitting the additional evidence on appeal.

B. *The Framework Governing Relocation Cases*

[92] I turn now to the second question in this appeal: whether the trial judge erred in his analysis of the mother's application to relocate to Telkwa with the children.

[93] The father argues that the trial judge erred in his application of the common law framework that governs relocation applications, and that this framework should be updated. He raises concerns regarding the trial judge's application of *Gordon* to the parties' shared parenting arrangement; his treatment of the "maximum contact principle"; the weight he afforded to the mother's reasons for moving; his neglect of the mother's testimony that she would stay in Kelowna and co-parent if her application failed; and the impact of family violence and discord between the parties on his analysis: R.F., at paras. 24-29, 33-37, 67 and 84-88.

[94] These submissions all bring into focus how case law across the country has refined and supplemented the *Gordon* framework for over 25 years. Indeed, the *Gordon* framework is flexible by design; it is not an unyielding set of rules. And with decades of *Gordon* jurisprudence as a guide, the federal government and many provinces have now enacted statutory relocation regimes that largely reflect the judicial experience evinced in the case law. As I will explain, this jurisprudential and legislative lineage

provides a clear framework for all family arrangements going forward. The trial judge's assessment of the best interests of the child is consistent with this refined framework. It was free from material error and entitled to deference on appeal.

[95] My reasons proceed as follows. First, I touch on the best interests of the child and the unique nature of mobility cases. Second, I underline the importance of deference in cases involving parenting issues. Third, I set out the refined *Gordon* framework in light of jurisprudential and legislative refinements that have occurred over the past two decades. Finally, I turn to the specific issues raised in this case: whether the trial judge erred in his application of the *Gordon* framework.

(1) The Best Interests of the Child

[96] The best interests of the child are an important legal principle in our justice system: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9. It is a staple in domestic statutes, international law, and the common law: see, for example, *Divorce Act*, s. 16; *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1); *Gordon*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909.

[97] But, even with a wealth of jurisprudence as guidance, determining what is “best” for a child is never an easy task. The inquiry is “highly contextual” because of the “multitude of factors that may impinge on the child’s best interest”: *Canadian Foundation for Children, Youth and the Law*, at para. 11; *Gordon*, at para. 20.

[98] The difficulties inherent to the best interests principle are amplified in the relocation context. Untangling family relationships may have profound consequences, especially when children are involved. A child’s welfare remains at the heart of the relocation inquiry, but many traditional considerations do not readily apply in the same way.

[99] In *Gordon*, this Court set out a framework for deciding whether relocation is in the best interests of the child. Under this framework, a judge has the onerous task of determining a child’s best interests in the tangle of competing benefits and detriments posed by either outcome: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, 334 D.L.R. (4th) 49, at para. 23. And as Abella J.A. (as she then was) once observed, “[i]t can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child’s best interests”: *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

(2) The Importance of Deference in Parenting Cases Affecting the Best Interests of the Child

[100] The scope of appellate review in family law cases is narrow: *Van de Perre*, at para. 11. Determining a child’s best interests is always a fact-specific and highly discretionary determination: *Van de Perre*, at para. 9. And as Gonthier J. observed, “Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge’s discretion”: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1374.

[101] The trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial: *R. v. G.F.*, 2021 SCC 20, at para. 81. After hearing from the parties directly, weighing the evidence, and making factual determinations, the trial court is best positioned to determine the best parenting arrangement.

[102] An appellate court’s role, as noted, is instead generally one of error correction; it is not to retry a case. Permitting appellate courts to become venues for dissatisfied parties to relitigate issues already resolved at trial erodes the public’s confidence in the judicial process and the rule of law. The proper functioning of our judicial system requires each level of court to remain moored to its respective role in the administration of justice.

[103] Therefore, an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12; *Van de Perre*, at para. 11.

[104] Absent an error of law or a palpable and overriding error of fact, deference is vital: *Housen*, at paras. 8, 10, 36 and 39. Appellate courts must review a trial judge’s

reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *G.F.*, at para. 79. As I have explained, an appeal is not a litigant's opportunity for a "second kick at the can", especially in parenting cases where finality is of paramount importance: *Van de Perre*, at para. 13.

(3) The Legal Principles Governing Relocation Applications

[105] For over 25 years, *Gordon* has been the governing authority for mobility applications. McLachlin J. (as she then was) set out a two-stage inquiry for determining whether to vary a parenting order under the *Divorce Act* and permit a custodial parent to relocate with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. *Gordon* then provided factors to be considered in relocation cases.

[106] Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications: see *Nunweiler v. Nunweiler*, 2000 BCCA 300, 186 D.L.R. (4th) 323, at paras. 27-28; *L.D.D. v. J.A.D.*, 2010 NBCA 69, 364 N.B.R. (2d) 200, at paras. 10, 24-25, 27 and 29; *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236 (C.A.), at para. 18. As well, courts have applied the framework in cases governed by provincial family law acts, even though *Gordon* concerned an application under the *Divorce Act*: *Bjornson*, at paras. 8 and 17; *G.J. v. C.M.*, 2021 YKSC 20, at para. 26 (CanLII); *Droit de la famille* — 2294, 2022 QCCA 125, at paras. 11-12 (CanLII).

[107] At the time *Gordon* was rendered, the *Divorce Act* and provincial family legislations did not contain any provisions pertaining to relocation. In 2019, Parliament amended the *Divorce Act* to provide a statutory regime that governs relocation applications. Several provinces have enacted similar statutory relocation regimes in recent years: see *Family Law Act*, S.B.C. 2011, c. 25, ss. 65 to 71; *The Children's Law Act*, 2020, S.S. 2020, c. 2, ss. 13 to 17; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 39.4; *Family Law Act*, S.N.B. 2020, c. 23, ss. 60 to 66; *Parenting and Support Act*, R.S.N.S. 1989, c. 160, ss. 18E to 18H; *Children's Law Act*, S.P.E.I. 2020, c. 59, ss. 46 to 52.

[108] Subject to some notable exceptions, the *Divorce Act* and these provincial statutes largely codified this Court's framework in *Gordon*. As I will explain, where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years.

[109] The *Divorce Act* amendments came into force on March 1, 2021, after the courts below decided this case. Therefore, the mobility application under appeal proceeded under the *Gordon* framework. That said, the transitional provision in s. 35.3 of the amended *Divorce Act* provides:

35.3 A proceeding commenced under this Act before the day on which this section comes into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with this Act as it reads as of that day.

[110] This Court did not receive any submissions on the application of s. 35.3. As I will explain, however, the outcome would be the same regardless of whether this case were decided under the amended *Divorce Act* or the refined *Gordon* framework. The new relocation provisions in the *Divorce Act* largely mirror developments in the common law since *Gordon*. As a result, I leave the discussion of the transitional provision for another day. This case, however, provides an opportunity to bring the common law framework in line with the amended *Divorce Act* to assist judges in dealing with future mobility cases.

[111] In the sections that follow, I clarify how certain aspects of the framework for determining parental relocation issues have evolved since this Court decided *Gordon*.

(a) *Determining Relocation Issues at First Instance and by Way of Variation Applications*

[112] The approach to mobility issues when they are raised at first instance, as in this case, differs from the approach to such issues when they are raised by way of a variation application, as in *Gordon*. Without a pre-existing judicial determination, a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child. Therefore, the first stage of *Gordon* — which sets out the usual requirement for a variation order — has no application.

[113] Even where there is an existing parenting order, relocation will typically constitute a material change in circumstances and therefore satisfy the first stage of the *Gordon* framework: *Gordon*, at para. 14; see also *Divorce Act*, s. 17(5.2).

[114] Therefore, regardless of how the relocation issue is brought before the court, the first stage of the *Gordon* inquiry will likely not raise a contentious issue. That said, when the relocation issue arises by way of a variation application, a court must consider the findings of fact of the judge who made the previous order, together with the evidence of new circumstances: *Gordon*, at para. 17. The history of parenting arrangements is always relevant to understanding a child's best interests.

(b) *Determining a Child's Best Interests in Mobility Cases*

[115] Accordingly, the so-called second stage of the *Gordon* framework is often the sole issue when determining a relocation issue. The crucial question is whether relocation is in the best interests of the child.

[116] Five considerations that bear upon the best-interests-of-the-child analysis arise in this case: (i) the application of *Gordon* to shared parenting arrangements and the so-called "great respect principle"; (ii) a moving parent's reasons for relocation; (iii) the "maximum contact principle"; (iv) a moving parent's testimony about how the outcome of the application will influence their decision to relocate; and (v) the impact of family violence. I address each in turn, looking at their evolution in the case law since *Gordon* and their reflection in amendments to the *Divorce Act*.

(i) The Application of *Gordon* to Shared Parenting Arrangements and the So-Called “Great Respect Principle”

[117] In determining the best interests of the child, *Gordon* first instructs that “[t]he inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent’s views are entitled to great respect”: para. 49.

[118] In this case, the father contends that this aspect of *Gordon* is of limited value where there is a shared parenting arrangement: R.F., at para. 28. He says the trial judge should not have paid special “respect” to the mother’s decision to move given their history of shared parenting roles. He relies on Newbury J.A.’s observation in *Q. (R.E.) v. K. (G.J.)*, 2012 BCCA 146, 348 D.L.R. (4th) 622, at para. 58, that “[i]t is not clear how the ‘great respect’ principle should work where both parents are custodial parents.”

[119] The parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests: *Gordon*, at para. 48. This logic applies to both parents in a shared parenting arrangement, and accordingly, both of their views are entitled to great respect in an assessment of the child’s best interests. This makes sense: a court always pays careful attention to the views of the parents. In my view, it adds little value to this analysis to label it a separate principle of “great respect”.

[120] As for any legal presumption in relocation cases, the Court in *Gordon* noted that the wording of the *Divorce Act* belied the need to defer to the custodial

parent. Rather, the Act expressly stipulated that the judge hearing the application should be concerned only with the best interests of the child, and the variation provisions did not place a burden on any parent at the merits stage of the analysis: paras. 37 and 39.

[121] But over time, certain patterns have emerged. In practice, a move is more likely to be approved where the clear primary caregiver for a child seeks to relocate and more likely to be denied if there is a shared parenting arrangement. Professor Thompson refers to this as the unspoken “primary caregiver presumption”: see D. A. R. Thompson, “Ten Years After *Gordon*: No Law, Nowhere” (2007), 35 *R.F.L.* (6th) 307, at p. 317; R. Thompson, “Where Is B.C. Law Going? The New Mobility” (2012), 30 *C.F.L.Q.* 235.

[122] In discussing presumptions, *Gordon* relied on the fact that Parliament had not set out any general rules. It has since done so. In 2019, Parliament enacted a burden of proof, set out in s. 16.93 of the *Divorce Act*, which corresponds to the broad trends in the jurisprudence.

[123] Therefore, in all cases, the history of caregiving will be relevant. And while it may not be useful to label the attention courts pay to the views of the parent as a separate “great respect” principle, the history of caregiving will sometimes warrant a burden of proof in favour of one parent. Indeed, federal and provincial legislatures have increasingly enacted presumptions, bringing clarity to the law. In all cases, however, the inquiry remains an individual one. The judge must consider the best interests of the

particular child in the particular circumstances of the case. Other considerations may demonstrate that relocation is in the child's best interests, even if the parties have historically co-parented.

(ii) The Reasons for Relocation

[124] The second refinement to the *Gordon* framework concerns the moving parent's reasons for relocating. Here, the father and the Court of Appeal took issue with the weight the trial judge ascribed to the mother's reasons for relocation, the implication being that this consideration detracted from his focus on the child's best interests.

[125] In *Gordon*, McLachlin J. cautioned that courts should avoid "descend[ing] into inquiries into the custodial parent's reason or motive for moving" because "[u]sually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability": paras. 22-23. Therefore, "absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry": para. 23. To hold otherwise, McLachlin J. reasoned, would shift the focus from the best interests of the child to the conduct of the custodial parent: para. 22.

[126] In practice, courts across the country have found that the reason for the move often bears on the best interests of the child: N. Bala, "Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's *Divorce Act*" (2020), 39 *C.F.L.Q.* 45,

at p. 71; Thompson (2007); E. Jollimore and R. Sladic, “Mobility — Are We There Yet?” (2008), 27 *C.F.L.Q.* 341.

[127] Recent amendments to the *Divorce Act* now instruct courts to consider the moving parent’s reasons for relocation: s. 16.92(1)(a). Similarly, provinces across Canada have incorporated the moving parent’s reasons for relocation within their statutory relocation regimes: *Family Law Act*, s. 69(6)(a) (B.C.); *The Children’s Law Act*, 2020, s. 15(1)(a) (Sask.); *Children’s Law Reform Act*, s. 39.4(3)(a) (Ont.); *Family Law Act*, s. 62(1)(a) (N.B.); *Parenting and Support Act*, s. 18H(4)(b) (N.S.); *Children’s Law Act*, s. 48(1)(a) (P.E.I.).

[128] Indeed, isolating the custodial parent’s reasons for the move from the broad, individualized inquiry of the child’s best interests has frequently proven impractical. There will often be a connection between the expected benefits of the move for the child and the relocating parent’s reasons for proposing the move in the first place. Relocation for financial reasons, for instance, will clearly carry implications for a child’s material welfare. Considering the parent’s reasons for moving can be relevant, and even necessary, to assess the merits of a relocation application.

[129] That said, the court should avoid casting judgment on a parent’s reasons for moving. A moving parent need not prove the move is justified. And a lack of a compelling reason for the move, in and of itself, should not count against a parent, unless it reflects adversely on a parent’s ability to meet the needs of the child: *Ligate v. Richardson* (1997), 34 O.R. (3d) 423 (C.A.), at p. 434.

[130] Ultimately, the moving parent’s reasons for relocating must not deflect from the focus of relocation applications — they must be considered only to the extent they are relevant to the best interests of the child.

(iii) The “Maximum Contact Principle” or “Parenting Time Consistent With the Best Interests of the Child”

[131] *Gordon* requires courts to consider “the desirability of maximizing contact between the child and both parents”: para. 49. This consideration has been referred to as the “maximum contact principle”: see *Gordon*, at para. 24; see also *Young v. Young*, [1993] 4 S.C.R. 3, at p. 53, per L’Heureux-Dubé J., and p. 118, per McLachlin J. (as she then was). In this case, the father contends that the trial judge neglected this consideration.

[132] Concerns about parenting time with the child will inevitably be engaged in relocation cases: the crux of the dispute is whether it is in the child’s best interests to move notwithstanding the impact on their relationship with the other parent. In other words, this concern is folded into the central inquiry before the court.

[133] What is known as the maximum contact principle has traditionally emphasized that children shall have as much contact with each parent as is consistent with their best interests. A corollary to this is sometimes referred to as the “friendly parent rule”, which instructs courts to consider the willingness of a parent to foster and support the child’s relationship with the other parent, where appropriate: see *Young*, at

p. 44. Both of these considerations have long been recognized by the *Divorce Act*: see *Divorce Act*, pre-amendments, ss. 16(10) and 17(9); and *Divorce Act*, post-amendments, ss. 16(6) and 16(3)(c).

[134] Although *Gordon* placed emphasis on the “maximum contact principle”, it was clear that the best interests of the child are the sole consideration in relocation cases, and “if other factors show that it would not be in the child’s best interests, the court can and should restrict contact”: *Gordon*, at para. 24; see also para. 49. But in the years since *Gordon*, some courts have interpreted what is known as the “maximum contact principle” as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access: *Folahan v. Folahan*, 2013 ONSC 2966, at para. 14 (CanLII); *Slade v. Slade*, 2002 YKSC 40, at para. 10 (CanLII); see also F. Kelly, “Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts” (2011), 49 *Osgoode Hall L.J.* 277, at pp. 278 and 296-98. Indeed, the term “maximum contact principle” seems to imply that as much contact with both parents as possible will necessarily be in the best interests of the child.

[135] These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is *only* significant to the extent that it is in the child’s best interests; it must not be used to detract from this inquiry. It is notable that the amended *Divorce Act* recasts the “maximum contact principle” as “[p]arenting time consistent with best interests of child”: s. 16(6). This shift in language is more neutral

and affirms the child-centric nature of the inquiry. Indeed, going forward, the “maximum contact principle” is better referred to as the “parenting time factor”.

(iv) A Parent’s Testimony About Whether They Will Relocate Regardless of the Outcome of the Relocation Application

[136] *Gordon* is silent as to whether, and how, a trier of fact may consider how the outcome of an application would affect the parties’ relocation plans. In this case, the mother indicated that she would return to Kelowna if her application was refused, while the father indicated he would not move to the Bulkley Valley if her application was granted.

[137] In the years since *Gordon*, many courts have recognized the danger that such evidence will place parties in a “double bind”. As Paperny J.A. explained in *Spencer v. Spencer*, 2005 ABCA 262, 257 D.L.R. (4th) 115, at para. 18:

In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self interested and discounting the children’s best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent’s well-being or to that of the children. If a judge mistakenly relies on a parent’s willingness to stay behind “for the sake of the children,” the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

[138] I agree. Considering a parent's willingness to move with or without the child can give rise to a double bind: a parent can either appear to be putting their own interests ahead of their child, or they risk undermining the strength of their relocation application (see *D.P. v. R.B.*, 2009 PECA 12, 285 Nfld. & P.E.I.R. 61, at para. 32; Jollimore and Sladic, at pp. 373-74).

[139] This risk has led appellate courts in many provinces to discourage trial judges from relying on a parent's representations about whether they will move without the children: see *Hopkins v. Hopkins*, 2011 ABCA 372, at para. 6 (CanLII); *Hejzlar*, at paras. 24-27; *D.P.*, at para. 32; *N.T. v. W.P.*, 2011 NLCA 47, 309 Nfld. & P.E.I.R. 350, at para. 9; *Morrill v. Morrill*, 2016 MBCA 66, 330 Man. R. (2d) 165, at para. 12.

[140] The same approach is now reflected in the *Divorce Act*: s. 16.92(2) precludes the court from considering whether the moving parent would relocate with or without the children. I would add that a responding parent could just as easily fall victim to the problematic inferences associated with the double bind: see *Joseph v. Washington*, 2021 BCSC 2014, at paras. 101-11 (CanLII). Therefore, in all cases, the court should not consider how the outcome of an application would affect the parties' relocation plans.

(v) Family Violence as a Relevant Factor

[141] In this case, the acrimonious relationship between the parties — featuring abusive conduct during the marriage, at separation, and at trial — was a significant

factor in the trial judge's relocation analysis. On appeal, the father argues that such "friction" is "not unusual for separating couples": R.F., at para. 35.

[142] Since *Gordon*, courts have increasingly recognized that any family violence or abuse may affect a child's welfare and should be considered in relocation decisions: see *Prokopchuk v. Borowski*, 2010 ONSC 3833, 88 R.F.L. (6th) 140; *Lawless v. Lawless*, 2003 ABQB 800, at para. 12 (CanLII); *Cameron v. Cameron*, 2003 MBQB 149, 41 R.F.L. (5th) 30; *Abbott-Ewen v. Ewen*, 2010 ONSC 2121, 86 R.F.L. (6th) 428; *N.D.L. v. M.S.L.*, 2010 NSSC 68, 289 N.S.R. (2d) 8, at paras. 22-23 and 35; *E.S.M. v. J.B.B.*, 2012 NSCA 80, 319 N.S.R. (2d) 232, at paras. 55-57. Courts have been significantly more likely to allow relocation applications where there was a finding of abuse: Department of Justice, *A Study of Post-Separation/Divorce Parental Relocation* (2014), at ch. 3.3.4.

[143] The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., "A Comprehensive Review of the Literature on the

Impact of Exposure to Intimate Partner Violence for Children and Youth” (2014), 5 *I.J.C.Y.F.S.* 493, at p. 497.

[144] Domestic violence allegations are notoriously difficult to prove: P. G. Jaffe, C. V. Crooks and N. Bala, “A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes” (2009), 6 *J. Child Custody* 169, at p. 175; A. M. Bailey, “Prioritizing Child Safety as the Prime Best-Interest Factor” (2013), 47 *Fam. L.Q.* 35, at pp. 44-45. As the interveners West Coast LEAF Association and Rise Women’s Legal Centre point out, family violence often takes place behind closed doors and may lack corroborating evidence: see S. B. Boyd and R. Lindy, “Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence” (2016), 35 *C.F.L.Q.* 101, at p. 115. Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support.

[145] The prospect that such findings could be unnecessarily relitigated on appeal will only deter abuse survivors from coming forward. And as it stands, the evidence shows that most family violence goes unreported: L. C. Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (2nd ed. 2020), 2017 CanLIIDocs 2 (online), at ch. 4.5.2.

[146] The recent amendments to the *Divorce Act* recognize that findings of family violence are a critical consideration in the best interests analysis: s. 16(3)(j) and (4). The *Divorce Act* broadly defines family violence in s. 2(1) to include any violent

or threatening conduct, ranging from physical abuse to psychological and financial abuse. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child.

[147] Because family violence may be a reason for the relocation and given the grave implications that any form of family violence poses for the positive development of children, this is an important factor in mobility cases.

(c) *Summary of the Framework for Determining Whether Relocation Is in the Best Interests of the Child*

[148] More than two decades ago, this Court set out a framework for relocation applications in *Gordon*: paras. 49-50. It applies to relocation issues that arise at first instance and in the context of applications to vary existing parenting orders.

[149] Since then, our jurisprudence has refined the *Gordon* framework, and, subject to two notable exceptions, the *Divorce Act* has largely codified it. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors. While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement: s. 16.93. And although *Gordon* restricted whether courts could consider a moving party's reasons for relocating, this is now an express consideration in the best-interests-of-the-child analysis: s. 16.92(1)(a).

[150] The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades, which did not arise in *Gordon*. Section 16.92(2) now provides that trial judges shall not consider a parent's testimony that they would move with or without the child. Furthermore, ss. 16(3)(j) and 16(4) of the *Divorce Act* now instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child.

[151] In light of the jurisprudential and legislative refinements, the common law relocation framework can be restated as follows.

[152] The crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary.

[153] Our jurisprudence and statutes provide a rich foundation for such an inquiry: see, for example, s. 16 of the *Divorce Act*. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and shall give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. These examples are illustrative, not exhaustive. While some of these

factors were specifically noted under *Gordon*, they have broad application to the best interests of the child.

[154] However, traditional considerations bearing on the best interests of the child must be considered in the context of the unique challenges posed by relocation cases. In addition to the factors that a court will generally consider when determining the best interests of the child and any applicable notice requirements, a court should also consider:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision making responsibility or contact, taking into

consideration, among other things, the location of the new place of residence and the travel expenses; and

- whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

The court should not consider how the outcome of an application would affect either party's relocation plans — for example, whether the person who intends to move with the child would relocate without the child or not relocate. These factors are drawn from s. 16.92(1) and (2) of the *Divorce Act* and largely reflect the evolution of the common law for over 25 years.

[155] As I have explained, several pillars underlying the Court's reasoning in *Gordon* have shifted over time, leading courts and now legislatures to refine, modify, and supplement the *Gordon* factors. These refinements leave us with a clear framework going forward.

(4) Did the Trial Judge Err in His Relocation Analysis?

[156] The father raises four issues with the trial judge's analysis. He argues that (i) the trial judge failed to account for the historical parenting roles of the parties;

(ii) the trial judge's decision was inconsistent with the parenting time factor; (iii) the mother's need for emotional support could not justify relocation in this case; and (iv) the trial judge paid undue attention to the acrimonious relationship between the parties.

[157] I would not accede to any of these submissions. The trial judge's *Gordon* analysis was free from a material error, serious misapprehension of evidence, or error of law.

(a) *The Trial Judge's Decision Considered the Historical Parenting Roles of the Parties*

[158] The father first contends the trial judge's analysis did not reflect the parties' shared parenting responsibilities throughout the marriage and after separation. This submission relies on the trial judge's statement, derived from *Gordon*, that "barring an improper motive, relocation must be approached from the perspective of respect for a parent's decision to live and work where they choose": para. 21. This statement, says the father, may be applicable to the views of a "custodial" parent, but it is not applicable where both parents have been fully engaged in a shared parenting arrangement.

[159] In my view, the trial judge's reasons do not suggest that he gave more "respect" or undue weight to the mother's desire to live and work in Telkwa. Rather, the trial judge canvassed, in detail, why staying in Kelowna with their father was not

best for the children. Most notably, the trial judge was concerned about the father's animosity towards the mother and the possibility that it could influence or otherwise impact the children: paras. 41-42. There were significant issues with the Kelowna residence, which was described as a working environment, not a living environment: para. 33. And the children and the mother would benefit from family support in Telkwa, including from her parents and siblings: para. 44.

[160] Nevertheless, the Court of Appeal concluded that the trial judge erred by failing to consider Kelowna as a viable option, especially because the mother testified that she was willing to move to Kelowna should the application be denied. The mother's evidence on this point, however, could not be determinative. The trial judge understood the risk posed by the double bind.

[161] The Court of Appeal also took issue with the trial judge's failure to consider whether the children should stay with their father in Kelowna since he also concluded that either "parent was, in concept, able to care for the children": C.A. reasons, at para. 86. However, the trial judge expressed serious reservations about whether the father would foster a positive relationship between the children and their mother: para. 42. The trial judge was right to take this into consideration when determining the options before him.

[162] The trial judge's reasoning on these points disclosed no reviewable error. It was owed deference on appeal.

(b) *The Trial Judge Considered Parenting Time Consistent With the Best Interests of the Child*

[163] The father submits the trial judge failed to give due weight to the parenting time factor. The Court of Appeal took a similar position, concluding that “[p]ermitting the relocation was inconsistent with the object of maximizing contact between the children and both their parents. Indeed the relocation was likely to permanently and profoundly alter the relationship of the children with their father”: para. 87. I have two concerns with this line of reasoning.

[164] First, the question before the trial judge was not how to best promote the parenting time factor; it was how to best promote the best interests of the children. These considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor *to the extent* that it is in the best interests of the child.

[165] Second, the trial judge did not fail to consider that children should have as much contact with each parent as is consistent with their best interests. He considered that “the children would suffer a very significant loss in being deprived of frequent care from and contact with their father” and “[t]here would also be some detriment to the children in removing them from the community they have lived in and the friends they have made”: para. 50. He was clearly alive to the risk of reducing contact with the father.

[166] The trial judge also did not fail to consider the corollary of the parenting time factor: whether either parent would be willing to facilitate contact and help foster a positive relationship between the children and the other parent. Again, the trial judge concluded that the father harboured animus towards the mother, and that she was more likely to build a positive relationship between the children and him than the converse.

[167] On the whole, the trial judge found that relocation would best promote the children's welfare, notwithstanding the impact on the relationship between the children and their father. This was a determination the trial judge was entitled to make, and it was owed deference on appeal.

(c) *The Mother's Need for Emotional Support*

[168] The father submits the trial judge gave undue weight to the mother's need for emotional support. The Court of Appeal similarly held that a parent's need for emotional support, "even with some friction between the parties", cannot justify relocation: para. 74.

[169] The mother's need for emotional support was a relevant consideration in the best interests analysis. The mother followed the father to Kelowna, but her family remained in Telkwa. A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent: *Burns v. Burns*, 2000

NSCA 1, 183 D.L.R. (4th) 66, at pp. 81-82; *L. (S.S.) v. W. (J.W.)*, 2010 BCCA 55, 316 D.L.R. (4th) 464, at para. 33; *Bjornson*, at para. 30; *Orring v. Orring*, 2006 BCCA 523, 276 D.L.R. (4th) 211, at para. 57.

[170] It is also simplistic to suggest that emotional support for the mother was the only benefit that weighed in favour of relocation. The trial judge described, in great detail, how the continuing animosity between the parents would impact the children should they stay in Kelowna. He also noted that the move would provide the mother with the benefit of housing support, childcare, better employment, and opportunities to advance her education: paras. 1, 44 and 46-47.

[171] These considerations all have direct or indirect bearing on the best-interests-of-the-child assessment. Relocation that provides a parent with more education, employment opportunities, and economic stability can contribute to a child's wellbeing: *Larose v. Larose*, 2002 BCCA 366, 1 B.C.L.R. (4th) 262, at paras. 6 and 19; *H.S. v. C.S.*, 2006 SKCA 45, 279 Sask. R. 55, at para. 26; see also E. El Fateh, "A Presumption for the Best?" (2009), 25 *Can. J. Fam. L.* 73, at pp. 80-83.

[172] Similarly, the additional support of family and community at the new location can enhance the parent's ability to care for the children: *D.A.F. v. S.M.O.*, 2004 ABCA 261, 354 A.R. 387, at para. 17. Extended family, for example, can provide additional support to children while their parents begin to navigate the new terrain of post-separation life: *Harnett v. Clements*, 2019 NLCA 53, 30 R.F.L. (8th) 49, at paras. 22 and 42; *C.M. v. R.L.*, 2013 NSFC 29, at para. 139 (CanLII).

[173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, “the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent” is far from novel: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also *Willick*, at pp. 724-25, per L’Heureux-Dubé J. A child’s welfare is often advanced in tandem with improvements in the parent’s financial, social, and emotional circumstances. The trial judge found this to be the case here.

[174] At all times, the trial judge remained focused on the child’s best interests. He only considered the mother’s needs — emotional or otherwise — to the extent that they were relevant to the children. The trial judge was clearly of the view that relocation would both directly and indirectly benefit the children, whereas “they would at least suffer indirectly to some degree if their mother remained in the Okanagan”: para. 46.

[175] Once again, his analysis on this point was free from any reviewable error.

(d) *The Parties’ Acrimonious Relationship*

[176] The father also submits the trial judge erred in placing undue emphasis on the acrimonious relationship between the parties. For the father, the “friction” was a “thing of the past” (R.F., at para. 34), it was nothing unusual for parties who are separating, and there was no evidence that it occasioned any distress for the children.

[177] I disagree. The trial judge's factual findings were well supported by the evidence.

[178] The trial judge carefully explained why he viewed the parties' relationship as acrimonious, both during the marriage and at the time of trial. He found that there was friction during the marriage: the mother had been subject to the father's controlling and overbearing personality; there was "possibly some degree of emotional abuse"; she had been physically assaulted; and she was emotionally traumatized.

[179] And the father's continued animosity towards the mother became readily apparent during the trial itself. The trial judge found his conduct at trial to be abusive: para. 41. Most notably, the father adduced a nude "selfie" of the mother in an affidavit, which the trial judge found served no purpose but to humiliate her. The trial judge also noted that the assault, and the father's denials that it had occurred, was "likely to be an ongoing source of acrimony": para. 41 (emphasis added). The trial judge concluded that this high-conflict relationship between the parties had "particularly significant" implications for the children: para. 41. These considerations weighed in favour of the children staying primarily with the mother. In these circumstances, it was open for the trial judge to conclude that a co-parenting arrangement could only work in Telkwa. If the mother returned to Kelowna, she would likely be socially isolated and reliant on the father.

[180] Despite the trial judge's findings, which were well supported by the record, the Court of Appeal intervened because "the trial judge's concerns about Mr. Grebliunas' behaviour towards Ms. Barendregt warrant some context": para. 70.

[181] The court identified four factors that purportedly "attenuated" the seriousness of the circumstances. First, the mother never argued that hostility between the parties supported her move; her evidence was that the parties were getting along better than when they first separated. Second, many of the issues the judge had been concerned about had taken place in the past. Third, there was no evidence of any event involving or taking place in the presence of the children since separation. And fourth, the trial judge failed to consider the evidence that the parties' relationship was improving.

[182] None of these factors gave the Court of Appeal licence to disturb the trial judge's factual findings regarding the relationship between the parties.

[183] First, although counsel for the mother did not advance the father's animus as a factor that supported relocation, the state of the parties' relationship was obviously relevant. And as the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, it is important to be aware of the social and legal barriers to women disclosing family violence in family law proceedings.

[184] Second, the parties' acrimonious relationship was far from a relic of the distant past. Again, the acrimony surfaced during the trial itself. And abusive dynamics

often do not end with separation — in fact, the opposite is often true: Jaffe, Crooks and Bala, at p. 171; Neilson, at ch. 4.5.1, 7.2.2 and 7.2.6. Trial judges have the advantage of observing the dynamic between the parties first-hand; any resulting assessment of their ability to work together in the future must attract deference.

[185] Third, the fact that there was no evidence of any event involving the children, or taking place in the children's presence, could not be determinative. Not only can *indirect* exposure to conflict have implications for the children's welfare, the trial judge found there was a significant risk that conflict between the parties would spill over and *directly* impact the children. He was entitled to make that finding on the evidence before him.

[186] Fourth, the record discloses no indication that the trial judge forgot, ignored, or misconceived the evidence showing improvements in the parties' relationship. An omission in the reasons, in and of itself, does not mean that the appellate court is permitted to review the evidence heard at trial. And in any event, cooperating, staying, or reconciling with a party does not necessarily indicate that an incident of abuse or violence was not serious: see D. Martinson and M. Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017), 30 *Can. J. Fam. L.* 11, at p. 34. In the end, what mattered was the trial judge's conclusion that it was unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future: para. 42.

[187] Nevertheless, the Court of Appeal concluded that the trial judge's findings regarding the acrimonious relationship between the parties could "no longer support the ultimate result arrived at by the trial judge": para. 69.

[188] Quite simply, however, it was not the place of the Court of Appeal to decide that the broader context could "attenuate" the seriousness of the father's behavior in the absence of an overriding and palpable error. Nor was it the court's place to reweigh a factor that had been carefully considered by the trial judge. A difference in opinion does not provide an appellate court licence to eclipse the trial court's judgment in favour of its own. The Court of Appeal was wrong to dispense with deference in the absence of a reversible error.

(e) *The Other Gordon Factors*

[189] I am satisfied that the trial judge's *Gordon* analysis was free from material error. The following factors all supported the trial judge's conclusion that relocation was in the children's best interests: there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna; the mother needed her family's support to independently care for the children, which was only available in Telkwa; she was more willing to facilitate a positive relationship between the children and the father than the converse; and there were findings of family violence. I see no reason to set aside the trial judge's decision.

VI. Disposition

[190] The appeal is allowed. The decision of the Court of Appeal is set aside, and paras. 1 to 6 of the trial judge’s order regarding the primary residence of the children are restored. The mother is entitled to her costs in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[191] I have had the benefit of reading my colleague Justice Karakatsanis’s reasons. While I agree that the test laid out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, governs, as it applies to both “fresh” and “new” evidence, I disagree with my colleague’s application of *Palmer* to the facts of this appeal. For the reasons that follow, I would uphold the Court of Appeal’s ultimate conclusion that the evidence is admissible, but reject its treatment of *Palmer* and its decision to reassess the best interests of the children.

[192] I respectfully part company with my colleague’s analysis on two points. First, it is in my view inappropriate to comment on the *Gordon v. Goertz*, [1996] 2 S.C.R. 27, framework in the context of this appeal. This issue was not raised by the appellant, Ms. Barendregt (“mother”), nor was it formally raised by the respondent, Mr. Grebliunas (“father”), who did not cross-appeal. It is therefore not properly before

this Court. Even if it were, I do not believe it prudent to comment on amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), without the benefit of submissions and of a full evidentiary record on the matter. It follows that I cannot agree with my colleague's analysis as set out in paras. 105-89 of her reasons. I will say no more on this issue; it ought to be left for another day.

[193] Second, as I mentioned, I disagree with my colleague's application of *Palmer* to the facts of this case. Appellate courts that strictly apply the *Palmer* test tend to focus too narrowly on the potential for further evidence to distort the appellate standard of review rather than properly focusing on the best interests of the child as the overriding consideration. The *Palmer* test must be applied flexibly in *all* cases involving the welfare of children. My colleague recognizes this well-established principle, yet her application of *Palmer* is devoid of flexibility.

[194] On a proper application of *Palmer*, I would admit the new evidence and remand the appeal to the trial court for reconsideration of the children's best interests in light of the new information regarding the father's financial situation and the condition of the West Kelowna home. The effect of holding otherwise would be to relocate 2 children 1,000 km away from their father based on an inaccurate picture of reality.

II. Analysis

[195] As my colleague rightfully notes, the *Palmer* test must be applied more flexibly in family law cases involving the best interests of a child (para. 67; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165). In such cases, an accurate assessment of the current situation of the parties, and of the children in particular, is of crucial importance (*Catholic Children's Aid*, at p. 188). A child's welfare is "ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context" (*T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, 316 N.S.R. (2d) 202, at para. 82).

[196] Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, it is trite law that the best interests of a child "may provide a compelling reason to admit evidence on appeal" (*C.K.S. v. O.S.S.*, 2014 ABCA 416, at para. 10 (CanLII)). After all, a custody appeal "is ultimately about a child and will affect the welfare of a child" (*Bacic v. Ivakic*, 2017 SKCA 23, 409 D.L.R. (4th) 571, at para. 24; see also *P. (J.) v. P. (J.)*, 2016 SKCA 168, 89 R.F.L. (7th) 92, at para. 24; *O. (A.) v. E. (T.)*, 2016 SKCA 148, 88 R.F.L. (7th) 34, at paras. 115-17; *C.L.B. v. J.A.B.*, 2016 SKCA 101, 484 Sask. R. 228, at paras. 21-22).

[197] This flexibility is borne out by a review of the relevant case law. Over the last decade, Canadian appellate courts admitted additional evidence in family law cases in 48 out of 152 reported cases reviewed. Notably, however, the national rate of admission was considerably higher in cases involving child custody and the welfare of children. In 85 such cases, the court admitted the evidence almost half the time (41 out

of 85). By contrast, the national rate of admission in cases not concerning children was closer to one tenth (7 out of 67). This supports my view that the rules for admitting further evidence ought to be relaxed — and in practice *are* relaxed — where the best interests of a child are at stake.

[198] My colleague appears to accept the importance of flexibility in this context. She notes that there may be “exceptional cases” where a child’s best interests favour admitting further evidence. For instance, she observes that the need for “finality” and “order” may yield “in the interest of justice” in “urgent matters requiring an immediate decision” (para. 70).

[199] But, respectfully, my colleague’s approach — narrowing *Palmer*’s flexibility to “exceptional cases” — is unduly rigid and undermines the specificity needed in cases involving children’s welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case.

[200] Contrary to my colleague’s reasoning, all of the criteria must be applied flexibly in cases involving the best interests of children. I will briefly explain why this is so with respect to the first and fourth of the *Palmer* criteria — due diligence and whether the evidence could have affected the result at trial — as only these criteria are at issue in this appeal. I will then move on to apply *Palmer* — with the requisite flexibility — to the facts of this case.

A. *Palmer Test*

(1) Flexibility in Assessing Due Diligence

[201] Finality and order are not judicial straitjackets. Infants grow quickly into toddlers and then — in what may seem like the blink of an eye — into young adults. This development and maturation process demands that our courts have ample flexibility to decide each child custody case based on the most current information available. I could not agree more with the intervener the Office of the Children’s Lawyer that a flexible approach “recognizes the need to be aware of children’s updated circumstances to understand how appellate decisions will impact their current lives, not the lives they had when the original decision was made” (para. 6).

[202] With respect, my colleague takes a rigid view of due diligence. She focuses inordinately and narrowly on the “litigant’s conduct”, stating that parties should not be permitted to “benefit from their own inaction” (paras. 60-61). She asserts that only in exceptional circumstances may courts admit evidence that does not meet the due diligence criterion. I respectfully disagree with this rigid approach for three reasons.

[203] First, I believe the reason for flexibility in this context to be obvious. It is to ensure that reviewing courts have the full context, given the ongoing nature of a child’s welfare — the undammed stream. This is precisely why appellate courts nationwide have held that due diligence is to be applied flexibly (*Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61, 315 D.L.R. (4th) 498, at para. 87; *Jiang v. Shi*, 2017

BCCA 232, at para. 11 (CanLII); *PT v. Alberta*, 2019 ABCA 158, 88 Alta. L.R. (6th) 235, at para. 61; *G (JD) v. G (SL)*, 2017 MBCA 117, [2018] 4 W.W.R. 543, at para. 39). These cases stand for a clear, principled proposition: the mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child (see, e.g., *Babich v. Babich*, 2020 SKCA 25; *Bacic*, at para. 24). Moreover, even if some of the evidence could have been adduced at trial, this does not end the *Palmer* analysis, as it is well established that a “failure to meet the due diligence criterion is not always fatal” (*R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 42). Where there has been such a failure, it must be determined whether the strength of the other *Palmer* criteria “is such that failure to satisfy the due diligence requirement is overborne” (*ibid.*). This clearly further supports my view that due diligence in the child custody context must be applied with greater flexibility than my colleague’s approach permits.

[204] Second, finality is a double-edged sword. My colleague is rightly concerned about the impact of protracted litigation on “women, [who] are often already shouldering the economic consequences of a marital breakdown” and who “will be unable to afford the financial and emotional cost of court proceedings” (para. 68). But she seems to overlook the fact that a strict application of due diligence would only add to the burden she describes. By requiring all family law litigants to “put their best foot forward at trial” (para. 60), my colleague would require a self-represented single mother of modest means to advance her claim while simultaneously assembling

up-to-date financial documentation, the relevance of which may not be apparent until after the initial hearing. Otherwise, this single mother runs the risk that new and potentially decisive evidence about her present circumstances will be ruled inadmissible. The result of my colleague's approach to *Palmer* is that such a single mother would face a significant legal hurdle in pursuing custody of her children simply because she is unable to get her finances in order in a timely fashion. I fail to see how this promotes my colleague's conception of "the interests of justice".

[205] Third, I acknowledge that an application to vary may in some circumstances be the appropriate procedure. But an application to vary, like a motion to adduce further evidence on appeal, is "adversarial". It would also place "additional strain on the parties' resources" and generate further delays (para. 68). This begs the question: How does the variation mechanism mitigate the "financial and emotional" cost which so concerns my colleague? I do not find an answer for this in her reasons. Put simply, and with respect, my colleague's conception of the due diligence criterion undercuts the interests of *all* family litigants, and "particularly women", in child welfare cases (para. 68).

(2) Flexibility in Assessing Whether the New Evidence Could Have Affected the Result

[206] The fourth *Palmer* criterion requires the court to ask whether the further evidence, if believed, could have affected the result.

[207] As with due diligence, however, flexibility is once again nowhere to be found in my colleague’s analysis. She does of course recite the definition of this criterion from *Palmer* and note that it must be approached “purposively”. But she leaves it to readers to discern for themselves what this might mean (para. 63).

[208] Such an approach fails to recognize that in *Catholic Children’s Aid*, this Court explicitly contemplated the need for flexibility in applying the fourth *Palmer* criterion. L’Heureux-Dubé J., writing for a unanimous Court, held as follows:

Counsel for the child supports the approach advanced by the respondent society and also relies on *Genereux*. . . as the appropriate test in matters where the best interests of the child are the paramount concern.

Although I doubt that *Genereux*. . . intended to depart significantly from the test of *Palmer*. . . its approach is to be commended. . . . If *Genereux*. . . has enlarged the scope of the admission of fresh evidence on appeal, it has done so, in the present case at least, with regard to the final arm of the [*Palmer*] test, that is, whether the fresh evidence may affect the result of the appeal when considered with the other evidence. If that is so, and the fact that the admission of up-to-date evidence is essential in cases such as the one at hand, *Genereux*. . . should be applied in cases determining the welfare of children. [Emphasis added; pp. 188-89.]

[209] This excerpt affirms what is by now beyond dispute: the *Palmer* criteria — particularly the fourth criterion — are more flexible in appeals concerning the best interests of children, “where it is important to have the most current information possible ‘[g]iven the inevitable fluidity in a child’s development’” (*K.K. v. M.M.*, 2022 ONCA 72, at para. 17 (CanLII) (text in brackets in original)).

[210] In light of the foregoing, I will now apply *Palmer* to the situation in the case at bar.

B. *Application of Palmer*

[211] As I mentioned above, only the first and fourth of the *Palmer* criteria are in issue in this appeal. With respect to the first criterion, the mother argues that the new evidence could, with proper diligence, have been adduced at trial. In any event, relying on the fourth criterion, she contends that the new evidence could not have affected the outcome of the case.

[212] As I will explain, I disagree with the mother on both counts.

(1) Due Diligence

[213] First, due diligence is not a barrier to admitting the new evidence. By its nature, the evidence could not have been adduced at trial. I acknowledge that the father could have acted more expeditiously in taking steps to address his financial situation and the condition of the family home, and in bringing these matters to the court's attention. However, an inescapable fact remains: The evidence the father produced on appeal was not in existence at the time of the trial. The first *Palmer* factor therefore does not preclude its admission.

[214] Further, even if the evidence in question could have been obtained for the trial, this would not end the analysis. As I have indicated, giving effect to the need for flexibility in the child custody context demands that we apply the well-established principle that due diligence is *not* a condition precedent to admission. Yet this is precisely how my colleague treats due diligence, contrary to this Court’s holding in *Lévesque*.

[215] Unlike my colleague, I do not accept that the existence of the variation procedure weighs against admission. She asserts that “[a] variation application and an appeal are distinct proceedings based on fundamentally different premises” (para. 75), and I agree with her. But in this case the father’s appeal would have gone ahead regardless of whether he brought a separate application to vary in the trial court. Hence, the mere existence of the possibility of a variation order does not foreclose a litigant’s right to appeal and therefore the right to present a motion to adduce additional evidence, particularly where the evidence in question is linked to the alleged error.

(2) Whether the New Evidence Could Have Affected the Result

[216] Applying the fourth *Palmer* criterion, I conclude that the new evidence could have affected the result.

[217] It is noteworthy that my colleague does not even reach this branch of the *Palmer* test. She bases her conclusion on the father’s alleged lack of due diligence and on an absence of “circumstances” which might “render the admission of this evidence

necessary in the interests of justice” (para. 91). All I would say in this regard is that I do not understand “necessity in the interests of justice” to be a *Palmer* criterion.

[218] More to the point, however, the fourth *Palmer* criterion favours admission of the new evidence. I say this for three reasons.

[219] First, the new evidence bears on a critical aspect of the trial judge’s reasoning. The trial judge found that the “parties’ financial situation, particularly as it pertains to the house”, was an issue that “significantly impact[ed]” his analysis of the children’s best interests (paras. 30-31). It matters not in my view that this issue was *comparatively* less significant than the relationship between the parties. The trial judge devoted 10 paragraphs of his best interests analysis to the financial issues related to the West Kelowna home. It is thus plain that the new evidence, which suggests that the father’s financial position and the condition of the home are much improved, *could* have affected the trial judge’s ultimate conclusion on the question whether permitting the children to relocate with their mother was in their best interests.

[220] Second, the new evidence addresses concerns the trial judge had regarding the home environment the father would provide for the children. If believed, the new evidence suggests that the house is now much closer to a “living environment” than to a “working environment”, as it was described at the time of trial (para. 33). The new evidence indicates that the father has renovated the bathroom and the master bedroom, and has definite plans to complete the kitchen renovation.

[221] Finally, the new evidence undermines the trial judge's conclusion that, given the father's dire financial straits, his ability to remain in the West Kelowna home was "less than certain" (para. 40). The trial judge found that the father's "plan to continue living in the house with the boys [was], for all practical purposes, entirely dependent on the willingness and ability of his parents to pay off the mortgage and the debt on the line of credit secured by the home, and finance the remainder of the renovations" (para. 39). As of the date of the trial, this was uncertain. His father had spoken with bankers about buying an interest in the home, but nothing concrete about this plan had been filed in evidence. If believed, the new evidence shows that the father's plan has come to fruition.

[222] The best interests analysis is of course highly contextual and fact-dependent. It is thus impossible to gauge exactly how this new evidence might have affected the trial judge's carefully calibrated analysis. However, I agree with the father that the new evidence plainly bears on "one significant pillar" of the trial judge's two-pronged rationale (R.F., at para. 67). In my view, this evidence could have altered the trial judge's view that the children's best interests would be better served by their living with their mother in Telkwa rather than in a shared parenting arrangement with both parents in the Kelowna area.

(3) Conclusion on *Palmer*

[223] Accordingly, on a properly flexible application of *Palmer*, I would admit the new evidence. I see no reason why the interest in "finality and order", to which my

colleague refers numerous times, should have tied the Court of Appeal's hands in admitting new evidence that was plainly relevant to the issues it had to decide in any event. I will now turn to the separate question of the proper use of that evidence.

C. *Proper Use of the New Evidence*

[224] I agree with the Office of the Children's Lawyer that the real concern with the new evidence in this appeal is not about appellate courts having up-to-date information on current circumstances which may affect a child's best interests. Rather, it is about the *use* of new evidence by appellate courts without proper deference to lower courts, which is contrary to the principles developed by this Court in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014. This issue should be dealt with separately from the admissibility analysis so as not to discourage the admission of new evidence about children's current circumstances that may be invaluable to appellate courts.

[225] The parties agree that an appellate court admitting further evidence in child custody matters may use that evidence in one of two ways: (1) to justify remanding the matter to the trial court for reconsideration in light of a potentially material change in circumstances or (2) to make its own determination of the best interests of the child.

[226] The mother concedes that if the new evidence is admitted, "the matter should [be] remitted to the trial judge because. . . he ha[s] 'extensive knowledge of this family and [these] child[ren]'" (A.F., at para. 71).

[227] I agree with the mother's concession. In my view, while the Court of Appeal was correct to admit this evidence, it should not have used the new evidence regarding the father's financial situation as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

[228] As this Court held in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, appellate courts are not entitled to overturn trial court decisions in family law matters "simply because [they] would have made a different decision or balanced the factors differently" (para. 12).

[229] The Court of Appeal accordingly erred in making its own determination based on the new evidence. Moreover, I agree with the father that finality, although important, should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. In this case, the new evidence bears directly — and perhaps decisively — on a matter of significance to the children's welfare. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess whether it is in the children's best interests to live closer to their father in his *current* circumstances. I would add that an application to vary in these circumstances would be pointless, since it would likewise, as was discussed above, involve further delay and expense to both parties.

III. Disposition

[230] For the foregoing reasons, I would admit the new evidence and allow the appeal in part, with costs to the father in this Court and in the court below.

[231] In the result, I would remand the appeal to the trial court for reconsideration of the children's best interests in light of the new evidence.

Appeal allowed with costs throughout, CÔTÉ J. dissenting in part.

Solicitors for the appellant: Power Law, Ottawa.

Solicitors for the respondent: Georgiale Lang & Associates, Vancouver.

Solicitor for the intervener the Office of the Children's Lawyer: Office of the Children's Lawyer, Toronto.

Solicitors for the interveners the West Coast Legal Education and Action Fund Association and the Rise Women's Legal Centre: Hunter Litigation Chambers, Vancouver; West Coast Legal Education and Action Fund Association, Vancouver; Rise Women's Legal Centre, Vancouver.

Tab 2:

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 3:

R. v. Anderson, 2014 SCC 41

Her Majesty The Queen *Appellant*

v.

Frederick Anderson *Respondent*

and

**Director of Public Prosecutions of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
David Asper Centre for Constitutional
Rights and Aboriginal Legal Services of
Toronto Inc.** *Interveners*

INDEXED AS: R. v. ANDERSON

2014 SCC 41

File No.: 35246.

2014: March 19; 2014: June 6.

Present: McLachlin C.J. and LeBel, Abella, Cromwell,
Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
NEWFOUNDLAND AND LABRADOR**

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Criminal law — Sentencing — Aboriginal offenders — Mandatory minimum sentence — Accused convicted of impaired driving for fifth time — Crown prosecutor seeking mandatory minimum sentence — Whether s. 7 of the Charter requires the Crown to consider Aboriginal status of accused when seeking minimum sentence for impaired driving — Whether consideration of Aboriginal status is a principle of fundamental justice — Whether decision to seek mandatory minimum sentence is a matter of core prosecutorial discretion — Standard of review for Crown decision making — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(b), 255(1)(a)(iii), 727(1).

Sa Majesté la Reine *Appelante*

c.

Frederick Anderson *Intimé*

et

**Directeur des poursuites pénales du Canada,
procureur général de l'Ontario,
procureur général du Nouveau-Brunswick,
procureur général de la Colombie-
Britannique, David Asper Centre for
Constitutional Rights et Aboriginal Legal
Services of Toronto Inc.** *Intervenants*

RÉPERTORIÉ : R. c. ANDERSON

2014 CSC 41

N° du greffe : 35246.

2014 : 19 mars; 2014 : 6 juin.

Présents : La juge en chef McLachlin et les juges LeBel,
Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

**EN APPEL DE LA COUR D'APPEL DE TERRE-
NEUVE-ET-LABRADOR**

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Droit criminel — Détermination de la peine — Délinquants autochtones — Peine minimale obligatoire — Accusé reconnu coupable une cinquième fois de conduite avec facultés affaiblies — Demande d'une peine minimale obligatoire par le procureur du ministère public — Lorsque le ministère public demande une peine minimale obligatoire pour conduite avec facultés affaiblies, l'art. 7 de la Charte exige-t-il qu'il prenne en considération le statut d'Autochtone d'un accusé? — La prise en considération du statut d'Autochtone est-elle un principe de justice fondamentale? — La décision de demander une peine minimale obligatoire relève-t-elle du pouvoir discrétionnaire essentiel en matière de poursuites? — Norme de contrôle applicable aux décisions du ministère public — Charte canadienne des droits et libertés, art. 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 253(1)b), 255(1)a)(iii), 727(1).

The accused was convicted of impaired driving. The offence of impaired driving carries with it a minimum sentence of 30 days' imprisonment for a second offence and 120 days' imprisonment for a subsequent offence. These mandatory minimum sentences apply only if the Crown notifies the accused of its intention to seek a greater punishment prior to any plea. Crown counsel served a Notice of intent to seek greater punishment by reason of the accused's four previous impaired driving convictions. The trial judge held that Crown counsel breached s. 7 of the *Canadian Charter of Rights and Freedoms* by tendering the Notice without considering the accused's Aboriginal status. The accused was sentenced to a 90-day intermittent sentence. The Court of Appeal dismissed an appeal from sentence.

Held: The appeal should be allowed and a term of imprisonment of 120 days should be substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

No constitutional obligation

Crown prosecutors are not constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving for two reasons.

First, while it is a principle of fundamental justice that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender, the duty to impose a proportionate sentence rests upon judges, *not* Crown prosecutors. The proportionality principle requires judges to consider systemic and background factors, including Aboriginal status, which may bear on the culpability of the offender. There is no basis in law to support equating the distinct roles of the judge and the prosecutor in the sentencing process.

L'accusé a été reconnu coupable de conduite avec facultés affaiblies. Une peine minimale de 30 jours d'emprisonnement est infligée pour une deuxième infraction, et pour une infraction subséquente la peine minimale est de 120 jours d'emprisonnement. Ces peines minimales obligatoires ne sont infligées que si le ministère public avise l'accusé, avant tout plaider, de son intention de demander une peine plus sévère. Le procureur du ministère public a signifié un avis de son intention de demander une peine plus sévère puisque l'accusé avait déjà été reconnu coupable de conduite avec facultés affaiblies à quatre reprises. Le juge du procès a estimé qu'en signifiant l'avis à l'accusé sans prendre en considération son statut d'Autochtone, le procureur du ministère public avait contrevenu à l'art. 7 de la *Charte canadienne des droits et libertés*. L'accusé a été condamné à une peine discontinue de 90 jours d'emprisonnement. La Cour d'appel a rejeté l'appel interjeté contre la peine.

Arrêt : Le pourvoi est accueilli et une peine d'emprisonnement de 120 jours est substituée à la peine infligée, avec sursis de ce qui reste à courir de la peine conformément à la concession du ministère public.

Le pourvoi soulève deux questions. (1) L'art. 7 de la *Charte* oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge — en l'espèce, la décision de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? (2) La décision de produire l'avis relève-t-elle du pouvoir discrétionnaire « essentiel » en matière de poursuites et, dans l'affirmative, quelle est la norme selon laquelle elle peut être révisée?

Aucune obligation constitutionnelle

Les procureurs du ministère public ne sont pas tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils décident s'il y a lieu de demander une peine minimale obligatoire pour conduite avec facultés affaiblies, et ce, pour deux raisons.

Premièrement, même si, selon le principe de justice fondamentale, une peine doit être proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant, le devoir d'infliger une peine proportionnée incombe aux juges et *non* aux procureurs du ministère public. Le principe de la proportionnalité exige du juge qu'il prenne en considération les facteurs systémiques ou historiques, y compris le statut d'Autochtone, qui peuvent influencer sur la culpabilité du délinquant. Aucun principe de droit ne permet d'assimiler les rôles distincts du juge et du procureur dans le processus de détermination de la peine.

Second, the principle of fundamental justice that the accused asks this Court to recognize does not meet the test which governs principles of fundamental justice. A principle of fundamental justice must be a legal principle, enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The principle advanced by the accused does not meet the second requirement as it is contrary to a long-standing and deeply-rooted approach to the division of responsibility between the Crown prosecutor and the courts. It would greatly expand the scope of judicial review of discretionary decisions made by prosecutors and put at risk the adversarial nature of our criminal justice system by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis.

Prosecutorial discretion

Decisions by Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court. Subsequent to this Court's decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. In particular, the use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion. The present appeal provides an opportunity for clarification.

"Prosecutorial discretion" is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers. In contrast, tactics and conduct before the court are governed by the inherent jurisdiction of the court to control its own processes. Deference is not owed to counsel who behave inappropriately in the courtroom, but a high degree of deference is accorded to the tactical decisions of counsel. Abuse of process is not a

Deuxièmement, le principe de justice fondamentale que l'accusé demande à notre Cour de reconnaître ne respecte pas le critère qui régit les principes de justice fondamentale. Un principe de justice fondamentale doit satisfaire aux conditions suivantes : il doit s'agir d'un principe juridique; il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice, et il doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne. Le principe que propose l'accusé ne satisfait pas à la deuxième condition puisqu'il est contraire à une approche reconnue depuis longtemps et fortement enracinée en ce qui concerne le partage de la responsabilité entre le procureur du ministère public et les tribunaux. Ce principe élargirait considérablement la portée du contrôle judiciaire des décisions discrétionnaires des poursuivants et mettrait en danger le caractère accusatoire de notre système de justice pénale en ouvrant la porte à la surveillance judiciaire des nombreuses décisions que prennent quotidiennement les procureurs du ministère public.

Pouvoir discrétionnaire en matière de poursuites

Les décisions des procureurs du ministère public visent soit l'exercice du pouvoir discrétionnaire en matière de poursuites, soit la stratégie ou la conduite devant le tribunal. Après l'arrêt de notre Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, il y a eu une certaine confusion quant au sens à donner à l'expression « pouvoir discrétionnaire en matière de poursuites » et le droit est devenu nébuleux à cet égard. En particulier, l'emploi de l'expression « au cœur de » dans *Krieger* a donné lieu à une définition étroite du pouvoir discrétionnaire en matière de poursuites. Le présent pourvoi nous donne l'occasion de le clarifier.

L'expression « pouvoir discrétionnaire en matière de poursuites » est une expression large. Elle renvoie à toutes les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Le pouvoir discrétionnaire en matière de poursuites justifie une grande déférence. Il ne doit pas être susceptible d'une remise en cause systématique par les tribunaux. Par principe, compte tenu du partage des pouvoirs, les tribunaux n'interviennent pas dans le pouvoir discrétionnaire en matière de poursuites. Par contre, la stratégie et la conduite du procureur du ministère public devant le tribunal sont assujetties à la compétence inhérente du tribunal de contrôler sa propre procédure. La

precondition for judicial intervention in relation to a party's tactics and conduct before the court.

Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision.

Tendering the Notice was a matter of prosecutorial discretion. In the complete absence of any evidence to support it, the accused's abuse of process argument must fail.

Cases Cited

Applied: *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **explained:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423; **distinguished:** *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v; **referred to:** *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; *R. v. Cook*, [1997] 1 S.C.R. 1113; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83.

déférence ne s'impose pas envers les avocats qui se comportent de façon inopportune dans la salle d'audience, mais notre système fait preuve d'une grande retenue envers les décisions tactiques des avocats. L'abus de procédure n'est pas une condition préalable à l'intervention du juge relativement à la stratégie ou à la conduite d'une partie devant le tribunal.

Le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire s'il y a eu abus de procédure. La règle de l'abus de procédure s'applique en présence d'éléments de preuve démontrant que la conduite du ministère public est inacceptable et compromet sérieusement l'équité du procès ou l'intégrité du système de justice. Avant que le ministère public soit tenu de justifier sa décision, il incombe à l'accusé d'établir, par prépondérance des probabilités, l'existence d'une preuve suffisante qu'une allégation relative à l'abus de procédure peut être examinée.

La production de l'avis relevait du pouvoir discrétionnaire en matière de poursuites. En l'absence totale de preuve pour l'étayer, l'argument de l'accusé fondé sur l'abus de procédure doit être rejeté.

Jurisprudence

Arrêt appliqué : *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3; **arrêts expliqués :** *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372; *R. c. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423; **distinction d'avec les arrêts :** *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433; *United States of America c. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, autorisation d'appel refusée, [2013] 1 R.C.S. v; **arrêts mentionnés :** *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76; *R. c. Beare*, [1988] 2 R.C.S. 387; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. T. (V.)*, [1992] 1 R.C.S. 749; *R. c. Cook*, [1997] 1 R.C.S. 1113; *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339; *Sriskandarajah c. États-Unis d'Amérique*, 2012 CSC 70, [2012] 3 R.C.S. 609; *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Jolivet*, 2000 CSC 29, [2000] 1 R.C.S. 751; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248; *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3; *R. c. S.G.T.*, 2010 CSC 20, [2010] 1 R.C.S. 688; *R. c. Auclair*, 2014 CSC 6, [2014] 1 R.C.S. 83.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1).
Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 5, 6.
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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, affirming a sentencing decision of English Prov. Ct. J., 2011 NLPC 1709A00569. Appeal allowed.

Iain R. W. Hollett, for the appellant.

Derek Hogan and Darlene Neville, for the respondent.

David Schermbrucker and Carole Sheppard, for the intervener the Director of Public Prosecutions of Canada.

Philip Perlmutter and Lorna Bolton, for the intervener the Attorney General of Ontario.

Kathryn A. Gregory and Cameron Gunn, Q.C., for the intervener the Attorney General of New Brunswick.

Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 15(1).
Code criminel, L.R.C. 1985, ch. C-46, art. 92, 94, 95, 151, 152, 253(1), 255, 267b), 271, 344, 718.1, 718.2, 727(1).
Loi réglementant certaines drogues et autres substances, L.C. 1996, ch. 19, art. 5, 6.
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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (le juge en chef Green et les juges Welsh et Rowe), 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, qui a confirmé une décision du juge English de la Cour provinciale relative à la détermination de la peine, 2011 NLPC 1709A00569. Pourvoi accueilli.

Iain R. W. Hollett, pour l'appelante.

Derek Hogan et Darlene Neville, pour l'intimé.

David Schermbrucker et Carole Sheppard, pour l'intervenant le directeur des poursuites pénales du Canada.

Philip Perlmutter et Lorna Bolton, pour l'intervenant le procureur général de l'Ontario.

Kathryn A. Gregory et Cameron Gunn, c.r., pour l'intervenant le procureur général du Nouveau-Brunswick.

Joyce DeWitt-Van Oosten, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Kent Roach and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Jonathan Rudin and Emily Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] This appeal raises the following question: Are Crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving? The answer, in my view, must be no. There is no principle of fundamental justice that supports the existence of such a constitutional obligation. Absent such an obligation, the prosecutor's decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process.

[2] The present appeal involves a scheme of escalating, mandatory minimum sentences for impaired driving convictions. These mandatory minimums are set out in s. 255 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”). Section 727(1) of the *Code* states that the mandatory minimums set out in s. 255 are applicable only if the Crown, in advance of any plea, notifies the accused of its intention to seek a greater punishment by reason of previous convictions (the “Notice”) and tenders proof at the sentencing hearing that the Notice was served. It is the Crown's discretionary decision to tender the Notice at the sentencing hearing that is the subject of the current debate.

[3] The respondent, Mr. Anderson, submits that the Crown is constitutionally obligated under s. 7

Kent Roach et Cheryl Milne, pour l'intervenant David Asper Centre for Constitutional Rights.

Jonathan Rudin et Emily Hill, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Version française du jugement de la Cour rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Le présent pourvoi soulève la question suivante : les procureurs du ministère public sont-ils tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils décident s'il y a lieu de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? À mon avis, il faut répondre à cette question par la négative. Aucun principe de justice fondamentale n'appuie l'existence d'une telle obligation constitutionnelle. En l'absence d'une telle obligation, la décision du poursuivant est une question de pouvoir discrétionnaire en matière de poursuites et les tribunaux ne peuvent contrôler cette décision que s'il y a eu abus de procédure.

[2] Le pourvoi dont nous sommes saisis a pour objet un régime de peines minimales obligatoires de sévérité croissante pour les infractions de conduite avec facultés affaiblies. Ces peines minimales obligatoires sont prévues à l'art. 255 du *Code criminel*, L.R.C. 1985, ch. C-46 (« *Code* »). Selon le par. 727(1) du *Code*, les peines minimales obligatoires prévues à l'art. 255 ne sont infligées que si le ministère public avise l'accusé, avant tout plaidoyer, de son intention de demander une peine plus sévère du fait de condamnations antérieures (l'« avis ») et présente, à l'audience de détermination de la peine, une preuve de la signification de l'avis. En l'espèce, le débat porte sur la décision discrétionnaire du ministère public de produire l'avis à l'audience de détermination de la peine.

[3] L'intimé, M. Anderson, plaide que le ministère public a l'obligation constitutionnelle, aux

of the *Canadian Charter of Rights and Freedoms* to consider the accused's Aboriginal status in deciding whether or not to tender the Notice. According to Mr. Anderson, for sentencing purposes, consideration of Aboriginal status is a principle of fundamental justice. It follows that the Crown must consider it when making decisions that limit the sentencing options available to a judge.

[4] The Crown denies the existence of any such obligation. The Crown submits that the decision to tender the Notice is a matter of prosecutorial discretion. As such, it can only be reviewed for abuse of process. The Crown further submits that if mandatory minimum sentences within a statutory scheme prevent a judge from imposing a fit and just sentence that accords with the fundamental principle of proportionality, it is the scheme that should be challenged, not the exercise of prosecutorial discretion that has triggered it.

[5] For the reasons that follow, I conclude that Crown prosecutors are under no constitutional duty to consider the accused's Aboriginal status when tendering the Notice. As a matter of prosecutorial discretion, the decision is only reviewable for abuse of process.

II. Background

[6] Mr. Anderson was charged with the offence of driving with more than 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Code*. Before pleading guilty, he was served with a Notice. He later learned that the Crown intended to prove the Notice at the sentencing hearing. As this was Mr. Anderson's fifth impaired driving-related conviction, tendering the Notice meant that he would be subject to a mandatory minimum sentence of not less than 120 days' imprisonment under s. 255(1)(a)(iii) of the *Code*.

termes de l'art. 7 de la *Charte canadienne des droits et libertés*, de prendre en considération le statut d'Autochtone de l'accusé lorsqu'il décide de produire ou non l'avis. Selon M. Anderson, pour les besoins de la détermination de la peine, la prise en considération du statut d'Autochtone est un principe de justice fondamentale. Il s'ensuit que le ministère public doit prendre en considération ce statut lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge.

[4] Le ministère public nie l'existence d'une telle obligation. Il plaide que la décision de produire l'avis relève du pouvoir discrétionnaire en matière de poursuites. En conséquence, la décision ne peut être révisée que s'il y a eu abus de procédure. Le ministère public plaide en outre que si les peines minimales obligatoires prévues dans un régime législatif empêchent un juge d'infliger une peine appropriée et juste qui soit conforme au principe fondamental de proportionnalité, il y a lieu de contester le régime en tant que tel et non l'exercice du pouvoir discrétionnaire en matière de poursuites qui l'a fait entrer en jeu.

[5] Pour les motifs qui suivent, je conclus que la Constitution n'oblige aucunement les procureurs du ministère public à prendre en considération le statut d'Autochtone lorsqu'ils produisent l'avis. S'agissant d'une question de pouvoir discrétionnaire en matière de poursuite, la décision ne peut être révisée que pour abus de procédure.

II. Contexte

[6] Monsieur Anderson a été accusé de conduite avec une alcoolémie supérieure à 80 milligrammes par 100 millilitres de sang, une infraction prévue à l'al. 253(1)b) du *Code*. Avant de plaider coupable, il s'est vu signifier un avis. Il a appris par la suite que le ministère public entendait faire la preuve de l'avis à l'audience de détermination de la peine. Puisqu'il s'agissait pour M. Anderson d'une cinquième condamnation pour conduite avec facultés affaiblies, la production de l'avis signifiait qu'il allait être passible, aux termes du sous-al. 255(1)a)(iii) du *Code*, d'une peine minimale obligatoire d'au moins 120 jours d'emprisonnement.

A. *Provincial Court of Newfoundland and Labrador, 2011 NLPC 1709A00569*

[7] Prior to the sentencing hearing, Mr. Anderson filed a *Charter* application in which he argued that ss. 255(1) and 727(1) of the *Code* violate s. 7 of the *Charter* because “the combined effect of the [provisions] is to transfer what is a judicial function to the prosecutor, namely, the setting of the floor or minimum sentence in a given case” (motion judgment, at para. 21). He also argued that the statutory scheme violated s. 15(1) of the *Charter* because it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence in an appropriate case.

[8] The trial judge, English Prov. Ct. J., accepted Mr. Anderson’s *Charter* arguments and concluded that the infringements of ss. 7 and 15(1) were not saved by s. 1 of the *Charter*. In order to ensure compliance with s. 7 of the *Charter*, he held that the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. As for the violation of s. 15(1), he declared the statutory scheme to be of no force and effect as it applied to Aboriginal offenders. Having determined that he was not bound by the minimums set out in s. 255(1), the trial judge sentenced Mr. Anderson to a 90-day intermittent sentence followed by two years’ probation. A five-year driving prohibition was also imposed.

B. *Newfoundland and Labrador Court of Appeal, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308*

[9] The Newfoundland and Labrador Court of Appeal rejected the Crown’s appeal. All members of the court held that where the Crown tenders the Notice at the sentencing hearing without considering the accused’s Aboriginal status, this renders the sentencing hearing fundamentally unfair, leading to a s. 7 *Charter* breach. According to the court, there would

A. *Cour provinciale de Terre-Neuve-et-Labrador, 2011 NLPC 1709A00569*

[7] Avant l’audience de détermination de la peine, M. Anderson a déposé une requête fondée sur la *Charte* dans laquelle il a plaidé que les par. 255(1) et 727(1) du *Code* violent l’art. 7 de la *Charte* parce que [TRADUCTION] « [les dispositions] ont pour effet conjugué de transférer au poursuivant une fonction judiciaire, à savoir l’établissement d’une peine minimale dans une affaire donnée » (jugement sur la requête, par. 21). Il a également plaidé que le régime législatif violait le par. 15(1) de la *Charte* parce qu’il privait un Autochtone de la possibilité de plaider en faveur d’une sanction autre que l’incarcération dans un cas approprié.

[8] En première instance, le juge English de la Cour provinciale a accueilli les arguments fondés sur la *Charte* soulevés par M. Anderson et a conclu que les atteintes à l’art. 7 et au par. 15(1) ne pouvaient se justifier au sens de l’article premier de la *Charte*. Le juge a statué que, pour assurer la conformité à l’art. 7 de la *Charte*, le ministère public devait dans tous les cas, y compris ceux mettant en cause des délinquants non autochtones, justifier pourquoi il s’appuyait sur l’avis. Pour ce qui est de la violation du par. 15(1), il a déclaré que le régime législatif était inopérant à l’égard des délinquants autochtones. Ayant jugé qu’il n’était pas lié par les peines minimales énoncées au par. 255(1), le juge du procès a condamné M. Anderson à une peine discontinue de 90 jours d’emprisonnement, suivie de deux ans de probation. Une interdiction de conduire durant cinq ans a également été imposée.

B. *Cour d’appel de Terre-Neuve-et-Labrador, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308*

[9] La Cour d’appel de Terre-Neuve-et-Labrador a rejeté l’appel du ministère public. À l’unanimité, la cour a statué que la production de l’avis par le ministère public à l’audience de détermination de la peine, sans que soit pris en considération le statut d’Autochtone de l’accusé, rendait l’audience de détermination de la peine fondamentalement injuste, entraînant une

be no breach of s. 7 if the Crown's policy statement¹ regarding the decision to tender the Notice included a *specific* direction to consider the offender's Aboriginal status. The absence of such a direction, and the lack of explanation on the part of the Crown for its decision to tender the Notice in this case, led the court to conclude that s. 7 of the *Charter* had been breached.

[10] The court split on how the Crown's decision to tender the Notice should be characterized. Welsh J.A. considered it to be a matter of "core" prosecutorial discretion; Green C.J.N.L. and Rowe J.A. maintained that it was "outside a core prosecutorial function": para. 49 (emphasis deleted). In the end, this difference of opinion did not affect the result and the Crown's appeal was dismissed.

III. Relevant Statutory Provisions

[11] Section 253(1) of the *Code* sets out the offence of impaired driving:

253. (1) [Operation while impaired] Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

¹ Crown policy statements are designed to assist Crown prosecutors in the performance of their functions. In this case, there was a Crown policy statement pertaining to the decision of whether or not to tender the Notice. The policy statement stated that "service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender" (Court of Appeal decision, at para. 19 (emphasis deleted)). The policy statement did not specifically reference Aboriginal status.

violation de l'art. 7 de la *Charte*. Selon la cour, il n'y aurait aucune violation de l'art. 7 si l'énoncé de politique du ministère public¹ relatif à la décision de produire l'avis renfermait une directive *particulière* indiquant que le statut d'Autochtone du délinquant doit être pris en considération. L'absence d'une telle directive et le fait que le ministère public n'avait pas expliqué sa décision de produire l'avis en l'espèce ont amené la cour à conclure à une violation de l'art. 7 de la *Charte*.

[10] La cour était partagée quant à la manière de qualifier la décision de produire l'avis. La juge Welsh estimait qu'il s'agissait d'un pouvoir discrétionnaire « essentiel » du poursuivant; selon le juge en chef Green et le juge Rowe, cette décision [TRADUCTION] « ne relevait pas d'une fonction essentielle du poursuivant » : par. 49 (soulignement omis). En définitive, cette divergence de vues n'a pas eu d'incidence sur l'issue de l'affaire et l'appel du ministère public a été rejeté.

III. Dispositions législatives applicables

[11] Le paragraphe 253(1) du *Code* énonce l'infraction de conduite avec facultés affaiblies :

253. (1) [Capacité de conduite affaiblie] Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants :

a) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue;

¹ Les énoncés de politique visent à aider les procureurs du ministère public dans l'exercice de leurs fonctions. En l'espèce, un énoncé de politique du ministère public traitait de la décision de produire ou non l'avis. L'énoncé de politique prévoyait que [TRADUCTION] « la signification de l'avis doit être prise en considération dans tous les cas, à la lumière de toutes les circonstances de l'infraction et des antécédents et de la situation du délinquant » (motifs de la Cour d'appel, par. 19 (soulignement omis)). L'énoncé de politique ne mentionnait pas particulièrement le statut d'Autochtone.

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[12] Section 255 of the *Code* sets out the escalating mandatory minimum penalties for impaired driving. For the purposes of this appeal, the relevant portion of s. 255 is the following:

255. (1) [Punishment] Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than \$1,000,

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

[13] Section 727(1) of the *Code* sets out the requirement to give notice to the accused of the Crown's intention to seek the mandatory minimum punishment:

727. (1) [Previous conviction] Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

[14] Section 718.2(e) of the *Code* states:

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.

[12] L'article 255 du *Code* prévoit les peines minimales obligatoires de sévérité croissante dans les cas de conduite avec facultés affaiblies. Pour les besoins du présent pourvoi, la partie pertinente de l'art. 255 est la suivante :

255. (1) [Peine] Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :

a) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes :

(i) pour la première infraction, une amende minimale de mille dollars,

(ii) pour la seconde infraction, un emprisonnement minimal de trente jours,

(iii) pour chaque infraction subséquente, un emprisonnement minimal de cent vingt jours;

[13] Le paragraphe 727(1) du *Code* énonce l'obligation d'aviser l'accusé de l'intention du ministère public de demander la peine minimale obligatoire :

727. (1) [Condamnations antérieures] Sous réserve des paragraphes (3) et (4), lorsque le délinquant est déclaré coupable d'une infraction pour laquelle une peine plus sévère peut être infligée du fait de condamnations antérieures, aucune peine plus sévère ne peut lui être infligée de ce fait à moins que le poursuivant ne convainque le tribunal que le délinquant, avant d'enregistrer son plaidoyer, a reçu avis qu'une peine plus sévère serait demandée de ce fait.

[14] L'alinéa 718.2e) du *Code* dispose :

718.2 [Principes de détermination de la peine] Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] Lastly, s. 7 of the *Charter* states:

7. 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.

IV. Issues

[16] This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

[17] Before analyzing these two issues, a brief explanation of how they are connected is warranted. The respondent argues that all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice. If this argument is accepted, it matters not whether the decision is one of prosecutorial discretion. The principle of fundamental justice — perhaps more aptly described as a constitutional duty — would apply regardless. As will be discussed in greater detail, prosecutorial discretion provides no answer to the breach of a constitutional duty. If, on the other hand, the respondent's argument is rejected, the distinction between prosecutorial discretion and tactics and conduct before the Court becomes important, as the categorization affects the standard of review to be applied to the decision.

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

[15] Enfin, l'art. 7 de la *Charte* est libellé ainsi :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

IV. Questions en litige

[16] Le présent pourvoi soulève deux questions. (1) L'art. 7 de la *Charte* oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge — en l'espèce, la décision de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? (2) La décision de produire l'avis relève-t-elle du pouvoir discrétionnaire « essentiel » en matière de poursuites et, dans l'affirmative, quelle est la norme selon laquelle elle peut être révisée?

[17] Il convient d'expliquer brièvement le lien qui unit ces deux questions avant de les analyser. L'intimé soutient que tous les représentants de l'État (y compris les procureurs du ministère public) doivent prendre en considération le statut d'Autochtone lorsqu'une décision porte atteinte à la liberté d'un Autochtone. Il s'agit selon lui d'un principe de justice fondamentale. Si cet argument est retenu, il n'importe pas que la décision relève du pouvoir discrétionnaire en matière de poursuites. Le principe de justice fondamentale — qu'il convient peut-être mieux de qualifier d'obligation constitutionnelle — s'appliquerait en tout état de cause. Comme nous le verrons plus en détail, le pouvoir discrétionnaire en matière de poursuites n'est pas la solution au manquement à une obligation constitutionnelle. Si, par contre, l'argument de l'intimé est rejeté, la distinction entre, d'une part, le pouvoir discrétionnaire en matière de poursuites et, d'autre part, la stratégie et la conduite devant la cour, revêt de l'importance car la qualification influe sur la norme de contrôle applicable à la décision.

V. Analysis

- A. *Does Section 7 of the Charter Require the Crown to Consider an Accused's Aboriginal Status When Making Decisions That Limit the Sentencing Options Available to a Judge?*

[18] Mr. Anderson submits that consideration of Aboriginal status in sentencing is a principle of fundamental justice that applies to all state actors, including Crown prosecutors. It follows that Crown prosecutors are constitutionally required to consider an accused's Aboriginal status when making a discretionary decision that limits the sentencing options available to a judge, including the decision to tender the Notice. In support of this argument, Mr. Anderson relies on s. 718.2(e) of the *Code*, as well as this Court's decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

[19] The Crown submits that Mr. Anderson's argument stretches s. 718.2(e) of the *Code* beyond its intended purpose. According to the Crown, a statutory direction to sentencing judges cannot be transformed into a constitutional obligation on the Crown to take Aboriginal status into account when making a discretionary decision that limits a judge's sentencing options.

[20] In my view, there are two reasons why Mr. Anderson's argument must fail. First, it conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges — the duty to impose a proportionate sentence. Second, the principle of fundamental justice that Mr. Anderson seeks does not meet the test that governs such principles, set out in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3.

V. Analyse

- A. *L'article 7 de la Charte oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge?*

[18] Monsieur Anderson plaide que la prise en considération du statut d'Autochtone dans la détermination de la peine est un principe de justice fondamentale qui s'applique à tous les représentants de l'État, y compris les procureurs du ministère public. Il s'ensuit que les procureurs du ministère public sont tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils prennent une décision discrétionnaire qui limite l'éventail des peines que peut infliger un juge, y compris la décision de produire l'avis. Au soutien de cet argument, M. Anderson invoque l'al. 718.2e) du *Code*, ainsi que les décisions de notre Cour dans *R. c. Gladue*, [1999] 1 R.C.S. 688, et *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433.

[19] Le ministère public plaide que l'argument de M. Anderson étend la portée de l'al. 718.2e) du *Code* au-delà des fins qu'il est censé servir. Selon le ministère public, une directive législative adressée aux juges chargés de la détermination de la peine ne saurait être transformée en une obligation constitutionnelle imposée au ministère public de prendre en considération le statut d'Autochtone lorsqu'il prend une décision discrétionnaire qui limite l'éventail des peines que peut infliger un juge.

[20] À mon avis, l'argument de M. Anderson doit être rejeté pour deux raisons. Premièrement, cet argument confond le rôle du poursuivant et celui du juge chargé de déterminer la peine car il impose au poursuivant un devoir qui n'appartient qu'au juge — le devoir d'infliger une peine proportionnée. Deuxièmement, le principe de justice fondamentale que M. Anderson cherche à faire reconnaître ne satisfait pas au critère énoncé dans *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3, qui régit les principes de ce genre.

(1) Imposing a Proportionate Sentence Is the Judge's Responsibility

[21] As LeBel J., for the majority of this Court, stated in *Ipeelee*, “[p]roportionality is the *sine qua non* of a just sanction” and a principle of fundamental justice: paras. 36-37. Proportionality means that the sentence must be “proportionate to both the gravity of the offence and the degree of responsibility of the offender” (*Ipeelee*, at para. 39 (emphasis deleted); see also s. 718.1 of the *Code*). “[S]ystemic and background factors [which include Aboriginal status] may bear on the culpability of the offender, [that is, the degree of responsibility of the offender,] to the extent that they shed light on his or her level of moral blameworthiness”: *Ipeelee*, at para. 73.

[22] The fundamental principle of proportionality has been codified. Section 718.1 of the *Code* states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 of the *Code* lists numerous factors that sentencing judges must consider when crafting a fair and just sentence that accords with the fundamental principle of proportionality. Aboriginal status is one of these factors and is found in s. 718.2(e).

[23] In *Gladue*, this Court discussed s. 718.2(e) of the *Code* at length, noting that it was enacted to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons and to encourage a restorative approach to sentencing: para. 93. The Court explained that “sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders” (*Gladue*, at para. 37 (emphasis deleted)). The Court held that, pursuant to s. 718.2(e), a judge must consider: “(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender

(1) Il appartient au juge d’infliger une peine proportionnée

[21] Comme l’a indiqué le juge LeBel au nom des juges majoritaires de notre Cour dans *Ipeelee*, « [l]a proportionnalité représente la condition *sine qua non* d’une sanction juste » et un principe de justice fondamentale : par. 36-37. La proportionnalité signifie que la peine doit être « proportionnelle à la fois à la gravité de l’infraction et au degré de responsabilité du délinquant » (*Ipeelee*, par. 39 (italiques omis); voir également l’art. 718.1 du *Code*). « [L]es facteurs systémiques et historiques [notamment le statut d’Autochtone] peuvent influencer sur la culpabilité du délinquant, [c’est-à-dire le degré de responsabilité du délinquant] dans la mesure où ils mettent en lumière son degré de culpabilité morale » : *Ipeelee*, par. 73.

[22] Le principe fondamental de la proportionnalité a été codifié. L’article 718.1 du *Code* prévoit que « [l]a peine est proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant. » L’article 718.2 du *Code* énumère les nombreux facteurs que doivent prendre en considération les juges chargés de la détermination de la peine pour que celle-ci soit juste et équitable, en accord avec le principe fondamental de la proportionnalité. Le statut d’Autochtone constitue l’un de ces facteurs et il est mentionné à l’al. 718.2e).

[23] Dans l’arrêt *Gladue*, notre Cour a examiné en détail l’al. 718.2e) du *Code*, notant qu’il a été édicté pour remédier au grave problème de la surreprésentation des Autochtones dans les prisons canadiennes et encourager les juges à aborder la détermination de la peine selon une approche corrective : par. 93. La Cour a expliqué que « les juges devraient porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones parce que ces circonstances sont particulières, et différentes de celles dans lesquelles se trouvent les non-autochtones » (*Gladue*, par. 37 (soulignement omis)). La Cour a estimé que, aux termes de l’al. 718.2e), un juge doit prendre en considération « (A) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux, [et] (B)

because of his or her particular aboriginal heritage or connection”: *Gladue*, at para. 66.

[24] Section 718.2(e) was also central to the discussion in *Ipeelee*. In that case, the Court noted that the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality. The failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate: *Ipeelee*, at para. 87.

[25] Importantly, both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson’s argument that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge’s* responsibility to impose sentence; likewise, it is *the judge’s* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.

[26] In so concluding, I have not ignored *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v, a case upon which Mr. Anderson relies. In *Leonard*, the United States sought the extradition

les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l’égard du délinquant en raison de son héritage ou ses attaches autochtones » : *Gladue*, par. 66.

[24] L’alinéa 718.2e) est également au cœur de l’analyse dans *Ipeelee*. Dans cet arrêt, la Cour a fait remarquer que les principes énoncés dans *Gladue* se rapportent à la question ultime de savoir en quoi consiste une peine juste et appropriée et aident le juge à établir une peine conforme au principe fondamental de la proportionnalité. L’omission du juge chargé de déterminer la peine de tenir compte des circonstances particulières propres aux délinquants autochtones viole donc à la fois les obligations légales qui incombent au juge aux termes des art. 718.1 et 718.2 du *Code*, et le principe de justice fondamentale suivant lequel les peines doivent être proportionnées : *Ipeelee*, par. 87.

[25] Fait important, il est question, dans *Gladue* et *Ipeelee*, des obligations qui incombent aux *juges* chargés de la détermination de la peine d’établir une peine proportionnée à l’égard des délinquants autochtones. Dans ces arrêts, il n’est nullement fait mention du pouvoir discrétionnaire en matière de poursuites et ces arrêts n’étaient pas l’argument de M. Anderson selon lequel les *poursuivants* doivent prendre en considération le statut d’Autochtone lorsqu’ils prennent une décision qui limite l’éventail des peines que peut infliger un juge. L’argument de M. Anderson assimile le devoir du juge à celui du poursuivant, mais aucun principe de droit ne permet d’assimiler leurs rôles distincts dans le processus de détermination de la peine. Il appartient *au juge* d’infliger la peine; il *lui* appartient également d’établir une peine proportionnée, sans s’écarter des paramètres juridiques applicables. Si un régime de peine minimale obligatoire oblige un juge à infliger une peine disproportionnée, il y aurait lieu de contester le régime.

[26] Je ne suis pas arrivé à cette conclusion sans tenir compte de l’arrêt *United States of America c. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, autorisation d’appel refusée, [2013] 1 R.C.S. v, un arrêt invoqué par M. Anderson. Dans cette affaire, les

of two Aboriginal Canadians. Sharpe J.A. held that in deciding whether or not to surrender the accused, the Minister of Justice was required to consider their Aboriginal status, noting that

the *Gladue* factors are not limited to criminal sentencing but . . . should be considered by all “decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65) whenever an Aboriginal person’s liberty is at stake in criminal and related proceedings. That category includes extradition. [para. 85]

[27] Mr. Anderson submits that, like the Minister of Justice in *Leonard*, Crown prosecutors should be required to consider Aboriginal status as they are “decision-makers” who “have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65). With respect, I cannot agree. The excerpt from *Leonard* upon which Mr. Anderson relies should not be taken out of context. Pursuant to s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, the Minister of Justice must refuse to surrender an individual if “the surrender would be unjust or oppressive having regard to all the relevant circumstances”. As Sharpe J.A. notes, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada* — a task which is impossible to do without reference to the *Gladue* principles. As Sharpe J.A. explained, the proper exercise of the Minister’s discretion in this context

requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender[ed]. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles. [para. 87]

États-Unis demandaient l’extradition de deux Canadiens autochtones. Le juge Sharpe a conclu qu’avant de décider d’extrader ou non les accusés, le ministre de la Justice était tenu de prendre en considération leur statut d’Autochtone, et il a fait remarquer que

[TRADUCTION] les facteurs énoncés dans l’arrêt *Gladue* ne se limitent pas à la détermination de la peine en matière pénale mais doivent être pris en considération par tous « les décideurs qui ont le pouvoir d’influer sur le traitement des délinquants autochtones dans le système de justice » (*Gladue*, par. 65) chaque fois que la liberté d’un Autochtone est en jeu dans un procès criminel et des instances connexes, notamment une procédure d’extradition. [par. 85]

[27] M. Anderson prétend que, tout comme le ministre de la Justice dans *Leonard*, les procureurs du ministère public devraient être tenus de prendre en considération le statut d’Autochtone parce que ce sont des « décideurs qui ont le pouvoir d’influer sur le traitement des délinquants autochtones dans le système de justice » (*Gladue*, par. 65). En toute déférence, je ne saurais être d’accord. L’extrait de *Leonard* sur lequel s’appuie M. Anderson ne doit pas être pris hors contexte. Aux termes de l’al. 44(1)a) de la *Loi sur l’extradition*, L.C. 1999, ch. 18, le ministre de la Justice doit refuser d’extrader une personne si « l’extradition serait injuste ou tyrannique compte tenu de toutes les circonstances ». Comme le fait remarquer le juge Sharpe, le fait de décider si l’extradition serait injuste ou tyrannique oblige le ministre de la Justice à comparer la peine qui serait vraisemblablement infligée dans un autre pays *et la peine qui serait vraisemblablement imposée au Canada*, une tâche qu’il est impossible d’accomplir sans se reporter aux principes établis dans *Gladue*. Comme l’a expliqué le juge Sharpe, l’exercice légitime du pouvoir discrétionnaire du ministre dans ce contexte

[TRADUCTION] requiert la détermination du résultat que donneraient vraisemblablement des poursuites intentées au pays et la comparaison de ce résultat avec l’issue probable dans le pays étranger si la personne recherchée était extradée. Dans le cas d’un délinquant autochtone, je ne vois pas comment l’on peut faire cette détermination et cette comparaison sans se reporter aux principes établis dans *Gladue*. [par. 87]

[28] It follows, in my view, that *Leonard* does not support the much broader application of *Gladue* that Mr. Anderson seeks.

(2) The R. v. D.B. Test Is Not Satisfied

[29] There is a further reason why Mr. Anderson's s. 7 argument must fail. The principle of fundamental justice that Mr. Anderson asks this Court to recognize — that Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options — does not meet the test which governs principles of fundamental justice. As Abella J. observed for the majority in *D.B.*, at para. 46, a principle of fundamental justice must (1) be a legal principle, (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8.

[30] The principle contended for by Mr. Anderson does not meet the second requirement that it enjoy consensus as a principle that is fundamental to the way in which the legal system ought to fairly operate. In fact, the principle is contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts.

[31] We must begin by acknowledging that the principle advanced by Mr. Anderson would enormously expand the scope of judicial review of discretionary decisions made by prosecutors. In doing so, it puts at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting

[28] Par conséquent, je suis d'avis que l'arrêt *Leonard* n'étaye pas l'application beaucoup plus large de l'arrêt *Gladue* que M. Anderson cherche à obtenir.

(2) Le critère de l'arrêt R. c. D.B. n'est pas respecté

[29] Une autre raison explique pourquoi l'argument avancé par M. Anderson sur le fondement de l'art. 7 doit être rejeté. Le principe de justice fondamentale que M. Anderson demande à notre Cour de reconnaître — à savoir que les procureurs du ministère public doivent prendre en considération le statut d'Autochtone de l'accusé avant de prendre des décisions qui limitent l'éventail des peines que peut infliger un juge — ne respecte pas le critère qui régit les principes de justice fondamentale. Comme la juge Abella l'a fait remarquer au nom des juges majoritaires dans *D.B.*, par. 46, un principe de justice fondamentale doit satisfaire aux conditions suivantes : (1) il doit s'agir d'un principe juridique; (2) il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice; (3) il doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne. Voir aussi *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76, par. 8.

[30] Le principe que propose M. Anderson ne satisfait pas à la deuxième condition selon laquelle il doit exister un consensus sur le fait que ce principe est essentiel au bon fonctionnement du système de justice. En fait, le principe proposé est contraire à une approche reconnue depuis longtemps et fortement enracinée en ce qui concerne le partage de la responsabilité entre le procureur du ministère public et les tribunaux.

[31] Il faut d'abord reconnaître que le principe que propose M. Anderson élargirait énormément la portée du contrôle judiciaire des décisions des poursuivants. Ce faisant, il met en danger le caractère accusatoire de notre système de justice pénale en entravant les procureurs du ministère public dans l'exécution de leur travail et en ouvrant la porte

judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis. As the Crown has pointed out, the situations where Crown decisions have the potential to limit the sentencing judge's options and therefore the judge's ability to take s. 718.2(e) into account are many: A.F., at para. 145. These decisions include: proceeding with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence (e.g. s. 95 as opposed to s. 92 or s. 94 of the *Code*); proceeding by indictment rather than summary conviction when different mandatory minimum sentences are required (e.g. ss. 151, 152 and 271 of the *Code*); and proceeding by indictment rather than by summary conviction when that decision precludes the possibility of a conditional sentence (e.g. s. 267(b) of the *Code*). Moreover, there are several provisions of the *Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, where a mandatory minimum is triggered by the Crown's decision to prove a particular aggravating factor — such as evidence of a firearm used in the commission of the offence (e.g. s. 344 of the *Code*; ss. 5 and 6 of the *Controlled Drugs and Substances Act*). As with the other examples provided, the decision to prove the aggravating factor limits the sentencing judge's options.

[32] Apart from the sheer volume of decisions that would be opened up for review, the Crown's decision to seek the mandatory minimum penalty — as we shall see — is a matter of prosecutorial discretion. There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion. As affirmed in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 411, the Court “has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice”. And, as L'Heureux-Dubé J., for the majority of this Court,

à la surveillance judiciaire des nombreuses décisions que prennent quotidiennement les procureurs du ministère public. Comme l'a fait remarquer le ministère public, les situations où les décisions du ministère public peuvent limiter l'éventail des sanctions que peut infliger le juge chargé de la détermination de la peine — et donc sa faculté de prendre en compte l'al. 718.2e) — sont nombreuses : m.a., par. 145. C'est le cas notamment des décisions suivantes : porter des accusations qui entraînent une peine minimale obligatoire alors que d'autres infractions connexes n'entraînent aucune peine minimale obligatoire (p. ex., invoquer l'art. 95 plutôt que les art. 92 ou 94 du *Code*); intenter une poursuite par voie de mise en accusation plutôt que par procédure sommaire lorsque des peines minimales obligatoires sont prescrites (p. ex. les infractions prévues aux art. 151, 152 et 271 du *Code*); intenter une poursuite par voie de mise en accusation, plutôt que par procédure sommaire, lorsque cette décision exclut la possibilité d'une condamnation avec sursis (p. ex. l'infraction prévue à l'al. 267b) du *Code*). En outre, plusieurs dispositions du *Code* et de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19, entraînent l'application d'une peine minimale obligatoire lorsque le ministère public décide de faire la preuve d'une circonstance aggravante — c'est le cas de la preuve qu'une arme à feu a été utilisée dans la perpétration de l'infraction (p. ex. l'art. 344 du *Code*; les art. 5 et 6 de la *Loi réglementant certaines drogues et autres substances*). À l'instar des autres exemples susmentionnés, la décision de faire la preuve de la circonstance aggravante limite l'éventail des peines que peut infliger le juge.

[32] Indépendamment du nombre considérable de décisions qui donneraient ouverture au contrôle judiciaire, la décision du ministère public de demander une peine minimale obligatoire — comme nous le verrons — est une question qui relève du pouvoir discrétionnaire en matière de poursuites. Il existe depuis longtemps une réticence fortement enracinée à permettre le contrôle judiciaire automatique de l'exercice de ce pouvoir discrétionnaire. Comme elle l'a affirmé dans *R. c. Beare*, [1988] 2 R.C.S. 387, p. 411, la Cour « a déjà reconnu que le pouvoir discrétionnaire de la poursuite ne porte pas atteinte

noted in *R. v. Power*, [1994] 1 S.C.R. 601, “the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it” (p. 627). The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. It cannot be a principle that is considered fundamental to the way in which our legal system ought fairly to operate.

[33] In sum, the principle of fundamental justice sought by Mr. Anderson must be rejected.

B. *Is the Crown’s Decision to Tender the Notice Against an Aboriginal Offender Reviewable?*

[34] Having concluded that the Crown is not under a constitutional obligation to consider the accused’s Aboriginal status when making a decision that limits the sentencing options available to a judge, the next question is whether the Crown’s decision to tender the Notice is reviewable in some other way, and if so, under what standard.

Review of Crown Decision Making

[35] There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.

[36] All Crown decision making is reviewable for abuse of process. However, as I will explain, exercises of prosecutorial discretion are *only* reviewable for abuse of process. In contrast, tactics and conduct before the court are subject to a wider range of review. The court may exercise its inherent

aux principes de justice fondamentale ». Et comme la juge L’Heureux-Dubé l’a fait remarquer au nom des juges majoritaires de la Cour dans *R. c. Power*, [1994] 1 R.C.S. 601, « le ministère public ne peut fonctionner à titre de poursuivant devant le tribunal tout en étant également assujéti à sa surveillance générale. Pour sa part, le tribunal ne peut à la fois superviser l’exercice du pouvoir discrétionnaire de la poursuite et agir à titre d’arbitre impartial de l’affaire qui lui est soumise » (p. 627). L’imposition d’une obligation très générale qui donne ouverture à la révision automatique de toutes les décisions susmentionnées va à l’encontre de nos traditions constitutionnelles. Il ne peut s’agir là d’un principe considéré comme essentiel au bon fonctionnement de notre système de justice.

[33] En résumé, le principe de justice fondamentale que fait valoir M. Anderson doit être rejeté.

B. *La décision du ministère public de produire l’avis à l’égard d’un délinquant autochtone peut-elle être révisée?*

[34] Ayant conclu que la Constitution n’oblige pas le ministère public à prendre en considération le statut d’Autochtone de l’accusé lorsqu’il prend une décision qui limite l’éventail des peines que peut infliger un juge, il s’agit maintenant de déterminer si la décision du ministère public de produire l’avis peut être révisée d’une autre façon et, dans l’affirmative, selon quelle norme.

Contrôle des décisions du ministère public

[35] Le contrôle judiciaire des décisions du ministère public peut se faire suivant deux voies distinctes. L’analyse différera selon qu’il s’agit de contrôler (1) l’exercice du pouvoir discrétionnaire en matière de poursuites, ou (2) la stratégie ou la conduite devant le tribunal.

[36] Toutes les décisions du ministère public sont susceptibles de révision s’il y a eu abus de procédure. Toutefois, ainsi que je vais l’expliquer, l’exercice du pouvoir discrétionnaire en matière de poursuites peut être révisé en cas d’abus de procédure *seulement*. Par contre, la stratégie ou la

jurisdiction to control its own processes even in the absence of abuse of process.

(a) *Prosecutorial Discretion*

[37] This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice’”. More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that “[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law”.

[38] Unfortunately, subsequent to this Court’s decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by “prosecutorial discretion” and the law has become cloudy. The present appeal provides an opportunity for clarification.

[39] In *Krieger*, this Court provided the following description of prosecutorial discretion:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to

conduite devant le tribunal peut être l’objet d’un contrôle plus large. La cour peut exercer sa compétence inhérente en vue de faire respecter sa propre procédure, même en l’absence d’abus de procédure.

a) *Le pouvoir discrétionnaire en matière de poursuites*

[37] Notre Cour a affirmé à maintes reprises que le pouvoir discrétionnaire en matière de poursuites est un élément essentiel au bon fonctionnement de la justice criminelle : *Beare*, p. 410; *R. c. T. (V.)*, [1992] 1 R.C.S. 749, p. 758-762; *R. c. Cook*, [1997] 1 R.C.S. 1113, par. 19. Dans *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339, par. 47, notre Cour a estimé que l’importance fondamentale du pouvoir discrétionnaire en matière de poursuites « tient à la défense de l’intérêt public, et non à la protection des droits individuels des procureurs de la Couronne, car elle permet à ces derniers de prendre des décisions discrétionnaires dans l’exécution de leurs obligations professionnelles sans craindre d’ingérence judiciaire ou politique et de s’acquitter ainsi de leur rôle *quasi* judiciaire de [TRADUCTION] “représentants de la justice” ». Plus récemment, dans *Sriskandarajah c. États-Unis d’Amérique*, 2012 CSC 70, [2012] 3 R.C.S. 609, par. 27, la Cour a fait remarquer que « [l]e pouvoir discrétionnaire du poursuivant est non seulement conforme aux principes de justice fondamentale, mais il représente un mécanisme essentiel d’application efficace du droit criminel ».

[38] Malheureusement, après l’arrêt de notre Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, il y a eu une certaine confusion quant au sens à donner à l’expression « pouvoir discrétionnaire en matière de poursuites » et le droit est devenu nébuleux à cet égard. Le présent pourvoi nous donne l’occasion de le clarifier.

[39] Dans *Krieger*, notre Cour a décrit de la façon suivante le pouvoir discrétionnaire en matière de poursuites :

L’expression « pouvoir discrétionnaire en matière de poursuites » est une expression technique. Elle ne désigne pas simplement la décision discrétionnaire d’un procureur

the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. [para. 43]

[40] The Court went on to provide the following examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution (para. 46). The Court continued:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added; emphasis in original deleted; para. 47.]

[41] Since *Krieger*, courts have struggled with the distinction between prosecutorial discretion, and tactics and conduct. The use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion, notwithstanding the expansive language used in *Krieger* to define the term, namely: "... decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (para. 47). Difficulty in defining the term has also led to confusion regarding the standard of review by which particular Crown decisions are to be assessed.

du ministère public, mais vise l'exercice des pouvoirs qui sont au cœur de la charge de procureur général et que le principe de l'indépendance protège contre l'influence de considérations politiques inappropriées et d'autres vices. [par. 43]

[40] La Cour donne ensuite les exemples suivants du pouvoir discrétionnaire en matière de poursuites : intenter ou non des poursuites relativement à une accusation portée par la police; ordonner un arrêt des procédures dans le cadre de poursuites privées ou publiques; accepter un plaidoyer de culpabilité relativement à une accusation moins grave; se retirer complètement de procédures criminelles; prendre en charge des poursuites privées (par. 46). La Cour ajoute ce qui suit :

Fait important, le point commun entre les divers éléments du pouvoir discrétionnaire en matière de poursuites est le fait qu'ils comportent la prise d'une décision finale quant à savoir s'il y a lieu d'intenter ou de continuer des poursuites ou encore d'y mettre fin, d'une part, et quant à l'objet des poursuites, d'autre part. Autrement dit, le pouvoir discrétionnaire en matière de poursuites vise les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Les décisions qui ne portent pas sur la nature et l'étendue des poursuites, c'est-à-dire celles qui ont trait à la stratégie ou à la conduite du procureur du ministère public devant le tribunal, ne relèvent pas du pouvoir discrétionnaire en matière de poursuites. Ces décisions relèvent plutôt de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui. [Je souligne; soulignements dans l'original omis; par. 47.]

[41] Depuis l'arrêt *Krieger*, la distinction entre le pouvoir discrétionnaire en matière de poursuites, d'une part, et la stratégie et la conduite, d'autre part, a donné du fil à retordre aux tribunaux. L'emploi de l'expression « au cœur de » dans *Krieger* a donné lieu à une définition étroite du pouvoir discrétionnaire en matière de poursuites, malgré la formulation libérale employée dans *Krieger* pour définir l'expression, à savoir : « ... les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci » (par. 47). La difficulté à définir l'expression a également semé la confusion quant à la norme de contrôle applicable à l'appréciation de décisions données du ministère public.

[42] The current appeal presents a good illustration of both problems. As noted earlier, the Newfoundland and Labrador Court of Appeal split on the issue of how to characterize the Crown's decision to tender the Notice. Welsh J.A. held that it was a matter of "core" prosecutorial discretion, whereas Green C.J.N.L. and Rowe J.A. (following *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, at paras. 54-56), considered it to be a tactical decision and thus "outside [the] core" (para. 49).

[43] The court also diverged on the applicable standard of review. Welsh J.A. held that the distinction between core decisions and decisions falling outside the core was of no consequence as both types of decisions were reviewable on the same standard — the standard articulated in *Gill*, in which the Ontario Court of Appeal held that the decision to tender the Notice was reviewable if it (1) undermined the integrity of the administration of justice; (2) operated in a manner that rendered the sentencing proceedings fundamentally unfair; (3) was arbitrary; or (4) resulted in a limit on the accused's liberty that was grossly disproportionate to the state interest in pursuing a particular course of action (*Gill*, at para. 59). Green C.J.N.L. and Rowe J.A. disagreed. In their view, tactical decisions (decisions "outside the core") were reviewable according to the *Gill* standard, whereas "core" prosecutorial discretion was reviewable solely for abuse of process. The diverging views present in this case, and in many others, demonstrate the unsatisfactory state of the law.

[44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the

[42] Le présent pourvoi illustre bien les deux problèmes. Rappelons que la Cour d'appel de Terre-Neuve-et-Labrador était partagée quant à la manière de qualifier la décision du ministère public de produire l'avis. La juge Welsh a statué que la décision en cause relevait du pouvoir discrétionnaire [TRADUCTION] « essentiel » en matière de poursuites, alors que le juge en chef Green et le juge Rowe (s'appuyant sur l'arrêt *R. c. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, par. 54-56), ont estimé qu'il s'agissait d'une décision stratégique qui [TRADUCTION] « ne relevait donc pas de ce pouvoir essentiel » (par. 49).

[43] La cour était également divisée quant à la norme de contrôle applicable. La juge Welsh a statué que la distinction entre les décisions essentielles et celles qui ne l'étaient pas n'avait pas de conséquences, puisque, dans les deux cas, les décisions pouvaient être révisées selon la même norme de contrôle — la norme énoncée dans *Gill*, où la Cour d'appel de l'Ontario a statué que la décision de produire l'avis pouvait être révisée si l'une des conditions suivantes était remplie : (1) la décision a porté atteinte à l'intégrité de l'administration de la justice; (2) elle a eu pour effet de rendre la procédure de détermination de la peine fondamentalement inéquitable; (3) elle était arbitraire; (4) elle a donné lieu à une restriction de la liberté de l'accusé qui était exagérément disproportionnée à l'intérêt qu'a l'État à prendre une mesure donnée (*Gill*, par. 59). Le juge en chef Green et le juge Rowe n'étaient pas de cet avis. Selon eux, les décisions stratégiques (les décisions « non essentielles ») pouvaient être révisées selon la norme énoncée dans *Gill*, alors que le pouvoir discrétionnaire « essentiel » en matière de poursuites n'était susceptible de révision que s'il y avait eu abus de procédure. Les points de vue divergents en l'espèce, et dans beaucoup d'autres affaires, montrent bien que la règle de droit en la matière laisse à désirer.

[44] En vue de clarifier la règle, je crois que nous devons d'abord reconnaître que l'expression « pouvoir discrétionnaire en matière de poursuites » est une expression large qui renvoie à toutes « les

prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.

[45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor's duty to disclose relevant evidence to the accused was at issue:

In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of

décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci » (*Krieger*, par. 47). Comme notre Cour l'a fait remarquer à maintes reprises, « [l]e pouvoir discrétionnaire [en matière de poursuites] renvoie à la discrétion exercée par le procureur général dans les affaires qui relèvent de sa compétence relativement à la poursuite d'infractions criminelles » (*Krieger*, par. 44, citant *Power*, p. 622, citant D. Vanek, « Prosecutorial Discretion » (1988), 30 *Crim. L.Q.* 219, p. 219 (je souligne)). Bien qu'il soit sans doute impossible de dresser une liste exhaustive des décisions qui relèvent de la nature et de l'étendue des poursuites, nous pouvons ajouter, outre ceux donnés dans *Krieger*, les exemples suivants : la décision de répudier une entente sur le plaidoyer (comme dans *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566); la décision d'introduire une demande de déclaration de délinquant dangereux; la décision de procéder par voie de mise en accusation directe; la décision de porter des accusations alléguant la perpétration de plusieurs infractions; la décision de négocier sur un plaidoyer; la décision de procéder par voie sommaire ou par voie de mise en accusation; la décision d'interjeter appel. Toutes ces décisions ont trait à la nature et à l'étendue des poursuites. Comme on peut le voir, plusieurs découlent de dispositions du *Code* même, y compris la décision en l'espèce de produire l'avis.

[45] En résumé, l'expression « pouvoir discrétionnaire en matière de poursuites » renvoie à un vaste éventail de décisions que peut prendre un poursuivant. Cela dit, il faut prendre soin de faire la distinction entre les questions qui relèvent de ce pouvoir et les obligations constitutionnelles. La distinction entre le pouvoir discrétionnaire en matière de poursuites et les obligations constitutionnelles du ministère public a été faite dans *Krieger*, où était en cause l'obligation du poursuivant de communiquer la preuve pertinente à l'accusé :

Dans l'arrêt *Stinchcombe*, précité, notre Cour a conclu que le ministère public est tenu de communiquer à la défense tous les renseignements pertinents. Par conséquent, bien que le procureur du ministère public conserve le pouvoir discrétionnaire de ne pas communiquer

prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]

Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

(i) The Standard of Review for Prosecutorial Discretion

[46] The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M. Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863, at p. 867. Judicial non-interference with prosecutorial discretion has been referred to as a “matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice” which also recognizes that prosecutorial discretion is “especially ill-suited to judicial review”: *Power*, at p. 623. In *Krieger*, the Court discussed the separation of powers doctrine as a basis for judicial deference to prosecutorial discretion:

In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive . . . [para. 45]

des renseignements non pertinents, la communication d’éléments de preuve pertinents est affaire non pas de pouvoir discrétionnaire mais plutôt d’obligation de sa part. [Je souligne; par. 54.]

Manifestement, le ministère public n’a pas le pouvoir discrétionnaire de porter atteinte aux droits que la *Charte* garantit à un accusé. Autrement dit, le pouvoir discrétionnaire en matière de poursuites ne protège aucunement le procureur du ministère public qui ne s’est pas acquitté de ses obligations constitutionnelles, par exemple celle de communiquer adéquatement la preuve à la défense.

(i) La norme de contrôle du pouvoir discrétionnaire en matière de poursuites

[46] Les nombreuses décisions que sont appelés à prendre les procureurs du ministère public dans l’exercice de leur pouvoir discrétionnaire en matière de poursuites ne doivent pas être susceptibles d’une remise en cause systématique par les tribunaux. Les tribunaux reconnaissent depuis longtemps que les décisions prises dans l’exercice du pouvoir discrétionnaire en matière de poursuites sont différentes de celles prises par l’exécutif : voir M. Code, « Judicial Review of Prosecutorial Decisions : A Short History of Costs and Benefits, in Response to Justice Rosenberg » (2009), 34 *Queen’s L.J.* 863, p. 867. Si les tribunaux n’interviennent pas dans le pouvoir discrétionnaire en matière de poursuites, c’est « par principe, compte tenu du partage des pouvoirs, de l’efficacité du système de justice criminelle », et parce qu’ils reconnaissent que ce pouvoir discrétionnaire « se prête particulièrement mal au contrôle judiciaire » : *Power*, p. 623. Dans *Krieger*, la Cour a examiné la théorie du partage des pouvoirs en tant que fondement de la retenue dont les tribunaux font preuve à l’égard du pouvoir discrétionnaire en matière de poursuites :

Dans notre système gouvernemental, c’est le souverain qui a le pouvoir de poursuivre ses sujets. Les autres organes du gouvernement ne peuvent pas modifier une décision que le procureur général ou l’un de ses mandataires a prise dans l’exercice du pouvoir que le souverain lui a délégué. Par conséquent, les tribunaux [et] les autres membres de l’exécutif [. . .] font preuve de retenue à l’égard de l’exercice du pouvoir discrétionnaire en matière de poursuites. [par. 45]

[47] The Court also noted the more practical problems associated with regular review of prosecutorial discretion:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. [para. 32]

[48] Manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight. This Court has repeatedly affirmed that prosecutorial discretion is reviewable for abuse of process: *Krieger*, at para. 32; *Nixon*, at para. 31; *Miazga*, at para. 46.

[49] The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term “flagrant impropriety” (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown’s decision “undermines the integrity of the judicial process” or “results in trial unfairness” (para. 64). The Court also referred to “improper motive[s]” and “bad faith” in its discussion (para. 68).

[50] Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.

[51] In sum, prosecutorial discretion is reviewable solely for abuse of process. The *Gill* test applied by the Newfoundland and Labrador Court of Appeal was developed at a time when courts were struggling with the post-*Krieger* “core” versus “outside the

[47] Notre Cour a aussi souligné les problèmes pratiques particuliers liés à la révision systématique du pouvoir discrétionnaire en matière de poursuites :

La fonction quasi judiciaire du procureur général ne saurait faire l’objet d’une ingérence de la part de parties qui ne sont pas aussi compétentes que lui pour analyser les divers facteurs à l’origine de la décision de poursuivre. Assujettir ce genre de décisions à une ingérence politique ou à la supervision des tribunaux pourrait miner l’intégrité de notre système de poursuites. [par. 32]

[48] Manifestement, le pouvoir discrétionnaire en matière de poursuites justifie une grande déférence. Toutefois, il n’est pas à l’abri de toute surveillance judiciaire. Notre Cour a affirmé à maintes reprises que le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire s’il y a eu abus de procédure : *Krieger*, par. 32; *Nixon*, par. 31; *Miazga*, par. 46.

[49] Dans la jurisprudence portant sur le contrôle du pouvoir discrétionnaire en matière de poursuites, le type de comportement de la poursuite qui constitue un abus de procédure a été décrit de diverses façons. Dans *Krieger*, notre Cour a employé l’expression « conduite répréhensible flagrante » (par. 49). Dans *Nixon*, la Cour a estimé que la règle de l’abus de procédure s’applique en présence d’éléments de preuve démontrant que la décision du ministère public « min[e] l’intégrité du processus judiciaire » ou « rend le procès inéquitable » (par. 64). La Cour a également fait état, dans son analyse, de « motif illégitime » et de « mauvaise foi » (par. 68).

[50] Indépendamment des termes employés, l’abus de procédure s’entend essentiellement d’une conduite du ministère public qui est inacceptable et qui compromet sérieusement l’équité du procès ou l’intégrité du système de justice. Les décisions du ministère public motivées par des préjugés à l’égard des Autochtones répondraient certainement à ce critère.

[51] En résumé, le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire seulement s’il y a eu abus de procédure. Le critère énoncé dans *Gill* qu’a appliqué la Cour d’appel de Terre-Neuve-et-Labrador a été élaboré à

core” dichotomy. To the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, respectfully, it should not be followed.

(ii) The Threshold Evidentiary Burden

[52] The burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities: *Cook*, at para. 62; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 69, *per* L'Heureux-Dubé J.; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 19. However, given the unique nature of prosecutorial discretion — specifically, the fact that the Crown will typically (if not always) be the only party who will know *why* a particular decision was made — this Court in *Nixon* recognized that where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation: para. 60.

[53] In *Nixon*, this Court noted the following reasons as to why there must be a “proper evidentiary foundation” before the abuse of process claim should proceed:

... mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable

une époque où, après l'arrêt *Krieger*, la distinction entre ce qui relève du pouvoir discrétionnaire « essentiel » et ce qui relève du pouvoir « non essentiel » n'allait pas de soi pour les tribunaux. Avec égards, il n'y a pas lieu de retenir le critère énoncé dans *Gill* dans la mesure où il laisse entendre qu'une conduite qui ne va pas jusqu'à l'abus de procédure peut justifier le contrôle judiciaire du pouvoir discrétionnaire en matière de poursuites.

(ii) Le fardeau initial de preuve

[52] Il incombe au demandeur de prouver par prépondérance des probabilités qu'il y a eu abus de procédure : *Cook*, par. 62; *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 69, la juge L'Heureux-Dubé; *R. c. Jolivet*, 2000 CSC 29, [2000] 1 R.C.S. 751, par. 19. Toutefois, en raison de la nature unique du pouvoir discrétionnaire en matière de poursuites — notamment le fait que le ministère public sera habituellement (voire toujours) la seule partie qui saura *pourquoi* une décision donnée a été prise — notre Cour a reconnu dans *Nixon* que lorsque le pouvoir discrétionnaire en matière de poursuites est contesté, le ministère public peut être tenu de justifier sa décision lorsque le demandeur établit l'existence d'une preuve suffisante : par. 60.

[53] Dans *Nixon*, notre Cour énonce les raisons suivantes pour lesquelles il doit exister « une preuve suffisante » avant que l'allégation relative à l'abus de procédure puisse être examinée :

... l'imposition aux tribunaux d'une exigence selon laquelle ils doivent d'abord se prononcer quant à l'utilité de la tenue d'une enquête fondée sur la *Charte* n'a rien de nouveau : *R. c. Pires*, 2005 CSC 66, [2005] 3 R.C.S. 343. Il faut également satisfaire à des critères préliminaires semblables dans d'autres domaines du droit criminel; ils ne constituent pas une anomalie. Des conditions préliminaires peuvent être imposées uniquement pour des raisons pragmatiques. Comme la Cour l'a fait remarquer dans *Pires* (par. 35) :

Pour que notre système de justice fonctionne, les juges qui président les procès doivent être en mesure de veiller au bon déroulement des instances. L'un des mécanismes leur permettant d'y arriver est le pouvoir de refuser de procéder à une audition de la preuve

to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. [Emphasis added; paras. 61-62.]

[54] *Nixon* involved the Crown's repudiation of a plea agreement. The Court held that the repudiation of a plea agreement was "a rare and exceptional event" that met the evidentiary threshold and justified an inquiry into the propriety of the Crown's decision: *Nixon*, at para. 63. Indeed, the evidence in *Nixon* was that only two other plea agreements had been repudiated in Alberta's history. As a result, the Court held that

to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim. [para. 63]

[55] Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95. It also accords with this Court's statement in *Sriskandarajah*, at para. 27, that "prosecutorial

lorsque la partie qui en fait la demande est incapable de démontrer qu'il est raisonnablement probable que cette audience aidera à résoudre les questions sou-mises au tribunal.

Hormis de telles considérations pragmatiques, il existe de bonnes raisons d'imposer un fardeau initial au demandeur qui prétend qu'un acte résultant de l'exercice du pouvoir discrétionnaire en matière de poursuites constitue un abus de procédure. Comme de telles décisions échappent généralement à la compétence du tribunal, il ne suffit pas d'entreprendre un examen pour qu'un demandeur puisse faire une simple allégation d'abus de procédure. [Je souligne; par. 61-62.]

[54] L'arrêt *Nixon* portait sur la répudiation d'une entente sur le plaidoyer par le ministère public. Notre Cour a affirmé que la répudiation d'une entente sur le plaidoyer est « un événement rare et exceptionnel » qui répond au critère préliminaire de preuve et justifie un examen du bien-fondé de la décision du ministère public : *Nixon*, par. 63. En fait, il ressortait de la preuve dans *Nixon* que seulement deux autres ententes sur le plaidoyer avaient déjà été répudiées en Alberta. En conséquence, la Cour a affirmé ce qui suit :

... dans la mesure où la Couronne est la seule partie au courant de l'information, c'est à elle qu'il incombe d'exposer au tribunal les circonstances et les motifs qui sous-tendent sa décision de répudier l'entente. En d'autres termes, la Couronne doit expliquer au tribunal pourquoi et comment elle est parvenue à la décision de ne pas respecter l'entente qu'elle avait pourtant conclue. En bout de ligne, c'est au demandeur qu'il revient d'établir qu'il y a eu abus de procédure et, comme il a déjà été discuté, il doit satisfaire à un critère rigoureux. Cependant, le peu, voire l'absence d'explications de la Couronne, le cas échéant, constitue un facteur qui milite fortement en faveur de la thèse du demandeur qui cherche à établir qu'il y a eu abus de procédure. [par. 63]

[55] Le fait d'obliger le demandeur à établir l'existence d'une preuve suffisante avant que la cour entreprenne l'examen des motifs qui sous-tendent l'exercice du pouvoir discrétionnaire en matière de poursuites respecte la présomption selon laquelle ce pouvoir est exercé de bonne foi : *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 95. Notre Cour a confirmé cette approche dans *Sriskandarajah*,

authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives” (emphasis added).

[56] Finally, I note that the content of a Crown policy or guideline may be relevant when a court is considering a challenge to the exercise of prosecutorial discretion. Policy statements or guidelines are capable of informing the debate as to whether a Crown prosecutor’s conduct was appropriate in the particular circumstances. See R. J. Frater, *Prosecutorial Misconduct* (2009), at p. 259. For example, a decision by a Crown prosecutor that appears to contravene a Crown policy or guideline may provide some evidence that assists the claimant in establishing the threshold evidentiary foundation. However, as the intervener the Director of Public Prosecutions of Canada submits, Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract: see *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 45 (discussing police practices manuals).

(b) *Tactics and Conduct Before the Court*

[57] The second category in the framework for review of Crown activity was referred to in *Krieger* as “tactics or conduct before the court”: para. 47. As stated in *Krieger*, “such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum” (para. 47).

[58] Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that

par. 27, où elle a dit que « sauf preuve de sa mauvaise foi ou du caractère inapproprié de ce qui l’a animé, le poursuivant n’est pas tenu de motiver sa décision » (je souligne).

[56] Enfin, je note que la teneur d’une politique ou d’une ligne directrice du ministère public peut être pertinente lorsqu’une cour examine une contestation de l’exercice du pouvoir discrétionnaire en matière de poursuites. Les énoncés de politique ou les lignes directrices peuvent éclairer le débat sur la question de savoir si la conduite d’un procureur du ministère public était appropriée dans les circonstances particulières. Voir R. J. Frater, *Prosecutorial Misconduct* (2009), p. 259. Par exemple, la décision d’un procureur du ministère public qui semble contrevenir à une politique ou à une ligne directrice du ministère public peut fournir une preuve susceptible d’aider le demandeur à satisfaire le critère préliminaire de preuve. Toutefois, comme le souligne dans ses observations le directeur des poursuites pénales du Canada, intervenant, les politiques et les lignes directrices du ministère public n’ont pas force de loi et ne peuvent elles-mêmes faire l’objet, dans l’abstrait, d’un examen fondé sur la *Charte* : voir *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190, par. 45 (traitant des guides de pratiques policières).

b) *Stratégie et conduite devant le tribunal*

[57] Selon l’arrêt *Krieger*, la deuxième catégorie de décisions du ministère public susceptibles de contrôle judiciaire a trait « à la stratégie ou à la conduite du procureur du ministère public devant le tribunal » : para. 47. Comme la Cour l’affirme dans *Krieger*, « [c]es décisions relèvent [. . .] de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui » (para. 47).

[58] Une cour supérieure possède la compétence inhérente de veiller au bon fonctionnement des rouages de la cour : *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18; *Ontario c. Criminal Lawyers’ Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, par. 26. De même, afin d’exercer sa fonction judiciaire, un tribunal d’origine législative possède des pouvoirs inhérents qui découlent

derive from the court's authority to control its own process: *Cunningham*, at para.18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.

[59] While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system *does* accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the *litigants*, they should generally refrain from interfering with the conduct of the *litigation* itself. In *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37, this Court explained why judges should be very cautious before interfering with tactical decisions:

In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel . . . [C]ounsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. . . .

The corollary of the preceding is that trial judges should seldom take it upon themselves, let alone be required, to second-guess the tactical decisions of counsel. Of course, trial judges are still required to “make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice”: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68.

du pouvoir de la cour de maîtriser sa propre procédure : *Cunningham*, par. 18. Cette compétence comprend le pouvoir de sanctionner les avocats qui font fi des décisions ou des ordonnances, ou qui affichent un comportement inacceptable, par exemple des retards, l'incivilité, le contre-interrogatoire abusif, un exposé introductif ou une plaidoirie finale inopportuns, ou une entorse au code vestimentaire. Les sanctions peuvent inclure l'ordonnance de se conformer, l'ajournement, la prorogation de délai, la mise en garde, la condamnation aux dépens, le rejet de demandes et les procédures d'outrage au tribunal.

[59] Bien que la déférence ne s'impose pas envers les avocats qui se comportent de façon inopportune dans la salle d'audience, notre système accusatoire fait *effectivement* preuve d'une grande retenue envers les décisions tactiques des avocats. Autrement dit, bien que les tribunaux puissent sanctionner la conduite des *parties au litige*, ils doivent généralement s'abstenir de s'immiscer dans la conduite du *litige* en tant que tel. Dans *R. c. S.G.T.*, 2010 CSC 20, [2010] 1 R.C.S. 688, par. 36-37, notre Cour explique pourquoi les juges doivent être très prudents avant de s'immiscer dans des décisions tactiques :

Dans un système de justice criminelle accusatoire, les juges instruisant les procès doivent, à moins de circonstances exceptionnelles, déférer aux décisions tactiques des avocats [. . .] [L]'avocat sera habituellement mieux placé que le juge du procès pour apprécier l'opportunité d'une décision tactique particulière en fonction de sa stratégie globale. Le juge du procès, lui, doit agir en arbitre impartial du litige dont il est saisi; plus un juge remet en question ou annule les décisions d'un avocat, plus il risque de s'écarter, en apparence ou dans les faits, de son rôle d'arbitre neutre et de devenir l'avocat de l'une des parties. . . .

Il en résulte que le juge du procès devrait rarement décider de son propre chef de remettre en question les décisions tactiques d'un avocat, et encore moins être tenu de le faire. Bien sûr, il doit toujours « s'assure[r] que le procès reste équitable et se déroule conformément aux lois pertinentes et aux principes de justice fondamentale » : *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 68.

[60] Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused: *Jolivet*, at para. 21. Likewise, as this Court recently held in *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, a judge may exceptionally override a Crown tactical decision in order to prevent a *Charter* violation.

[61] Finally, as with all Crown decision making, courtroom tactics or conduct may amount to abuse of process, but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion.

VI. Conclusion

[62] Parliament has expressly conferred on the Crown the discretion to tender the Notice at the sentencing hearing through the governing provisions of the *Code*. This discretion is consistent with our constitutional traditions. As the Crown points out, tendering the Notice is not simply a decision as to what submissions will be made at a sentencing hearing (A.F., at para. 119). Tendering the Notice fundamentally alters the *extent* of prosecution — specifically, the extent of the jeopardy facing the accused. In this respect, the Crown's decision to tender the Notice is analogous to the decision to proceed with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence; the decision to proceed by indictment rather than summary conviction when different mandatory minimum sentences are involved; and the decision to proceed by indictment rather than by summary conviction when that decision precludes certain sentencing options.

[63] For these reasons, I conclude that tendering the Notice is a matter of prosecutorial discretion. As a result, it is reviewable only for abuse of process.

[60] Le procureur du ministère public a le droit d'avoir une stratégie de procès et de la modifier en cours de route, pourvu que la modification n'entraîne aucune iniquité pour l'accusé : *Jolivet*, par. 21. De même, comme notre Cour l'a affirmé récemment dans *R. c. Auclair*, 2014 CSC 6, [2014] 1 R.C.S. 83, un juge peut exceptionnellement passer outre à une décision stratégique du ministère public afin d'empêcher une violation de la *Charte*.

[61] Enfin, comme pour toute prise de décision du ministère public, les stratégies ou la conduite dans la salle d'audience peuvent équivaloir à un abus de procédure, mais l'abus de procédure n'est pas une condition préalable à l'intervention du juge comme c'est le cas pour les décisions qui relèvent du pouvoir discrétionnaire en matière de poursuites.

VI. Conclusion

[62] Dans les dispositions applicables du *Code*, le législateur a expressément conféré au ministère public le pouvoir discrétionnaire de produire l'avis à l'audience de détermination de la peine. Ce pouvoir discrétionnaire est conforme à nos traditions constitutionnelles. Comme le souligne le ministère public, la production de l'avis n'est pas simplement une décision quant aux observations qui seront faites à l'audience de détermination de la peine (m.a., par. 119). La production de l'avis modifie fondamentalement l'*étendue* de la poursuite — particulièrement l'*étendue* du risque auquel l'accusé est exposé. À cet égard, la décision du ministère public de produire l'avis est analogue à la décision de porter des accusations qui entraînent une peine minimale obligatoire alors que d'autres infractions connexes n'entraînent aucune peine minimale obligatoire, à la décision d'intenter une poursuite par mise en accusation, plutôt que par procédure sommaire, lorsque diverses peines minimales obligatoires sont prescrites, et à la décision d'intenter une poursuite par mise en accusation plutôt que par procédure sommaire, lorsque cette décision exclut la possibilité d'infliger certaines peines.

[63] Pour ces motifs, je conclus que la production de l'avis relève du pouvoir discrétionnaire en matière de poursuites. Par conséquent, elle n'est susceptible

In the complete absence of any evidence to support it, Mr. Anderson's abuse of process argument must fail.

[64] As a final matter, I note that the s. 15(1) *Charter* challenge to the constitutionality of the statutory scheme was not pursued before this Court. These reasons should not be taken as endorsing the trial judge's analysis or conclusion with respect to that issue.

[65] Accordingly, I would allow the appeal. The order of the Newfoundland and Labrador Court of Appeal is set aside and a term of imprisonment of 120 days is substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

Appeal allowed.

Solicitor for the appellant: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the respondent: Newfoundland and Labrador Legal Aid Commission, St. John's.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

de contrôle judiciaire que s'il y a eu abus de procédure. En l'absence totale de preuve pour l'étayer, l'argument fondé sur l'abus de procédure invoqué par M. Anderson doit être rejeté.

[64] Enfin, je note que la contestation de la constitutionnalité du régime législatif sur le fondement du par. 15(1) de la *Charte* n'a pas été avancée devant notre Cour. Les présents motifs ne signifient pas que j'accepte l'analyse ou la conclusion du juge de première instance à l'égard de cette question.

[65] Je suis en conséquence d'avis d'accueillir le pourvoi. L'ordonnance de la Cour d'appel de Terre-Neuve-et-Labrador est annulée et une peine d'emprisonnement de 120 jours est substituée à la peine infligée, avec sursis de ce qui reste à courir de la peine conformément à la concession du ministère public.

Pourvoi accueilli.

Procureur de l'appelante : Procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureur de l'intimé : Newfoundland and Labrador Legal Aid Commission, St. John's.

Procureur de l'intervenant le directeur des poursuites pénales du Canada : Service des poursuites pénales du Canada, Halifax.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant David Asper Centre for Constitutional Rights : Université de Toronto, Toronto.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

Tab 4:

R. v. P.B., 2019 ONCA 13

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(1), (1.1), (2), or (3) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486(1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

(1.1) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or the justice who will preside at the proceedings or, if that judge or justice has not yet been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

(2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider

(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;

(b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;

(c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;

(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;

(e) the protection of justice system participants who are involved in the proceedings;

(f) whether effective alternatives to the making of the proposed order are available in the circumstances;

(g) the salutary and deleterious effects of the proposed order; and

(h) any other factor that the judge or justice considers relevant.

(3) If an accused is charged with an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 163.1, 171, 171.1, 172, 172.1, 172.2, 173, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 and the prosecutor or the accused applies for an order under subsection (1), the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

R.S., 1985, c. C-46, s. 486; R.S., 1985, c. 27(1st Supp.), s. 203, c. 19 (3rd Supp.), s. 14, c. 23 (4th Supp.) s. 1; 1992, c. 1, s. 60(F), c. 21, s. 9; 1993, c. 45, s.7; 1997, c. 16, s. 6; 1999, c. 25, s. 2(Preamble); 2001, c. 32, s. 29, c. 41, ss. 16, 34, 133; 2002, c. 13, s. 20; 2005, c. 32, c.43, ss. 4,8,; 2010, c.3, s. 4; 2012, c. 1, s. 28; 2014, c. 25, s. 21; 2015, c. 13, s. 13, c. 20, s. 21.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. P.B., 2019 ONCA 13

DATE: 20190111

DOCKET: C62057

MacPherson, Paciocco and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

P.B.

Appellant

Peter Thorning and Deepa Negandhi, for the appellant

Justin Reid, for the respondent

Heard: January 7, 2019

On appeal from the conviction entered by Justice Brian P. O'Marra of the Superior Court of Justice, sitting with a jury, on November 14, 2014, and from the sentence imposed on July 29, 2016, with reasons for sentence reported at 2016 ONSC 4350.

REASONS FOR DECISION

[1] P.B. was convicted by a jury of sexual interference and sexual assault of his daughter, A.B., relating to one incident of sexual touching occurring between June 1, 1997 and August 31, 1998. A.B. was approximately 11 years old at the time. P.B. was also convicted of sexual assault and incest relating to numerous

incidents involving A.B. between August 1, 2004 and September 12, 2012, including frequent sexual intercourse with A.B.

[2] P.B. appeals all of his convictions, alleging that the Crown breached its disclosure obligations relating to therapeutic records arising from counselling received by A.B. in New York between January and March 2003. He also appeals his sentence, based solely on his double jeopardy in having been convicted of sexual interference and sexual assault relating to the same 1997/1998 incident.

[3] At the conclusion of oral argument we dismissed the conviction appeal, and allowed the sentencing appeal on consent, with reasons to follow. These are our reasons. We will address the conviction appeal first.

[4] P.B. claims that the Crown breached its disclosure obligations relating to A.B.'s therapeutic records that were in its possession. Those records were not produced to P.B. until the second day of trial after A.B. waived her privacy interest.

[5] P.B. does not contend that the Crown should have produced those records sooner. During oral argument he agreed that because of the combined effect of *Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.2(2) and 278.3(1), the Crown was not authorized to do so until A.B.'s waiver, absent a third party records disclosure order. He argues, instead, that a disclosure breach occurred because, prior to

A.B.'s waiver, the Crown had already decided it would use the records as part of its case, yet failed in its duty under *Criminal Code*, s. 278.2(3) to notify P.B. of the likely relevance of the records as required by *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 16.

[6] In our view, P.B. has not shown that the Crown decided it would use the records as part of its case before those records were disclosed. Instead, the transcripts suggest that it was after A.B. waived her privacy interest in the records and those records were copied and viewed by the parties that the potential use of the records at trial by the Crown first arose. Simply put, P.B. has not established the lynch-pin factual premise of his disclosure breach claim.

[7] Even if P.B. had established that the Crown failed to comply with s. 278.2(3), we would not have allowed the conviction appeal. To succeed in a non-disclosure appeal an appellant must do more than show that the Crown breached its disclosure obligation. The appellant must also show that his right to make full answer and defence has been impaired as a result of the non-disclosure, by showing that there is a reasonable possibility that the non-disclosure affected the outcome at trial or the overall fairness of the trial process: *R. v. Dixon*, [1998] 1 S.C.R. 244, at paras. 32-34; and *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at para. 74. P.B. has not done so.

[8] First, the therapeutic records the Crown possessed were of limited use to P.B. because they support the allegations that P.B. sexually abused A.B. He argues, however, that had the Crown provided s. 278.2(3) notice relating to those records he would ultimately have discovered two pages from A.B.'s therapeutic records dated January 15, 2003 that the Crown did not have, and which contain entries suggesting that A.B. was never sexually assaulted. We are not persuaded that disclosure by the Crown that it possessed therapeutic records relating to A.B. that supported the Crown's case would have led P.B. to secure the missing January 15, 2003 pages. In our view, P.B.'s theory of prejudice is simply too attenuated and speculative to support a finding that his right to full answer and defence has been compromised.

[9] Second, prior to the criminal trial, P.B.'s civil counsel obtained the therapeutic records, including the missing pages, through the civil discovery process arising from a lawsuit between P.B. and A.B. The fact that P.B. and his criminal counsel appear not to have appreciated that his civil counsel had these records does not change the fact that P.B.'s agent, and therefore P.B., had possession of the records. Nothing in the implied undertaking rule prevented P.B. from using those records to impeach A.B.'s testimony: see *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1.01(6). In effect, P.B. is seeking to obtain a remedy on appeal based on the failure of the Crown to disclose records P.B.'s civil counsel already held on his behalf. This is not a solid foundation for

claiming that non-disclosure by the Crown impaired the verdict and the fairness of the trial.

[10] Finally, P.B. knew during the preliminary inquiry, if not before, that the investigating police force had the therapeutic records, and P.B. was permitted to ask extensive questions at the preliminary inquiry about the records in order to facilitate a third party records application. Yet that application never came. In these circumstances, a failure by the Crown to alert P.B. to the relevance of the records would have been harmless. Even at the trial, after A.B. had been examined-in-chief, P.B. chose to proceed without the missing pages, rather than adjourn the trial. Thus, P.B. had the means to obtain the records held by the Crown but made a tactical choice not to pursue them before trial, and then, after receiving production of the therapeutic records held by the Crown, chose to proceed without the missing pages he now contends were crucial to his full answer and defence.

[11] In all of the circumstances, we are not satisfied that, even if it occurred, non-disclosure compromised P.B.'s right to make full answer and defence.

[12] With respect to the sentencing appeal, the Crown concedes that P.B. should not have been convicted and sentenced for both sexual interference and sexual assault relating to a single act of sexual touching in 1997/1998. The Crown and P.B. agree that we should substitute a stay on the sexual assault

conviction, in accordance with the principles outlined in *Kienapple v. R.*, [1975] 1 S.C.R. 729.

[13] In terms of the sentence itself, the parties agree that there is no basis for interfering with the trial judge's overarching objective of imposing an eight year global sentence, minus six months' credit for stringent bail conditions. Therefore, P.B. does not ask us to reduce his sentence by the 12 months that the trial judge had imposed consecutively on the 1997/1998 sexual assault count. The parties agree that a proper outcome is to leave the overall sentence unaffected by the *Kienapple* error by adding four months to each of the three remaining convictions.

[14] We therefore dismiss the conviction appeal.

[15] We allow the sentencing appeal and set aside the conviction on Count 3, the 1997/1998 sexual assault charge. We substitute a stay.

[16] The sentence on Count 2 is varied to 1 year and 4 months. The sentence on Count 4 is varied to 2 years and 4 months consecutive. On Count 5, the sentence is varied to 4 years and 4 months consecutive, minus 6 months' credit for stringent bail conditions.

"J.C. MacPherson J.A."
"David M. Paciocco J.A."
"I.V.B. Nordheimer J.A."

Tab 5:

R. v. Babos, 2014 SCC 16

Antal Babos *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Sergio Piccirilli *Appellant*

v.

Her Majesty The Queen *Respondent***INDEXED AS: R. v. BABOS****2014 SCC 16**

File No.: 34824.

2013: October 9; 2014: February 21.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Stay of proceedings — Abuse of process — Accused charged with offences related to firearms and importation, production and trafficking of methamphetamine — Accused alleging Crown misconduct in obtaining medical records, police collusion to mislead court, and Crown threats pressuring accused to plead guilty — Trial judge staying proceedings — Whether stay of proceedings necessary to protect integrity of justice system.

The accused were charged with numerous firearms offences, as well as offences related to the importation, production and trafficking of methamphetamine. During the course of the trial, the accused brought an application to stay the proceedings for abuse of process. They took issue with three forms of state misconduct: attempts by the Crown to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty, collusion on the part of two police officers to mislead the court about the seizure of a firearm, and improper means used by the Crown in obtaining the medical records of one of the

Antal Babos *Appellant*

c.

Sa Majesté la Reine *Intimée*

- et -

Sergio Piccirilli *Appellant*

c.

Sa Majesté la Reine *Intimée***RÉPERTORIÉ : R. c. BABOS****2014 CSC 16**

N° du greffe : 34824.

2013 : 9 octobre; 2014 : 21 février.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Arrêt des procédures — Abus de procédure — Accusés inculpés d'infractions relatives aux armes à feu et à l'importation, à la production et au trafic de méthamphetamine — Accusés allèguent des comportements répréhensibles du ministère public en ce qui a trait à l'obtention d'un dossier médical, à de la collusion entre policiers pour induire le tribunal en erreur et à des menaces proférées par la substitut du procureur général pour inciter les accusés à plaider coupable — Arrêt des procédures ordonné par le juge du procès — L'arrêt des procédures était-il nécessaire pour protéger l'intégrité du système judiciaire?

Les accusés ont été inculpés de nombreuses infractions liées aux armes à feu et d'autres infractions relatives à l'importation, à la production et au trafic de méthamphetamine. Durant le procès, les accusés ont présenté une demande d'arrêt des procédures pour abus de procédure. Ils se plaignaient de trois actes répréhensibles du ministère public, soit du fait que la substitut du procureur général a essayé plusieurs fois de les intimider pour qu'ils renoncent à leur droit à un procès en les menaçant de porter d'autres accusations contre eux s'ils décidaient de nier leur culpabilité; que deux agents de police se sont concertés pour induire le tribunal en erreur au sujet

accused. The trial judge stayed the proceedings. The Court of Appeal set aside the stay and ordered a new trial.

Held (Abella J. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: A stay of proceedings for an abuse of process will only be warranted in the clearest of cases. Two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main" category). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category). The test for determining whether a stay of proceedings is warranted is the same for both categories and consists of three requirements: (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, (2) there must be no alternative remedy capable of redressing the prejudice, and (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

When the residual category is invoked, the first stage of the test is met when it is established that the state has engaged in conduct that is offensive to societal notions of fair play and decency, and that proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. At the second stage of the test, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward. Finally, the court must decide whether staying the proceedings or having a trial despite the impugned conduct better protects the integrity of the justice system. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.

de la saisie d'une arme à feu; et que le ministère public a utilisé des moyens irréguliers pour obtenir le dossier médical d'un des accusés. Le juge du procès a ordonné l'arrêt des procédures. La Cour d'appel a annulé l'arrêt des procédures et ordonné la tenue d'un nouveau procès.

Arrêt (la juge Abella est dissidente) : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges LeBel, Cromwell, Moldaver, Karakatsanis et Wagner : Un arrêt des procédures pour abus de procédure n'est justifié que dans les cas les plus manifestes. Deux types de conduite de l'État justifient un tel arrêt. Le premier concerne la conduite qui compromet l'équité du procès d'un accusé (la catégorie « principale »). Le second concerne la conduite qui ne présente aucune menace pour l'équité du procès, mais risque de miner l'intégrité du processus judiciaire (la catégorie « résiduelle »). Le test servant à déterminer si l'arrêt des procédures est justifié est le même pour les deux catégories et comporte trois exigences : (1) il doit y avoir une atteinte au droit de l'accusé à un procès équitable ou à l'intégrité du système de justice qui sera révélée, perpétuée ou aggravée par le déroulement du procès ou par son issue, (2) il ne doit y avoir aucune autre réparation susceptible de corriger l'atteinte et (3), s'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, d'une part, et l'intérêt que représente pour la société un jugement définitif statuant sur le fond, d'autre part.

Lorsque c'est la catégorie résiduelle qui est invoquée, il est satisfait à la première étape du test s'il est établi que l'État a adopté une conduite choquant le sens du franc-jeu et de la décence de la société et que la tenue d'un procès malgré cette conduite serait préjudiciable à l'intégrité du système de justice. À la deuxième étape du test, l'accent est plutôt mis sur la question de savoir si une autre réparation, moindre que l'arrêt des procédures, permettra au système de justice de se dissocier suffisamment à l'avenir de la conduite reprochée à l'État. Finalement, le tribunal est appelé à décider quelle des deux solutions suivantes assure le mieux l'intégrité du système de justice : l'arrêt des procédures ou la tenue d'un procès en dépit de la conduite contestée. Cette analyse suppose nécessairement une mise en balance. Le tribunal doit prendre en compte des éléments comme la nature et la gravité de la conduite reprochée — que celle-ci soit un cas isolé ou la manifestation d'un problème systémique et persistant —, la situation de l'accusé, les accusations auxquelles il doit répondre et l'intérêt de la société à ce que les accusations soient jugées au fond.

In the instant case, the three forms of state misconduct that are at issue fall squarely within the residual category. The trial judge erred in his assessment of the impugned misconduct and in concluding that a stay of proceedings was warranted. As regards the medical records, the trial judge made a palpable and overriding error in finding that the Crown's conduct occasioned prejudice to the integrity of the justice system. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider the existence of another remedy that would have overcome the threat posed to the integrity of the justice system — namely, excluding the firearm from evidence in respect of both accused. As for the threats made by the Crown, while they were reprehensible and should not be repeated, the trial judge failed to consider that they were made more than a year before the trial began, and that the accused took no steps for over a year to address the Crown's conduct. These factors shed light on how seriously the accused took the threats. The trial judge also failed to consider that the Crown prosecutor who made the threats was removed from the case months before the trial started. Moreover, the trial judge failed to balance the need for a stay against society's interest in a trial on the merits. When the impugned misconduct is weighed against society's interest in a trial, this is not one of the clearest of cases where the exceptional remedy of a stay of proceedings is warranted.

Per Abella J. (dissenting): A stay of proceedings may be imposed when the state conduct is so profoundly and disproportionately inconsistent with the public perception of what a fair justice system requires, that proceeding with a trial means condoning unforgiveable conduct. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

The unjustifiable nature of the Crown's conduct in this case was not mitigated by the length of time between the threats and the trial. Time is not a legal remedy for a fundamental breach of the Crown's role and the passage of time does not attenuate her unpardonable conduct. It was the mere fact that the threats were made at all that was key, not when they were made.

En l'instance, les trois actes répréhensibles de l'État en cause sont manifestement de ceux qui entrent dans la catégorie résiduelle. Le juge du procès a commis des erreurs dans l'appréciation des trois actes répréhensibles et en concluant qu'il était justifié d'ordonner l'arrêt des procédures. En ce qui concerne le dossier médical, le juge du procès a commis une erreur manifeste et dominante en concluant que la conduite du ministère public avait miné l'intégrité du système de justice. Pour ce qui est de la collusion policière, abstraction faite de sa portée limitée, le juge du procès n'a pas tenu compte du fait qu'une autre réparation, soit l'exclusion de l'arme à feu à l'égard des deux accusés, aurait contré toute menace que la collusion policière représentait pour l'intégrité du système de justice. Quant aux menaces proférées par la substitut du procureur général, bien qu'elles aient été répréhensibles et ne doivent pas se reproduire, le juge du procès a omis de tenir compte du fait qu'elles avaient été faites plus d'un an avant l'ouverture du procès, et que les accusés n'ont pris aucune mesure durant plus d'un an avant de s'en plaindre. Ces facteurs jettent un éclairage sur le niveau de gravité attribué par la défense à ces menaces. Le juge du procès a aussi omis de tenir compte du fait que la substitut du procureur général qui a proféré les menaces avait cessé d'occuper dans le dossier des mois avant le début du procès. En outre, le juge du procès a omis de mettre en balance la nécessité de l'arrêt des procédures, d'une part, et l'intérêt de la société à ce qu'un procès soit jugé sur le fond, d'autre part. Lorsque la conduite répréhensible attaquée est soupesée par rapport à l'intérêt pour la société à ce qu'un procès soit tenu, il ne s'agit pas de l'un des cas les plus manifestes où la réparation exceptionnelle que constitue l'arrêt des procédures est justifiée.

La juge Abella (dissidente) : L'arrêt des procédures peut être ordonné lorsque la conduite de l'État est si profondément et disproportionnellement incompatible avec ce qu'exige, aux yeux du public, un système de justice équitable, que la tenue d'un procès revient à tolérer une conduite impardonnable. Le substitut du procureur général qui profère des menaces dans le but d'intimider l'accusé pour qu'il renonce à son droit à un procès porte un coup fatal au cœur de la confiance du public dans cette intégrité.

Le caractère injustifiable de la conduite du ministère public en l'espèce n'a pas été atténué par le temps qui s'est écoulé entre la prolifération des menaces et la tenue du procès. Le temps n'est pas une réparation prévue par la loi en cas de manquement fondamental à la fonction du ministère public et il n'a pas pour effet d'atténuer ce qui constitue une conduite impardonnable. C'est la prolifération des menaces en tant que telle qui était déterminante, et non le moment où elles ont été proférées.

Moreover, a further balancing exercise was not required in the circumstances. The trial judge was unequivocal in concluding that the conduct justified a stay, and there was none of the uncertainty as to the propriety of a stay that is a condition precedent to the need for a balancing exercise. When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice, it is conceptually inconsistent to ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits. The public has an interest not only in trials on the merits, it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

Cases Cited

By Moldaver J.

Referred to: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Waugh* (1985), 68 N.S.R. (2d) 247; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *Boucher v. The Queen*, [1955] S.C.R. 16; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587.

By Abella J. (dissenting)

R. v. O'Connor, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Conway*, [1989] 1 S.C.R. 1659; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509.

En outre, une mise en balance en plus de l'examen préalable ne s'imposait pas en l'espèce. Le juge du procès a conclu sans équivoque que l'abus justifiait l'arrêt des procédures et on ne retrouvait aucunement dans la présente affaire l'incertitude quant au bien-fondé de l'arrêt des procédures qui constitue une condition préalable au besoin de procéder à une mise en balance. Lorsque le juge du procès conclut à l'impossibilité de tolérer la conduite en question parce qu'elle choque aussi profondément le sens de la justice du public, il est conceptuellement illogique de demander au tribunal d'affaiblir sa propre conclusion en pesant de nouveau le côté de la balance où se trouve l'intérêt du public dans la tenue d'un procès sur le fond. Le public a non seulement intérêt à ce qu'il y ait des procès sur le fond, il a aussi bien davantage intérêt à savoir que l'État privilégie l'équité aux dépens de la célérité lorsqu'il participe à des procédures, notamment celles susceptibles d'entraîner la perte de liberté. La justice ne se limite pas aux résultats, elle s'étend aussi à la manière de les atteindre. Lorsqu'un substitut du procureur général menace l'accusé de porter d'autres accusations contre lui s'il n'avoue pas sa culpabilité, l'intérêt du public dans l'issue d'un procès doit céder le pas à l'intérêt transcendant d'assurer la confiance du public dans l'intégrité du système de justice.

Jurisprudence

Citée par le juge Moldaver

Arrêts mentionnés : *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Keyowski*, [1988] 1 R.C.S. 657; *R. c. Waugh* (1985), 68 N.S.R. (2d) 247; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *R. c. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *Boucher c. The Queen*, [1955] R.C.S. 16; *États-Unis d'Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587.

Citée par la juge Abella (dissidente)

R. c. O'Connor, [1995] 4 R.C.S. 411; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Conway*, [1989] 1 R.C.S. 1659; *États-Unis d'Amérique c. Shulman*, 2001 CSC 21, [2001] 1 R.C.S. 616; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 11(b), 24.
Criminal Code, R.S.C. 1985, c. C-46, ss. 574(1)(b), 577.

APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Chamberland and Doyon J.J.A.), 2012 QCCA 471, [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, setting aside the stay of proceedings entered by Garneau J. and ordering a new trial, 2008 QCCQ 11373, [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Appeals dismissed, Abella J. dissenting.

Franco Schiro and Xuan Trung Nguyen, for the appellant Antal Babos.

Guylaine Tardif, Jean-Pierre Pilon and Maxime Wilkins, for the appellant Sergio Piccirilli.

Gilles Villeneuve and François Lacasse, for the respondent.

The judgment of McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner J.J. was delivered by

MOLDAVER J. —

I. Introduction

[1] This appeal provides the Court with an opportunity to revisit the law of abuse of process as it relates to state conduct that impinges on the integrity of the justice system but does not affect trial fairness — sometimes referred to as the “residual category” of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 11b), 24.
Code criminel, L.R.C. 1985, ch. C-46, art. 574(1)b), 577.

POURVOIS contre un arrêt de la Cour d’appel du Québec (la juge en chef Duval Hesler et les juges Chamberland et Doyon), 2012 QCCA 471, [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, qui a annulé l’arrêt des procédures ordonné par le juge Garneau et ordonné la tenue d’un nouveau procès, 2008 QCCQ 11373, [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Pourvois rejetés, la juge Abella est dissidente.

Franco Schiro et Xuan Trung Nguyen, pour l’appelant Antal Babos.

Guylaine Tardif, Jean-Pierre Pilon et Maxime Wilkins, pour l’appelant Sergio Piccirilli.

Gilles Villeneuve et François Lacasse, pour l’intimée.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Cromwell, Moldaver, Karakatsanis et Wagner rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Le présent pourvoi donne à la Cour l’occasion de revoir les règles régissant l’abus de procédure auxquelles sont assujettis les comportements de l’État qui portent atteinte à l’intégrité du système de justice, mais ne nuisent pas à l’équité du procès. Ce sont les comportements qui font partie de ce qu’on appelle parfois la « catégorie résiduelle » de cas où le tribunal peut ordonner l’arrêt des procédures. Plus particulièrement, il nous incombe de préciser la marche à suivre pour décider s’il y a lieu d’ordonner l’arrêt des procédures lorsqu’une telle conduite est dévoilée.

[2] As we shall see, the appellants, Antal Babos and Sergio Piccirilli, complain about three forms of state misconduct:

- (1) Attempts by the original provincial Crown Attorney to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty;
- (2) Collusion on the part of two police officers to mislead the court about the seizure of a firearm from Mr. Babos's car; and
- (3) Improper means used by a federal Crown Attorney in obtaining Mr. Piccirilli's medical records from the detention centre where he was being detained pending trial.

[3] Notably, the appellants do not argue that they cannot receive a fair trial as a result of the alleged incidents of misconduct — they accept that they can. They submit instead that this is one of the clearest of cases in which a stay of proceedings is necessary to preserve and protect the integrity of the justice system. Anything short of that would amount to judicial condonation of egregious misconduct and erode the public's confidence in the administration of justice.

[4] And that, the appellants say, is the basis upon which the trial judge ordered a stay of proceedings in their case. In doing so, he made no error. His decision was discretionary and entitled to deference, and the Quebec Court of Appeal should not have interfered. Hence, the appellants seek to have the order of the trial judge reinstated.

[5] For the reasons that follow, I would not give effect to the appellants' submissions. In my respectful view, the trial judge committed errors in

[2] Comme nous le verrons, les appelants, Antal Babos et Sergio Piccirilli, se plaignent de trois actes répréhensibles commis par des représentants de l'État :

- (1) La première substitut du procureur général provincial a essayé plusieurs fois de les intimider pour qu'ils renoncent à leur droit à un procès, en les menaçant de porter d'autres accusations contre eux s'ils décidaient de nier leur culpabilité;
- (2) Deux agents de police se sont concertés pour induire le tribunal en erreur au sujet de la saisie d'une arme à feu qu'ils ont trouvée à l'intérieur de la voiture de M. Babos;
- (3) Une procureure fédérale, agissant à titre de substitut du procureur général, a utilisé des moyens irréguliers pour obtenir le dossier médical de M. Piccirilli auprès du centre de détention où il était incarcéré en attendant son procès.

[3] Soulignons que les appelants ne plaident pas l'impossibilité de subir un procès équitable en raison des présumés incidents d'inconduite : ils admettent pouvoir compter sur un procès équitable. Ils soutiennent plutôt que la présente affaire est l'un des cas les plus manifestes où l'arrêt des procédures s'impose pour préserver et protéger l'intégrité du système de justice. Si le tribunal optait pour une solution moins draconienne, cela reviendrait selon eux à absoudre judiciairement une conduite inacceptable et minerait la confiance du public envers l'administration de la justice.

[4] Selon les appelants, c'est la raison pour laquelle le juge du procès a ordonné l'arrêt des procédures à leur endroit et, ce faisant, n'a commis aucune erreur. En outre, puisque sa décision a été, à leur avis, le fruit de l'exercice de son pouvoir discrétionnaire, elle commande la déférence et la Cour d'appel n'aurait pas dû la modifier. Ainsi, les appelants demandent-ils le rétablissement de l'ordonnance du juge de première instance.

[5] Pour les motifs qui suivent, je suis d'avis de ne pas faire droit aux arguments des appelants. Selon moi et avec respect, le juge du procès a commis des

assessing all three forms of state misconduct. As regards Mr. Piccirilli's medical records, he made a palpable and overriding error in assessing the Crown's conduct. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider that excluding the firearm found in Mr. Babos's trunk would have overcome whatever threat it posed to the integrity of the justice system. As for the threats by the provincial Crown, while they were reprehensible and should not be repeated, the trial judge overstated their seriousness and failed to balance the need for a stay against society's interest in a trial on the merits.

[6] When the impugned misconduct is properly considered and the correct legal framework is applied, a stay is unwarranted. Accordingly, I would dismiss the appeals.

II. Background Facts

[7] On February 17, 2006, Mr. Babos was pulled over by Constables Guy Brière and Marc Sénéchal. The officers believed that Mr. Babos was transporting guns. Upon searching the trunk of his car, they found a semi-automatic firearm. Mr. Babos was arrested.

[8] On June 21, 2006, Mr. Piccirilli was arrested. Both he and Mr. Babos were ultimately charged with numerous firearms related offences, as well as offences related to the importation, production and trafficking of methamphetamine.

[9] The instances of threatening conduct by Crown counsel are said to have occurred between June 2006 and February 2007. Specifically, the provincial prosecutor assigned to the case, Ms. Valérie Tremblay, was accused of threatening Mr. Piccirilli on three separate occasions with additional charges if he did not plead guilty.

[10] According to Mr. Patrice Duliot, Mr. Piccirilli's former lawyer, Ms. Tremblay told him, in the

erreurs dans l'appréciation des trois actes répréhensibles posés par des représentants de l'État. Quant au dossier médical de M. Piccirilli, le juge du procès a commis une erreur manifeste et dominante dans l'appréciation de la conduite de l'État. Pour ce qui est de la collusion policière, abstraction faite de sa portée limitée, le juge du procès n'a pas tenu compte du fait que l'exclusion de l'arme à feu retrouvée dans le coffre de la voiture de M. Babos aurait contré toute menace que la collusion policière représentait pour l'intégrité du système de justice. En ce qui concerne les menaces proférées par la substitut du procureur général provincial, bien qu'elles aient été répréhensibles et ne doivent pas se reproduire, le juge du procès a surestimé leur gravité et n'a pas mis en balance la nécessité de l'arrêt des procédures, d'une part, et l'intérêt de la société à ce qu'un procès soit jugé sur le fond, d'autre part.

[6] Lorsqu'on tient dûment compte de l'inconduite reprochée et qu'on applique le bon cadre juridique, l'arrêt des procédures est injustifié. Je suis donc d'avis de rejeter les pourvois.

II. Contexte factuel

[7] Le 17 février 2006, croyant que M. Babos transportait des armes à feu, les policiers Guy Brière et Marc Sénéchal ont intercepté son véhicule. En fouillant le coffre de ce dernier, ils ont trouvé une arme semi-automatique. M. Babos a été arrêté.

[8] Le 21 juin 2006, M. Piccirilli a été arrêté. Par la suite, M. Babos et lui ont été accusés de nombreuses infractions liées aux armes à feu et d'autres relatives à l'importation, à la production et au trafic de méthamphétamine.

[9] La substitut du procureur général aurait proféré ses menaces entre juin 2006 et février 2007. Plus précisément, la poursuivante provinciale affectée au dossier, M^e Valérie Tremblay, a été accusée d'avoir menacé M. Piccirilli, à trois occasions distinctes, de porter d'autres accusations contre lui s'il n'avouait pas sa culpabilité.

[10] Selon M^e Patrice Duliot, l'ancien avocat de M. Piccirilli, M^e Tremblay lui a dit, en présence de

presence of Mr. Piccirilli, that [TRANSLATION] “if your client doesn’t settle, he’s gonna be hit by a train” (A.R., vol. V, at p. 5). Mr. Piccirilli claimed that on another occasion, either in June or September 2006, Ms. Tremblay threatened him personally in the courtroom. According to Mr. Piccirilli, she said “if you proceed, we’ll bring other charges against you” and that she would “use section 577” and go “straight to trial” (pp. 65 and 69).¹ Another of Mr. Piccirilli’s counsel, Ms. Guylaine Tardif, deposed in an affidavit that in November 2006 or February 2007, Ms. Tremblay told her that Mr. Piccirilli would be charged with money laundering and organized crime offences if he did not plead guilty. Ms. Tremblay asked Ms. Tardif to relay this message to her client. Although Mr. Babos was not threatened directly, no issue is taken with the fact that the threats conveyed to Mr. Piccirilli would have come to his attention.

[11] The appellants’ trial began in April 2008. Notably, by February 2008, Ms. Tremblay was no longer on the file. She had been removed for health reasons and replaced by a federal prosecutor, Ms. Kovacevich, when the charges against the appellants were joined in a single indictment. It was at this juncture that the appellants were charged with four additional offences relating to organized crime, firearms and drug trafficking. The additional charges stemmed from evidence led at the appellants’ preliminary hearings. By this point, neither the appellants nor their counsel had mentioned the alleged threats made by Ms. Tremblay. Indeed, the threats did not surface until they were brought to the attention of the trial judge some six months into the trial and at least eighteen months after they were made.

[12] At the outset of the trial, Mr. Babos alleged that the police had illegally searched the trunk of his car and he sought to have the firearm they seized excluded from evidence under s. 24(2) of the

son client, que, « si ton client [ne] règle pas, le train va le frapper » (d.a., vol. V, p. 5). M. Piccirilli a soutenu qu’à une autre occasion, en juin ou septembre 2006, M^e Tremblay l’avait menacé en personne dans la salle d’audience en lui tenant les propos suivants : « si tu procèdes, on va te mettre d’autres charges », « mettre [l’]article 577 » et aller « *straight to trial* » [« directement à procès »] (p. 65 et 69)¹. Une autre avocate de M. Piccirilli, M^e Guylaine Tardif, a mentionné dans un affidavit que, en novembre 2006 ou février 2007, M^e Tremblay lui a dit que M. Piccirilli serait accusé de blanchiment d’argent et d’infractions d’organisation criminelle s’il ne reconnaissait pas sa culpabilité. M^e Tremblay a demandé à M^e Tardif de transmettre ce message à son client. Même si les menaces n’étaient pas adressées directement à M. Babos, personne ne conteste le fait qu’il aurait eu vent des menaces transmises à M. Piccirilli.

[11] Le procès des appelants s’est ouvert en avril 2008. Soulignons que M^e Tremblay n’occupait plus dans le dossier depuis février 2008. On l’en avait retirée pour des raisons de santé et elle avait été remplacée par M^e Kovacevich, une procureure fédérale agissant à titre de substitut du procureur général, quand les accusations pesant contre les appelants ont été regroupées dans un seul acte d’accusation. C’est à ce stade que les appelants ont été inculpés de quatre autres infractions liées au crime organisé, aux armes à feu et au trafic de drogue. Les accusations supplémentaires ont découlé de la preuve produite durant les enquêtes préliminaires visant les appelants. Ni ces derniers, ni leurs avocats n’avaient alors mentionné les menaces reprochées à M^e Tremblay. De fait, ces menaces n’ont pas émergé avant d’être portées à l’attention du juge du procès quelque six mois après l’ouverture du procès et au moins dix-huit mois après qu’elles eurent été proférées.

[12] Au début du procès, M. Babos a reproché aux policiers d’avoir fouillé illégalement le coffre de sa voiture et il a cherché à faire exclure, en application du par. 24(2) de la *Charte canadienne des droits*

¹ “577” is a reference to s. 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, which empowers a Crown to prefer a “direct indictment”, bypassing an accused’s right to a preliminary inquiry.

¹ Le numéro « 577 » désigne l’art. 577 du *Code criminel*, L.R.C. 1985, ch. C-46, qui confère au substitut du procureur général le pouvoir de présenter un « acte d’accusation », contournant ainsi le droit de l’accusé à une enquête préliminaire.

Canadian Charter of Rights and Freedoms. On the s. 24(2) application, a key factual issue was whether Mr. Babos consented to the search and opened the trunk himself. Constables Brière and Sénéchal testified at the hearing. Cst. Brière testified that it was Mr. Babos who opened the trunk of the car. This testimony differed from the version of events he had given at the preliminary inquiry.² When defence counsel confronted Cst. Brière with the change, Cst. Brière explained that he had spoken to Cst. Sénéchal while they were waiting to testify, and that Cst. Sénéchal had [TRANSLATION] “convinced” him that the new version of events was the truth.

[13] The trial judge concluded that the trunk had been illegally searched and that Mr. Babos’s rights under s. 8 of the *Charter* had been violated. He also found that the officers had colluded for the purpose of misleading the court. The firearm found in the trunk was excluded.

[14] In June 2008, during the continuation of the trial, the Crown attempted to adduce the same firearm against Mr. Piccirilli. Mr. Piccirilli objected. The Crown took the position that Mr. Piccirilli had no standing to allege a violation of his s. 8 rights because the car from which the firearm was seized belonged to Mr. Babos. Again Cst. Brière testified, and again his evidence was somewhat different than before.³ The trial judge ruled in favour of the Crown on the issue of standing, but did so provisionally; he reserved to Mr. Piccirilli the right to present another motion [TRANSLATION] “in due course if necessary” (A.R., vol. III, at p. 124).⁴

2 At the preliminary inquiry, Cst. Brière testified that he had opened the trunk of the car.

3 Cst. Brière testified that Mr. Babos opened the trunk most of the way, and that he opened the trunk [TRANSLATION] “a little bit” (A.R., vol. III, at p. 217).

4 As matters turned out, the trial judge never did make a final ruling on the admissibility of the firearm against Mr. Piccirilli. Instead, he ended up staying the proceedings against Mr. Piccirilli and in doing so, he took into account the Crown’s attempt to introduce the firearm against him despite his earlier finding of collusion on the part of the officers.

et libertés, l’arme à feu qu’ils avaient saisie. Cette demande fondée sur le par. 24(2) soulève une question de fait clé : M. Babos a-t-il consenti à la fouille et ouvert lui-même le coffre? Les policiers Brière et Sénéchal ont témoigné à l’audience. Selon l’agent Brière, c’est M. Babos qui a ouvert le coffre de la voiture. Or, ce témoignage était différent de la version des faits qu’il avait donnée à l’enquête préliminaire². Lorsque l’avocat de la défense lui a signalé ce changement de version, l’agent Brière a expliqué que lui et l’agent Sénéchal s’étaient parlé avant de témoigner et que ce dernier l’avait « convaincu » que la nouvelle version des faits était exacte.

[13] Le juge du procès a conclu que les policiers avaient fouillé illégalement le coffre et violé les droits garantis à M. Babos par l’art. 8 de la *Charte*. Il a aussi conclu que les policiers s’étaient concertés dans le but d’induire le tribunal en erreur. Il a écarté l’arme à feu découverte dans le coffre.

[14] En juin 2008, toujours au cours du procès, le ministère public a tenté de présenter en preuve la même arme à feu contre M. Piccirilli, qui s’y est opposé. Le ministère public a soutenu que M. Piccirilli n’avait pas qualité pour alléguer une violation des droits que lui garantit l’art. 8, puisque la voiture où se trouvait l’arme à feu saisie appartenait à M. Babos. L’agent Brière a témoigné de nouveau et, là encore, sa déposition différait quelque peu des précédentes³. Le juge du procès a tranché en faveur du ministère public sur la question de la qualité pour agir, mais de façon provisoire; il a accordé à M. Piccirilli le droit de présenter une autre requête « en temps et lieu si nécessaire » (d.a., vol. III, p. 124)⁴.

2 À l’enquête préliminaire, l’agent Brière a dit avoir ouvert le coffre de la voiture.

3 L’agent Brière a affirmé que M. Babos avait ouvert le coffre en majeure partie et que lui-même l’avait ouvert « un petit peu » (d.a., vol. III, p. 217).

4 En fin de compte, le juge du procès n’a jamais statué de façon définitive sur l’admissibilité en preuve de l’arme à feu à l’égard de M. Piccirilli. Il a plutôt fini par arrêter les procédures engagées contre lui et, ce faisant, il a pris en considération la tentative du ministère public de présenter l’arme à feu en preuve contre M. Piccirilli même s’il avait conclu plus tôt à la collusion des policiers.

[15] On October 3, 2008, with the trial still ongoing, Mr. Babos brought an application to stay the charges for unreasonable delay under s. 11(b) of the *Charter*. That same week, on October 7, 2008, Mr. Piccirilli had a heart attack and the trial was adjourned. Mr. Piccirilli applied for bail, alleging that the detention centre in which he was being held was unable to adequately care for his health. As part of his application, Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

[16] Ms. Kovacevich contacted the detention centre directly and spoke to Mr. Piccirilli's doctor. Ms. Kovacevich asked him to provide an affidavit explaining whether medical staff at the detention centre had followed up on Mr. Piccirilli's health since his heart attack and whether Mr. Piccirilli had been receiving his medication since his hospitalization. On October 23, 2008, Mr. Piccirilli's doctor provided the Crown with medical documents pertaining to Mr. Piccirilli. Ms. Kovacevich immediately disclosed these documents to Mr. Piccirilli's counsel, but she initially refused to divulge their source. A few days later, in an affidavit dated October 30, 2008, she explained that the medical records had been sent from the detention centre by Mr. Piccirilli's doctor.

[17] When Mr. Babos's s. 11(b) application resumed in late October, Mr. Babos's former counsel (Mr. Duliot) testified. It was in the course of his testimony that Ms. Tremblay's threatening conduct came to light for the first time. After hearing evidence regarding Ms. Tremblay's conduct, the trial judge asked Ms. Kovacevich if she wanted to call any witnesses or have Ms. Tremblay prepare an affidavit. Ms. Kovacevich declined. She explained that the only response she could make was that the state of Ms. Tremblay's health did not allow her to testify, that the alleged threats were not admitted, and that no postponement was requested to have her testify.

[18] Both appellants brought an application to stay the proceedings for abuse of process shortly

[15] Le 3 octobre 2008, pendant que le procès était toujours en cours, M. Babos a présenté une demande d'arrêt des procédures pour délai déraisonnable en vertu de l'al. 11b) de la *Charte*. Plus tard cette semaine-là, soit le 7 octobre 2008, M. Piccirilli a subi une crise cardiaque et le procès a été ajourné. M. Piccirilli a demandé sa mise en liberté sous caution, soutenant que le centre de détention où il était incarcéré ne pouvait pas lui fournir des soins médicaux adéquats. Dans le cadre de sa demande, il s'est engagé à fournir au tribunal son dossier médical et la liste de ses médicaments.

[16] M^e Kovacevich a communiqué directement avec le centre de détention et s'est entretenu avec le médecin de M. Piccirilli. Elle lui a demandé de fournir un affidavit indiquant si le personnel médical du centre de détention avait surveillé l'état de santé de M. Piccirilli depuis sa crise cardiaque et si M. Piccirilli avait reçu ses médicaments depuis son hospitalisation. Le 23 octobre 2008, le médecin de M. Piccirilli a remis au ministère public des documents médicaux concernant son patient. M^e Kovacevich a communiqué sans tarder ces documents à l'avocat de M. Piccirilli, mais elle a refusé au départ de révéler leur provenance. Quelques jours plus tard, dans un affidavit daté du 30 octobre 2008, elle a précisé que le dossier médical avait été envoyé par le médecin de M. Piccirilli à partir du centre de détention.

[17] Lorsque l'audition de la demande présentée par M. Babos en vertu de l'al. 11b) a repris à la fin octobre, l'ancien avocat de M. Babos (M^e Duliot) a témoigné. C'est durant son témoignage que le comportement menaçant de M^e Tremblay a été dévoilé pour la première fois. Après avoir entendu des témoignages au sujet de ce comportement, le juge du procès a demandé à M^e Kovacevich si elle désirait citer des témoins ou faire préparer un affidavit par M^e Tremblay. M^e Kovacevich a décliné cette offre, expliquant être seulement en mesure de répondre que l'état de santé de M^e Tremblay l'empêchait de témoigner, que la véracité des menaces alléguées n'était pas admise, et qu'aucune remise n'était sollicitée pour la faire témoigner.

[18] Peu après, les appelants ont tous deux présenté une demande d'arrêt des procédures pour

thereafter. On November 14, 2008, the trial judge granted the application and the charges against the appellants were stayed.

III. Judgments Below

A. *The Quebec Court, 2008 QCCQ 11373 (CanLII)*

[19] Garneau J. stayed the proceedings against both appellants. He based his decision to do so on three instances of state misconduct: (1) Ms. Tremblay's threats to the appellants that they would face additional charges if they did not plead guilty; (2) collusion on the part of Constables Brière and Sénéchal to mislead the court; and (3) Ms. Kovacevich's improper conduct in securing Mr. Piccirilli's medical records from the detention centre without first obtaining his consent.

[20] Commencing with Ms. Tremblay's threatening conduct, the trial judge described the threats as [TRANSLATION] "unacceptable, intolerable, unjustifiable, illegal and, above all, undemocratic" (para. 59). The trial judge was also critical of the Crown attorney's office for failing to take any steps to address Ms. Tremblay's conduct, noting that "nothing, absolutely nothing had been done by the representative of the Attorney General to remedy or even try to remedy the situation" (para. 66). Instead, the Crown had "remained entrenched in its position" (para. 66). The trial judge found that the threats had tarnished the reputation of the judicial system and impacted the fairness of the accused's trial. Allowing the trial to continue in the face of these threats would be "shocking and outrageous" (para. 78). According to the trial judge, Ms. Tremblay's misconduct was sufficient in and of itself to warrant a stay of proceedings.

[21] With respect to collusion, the trial judge made a finding that Constables Brière and Sénéchal colluded in order to mislead the court. This finding was based on Cst. Brière's admission that he had spoken to Cst. Sénéchal before testifying, and

abus de procédure. Le 14 novembre 2008, le juge du procès a fait droit à la demande et ordonné l'arrêt des procédures intentées contre les appelants.

III. Les décisions des juridictions inférieures

A. *La Cour du Québec, 2008 QCCQ 11373 (CanLII)*

[19] Le juge Garneau a ordonné l'arrêt des procédures intentées contre les deux appelants en se fondant sur trois actes répréhensibles commis par des représentants de l'État : (1) les menaces adressées par M^e Tremblay aux appelants selon lesquelles ils répondraient à d'autres accusations s'ils n'avaient pas leur culpabilité; (2) la collusion entre les policiers Brière et Sénéchal en vue d'induire le tribunal en erreur; (3) le comportement inapproprié dont a fait preuve M^e Kovacevich en se faisant remettre par le centre de détention le dossier médical de M. Piccirilli, et ce, sans avoir d'abord obtenu le consentement de ce dernier.

[20] Tout d'abord, en ce qui concerne le comportement menaçant de M^e Tremblay, le juge du procès a dit que ses menaces étaient « inacceptables, intolérables, injustifiables, illégales et surtout antidémocratiques » (par. 59). Il a aussi reproché au bureau du substitut du procureur général de n'avoir pris aucune mesure pour réagir à la conduite de M^e Tremblay, faisant remarquer que « rien, absolument rien n'a[vait] été fait par le Procureur général pour remédier ou même tenter de remédier à la situation » (par. 66). Au contraire, le ministère public « s'est cambré dans ses positions » (par. 66). Le juge du procès a conclu que les menaces avaient terni la réputation du système judiciaire et porté atteinte à l'équité du procès des accusés. Selon lui, il aurait été « choquant et outrageant » (par. 78) de laisser le procès suivre son cours malgré ces menaces. Enfin, il a estimé que la conduite répréhensible de M^e Tremblay était suffisamment grave en soi pour justifier l'arrêt des procédures.

[21] Pour ce qui est de la collusion, le juge du procès a conclu que les policiers Brière et Sénéchal s'étaient concertés pour induire le tribunal en erreur. Cette conclusion reposait sur l'aveu de l'agent Brière suivant lequel il avait parlé à l'agent

that Cst. Sénéchal had [TRANSLATION] “convinced” him that Mr. Babos had opened the trunk of the car (para. 12). The trial judge also found that the Crown’s later attempt to lead the firearm seized from the trunk against Mr. Piccirilli perpetuated the officers’ collusion.

[22] Finally, regarding Mr. Piccirilli’s medical records, the trial judge concluded that the Crown should have taken the [TRANSLATION] “necessary precautions” to ensure that the confidentiality of Mr. Piccirilli’s records was respected (para. 53). The trial judge also found that there had been a “lack of transparency” because the Crown had “always refused” to disclose the source of the information once she had obtained it (para. 56).

[23] In the face of these three instances of misconduct, but particularly Ms. Tremblay’s threats, the trial judge stayed the proceedings against both appellants.

B. *The Quebec Court of Appeal, 2012 QCCA 471 (CanLII)*

[24] Doyon J.A., writing for a unanimous court, set aside the stay of proceedings and ordered a new trial. A stay of proceedings was only to be granted in [TRANSLATION] “extreme cases” where no other remedy was possible (para. 56). This was not such a case.

[25] Acknowledging that Ms. Tremblay’s threats were [TRANSLATION] “unacceptable” and “outrageous”, Doyon J.A. noted that the impact of the threats was lessened by the fact that they were made over a year before the trial began and that Ms. Tremblay had long since been replaced as the prosecutor in charge of the case (paras. 59 and 73).

[26] As for the trial judge’s finding that Constables Brière and Sénéchal colluded to mislead the court, Doyon J.A. considered this finding to be a palpable and overriding error. Cst. Brière explained why his testimony had changed. The trial judge’s

Sénéchal avant de témoigner et que ce dernier l’avait « convaincu » que M. Babos avait ouvert le hayon de la voiture (par. 12). Toujours selon le juge du procès, le ministère public a perpétué la collusion entre les agents en tentant par la suite de produire en preuve contre M. Piccirilli l’arme à feu saisie à l’intérieur du coffre.

[22] Enfin, s’agissant du dossier médical de M. Piccirilli, le juge du procès a conclu que le ministère public aurait dû prendre les « précautions nécessaires » pour en assurer la confidentialité (par. 53). Le juge du procès a aussi conclu à un « manque de transparence », vu que la substitut du procureur général avait « toujours refusé » de révéler la provenance des renseignements après les avoir obtenus (par. 56).

[23] Au vu des trois actes répréhensibles décrits précédemment, mais en particulier des menaces de M^e Tremblay, le juge du procès a ordonné l’arrêt des procédures intentées contre les deux appelants.

B. *La Cour d’appel du Québec, 2012 QCCA 471 (CanLII)*

[24] Au nom des juges unanimes de la Cour d’appel, le juge Doyon a annulé l’arrêt des procédures et ordonné la tenue d’un nouveau procès. L’arrêt des procédures est réservé « aux cas extrêmes », quand aucune autre réparation n’est possible (par. 56). Tel n’était pas le cas en l’espèce.

[25] Le juge Doyon a certes reconnu que les menaces de M^e Tremblay étaient « inacceptable[s] » et « outrageante[s] », mais il a signalé qu’elles avaient eu une incidence moindre du fait qu’elles avaient été proférées plus d’un an avant l’ouverture du procès et que M^e Tremblay avait été remplacée depuis longtemps comme poursuivante responsable du dossier (par. 59 et 73).

[26] Quant à la conclusion du juge du procès selon laquelle les policiers Brière et Sénéchal s’étaient concertés pour induire le tribunal en erreur, le juge Doyon l’a considérée comme une erreur manifeste et dominante. L’agent Brière a expliqué pourquoi il avait

determination that the officers' conduct amounted to collusion lacked an evidentiary foundation.

[27] With respect to Ms. Kovacevich's conduct in securing Mr. Piccirilli's medical records, Doyon J.A. concluded that there was no misconduct and that the trial judge committed another palpable and overriding error in finding otherwise. Mr. Piccirilli put his medical condition in issue and at least implicitly waived his right to invoke confidentiality in the information. The Crown was free to seek evidence to contradict Mr. Piccirilli's assertions for purposes of resisting his application for interim release.

[28] Having reassessed the facts, Doyon J.A. observed that Ms. Tremblay's threats remained the sole cause of concern. In assessing whether those threats warranted a stay, he noted that they were uttered months before trial, by a Crown who was replaced before trial, and about whom the appellants did not complain until after their trial had been in progress for at least six months. In his view, this did not amount to an extreme case that required a stay of proceedings.

IV. Issues

[29] The narrow issue on appeal is whether the trial judge erred in granting a stay of proceedings. More broadly, we are tasked with clarifying the proper analysis to be undertaken when a stay of proceedings is sought for prior state conduct that is said to impinge on the integrity of the justice system.

V. Analysis

A. *Abuse of Process and Stays of Proceedings*

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It

livré des témoignages différents. La décision du juge du procès que la conduite des agents était assimilable à de la collusion n'était fondée sur aucune preuve.

[27] Pour ce qui est de l'obtention, par M^e Kovacevich, du dossier médical de M. Piccirilli, le juge Doyon a conclu qu'il ne s'agissait pas d'un acte répréhensible et que le juge du procès avait commis une autre erreur manifeste et dominante en concluant le contraire. M. Piccirilli a mis en cause ses problèmes de santé et a renoncé, à tout le moins implicitement, à son droit d'invoquer le caractère confidentiel des renseignements. Ainsi, il était loisible au ministère public de tenter d'obtenir des éléments de preuve pour contredire les affirmations de M. Piccirilli dans le but de s'opposer à sa demande de libération provisoire.

[28] Après avoir réexaminé les faits, le juge Doyon a fait observer que seules les menaces de M^e Tremblay posaient encore problème. Au moment de déterminer si ces menaces justifiaient l'arrêt des procédures, il a souligné qu'elles avaient été proférées des mois avant le procès par une substitut du procureur général remplacée avant le procès et que les appelants ne s'en sont pas plaints avant au moins six mois après l'ouverture du procès. À son avis, il ne s'agissait pas d'un cas extrême où l'arrêt des procédures s'impose.

IV. Questions en litige

[29] La question précise qui se pose en l'espèce est celle de savoir si le juge du procès a eu tort d'ordonner l'arrêt des procédures. D'un point de vue plus général, nous sommes appelés à clarifier l'analyse qu'il convient de faire lorsqu'on demande l'arrêt des procédures en raison d'actes antérieurs de l'État qui porteraient atteinte à l'intégrité du système de justice.

V. Analyse

A. *Abus de procédure et arrêt des procédures*

[30] L'arrêt des procédures est la réparation la plus draconienne qu'une cour criminelle puisse accorder (*R. c. Regan*, 2002 CSC 12, [2002]

permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions — the “clearest of cases” — when a stay of proceedings for an abuse of process will be warranted (*R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused’s trial (the “main” category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O’Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused’s right to a fair trial or the integrity of the justice system that “will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome” (*Regan*, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against “the interest that society has in having a final decision on the merits” (*ibid.*, at para. 57).

1 R.C.S. 297, par. 53). Il met un terme de façon définitive à la poursuite de l’accusé, ce qui a pour effet d’entraver la fonction de recherche de la vérité du procès et de priver le public de la possibilité de voir justice faite sur le fond. En outre, dans bien des cas, l’arrêt des procédures empêche les victimes alléguées d’actes criminels de se faire entendre.

[31] La Cour a néanmoins reconnu qu’il existe de rares cas — les « cas les plus manifestes » — dans lesquels un abus de procédure justifie l’arrêt des procédures (*R. c. O’Connor*, [1995] 4 R.C.S. 411, par. 68). Ces cas entrent généralement dans deux catégories : (1) ceux où la conduite de l’État compromet l’équité du procès de l’accusé (la catégorie « principale »); (2) ceux où la conduite de l’État ne présente aucune menace pour l’équité du procès, mais risque de miner l’intégrité du processus judiciaire (la catégorie « résiduelle ») (*O’Connor*, par. 73). La conduite attaquée en l’espèce ne met pas en cause la catégorie principale. Elle fait plutôt nettement partie de la deuxième catégorie.

[32] Le test servant à déterminer si l’arrêt des procédures se justifie est le même pour les deux catégories et comporte trois exigences :

- (1) Il doit y avoir une atteinte au droit de l’accusé à un procès équitable ou à l’intégrité du système de justice qui « sera révélé[e], perpétué[e] ou aggravé[e] par le déroulement du procès ou par son issue » (*Regan*, par. 54);
- (2) Il ne doit y avoir aucune autre réparation susceptible de corriger l’atteinte;
- (3) S’il subsiste une incertitude quant à l’opportunité de l’arrêt des procédures à l’issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, comme le fait de dénoncer la conduite répréhensible et de préserver l’intégrité du système de justice, d’une part, et « l’intérêt que représente pour la société un jugement définitif statuant sur le fond », d’autre part (*ibid.*, par. 57).

[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids “schizophrenia” in the law (*O’Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused’s right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[36] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society’s sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not

[33] Le test est le même pour les deux catégories parce que les problèmes touchant l’équité du procès et ceux touchant l’intégrité du système de justice sont souvent liés et se posent couramment dans la même affaire. Le recours à un seul test pour les deux catégories crée un cadre cohérent qui permet d’éviter une « dichotomie » inutile dans le droit (*O’Connor*, par. 71). Cela dit, bien que le cadre d’analyse soit le même pour les deux catégories, le test pourra s’appliquer — et s’appliquera souvent — différemment, selon qu’on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[34] Passons d’abord à la première étape du test. Lorsqu’on invoque la catégorie principale, la question est celle de savoir s’il y a eu atteinte au droit de l’accusé à un procès équitable et si cette atteinte sera perpétuée par le déroulement du procès; autrement dit, il faut chercher à savoir s’il y a une injustice *persistante* envers l’accusé.

[35] Par contre, lorsque la catégorie résiduelle est invoquée, il s’agit de savoir si l’État a adopté une conduite choquant le sens du franc-jeu et de la décence de la société et si la tenue d’un procès malgré cette conduite serait préjudiciable à l’intégrité du système de justice. Pour dire les choses plus simplement, il y a des limites au genre de conduite que la société tolère dans la poursuite des infractions. Parfois, la conduite de l’État est si troublante que la tenue d’un procès — même un procès équitable — donnera l’impression que le système de justice cautionne une conduite heurtant le sens du franc-jeu et de la décence qu’a la société, et cela porte préjudice à l’intégrité du système de justice. Dans ce genre d’affaires, la première étape du test est franchie.

[36] La Cour décrit la catégorie résiduelle en ces termes dans *Canada (Ministre de la Citoyenneté et de l’Immigration) c. Tobiass*, [1997] 3 R.C.S. 391 :

Pour que la suspension des procédures soit appropriée dans un cas visé par la catégorie résiduelle, il doit ressortir que la conduite répréhensible de l’État risque de continuer à l’avenir ou que la poursuite des procédures choquera le sens de la justice de la société. Ordinairement, la dernière condition ne sera pas remplie

take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

[38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such

à moins que la première ne le soit aussi — la société ne s'offusquera pas de la poursuite des procédures à moins qu'une forme de conduite répréhensible soit susceptible de persister. Il peut y avoir des cas exceptionnels où la conduite reprochée est si grave que le simple fait de poursuivre le procès serait choquant. Mais de tels cas devraient être relativement très rares. [par. 91]

[37] Deux points d'intérêt se dégagent de cette description. Premièrement, bien qu'il soit généralement vrai que l'on invoque la catégorie résiduelle à la suite d'une *conduite répréhensible* de l'État, il n'en est pas toujours ainsi. Il peut y avoir des situations où l'intégrité du système de justice est en jeu en l'absence d'une conduite répréhensible. Poursuivre plusieurs fois un accusé pour la même infraction après que des jurys successifs ne soient pas parvenus à rendre un verdict en est un exemple (voir, p. ex., *R. c. Keyowski*, [1988] 1 R.C.S. 657), tout comme le fait d'avoir recours aux tribunaux criminels pour percevoir une dette civile (voir, p. ex., *R. c. Waugh* (1985), 68 N.S.R. (2d) 247 (C.S., Div. app.)).

[38] Deuxièmement, dans un cas relevant de la catégorie résiduelle, peu importe le type de conduite dont on se plaint, la question à laquelle il faut répondre à la première étape du test demeure la même : la tenue d'un procès en dépit de la conduite reprochée causerait-elle un préjudice supplémentaire à l'intégrité du système de justice? Je ne mets pas en question la distinction entre la conduite répréhensible persistante et la conduite répréhensible antérieure, mais cette distinction ne résout pas totalement la question de savoir si la tenue d'un procès cause un préjudice supplémentaire au système de justice. Le tribunal doit tout de même déterminer si la tenue d'un procès reviendrait à absoudre judiciairement la conduite reprochée.

[39] À la deuxième étape du test, il s'agit de déterminer si une autre réparation, moindre que l'arrêt des procédures, permettrait de corriger le préjudice. Différentes réparations peuvent être accordées, selon que le préjudice touche le droit de l'accusé à un procès équitable (la catégorie principale) ou l'intégrité du système de justice (la catégorie résiduelle). Quand c'est l'équité du procès qui est en cause, l'objectif est de rétablir le droit de l'accusé

as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these “clearest of cases”, the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is

à un procès équitable. En l’espèce, les réparations procédurales, comme la tenue d’un nouveau procès, ont plus de chance de corriger le préjudice causé par une injustice persistante. En revanche, lorsque la catégorie résiduelle est invoquée et que le préjudice dénoncé porte atteinte à l’intégrité du système de justice, les réparations doivent s’attaquer à ce préjudice. Il faut se rappeler que, dans les affaires entrant uniquement dans la catégorie résiduelle, l’objectif *n’est pas* d’accorder réparation à l’accusé pour un tort qui lui a été causé auparavant. L’accent est plutôt mis sur la question de savoir si une autre réparation, moindre que l’arrêt des procédures, permettra au système de justice de se dissocier suffisamment à l’avenir de la conduite reprochée à l’État.

[40] Enfin, la mise en balance des intérêts effectuée à la troisième étape du test revêt une importance accrue lorsque la catégorie résiduelle est invoquée. La Cour a indiqué que la mise en balance n’est nécessaire que s’il subsiste une incertitude quant à l’opportunité de l’arrêt des procédures à l’issue des deux premiers volets du test (*Tobiass*, par. 92). Lorsque la catégorie principale est invoquée, il est souvent clair, au moment où le tribunal atteint l’étape de la mise en balance, qu’il n’y a pas eu atteinte à l’équité du procès ou que, en cas d’atteinte à celle-ci, une autre réparation, moindre que l’arrêt des procédures, permettrait de régler la question. Aucune mise en balance n’est nécessaire dans ces circonstances. Dans de rares cas, la conduite de l’État a manifestement empêché en permanence la tenue d’un procès équitable. Dans ces « cas les plus manifestes », la troisième et dernière étape, la mise en balance, ajoute souvent peu de choses à l’analyse, parce que la société n’a aucun intérêt dans la tenue de procès inéquitables.

[41] Par contre, lorsque c’est la catégorie résiduelle qui est invoquée, l’étape de la mise en balance revêt une importance accrue. Si on allègue une atteinte à l’intégrité du système de justice, le tribunal est appelé à décider quelle des deux solutions suivantes assure le mieux l’intégrité du système de justice : l’arrêt des procédures ou la tenue d’un procès en dépit de la conduite contestée. Cette analyse suppose nécessairement une mise en balance. Le tribunal doit prendre en compte des

isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.⁵ Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[42] This Court's recent decision in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had

appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]

⁵ At this stage, whether the impugned conduct is a systemic and ongoing problem or lies purely in the past may also become relevant. Where the conduct is ongoing and systemic, it may be more difficult for the court to dissociate itself from it with anything less than a stay.

éléments comme la nature et la gravité de la conduite reprochée — que celle-ci soit un cas isolé ou la manifestation d'un problème systémique et persistant —, la situation de l'accusé, les accusations auxquelles il doit répondre et l'intérêt de la société à ce que les accusations soient jugées au fond⁵. De toute évidence, plus la conduite de l'État est grave, plus il est nécessaire que le tribunal s'en dissocie. Lorsque la conduite en question choque la conscience de la communauté ou heurte son sens du franc-jeu et de la décence, il est peu probable que l'intérêt de la société dans la tenue d'un procès complet sur le fond l'emporte au terme de la mise en balance. Or, dans les cas faisant partie de la catégorie résiduelle, il faut toujours tenir compte de l'équilibre.

[42] L'arrêt récent *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, illustre la nécessité d'une mise en balance dans le cas d'une conduite entrant uniquement dans la catégorie résiduelle. Dans cette affaire, l'accusé avait été agressé à l'arrière d'une fourgonnette par un agent de détention alors qu'il était enchaîné et menotté. L'accusé a été inculpé de voies de fait contre l'agent de détention et d'intimidation à l'endroit d'une personne associée au système judiciaire. Rédigeant l'arrêt unanime de la Cour, le juge Fish a confirmé la décision du juge du procès d'ordonner l'arrêt des procédures en raison de la conduite répréhensible d'un représentant de l'État qui entre dans la catégorie résiduelle. Ce faisant, il a signalé que le juge du procès avait

reconn[u] la nécessité de mettre en balance les intérêts en jeu qui s'opposent avant d'ordonner l'arrêt des procédures. Il [a] consid[éré] expressément la difficulté inhérente au travail d'agent de détention, la nécessité que le système de justice assure la protection de ce dernier, la gravité des accusations portées contre l'accusé, l'intégrité du système de justice, ainsi que la nature et la gravité de l'atteinte aux droits de M. Bellusci. Ce n'est qu'à l'issue de cet examen qu'il [a] concl[u] que l'arrêt des procédures [était] justifié. [Je souligne; par. 29.]

⁵ La question de savoir si la conduite reprochée constitue un problème systémique et persistant ou est uniquement chose du passé peut également s'avérer pertinente à ce stade. Si la conduite en question se poursuit et est systémique, il peut être plus difficile pour le tribunal de s'en dissocier en optant pour une solution moins draconienne que l'arrêt des procédures.

[43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(*R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60)

[44] Undoubtedly, the balancing of societal interests that must take place and the “clearest of cases” threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be “exceptional” and “very rare” (*Tobiass*, at para. 91). But this is as it should be. It is only where the “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[45] To recapitulate, while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused’s right to a fair trial — but it would also impinge on the integrity of the justice system.

[43] La Cour d’appel de l’Ontario a également souligné récemment l’importance que revêt l’étape de la mise en balance lorsque la catégorie résiduelle est en jeu :

[TRADUCTION] En un sens, l’accusé qui obtient un arrêt des procédures au titre de la catégorie résiduelle bénéficie d’une aubaine. Il importe donc de se demander si le prix de l’arrêt des procédures contre un accusé en vaut la peine. L’avantage que présente l’arrêt des procédures contre cet accusé l’emporte-t-il sur l’intérêt à ce que l’affaire soit tranchée au fond? Pour répondre à cette question, le tribunal doit presque inévitablement procéder à une mise en balance du type de celle dont il est question au troisième critère. [Je souligne.]

(*R. c. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, par. 60)

[44] La mise en balance nécessaire des intérêts de la société et le critère des « cas les plus manifestes » imposent sans aucun doute un lourd fardeau à l’accusé qui demande l’arrêt des procédures au titre de la catégorie résiduelle. En fait, les cas faisant partie de la catégorie résiduelle qui justifient l’arrêt des procédures sont « exceptionnels » et « très rares » (*Tobiass*, par. 91). Mais les choses sont comme elles doivent être. Ce n’est que lorsque l’« atteinte au franc-jeu et à la décence est disproportionnée à l’intérêt de la société d’assurer que les infractions criminelles soient efficacement poursuivies » que l’arrêt des procédures est justifié (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667).

[45] Bref, bien que le cadre soit le même pour les deux catégories, le test pourra s’appliquer — et s’appliquera souvent — différemment, selon qu’on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[46] La situation hypothétique suivante peut servir d’exemple utile. Prenons le cas où l’on constate, à l’issue du procès, que les policiers ont corrompu le jury pour qu’il déclare l’accusé coupable. Manifestement, la conduite des policiers porterait atteinte au droit de l’accusé à un procès équitable, mais aussi à l’intégrité du système de justice.

[47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the seriousness of the misconduct — jury tampering strikes at the very heart of the criminal justice system — the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

B. Whether a Stay of Proceedings Was Warranted in the Instant Case

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice” (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[49] In the instant case, the appellants acknowledge that trial fairness is not in issue. They accept that the trial judge viewed the misconduct as coming within the residual category. Approaching the matter from that perspective, I am respectfully of the view that the trial judge erred in assessing all three forms of alleged state misconduct.

(1) The Medical Records

[50] In order for the Crown’s conduct in securing Mr. Piccirilli’s medical records to factor into a decision to stay proceedings, it must pass the first

[47] La tenue d’un nouveau procès corrigerait vraisemblablement l’iniquité du premier procès, mais l’analyse ne se terminerait pas là. Le tribunal aurait aussi à décider si la tenue d’un nouveau procès ou une autre réparation serait suffisante pour lui permettre de se dissocier du préjudice causé à l’intégrité du système de justice par la conduite répréhensible des policiers. Si aucune réparation n’est adéquate, le tribunal doit procéder à la mise en balance et décider si l’intégrité du système de justice serait mieux servie par un arrêt des procédures ou par un procès complet sur le fond. Vu la gravité de la conduite répréhensible — la corruption du jury va à l’encontre de l’essence même du système de justice pénale — l’arrêt des procédures pourrait fort bien s’imposer dans la catégorie résiduelle pour neutraliser la menace à l’intégrité du système de justice, bien qu’un deuxième procès aurait permis de remédier à l’iniquité ayant entaché le premier.

B. L’arrêt des procédures était-il justifié en l’espèce?

[48] La norme de contrôle applicable à une réparation accordée en vertu du par. 24(1) de la *Charte* est bien établie. Une cour d’appel n’est justifiée d’intervenir que si le juge du procès s’est fondé sur des considérations erronées en droit, a commis une erreur de fait susceptible de contrôle ou a rendu une décision « erronée au point de créer une injustice » (*Bellusci*, par. 19; *Regan*, par. 117; *Tobiass*, par. 87; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15 et 51).

[49] Dans la présente affaire, les appelants reconnaissent que l’équité du procès n’est pas en cause. Ils conviennent que, selon le juge du procès, la conduite répréhensible entre dans la catégorie résiduelle. En abordant la question sous cet angle, j’estime avec égards que le juge du procès a mal apprécié les trois actes répréhensibles qu’auraient commis les représentants de l’État.

(1) Le dossier médical

[50] Pour que la conduite du ministère public consistant à obtenir le dossier médical de M. Piccirilli joue dans la décision d’arrêter les procédures, elle doit

stage of the test. That is, the appellants must show that Ms. Kovacevich's conduct was prejudicial to the integrity of the justice system. The trial judge appears to have found that this requirement was met when, after considering her conduct, he held that [TRANSLATION] "[t]his conduct will be taken into consideration in reviewing the abuse of process motion" (para. 57).

[51] The trial judge committed a palpable and overriding error in reaching the conclusion that this conduct impinged on the integrity of the justice system. In the first place, he erred in concluding that the Crown's conduct was marked by a lack of transparency because the Crown had [TRANSLATION] "always refused to disclose the source of the information" (para. 56). In fact, the Crown disclosed the source of the information within a matter of days. In addition, the trial judge failed to consider that Mr. Piccirilli had put his health in issue in his application for interim release and had undertaken to provide the court with his medical records. The trial judge also failed to consider that Ms. Kovacevich had asked the medical staff at the jail to provide an affidavit explaining the medical care Mr. Piccirilli had received since his heart attack. It appears that Mr. Piccirilli's doctor took it upon himself to forward the appellant's medical records to the Crown.

[52] In my view, when the Crown's conduct is considered free of the trial judge's errors, it is clear that it occasioned no prejudice to the integrity of the justice system. Mr. Piccirilli had put the state of his health in issue. Ms. Kovacevich sought an affidavit from the jail Mr. Piccirilli was being held in. When she received more than she asked for — Mr. Piccirilli's confidential medical records — she immediately disclosed the information to Mr. Piccirilli's counsel. Within a matter of days, she also disclosed the source of the information.⁶ Accordingly, the appellants' argument fails at the first stage of the test.

⁶ Admittedly, the Crown's initial refusal to disclose the source of the information was bizarre, but this refusal was short-lived.

franchir la première étape du test. Cela veut dire qu'il incombe aux appelants de démontrer que la conduite de M^e Kovacevich a porté préjudice à l'intégrité du système de justice. Le juge du procès semble avoir conclu que cette condition était remplie quand, après avoir examiné la conduite de la substitut du procureur général, il a affirmé que « [c]e comportement sera pris en considération dans l'évaluation de la requête en abus de procédure » (par. 57).

[51] Le juge du procès a commis une erreur manifeste et dominante en arrivant à la conclusion que ce comportement portait atteinte à l'intégrité du système de justice. Tout d'abord, il a conclu à tort que le ministère public avait manqué de transparence parce qu'il avait « toujours refusé de dévoiler la provenance des renseignements obtenus » (par. 56). En fait, le ministère public l'a dévoilée à peine quelques jours plus tard. De plus, le juge du procès n'a pas tenu compte du fait que M. Piccirilli avait mis en cause sa santé dans sa demande de libération provisoire et s'était engagé à fournir son dossier médical au tribunal. Le juge du procès n'a pas tenu compte non plus du fait que M^e Kovacevich avait demandé au personnel médical du centre de détention de remettre un affidavit expliquant les soins administrés à M. Piccirilli depuis sa crise cardiaque. C'est le médecin de M. Piccirilli qui a, semble-t-il, pris l'initiative de transmettre le dossier médical de ce dernier au ministère public.

[52] À mon avis, lorsqu'on examine la conduite du ministère public en faisant abstraction des erreurs du juge du procès, il est évident qu'elle n'a aucunement porté préjudice à l'intégrité du système de justice. M. Piccirilli a mis son état de santé en cause. M^e Kovacevich a demandé un affidavit au personnel du centre de détention où était incarcéré M. Piccirilli. Lorsqu'elle a reçu plus que ce qu'elle avait demandé, en l'occurrence le dossier médical confidentiel de M. Piccirilli, elle a immédiatement communiqué ces renseignements à l'avocat de ce dernier. Elle a aussi dévoilé leur provenance à peine quelques jours plus tard⁶. L'argument des appelants ne franchit donc pas la première étape du test.

⁶ Certes, le refus initial du ministère public de dévoiler la provenance des renseignements était étrange, mais il fut de courte durée.

(2) The Police Collusion

[53] The Court of Appeal disagreed with the trial judge's finding that Constables Brière and Sénéchal colluded to mislead the court. I too have serious reservations with the trial judge's finding. Indeed, had I been the trial judge, I doubt that I would have reached the same conclusion. However, having seen the witnesses, the trial judge was in a better position to assess the matter. Accordingly, his finding is entitled to deference.

[54] That said, at the first stage of the test, the officers' conduct must be looked at in context. Cst. Brière changed his testimony on a central issue: whether he or Mr. Babos opened the trunk of the car. He did so, however, after having testified at the preliminary inquiry. As an officer, he surely knew that this change would be the subject of questioning by defence counsel. Changes in an officer's testimony are routinely exposed in cross-examination. And when Cst. Brière was predictably questioned about why his story had changed, he immediately explained that he had spoken with Cst. Sénéchal and had been [TRANSLATION] "convinced" of the true version of events. There was no attempt by the officers to cover up their discussions or to hide anything from the court. To the extent this amounts to collusion, it does so in the most technical sense. Whatever threat it poses to the integrity of the justice system must surely be slight.

[55] However, given the trial judge's finding, it is necessary to proceed to the second stage of the test and ask whether there is another remedy, short of a stay, capable of redressing the prejudice to the integrity of the judicial system occasioned by the collusion.

[56] Two concerns to the integrity of the justice system arise out of the trial judge's finding of collusion: (1) the impropriety of police collusion

(2) La collusion policière

[53] La Cour d'appel a exprimé son désaccord avec la conclusion du juge du procès selon laquelle les policiers Brière et Sénéchal s'étaient concertés pour induire le tribunal en erreur. J'ai aussi de sérieuses réserves au sujet de sa conclusion. En effet, si j'avais été le juge du procès, je ne crois pas que je serais parvenu à la même conclusion. Cependant, comme il a observé les témoins, le juge du procès était mieux placé pour examiner la question. Sa conclusion commande donc la retenue.

[54] Cela dit, à la première étape du test, il faut examiner la conduite des policiers dans son contexte. L'agent Brière a modifié son témoignage sur une question fondamentale : celle de savoir si c'est lui ou M. Babos qui a ouvert le hayon de la voiture. Il l'a toutefois fait après avoir témoigné à l'enquête préliminaire. À titre de policier, il savait sûrement que l'avocat de la défense l'interrogerait à propos de ce changement de version. En effet, les modifications au témoignage d'un policier sont couramment mises en évidence lors du contre-interrogatoire. Or, lorsque l'agent Brière s'est fait demander, comme on pouvait s'y attendre, pourquoi il avait modifié sa version des faits, il a tout de suite expliqué qu'il avait parlé avec l'agent Sénéchal et que ce dernier l'avait « convaincu » de la version exacte des faits. Les policiers n'ont pas tenté de dissimuler leurs entretiens, ni de cacher quoi que ce soit au tribunal. Dans la mesure où leur comportement est assimilable à de la collusion, il l'est au sens le plus technique du terme. Quelle que soit la menace qu'il représente pour l'intégrité du système de justice, c'est assurément une faible menace.

[55] Par contre, vu la conclusion du juge du procès, il faut passer à la deuxième étape du test et se demander si une autre réparation, moindre que l'arrêt des procédures, permettrait de corriger le préjudice causé à l'intégrité du système de justice par la collusion.

[56] Deux problèmes touchant l'intégrité du système de justice se dégagent de la conclusion de collusion tirée par le juge du procès : (1) le caractère

designed to mislead the court, and (2) the Crown's attempt to introduce the firearm against Mr. Piccirilli in the wake of the trial judge's finding of collusion. Manifestly, both are improper. But there was another remedy before the trial judge that would have addressed both, namely: refusing to admit the firearm against Mr. Piccirilli even though he had no standing under s. 8 of the *Charter* to challenge its admissibility. The trial judge erred in failing to consider that alternative.

[57] Excluding the firearm against Mr. Piccirilli would serve to dissociate the court from the officers' collusion and the Crown's misguided attempt, in the face of that finding, to introduce the firearm against Mr. Piccirilli. Both forms of misconduct were intended to achieve the same end — admission of the firearm into evidence. Excluding the firearm against Mr. Piccirilli — even though it was likely admissible against him — purges the problematic evidence from the trial, thereby dissociating the court from the misconduct in question. By doing so, it cannot be said that the misconduct has a lingering effect on the integrity of the justice system. In my view, this remedy fully addresses any prejudice occasioned to the justice system by the impugned conduct. Hence, there is no need to go further in the analysis.

(3) The Crown's Threatening Conduct

[58] In the end, I view this case as turning on the Crown's threatening conduct.

[59] The distinction between the Crown's conduct in this case and legitimate plea bargaining practices should be made clear at the outset. It is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the accused pleads guilty. It is also proper for a Crown to advise counsel that if evidence arises at

irrégulier de la collusion policière visant à induire le tribunal en erreur et (2) la tentative du ministère public de produire en preuve l'arme à feu contre M. Piccirilli dans la foulée de cette conclusion. Ces deux actes sont manifestement inopportuns. Pourtant, le juge du procès disposait d'une autre mesure de réparation qui lui aurait permis de remédier à ces deux actes : refuser d'admettre en preuve l'arme à feu contre M. Piccirilli même si l'art. 8 de la *Charte* ne conférait pas à ce dernier qualité pour en contester la recevabilité. Le juge du procès a commis une erreur en négligeant d'examiner cette solution de rechange.

[57] L'exclusion de l'arme à feu à l'égard de M. Piccirilli aurait pour effet de dissocier le tribunal de la collusion des policiers et de la tentative malavisée du ministère public de la produire en preuve contre M. Piccirilli en dépit de la conclusion de collusion. Ces deux actes répréhensibles visaient la même fin : faire admettre l'arme à feu en preuve. Le fait de l'exclure à l'endroit de M. Piccirilli — même si elle était vraisemblablement admissible contre lui — aurait écarté du procès cet élément de preuve problématique, et permis au tribunal de se dissocier de l'acte répréhensible en question. Une fois l'arme à feu exclue, on ne pourrait pas affirmer que l'acte répréhensible a encore une incidence sur l'intégrité du système de justice. À mon avis, cette réparation corrigerait entièrement tout préjudice causé au système de justice par la conduite reprochée. Il n'est donc pas nécessaire de poursuivre l'analyse.

(3) Le comportement menaçant du ministère public

[58] En définitive, c'est le comportement menaçant du ministère public qui me semble déterminant en l'espèce.

[59] Il faut dès le départ établir clairement la distinction entre la conduite du ministère public en l'espèce et les méthodes légitimes de négociation d'un plaidoyer. Le substitut du procureur général est parfaitement en droit de dire qu'il retirera certaines accusations fondées sur la preuve si l'accusé avoue sa culpabilité. Il est aussi en droit d'aviser l'avocat

the preliminary inquiry that would support additional charges, they may be added to the indictment under s. 574(1)(b) of the *Criminal Code*.⁷ Where discussions of this sort occur with counsel after substantial disclosure has been provided, the accused and his or her lawyer are able to make an informed decision as to how to proceed and nothing improper has occurred.

[60] The Crown's conduct in this case was of a different nature. The impugned comments were made early on in the proceedings, before the appellants and their counsel had sufficient disclosure to make an informed decision as to how they wished to proceed. Moreover, in at least one instance, the comments occurred in the presence of one of the appellants, Mr. Piccirilli. And the Crown's language was nothing short of threatening. Mr. Piccirilli was told, for example, that if he did not settle, he was going to be [TRANSLATION] "hit by a train". Put simply, the Crown's threats were intended to pressure the appellants into foregoing their right to a trial.

[61] Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. In her capacity as a Crown, Ms. Tremblay's role was that of a quasi-judicial officer. Her function was to be "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party" (*Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25). In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.

⁷ Section 574(1)(b) of the *Criminal Code* allows the Crown to lay additional charges, supported by the evidence that has been adduced at the preliminary inquiry.

de la défense que, si des éléments de preuve présentés à l'enquête préliminaire étayent d'autres accusations, celles-ci seront peut-être ajoutées à l'acte d'accusation en vertu de l'al. 574(1)b) du *Code criminel*⁷. Dans les cas où le procureur du ministère public a des discussions de ce genre avec l'avocat de la défense après la communication d'une partie importante des renseignements, l'accusé et son avocat sont à même de prendre une décision éclairée sur la marche à suivre, et il n'y a aucune irrégularité.

[60] La conduite du ministère public en l'espèce était toutefois d'une autre nature. Les commentaires qui lui sont reprochés ont été formulés au début des procédures, soit avant que les appelants et leurs avocats n'aient reçu suffisamment de renseignements pour être en mesure de décider de façon éclairée de la stratégie qu'ils voulaient adopter. Qui plus est, les commentaires ont été faits au moins une fois en présence d'un des appelants, M. Piccirilli. En outre, les propos de la substitut du procureur général n'étaient rien de moins que menaçants. M. Piccirilli s'est fait dire notamment que, s'il ne réglait pas, le « train [allait] le frapper ». Autrement dit, les menaces de la substitut du procureur général visaient à faire pression sur les appelants pour qu'ils renoncent à leur droit à un procès.

[61] La tactique d'intimidation à laquelle a eu recours M^e Tremblay était indubitablement répréhensible et indigne de sa charge. Elle ne doit être utilisée de nouveau ni par M^e Tremblay, ni par aucun autre substitut du procureur général. À ce titre, M^e Tremblay exerçait une fonction quasi judiciaire. Son travail consistait à [TRADUCTION] « aider le tribunal à rendre justice, et non à agir comme avocat[e] d'une personne ou d'une partie » (*Boucher c. The Queen*, [1955] R.C.S. 16, p. 25). En menaçant M. Piccirilli de l'inculper d'autres infractions s'il n'avouait pas sa culpabilité, M^e Tremblay a trahi sa fonction de substitut du procureur général. C'est manifestement le genre de conduite dont le tribunal doit se dissocier.

⁷ L'alinéa 574(1)b) du *Code criminel* permet au ministère public de porter des accusations additionnelles qui sont étayées par la preuve présentée à l'enquête préliminaire.

[62] However, the threats must be considered in their context. With respect, the trial judge did not do so. Here, there were several factors which the trial judge failed to consider. With respect, he erred in this regard.

[63] The threats were made more than a year before the trial began. The 18-month long silence of the appellants and their counsel sheds some light on how seriously they took the threats. Had they been taken seriously, one might have expected counsel to respond immediately. Surely the proper course of action was not to sit back for over a year before applying, mid-trial, for a stay of proceedings. Instead, counsel should have confronted Ms. Tremblay and, failing an adequate response by her, brought the matter immediately to the attention of a senior Crown or a judge. That way, Ms. Tremblay could have been removed from the file during the early stages of the proceedings. Be that as it may, as it turned out, she was removed from the case months before the trial started — and it was not until six months after the trial was underway that the threats first came to light.

[64] As indicated, context is essential in considering the seriousness of the threatening conduct. By the time the misconduct came to light, Ms. Tremblay had long since been removed from the case and no longer played any part in it. The trial judge acknowledged this fact but did not consider it to be an attenuating factor because the Crown's office had taken no steps [TRANSLATION] "to remedy or even try to remedy the situation" once the threats were revealed and had instead "remained entrenched in its position" (para. 66). With respect, this observation does not accurately reflect the facts. At the point when the threats first came to light, they were unproven and Ms. Tremblay's health did not allow her to testify.⁸ The Crown's office did not condone Ms. Tremblay's actions, but

[62] Les menaces doivent toutefois être replacées dans leur contexte. Avec égards, le juge du procès ne l'a pas fait. En effet, en l'espèce, le juge du procès a négligé de tenir compte de plusieurs facteurs. En toute déférence, il a commis une erreur à cet égard.

[63] Les menaces ont été proférées plus d'un an avant l'ouverture du procès. Les 18 mois de silence des appelants et de leurs avocats jettent un certain éclairage sur la mesure dans laquelle ils ont pris les menaces au sérieux. Si elles avaient été prises au sérieux, on aurait pu s'attendre à ce que les avocats réagissent sur-le-champ. Il ne convenait assurément pas de ne rien faire pendant plus d'un an avant de demander l'arrêt des procédures au milieu du procès. L'avocat aurait plutôt dû sommer M^e Tremblay de s'expliquer et, à défaut d'une réponse adéquate de sa part, porter sur-le-champ la question à l'attention d'un des supérieurs de M^e Tremblay ou d'un juge. Ainsi, il aurait été possible de retirer M^e Tremblay du dossier dès le début de l'instance. Quoi qu'il en soit, en fin de compte, elle a été retirée du dossier des mois avant le début du procès et c'est seulement six mois après le début du procès que les menaces ont été dévoilées pour la première fois.

[64] Je le rappelle, le contexte est crucial lorsqu'il s'agit d'examiner la gravité du comportement menaçant. Quand la conduite répréhensible a été dévoilée, M^e Tremblay n'occupait plus et n'intervenait plus dans le dossier depuis longtemps. Le juge du procès a certes pris acte de ce fait, mais il n'a pas considéré que c'était un facteur atténuant, parce que le bureau du substitut du procureur général n'a rien fait « pour remédier ou même tenter de remédier à la situation » après le dévoilement des menaces. Au contraire, ce bureau « s'est cambré dans ses positions » (par. 66). Avec égards, cette observation ne traduit pas fidèlement les faits. Au moment où on a révélé les menaces pour la première fois, elles n'étaient pas établies et l'état de santé de M^e Tremblay ne lui permettait pas de témoigner⁸.

⁸ Fresh evidence was tendered before this Court in which Ms. Tremblay denies ever having made the threats in question. Given the disposition of the appeal, this evidence is irrelevant and there is no need to consider the Crown's motion to adduce it.

⁸ On a présenté à la Cour un nouvel élément de preuve dans lequel M^e Tremblay nie avoir, à quelque moment que ce soit, proféré les menaces en question. Étant donné l'issue du pourvoi, cet élément de preuve n'est pas pertinent et point n'est besoin d'examiner la requête du ministère public en vue de le présenter.

simply left it to the appellants to prove the threats. Surely the Crown's office cannot be faulted for taking that approach, especially in the absence of any evidence suggesting that Ms. Tremblay's conduct was systemic.

[65] Moreover, the trial judge did not consider the passage of time between when the threats were made and when they were first brought to light. He made no mention of this in his reasons. In this regard, while I agree in general with Justice Abella that the passage of time itself cannot "retroactively cure intolerable state conduct" (para. 82), its significance here is that it serves as a yardstick against which to measure just how serious Ms. Tremblay's conduct was perceived by the defence. The fact that defence counsel took no steps for over a year to raise concerns — and then, almost by accident in the context of a s. 11(b) delay motion — sheds important light on this subject. The trial judge erred in failing to take this into account.

[66] Manifestly, Ms. Tremblay's misconduct was serious enough to warrant proceeding to the second stage of the test. That said, in my respectful view, when the mitigating factors which the trial judge failed to consider are taken into account, the trial judge's conclusion that the threats amounted to [TRANSLATION] "an abuse of the worst kind" is simply not borne out (para. 78).

[67] Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.

Le bureau du substitut du procureur général n'a pas cautionné les agissements de M^e Tremblay, mais il a simplement laissé aux appelants le soin de prouver les menaces. On ne peut certainement pas reprocher au bureau du substitut du procureur général d'avoir procédé de cette façon, surtout en l'absence de preuve laissant croire que M^e Tremblay agissait systématiquement ainsi.

[65] De surcroît, le juge du procès n'a pas tenu compte du temps écoulé entre le moment où les menaces avaient été proférées et celui où elles avaient été révélées la première fois. Il n'en a d'ailleurs pas parlé dans ses motifs. Bien que je convienne de façon générale à cet égard avec la juge Abella que le passage du temps en soi ne saurait « remédier rétroactivement à une conduite intolérable de l'État » (par. 82), l'importance qu'il revêt en l'espèce tient au fait qu'il sert de jalon pour mesurer le niveau de gravité attribué par la défense à la conduite de M^e Tremblay. Le fait que l'avocat de la défense n'a pris aucune mesure pendant plus d'un an pour exprimer ses préoccupations — et qu'il les a exprimées de manière presque fortuite dans le cadre d'une requête concernant le délai fondée sur l'al. 11b) — jette un éclairage important à ce sujet. Le juge du procès a commis une erreur en n'en tenant pas compte.

[66] De toute évidence, la conduite répréhensible de M^e Tremblay était suffisamment grave pour que le tribunal passe à la deuxième étape du test. Cela dit, j'estime avec égards que, si on prend en considération les facteurs atténuants dont le juge du procès n'a pas tenu compte, sa conclusion selon laquelle les menaces ont constitué « un abus des plus graves » n'est tout simplement pas établie (par. 78).

[67] Passons à la deuxième étape du test. Puisque personne n'a soutenu qu'il existait une autre réparation permettant de corriger le préjudice causé à l'intégrité du système de justice par les menaces, je n'ai pas à décider en définitive si une telle réparation existait bel et bien. Je passe plutôt à la troisième étape du test, soit celle de déterminer si la conduite de M^e Tremblay était suffisamment grave pour justifier l'arrêt des procédures.

[68] The answer lies in the balancing process — an exercise which the trial judge did not undertake. The question at this stage is whether the integrity of the justice system is better preserved by staying the proceedings, or proceeding to a trial in the face of the Crown’s threatening conduct.

[69] This balancing requires weighing the seriousness of the misconduct against the societal interest in having a trial. At this stage, the very serious nature of the charges facing the appellants — 22 charges concerning firearms, illegal drugs, and organized crime — looms large. Society has a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. When the impugned misconduct — threats uttered more than a year before trial by a Crown no longer on the case — is weighed against society’s interest in a trial, I am satisfied that this is not one of the “clearest of cases” where the exceptional remedy of a stay of proceedings is warranted.

[70] The appellants contend that this case is analogous to *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, a case in which this Court upheld a stay of proceedings. In *Cobb*, the accused were facing extradition proceedings from Canada to the United States. They were granted a stay after the American prosecutor on the file hinted to the media that uncooperative fugitives would be subjected to rape in prison, and the judge presiding over their trial in the United States commented that uncooperative defendants would get the maximum jail sentence legally available.

[71] This case is a far cry from *Cobb*. In *Cobb*, the American prosecutor had threatened the accused with sexual violence. Here, the Crown threatened to charge the accused with additional offences if they did not plead guilty. While that was improper, the threats related to something she could have done

[68] La réponse réside dans la mise en balance, un exercice auquel ne s’est pas livré le juge du procès. Il s’agit à cette étape de déterminer si l’intégrité du système de justice est mieux préservée par l’arrêt des procédures ou par la tenue d’un procès malgré le comportement menaçant de la substitut du procureur général.

[69] Cette mise en balance exige que l’on soupèse la gravité de la conduite répréhensible par rapport à l’intérêt de la société dans la tenue d’un procès. Le caractère très grave des accusations portées contre les appelants — 22 accusations relatives aux armes à feu, aux drogues illégales et au crime organisé — revêt une grande importance à cette étape. La société tient énormément à ce que justice soit faite par un tribunal et que la culpabilité ou l’innocence des appelants soit établie au terme d’un procès complet sur le fond. Lorsque la conduite répréhensible attaquée — des menaces proférées plus d’un an avant le procès par une substitut du procureur général n’occupant plus au dossier — est soupesée par rapport à l’intérêt pour la société à ce qu’un procès soit tenu, je ne suis pas convaincu qu’il s’agit de l’un des « cas les plus manifestes » où la réparation exceptionnelle que constitue l’arrêt des procédures est justifiée.

[70] Les appelants soutiennent que la présente affaire s’apparente à *États-Unis d’Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587, une affaire où la Cour a confirmé l’arrêt des procédures. Les accusés dans *Cobb* faisaient l’objet de procédures d’extradition du Canada vers les États-Unis. L’arrêt des procédures leur a été accordé après que le poursuivant américain au dossier a laissé entendre aux médias que les fugitifs refusant de collaborer seraient victimes de viol en prison, et que le juge chargé de présider leur procès aux États-Unis a dit que les défendeurs refusant de collaborer se verraient infliger la peine d’emprisonnement la plus lourde prévue par la loi.

[71] La présente espèce est très différente de l’affaire *Cobb*, dans laquelle le poursuivant américain avait menacé les accusés de violence sexuelle. En l’espèce, la substitut du procureur général a menacé de porter d’autres accusations contre les accusés s’ils n’avouaient pas leur culpabilité. Malgré

legally under s. 574(1)(b) of the *Criminal Code*. Moreover, the decision to stay the proceedings in *Cobb* was motivated in large part by the fact that the prosecutor who made the threats remained in charge of the prosecutions. This Court noted that extraditing the accused would return them to an “ominous climate” in which the American prosecutor and judge would play a “large, if not decisive role” in determining their “ultimate fate” (*Cobb*, at para. 43). Here, Ms. Tremblay was off the case long before trial. In my view, *Cobb* provides little or no assistance to the appellants.

VI. Conclusion

[72] In deciding that a stay of proceedings is unwarranted in this case, I have assessed the three forms of alleged misconduct individually. The Crown’s conduct in securing Mr. Piccirilli’s medical records occasioned no prejudice to the integrity of the justice system. The harm caused by the finding of police collusion was curable through an alternate remedy: excluding the firearm from evidence against both appellants. And the Crown’s threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay.

[73] This case lent itself to an individualistic approach. The three alleged instances of misconduct were separate and distinct, committed at different times by different players. There was no link between them. And in only one instance — the Crown’s threatening behaviour — was it necessary to consider the third stage of the test and balance the Crown’s misconduct against society’s interest in a trial on the merits. That said, I should not be taken as suggesting that an individualistic approach should always be followed. Indeed, a judge who is required to balance several instances of misconduct against the societal interest in a trial will almost certainly wish to consider the conduct cumulatively

leur caractère inapproprié, les menaces visaient quelque chose qu’elle aurait pu faire à bon droit en vertu de l’al. 574(1)b) du *Code criminel*. Par ailleurs, la décision d’arrêter les procédures dans *Cobb* était motivée en grande partie par le fait que le poursuivant ayant proféré les menaces est demeuré responsable des poursuites. En effet, dans cette affaire, la Cour a souligné que, s’ils étaient extradés, les accusés feraient face à un « climat [. . .] hostile » dans lequel le poursuivant et le juge américains joueraient un « rôle important, voire décisif », dans la détermination de leur « sort ultime » (*Cobb*, par. 43). En l’espèce, M^e Tremblay a cessé d’occuper dans le dossier bien avant l’ouverture du procès. À mon sens, *Cobb* n’aide guère, voire pas du tout, la cause des appelants.

VI. Conclusion

[72] Pour décider que l’arrêt des procédures est injustifié en l’espèce, j’ai étudié séparément les trois actes répréhensibles allégués. La conduite du ministère public consistant à obtenir le dossier médical de M. Piccirilli n’a aucunement porté préjudice à l’intégrité du système de justice. Quant au tort causé par la conclusion de collusion policière, il était possible d’y remédier en accordant une autre mesure de réparation, soit l’exclusion de l’arme à feu de la preuve présentée contre les deux appelants. Finalement, le comportement menaçant du ministère public, quoique répréhensible, ne se rapprochait pas du type de conduite choquante nécessaire pour justifier l’arrêt des procédures.

[73] La présente affaire se prêtait à une approche fractionnée. Les trois actes répréhensibles reprochés étaient distincts et ils ont été commis à des moments différents par des auteurs différents. Il n’y avait aucun lien entre eux. En outre, c’est dans un seul des cas, soit le comportement menaçant de la substitut du procureur général, qu’il fallait passer à la troisième étape du test et mettre en balance la conduite répréhensible du ministère public, d’une part, et l’intérêt pour la société qu’un procès soit tenu sur le fond, d’autre part. Cela dit, je n’affirme pas que l’on devrait toujours adopter une telle approche fractionnée. En effet, le juge tenu de mettre en balance plusieurs incidents d’inconduite

and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together. But this is not such a case.

[74] For these reasons, I would dismiss the appeals.

The following are the reasons delivered by

[75] ABELLA J. (dissenting) — A stay should only be imposed in the clearest of cases, as Justice Moldaver points out, since it has the effect of precluding proceedings which determine the merits of a case, something to which the public — and the parties — are entitled. But the public is also entitled to have confidence in the integrity of the justice system. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

Analysis

[76] A stay may be justified for an abuse of process under the residual category when the state's conduct “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process” (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73). A stay may be justified, in exceptional circumstances, when the conduct “is so egregious that the mere fact of going forward [with the trial] in the light of it [would] be offensive” (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91).

[77] There are two public interests at play: “the affront to fair play and decency” and “the effective prosecution of criminal cases”. Where the affront is “disproportionate”, the administration of justice is “best served by staying the proceedings” (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

et l'intérêt de la société dans la tenue d'un procès voudra presque assurément examiner la conduite globalement et dans son contexte intégral. De plus, il peut y avoir des cas où la nature et le nombre des incidents considérés globalement nécessiteraient l'arrêt des procédures même si, pris isolément, ils ne le justifieraient pas. Mais tel n'est pas le cas ici.

[74] Pour ces motifs, je suis d'avis de rejeter les pourvois.

Version française des motifs rendus par

[75] LA JUGE ABELLA (dissidente) — L'arrêt des procédures ne doit être ordonné que dans les cas les plus manifestes, comme le souligne le juge Moldaver, puisqu'il a pour effet d'empêcher la tenue d'un procès qui tranche l'affaire sur le fond, ce à quoi ont droit le public et les parties. Cependant, le public est aussi en droit d'avoir confiance dans l'intégrité du système de justice. Le substitut du procureur général qui profère des menaces dans le but d'intimider l'accusé pour qu'il renonce à son droit à un procès porte un coup fatal au cœur de la confiance du public dans cette intégrité.

Analyse

[76] En cas d'abus de procédure, l'arrêt des procédures peut se justifier s'agissant de la catégorie résiduelle dans les cas où la conduite de l'État « contrev[ient] aux notions fondamentales de justice et [...] min[e] ainsi l'intégrité du processus judiciaire » (*R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 73). L'arrêt des procédures peut se justifier dans des cas exceptionnels, lorsque la conduite « est si grave que le simple fait de poursuivre le procès serait choquant » (*Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, par. 91).

[77] Deux intérêts publics entrent en jeu : « l'atteinte au franc-jeu et à la décence » et l'intérêt à ce que « les infractions criminelles soient efficacement poursuivies ». Lorsque l'atteinte est « disproportionnée », l'administration de la justice est « mieux servie par l'arrêt des procédures » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667).

[78] In other words, when the conduct is so profoundly and demonstrably inconsistent with the public perception of what a fair justice system requires, proceeding with a trial means condoning unforgivable conduct.

[79] The Crown who is the focus of this appeal threatened one of the co-accused, Sergio Piccirilli, on three separate occasions. The threats were made twice to Mr. Piccirilli personally and once to his lawyer. All were to the effect that if Mr. Piccirilli did not plead guilty, he would be charged with additional, serious offences. By the time the trial started several months after the last threat, the Crown was on medical leave and a new Crown was assigned to the case. New charges were in fact brought.

[80] The trial judge concluded that the Crown's conduct was in "bad faith", "unacceptable", "intolerable", "unjustifiable", and was one of the "exceptional and rare cases" that justified a stay.

[81] The Court of Appeal agreed that the threats were "unacceptable" and "outrageous", but found that the trial judge erred in imposing a stay because he did not undertake a sufficient balancing or sufficiently consider the context. That context included the fact that the threats were made more than a year before the trial began, that counsel did not react immediately, and that the Crown was replaced for health reasons months before the trial started. In other words, the impact of the threats was mitigated by the passage of time and the change in personnel.

[82] With great respect, however, the passage of time does not operate to attenuate what was unpardonable conduct. Time is not a legal remedy for a fundamental breach of the Crown's role, and cannot retroactively cure intolerable state conduct. The reason, therefore, that the trial judge did not

[78] Autrement dit, lorsque la conduite est si profondément et manifestement incompatible avec ce qu'exige, aux yeux du public, un système de justice équitable, la tenue d'un procès revient à tolérer une conduite impardonnable.

[79] La substitut du procureur général sur qui porte principalement le présent pourvoi a menacé un des accusés, Sergio Piccirilli, à trois occasions distinctes. Les menaces ont été adressées deux fois à M. Piccirilli en personne et une fois à son avocat. Selon toutes ces menaces, M. Piccirilli serait accusé d'autres infractions graves s'il ne plaiderait pas coupable. À l'ouverture du procès, plusieurs mois après la dernière menace, la substitut du procureur général était en congé de maladie et une nouvelle procureure avait été affectée au dossier. De nouvelles accusations ont effectivement été déposées.

[80] Le juge du procès a conclu que le comportement de la substitut du procureur général était « fait de mauvaise foi », « inacceptable », « intolérabl[e] », « injustifiable », et que c'était un des « cas exceptionnels et rares » où l'arrêt des procédures se justifiait.

[81] La Cour d'appel a elle aussi jugé que les menaces étaient « inacceptable[s] » et « outrageante[s] », mais elle a conclu que le juge du procès avait fait erreur en ordonnant l'arrêt des procédures parce qu'il n'avait ni procédé à une mise en balance adéquate, ni tenu compte suffisamment du contexte. Ce contexte comprenait le fait que les menaces remontaient à plus d'un an avant le début du procès, que l'avocat n'avait pas réagi sur-le-champ, et que la substitut du procureur général avait été remplacée pour des raisons de santé des mois avant l'ouverture du procès. Autrement dit, le passage du temps et le changement de personnel auraient atténué l'incidence des menaces.

[82] Or, avec égards, le passage du temps n'a pas pour effet d'atténuer ce qui constitue une conduite impardonnable. Le temps n'est pas une réparation prévue par la loi en cas de manquement fondamental à la fonction du ministère public, et il ne saurait remédier rétroactivement à une conduite

mention the passage of time in assessing the impact of the threats on the public's confidence in a fair justice system, is that it was not relevant. It was the fact that the threats were made at all that was key, not when they were made (*United States of America v. Shulman*, [2001] 1 S.C.R. 616).

[83] Moreover, I am not persuaded that a balancing exercise was required here. The trial judge was unequivocal in concluding that the abuse justified a stay. There was none of the uncertainty as to the propriety of a stay that this Court said was a condition precedent to the need for a balancing exercise (*Tobiass*, at para. 92; *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 57).

[84] But in any event, it is not at all clear to me how one goes about such a balancing. When a trial judge has concluded that conduct is “so egregious that the mere fact of going forward in the light of it will be offensive” (*Tobiass*, at para. 91), against what does one balance that singularly egregious state conduct? When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice, it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits. It is one thing to require that trial judges look at the “competing interests at play” (*R. v. Bellusci*, [2012] 2 S.C.R. 509, at para. 29) before concluding that the state conduct could not be condoned, but how, having concluded that it could not be condoned, can such conduct be subjected to yet *another* balancing of factors to determine whether it is nonetheless pardonable?

[85] Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above

intolérable de l'État. Par conséquent, le fait que le juge du procès n'a pas mentionné le passage du temps lorsqu'il a évalué l'incidence des menaces sur la confiance du public dans un système de justice équitable découle précisément du fait que ce n'était pas pertinent. C'est la profération des menaces en tant que telle qui était déterminante, et non le moment où elles ont été proférées (*États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616).

[83] Par ailleurs, je ne suis pas convaincue qu'une mise en balance s'imposait en l'espèce. Le juge du procès a conclu sans équivoque que l'abus justifiait l'arrêt des procédures. On ne retrouvait aucune-ment dans la présente affaire l'incertitude quant au bien-fondé de l'arrêt des procédures qui, selon la Cour, constitue une condition préalable au besoin de procéder à une mise en balance (*Tobiass*, par. 92; *R. c. Regan*, [2002] 1 R.C.S. 297, par. 57).

[84] Quoi qu'il en soit, je ne vois pas du tout comment cette mise en balance devrait se faire. Lorsque le juge du procès conclut qu'une conduite est « si grave que le simple fait de poursuivre le procès serait choquant » (*Tobiass*, par. 91), avec quoi faut-il mettre en balance cette conduite particulièrement grave de l'État? Lorsque le juge du procès conclut à l'impossibilité de tolérer la conduite en question parce qu'elle choque aussi profondément le sens de la justice du public, il me paraît conceptuellement illogique de demander malgré tout au tribunal d'affaiblir sa propre conclusion en pesant de nouveau le côté de la balance où se trouve l'intérêt du public dans la tenue d'un procès sur le fond. C'est une chose d'exiger du juge du procès qu'il considère les « intérêts en jeu qui s'opposent » (*R. c. Bellusci*, [2012] 2 R.C.S. 509, par. 29) avant de conclure à l'impossibilité de tolérer la conduite de l'État, mais comment, après avoir tiré cette conclusion, le juge peut-il soumettre pareille conduite à une *autre* mise en balance des facteurs afin de déterminer si elle est néanmoins pardonnable?

[85] Certes, le public a intérêt à ce qu'il y ait des procès sur le fond, mais il a bien davantage intérêt à savoir que l'État privilégie l'équité aux dépens de la célérité lorsqu'il participe à des procédures, notamment celles susceptibles d'entraîner la perte

expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

[86] In *Bellusci*, this Court cautioned appellate courts to exercise restraint with respect to the findings of the trial judge, intervening only if the trial judge “misdirects himself or if his decision is so clearly wrong as to amount to an injustice” (para. 17; see also *Regan*, at para. 117; *Tobiass*, at para. 87). There was no such misdirection or injustice here. On the contrary, the trial judge concluded that a stay was justified in order to *prevent* an injustice to the justice system itself. I agree.

[87] I would allow the appeals.

Appeals dismissed, ABELLA J. dissenting.

Solicitors for the appellant Antal Babos: Étude Légale Franco Schiro, Montréal.

Solicitors for the appellant Sergio Piccirilli: Pilon & Associés, Montréal.

Solicitor for the respondent: Public Prosecution Service of Canada, Montréal and Ottawa.

de liberté. La justice ne se limite pas aux résultats, elle s'étend aussi à la manière de les atteindre. Lorsqu'un substitut du procureur général menace l'accusé de porter d'autres accusations contre lui s'il n'avoue pas sa culpabilité, l'intérêt du public dans l'issue d'un procès doit céder le pas à l'intérêt transcendant d'assurer la confiance du public dans l'intégrité du système de justice.

[86] Dans l'arrêt *Bellusci*, la Cour a souligné à l'intention des tribunaux d'appel l'importance de faire preuve de retenue à l'égard des conclusions du juge du procès et de n'intervenir que si ce dernier « s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice » (par. 17; voir aussi *Regan*, par. 117; *Tobiass*, par. 87). Il n'y a eu ni erreur, ni injustice de ce genre en l'espèce. Au contraire, le juge du procès a conclu que l'arrêt des procédures se justifiait pour *empêcher* que le système de justice lui-même subisse une injustice. Je suis d'accord.

[87] Je suis d'avis d'accueillir les pourvois.

Pourvois rejetés, la juge ABELLA est dissidente.

Procureurs de l'appellant Antal Babos : Étude Légale Franco Schiro, Montréal.

Procureurs de l'appellant Sergio Piccirilli : Pilon & Associés, Montréal.

Procureur de l'intimée : Service des poursuites pénales du Canada, Montréal et Ottawa.

Tab 6:

R. v. Biniaris, 2000 SCC 15

Her Majesty The Queen *Appellant*

v.

John Biniaris *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Criminal Lawyers' Association (Ontario), the Innocence Project, the Association in Defence of the Wrongly Convicted and the Criminal Trial Lawyers Association of Alberta *Interveners*

INDEXED AS: R. v. BINIARIS

Neutral citation: 2000 SCC 15.

File No.: 26570.

1999: October 5, 6; 2000: April 13.

Present: Lamer C.J.* and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Appeals — Supreme Court — Rights of appeal from substituted verdict — Accused convicted of second degree murder — Court of Appeal dismissing accused's appeal but substituting conviction for manslaughter — Whether Court of Appeal set aside conviction thereby providing Crown with right of appeal under s. 693(1) of Criminal Code — Whether Court of Appeal affirmed conviction thereby providing accused with right of appeal from conviction on substituted offence under s. 691(1) of Criminal Code — Whether there are co-existing rights of appeal for both accused and Crown from court of appeal order for substituted verdict — Criminal Code, R.S.C., 1985, c. C-46, ss. 691(1), 693(1).

*Lamer C.J. took no part in the judgment.

Sa Majesté la Reine *Appelante*

c.

John Biniaris *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, la Criminal Lawyers' Association (Ontario), l'Innocence Project, l'Association in Defence of the Wrongly Convicted et la Criminal Trial Lawyers Association of Alberta *Intervenants*

RÉPERTORIÉ: R. c. BINIARIS

Référence neutre: 2000 CSC 15.

N° du greffe: 26570.

1999: 5, 6 octobre; 2000: 13 avril.

Présents: Le juge en chef Lamer* et les juges L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Appels — Cour suprême — Droits d'appel contre une substitution de verdict — Accusé déclaré coupable de meurtre au deuxième degré — Cour d'appel rejetant l'appel de l'accusé mais substituant une déclaration de culpabilité d'homicide involontaire coupable — La Cour d'appel annule-t-elle une déclaration de culpabilité et confère-t-elle ainsi au ministère public un droit d'appel fondé sur l'art. 693(1) du Code criminel? — La Cour d'appel confirme-t-elle une déclaration de culpabilité et confère-t-elle ainsi à l'accusé le droit, en vertu de l'art. 691(1) du Code criminel, d'en appeler de la déclaration de culpabilité relative à l'infraction substituée? — L'accusé et le ministère public bénéficient-ils de droits coexistants d'interjeter appel contre une ordonnance de substitution de verdict rendue par une cour d'appel? — Code criminel, L.R.C. (1985), ch. C-46, art. 691(1), 693(1).

*Le juge en chef Lamer n'a pas pris part au jugement.

Criminal law — Appeals — Supreme Court — Question of law — Whether reasonableness of verdict involves question of law within meaning of ss. 691(1) and 693(1) of Criminal Code — Criminal Code, R.S.C., 1985, c. C-46, ss. 691(1), 693(1).

Criminal law — Reasonableness of verdict — Standard of review — Standard of review applicable by reviewing court in examining reasonableness of verdict — Whether Yebes should be reaffirmed — Whether verdict was unreasonable — Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(a)(i).

The accused was charged with second degree murder. The accused and S, a young offender, participated in a senseless and violent beating which left a man dead. S threw the deceased against a plate glass window, then propelled him to the ground, causing the deceased to strike the back of his head on the pavement. Once the deceased was on the ground, S straddled the deceased's thighs and began to punch the deceased in the stomach. The accused entered into the fray, ran up to the deceased and stomped on his forehead a number of times with sufficient force to leave tread marks from his shoes on the deceased's forehead. The Crown's expert testified that the fatal injuries to the deceased's brain resulted from the accused's actions. The defence expert was of the opinion that the deceased had sustained lethal brain injuries when S caused him to strike his head on the pavement, fracturing the thickest bone in the skull. During the course of the trial, after consulting with the defence expert and another expert, the Crown's expert also came to share the view that the fatal injuries were attributable to the actions of S. The Crown's expert was recalled and testified to this effect. In its closing submissions to the jury, the Crown maintained its original theory and invited the jury to rely on its common sense and to convict the accused of second degree murder as the perpetrator of the fatal injuries, notwithstanding the medical evidence to the contrary. The Crown also suggested to the jury that it could find the accused guilty of second degree murder as S's co-perpetrator or accomplice. The trial judge charged the jury that they should proceed carefully before rejecting the ultimately unanimous expert evidence regarding causation. The accused was convicted of second degree murder. The majority of the Court of Appeal dismissed the accused's appeal but substituted a conviction for manslaughter on the basis that the jury's verdict was unreasonable and unsupported by the evidence. The dissenting judge concluded

Droit criminel — Appels — Cour suprême — Question de droit — Le caractère raisonnable d'un verdict soulève-t-il une question de droit au sens des art. 691(1) et 693(1) du Code criminel? — Code criminel, L.R.C. (1985), ch. C-46, art. 691(1), 693(1).

Droit criminel — Caractère raisonnable du verdict — Norme de contrôle — Norme de contrôle applicable par le tribunal qui procède à l'examen du caractère raisonnable d'un verdict — L'arrêt Yebes devrait-il être confirmé de nouveau? — Le verdict était-il déraisonnable? — Code criminel, L.R.C. (1985), ch. C-46, art. 686(1)(a)(i).

L'accusé a été inculpé de meurtre au deuxième degré. L'accusé et S, un jeune contrevenant, ont participé à une raclée insensée et brutale qui a entraîné la mort d'une personne. S a projeté la victime contre une vitrine et ensuite au sol, et cette dernière s'est alors frappé l'arrière de la tête contre le pavé. Pendant que la victime était allongée sur le sol, S lui a sauté à califourchon sur les cuisses et a commencé à lui donner des coups de poing à l'estomac. L'accusé s'est mêlé à la bagarre, a couru vers la victime et lui a sauté sur le front à un certain nombre de reprises, et ce, si durement que ses chaussures y ont laissé des empreintes. L'expert du ministère public a témoigné que les blessures mortelles au cerveau de la victime étaient attribuables aux actes de l'accusé. L'expert de la défense était d'avis que la victime avait subi des blessures mortelles au cerveau lorsque S lui avait fracturé la partie la plus épaisse du crâne en la faisant tomber tête première sur le pavé. Au cours du procès, après avoir consulté l'expert de la défense et un autre expert, l'expert du ministère public en est venu à partager l'opinion que les blessures mortelles étaient attribuables aux actes de S. L'expert du ministère public a été rappelé à la barre et a témoigné dans ce sens. Dans son exposé final au jury, le ministère public a maintenu sa thèse initiale et a invité les membres du jury à faire appel à leur bon sens et à déclarer l'accusé coupable de meurtre au deuxième degré en tant qu'auteur des blessures mortelles, malgré la preuve médicale contraire. Le ministère public a également indiqué au jury qu'il pourrait déclarer l'accusé coupable de meurtre au deuxième degré en tant que coauteur ou complice de S. Dans son exposé, le juge du procès a demandé au jury de ne pas rejeter trop rapidement la preuve d'expert qui, en fin de compte, s'était révélée unanime sur la question de la causalité. L'accusé a été déclaré coupable de meurtre au deuxième degré. Les juges majoritaires de la Cour d'appel ont rejeté l'appel de l'accusé, mais ont substitué une déclaration de culpabilité d'homicide involontaire coupable pour le motif que le verdict du jury était déraisonnable et ne s'appuyait pas sur la preuve. Le juge dissi-

that it was not unreasonable for the jury to convict the accused of second degree murder.

Held: The appeal should be allowed.

While the language of s. 686(1)(b)(i) and (3) of the *Criminal Code* does not contain an explicit direction to a court of appeal to set aside a conviction, when a court of appeal dismisses the accused's appeal from the original conviction by substituting a verdict on another count or part of the indictment, the court of appeal implicitly sets aside the conviction by the trial court and also implicitly affirms the new conviction on the included offence. Thus, there are co-existing rights of appeal for both the accused, under s. 691, and the Crown, under s. 693, to this Court from a court of appeal order for a substituted verdict.

This Court, in *Yebes*, decided unequivocally that the reasonableness of a verdict, within the meaning of s. 686(1)(a)(i) of the *Criminal Code*, involves a decision on a question of law, and as such gives rise to a further appeal to this Court. Whether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard. As a jurisdictional issue of appellate access, the application of that legal standard is enough to make the question a question of law. The conclusion that a finding by an appeal court that a verdict is unreasonable or cannot be supported by the evidence raises a question of law is in harmony with the overall intent and spirit of the two-tier criminal appeal structure in the *Criminal Code*, even if there are some statutory constructions that may lend support to a different conclusion.

The test set out in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. A dissent on the issue of whether the verdict was reasonable is a dissent on a question of law, whether the dissent is based on the articulation of the applicable test or on its actual application to the particular circumstances of the case. The proper test is "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered". In embarking on the exercise mandated by s. 686(1)(a)(i), the reviewing court must engage in a

dent a conclu qu'il n'était pas déraisonnable que le jury déclare l'accusé coupable de meurtre au deuxième degré.

Arrêt: Le pourvoi est accueilli.

Même si le texte du sous-al. 686(1)(b)(i) et celui du par. 686(3) du *Code criminel* n'ordonnent pas explicitement à une cour d'appel d'annuler une déclaration de culpabilité, il reste que, lorsqu'elle rejette l'appel de l'accusé contre la déclaration de culpabilité initiale en y substituant un verdict de culpabilité relativement à un autre chef ou à une autre partie de l'acte d'accusation, la cour d'appel annule implicitement la déclaration de culpabilité prononcée par le tribunal de première instance et confirme aussi implicitement la nouvelle déclaration de culpabilité relative à l'infraction incluse. Ainsi l'accusé, en vertu de l'art. 691, et le ministère public, en vertu de l'art. 693, bénéficient de droits coexistants d'interjeter appel devant notre Cour contre une ordonnance de substitution de verdict rendue par une cour d'appel.

Dans l'arrêt *Yebes*, notre Cour a décidé sans équivoque que la question de savoir si un verdict est déraisonnable au sens du sous-al. 686(1)(a)(i) du *Code criminel* implique une décision sur une question de droit et que, pour cette raison, elle donne naissance à un appel supplémentaire devant notre Cour. La question de savoir si on peut dire qu'une déclaration de culpabilité est déraisonnable ou ne s'appuie pas sur la preuve mène, dans chaque cas, à l'application d'une norme juridique. Du fait qu'elle est appliquée pour déterminer la compétence en matière d'appel, cette norme juridique suffit pour faire de la question une question de droit. La conclusion que la décision d'une cour d'appel qu'un verdict est déraisonnable ou ne peut pas s'appuyer sur la preuve soulève une question de droit est conforme à l'intention générale et à l'esprit du régime d'appel à deux niveaux établi par le *Code criminel*, même si certaines interprétations de la loi peuvent étayer une conclusion différente.

Les cours d'appel doivent continuer d'appliquer le critère énoncé dans l'arrêt *Yebes* pour déterminer si le verdict du jury est déraisonnable ou ne peut pas s'appuyer sur la preuve. Une dissidence sur la question de savoir si le verdict était raisonnable est une dissidence sur une question de droit, peu importe qu'elle repose sur la formulation du critère applicable ou sur l'application de ce critère aux circonstances particulières de l'affaire. Le critère qui doit être appliqué est celui de savoir «si le verdict est l'un de ceux qu'un jury qui a reçu les directives appropriées et qui agit d'une manière judiciaire aurait pu raisonnablement rendre». En se livrant à

thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict was a reasonable one. It is not sufficient for the reviewing court to simply take a different view of the evidence than the trier of fact. Nor is it sufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. While a “lurking doubt” may be a powerful trigger for thorough appellate scrutiny of the evidence, it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of the trier of fact. Rather, the appeal court, if it is to overturn the verdict, must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence.

In the present case, the “real question to be faced by the jury” was whether the accused intended to cause the victim’s death or to cause bodily harm which he knew was likely to cause death and was reckless as to whether death ensued or not. The reasons of the majority of the Court of Appeal focused principally on the issue of causation and did not contain a thorough review and re-examination of the evidence as it relates to intent. The determination of the intent or foresight of a person at the time of his participation in a homicide is often a difficult question of fact. The trial judge thoroughly canvassed all the evidence adduced on the issue of intent in her charge to the jury. There is nothing in the compendium of accumulated judicial experience that should cause concern that the jury went astray in its review and assessment of the evidence. Even though it might have been reasonable for the jury to conclude otherwise, it was perfectly reasonable for the jury to be satisfied beyond a reasonable doubt that the accused had acted with the requisite intent for murder. In light of his responsibility as a party, the fact that the specific blows inflicted by the accused were not the ones which were the immediate cause of death was of no significance. In overturning the verdict of the jury as unreasonable, the majority of the Court of Appeal was also concerned about the change in the Crown’s theory of the case and the jury’s ability to appreciate the nuances of all of this, as well as about the fact that the case was “highly emotional by reason of these outrageous assaults”. The concerns of the majority of the Court of Appeal were insufficient to set aside the verdict of the jury as unreasonable. They were more than adequately addressed by the trial judge, whose charge to the jury was instructive and fair. The verdict was one that this

l’exercice prescrit pas le sous-al. 686(1)a(i), le tribunal d’examen doit réexaminer la preuve en profondeur et mettre à profit toute son expérience pour déterminer si, compte tenu de l’ensemble de la preuve, le verdict était raisonnable. Il ne suffit pas que le tribunal d’examen ait simplement une perception de la preuve différente de celle du juge des faits. Il ne suffit pas non plus que la cour d’appel parle d’un vague malaise ou d’un doute persistant qui résulte de son propre examen de la preuve. Même si un «doute persistant» peut être un puissant élément déclencheur d’un examen approfondi de la preuve en appel, il ne constitue pas, sans plus d’explications, une bonne raison de modifier les conclusions du juge des faits. Pour écarter le verdict, la cour d’appel doit plutôt expliquer ce qui l’incite à conclure qu’il n’est pas conforme aux exigences d’une appréciation judiciaire de la preuve.

En l’espèce, la «véritable question à laquelle devait répondre le jury» était de savoir si l’accusé avait l’intention de causer la mort de la victime ou de lui infliger des lésions corporelles qu’il savait être de nature à causer la mort et qu’il lui était indifférent que la mort s’ensuive ou non. Les motifs des juges majoritaires de la Cour d’appel sont axés principalement sur la question de la causalité et ne comportent pas une révision et un réexamen complets de la preuve relative à l’intention. La détermination de l’intention d’une personne et de ce qu’elle prévoyait au moment où elle a participé à un homicide est souvent une question de fait difficile. Dans son exposé au jury, le juge du procès a examiné en profondeur toute la preuve présentée au sujet de la question de l’intention. D’après l’ensemble de l’expérience acquise par les tribunaux, rien ne permet de craindre que le jury se soit égaré dans son examen et son évaluation de la preuve. Même si le jury avait pu raisonnablement tirer une conclusion différente, il était parfaitement raisonnable que celui-ci soit convaincu hors de tout doute raisonnable que l’accusé avait l’intention requise pour commettre un meurtre au moment où il a agi. Compte tenu de sa responsabilité à titre de participant à l’infraction, il était sans importance que les coups portés par l’accusé n’aient pas été la cause immédiate du décès. Lorsqu’ils ont écarté le verdict du jury pour le motif qu’il était déraisonnable, les juges majoritaires de la Cour d’appel s’inquiétaient également du revirement de la thèse du ministère public, de la capacité du jury d’en saisir toutes les nuances, et du fait que l’affaire était «chargée d’émotions en raison de ces agressions révoltantes». Les préoccupations des juges majoritaires de la Cour d’appel ne justifiaient pas l’annulation du verdict du jury pour le motif qu’il était déraisonnable. Elles ont

properly instructed jury, acting judicially, could reasonably have rendered, and it should be restored.

été traitées d'une manière plus que suffisante par le juge du procès, dont l'exposé au jury était instructif et équitable. Le verdict rendu est un verdict qu'un jury ayant reçu des directives appropriées et agissant d'une manière judiciaire aurait pu raisonnablement rendre, et il y a lieu de le rétablir.

Cases Cited

Followed: *R. v. Yebes*, [1987] 2 S.C.R. 168; **referred to:** *R. v. Molodowic*, [2000] 1 S.C.R. 420, 2000 SCC 16; *R. v. A.G.*, [2000] 1 S.C.R. 439, 2000 SCC 17; *R. v. Nantais*, [1966] 2 O.R. 246; *R. v. McGloan*, [1976] 2 S.C.R. 842; *Mahoney v. The Queen*, [1982] 1 S.C.R. 834; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221; *Lampard v. The Queen*, [1969] S.C.R. 373; *Ciglen v. The Queen*, [1970] S.C.R. 804; *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. H. (D.S.) and N. (J.D.)*, [1994] 2 S.C.R. 392, rev'g (1994), 90 C.C.C. (3d) 564; *R. v. Blundon* (1993), 84 C.C.C. (3d) 249; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Jensen* (1996), 106 C.C.C. (3d) 430, appeal quashed, [1997] 1 S.C.R. 304; *R. v. Osvath* (1996), 87 O.A.C. 274, appeal quashed, [1997] 1 S.C.R. 7; *R. v. Hamilton*, [1997] Q.J. No. 67 (QL), appeal quashed, [1997] S.C.C.A. No. 105 (QL); *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev'g (1997), 97 B.C.A.C. 303; *R. v. O'Connor* (1998), 123 C.C.C. (3d) 487; *R. v. Keeper* (1993), 88 Man. R. (2d) 156; *R. v. Malcolm* (1993), 81 C.C.C. (3d) 196; *R. v. Tat* (1997), 117 C.C.C. (3d) 481; *R. v. N.D.*, [1993] O.J. No. 2139 (QL); *R. v. C.V.*, [1993] O.J. No. 1512 (QL); *R. v. L. (J.H.H.P.)* (1992), 75 C.C.C. (3d) 165; *R. v. Vaillancourt* (1999), 136 C.C.C. (3d) 530.

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Criminal Code, R.S.C., 1985, c. C-46, ss. 21(1), 675(1)(a), 676(1)(a) [am. 1997, c. 18, s. 93], 677 [repl. 1994, c. 44, s. 67], 686(1) [am. c. 27 (1st Supp.), s. 145; am. 1991, c. 43, s. 9 (Sch., item 8)], (3) [rep. & sub. c. 27 (1st Supp.), s. 145], (4) [am. *idem*; am. 1999, c. 5, s. 26], 691(1) [am. c. 34 (3rd Supp.), s. 10], 693(1) [rep. & sub. c. 27 (1st Supp.), s. 146; c. 34 (3rd Supp.), s. 12].

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 104 B.C.A.C. 203, 170 W.A.C. 203, 124 C.C.C. (3d) 58, [1998]

Jurisprudence

Arrêt suivi: *R. c. Yebes*, [1987] 2 R.C.S. 168; **arrêts mentionnés:** *R. c. Molodowic*, [2000] 1 R.C.S. 420, 2000 CSC 16; *R. c. A.G.*, [2000] 1 R.C.S. 439, 2000 CSC 17; *R. c. Nantais*, [1966] 2 O.R. 246; *R. c. McGloan*, [1976] 2 R.C.S. 842; *Mahoney c. La Reine*, [1982] 1 R.C.S. 834; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Sunbeam Corporation (Canada) Ltd. c. The Queen*, [1969] R.C.S. 221; *Lampard c. The Queen*, [1969] R.C.S. 373; *Ciglen c. La Reine*, [1970] R.C.S. 804; *R. c. B. (G.)*, [1990] 2 R.C.S. 57; *R. c. H. (D.S.) et N. (J.D.)*, [1994] 2 R.C.S. 392, inf. (1994), 90 C.C.C. (3d) 564; *R. c. Blundon* (1993), 84 C.C.C. (3d) 249; *Schuldt c. La Reine*, [1985] 2 R.C.S. 592; *R. c. Jensen* (1996), 106 C.C.C. (3d) 430, pourvoi annulé, [1997] 1 R.C.S. 304; *R. c. Osvath* (1996), 87 O.A.C. 274, pourvoi annulé, [1997] 1 R.C.S. 7; *R. c. Hamilton*, [1997] A.Q. n° 67 (QL), pourvoi annulé, [1997] C.S.C.R. n° 105 (QL); *Corbett c. La Reine*, [1975] 2 R.C.S. 275; *R. c. Burke*, [1996] 1 R.C.S. 474; *R. c. Reitsma*, [1998] 1 R.C.S. 769, inf. (1997), 97 B.C.A.C. 303; *R. c. O'Connor* (1998), 123 C.C.C. (3d) 487; *R. c. Keeper* (1993), 88 Man. R. (2d) 156; *R. c. Malcolm* (1993), 81 C.C.C. (3d) 196; *R. c. Tat* (1997), 117 C.C.C. (3d) 481; *R. c. N.D.*, [1993] O.J. No. 2139 (QL); *R. c. C.V.*, [1993] O.J. No. 1512 (QL); *R. c. L. (J.H.H.P.)* (1992), 75 C.C.C. (3d) 165; *R. c. Vaillancourt* (1999), 136 C.C.C. (3d) 530.

Lois et règlements cités

Code criminel, L.R.C. (1985), ch. C-46, art. 21(1), 675(1)(a), 676(1)(a) [mod. 1997, ch. 18, art. 93], 677 [rempl. 1994, ch. 44, art. 67], 686(1) [mod. ch. 27 (1^{er} suppl.), art. 145; mod. 1991, ch. 43, art. 9 (ann., art. 8)], (3) [abr. & rempl. ch. 27 (1^{er} suppl.), art. 145], (4) [mod. *idem*; mod. 1999, ch. 5, art. 26], 691(1) [mod. ch. 34 (3^e suppl.), art. 10], 693(1) [abr. & rempl. ch. 27 (1^{er} suppl.), art. 146; ch. 34 (3^e suppl.), art. 12].

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 104 B.C.A.C. 203, 170 W.A.C. 203, 124 C.C.C. (3d) 58, [1998]

B.C.J. No. 576 (QL), dismissing the accused's appeal from his conviction on a charge of second degree murder and substituting a verdict of manslaughter. Appeal allowed.

William F. Ehrcke, Q.C., and Kate Ker, for the appellant.

Gil D. McKinnon, Q.C., and Peter J. Wilson, for the respondent.

Robert J. Frater and Morris Pistyner, for the intervener the Attorney General of Canada.

Robert Kelly, for the intervener the Attorney General for Ontario.

Carole Lebeuf and Maurice Galarneau, for the intervener the Attorney General of Quebec.

Frank R. Addario, for the intervener the Criminal Lawyers' Association (Ontario).

Marlys A. Edwardh, for the intervener the Innocence Project.

Melvyn Green, for the intervener the Association in Defence of the Wrongly Convicted.

Written submissions only by *Marvin R. Bloos*, for the intervener the Criminal Trial Lawyers Association of Alberta.

The judgment of the Court was delivered by

ARBOUR J. —

I. Introduction

1

This appeal was heard together with *R. v. Molodowic*, [2000] 1 S.C.R. 420, 2000 SCC 16, and *R. v. A.G.*, [2000] 1 S.C.R. 439, 2000 SCC 17. In this trilogy, the Court was asked to reconsider its decision in *R. v. Yebe*s, [1987] 2 S.C.R. 168, and, in particular, to decide two issues of general application. First, whether the reasonableness of a verdict involves a question of law, within the meaning of ss. 691 and 693 of the *Criminal Code*,

B.C.J. No. 576 (QL), qui a rejeté l'appel de l'accusé contre sa déclaration de culpabilité de meurtre au deuxième degré, mais qui a substitué à cette dernière un verdict de culpabilité d'homicide involontaire coupable. Pourvoi accueilli.

William F. Ehrcke, c.r., et Kate Ker, pour l'appelante.

Gil D. McKinnon, c.r., et Peter J. Wilson, pour l'intimé.

Robert J. Frater et Morris Pistyner, pour l'intervenant le procureur général du Canada.

Robert Kelly, pour l'intervenant le procureur général de l'Ontario.

Carole Lebeuf et Maurice Galarneau, pour l'intervenant le procureur général du Québec.

Frank R. Addario, pour l'intervenante la Criminal Lawyers' Association (Ontario).

Marlys A. Edwardh, pour l'intervenant l'Innocence Project.

Melvyn Green, pour l'intervenante l'Association in Defence of the Wrongly Convicted.

Argumentation écrite seulement par *Marvin R. Bloos*, pour l'intervenante la Criminal Trial Lawyers Association of Alberta.

Version française du jugement de la Cour rendu par

LE JUGE ARBOUR —

I. Introduction

Le présent pourvoi a été entendu en même temps que les pourvois *R. c. Molodowic*, [2000] 1 R.C.S. 420, 2000 CSC 16, et *R. c. A.G.*, [2000] 1 R.C.S. 439, 2000 CSC 17. Dans cette trilogie, la Cour était invitée à revenir sur son arrêt *R. c. Yebe*s, [1987] 2 R.C.S. 168, et, en particulier, à trancher deux questions d'application générale. Il s'agissait, premièrement, de savoir si le caractère raisonnable d'un verdict soulève une question de

R.S.C., 1985, c. C-46, so as to permit a further appeal to this Court from a decision by a provincial appellate court, and, second, what standard of review must be applied by the reviewing court in examining the reasonableness of a verdict. Each case involved, of course, an application of that standard to the facts of that case.

II. Factual Background

The respondent John Biniaris was 15 years old at the time of the events that gave rise to his conviction for second degree murder. He was tried in adult court, separately from his co-perpetrator, Stephen Stark, who was tried first and also convicted of second degree murder. The two had been involved in a brutal assault on the victim, Graham Niven, whom they had encountered by chance in the early morning hours of August 13, 1994.

Graham Niven was coming out of a Coquitlam, B.C., convenience store with 14-year-old Kaven Valin, when they came across a group of four youths, which included the respondent Biniaris and Stephen Stark. The events that followed were described at trial by Kaven Valin, and by Peter Lehtonen, one of the two other boys who were with Biniaris and Stark that night. While Niven and Valin were waiting for a taxi, Niven became involved in a conversation with the boys, and the subject of drugs came up.

Niven asked if anyone “did heroin”. Stark stood up and responded that he did. Niven said not to do heroin because “it fucked up your head”. Stark became angry and tensions mounted as Stark and Niven stood facing each other near the entrance to the store. According to Kaven Valin, shortly after the initial exchange between Stark and Niven, the respondent Biniaris, who was now standing beside Niven, told him to “make a move”. Stark threatened Niven, saying things such as “I’ll fuckin cut a hole in your head” and “Go in. Save yourself”. At that point, Stark and Niven grabbed

droit au sens des art. 691 et 693 du *Code criminel*, L.R.C. (1985), ch. C-46, de manière à autoriser un pourvoi devant notre Cour contre une décision d’une cour d’appel provinciale, et deuxièmement, de savoir quelle norme de contrôle doit être appliquée par le tribunal qui procède à l’examen du caractère raisonnable d’un verdict. Il va sans dire que chaque cas comportait une application de cette norme aux faits en présence.

II. Les faits

L’intimé John Biniaris était âgé de 15 ans au moment où se sont produits les faits à l’origine de sa déclaration de culpabilité de meurtre au deuxième degré. Il a été jugé devant un tribunal pour adultes dans le cadre d’un procès séparé de celui de Stephen Stark, le coauteur du crime reproché, qui a subi son procès le premier et qui a également été déclaré coupable de meurtre au deuxième degré. Les deux s’étaient livrés à une agression sauvage contre la victime, Graham Niven, qu’ils avaient rencontrée par hasard tôt le matin du 13 août 1994.

Graham Niven sortait d’un dépanneur de Coquitlam (C.-B.) en compagnie de Kaven Valin, âgé de 14 ans, lorsqu’ils ont croisé un groupe de quatre jeunes, dont faisaient partie l’intimé Biniaris et Stephen Stark. Au procès, Kaven Valin et Peter Lehtonen, l’un des deux autres garçons qui accompagnaient Biniaris et Stark cette nuit-là, ont décrit la suite des événements. Pendant que Niven et Valin attendaient un taxi, Niven a engagé une conversation avec les garçons au cours de laquelle le sujet de la drogue a été abordé.

Niven a demandé si quelqu’un [TRADUCTION] «prenait de l’héroïne». Stark s’est levé et a répondu qu’il en prenait. Niven lui a dit de ne pas en prendre, car [TRADUCTION] «ça rend fou». Stark s’est mis en colère et la tension a monté alors que Stark et Niven étaient debout face à face près de l’entrée du dépanneur. Selon Kaven Valin, peu après le début des échanges entre Stark et Niven, l’intimé Biniaris, qui s’était approché de Niven, l’a défié verbalement. Stark a menacé Niven en lui disant notamment [TRADUCTION] «Je vais te percer la tête, crisse» et «Vas à l’intérieur. Sauves-toi».

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each other. The events which followed lasted only 20 to 30 seconds. According to Kaven Valin, Stark threw Niven into the store's plate glass window, causing Niven to hit his head against the window. Stark then spun Niven around quickly and forcefully pushed him to the ground, causing Niven to strike the back of his head on the pavement. Once Niven was on the ground, Stark straddled Niven's thighs and started punching him in the stomach with a closed right fist while holding down Niven's right arm with his left hand. At this point, and for the next five to ten seconds, the respondent Biniaris entered the fray. Peter Lehtonen testified that he thought he saw the respondent inflict a "medium strength" kick to the middle of Niven's back just as he was attempting to raise his head and upper body off the ground by holding onto Stark's jacket sleeves. He said the kick startled Niven and caused him to fall back to the ground. Lehtonen also testified that he thought he saw the respondent kick Niven on the top part of the head with "medium" force. Kaven Valin did not testify to any kicks. He saw the respondent run toward Niven and jump "hard" on the latter's forehead roughly five times using his right foot, taking two or three steps back and forth in between jumps. The respondent stomped or jumped with sufficient force to leave tread marks from his shoes on Niven's forehead. Lehtonen saw only two stationary up and down stomps, but he left the scene prior to the end of the attack. After the attack, the respondent Biniaris and Stark fled together.

C'est à ce moment-là que Stark et Niven se sont empoignés. Les événements qui ont suivi n'ont duré que de 20 à 30 secondes. Selon Kaven Valin, Niven a subi un coup à la tête en entrant en contact avec la vitrine du magasin contre laquelle Stark l'avait projeté. Stark a ensuite fait virevolter rapidement Niven qui s'est frappé l'arrière de la tête contre le pavé après avoir été projeté violemment au sol. Pendant que Niven était allongé sur le sol, Stark lui a sauté à califourchon sur les cuisses et a commencé à le frapper à l'estomac à l'aide de son poing droit fermé tout en lui retenant le bras droit avec sa main gauche. À ce moment-là et pendant les cinq à dix secondes qui ont suivi, l'intimé Biniaris s'est mêlé à la bagarre. Peter Lehtonen a témoigné qu'il croyait avoir vu l'intimé donner un coup de pied «de force moyenne» au milieu du dos de Niven juste au moment où celui-ci tentait de relever la tête et le haut du corps en s'agrippant aux manches de la veste de Stark. Il a dit que le coup avait fait tressauter Niven qui était alors retombé sur le sol. Lehtonen a également témoigné qu'il croyait avoir vu l'intimé donner un coup de pied de force «moyenne» sur la tête de Niven. Kaven Valin n'a pas fait état de coups de pied. Il a vu l'intimé courir vers Niven et lui sauter «durement» sur le front à environ cinq reprises à l'aide de son pied droit, en reculant chaque fois de deux ou trois pas avant de sauter. L'intimé a piétiné ou sauté si fort que ses chaussures ont laissé des empreintes sur le front de Niven. Lehtonen n'a vu que deux coups de pied assénés en position stationnaire, mais il a quitté les lieux avant la fin de l'attaque. Après l'attaque, l'intimé Biniaris et Stark se sont enfuis ensemble.

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Niven was deeply unconscious when emergency personnel arrived at the convenience store. He was brain dead at the time of his arrival at Royal Columbian Hospital and was pronounced dead some 10 hours later. Biniaris and Stark were arrested shortly before 11:00 p.m. on August 13, 1994. The arresting officers testified that the respondent expressed surprise when informed that he was under arrest for second degree murder.

Niven se trouvait dans un état d'inconscience profonde lorsque les ambulanciers sont arrivés au dépanneur. Il était cliniquement décédé à son arrivée au Royal Columbian Hospital et a été déclaré mort une dizaine d'heures plus tard. Biniaris et Stark ont été arrêtés peu avant 23 h, le 13 août 1994. Les policiers qui les ont arrêtés ont témoigné que l'intimé avait paru surpris en apprenant qu'il était mis en état d'arrestation pour meurtre au deuxième degré.

The respondent's trial before Boyd J. and a jury took an unusual course. The Crown's theory was that the respondent Biniaris had caused Niven's death and was guilty of second degree murder as a principal. As a result, much of the focus at trial was on the issue of causation. In turn, that issue rested largely on the medical evidence, which was both lengthy and complex, as it dealt with the causes of fatal brain injuries. Dr. Sheila Carlyle, the pathologist who performed the autopsy on the deceased, was called by the Crown. She and the pathologist called by the defence, Dr. Jennifer Rice, agreed on a number of points. For example, they agreed that there was medical evidence of only five head injuries — three stomps to the face, a glancing blow or kick near the left eye and a fracture to the back of the skull — and that to the extent that there may have been additional blows, they were not of sufficient force to produce bruising or broken bones. Further, they agreed that two of the three stomps were attributable to the shoes worn by the respondent. The source of the third stomp could not be identified while the source of the glancing blow or kick was not explained by either Dr. Carlyle or Dr. Rice.

However, the doctors disagreed about whether the fatal injuries suffered by Niven resulted from the fall or from the stomping. Dr. Carlyle testified that the respondent's actions had caused Niven's death. Dr. Rice was of the opinion that Niven's fatal brain injuries were attributable to the actions of Stark, although she could not exclude the unlikely possibility that the stomping aggravated the already injured brain. Specifically, she was of the opinion that Niven had sustained lethal brain injuries when Stark caused him to strike his head on the pavement, fracturing the thickest bone in the skull.

Le procès de l'intimé, tenu devant le juge Boyd et un jury, a pris une tournure inusitée. La thèse du ministère public était que l'intimé Biniaris avait causé la mort de Niven et qu'il était coupable de meurtre au deuxième degré en tant qu'auteur principal du crime. Par conséquent, le procès a porté en grande partie sur la question de la causalité. En revanche, cette question reposait largement sur la preuve médicale qui était à la fois longue et complexe du fait qu'elle portait sur les causes des blessures mortelles au cerveau. Le ministère public a fait témoigner le Dr Sheila Carlyle, la pathologiste qui avait autopsié la victime. Celle-ci et le Dr Jennifer Rice, la pathologiste appelée à la barre par la défense, étaient d'accord sur un certain nombre de points. Par exemple, elles convenaient que la preuve médicale ne faisait état que de cinq blessures à la tête — trois marques de piétinement au visage, une marque de coup de poing ou de coup de pied oblique près de l'œil gauche ainsi qu'une fracture à l'arrière du crâne — et que, s'il y avait eu d'autres coups, ils n'avaient pas été portés avec suffisamment de force pour causer des contusions ou briser des os. Elles convenaient également que deux des marques de piétinement pouvaient avoir été laissées par les chaussures de l'intimé. L'origine de la troisième marque de piétinement ne pouvait pas être déterminée, alors que celle du coup de poing ou coup de pied oblique n'a fait l'objet d'aucune explication de la part des Drs Carlyle et Rice.

Les médecins ne s'entendaient toutefois pas sur la question de savoir si les blessures mortelles subies par Niven avaient résulté de la chute ou du piétinement. Le Dr Carlyle a témoigné que les actes de l'intimé avaient causé la mort de Niven. Le Dr Rice était d'avis que les blessures mortelles au cerveau de Niven étaient attribuables aux actes de Stark, même si elle ne pouvait pas écarter la possibilité invraisemblable que le piétinement ait aggravé les blessures déjà existantes au cerveau. Plus précisément, elle était d'avis que Niven avait subi des blessures mortelles au cerveau lorsque Stark lui avait fracturé la partie la plus épaisse du crâne en le faisant tomber tête première sur le pavé.

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Dr. Carlyle maintained her position on causation throughout her testimony in chief and under cross-examination. However, during the course of the trial, after consulting with Dr. Rice and with Dr. Charles Hirsch, an eminent American pathologist, she came to share Dr. Rice's opinion. Dr. Carlyle was recalled and testified to this effect, conceding that the respondent's stomping was distinctly unlikely to have caused Niven's fatal injuries and that while she could not exclude the possibility that the stomping had enhanced the pre-existing brain injuries suffered by Niven as a result of Stark's actions, this latter opinion was not something she felt "comfortable advancing with any scientific basis".

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Despite this dramatic change in the evidence, at the close of the trial the Crown maintained its original theory and suggested that, notwithstanding the consensus in the medical evidence, it was still open to the jury, as a matter of common sense, to conclude that the respondent had caused Niven's death and that, if they found that he had the intent necessary for murder, then he was guilty of second degree murder as a principal. However, the jury was also offered two alternative routes to a conviction for second degree murder, each of which, like the primary route urged by the Crown, required proof of an intent to cause bodily harm that the respondent knew was likely to cause death and was reckless as to whether death ensued or not. First, even if the respondent had not caused Niven's death, the Crown argued that the respondent was guilty as a co-perpetrator, having acted in concert with Stark with the necessary intent to sustain a conviction for murder. Second, it was suggested that the respondent could be found guilty of murder because he aided or abetted Stark and did so with the knowledge and intent for murder. In her charge, the trial judge warned the jury to be slow

Le D^r Carlyle a maintenu sa position sur la causalité pendant tout son interrogatoire principal et son contre-interrogatoire. Cependant, au cours du procès, après avoir consulté le D^r Rice et le D^r Charles Hirsch, un éminent pathologiste américain, elle en est venue à partager l'opinion du D^r Rice. Le D^r Carlyle a été rappelée à la barre et elle a témoigné dans ce sens, en reconnaissant qu'il était très peu probable que le piétinement auquel s'était livré l'intimé ait causé les blessures mortelles de Niven et que, même si elle ne pouvait pas écarter la possibilité que ce piétinement ait aggravé les blessures que Stark avaient déjà causées au cerveau de Niven, il s'agissait d'une opinion qui la mettait [TRADUCTION] «scientifiquement mal à l'aise».

Malgré ce revirement spectaculaire de la preuve, le ministère public a maintenu sa thèse initiale à la fin du procès et a indiqué que, en dépit du consensus qui se dégageait de la preuve médicale, il allait de soi que le jury pouvait toujours conclure que l'intimé avait causé la mort de Niven, et que si le jury concluait que l'intimé avait eu l'intention requise pour commettre un meurtre, ce dernier serait alors coupable de meurtre au deuxième degré en tant qu'auteur principal du crime. Cependant, on a également dit au jury qu'il y avait deux façons de parvenir à une déclaration de culpabilité de meurtre au deuxième degré, dont chacune, à l'instar de la principale façon préconisée par le ministère public, exigeait de prouver que l'intimé avait l'intention de causer des lésions corporelles qu'il savait être de nature à causer la mort, et qu'il lui était indifférent que la mort s'ensuive ou non. Premièrement, le ministère public a prétendu que, même si l'intimé n'avait pas causé la mort de Niven, il était coupable en qualité de coauteur, du fait qu'il avait agi de concert avec Stark en ayant l'intention requise pour justifier une déclaration de culpabilité de meurtre. Deuxièmement, on a laissé entendre que l'intimé pouvait être déclaré coupable de meurtre parce qu'il avait aidé ou encouragé Stark et qu'il l'avait fait en ayant la connaissance et l'intention requises pour qu'il y ait meurtre. Dans son exposé, le juge du procès a prévenu le jury de ne pas invoquer trop rapidement le bon sens pour rejeter la preuve d'expert qui, en fin de

to reject the ultimately unanimous expert evidence regarding causation in favour of common sense.

The respondent was convicted of second degree murder and sentenced by Boyd J. to life imprisonment without eligibility for parole for five years.

III. Relevant Statutory Provisions

Criminal Code, R.S.C., 1985, c. C-46

675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) against his conviction

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or

(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal;

. . .

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

. . .

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

compte, s'était révélée unanime sur la question de la causalité.

L'intimé a été déclaré coupable de meurtre au deuxième degré et condamné par le juge Boyd à l'emprisonnement à perpétuité sans possibilité de bénéficier de la libération conditionnelle avant cinq ans.

III. Les dispositions législatives pertinentes

Code criminel, L.R.C. (1985), ch. C-46

675. (1) Une personne déclarée coupable par un tribunal de première instance dans des procédures sur acte d'accusation peut interjeter appel, devant la cour d'appel:

a) de sa déclaration de culpabilité:

(i) soit pour tout motif d'appel comportant une simple question de droit,

(ii) soit pour tout motif d'appel comportant une question de fait, ou une question de droit et de fait, avec l'autorisation de la cour d'appel ou de l'un de ses juges ou sur certificat du juge de première instance attestant que la cause est susceptible d'appel,

(iii) soit pour tout motif d'appel non mentionné au sous-alinéa (i) ou (ii) et jugé suffisant par la cour d'appel, avec l'autorisation de celle-ci;

. . .

676. (1) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut introduire un recours devant la cour d'appel:

a) contre un jugement ou verdict d'acquiescement ou un verdict de non-responsabilité criminelle pour cause de troubles mentaux prononcé par un tribunal de première instance à l'égard de procédures sur acte d'accusation pour tout motif d'appel qui comporte une question de droit seulement;

. . .

686. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel:

a) peut admettre l'appel, si elle est d'avis, selon le cas:

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(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;

. . .

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; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

. . .

693. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada

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

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,

(ii) que le jugement du tribunal de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit,

(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;

b) peut rejeter l'appel, dans l'un ou l'autre des cas suivants:

(i) elle est d'avis que l'appellant, bien qu'il n'ait pas été régulièrement déclaré coupable sur un chef d'accusation ou une partie de l'acte d'accusation, a été régulièrement déclaré coupable sur un autre chef ou une autre partie de l'acte d'accusation,

(ii) l'appel n'est pas décidé en faveur de l'appellant pour l'un des motifs mentionnés à l'alinéa a),

(iii) bien qu'elle estime que, pour un motif mentionné au sous-alinéa a)(ii), l'appel pourrait être décidé en faveur de l'appellant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

(iv) nonobstant une irrégularité de procédure au procès, le tribunal de première instance était compétent à l'égard de la catégorie d'infractions dont fait partie celle dont l'appellant a été déclaré coupable et elle est d'avis qu'aucun préjudice n'a été causé à celui-ci par cette irrégularité;

. . .

691. (1) La personne déclarée coupable d'un acte criminel et dont la condamnation est confirmée par la cour d'appel peut interjeter appel à la Cour suprême du Canada:

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;

b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.

. . .

693. (1) Lorsqu'un jugement d'une cour d'appel annule une déclaration de culpabilité par suite d'un appel interjeté aux termes de l'article 675 ou rejette un appel interjeté aux termes de l'alinéa 676(1)a), b) ou c) ou du paragraphe 676(3), le procureur général peut interjeter appel devant la Cour suprême du Canada:

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

IV. Judgments Below

British Columbia Court of Appeal (1998), 124 C.C.C. (3d) 58

(i) Hall J.A., Braidwood J.A. concurring

Hall J.A. held that the respondent's conviction for second degree murder was unreasonable and not supported by the evidence. Relying on s. 686(1)(b)(i) of the *Criminal Code*, he dismissed the appeal but substituted a verdict of manslaughter and remanded the matter to the trial court for sentencing. The conclusions of Hall J.A. are summarized in his reasons as follows (at p. 73):

By the end of the evidence, the case for a murder conviction against this accused was frankly a thin case. This case was also highly emotional by reason of these outrageous assaults. If one analyzes the activities of the two assailants, it seems to me to be an inescapable conclusion that the assaultive activity attributed to this [accused] all occurred after the infliction of the fatal harm and in circumstances where Biniaris' intention to assist in a murder is unclear. Nor, as I observed, is this a joint venture case of the sort where one or more of the parties may possess a deadly weapon like a gun or a knife. Biniaris very briefly participated as a party in an affray that had a fatal consequence. To found a conviction for murder against this [accused], I believe that the trier of fact would be required to find that Biniaris aided or abetted Stark with a murderous intent of the sort set out in s. 229(a)(ii); *R. v. Kirkness*, [1990] 3 S.C.R. 74, 60 C.C.C. (3d) 97. On the facts here that was perhaps an open verdict one that was but very thinly supported by the evidence. The case for murder was sufficiently tenuous against Biniaris that I believe the murder verdict returned by the jury against this [accused] was not supported by the evidence.

Hall J.A. was very concerned about the shift in the underlying theory of culpability and, in particular, about the fact the Crown maintained its origi-

b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.

IV. Les décisions des cours d'instance inférieure

Cour d'appel de la Colombie-Britannique (1998), 124 C.C.C. (3d) 58

(i) Le juge Hall, avec l'appui du juge Braidwood

Le juge Hall a conclu que la déclaration de culpabilité de meurtre au deuxième degré prononcée contre l'intimé était déraisonnable et ne s'appuyait pas sur la preuve. Se fondant sur le sous-al. 686(1)(b)(i) du *Code criminel*, il a rejeté l'appel mais a substitué un verdict d'homicide involontaire coupable et a renvoyé l'affaire au tribunal de première instance pour qu'il détermine la peine. Les conclusions du juge Hall sont résumées ainsi dans ses motifs (à la p. 73):

[TRADUCTION] Dès la fin de la présentation de la preuve, les éléments qui permettaient de déclarer le présent accusé coupable de meurtre étaient franchement peu nombreux. Cette affaire était également chargée d'émotions en raison de ces agressions révoltantes. Si on analyse les actes des deux agresseurs, il me semble qu'on ne peut que conclure que les actes d'agression attribués au présent [accusé] se sont tous produits après que les blessures mortelles eurent été infligées et dans des circonstances où il n'est pas évident que Biniaris avait l'intention d'aider à commettre un meurtre. J'ai remarqué qu'il ne s'agissait pas non plus d'un cas d'entreprise commune où une seule ou plusieurs parties peuvent être en possession d'une arme meurtrière comme une arme à feu ou un couteau. Biniaris a participé très brièvement à une bagarre qui a eu des conséquences fatales. Je crois que, pour pouvoir déclarer Biniaris coupable, le juge des faits devrait conclure qu'il a aidé ou encouragé Stark en ayant le genre d'intention meurtrière mentionné au sous-al. 229(a)(ii); *R. c. Kirkness*, [1990] 3 R.C.S. 74, 60 C.C.C. (3d) 97. À la lumière des faits de la présente affaire, ce verdict était peut-être possible, mais il ne s'appuyait que très peu sur la preuve. La preuve que Biniaris aurait commis un meurtre était si faible que je crois que le verdict de meurtre rendu contre lui par le jury ne s'appuyait pas sur la preuve.

Le juge Hall était très préoccupé par le changement survenu dans la thèse sous-jacente de la culpabilité et, notamment, par le fait que le ministère

nal position that the respondent Biniaris was the principal offender when, in Hall J.A.'s view, there was no longer any evidentiary basis to treat him as such.

(ii) Ryan J.A., dissenting

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Ryan J.A. was of the opinion that the jury was entitled to conclude that the attack on Niven was a joint endeavor carried out by the respondent and Stark, and that the nature of the combined attack manifested the requisite intent to support a conviction for murder. She noted that the respondent had been the first to verbally challenge Niven and that he had entered the fray almost immediately after Stark had thrown Niven to the ground and begun punching him in the stomach. While there was evidence which could have been accepted by the jury as supporting the respondent's position that he lacked the necessary intent, Ryan J.A. was of the opinion that "[a]ll of these facts were for the jury to assess" (p. 77). In this light, she concluded that it was not unreasonable for the jury to convict the respondent of second degree murder. She would have dismissed the appeal.

V. Analysis

A. *Rights of Appeal from a Substituted Verdict*

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Shortly before the hearing of this appeal, the Court invited the parties and the interveners to address a preliminary legal issue, which is unique to this appeal. Of the three cases before us, *Biniaris* is the only one where the appeal is by the Crown, from a judgment of the Court of Appeal dismissing an appeal by the accused from his conviction for murder, but substituting a conviction for manslaughter. The question arises, therefore, as to whether a substituted verdict gives rise to a right of appeal by the Crown, whether with leave, or as of right on the strength of a dissent in the Court of Appeal, within the language of s. 693(1) of the *Criminal Code*.

public maintenait sa position initiale selon laquelle l'intimé Biniaris était l'auteur principal du crime, alors qu'il n'y avait plus, selon lui, aucun élément de preuve qui permettait de le considérer comme tel.

(ii) Madame le juge Ryan, dissidente

Le juge Ryan était d'avis que le jury avait le droit de conclure que l'attaque contre Niven était une entreprise commune de l'intimé et de Stark, et que la nature de l'attaque concertée démontrait l'existence de l'intention requise pour justifier une déclaration de culpabilité de meurtre. Elle a souligné que l'intimé avait été le premier à défier verbalement Niven et qu'il s'était mêlé à la bagarre presque immédiatement après que Stark eut projeté Niven au sol et commencé à lui donner des coups de poing à l'estomac. Même s'il existait des éléments de preuve que le jury aurait pu considérer comme appuyant la position de l'intimé, selon laquelle il n'avait pas l'intention requise, le juge Ryan était d'avis qu'[TRADUCTION] «[i]l appartenait au jury d'évaluer tous ces faits» (p. 77). Compte tenu de cela, elle a décidé qu'il n'était pas déraisonnable que le jury déclare l'intimé coupable de meurtre au deuxième degré. Elle aurait rejeté l'appel.

V. Analyse

A. *Droits d'appel contre une substitution de verdict*

Peu avant l'audition du pourvoi, notre Cour a invité les parties et les intervenants à aborder une question de droit préliminaire propre au présent pourvoi. Des trois pourvois dont nous sommes saisis, le pourvoi *Biniaris* est le seul qui a été formé par le ministère public contre un arrêt de la Cour d'appel qui a rejeté l'appel de l'accusé contre sa déclaration de culpabilité de meurtre, mais qui a substitué à cette dernière une déclaration de culpabilité d'homicide involontaire coupable. Se pose donc la question de savoir si une substitution de verdict confère au ministère public un droit d'appel avec autorisation ou de plein droit lorsqu'un juge de la Cour d'appel est dissident, au sens du par. 693(1) du *Code criminel*.

In this case, the Court of Appeal, acting under s. 686(1)(b)(i) and (3), dismissed the accused's appeal of his second degree murder conviction and substituted a conviction for manslaughter. This was clearly the correct procedure to follow in the case of a substituted verdict. See *R. v. Nantais*, [1966] 2 O.R. 246 (C.A.). The issue was raised by this Court as to whether in substituting a verdict, a court of appeal "sets aside a conviction", and consequently provides the Crown with a right of appeal under s. 693(1), or whether, in substituting a verdict, a court of appeal "affirms a conviction" so as to give the accused an appeal from the conviction on the substituted offence under s. 691(1), or, possibly, both.

In *R. v. McGloan*, [1976] 2 S.C.R. 842, at p. 848, Ritchie J., writing for the majority, considered the argument that the Crown had no right of appeal under s. 621(1) (now s. 693(1)), on the grounds that a substituted verdict did not set aside a conviction. Ritchie J. rejected this argument, pointing to the order of the Supreme Court of Alberta (Appellate Division), which clearly stated that the original conviction was quashed and a new conviction substituted. It is frequently the practice of courts of appeal, in similar cases, to state in their orders that the original conviction is set aside and a new conviction is substituted.

While the language of s. 686(1)(b)(i) and (3) does not contain an explicit direction to a court of appeal to set aside a conviction, when a court of appeal dismisses the accused's appeal from the original conviction by substituting a verdict on another count or part of the indictment, the court of appeal implicitly sets aside the conviction by the trial court and also implicitly affirms the new conviction on the included offence. Thus, there are co-existing rights of appeal for both the accused,

Dans la présente affaire, la Cour d'appel s'est fondée sur le sous-al. 686(1)(b)(i) et sur le par. 686(3) pour rejeter l'appel de l'accusé contre sa déclaration de culpabilité de meurtre au deuxième degré et substituer à cette dernière une déclaration de culpabilité d'homicide involontaire coupable. Il s'agissait manifestement de la bonne façon de procéder en matière de substitution de verdict. Voir *R. c. Nantais*, [1966] 2 O.R. 246 (C.A.). Notre Cour s'est demandé si, en substituant un verdict, une cour d'appel «annule une déclaration de culpabilité» et confère ainsi au ministère public un droit d'appel fondé sur le par. 693(1), ou si, en substituant un verdict, une cour d'appel «confirme une déclaration de culpabilité», de sorte que l'accusé peut, en vertu du par. 691(1), en appeler de la déclaration de culpabilité relative à l'infraction substituée, ou encore si, en substituant un verdict, il se peut qu'elle fasse les deux à la fois.

Dans l'arrêt *R. c. McGloan*, [1976] 2 R.C.S. 842, à la p. 848, le juge Ritchie, s'exprimant au nom des juges majoritaires, a examiné l'argument selon lequel le ministère public n'avait aucun droit d'appel en vertu du par. 621(1) (maintenant le par. 693(1)) du fait qu'une substitution de verdict n'annulait pas une déclaration de culpabilité. Le juge Ritchie a rejeté cet argument en attirant l'attention sur l'ordonnance de la Cour suprême de l'Alberta (Division d'appel), qui indiquait clairement que la déclaration de culpabilité initiale était annulée et remplacée par une nouvelle déclaration de culpabilité. Les cours d'appel ont souvent coutume, dans des affaires similaires, d'indiquer dans leurs ordonnances que la déclaration de culpabilité initiale est annulée et remplacée par une nouvelle déclaration de culpabilité.

Même si le texte du sous-al. 686(1)(b)(i) et celui du par. 686(3) n'ordonnent pas explicitement à une cour d'appel d'annuler une déclaration de culpabilité, il reste que, lorsqu'elle rejette l'appel de l'accusé contre la déclaration de culpabilité initiale en y substituant un verdict de culpabilité relativement à un autre chef ou à une autre partie de l'acte d'accusation, la cour d'appel annule implicitement la déclaration de culpabilité prononcée par le tribunal de première instance et confirme aussi implicite-

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under s. 691, and the Crown, under s. 693, to this Court from a court of appeal order for a substituted verdict.

B. Whether the Reasonableness of a Verdict Is a Question of Law

19 This Court, in *Yebe*, *supra*, decided unequivocally that the reasonableness of a verdict, within the meaning of s. 686(1)(a)(i) of the *Criminal Code*, involves a decision on a question of law, and as such gives rise to a further appeal to this Court. McIntyre J., speaking for a unanimous six-member panel of the Court, indicated that although the respondent Crown had raised that jurisdictional issue, it was not “strongly pressed” at the hearing of the appeal (p. 181). McIntyre J. recognized that although the proper qualification of the issue as either one of law, fact, or mixed fact and law was far from self-evident, there was no reason to treat it differently from the similar issue of whether a substantial wrong or miscarriage of justice had occurred, within the meaning of s. 686(1)(b)(iii). That having been interpreted as a question of law in *Mahoney v. The Queen*, [1982] 1 S.C.R. 834, McIntyre J. concluded that whether a verdict was unreasonable or not supportable by the evidence also amounted to a question of law.

20 The revisiting of this issue in the current trilogy is based, in part, on an argument that the decision in *Yebe* was an unjustified departure from the previous state of the law, and that it has not been consistently followed by this Court since.

21 The terminology “question of fact”, “question of law”, “question of mixed fact and law”, “question of law alone”, as used in the *Criminal Code* and in the case law in relation to rights of appeal has created serious difficulties of interpretation that are

ment la nouvelle déclaration de culpabilité relative à l’infraction incluse. Ainsi l’accusé, en vertu de l’art. 691, et le ministère public, en vertu de l’art. 693, bénéficient de droits coexistants d’interjeter appel devant notre Cour contre une ordonnance de substitution de verdict rendue par une cour d’appel.

B. Le caractère raisonnable d’un verdict est-il une question de droit?

Dans l’arrêt *Yebe*, précité, notre Cour a décidé sans équivoque que la question de savoir si un verdict est déraisonnable au sens du sous-al. 686(1)a)(i) du *Code criminel* implique une décision sur une question de droit et que, pour cette raison, elle donne naissance à un appel supplémentaire devant notre Cour. Le juge McIntyre, s’exprimant au nom d’une formation unanime de six juges de notre Cour, a indiqué que, même si le ministère public intimé avait soulevé cette question de compétence, il n’avait «pas insisté» sur ce point à l’audition du pourvoi (p. 181). Le juge McIntyre a reconnu que, même s’il était loin d’être évident en soi que la question devait être qualifiée de question de droit, de question de fait ou de question mixte de droit et de fait, il n’y avait aucune raison de la traiter différemment de la question similaire de savoir s’il y avait eu tort important ou erreur judiciaire grave au sens du sous-al. 686(1)b)(iii). Étant donné que cette question avait été interprétée comme une question de droit dans l’arrêt *Mahoney c. La Reine*, [1982] 1 R.C.S. 834, le juge McIntyre a conclu que la question de savoir si un verdict était déraisonnable ou ne pouvait pas s’appuyer sur la preuve constituait aussi une question de droit.

Le réexamen de cette question dans la présente trilogie est fondé en partie sur l’argument que l’arrêt *Yebe* constituait une dérogation injustifiée à l’état antérieur du droit et qu’il n’a pas toujours été suivi par notre Cour depuis lors.

Les expressions «question de fait», «question de droit», «question mixte de droit et de fait», «question de droit seulement», qui sont utilisées dans le *Code criminel* et la jurisprudence relativement aux droits d’appel, sont à l’origine de grandes diffi-

best resolved by a broad, purposive interpretative approach, adopted by Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 (quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87):

Today there is only one principle or approach [to statutory interpretation], 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.

The sole purpose of the exercise here, in identifying the reasonableness of a verdict as a question of fact, law or both, is to determine access to appellate review. One can plausibly maintain, on close scrutiny of any decision under review, that the conclusion that a verdict was unreasonable was reached sometimes mostly as a matter of law, in other cases predominantly as a matter of factual assessment. But when that exercise is undertaken as a jurisdictional threshold exercise, little is gained by embarking on such a case-by-case analysis. Rather, it is vastly preferable to look at the overall nature of these kinds of decisions, and of their implications. Ideally, threshold jurisdictional issues should be as straightforward and free of ambiguity as possible. Otherwise, as these and many similar cases illustrate, courts spend an inordinate amount of time and effort attempting to ascertain their jurisdiction, while their resources would be better employed dealing with the issues on their merits.

Whether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard. The process by which this standard is applied inevitably entails a review of the facts of the case. I will say more about the review process below. As a jurisdictional issue of appellate access, the application of that legal standard is enough to make the question a question of law. It is of no import to

cultés d'interprétation qui sont mieux résolues au moyen de la méthode d'interprétation large et fondée sur l'objet visé, que le juge Iacobucci a adoptée dans l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 21 (en citant E. Driedger, *Construction of Statutes* (2^e éd. 1983), à la p. 87):

[TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution [en matière d'interprétation législative]: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

En l'espèce, la qualification du caractère raisonnable d'un verdict de question de fait, de question de droit ou de question mixte de droit et de fait vise seulement à déterminer l'existence d'un droit d'appel. Après avoir examiné attentivement une décision qui fait l'objet d'un contrôle, on peut soutenir de façon plausible, dans certains cas, que la conclusion qu'un verdict était déraisonnable a été prise surtout du point de vue du droit, et dans d'autres cas, qu'elle résulte principalement d'une évaluation factuelle. Mais si on procède à cette qualification pour déterminer l'existence de compétence au départ, il est peu utile d'effectuer une telle analyse dans chaque cas. Au contraire, il vaut beaucoup mieux examiner la nature globale de ces types de décision et de leurs conséquences. Idéalement, les questions préliminaires de compétence devraient être aussi simples et claires que possible. Sans cela, comme la présente affaire et de nombreuses affaires semblables le démontrent, les tribunaux consacrent énormément de temps et d'efforts à tenter de vérifier s'ils ont compétence, alors que leurs ressources seraient beaucoup mieux utilisées s'ils examinaient les questions au fond.

La question de savoir si on peut dire qu'une déclaration de culpabilité est déraisonnable ou ne s'appuie pas sur la preuve mène, dans chaque cas, à l'application d'une norme juridique. L'application de cette norme commande inévitablement l'examen des faits de l'affaire. J'en dirai davantage plus loin au sujet du processus d'examen. Du fait qu'elle est appliquée pour déterminer la compétence en matière d'appel, cette norme juridique

suggest that it is not a “pure question of law”, or that it is not a “question of law alone”.

suffit pour faire de la question une question de droit. Il n’importe pas d’indiquer qu’il ne s’agit ni d’une «pure question de droit» ni d’une «question de droit seulement».

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Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown’s case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction. Although reasonable people may disagree about their appreciation of the facts, a conviction, which conveys legality, authority and finality, is not something about which reasonable people may disagree. A conviction cannot be unreasonable, except as a matter of law, in which case it must be overturned.

Le juge des faits, peu importe qu’il soit un jury ou un juge, jouit d’une grande latitude pour apprécier la preuve et décider des conclusions qu’il faut en tirer, pour évaluer la crédibilité des témoins et, en fin de compte, pour déterminer si le ministère public a présenté, dans l’ensemble, une preuve hors de tout doute raisonnable. Tout système judiciaire doit tolérer les divergences d’opinions raisonnables sur des questions de fait. Par conséquent, il est loisible au juge des faits de tirer toute conclusion de fait, sauf des conclusions déraisonnables qui sous-tendent une déclaration de culpabilité exécutoire en droit. Bien que des gens raisonnables puissent avoir une appréciation des faits différente, une déclaration de culpabilité, qui a une connotation de légalité, d’autorité et de caractère final, n’est pas une question sur laquelle ils peuvent être en désaccord. Une déclaration de culpabilité ne peut être déraisonnable que sur le plan du droit, et doit être annulée le cas échéant.

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Very little additional insight is gained by elaborate exercises in statutory interpretation. The intention of Parliament is better ascertained in broad terms than by microscopic examination of the relevant provisions of the *Criminal Code*. Although the cases before us today come as of right, on the basis of a dissent in the Court of Appeal, I think that the fact that they are appeals as of right obscures the true nature of the debate on the question of reviewability of alleged unreasonable convictions. Access to the Supreme Court is generally reserved for important cases that have legal significance. Inevitably, not all appeals as of right have great legal importance, although the assumption is that, as a category, they do. As with all other questions of law, not all dissents in an appeal court on the issue of unreasonable verdict rest on a question of great importance. However, if the reasonableness of a conviction is not a question of law, no right of appeal will exist from a decision on that issue, not even with leave of the Court. This result would, in my view, be incompatible with the inten-

Les exercices approfondis d’interprétation législative ne nous éclairent pas beaucoup. Il vaut mieux établir l’intention du législateur de manière générale plutôt que de le faire au moyen d’un examen à la loupe des dispositions pertinentes du *Code criminel*. Bien que les pourvois dont nous sommes saisis aujourd’hui soient des pourvois de plein droit en raison d’une dissidence en cour d’appel, j’estime que le fait qu’il s’agisse de pourvois de plein droit masque la vraie nature du débat sur la question de la possibilité d’examiner les allégations de déclaration de culpabilité déraisonnable. L’accès à la Cour suprême est généralement réservé aux affaires importantes sur le plan juridique. Les pourvois de plein droit n’ont pas tous nécessairement une grande importance sur le plan juridique, même si on tient pour acquis qu’ils ont cette importance en tant que catégorie. À l’instar d’autres questions de droit, les dissidences en cour d’appel sur la question du verdict déraisonnable ne reposent pas toutes sur une question de grande importance. Cependant, si le caractère raisonnable

tion of Parliament expressed, overall, in the totality of the scheme for appellate review.

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. It is inconceivable that Parliament would have permitted access, by leave or as of right, to this Court, in the case of trials or appeals affected by legal error, but would have granted no access whatsoever in the case of possibly the gravest error of all: an unreasonable conviction, or one that cannot be supported by the evidence.

The conclusion that a finding by an appeal court that a verdict is unreasonable or cannot be supported by the evidence raises a question of law is in harmony with the overall intent and spirit of the two-tier criminal appeal structure in the *Criminal Code*, even if there are some statutory constructions that may lend support to a different conclusion. Several of these constructions were advanced, none of which, in my view, is conclusive.

(i) Sections 686(1)(a)(i) and 686(1)(a)(ii)

For instance, the contrast between s. 686(1)(a)(i) and s. 686(1)(a)(ii) has been relied upon to suggest that the opinion of a court of appeal that the verdict is unreasonable is merely an opinion on a question of fact. For convenience, I will set these subsections out again:

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

d'une déclaration de culpabilité n'est pas une question de droit, il n'y aura aucun droit d'en appeler d'une décision sur ce point, pas même avec l'autorisation de la Cour. J'estime que ce résultat serait incompatible avec l'intention que le législateur a exprimée dans l'ensemble du régime de contrôle en appel.

Les appels sur des questions de droit en matière criminelle reposent en partie sur la volonté d'assurer que les déclarations de culpabilité criminelle résultent de procès dénués de toute erreur. Les procès dénués de toute erreur sont souhaitables en soi, mais à plus forte raison en tant que moyen d'éviter les déclarations de culpabilité erronées. Il est inconcevable que le législateur ait accordé le droit de se pourvoir devant notre Cour, avec autorisation ou de plein droit, dans le cas de procès ou d'appels entachés d'une erreur de droit, mais qu'il ne l'ait pas fait dans le cas de l'erreur qui est peut-être la plus grave de toutes: une déclaration de culpabilité qui est déraisonnable ou qui ne peut pas s'appuyer sur la preuve.

La conclusion que la décision d'une cour d'appel qu'un verdict est déraisonnable ou ne peut pas s'appuyer sur la preuve soulève une question de droit est conforme à l'intention générale et à l'esprit du régime d'appel à deux niveaux établi par le *Code criminel*, même si certaines interprétations de la loi peuvent étayer une conclusion différente. Plusieurs de ces interprétations ont été avancées, mais j'estime qu'aucune d'elles n'est concluante.

(i) Les sous-al. 686(1)a)(i) et 686(1)a)(ii)

Par exemple, on a invoqué le contraste entre les sous-al. 686(1)a)(i) et 686(1)a)(ii) pour prétendre que l'avis d'une cour d'appel que le verdict est déraisonnable n'est qu'une simple opinion sur une question de fait. Pour plus de commodité, je reproduis de nouveau le texte de ces sous-alinéas:

686. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'incapacité à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel:

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(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. . . .

a) peut admettre l'appel, si elle est d'avis, selon le cas:

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,

(ii) que le jugement du tribunal de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit . . .

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The reasoning is that if it were a question of law, there would be no need for both s. 686(1)(a)(i) and s. 686(1)(a)(ii). See *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221, at pp. 237-38; *Lampard v. The Queen*, [1969] S.C.R. 373, at pp. 380-81. This inference from the wording of the two subsections is far from inescapable. True, the remedial power contained in s. 686(1)(a)(i) may be linked to the jurisdiction of the court of appeal to entertain, with leave, questions of mixed fact and law or indeed questions of fact (see s. 675(1)(a)(ii)). However, it may also be viewed as a question of law that needed to be specifically identified as a basis for appellate intervention, since it would not fit well under the terminology used in s. 686(1)(a)(ii): an unreasonable verdict is not a “wrong decision on a question of law”. It is also arguable that the two subsections may coexist without creating a redundancy or in any way doing violence to the idea that an unreasonable verdict is a question of law, by contrasting the word “verdict” in s. 686(1)(a)(i) with the phrase “judgment of the trial court” in s. 686(1)(a)(ii). The “verdict” could be seen as referring to the wrong legal conclusion of the trial judge or the jury on the ultimate issue of guilt or innocence, as opposed to the wrong legal conclusions of the trial judge on a myriad of issues of substantive law, procedure and evidence.

On fait valoir que, s'il s'agissait d'une question de droit, les sous-al. 686(1)a(i) et 686(1)a(ii) seraient tous les deux inutiles. Voir *Sunbeam Corporation (Canada) Ltd. c. The Queen*, [1969] R.C.S. 221, aux pp. 237 et 238; *Lampard c. The Queen*, [1969] R.C.S. 373, aux pp. 380 et 381. Cette déduction du libellé des deux sous-alinéas est loin d'être inévitable. Il est vrai que le pouvoir de redressement prévu au sous-al. 686(1)a(i) peut être lié à la compétence de la cour d'appel d'examiner, avec son autorisation, des questions mixtes de droit et de fait ou, même, des questions de fait (voir le sous-al. 675(1)a(ii)). Il peut également être perçu comme une question de droit devant être décrite expressément comme justifiant l'intervention d'une cour d'appel, étant donné qu'il ne correspond pas bien à la terminologie utilisée au sous-al. 686(1)a(ii): un verdict déraisonnable n'est pas une «décision erronée sur une question de droit». Si on oppose le mot «verdict» figurant au sous-al. 686(1)a(i) à l'expression «jugement du tribunal de première instance» figurant au sous-al. 686(1)a(ii), on peut également prétendre que les deux sous-alinéas peuvent coexister sans créer de redondance ni aucunement aller à l'encontre de l'idée que le caractère déraisonnable d'un verdict est une question de droit. Le «verdict» pourrait être interprété comme visant la conclusion de droit erronée du juge du procès ou du jury sur la question fondamentale de la culpabilité ou de l'innocence, par opposition aux conclusions de droit erronées du juge du procès sur une multitude de questions de droit substantiel, de procédure et de preuve.

(ii) “Question of Law Alone” and Unreasonable Acquittals

Various arguments have been advanced, based on the implications that should flow from the use of the expression “question of law alone” in s. 676(1)(a), which provides for appeals by the Crown to the court of appeal. These arguments are of little assistance or consequence in determining the scope of access to this Court under ss. 691 or 693. The use of that expression can be taken to mean either that the Crown has a right of appeal from an acquittal only on a question of law, or that there is such a thing as a “question of law alone”, which is distinct from a “question of law”. I think it means the former. It is used in contrast to the right of the accused to appeal both on questions of law, questions of fact, and questions of mixed fact and law (see s. 675(1)(a)(i) and (ii)), and it is of no assistance in further defining the scope of the expression “question of law” in ss. 691 and 693.

The fact that a “question of law alone” is nothing different than a “question of law”, and that the reasonableness of a verdict is a “question of law” within the meaning of s. 686(1)(a)(i), raises the question of whether the Crown will have a right of appeal against an “unreasonable acquittal”. Although this question does not squarely arise on the facts of any of the three cases before us, it arises unavoidably since the interpretation given to “question of law” in s. 693(1) must equally apply to the phrase “question of law alone” in ss. 675(1) and 676(1). The conclusion that the reasonableness of a verdict always raises a question of law has a single, inevitable, consequence for these two sections: an accused person does not require leave to appeal under s. 675(1) where he or she challenges the reasonableness of the verdict. On the other

(ii) «Question de droit seulement» et acquittements déraisonnables

On a avancé divers arguments fondés sur les conséquences que devrait entraîner l’utilisation de l’expression «question de droit seulement» à l’al. 676(1)a), qui prévoit que le ministère public peut interjeter appel devant la cour d’appel. Ces arguments ont peu d’utilité ou d’importance pour ce qui est de déterminer la portée du droit d’appel devant notre Cour qui est prévu à l’art. 691 ou à l’art. 693. Le recours à cette expression peut s’interpréter comme signifiant soit que le ministère public n’a le droit d’en appeler d’un acquittement que sur une question de droit, soit qu’il existe une notion de «question de droit seulement» qui est distincte de la notion de «question de droit». J’estime que la première interprétation est la bonne. L’expression est utilisée par opposition au droit de l’accusé d’interjeter appel autant sur des questions de droit et des questions de fait que sur des questions mixtes de fait et de droit (voir les sous-al. 675(1)a)(i) et (ii)), et elle n’est d’aucune utilité pour ce qui est de définir davantage la portée de l’expression «question de droit» qui figure aux art. 691 et 693.

Le fait qu’une «question de droit seulement» ne diffère guère d’une «question de droit» et que le caractère raisonnable d’un verdict est une «question de droit» au sens du sous-al. 686(1)a)(i) soulève la question de savoir si le ministère public aura le droit d’en appeler d’un «acquittement déraisonnable». Même si cette question ne se pose pas directement d’après les faits de l’une ou l’autre des trois pourvois dont nous sommes saisis, elle se pose immanquablement étant donné que l’interprétation donnée à l’expression «question de droit» qui figure au par. 693(1) doit également s’appliquer aux expressions «simple question de droit» et «question de droit seulement» qui figurent aux par. 675(1) et 676(1) respectivement. La conclusion que le caractère raisonnable d’un verdict soulève toujours une question de droit a une seule conséquence inévitable pour ces deux paragraphes: l’accusé qui conteste le caractère raisonnable du verdict n’a pas besoin d’une autorisation d’appel fondée sur le par. 675(1). Par contre, cela ne com-

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hand, it will not affect the Crown's rights of appeal from an acquittal in any way.

promet aucunement le droit du ministère public d'en appeler d'un acquittement.

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In their written submissions, both the Attorney General for Ontario and the Attorney General of Manitoba (who participated in the companion cases) recognized that the law, as it stood at the time of the appeal, is clear that the Crown has no right of appeal from an acquittal on the ground that it was unreasonable, because the reasonableness of a verdict is a question of fact (or one of mixed fact and law). See, e.g., *Sunbeam*, *supra*, at p. 233; *Lampard*, *supra*, at pp. 380-81; *Ciglen v. The Queen*, [1970] S.C.R. 804, at pp. 814-15, *per* Cartwright C.J., dissenting; *R. v. B. (G.)*, [1990] 2 S.C.R. 57, at pp. 70-71; *R. v. H. (D.S.) and N. (J.D.)*, [1994] 2 S.C.R. 392, *rev'g* (1994), 90 C.C.C. (3d) 564 (B.C.C.A.); *R. v. Blundon* (1993), 84 C.C.C. (3d) 249 (Nfld. C.A.), at pp. 279-80. There can be no suggestion that the Crown's right of appeal at first instance is being enlarged or expanded to include "unreasonable acquittals" as a result of the determination that the reasonableness of a verdict is a "question of law" as well as a "question of law alone". As before, the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.

Dans leur argumentation écrite, le procureur général de l'Ontario et le procureur général du Manitoba (qui a participé aux pourvois connexes) ont tous les deux reconnu qu'il était clair, selon l'état du droit à l'époque du pourvoi, que le ministère public n'avait aucun droit d'en appeler d'un acquittement pour le motif qu'il est déraisonnable, parce que le caractère raisonnable d'un verdict est une question de fait (ou une question mixte de fait et de droit). Voir, par exemple, *Sunbeam*, précité, à la p. 233; *Lampard*, précité, aux pp. 380 et 381; *Ciglen c. La Reine*, [1970] R.C.S. 804, aux pp. 814 et 815, le juge en chef Cartwright, dissident; *R. c. B. (G.)*, [1990] 2 R.C.S. 57, aux pp. 70 et 71; *R. c. H. (D.S.) et N. (J.D.)*, [1994] 2 R.C.S. 392, *inf.* (1994), 90 C.C.C. (3d) 564 (C.A.C.-B.); *R. c. Blundon* (1993), 84 C.C.C. (3d) 249 (C.A.T.-N.), aux pp. 279 et 280. On ne saurait laisser entendre que, de prime abord, le droit d'appel du ministère public est élargi de manière à viser les «acquittements déraisonnables» en raison de la décision que le caractère raisonnable d'un verdict est à la fois une «question de droit» et une «question de droit seulement». Comme c'était le cas auparavant, il est interdit au ministère public d'en appeler d'un verdict d'acquiescement pour la seule raison qu'il est déraisonnable, sans invoquer quelque autre erreur de droit à l'origine de ce verdict.

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There is no anomaly in this result. The powers of the court of appeal in the case of Crown appeals on a question of law are contained in s. 686(4) of the *Code*. There is no reference in that section to an unreasonable verdict. This is consistent with the limited rights of appeal conferred on the Crown by s. 676(1). The absence of language granting a remedial power corresponding to s. 686(1)(a)(i), suggests that Parliament did not intend "unreasonable acquittals" to be appealable by the Crown at first instance. Further, and more importantly, as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt. See *Lampard*, *supra*, at pp. 380-81; *Schuldt v. The*

Cela n'a rien d'anormal. Les pouvoirs de la cour d'appel en matière d'appels interjetés par le ministère public sur une question de droit sont énoncés au par. 686(4) du *Code*. Il n'y a aucune mention de verdict déraisonnable dans ce paragraphe. Cela est compatible avec les droits d'appel limités que le par. 676(1) confère au ministère public. L'absence de termes accordant un pouvoir de redressement correspondant à celui prévu au sous-al. 686(1)(a)(i) indique que le législateur n'a pas voulu que les «acquittements déraisonnables» puissent, de prime abord, faire l'objet d'un appel du ministère public. En outre et qui plus est, la notion d'«acquittement déraisonnable» est incompatible, en droit, avec la présomption d'innocence et l'obligation qu'a la poursuite de présenter une preuve hors de tout

Queen, [1985] 2 S.C.R. 592, at p. 610; *B. (G.)*, *supra*, at pp. 70-71. Since, different policy considerations apply in providing the Crown with a right of appeal against acquittals, it seems to me that there is no principle of parity of appellate access in the criminal process that must inform our interpretation of this issue.

(iii) Redundancy

Finally, there is little merit in the argument, which is more one of policy than of statutory interpretation, that a second level of assessment of the reasonableness of a verdict is unnecessary since this Court is in no better position than courts of appeal to arrive at a correct answer, and that the exercise is merely repetitious. The review by the Supreme Court of a decision by a court of appeal that a verdict is unreasonable or cannot be supported by the evidence is in reality the first level of appellate review of that conclusion. The court of appeal, in examining the issue, obviously does not have the benefit of the analysis of the question by the trial court, as it would, or should, on legal issues such as the admissibility of evidence or the availability of a defence. The determination of the reasonableness of the verdict is therefore an original decision by the court of appeal, and there is no reason to bar the possibility of a review of that important decision.

In the end, there is no statutory interpretation principle that precludes the conclusion reached in *Yebe*s, which is in accordance with the overriding principle expressed in *Rizzo Shoes*, *supra*. To the extent that decisions subsequent to *Yebe*s may have suggested that the reasonableness of a verdict does not raise a question of law so as to give rise to a right of appeal, either as of right or by leave, under ss. 691 or 693 of the *Criminal Code*, these decisions in my view are in error, and *Yebe*s must be reaffirmed. Three cases were brought to our attention which are said to cast doubt on whether the reasonableness of a verdict involves a question of

doute raisonnable. Voir *Lampard*, précité, aux pp. 380 et 381; *Schuldt c. La Reine*, [1985] 2 R.C.S. 592, à la p. 610; *B. (G.)*, précité, aux pp. 70 et 71. Vu que différentes considérations de principe s'appliquent à l'attribution au ministère public d'un droit d'appel contre des acquittements, il me semble que le processus criminel ne comporte aucun principe de parité en matière de droit d'appel qui doit sous-tendre notre interprétation de cette question.

(iii) La redondance

Enfin, il y a peu de fondement à l'argument — qui relève davantage de la politique générale que de l'interprétation de la loi — qu'un deuxième niveau d'évaluation du caractère raisonnable d'un verdict est inutile vu que notre Cour n'est pas mieux placée que les cours d'appel pour trouver la bonne réponse et qu'il ne s'agit là que d'un exercice redondant. L'examen par la Cour suprême de la décision d'une cour d'appel qu'un verdict est déraisonnable ou ne peut pas s'appuyer sur la preuve constitue en réalité le premier niveau de contrôle en appel de cette conclusion. Lorsqu'elle examine la question, la cour d'appel ne bénéficie évidemment, à ce sujet, d'aucune analyse du tribunal de première instance comme ce serait le cas, ou ce devrait être le cas, relativement à des questions de droit comme l'admissibilité de la preuve ou la possibilité d'invoquer un moyen de défense. La détermination du caractère raisonnable du verdict est donc une décision originale de la cour d'appel, et rien ne justifie d'écarter la possibilité de contrôler cette décision importante.

En définitive, aucun principe d'interprétation législative n'empêche de tirer la conclusion à laquelle on est arrivé dans l'arrêt *Yebe*s, laquelle est conforme au principe dominant énoncé dans l'arrêt *Rizzo Shoes*, précité. Dans la mesure où les décisions postérieures à l'arrêt *Yebe*s peuvent avoir laissé entendre que le caractère raisonnable d'un verdict ne soulève pas une question de droit susceptible de donner naissance à un droit d'appel de plein droit ou avec autorisation en vertu de l'art. 691 ou de l'art. 693 du *Code criminel*, ces décisions sont, selon moi, erronées et l'arrêt *Yebe*s doit être confirmé à nouveau. On nous a signalé

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law. In all three cases, two of which were appeals by the Crown and one by the defence, this Court quashed the appeal which was launched as of right on the basis of a dissent in the court of appeal on the question of whether the verdict was reasonable. See *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), appeal quashed, [1997] 1 S.C.R. 304; *R. v. Osvath* (1996), 87 O.A.C. 274 (C.A.), appeal quashed, [1997] 1 S.C.R. 7; *R. v. Hamilton*, [1997] Q.J. No. 67 (QL) (C.A.), appeal quashed June 2, 1997, [1997] S.C.C.A. No. 105 (QL). The quashing of these appeals, which implies an absence of jurisdiction rather than a disposition of the appeal on the merits, could be viewed as a proper application of *Yebe*s. Arguably, *Yebe*s left open the possibility that some dissents in appellate courts on the unreasonableness of a verdict may not amount to dissents on a question of law. After referring to the difficulty in drawing a clear line between a question of fact and one of law, and in response to the argument advanced by the Crown in that case that there was no point of law dividing the majority and the dissenting judge in the Court of Appeal, McIntyre J. said, at p. 181:

Therefore, whether or not an appeal raises a question of law can only be determined after an examination of both the statements of law and the application of the law to the facts in the courts below.

This may be taken to suggest that some, but not all differences of opinion about the reasonableness of a verdict will give rise to a question of law. Others, presumably, would at best involve a mixed question of fact and law, or a simple disagreement on the facts. With respect, I do not agree that such a distinction was intended by *Yebe*s. It is both unsound and undesirable. When a conviction is said to be unreasonable, or unsupported by the evidence, it is that conclusion itself that raises a question of law, not merely the process by which the conclusion was reached. Therefore, there is no need to determine whether that conclusion was

trois arrêts dont on dit qu'ils sèment un doute quant à savoir si le caractère raisonnable d'un verdict soulève une question de droit. Dans ces trois arrêts, où l'appel avait été interjeté par le ministère public dans deux cas et par la défense dans l'autre cas, notre Cour a annulé le pourvoi qui avait été formé de plein droit en raison d'une dissidence en cour d'appel sur la question de savoir si le verdict était raisonnable. Voir *R. c. Jensen* (1996), 106 C.C.C. (3d) 430 (C.A. Ont.), pourvoi annulé, [1997] 1 R.C.S. 304; *R. c. Osvath* (1996), 87 O.A.C. 274 (C.A.), pourvoi annulé, [1997] 1 R.C.S. 7; *R. c. Hamilton*, [1997] A.Q. n° 67 (QL) (C.A.), pourvoi annulé le 2 juin 1997, [1997] C.S.C.R. n° 105 (QL). L'annulation de ces pourvois, qui implique l'absence de compétence plutôt qu'une décision sur le fond, pourrait être interprétée comme une application correcte de l'arrêt *Yebe*s. On peut prétendre que ce dernier arrêt n'a pas écarté la possibilité que certaines dissidences, en cour d'appel, sur le caractère déraisonnable d'un verdict ne constituent pas des dissidences sur une question de droit. Après avoir mentionné la difficulté de tracer une ligne de démarcation claire entre une question de fait et une question de droit, et pour répondre à l'argument du ministère public qu'il n'y avait, dans cette affaire, aucun point de droit sur lequel ne s'entendaient pas les juges majoritaires et le juge dissident de la Cour d'appel, le juge McIntyre a dit, à la p. 181:

Par conséquent, la question de savoir si un appel soulève une question de droit ne peut être tranchée qu'après un examen des principes de droit et l'application du droit aux faits par les cours d'instance inférieure.

Cela peut être interprété comme indiquant que les divergences d'opinions sur le caractère raisonnable d'un verdict ne soulèvent pas toutes une question de droit. Certaines divergences d'opinions ne constitueraient vraisemblablement tout au plus qu'une question mixte de droit et de fait, ou un simple désaccord sur les faits. En toute déférence, je ne suis pas d'accord pour dire qu'on a voulu établir une telle distinction dans l'arrêt *Yebe*s. Pareille distinction est à la fois boiteuse et non souhaitable. Lorsqu'on dit qu'une déclaration de culpabilité est déraisonnable ou qu'elle ne s'appuie pas sur la preuve, c'est cette conclusion même qui soulève

arrived at by the application of the wrong legal test, or otherwise tainted by a legal irregularity, since even when it applies the right test, in an error-free process, the court of appeal must be right, as a matter of law, on the legal appreciation of the verdict as a reasonable one. This approach is also consistent with the need for clarity in jurisdictional matters. There certainly would be little judicial economy in embarking upon a characterization of the appellate exercise as one of fact, rather than law, as a threshold determination of jurisdiction. Rather than streamlining or reducing appeals, it would add to their litigiousness, but on the wrong question.

C. Whether the Standard of Review Under Section 686(1)(a)(i) Should Be Modified

The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebe*s as follows:

[C]urial review is invited whenever a jury goes beyond a reasonable standard. . . . [T]he test is ‘whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered’.

(*Yebe*s, *supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, *per* Pigeon J.).)

That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of

une question de droit, et non simplement la façon dont on en est arrivé à cette conclusion. Il est donc inutile de déterminer si cette conclusion résulte de l’application du mauvais critère juridique ou si elle est par ailleurs entachée d’une irrégularité en droit, car même lorsqu’elle applique le bon critère en l’absence de toute erreur, la cour d’appel doit avoir raison en droit lorsqu’elle juge que le verdict est raisonnable. Ce point de vue est également compatible avec le besoin de clarté en matière de compétence. L’économie des ressources judiciaires serait sûrement faible si on entreprenait de qualifier de question de fait, plutôt que de droit, l’exercice auquel se livre une cour d’appel pour déterminer si elle a compétence au départ. Au lieu de rationaliser les appels ou d’en réduire le nombre, cela aurait pour effet d’en accroître le caractère litigieux, mais relativement à la mauvaise question.

C. La norme de contrôle en vertu du sous-al. 686(1)a)(i) devrait-elle être modifiée?

Le critère qu’une cour d’appel doit appliquer pour déterminer si le verdict d’un jury ou le jugement d’un juge du procès est déraisonnable ou ne peut pas s’appuyer sur la preuve a été énoncé clairement dans l’arrêt *Yebe*s:

[I]l doit y avoir révision judiciaire chaque fois que le jury dépasse une norme raisonnable. [. . .] [L]e critère est celui de savoir «si le verdict est l’un de ceux qu’un jury qui a reçu les directives appropriées et qui agit d’une manière judiciaire aurait pu raisonnablement rendre».

(*Yebe*s, *précité*, à la p. 185 (citant *Corbett c. La Reine*, [1975] 2 R.C.S. 275, à la p. 282, *le juge Pigeon*).)

Cette formulation du critère implique à la fois une évaluation objective et, dans une certaine mesure, une évaluation subjective. Elle oblige la cour d’appel à déterminer quel verdict un jury raisonnable, ayant reçu des directives appropriées et agissant de manière judiciaire, aurait pu rendre, et ce faisant, à examiner, à analyser et, dans la mesure où il est possible de le faire compte tenu de la situation désavantageuse dans laquelle se trouve un tribunal d’appel, à évaluer la preuve. Ce dernier processus est généralement considéré comme un exercice subjectif qui oblige la cour d’appel à examiner

that test entails, than to characterize it as either an objective or a subjective test.

l'importance de la preuve, et non seulement à vérifier si elle est suffisante. Le critère est donc mixte, et il est plus utile de décrire les conséquences de son application que de le qualifier d'objectif ou de subjectif.

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The *Yebe*s test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, 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. For example, in *R. v. Burke*, [1996] 1 S.C.R. 474, this Court was in a position to identify the deficiencies in the trial judge's analysis of the evidence which led to her unreasonable conclusions in respect of the three counts of indecent assault facing the accused. In that case, Sopinka J. found that the trial judge had ignored the possibility of collusion or corroboration between witnesses before accepting their "strikingly similar" evidence, had not been alive to circumstances (i.e., the absence of physical traces of an alleged indecent assault which, if true, should have left observable marks) which caused great concern about the reliability of evidence adduced in support of allegations of a bizarre nature, and had relied uncritically on unorthodox identification evidence. Similarly, in *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev'g (1997), 97 B.C.A.C. 303, this Court agreed with Rowles J.A., dissenting, that the trial judge had failed to advert to deficiencies in the pre-trial identification procedure and the shortcoming of "in-dock" identification. Finally, in *R. v. O'Connor* (1998), 123 C.C.C. (3d) 487 (B.C.C.A.), at pp. 492-93 and 518-20, the trial judge accepted the accused's evidence that he was not present at the place where the offence was alleged to have been committed, and yet convicted the accused. This logical inconsistency was relied upon by the Court of Appeal to explain the unreasonableness of the verdict. These examples demonstrate that in trials by judge alone, the court

Le critère de l'arrêt *Yebe*s est formulé en fonction d'un verdict prononcé par un jury, mais il s'applique tout autant au jugement d'un juge siégeant sans jury. L'examen en appel du caractère déraisonnable est toutefois différent et un peu plus facile lorsque le jugement contesté est celui d'un juge seul, du moins quand il y a des motifs de jugement assez substantiels. Le cas échéant, le tribunal d'appel qui procède à l'examen est parfois en mesure de déceler une lacune dans l'évaluation de la preuve ou dans l'analyse, qui servira à expliquer la conclusion déraisonnable qui a été tirée, et à justifier l'annulation. Par exemple, dans l'arrêt *R. c. Burke*, [1996] 1 R.C.S. 474, notre Cour a été en mesure de déceler les lacunes de l'analyse de la preuve qui avaient amené le juge du procès à tirer des conclusions déraisonnables sur les trois chefs d'attentat à la pudeur auxquels faisait face l'accusé. Dans cet arrêt, le juge Sopinka a décidé, d'une part, que le juge du procès n'avait tenu compte ni de la possibilité de collusion ou de corroboration entre les témoins avant d'accepter leurs dépositions d'une «ressemblance frappante», ni des circonstances (c'est-à-dire l'absence d'indices physiques d'un prétendu attentat à la pudeur qui, s'il s'était produit, aurait dû laisser des traces visibles) qui soulevaient de sérieux doutes au sujet de la fiabilité de la preuve produite à l'appui d'étranges allégations, et d'autre part, que celui-ci s'était fondé, sans se poser de questions, sur une preuve d'identification inhabituelle. De même, dans l'arrêt *R. c. Reitsma*, [1998] 1 R.C.S. 769, inf. (1997), 97 B.C.A.C. 303, notre Cour a conclu, à l'instar du juge Rowles, dissidente en cour d'appel, que le juge du procès n'avait fait aucune allusion aux lacunes de la procédure d'identification préalable au procès et à la faiblesse de l'identification au banc des accusés. Enfin, dans l'arrêt *R. c. O'Connor* (1998), 123 C.C.C. (3d) 487 (C.A.C.-B.), aux pp. 492, 493 et 518 à 520, le juge du procès a accepté le témoignage de l'accusé, selon lequel il n'était pas à l'endroit où l'infraction aurait été

of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury. If there are no errors in the charge, as must be assumed, there is no way of determining the basis upon which the jury reached its conclusion. But this does not dispense the reviewing court from the need to articulate the basis upon which it finds that the conclusion reached by the jury was unreasonable. It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This “lurking doubt” may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner. In that case, the court of appeal must proceed further with its analysis.

commise, ce qui ne l’a pas empêché de déclarer l’accusé coupable. La Cour d’appel a invoqué cet illogisme pour expliquer le caractère déraisonnable du verdict. Ces exemples démontrent que, dans le cas d’un procès devant un juge seul, la cour d’appel peut souvent identifier les faiblesses de l’analyse qui ont amené le juge des faits à tirer une conclusion déraisonnable, et qu’elle devrait le faire. La cour d’appel est donc justifiée d’intervenir et d’annuler un verdict parce qu’il est déraisonnable, lorsqu’il ressort des motifs du juge du procès qu’il n’a pas tenu compte d’un principe de droit applicable ou qu’il a inscrit un verdict incompatible avec les conclusions de fait tirées. Ces faiblesses discernables s’apparentent parfois elles-mêmes à une erreur de droit distincte et permettent donc facilement de conclure que le verdict déraisonnable auxquels elles ont donné lieu soulève également une question de droit.

Le contrôle en appel est beaucoup plus difficile lorsque la cour d’appel doit statuer sur l’allégation de caractère déraisonnable du verdict prononcé par un jury. Si l’exposé ne contient aucune erreur, comme il faut le présumer, il n’y a aucun moyen de déterminer ce qui a amené le jury à tirer sa conclusion. Mais cela ne dispense pas la cour qui procède au contrôle du besoin d’énoncer les motifs pour lesquels elle juge que la conclusion tirée par le jury était déraisonnable. Il ne suffit pas que la cour d’appel parle d’un vague malaise ou d’un doute persistant qui résulte de son propre examen de la preuve. Ce «doute persistant» peut être un puissant élément déclencheur d’un examen approfondi de la preuve en appel, mais il ne constitue pas, sans plus d’explications, une bonne raison de modifier les conclusions d’un jury. En d’autres termes, si après avoir examiné la preuve à la fin d’un procès dénué de toute erreur, qui a abouti à une déclaration de culpabilité, le juge de la cour d’appel continue d’éprouver un doute ou un certain malaise, ce doute, qui n’est pas suffisant en soi pour justifier l’annulation de la déclaration de culpabilité, peut constituer un signe utile qu’on en est effectivement arrivé d’une manière non judiciaire au verdict. Dans ce cas, la cour d’appel doit poursuivre son analyse.

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When a jury which was admittedly properly instructed returns what the appeal court perceives to be an unreasonable conviction, the only rational inference, if the test in *Yebes* is followed, is that the jury, in arriving at that guilty verdict, was not acting judicially. This conclusion does not imply an impeachment of the integrity of the jury. It may be that the jury reached its verdict pursuant to an analytical flaw similar to the errors occasionally incurred in the analysis of trial judges and revealed in their reasons for judgment. Such error would of course not be apparent on the face of the verdict by a jury. But the unreasonableness itself of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury. Judicial appreciation of the evidence is governed by rules that dictate the required content of the charge to the jury. These rules are sometimes expressed in terms of warnings, mandatory or discretionary sets of instructions by which a trial judge will convey the product of accumulated judicial experience to the jury, who, by definition, is new to the exercise. For instance, a judge may need to warn the jury about the frailties of eye-witness identification evidence. Similarly, years of judicial experience has revealed the possible need for special caution in evaluating the evidence of certain witnesses, such as accomplices, who may, to the uninitiated, seem particularly knowledgeable and therefore credible. Finally, judicial warnings may be required when the jury has heard about the criminal record of the accused, or about similar fact evidence. But these rules of caution cannot be exhaustive, they cannot capture every situation, and cannot be formulated in every case as a requirement of the charge. Rather, after the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial

Lorsqu'une déclaration de culpabilité prononcée par un jury qui a reçu des directives certes appropriées est jugée déraisonnable par la cour d'appel, la seule conclusion rationnelle qui peut être tirée, selon le critère de l'arrêt *Yebes*, est que le jury n'a pas agi de manière judiciaire pour en arriver à ce verdict de culpabilité. Cette conclusion ne met pas en doute l'intégrité du jury. Il se peut que le jury soit arrivé à son verdict en raison d'une faiblesse d'analyse semblable aux erreurs d'analyse que les juges du procès commettent parfois et qui ressortent de leurs motifs de jugement. Une telle erreur n'est évidemment pas apparente à la lecture même du verdict d'un jury. Mais le caractère déraisonnable lui-même du verdict est évident pour la personne dotée d'une formation juridique qui l'examine si, compte tenu de l'ensemble des circonstances d'une affaire donnée, l'appréciation judiciaire des faits exclut la conclusion tirée par le jury. L'appréciation judiciaire de la preuve est régie par des règles qui dictent le contenu de l'exposé au jury. Ces règles sont parfois exprimées sous forme de mises en garde, de directives obligatoires ou discrétionnaires, au moyen desquelles un juge du procès transmet le fruit de toute son expérience judiciaire aux membres du jury qui, par définition, sont des profanes en la matière. Par exemple, il se peut qu'un juge doive mettre le jury en garde contre les faiblesses de la preuve d'identification par témoin oculaire. De même, des années d'expérience judiciaire montrent qu'il peut se révéler nécessaire de faire une mise en garde spéciale en évaluant la déposition de certains témoins, comme les complices, qui, aux yeux du profane, peuvent sembler particulièrement bien informés et donc crédibles. Enfin, il se peut que le juge doive faire une mise en garde lorsque le jury a entendu parler du casier judiciaire de l'accusé ou d'une preuve de faits similaires. Mais ces règles de prudence ne peuvent ni être exhaustives au sens d'englober chaque situation, ni constituer, dans chaque cas, une exigence de l'exposé au jury. Au contraire, une fois que le jury a reçu des directives suffisantes au sujet du droit applicable et qu'il a été mis en garde, si nécessaire, contre la possibilité de tirer des conclusions injustifiées, il reste que, dans certains cas, l'ensemble de la preuve ainsi que les faits particuliers de l'affaire amèneront un juriste

was flawed in light of the unreasonable result that it produced.

When an appellate court arrives at that conclusion, it does not act as a “thirteenth juror”, nor is it “usurping the function of the jury”. In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

It is not particularly significant to describe this judicial oversight as either objective or subjective. It is exercised by an appeal court and therefore it will invariably draw on a collection of judicial experiences. Because of its judicial character, and because it purports to identify features of a case that will give experienced jurists cause for concern, it is imperative that the reviewing court articulate as precisely as possible what features of the case suggest that the verdict reached by the jury was unreasonable, despite the fact that it was not tainted by any erroneous instructions as to the applicable law. In some cases, the articulation of the grounds upon which an appellate court concludes that a conviction was unreasonable may elucidate previously unidentified dangers in evidence and give rise to additional warnings to the jury in subsequent cases. Most of the time, it will simply point to a case that presented itself with several causes for concern, none of which, in isolation, might have required that the jury be warned

expérimenté à conclure que l’appréciation des faits effectuée au procès était lacunaire vu le résultat déraisonnable auquel elle a mené.

Lorsqu’une cour d’appel en arrive à cette conclusion, elle n’agit pas à titre de «treizième juré» et n’«usurpe [pas non plus] la fonction de jury». En concluant qu’aucun jury ayant reçu des directives appropriées et agissant d’une manière judiciaire n’aurait pu prononcer une déclaration de culpabilité, le tribunal d’examen conclut inévitablement que les jurés qui ont prononcé la déclaration de culpabilité n’ont pas agi de manière judiciaire. Dans ce contexte, agir de manière judiciaire signifie non seulement agir impartialement, appliquer la loi et juger uniquement en fonction du dossier, mais encore tirer une conclusion qui ne va pas à l’encontre de l’ensemble de l’expérience judiciaire. Telle est, à mon avis, l’évaluation que doit faire le tribunal d’examen. Il ne suffit pas de se demander si douze jurés ayant reçu des directives appropriées et agissant d’une manière judiciaire auraient pu arriver au même résultat, mais encore faut-il le faire à la lumière de l’expérience judiciaire qui est un autre moyen d’éviter les déclarations de culpabilité injustifiées.

Il n’importe pas particulièrement de qualifier d’objective ou de subjective cette surveillance judiciaire. Elle est exercée par une cour d’appel de sorte qu’elle s’appuie inmanquablement sur l’expérience de divers juges. En raison de la nature judiciaire de cette surveillance et du fait qu’elle vise à identifier les caractéristiques d’une affaire qui sont de nature à préoccuper des juristes expérimentés, il est absolument nécessaire que le tribunal d’examen décrive de façon aussi précise que possible les caractéristiques de l’affaire qui laissent croire que le verdict du jury était déraisonnable, même s’il n’était pas vicié par des directives erronées sur le droit applicable. Dans certains cas, les motifs qu’une cour d’appel donne à l’appui de sa conclusion qu’une déclaration de culpabilité est déraisonnable peuvent faire ressortir des dangers autrefois inconnus en matière de preuve et donner lieu à d’autres mises en garde au jury dans des affaires ultérieures. La plupart du temps, ils ne font qu’attirer l’attention sur une affaire qui comportait

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in any particular way. There are many illustrations from the case law of verdicts having been found unreasonable essentially on the strength of accumulated judicial experience. Concerns about various aspects of the frailty of identification evidence have been a recurrent basis, by itself or together with other considerations, for overturning verdicts as unreasonable. See, e.g., *Burke, supra*; *Reitsma, supra*; *R. v. Keeper* (1993), 88 Man. R. (2d) 156 (C.A.); *R. v. Malcolm* (1993), 81 C.C.C. (3d) 196 (Ont. C.A.); *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); *R. v. N.D.*, [1993] O.J. No. 2139 (QL) (C.A.). Judicial experience has also been relied upon to question the reasonableness of verdicts in cases of sexual misconduct presenting troubling features such as allegations of sexual touching of a bizarre nature (see, e.g., *Burke, supra*; *R. v. C.V.*, [1993] O.J. No. 1512 (QL) (C.A.); *R. v. L. (J.H.H.P.)* (1992), 75 C.C.C. (3d) 165 (Man. C.A.)), or the possibility of collusion between witnesses (see, e.g., *Burke, supra*). Finally, the experience of the courts has occasionally been brought to bear, although not always explicitly, on the assessment of verdicts rejecting a defence with respect to which there may be unjustified skepticism or even prejudice because those relying on such justifications or excuses may be viewed as simply trying to avoid responsibility for their actions. See, e.g., *R. v. Vaillancourt* (1999), 136 C.C.C. (3d) 530 (Que. C.A.); *Molodowic, supra*.

plusieurs sources de préoccupation, dont aucune, prise isolément, n'aurait pu commander une mise en garde particulière du jury. La jurisprudence renferme plusieurs exemples de verdicts qui ont été jugés déraisonnables essentiellement sur la foi de l'expérience judiciaire. Les préoccupations relatives à divers aspects de la faiblesse de la preuve d'identification justifient souvent, à elles seules ou conjointement avec d'autres facteurs, d'écarter des verdicts pour le motif qu'ils sont déraisonnables. Voir, par exemple, *Burke*, précité; *Reitsma*, précité; *R. c. Keeper* (1993), 88 Man. R. (2d) 156 (C.A.); *R. c. Malcolm* (1993), 81 C.C.C. (3d) 196 (C.A. Ont.); *R. c. Tat* (1997), 117 C.C.C. (3d) 481 (C.A. Ont.); *R. c. N.D.*, [1993] O.J. No. 2139 (QL) (C.A.). On s'est également fondé sur l'expérience judiciaire pour mettre en doute le caractère raisonnable de verdicts rendus dans des affaires d'inconduite sexuelle qui comportaient des caractéristiques troublantes comme des allégations d'attouchements sexuels étranges (voir, par exemple, *Burke*, précité; *R. c. C.V.*, [1993] O.J. No. 1512 (QL) (C.A.); *R. c. L. (J.H.H.P.)* (1992), 75 C.C.C. (3d) 165 (C.A. Man.)), ou la possibilité de collusion entre témoins (voir, par exemple, *Burke*, précité). Enfin, il est arrivé parfois que l'expérience des tribunaux soit mise à profit, quoique ce ne soit pas toujours explicitement, pour évaluer des verdicts qui rejettent un moyen de défense susceptible d'engendrer un scepticisme injustifié ou même des préjugés, en raison de la possibilité que les gens qui invoquent de telles justifications ou excuses soient perçus comme tentant simplement d'éviter d'assumer la responsabilité de leurs actes. Voir, par exemple, *R. c. Vaillancourt* (1999), 136 C.C.C. (3d) 530 (C.A. Qué.); *Molodowic*, précité.

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It follows from the above that the test in *Yebe*s continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or

Il s'ensuit que les cours d'appel doivent continuer d'appliquer le critère de l'arrêt *Yebe*s pour déterminer si le verdict du jury est déraisonnable ou ne peut pas s'appuyer sur la preuve. Dans la mesure où ce critère a un aspect subjectif, c'est l'appréciation subjective d'une personne qui possède la formation et l'expérience d'un juge qui doit être mise à profit pour examiner la preuve sur laquelle repose une déclaration de culpabilité que l'on prétend déraisonnable. Cela oblige le juge qui procède à l'examen à faire appel à sa connaissance

her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention. I wish to stress the importance of explicitness in the articulation of the reasons that support a finding that a verdict is unreasonable or cannot be supported by the evidence. Particularly since this amounts to a question of law that may give rise to an appeal, either as of right or by leave, the judicial process requires clarity and transparency as well as accessibility to the legal reasoning of the court of appeal. When there is a dissent in the court of appeal on the issue of the reasonableness of the verdict, both the spirit and the letter of s. 677 of the *Criminal Code* should be complied with. This Court should be supplied with the grounds upon which the verdict was found to be, or not to be, unreasonable.

D. Application to this Appeal

The appellant raised three issues before this Court:

1. Did the majority of the British Columbia Court of Appeal err in law in failing to consider that the verdict was reasonable and supported by the evidence on the basis of co-perpetrator liability as outlined in *Regina v. McMaster*, [1996] 1 S.C.R. 740?
2. Did the majority of the British Columbia Court of Appeal err in law by applying the wrong test to determine whether the verdict was unreasonable or could not be supported by the evidence?
3. Did the majority of the British Columbia Court of Appeal err in law in failing to review, and to some extent re-examine and re-weigh, all of the evidence in the instant case when it concluded that the verdict was unreasonable and unsupported by the evidence?

These three issues can conveniently be addressed together. At the outset of the respondent Biniaris' trial and until the change in Dr. Carlyle's

du droit et à l'expertise que les tribunaux ont acquise au fil des ans, et non seulement à sa propre expérience personnelle et à sa propre perspicacité. Cela oblige également le tribunal d'examen à énoncer de façon aussi claire et précise que possible les motifs de son intervention. Je tiens à souligner l'importance d'énoncer explicitement les motifs à l'appui d'une conclusion qu'un verdict est déraisonnable ou ne peut pas s'appuyer sur la preuve. Étant donné, plus particulièrement, qu'une telle conclusion constitue une question de droit susceptible de donner lieu à un appel, de plein droit ou avec autorisation, le processus judiciaire exige la clarté et la transparence, ainsi que l'accessibilité au raisonnement juridique de la cour d'appel. Lorsqu'un juge de la cour d'appel est dissident sur la question du caractère raisonnable du verdict, il faut respecter à la fois l'esprit et la lettre de l'art. 677 du *Code criminel*. Notre Cour doit disposer des motifs pour lesquels le verdict a été jugé déraisonnable ou non.

D. Application au présent pourvoi

L'appelante a soulevé trois questions devant notre Cour:

[TRADUCTION]

1. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont-ils commis une erreur de droit en ne considérant pas que le verdict était raisonnable et s'appuyait sur la preuve compte tenu de la responsabilité du coauteur exposée dans l'arrêt *Regina c. McMaster*, [1996] 1 R.C.S. 740?
2. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont-ils commis une erreur de droit en appliquant le mauvais critère pour déterminer si le verdict était déraisonnable ou ne pouvait pas s'appuyer sur la preuve?
3. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont-ils commis une erreur de droit en omettant d'examiner et, dans une certaine mesure, de réexaminer et réévaluer l'ensemble de la preuve dans la présente affaire, lorsqu'ils ont conclu que le verdict était déraisonnable et ne s'appuyait pas sur la preuve?

Ces trois questions peuvent être examinées ensemble. À partir du début du procès de l'intimé Biniaris jusqu'au changement d'avis du

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opinion, the Crown's position was that Biniaris alone had caused the fatal injuries suffered by Niven and was guilty of second degree murder as a principal. The shift in Dr. Carlyle's evidence led Crown counsel, at the end of the trial, to advance a modified, three-part theory of liability — liability as a principal, liability as a co-perpetrator or liability as an aider or abettor. Boyd J. dealt adequately with the implications of the reversal of Dr. Carlyle's position and the Crown's modified theory in her charge to the jury. The trial judge explained the Crown's position that it was open to the jury to reject the medical evidence offered by Drs. Rice and Carlyle on the issue of causation in favour of their own common sense and, if they were satisfied beyond a reasonable doubt that Biniaris had acted with the requisite intent, to conclude that Biniaris was guilty of second degree murder as the perpetrator of Niven's fatal injuries. However, Boyd J. quite properly urged the jury to be very careful, characterizing the choice to ignore the unanimous expert evidence on causation as a "dangerous venture". The trial judge then explained the circumstances under which it was open to the jury, applying the relevant principles of party liability set out in s. 21(1) of the *Criminal Code*, to convict the accused of second degree murder:

The matter now to consider is under what circumstances one or more persons can be responsible for the death of the deceased and one *actus reus*.

. . .

[I]f you should find after a consideration of all of the evidence that it has been shown beyond a reasonable doubt that the accused, Mr. Biniaris, together with Mr. Stark, participated in a chain of events which were all interrelated and interconnected from the time the altercation began until they left the scene, then you will have concluded that the *actus reus* has been committed.

. . .

D^r Carlyle, le ministère public estimait que seul Biniaris avait causé les blessures mortelles de Niven et qu'il était coupable de meurtre au deuxième degré en tant qu'auteur principal du crime. Le changement de témoignage du D^r Carlyle a amené l'avocat du ministère public à avancer, à la fin du procès, une nouvelle thèse à trois volets de la responsabilité — la responsabilité en tant qu'auteur principal, la responsabilité en tant que coauteur ou la responsabilité en tant que personne ayant aidé ou encouragé. Dans son exposé au jury, le juge Boyd a traité adéquatement des conséquences du revirement d'opinion du D^r Carlyle et de la nouvelle thèse du ministère public. Le juge du procès a expliqué le point de vue du ministère public que les membres du jury pouvaient se servir de leur propre bon sens pour rejeter la preuve médicale des D^{rs} Rice et Carlyle sur la question de la causalité, et conclure que Biniaris était coupable de meurtre au deuxième degré en tant qu'auteur des blessures mortelles de Niven, s'ils étaient convaincus hors de tout doute raisonnable que Biniaris avait eu l'intention requise en agissant. Cependant, le juge Boyd a parfaitement eu raison d'inciter le jury à être très prudent et de qualifier de [TRADUCTION] «risqué» le choix de ne pas tenir compte de la preuve d'expert unanime sur la causalité. Le juge du procès a ensuite expliqué les circonstances dans lesquelles le jury pouvait appliquer les principes pertinents de la responsabilité du participant à une infraction, énoncés au par. 21(1) du *Code criminel*, pour déclarer l'accusé coupable de meurtre au deuxième degré:

[TRADUCTION] Il s'agit maintenant d'examiner les circonstances dans lesquelles une seule ou plusieurs personnes peuvent être responsables du décès de la victime et d'un *actus reus*.

. . .

[S]i, après avoir examiné l'ensemble de la preuve, vous deviez conclure qu'il a été démontré hors de tout doute raisonnable que l'accusé, M. Biniaris, a participé conjointement avec M. Stark à une suite d'événements étroitement liés les uns aux autres, à partir du début de l'altercation jusqu'à leur départ des lieux, vous aurez alors conclu que l'*actus reus* a été commis.

. . .

Assuming... that you conclude there was such a chain of events, if you should find beyond a reasonable doubt that Mr. Biniaris, during the course of that chain of events, struck Mr. Niven in the manner which has been described in the evidence, and if you find again beyond a reasonable doubt that these blows were delivered by Mr. Biniaris either with the intent to cause his death or with the intent to cause Mr. Niven bodily harm which he knew was likely to cause his death and was reckless whether death ensued or not, then he is guilty of second degree murder [as a co-perpetrator] no matter which of the blows during that series of events, including the initial fall to the ground, caused Mr. Niven's death.

Assuming again that you conclude there was a chain of events, an interrelated chain of events constituting the *actus reus*, if you find it was Mr. Stark who intended to kill Mr. Niven and that Mr. Biniaris, knowing of Stark's intention to cause bodily harm to Niven that was likely to cause death, aided or abetted Stark by either encouraging Niven to fight or by actually participating in the beating in order to carry out that purpose, then you will have found that Mr. Biniaris was an accomplice and is a party to the offence of second degree murder and is equally guilty regardless of whether or not Mr. Biniaris' actions, the stomping, the kicking, regardless [of] whether any of that actually caused Mr. Niven's death.

What I am really saying to you is there are two routes to a second degree murder conviction. One is if you find that Mr. Biniaris was the principal offender, and that other is if you find that Mr. Biniaris was a party [either as a co-perpetrator or as an accomplice] to a single transaction, an interrelated series of events that led to and ultimately resulted in Mr. Niven's death.

The unusual course of the respondent's trial caused grave concern to the majority of the Court of Appeal and ultimately, in my respectful view, led Hall J.A.'s reasonableness analysis astray. Despite the availability of two alternative routes to a second degree murder conviction, neither of which was dependent on proof that the respondent actually caused Niven's fatal injuries, Hall J.A.'s reasons for judgment indicate that he remained unduly concerned about causation. In light of the state of the medical evidence at the end of the trial, Hall J.A. correctly concluded that, "the only safe

Dans l'hypothèse [...] où vous décideriez qu'une telle suite d'événements a eu lieu, si vous deviez conclure hors de tout doute raisonnable que M. Biniaris a, au cours de cette suite d'événements, frappé M. Niven de la manière décrite dans la preuve, et si vous deviez également conclure hors de tout doute raisonnable que M. Biniaris a porté ces coups dans l'intention de causer la mort de M. Niven ou de lui infliger des lésions corporelles qu'il savait être de nature à causer sa mort et qu'il lui était indifférent que la mort s'ensuive ou non, il sera alors coupable de meurtre au deuxième degré [en tant que coauteur] peu importe lequel des coups portés au cours de cette suite d'événements, y compris la première chute au sol, a causé la mort de M. Niven.

Toujours dans l'hypothèse où vous décideriez qu'il y a eu une suite d'événements, une suite d'événements étroitement liés constituant l'*actus reus*, si vous concluez que c'était M. Stark qui avait l'intention de tuer M. Niven et que M. Biniaris, connaissant l'intention de Stark d'infliger à M. Niven des lésions corporelles de nature à causer sa mort, a aidé ou encouragé Stark en incitant M. Niven à se battre ou en participant effectivement à la raclée afin de mettre à exécution cette intention, vous aurez alors conclu que M. Biniaris était complice, qu'il a participé à l'infraction de meurtre au deuxième degré et qu'il est tout aussi coupable peu importe que ses actes, le piétinement ou les coups de pied, aient ou n'aient pas vraiment causé la mort de M. Niven.

Ce que je vous dis, en réalité, c'est qu'il y a deux manières de parvenir à une déclaration de culpabilité de meurtre au deuxième degré. La première est si vous concluez que M. Biniaris était l'auteur principal de l'infraction, et la deuxième, si vous concluez que M. Biniaris a participé [à titre de coauteur ou de complice] à une seule opération, à une suite d'événements étroitement liés qui ont abouti à la mort de M. Niven.

La tournure inusitée du procès de l'intimé a fait naître des préoccupations sérieuses chez les juges majoritaires de la Cour d'appel et a fini par fausser, à mon avis, l'analyse du caractère raisonnable par le juge Hall. Malgré l'existence de deux raisonnements permettant de parvenir à une déclaration de culpabilité de meurtre au deuxième degré, dont aucun ne dépendait de la preuve que l'intimé était vraiment l'auteur des blessures mortelles de Niven, les motifs de jugement du juge Hall indiquent que la question de la causalité continuait de le préoccuper démesurément. Compte tenu de

route for a conviction of the appellant Biniaris for murder lay through the application of s. 21 of the *Criminal Code*” (p. 71). This was also clearly the view of the trial judge who directed the jury accordingly. However, Hall J.A.’s analysis remained focused on the issue of causation, despite its minor significance to the respondent’s liability as a party. He wrote (at pp. 71-73):

At the outset, the jury had, in the Crown opening, been advised of the theory that the fatal injuries were caused by actions of the [accused] Biniaris. By the end of the case there had been a complete reversal of this theory. He was now said to be liable to be found culpable of murder on the ground of being a party to the activity of Stark. It must be observed that the activity of Stark causative of the injuries had terminated almost entirely by the time Biniaris became involved in the affray. Blows struck by Stark after Niven was on the pavement were to his abdomen area and if, as was less than clear from the evidence, Stark did, near the termination of the incident, direct a kick at the chin of Niven, that again seems unlikely to have had any causal relationship to the serious brain injury. Thus in this case, we have the situation that anything done by Biniaris, the [accused], by his stomping activity, while no doubt manifesting an intention to assist Stark in his general assault of Niven, seems most unlikely to have been causative of the fatal brain injuries suffered by Niven. The nature of the brain injuries testified to by the experts makes the temporal sequence of events important here. This [accused] came into the fray at a point in time when, as I interpret the medical testimony, the damage to the brain of the deceased was irreversible.

. . .

If one analyzes the activities of the two assailants, it seems to me to be an inescapable conclusion that the assaultive activity attributed to the [accused] all occurred after the infliction of the fatal harm and in circumstances where Biniaris’ intention to assist in a murder is unclear.

l’état de la preuve d’expert à la fin du procès, le juge Hall a eu raison de conclure que [TRADUCTION] «la seule manière sûre de déclarer l’appellant Biniaris coupable de meurtre passe par l’application de l’art. 21 du *Code criminel*» (p. 71). Cela était aussi clairement l’avis du juge du procès, qui a donné des directives en ce sens au jury. Toutefois, l’analyse du juge Hall est demeurée axée sur la question de la causalité, malgré son peu d’importance relativement à la responsabilité de l’intimé en tant que participant à l’infraction. Il a écrit (aux pp. 71, 72 et 73):

[TRADUCTION] Au départ, dans l’exposé initial du ministère public, le jury avait été informé de la thèse voulant que les blessures mortelles aient résulté des actes de l’[accusé] Biniaris. À la fin, cette thèse avait été complètement modifiée. On disait maintenant qu’il devait être déclaré coupable de meurtre à cause de sa participation aux actes de Stark. Il faut noter que Stark avait accompli presque tous les actes à l’origine des blessures au moment où Biniaris s’est mêlé à la bagarre. Les coups portés par Stark à Niven lorsqu’il gisait sur le pavé l’ont été au niveau de l’abdomen, et si, ce qui est loin d’être établi clairement par la preuve, Stark a effectivement donné un coup de pied au menton de Niven vers la fin de l’incident, là encore il semble improbable que ce coup de pied ait causé la blessure grave au cerveau. En l’espèce, il semble donc très improbable que les blessures mortelles au cerveau de Niven aient résulté, de quelque manière que ce soit, du piétinement auquel s’est livré l’[accusé] Biniaris, même si ce piétinement démontrait sans aucun doute l’intention d’aider Stark à agresser Niven. La chronologie des événements est importante, dans la présente affaire, en raison de la nature des blessures au cerveau que les experts ont décrites dans leur témoignage. L’[accusé] s’est mêlé à la bagarre au moment où, selon mon interprétation du témoignage des médecins, les dommages au cerveau de la victime étaient irréversibles.

. . .

Si on analyse les actes des deux agresseurs, il me semble qu’on ne peut que conclure que les actes d’agression attribués au présent [accusé] se sont tous produits après que les blessures mortelles eurent été infligées et dans des circonstances où il n’est pas évident que Biniaris avait l’intention d’aider à commettre un meurtre.

In my opinion, Hall J.A. properly identified *mens rea* as a critical issue but erred in interfering with the conclusion reached by the jury on that question, which was fully open to them on the evidence. He said (at pp. 72-73):

In order to be found guilty of murder as a party, the jury would have to conclude that the [accused] had the same intent as the killer [i.e., the intent to cause death or the intention to cause bodily harm that he knew was likely to cause death, being reckless whether death ensued or not] and was carrying out these acts of stomping for the purpose of aiding and abetting in the murder of the deceased. The intention is probably less easy to attribute in the case of a sudden affray of this sort than might be the case where a deadly weapon is anticipated to be used.

I see the position of the [accused] in this case as rather different from that of Stark. Stark, the initial aggressor outside the store, decided to attack Niven and carried out that attack with great violence and with disastrous results. Biniaris was by no means the prime mover in the event.

. . .

Nor, as I observed, is this a joint venture case of the sort where one or more of the parties may possess a deadly weapon like a gun or a knife.

Whether Stark was the initial aggressor, the degree and the intensity of the respondent's participation in the attack and his intention or foresight at the time of his participation in the attack were all matters raised by the evidence and commented upon by the parties and by the trial judge. Although a conviction for manslaughter was a given, as was conceded by the respondent before this Court, and although reasonable people may disagree about whether they would have found, on the evidence, that the respondent had the requisite intent for murder, there is nothing to qualify that conclusion, which is really the only one in issue in this case, as an unreasonable one.

On the evidence adduced by the Crown, it was reasonable for the jury to conclude that the respon-

J'estime que le juge Hall a eu raison de qualifier la *mens rea* de question cruciale, mais qu'il a commis une erreur en modifiant la conclusion que le jury était parfaitement en droit de tirer d'après la preuve. Il a dit (aux pp. 72 et 73):

[TRADUCTION] Pour que l'[accusé] soit déclaré coupable de meurtre en qualité de participant au crime, il faudrait que le jury conclue qu'il avait la même intention que le meurtrier [c'est-à-dire l'intention de causer la mort ou des lésions corporelles qu'il savait être de nature à causer la mort et qu'il lui était indifférent que la mort s'ensuive ou non] et qu'il s'est livré à ce piétinement dans le but d'aider et d'encourager à commettre le meurtre de la victime. Il est probablement moins facile d'imputer l'intention dans le cas d'une telle bagarre soudaine que dans celui où l'utilisation d'une arme meurtrière est prévue.

Je considère que la situation de l'[accusé] en l'espèce est quelque peu différente de celle de Stark. Stark, l'agresseur initial à l'extérieur du dépanneur, a décidé d'attaquer Niven et l'a fait avec une grande violence, ce qui a eu des conséquences désastreuses. Biniaris n'est pas du tout l'instigateur de l'événement.

. . .

J'ai remarqué qu'il ne s'agissait pas non plus d'un cas d'entreprise commune où une seule ou plusieurs parties peuvent être en possession d'une arme meurtrière comme une arme à feu ou un couteau.

La question de savoir si Stark était l'agresseur initial et la question du degré et de l'intensité de la participation de l'intimé à l'attaque, de même que celle de l'intention qu'il avait ou de ce qu'il prévoyait au moment de sa participation à l'attaque, ont toutes été soulevées par la preuve et commentées par les parties et le juge du procès. Même si, comme il l'a reconnu devant notre Cour, l'intimé était assuré d'être déclaré coupable d'homicide involontaire coupable et que des personnes raisonnables peuvent être en désaccord quant à savoir si elles auraient conclu, d'après la preuve, que l'intimé avait l'intention requise pour commettre un meurtre, rien ne permet de qualifier de déraisonnable cette conclusion qui, en réalité, constitue le seul point en litige dans la présente affaire.

Selon la preuve présentée par le ministère public, le jury pouvait raisonnablement conclure

dent and Stark had aided and abetted one another in a joint attack on Niven. There was evidence on the basis of which the jury could reasonably find that the respondent was no less a “prime mover” or “initial aggressor” than Stark. The evidence establishes that Biniaris stood up and moved close to Niven soon after the initial exchange of words between Stark and Niven, suggesting, not unreasonably, that the respondent was readying himself for a fight. The evidence also suggests that the respondent, as Ryan J.A. noted, “was the first to verbally challenge Niven to a fight” (p. 75) and that he entered the fray moments after Stark began to punch Niven, at a point where Niven was trying to raise himself, holding onto Stark’s jacket sleeves. Finally, the evidence establishes that the respondent and Stark fled the scene together. It was clearly reasonable for the jury to conclude that the respondent had, through words and actions which encouraged and assisted Stark, participated in an interrelated chain of events which ultimately led to Niven’s death. The respondent does not dispute the reasonableness of this conclusion as is reflected in his submission that he was properly convicted of manslaughter.

que l’intimé et Stark s’étaient entraîdés et s’étaient encouragés mutuellement dans une attaque commune contre Niven. Il y avait des éléments de preuve sur lesquels le jury pouvait raisonnablement se fonder pour conclure que l’intimé n’était pas moins un «instigateur» ou un «agresseur initial» que Stark. La preuve démontre que Biniaris s’est levé et s’est approché de Niven peu après le premier échange de mots entre Stark et Niven, ce qu’on peut raisonnablement interpréter comme indiquant que l’intimé se préparait à se bagarrer. La preuve indique également que l’intimé, comme l’a souligné le juge Ryan, [TRADUCTION] «a été le premier à inviter verbalement Niven à se battre» (p. 75) et qu’il s’est mêlé à la bagarre peu après que Stark eut commencé à frapper Niven à coups de poing, c’est-à-dire au moment où Niven tentait de se relever en s’agrippant aux manches de la veste de Stark. Enfin, la preuve démontre que l’intimé et Stark ont fui les lieux ensemble. Il était clair que le jury pouvait raisonnablement conclure que l’intimé avait, en encourageant et en aidant Stark par des paroles et des actes, participé à une suite d’événements étroitement liés les uns aux autres qui ont abouti au décès de Niven. L’intimé ne conteste pas le caractère raisonnable de cette conclusion puisqu’il admet le bien-fondé de sa condamnation pour homicide involontaire coupable.

48

Both Boyd J., in her instructions to the jury, and Hall J.A. recognized that intent, namely whether Biniaris intended to cause Niven’s death or to cause bodily harm which he knew was likely to cause death and was reckless as to whether death ensued or not, was the “real question to be faced by the jury” (p. 72). However, Hall J.A.’s reasons do not contain a thorough review and re-examination of the evidence as it relates to intent. In light of the respondent’s brief involvement in the sudden affray, Hall J.A. opined that the respondent’s “intention to assist in a murder [was] unclear” (p. 73). In contrast, Boyd J. thoroughly canvassed all the evidence adduced on the issue of intent in her charge to the jury, including the evidence of Valin and Lehtonen in relation to the number and strength of the kicks and stomps allegedly administered by the respondent, the evidence of these

Tant le juge Boyd, dans ses directives au jury, que le juge Hall ont reconnu que la [TRADUCTION] «véritable question à laquelle devait répondre le jury» (p. 72) était celle de l’intention, qui était de savoir si Biniaris avait l’intention de causer la mort de Niven ou de lui infliger des lésions corporelles qu’il savait être de nature à causer la mort et qu’il lui était indifférent que la mort s’ensuive ou non. Cependant, dans ses motifs, le juge Hall n’a pas effectué une révision et un réexamen complets de la preuve relative à l’intention. En raison de la brève participation de l’intimé à la bagarre soudaine, le juge Hall s’est dit d’avis qu’il [TRADUCTION] «[n’était] pas évident que [l’intimé] avait l’intention d’aider à commettre un meurtre» (p. 73). Par contre, dans son exposé au jury, le juge Boyd a examiné en profondeur toute la preuve présentée au sujet de la question de l’intention,

same witnesses regarding the short duration of the attack on Niven and of the respondent's participation therein, the evidence of Dr. Rice which, defence counsel suggested, contradicted Kaven Valin's testimony that the stomps administered by the respondent involved a substantial amount of force, the evidence of Dr. Carlyle that the effects of "lividity" enhanced and emphasized the tread mark patterns and related bruising on Niven's forehead, and the testimony of the arresting officers concerning the respondent's surprised reaction upon being informed that he was being charged with second degree murder.

I agree with Ryan J.A.'s conclusion that "[a]ll of these facts were for the jury to assess" (p. 77). There is nothing in the compendium of accumulated judicial experience that should cause concern that the jury went astray in its review and assessment of the evidence. Even though it might have been reasonable for the jury to conclude otherwise, it was perfectly reasonable for the jury to be satisfied beyond a reasonable doubt that Biniaris had acted with the requisite intent for murder. There was evidence upon which the jury could reasonably find that the respondent had administered one or more kicks to Niven, including the glancing blow to the face; and to accept the Crown's contention that the respondent had "changed gears" when he moved from kicking to stomping and that, in so doing, he "obviously intended deadly harm". In the same way, it was not unreasonable for the jury to conclude that in deciding to stomp, not once but twice, on Niven's head, the respondent's purposive, deliberate and intentional conduct, which involved the repeated use of violence against a defenceless man, established that he intended to cause Niven bodily harm which he must have known was likely to cause death, being reckless as to whether or not death ensued. As indicated earlier, in light of his responsibility as a party, the fact that the specific blows inflicted by

notamment le témoignage de Valin et de Lehtonen relativement au nombre et à la force des coups de pied qui auraient été portés par l'intimé, leur témoignage relativement à la courte durée de l'attaque contre Niven et à la participation de l'intimé à cette attaque, le témoignage du Dr Rice qui, selon l'avocat de la défense, contredisait celui de Kaven Valin que les coups de pied de l'intimé avaient été portés avec beaucoup de force, le témoignage du Dr Carlyle selon lequel la «lividité» accentuait les empreintes de semelles et les contusions correspondantes sur le front de Niven, ainsi que le témoignage des policiers ayant procédé à l'arrestation de l'intimé, selon lequel ce dernier avait paru surpris en apprenant qu'il était accusé de meurtre au deuxième degré.

Je partage la conclusion du juge Ryan qu'[TRA-
DUCTION]«[i]l appartenait au jury d'évaluer tous ces faits» (p. 77). D'après l'ensemble de l'expérience acquise par les tribunaux, rien ne permet de craindre que le jury se soit égaré dans son examen et son évaluation de la preuve. Même si le jury avait pu raisonnablement tirer une conclusion différente, il était parfaitement raisonnable que celui-ci soit convaincu hors de tout doute raisonnable que Biniaris avait l'intention requise pour commettre un meurtre au moment où il a agi. Il y avait des éléments de preuve sur lesquels le jury pouvait raisonnablement s'appuyer pour conclure que l'intimé avait donné un ou des coups de pied à Niven, notamment le coup oblique au visage, et pour accepter la prétention du ministère public que l'intimé était [TRADUCTION] «devenu plus violent» lorsqu'il était passé des coups de pied au piétinement et que, ce faisant, il [TRADUCTION] «avait manifestement eu l'intention d'infliger des blessures mortelles». De même, il n'était pas déraisonnable que le jury conclue que la décision de piétiner, deux fois plutôt qu'une, la tête de Niven dénotait une conduite réfléchie, intentionnelle et délibérée de l'intimé, consistant en l'utilisation répétée de violence contre un homme sans défense, et démontrait qu'il avait l'intention d'infliger à Niven des lésions corporelles qu'il devait savoir de nature à causer la mort et qu'il lui était indifférent que la mort s'ensuive ou non. Comme je l'ai indiqué précédemment, compte tenu de sa respon-

the respondent were not the ones which were the immediate cause of death was of no significance.

50 In overturning the verdict of the jury as unreasonable, Hall J.A. was troubled by the unusual course of the trial, resulting from Dr. Carlyle's abandonment of the opinion upon which the Crown's case had originally been cast. He viewed this as a "dramatic" change in the composition of the Crown's case and was concerned that "the nuances of all this might not have been that easy for a jury to appreciate" (p. 72). Moreover, Hall J.A. considered this case to have been "highly emotional by reason of these outrageous assaults" (p. 73). These concerns, in my respectful opinion, were insufficient to set aside the verdict of the jury as unreasonable. They were more than adequately addressed by the trial judge, whose charge to the jury was instructive and fair.

51 The determination of the intent or foresight of a person at the time of his participation in a homicide is often a difficult question of fact. It certainly was so in this case where a very young man was involved in a brief, senseless and violent beating which left an innocent man dead. Despite the unusual turn of events at trial, and the fact that many similar incidents in the past have led to convictions for manslaughter only, the law required this jury to answer this difficult question on the facts of this case, and it did. In my view, the verdict was one that this properly instructed jury, acting judicially, could reasonably have rendered, and it should be restored.

VI. Conclusion and Disposition

52 For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the conviction for second degree murder and the sentence imposed by Boyd J.

Appeal allowed.

sabilité à titre de participant à l'infraction, il était sans importance que les coups portés par l'intimé n'aient pas été la cause immédiate du décès.

Lorsqu'il a écarté le verdict du jury pour le motif qu'il était déraisonnable, le juge Hall s'inquiétait de la tournure inusitée que le procès avait prise du fait que le Dr Carlyle avait abandonné l'opinion sur laquelle la preuve du ministère public reposait au départ. Il percevait cela comme un revirement [TRADUCTION] «spectaculaire» de la preuve du ministère public et craignait qu'«un jury n'ait pas pu facilement en saisir toutes les nuances» (p. 72). De plus, le juge Hall considérait que la présente affaire était «chargée d'émotions en raison de ces agressions révoltantes» (p. 73). À mon avis, ces préoccupations ne justifiaient pas l'annulation du verdict du jury pour le motif qu'il était déraisonnable. Elles ont été traitées d'une manière plus que suffisante par le juge du procès, dont l'exposé au jury était instructif et équitable.

La détermination de l'intention d'une personne et de ce qu'elle prévoyait au moment où elle a participé à un homicide est souvent une question de fait difficile. Il en a sûrement été ainsi dans la présente affaire, où un homme très jeune a participé à une raclée brève, insensée et brutale qui a entraîné la mort d'un innocent. Malgré la tournure inusitée des événements au procès et le fait que de nombreux faits semblables ont, dans le passé, mené à des déclarations de culpabilité d'homicide involontaire coupable seulement, le jury était tenu, en droit, de répondre à cette question difficile en fonction des faits de la présente affaire, et c'est ce qu'il a fait. J'estime que le verdict rendu est un verdict qu'un jury ayant reçu des directives appropriées et agissant d'une manière judiciaire aurait pu raisonnablement rendre, et qu'il y a lieu de le rétablir.

VI. Conclusion et dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel et de rétablir la déclaration de culpabilité de meurtre au deuxième degré et la peine infligée par le juge Boyd.

Pourvoi accueilli.

Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.

Procureur de l'appelante: Le ministère du Procureur général, Vancouver.

Solicitors for the respondent: Wilson & Buck, Vancouver.

Procureurs de l'intimé: Wilson & Buck, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General's Prosecutor, Montréal.

Procureur de l'intervenant le procureur général du Québec: Le substitut du Procureur général, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Gold & Fuerst, Toronto.

Procureurs de l'intervenante la Criminal Lawyers' Association (Ontario): Gold & Fuerst, Toronto.

Solicitors for the intervener the Innocence Project: Ruby & Edwardh, Toronto.

Procureurs de l'intervenant l'Innocence Project: Ruby & Edwardh, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association in Defence of the Wrongly Convicted: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Criminal Trial Lawyers Association of Alberta: Beresh DePoe Cunningham, Edmonton.

Procureurs de l'intervenante la Criminal Trial Lawyers Association of Alberta: Beresh DePoe Cunningham, Edmonton.

Tab 7:

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 C.E. Tomusiak
(via audioconference):

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 8:

R. V. Cawthorne, 2016 SCC 32

Her Majesty The Queen *Appellant*

v.

Ordinary Seaman Cawthorne *Respondent*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia and
Director of Criminal and Penal Prosecutions
of Quebec** *Intervenors*

- and -

Her Majesty The Queen *Appellant*

v.

Warrant Officer J.G.A. Gagnon *Respondent*

and

Her Majesty The Queen *Appellant*

v.

Corporal A.J.R. Thibault *Respondent*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec and
Attorney General of
British Columbia** *Intervenors*

INDEXED AS: R. v. CAWTHORNE

2016 SCC 32

File Nos.: 36466, 36844.

2016: April 25; 2016: July 22.

Sa Majesté la Reine *Appelante*

c.

Matelot de 3^e classe Cawthorne *Intimé*

et

**Procureur général du Canada,
procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la
Colombie-Britannique et directeur
des poursuites criminelles et pénales
du Québec** *Intervenants*

- et -

Sa Majesté la Reine *Appelante*

c.

Adjudant J.G.A. Gagnon *Intimé*

et

Sa Majesté la Reine *Appelante*

c.

Caporal A.J.R. Thibault *Intimé*

et

**Procureur général du Canada,
procureur général de l'Ontario,
procureure générale du Québec et
procureur général de la
Colombie-Britannique** *Intervenants*

RÉPERTORIÉ : R. c. CAWTHORNE

2016 CSC 32

N^{os} du greffe : 36466, 36844.

2016 : 25 avril; 2016 : 22 juillet.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT MARTIAL
APPEAL COURT OF CANADA

EN APPEL DE LA COUR D'APPEL DE LA COUR
MARTIALE DU CANADA

Constitutional law — Charter of Rights — Fundamental justice — Armed forces — Prosecutorial independence — Right to trial by independent tribunal — Members of Canadian Forces charged with criminal offences — Sections 230.1 and 245(2) of National Defence Act, R.S.C. 1985, c. N-5, giving Minister of National Defence authority to appeal from decisions of court martial or Court Martial Appeal Court — Whether these provisions violate ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

Droit constitutionnel — Charte des droits — Justice fondamentale — Forces armées — Indépendance de la poursuite — Droit d'être jugé par un tribunal indépendant — Militaires canadiens accusés d'infractions criminelles — Articles 230.1 et 245(2) de la Loi sur la défense nationale, L.R.C. 1985, c. N-5, qui confèrent au ministre de la Défense nationale le pouvoir d'interjeter appel des décisions d'une cour martiale ou de la Cour d'appel de la cour martiale — Ces dispositions violent-elles les art. 7 et 11d) de la Charte canadienne des droits et libertés?

Criminal law — Trial — Evidence — Mistrial — Accused bringing motion for mistrial on basis of prejudice arising from inadmissible re-examination evidence — Whether military judge erred in declining to grant mistrial.

Droit criminel — Procès — Preuve — Annulation du procès — Requête en annulation du procès présentée par l'accusé en raison du préjudice causé par un témoignage inadmissible donné en réinterrogatoire — Le juge militaire a-t-il commis une erreur en refusant d'annuler le procès?

C was charged with two child pornography offences. At trial, defence counsel objected to re-examination evidence given by C's former girlfriend. The military judge ruled that it was inadmissible and advised the jury panel to disregard it, but C brought a motion for a mistrial on the basis of the prejudice arising from it. The military judge dismissed the motion and gave a further limiting instruction to the panel. C was found guilty. On appeal, a majority of the Court Martial Appeal Court found that the mistrial ought to have been granted and ordered a new trial. The Minister of National Defence ("Minister") appeals as of right to this Court, pursuant to s. 245(2) of the *National Defence Act*, arguing that the military judge made no error in declining to grant a mistrial. C brings a motion to quash the Minister's appeal, on the basis that s. 245(2), which gives the Minister the authority to appeal to this Court, violates ss. 7 and 11(d) of the *Charter*.

C a été accusé de deux infractions de pornographie juvénile. Au procès, l'avocat de la défense s'est opposé au témoignage donné en réinterrogatoire par l'ex-petite amie de C. Le juge militaire a décidé que ce témoignage était inadmissible et a dit au jury de ne pas en tenir compte, mais C a déposé une requête en annulation du procès en raison du préjudice causé par le témoignage. Le juge militaire a rejeté la requête et a donné au jury une autre directive restrictive. C a été déclaré coupable. En appel, les juges majoritaires de la Cour d'appel de la cour martiale ont conclu que le procès aurait dû être annulé et ils ont ordonné la tenue d'un nouveau procès. Le ministre de la Défense nationale (« ministre ») interjette appel de plein droit à la Cour en vertu du par. 245(2) de la *Loi sur la défense nationale*, prétendant que le juge militaire n'a pas commis d'erreur en refusant d'annuler le procès. C dépose une requête pour faire casser l'appel du ministre au motif que le par. 245(2), qui confère à ce dernier le pouvoir d'interjeter appel à la Cour, viole l'art. 7 et l'al. 11d) de la *Charte*.

G and T were each charged with sexual assault. G was acquitted and the Minister appealed, seeking a new trial. T presented a plea in bar of trial, on the basis that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea and the Minister appealed. G and T brought motions to quash the Minister's appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*. The Court Martial

G et T ont tous deux été accusés d'agression sexuelle. G a été acquitté et le ministre a interjeté appel de cette décision et demandé la tenue d'un nouveau procès. T a soulevé une fin de non-recevoir parce que l'affaire ne relevait pas de la compétence des tribunaux militaires à cause de l'insuffisance de son lien avec le service militaire. Le juge militaire a accueilli ce moyen et le ministre a interjeté appel de cette décision. G et T ont demandé par voie de requête la cassation des appels formés par le ministre, car l'art. 230.1 de la *Loi sur la défense nationale*, qui confère

Appeal Court dismissed the motions to quash but agreed that s. 230.1 should be invalidated, as it violates the right to an independent prosecutor. The Minister appeals to this Court.

Held: The motion to quash should be dismissed and the appeals should be allowed. Sections 230.1 and 245(2) of the *National Defence Act* are constitutional.

The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister — that is, to initiate an appeal — may effect a deprivation of liberty. Therefore, s. 7 of the *Charter* is engaged. The law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system, and it satisfies the criteria to be considered a principle of fundamental justice. A prosecutor — whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function — has a constitutional obligation to act independently of partisan concerns and other improper motives.

The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. The law presumes that the Attorney General, also a member of Cabinet, can and does set aside partisan duties in exercising prosecutorial responsibilities, and there is no compelling reason to treat the Minister differently in this regard. Accordingly, Parliament's conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*. As to the argument that the impugned provisions violate the right to an independent tribunal guaranteed by s. 11(d) of the *Charter*, it cannot succeed.

The military judge in C's case did not err in declining to grant a mistrial. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial. The decision of whether to grant a mistrial falls within the discretion of the judge, who must assess

au ministre le pouvoir d'interjeter appel à la Cour d'appel de la cour martiale, viole l'art. 7 de la *Charte*. La Cour d'appel de la cour martiale a rejeté les requêtes en cassation, mais a convenu qu'il y a lieu d'invalidier l'art. 230.1 parce qu'il viole le droit à un poursuivant indépendant. Le ministre se pourvoit devant la Cour.

Arrêt : La requête en cassation est rejetée et les pourvois sont accueillis. L'article 230.1 et le par. 245(2) de la *Loi sur la défense nationale* sont constitutionnels.

Le pouvoir que confèrent au ministre l'art. 230.1 et le par. 245(2) de la *Loi sur la défense nationale* — soit d'interjeter appel — peut entraîner une privation de liberté. Par conséquent, l'art. 7 de la *Charte* entre en jeu. Le droit reconnaît le caractère constitutionnel du principe voulant que les poursuivants n'agissent pas à des fins illégitimes, comme des motifs purement partisans. Ce principe est un précepte fondamental de notre système juridique. Il sauvegarde les droits de la personne et l'intégrité du système de justice. En outre, il satisfait aux critères de reconnaissance d'un principe de justice fondamentale. Un poursuivant — qu'il s'agisse d'un procureur général, d'un procureur du ministère public ou d'un autre fonctionnaire exerçant une fonction de poursuivant — a l'obligation constitutionnelle d'agir indépendamment de toute considération partisane et d'autres motifs illégitimes.

À l'instar du procureur général ou des autres fonctionnaires exerçant une fonction de poursuivant, le ministre a droit au bénéfice d'une forte présomption qu'il exerce son pouvoir discrétionnaire en matière de poursuites indépendamment de toute considération partisane. Le simple fait que le ministre est membre du Cabinet n'écarter pas cette présomption. La loi présume que le procureur général — lui aussi membre du Cabinet — peut faire abstraction des obligations partisans et en fait abstraction dans l'exercice de ses responsabilités de poursuivant et il n'y a aucune raison impérieuse de traiter le ministre différemment à cet égard. Par conséquent, l'octroi par le législateur au ministre d'un pouvoir sur les appels interjetés au sein du système de justice militaire ne viole pas l'art. 7 de la *Charte*. Quant à l'argument que les dispositions attaquées violent le droit à un tribunal indépendant garanti par l'al. 11d) de la *Charte*, il ne saurait être retenu.

Le juge militaire dans l'affaire C n'a pas commis d'erreur en refusant d'annuler le procès. Lorsqu'une erreur survient au cours du procès, le juge du procès peut, pour décider s'il convient d'annuler le procès, se demander si l'erreur a été corrigée ou s'il est possible d'y remédier lors du procès. La décision d'annuler le procès ou non

whether there is a real danger that trial fairness has been compromised. That discretion is not absolute, but its exercise must not be routinely second-guessed by the court of appeal.

Cases Cited

Referred to: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).
Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).
National Defence Act, R.S.C. 1985, c. N-5, ss. 130, 230.1, 245(2).

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 Sterling, Lori, and Heather Mackay. “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169.

MOTION to quash the appeal from a judgment of the Court Martial Appeal Court of Canada (Veit, Zinn and Abra JJ.A.), 2015 CMAC 1, 472 N.R. 47, [2015] C.M.A.J. No. 1 (QL), 2015 CarswellNat 1361 (WL Can.), setting aside the accused's convictions for possession of child pornography and accessing child pornography and ordering a new trial. Motion to quash dismissed. Appeal allowed.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Deschênes and Cournoyer JJ.A.), 2015 CMAC 2, [2015]

relève du pouvoir discrétionnaire du juge, qui doit vérifier s'il existe un danger réel que l'équité du procès ait été compromise. Ce pouvoir discrétionnaire n'est pas absolu, mais la cour d'appel doit se garder d'en mettre systématiquement l'exercice en doute après coup.

Jurisprudence

Arrêts mentionnés : *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372; *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76; *R. c. Khan*, 2001 CSC 86, [2001] 3 R.C.S. 823.

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Charte canadienne des droits et libertés, art. 1, 7, 11d).
Code criminel, L.R.C. 1985, c. C-46, art. 686(1)(b)(iii).
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REQUÊTE en cassation de l'appel d'un arrêt de la Cour d'appel de la cour martiale du Canada (les juges Veit, Zinn et Abra), 2015 CACM 1, 472 N.R. 47, [2015] A.C.A.C. n° 1 (QL), 2015 CarswellNat 5288 (WL Can.), qui a annulé les déclarations de culpabilité de possession de pornographie juvénile et d'accès à la pornographie juvénile prononcées contre l'accusé et ordonné la tenue d'un nouveau procès. Requête en cassation rejetée. Pourvoi accueilli.

POURVOI contre un arrêt de la Cour d'appel de la cour martiale du Canada (le juge en chef Bell et les juges Deschênes et Cournoyer), 2015 CACM 2,

C.M.A.J. No. 2 (QL), 2015 CarswellNat 7156 (WL Can.), declaring invalid s. 230.1 of the *National Defence Act*. Appeal allowed.

David Antonyshyn, Dylan Kerr and B. W. MacGregor, for the appellant.

Mark Létourneau and Jean-Bruno Cloutier, for the respondents.

François Lacasse and Ginette Gobeil, for the intervener the Attorney General of Canada.

Patrick J. Monahan and Jamie Klukach, for the intervener the Attorney General of Ontario.

Sylvain Leboeuf, for the intervener the Attorney General of Quebec.

Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

Joanne Marceau and Patrick Michel, for the intervener the Director of Criminal and Penal Prosecutions of Quebec.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] These appeals present two issues. First, do provisions of the *National Defence Act*, R.S.C. 1985, c. N-5, giving the Minister of National Defence (“Minister”) the authority to appeal from decisions of a court martial or the Court Martial Appeal Court violate ss. 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*? Second, did the military judge in the Cawthorne matter err in declining to grant a mistrial?

[2015] A.C.A.C. n° 2 (QL), 2015 CarswellNat 9263 (WL Can.), qui a déclaré invalide l’art. 230.1 de la *Loi sur la défense nationale*. Pourvoi accueilli.

David Antonyshyn, Dylan Kerr et B. W. MacGregor, pour l’appelante.

Mark Létourneau et Jean-Bruno Cloutier, pour les intimés.

François Lacasse et Ginette Gobeil, pour l’intervenant le procureur général du Canada.

Patrick J. Monahan et Jamie Klukach, pour l’intervenant le procureur général de l’Ontario.

Sylvain Leboeuf, pour l’intervenante la procureure générale du Québec.

Joyce DeWitt-Van Oosten, c.r., pour l’intervenant le procureur général de la Colombie-Britannique.

Joanne Marceau et Patrick Michel, pour l’intervenant le directeur des poursuites criminelles et pénales du Québec.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Les présents pourvois soulèvent deux questions. Premièrement, les dispositions de la *Loi sur la défense nationale*, L.R.C. 1985, c. N-5, qui confèrent au ministre de la Défense nationale (« ministre ») le pouvoir d’interjeter appel des décisions d’une cour martiale ou de la Cour d’appel de la cour martiale violent-elles l’art. 7 ou l’al. 11d) de la *Charte canadienne des droits et libertés*? Deuxièmement, dans l’affaire Cawthorne, le juge militaire a-t-il commis une erreur en refusant d’annuler le procès?

II. Background

A. *Ordinary Seaman Cawthorne*

[2] In July 2012, Ordinary Seaman Cawthorne was on exercise near Hawaii. On July 20, an able seaman found an iPhone on board the ship. To determine the owner of the phone, the seaman swiped the screen. He saw an image of a man having sex with a child. The seaman took the phone to a superior. The phone belongs to O.S. Cawthorne.

[3] O.S. Cawthorne was charged with two child pornography offences under s. 130 of the *National Defence Act*. O.S. Cawthorne did not contest ownership of the phone, nor did he deny accessing and possessing pornographic images of teenage girls. He testified, however, that his practice was to download an entire thread of pornographic images, without reviewing each image individually. He claimed that his download of the child pornography was inadvertent, and that he had not knowingly possessed or accessed child pornography.

[4] O.S. Cawthorne's former girlfriend testified for the prosecution at trial. During her examination-in-chief, she testified about several conversations she had with him. She stated that he told her that he had been arrested "for having inappropriate images on his phone". She also asked him what types of images were on his phone. When asked if she recalled his answer, her response was the following: "He said they were children and I believe that he said they were both male and female."

[5] In brief cross-examination, she was asked whether her conversations with O.S. Cawthorne amounted to his merely advising her of the allegations against him (i.e., as opposed to his admitting culpability). She agreed.

[6] In re-examination, she was asked, "During any of those conversations, do you recall him

II. Contexte

A. *Matelot de 3^e classe Cawthorne*

[2] En juillet 2012, le matelot de 3^e classe Cawthorne participait à un exercice près d'Hawaii. Le 20 juillet, un matelot de 2^e classe a trouvé un iPhone à bord du navire. Cherchant à savoir qui en était le propriétaire, le matelot a glissé son doigt sur l'écran. Il a alors vu l'image d'un homme ayant des rapports sexuels avec un enfant. Le matelot a remis le téléphone à un supérieur. Le téléphone appartient au mat 3 Cawthorne.

[3] Le mat 3 Cawthorne a été accusé de deux infractions de pornographie juvénile en application de l'art. 130 de la *Loi sur la défense nationale*. Le mat 3 Cawthorne n'a pas nié que le téléphone lui appartenait ni qu'il accédait à des images pornographiques d'adolescentes et qu'il en possédait. Il a cependant déclaré qu'il avait l'habitude de télécharger un fil complet d'images pornographiques sans examiner chacune d'elles individuellement. Il a prétendu avoir téléchargé de la pornographie juvénile par inadvertance et qu'il n'avait pas sciemment accédé à de la pornographie juvénile ou été en possession de pornographie juvénile.

[4] Au procès, l'ex-petite amie du mat 3 Cawthorne a témoigné pour la poursuite. Au cours de son interrogatoire principal, elle a parlé de plusieurs conversations qu'elle avait eues avec l'accusé. Selon elle, il lui a dit qu'il avait été arrêté [TRADUCTION] « parce que des images inappropriées se trouvaient sur son téléphone ». Elle lui a demandé de quel type d'images il s'agissait. Lorsqu'on lui a demandé si elle se souvenait de la réponse de l'accusé, elle a répondu : « Il a dit que c'étaient des enfants et je crois qu'il a dit que c'étaient des garçons et des filles. »

[5] Durant un bref contre-interrogatoire, on lui a demandé si, dans les conversations qu'elle avait eues avec le mat 3 Cawthorne, ce dernier s'était contenté de l'informer des faits qui lui étaient reprochés (c.-à-d. plutôt que d'admettre sa culpabilité). Elle a répondu par l'affirmative.

[6] En réinterrogatoire, on lui a demandé : [TRADUCTION] « Pendant ces conversations, vous

saying that he did in fact do these things?” She said: “Yes.”

[7] Defence counsel objected, and the military judge ruled that her evidence on re-examination was inadmissible because it did not arise from cross-examination. The military judge advised the jury panel to disregard the question and answer.

[8] The defence then brought a motion for a mistrial on the basis of the prejudice arising from the inadmissible re-examination evidence. The military judge dismissed the motion and gave a further limiting instruction to the panel:

. . . I further instruct you that you shall not draw any inference against the accused . . . from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore the inadmissible evidence and that you shall evacuate from your mind anything about it.

[9] The panel returned a verdict of guilty on both counts charged.

[10] A majority of the Court Martial Appeal Court found that the mistrial ought to have been granted. The court allowed O.S. Cawthorne’s appeal and ordered a new trial (2015 CMAC 1, 472 N.R. 47).

[11] The Minister appeals as of right to this Court, pursuant to s. 245(2)(a) of the *National Defence Act*. The Minister argues that the military judge made no error in declining to grant a mistrial. O.S. Cawthorne seeks to quash the Minister’s appeal on the basis that s. 245(2) violates ss. 7 and 11(d) of the *Charter*.

B. *Warrant Officer Gagnon and Corporal Thibault*

[12] Warrant Officer Gagnon and Corporal Thibault were each charged with sexual assault.

[13] Warrant Officer Gagnon was acquitted. The Minister appealed to seek a new trial, on the basis that the military judge erred by putting the defence

rappelez-vous s’il a dit qu’il avait vraiment fait ces choses? » Elle a répondu : « Oui. »

[7] L’avocat de la défense s’y est opposé et le juge militaire a décidé que la réponse du témoin en réinterrogatoire était inadmissible parce qu’elle ne découlait pas du contre-interrogatoire. Le juge militaire a dit au jury de ne pas tenir compte de la question et de la réponse.

[8] La défense a alors déposé une requête en annulation du procès en raison du préjudice causé par la réponse inadmissible donnée lors du réinterrogatoire. Le juge militaire a rejeté la requête et a donné au jury une autre directive restrictive :

[TRADUCTION] . . . je vous donne aussi comme directive de ne pas tirer une conclusion défavorable à l’accusé [. . .] de cette preuve inadmissible, parce que celle-ci est à la fois non digne de foi et préjudiciable. Je vous donne donc comme directive de ne tenir aucunement compte de la preuve inadmissible et de ne plus penser à tout ce qui s’y rapporte.

[9] Le jury a rendu un verdict de culpabilité à l’égard des deux chefs d’accusation.

[10] Les juges majoritaires de la Cour d’appel de la cour martiale ont conclu que le procès aurait dû être annulé. La cour a accueilli l’appel du mat 3 Cawthorne et ordonné la tenue d’un nouveau procès (2015 CACM 1).

[11] Le ministre interjette appel de plein droit à la Cour en vertu de l’al. 245(2)a) de la *Loi sur la défense nationale*. Il prétend que le juge militaire n’a pas commis d’erreur en refusant d’annuler le procès. Le mat 3 Cawthorne demande la cassation de l’appel du ministre au motif que le par. 245(2) viole l’art. 7 et l’al. 11d) de la *Charte*.

B. *Adjudant Gagnon et caporal Thibault*

[12] L’adjudant Gagnon et le caporal Thibault ont tous deux été accusés d’agression sexuelle.

[13] L’adjudant Gagnon a été acquitté. Le ministre a interjeté appel de cette décision et demandé la tenue d’un nouveau procès, parce que le juge

of honest but mistaken belief in consent to the panel.

[14] Corporal Thibault presented a plea in bar of trial, claiming that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea (2015 CM 1001). The Minister appealed.

[15] Warrant Officer Gagnon and Corporal Thibault brought motions to quash the Minister's appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*.

[16] The Court Martial Appeal Court dismissed the motions to quash but agreed that s. 230.1 of the *National Defence Act* should be invalidated. It found that the law's conferral of the authority to appeal on the Minister violates the right to an independent prosecutor, which it held is a principle of fundamental justice under s. 7 of the *Charter* (2015 CMAc 2).

III. The Challenged Legislation

[17] Sections 230.1 and 245(2) of the *National Defence Act* provide the following:

230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

- (a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
- (a.1) the decision not to make an order under subsection 745.51(1) of the *Criminal Code*;
- (b) the legality of any finding of not guilty;
- (c) the legality of the whole or any part of the sentence;

militaire a commis une erreur en soumettant au jury la défense de croyance sincère mais erronée au consentement.

[14] Le caporal Thibault a soulevé une fin de non-recevoir, prétendant que l'affaire ne relevait pas de la compétence des tribunaux militaires à cause de l'insuffisance de son lien avec le service militaire. Le juge militaire a accueilli ce moyen (2015 CM 1001). Le ministre a interjeté appel de cette décision.

[15] L'adjudant Gagnon et le caporal Thibault ont demandé par voie de requête la cassation des appels formés par le ministre, car l'art. 230.1 de la *Loi sur la défense nationale*, qui confère au ministre le pouvoir d'interjeter appel à la Cour d'appel de la cour martiale, viole l'art. 7 de la *Charte*.

[16] La Cour d'appel de la cour martiale a rejeté les requêtes en cassation, mais a convenu qu'il y a lieu d'invalidier l'art. 230.1 de la *Loi sur la défense nationale*. Elle a conclu que le pouvoir de faire appel conféré par la loi au ministre viole le droit à un poursuivant indépendant, droit qui constitue, selon elle, un principe de justice fondamentale au sens de l'art. 7 de la *Charte* (2015 CACM 2).

III. Les dispositions législatives contestées

[17] L'article 230.1 et le par. 245(2) de la *Loi sur la défense nationale* disposent :

230.1 Le ministre ou un avocat à qui il a donné des instructions à cette fin peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale :

- a) avec l'autorisation de la Cour d'appel ou de l'un de ses juges, la sévérité de la sentence, à moins que la sentence n'en soit une que détermine la loi;
- a.1) la décision de ne pas rendre l'ordonnance visée au paragraphe 745.51(1) du *Code criminel*;
- b) la légalité de tout verdict de non-culpabilité;
- c) la légalité de la sentence, dans son ensemble ou tel aspect particulier;

(d) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;

(e) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;

(f) the legality of a disposition made under section 201, 202 or 202.16;

(f.1) the legality of an order for a stay of proceedings made under subsection 202.121(7);

(g) the legality of a decision made under any of subsections 196.14(1) to (3); or

(h) the legality of a decision made under subsection 227.01(2).

245 . . .

(2) The Minister, or counsel instructed by the Minister for that purpose, may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court

(a) on any question of law on which a judge of the Court Martial Appeal Court dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

IV. Analysis

A. *Is the Conferral of the Authority to Appeal on the Minister of National Defence Unconstitutional?*

[18] The main question on these appeals is whether provisions of the *National Defence Act* that give the Minister the authority to appeal from decisions of a court martial or Court Martial Appeal Court infringe the right to liberty under s. 7 of the *Charter*, and if so, whether the limitation is justified under s. 1 of the *Charter*. It is also argued that the law infringes the right to trial by an independent tribunal under s. 11(d) of the *Charter*.

d) la légalité d'une décision d'une cour martiale qui met fin aux délibérations ou qui refuse ou fait défaut d'exercer sa juridiction à l'égard d'une accusation;

e) relativement à l'accusé, la légalité d'un verdict d'inaptitude à subir son procès ou de non-responsabilité pour cause de troubles mentaux;

f) la légalité d'une décision rendue aux termes de l'article 201, 202 ou 202.16;

f.1) la légalité d'une ordonnance de suspension d'instance rendue en vertu du paragraphe 202.121(7);

g) la légalité de la décision prévue à l'un des paragraphes 196.14(1) à (3);

h) la légalité de la décision rendue en application du paragraphe 227.01(2).

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(2) Le ministre ou un avocat à qui il a donné des instructions à cette fin peut interjeter appel à la Cour suprême du Canada d'une décision de la Cour d'appel de la cour martiale sur toute question de droit, dans l'une ou l'autre des situations suivantes :

a) un juge de la Cour d'appel de la cour martiale exprime son désaccord à cet égard;

b) l'autorisation d'appel est accordée par la Cour suprême.

IV. Analyse

A. *L'octroi au ministre de la Défense nationale du pouvoir d'interjeter appel est-il inconstitutionnel?*

[18] La principale question soulevée dans les présents pourvois est celle de savoir si les dispositions de la *Loi sur la défense nationale* qui confèrent au ministre le pouvoir d'interjeter appel des décisions d'une cour martiale ou de la Cour d'appel de la cour martiale portent atteinte au droit à la liberté garanti par l'art. 7 de la *Charte* et, dans l'affirmative, si l'atteinte est justifiée par application de l'article premier de la *Charte*. Ces dispositions portent également atteinte, soutient-on, au droit, garanti à l'al. 11d) de la *Charte*, d'être jugé par un tribunal indépendant.

[19] Section 7 of the *Charter* provides:

7. 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.

[20] The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister — that is, to initiate an appeal — may effect a deprivation of liberty. Section 7 is engaged.

[21] The next question is whether the deprivation of liberty conforms to the principles of fundamental justice. If it does not, the law violates s. 7.

[22] The answer is found in this Court's jurisprudence on prosecutorial independence and abuse of process. It establishes, as a matter of constitutional law, that partisan or other improper considerations must not influence prosecutorial decisions.

[23] Our cases on prosecutorial independence tend to discuss this principle in the context of the role of the Attorney General. In *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, Iacobucci and Major JJ., writing for the Court, noted that there is a "constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions": para. 30. Charron J. reiterated this point in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, describing the independence of the Attorney General as a "constitutionally entrenched" principle that "requires that the Attorney General act independently of political pressures from government": para. 46. But the logic of these statements clearly extends to Crown prosecutors and other public officials exercising a prosecutorial function. Indeed, both *Krieger* and *Miazga* cited with approval Binnie J.'s reasons (dissenting on another point) in *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 157, where he remarked that a Crown Attorney's duty "to respect his or her 'Minister of Justice' obligations of objectivity and independence" easily

[19] L'article 7 de la *Charte* dispose :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[20] Le pouvoir que confèrent au ministre l'art. 230.1 et le par. 245(2) de la *Loi sur la défense nationale* — soit d'interjeter appel — peut entraîner une privation de liberté. L'article 7 entre en jeu.

[21] La question suivante est celle de savoir si la privation de liberté respecte les principes de justice fondamentale. Si elle ne les respecte pas, les dispositions violent l'art. 7.

[22] La réponse se trouve dans la jurisprudence de la Cour sur l'indépendance de la poursuite et l'abus de procédure. Cette jurisprudence établit qu'en droit constitutionnel, les considérations partisans ou autres considérations illégitimes ne doivent pas influencer les décisions d'un procureur du ministère public.

[23] Notre jurisprudence relative à l'indépendance de la poursuite tend à analyser ce principe sous l'angle du rôle joué par le procureur général. S'exprimant au nom de la Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, les juges Iacobucci et Major ont souligné que « [d]ans notre pays, un principe constitutionnel veut que le procureur général agisse indépendamment de toute considération partisane lorsqu'il supervise les décisions d'un procureur du ministère public » (par. 30). La juge Charron a repris cette idée dans *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339, décrivant l'indépendance du procureur général comme un principe « consacr[é] par la Constitution » qui « veut que le procureur général agisse indépendamment de toute pression politique du gouvernement » (par. 46). Or, la logique de ces affirmations s'étend clairement aux procureurs du ministère public et aux autres fonctionnaires exerçant une fonction de poursuivant. D'ailleurs, les arrêts *Krieger* et *Miazga* citent tous deux avec approbation les motifs du juge Binnie (dissident sur un autre point) dans *R. c. Regan*, 2002 CSC 12, [2002]

met the criteria for a principle of fundamental justice under s. 7 of the *Charter*.

[24] These cases establish that a prosecutor — whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function — has a constitutional obligation to act independently of partisan concerns and other improper motives: see generally L. Sterling and H. Mackay, “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169, at p. 170; see also M. Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813, at pp. 832-36.

[25] This principle is also reflected in this Court’s abuse of process jurisprudence. We have long recognized that the Crown’s unfair or oppressive treatment of an accused can rise to the level of an abuse of the court’s process and warrant judicial intervention: see *R. v. Power*, [1994] 1 *S.C.R.* 601, at pp. 612-15. Both the common law and s. 7 of the *Charter* empower a court to stay proceedings

where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive or vexatious proceedings.

(*R. v. Jewitt*, [1985] 2 *S.C.R.* 128, at pp. 136-37, quoted in *R. v. O’Connor*, [1995] 4 *S.C.R.* 411, at p. 455.)

Those principles of justice may be violated where there is “conspicuous evidence of improper motives or of bad faith” on the Crown’s part: *Power*, at p. 616.

1 R.C.S. 297, par. 157, où il a fait remarquer que le devoir d’un procureur de la Couronne « de s’acquitter de ses obligations d’objectivité et d’indépendance de “représentant de la justice” » répondait aisément aux critères de reconnaissance d’un principe de justice fondamentale au sens de l’art. 7 de la *Charte*.

[24] Cette jurisprudence établit qu’un poursuivant — qu’il s’agisse d’un procureur général, d’un procureur du ministère public ou d’un autre fonctionnaire exerçant une fonction de poursuivant — a l’obligation constitutionnelle d’agir indépendamment de toute considération partisane et d’autres motifs illégitimes (voir, de façon générale, L. Sterling et H. Mackay, « Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions : *Krieger v. Law Society of Alberta* » (2003), 20 *S.C.L.R.* (2d) 169, p. 170; voir aussi M. Rosenberg, « The Attorney General and the Administration of Criminal Justice » (2009), 34 *Queen’s L.J.* 813, p. 832-836).

[25] Ce principe se dégage aussi de la jurisprudence de la Cour sur l’abus de procédure. Nous reconnaissons depuis longtemps que le traitement injuste ou oppressif réservé par le ministère public à un accusé peut constituer un abus des procédures de la cour et justifier une intervention judiciaire (voir *R. c. Power*, [1994] 1 R.C.S. 601, p. 612-615). La common law et l’art. 7 de la *Charte* habilitent tous deux la cour à suspendre l’instance

lorsque forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu’a la société, ainsi que pour empêcher l’abus des procédures de la cour par une procédure oppressive ou vexatoire.

(*R. c. Jewitt*, [1985] 2 R.C.S. 128, p. 136-137, cité dans *R. c. O’Connor*, [1995] 4 R.C.S. 411, p. 455.)

Il peut y avoir violation de ces principes de justice si la « preuve démontre clairement l’existence de motifs illégitimes [ou] de mauvaise foi » de la part du ministère public (*Power*, p. 616).

[26] I conclude that the law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system. And it satisfies the criteria for a principle of fundamental justice identified in *R. v. Marmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8. This principle is, accordingly, a principle of fundamental justice under s. 7 of the *Charter*.

[27] I emphasize that the scope of “partisan” in this context is narrow. “Partisan” is not broadly synonymous with “political”. An Attorney General — like other public officials exercising a prosecutorial function — is a “protector of the public interest”: Sterling and Mackay, at p. 179. As L’Heureux-Dubé J. explained in *Power*, at p. 616:

... the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General’s role in this regard is not only to protect the public, but also to honour and express the community’s sense of justice. Accordingly, courts should be careful before they attempt to “second-guess” the prosecutor’s motives when he or she makes a decision.

[28] Decisions to prosecute (or to not prosecute) can have broad social repercussions, and regard for those repercussions properly informs prosecutorial discretion: Sterling and Mackay, at p. 179; Rosenberg, at pp. 821-22, fn. 24. It is not open to a court to scrutinize this exercise of discretion, or to question a prosecutor’s particular conception of the public interest. A government policy of strict prosecution of certain offences, if motivated by concerns for the public interest, does not offend s. 7. It is only when the considerations underlying a prosecution are partisan — that is, when a prosecutor acts not for the public good, but “for the good of the

[26] Je conclus que le droit reconnaît le caractère constitutionnel du principe voulant que les poursuivants n’agissent pas à des fins illégitimes, comme des motifs purement partisans. Ce principe est un précepte fondamental de notre système juridique. Il sauvegarde les droits de la personne et l’intégrité du système de justice. En outre, il satisfait aux critères de reconnaissance d’un principe de justice fondamentale qui sont énoncés dans *R. c. Marmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 113, et *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76, par. 8. Il s’agit par conséquent d’un principe de justice fondamentale au sens de l’art. 7 de la *Charte*.

[27] Je tiens à souligner que le mot « partisan » a une portée restreinte dans ce contexte. Le mot « partisan » n’est pas, au sens large, synonyme de « politique ». Le procureur général, tout comme les autres fonctionnaires exerçant une fonction de poursuivant, est un [TRADUCTION] « défenseur de l’intérêt public » (Sterling et Mackay, p. 179). Comme l’a expliqué la juge L’Heureux-Dubé dans *Power*, p. 616 :

... le procureur général est un représentant de l’exécutif et, à ce titre, il reflète, de par sa fonction de poursuivant, l’intérêt de la collectivité à faire en sorte que justice soit adéquatement rendue. Le rôle du procureur général à cet égard consiste non seulement à protéger le public, mais également à honorer et à exprimer le sens de justice de la collectivité. Aussi, les tribunaux devraient-ils être prudents avant de s’adonner à des conjectures rétrospectivement sur les motifs qui poussent le poursuivant à prendre une décision.

[28] Les décisions de poursuivre ou non peuvent avoir de vastes répercussions sur le plan social et la prise en compte de ces répercussions guide à juste titre le poursuivant dans l’exercice de son pouvoir discrétionnaire (Sterling et Mackay, p. 179; Rosenberg, p. 821-822, note de bas de page 24). Il n’est pas loisible à un tribunal d’examiner minutieusement l’exercice de ce pouvoir ou de mettre en question la conception particulière qu’un poursuivant se fait de l’intérêt public. Une politique gouvernementale prévoyant la poursuite stricte de certaines infractions ne contrevient pas à l’art. 7 si elle est motivée par un souci de l’intérêt public. Ce

government of the day” — that a court’s intervention is warranted: Sterling and Mackay, at p. 179, citing I. Scott, “Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s” (1989), 39 *U.T.L.J.* 109, at p. 121.

[29] Whether a prosecutor’s purposes are “improper” will depend on the facts of the case. It would be impossible to exhaustively define all considerations that are improper in the context of a prosecution, but our abuse of process decisions provide some guidance on that issue. These decisions indicate that, whatever the circumstances of the particular case, the bar for finding that a prosecutor’s conduct was prompted by an improper motive is rightly very high.

[30] Recognition of this principle as one of fundamental justice does not affect the existing and well-developed doctrine of abuse of process; indeed, the two are integrally related. Claims of improper prosecutorial conduct, including partisan-motivated conduct, will continue to be brought and assessed under the doctrine of abuse of process, which determines the standard for improper conduct and the appropriate remedy: see *Power*, at pp. 615-16; *O’Connor*, at pp. 465-68.

[31] There is no evidence of any improper prosecutorial conduct in the cases before us. But the respondents say such evidence is unnecessary. In their view, the principle of prosecutorial independence requires both that a prosecutor be independent *and* that a reasonable person perceive him or her as independent. The Minister, they say, is independent neither in fact nor in appearance. They emphasize that the Minister is a member of Cabinet not bound by the conventions of independence that apply to the Attorney General, and that the Minister’s “quasi-judicial” role is incompatible with his control and administration of the Canadian Forces. Accordingly,

n’est que lorsque les considérations sous-tendant une poursuite sont partisans, soit lorsqu’un poursuivant agit non pas pour le bien public, mais [TRADUCTION] « pour le bien du gouvernement au pouvoir », que l’intervention d’un tribunal est justifiée (Sterling et Mackay, p. 179, citant I. Scott, « Law, Policy, and the Role of the Attorney General : Constancy and Change in the 1980s » (1989), 39 *U.T.L.J.* 109, p. 121).

[29] Pour ce qui est de savoir si les objectifs d’un poursuivant sont « illégitimes », cela dépend des faits en cause. Il serait impossible de définir de façon exhaustive toutes les considérations qui sont illégitimes dans le contexte d’une poursuite, mais notre jurisprudence en matière d’abus de procédure fournit certaines indications sur ce point. Cette jurisprudence indique que, quelles que soient les circonstances de l’affaire en cause, la barre à atteindre pour conclure que la conduite d’un poursuivant était motivée par un motif illégitime est très haute avec raison.

[30] Reconnaître que ce principe en est un de justice fondamentale ne modifie pas la doctrine actuelle et bien établie de l’abus de procédure; en fait, les deux font partie intégrante l’un de l’autre. Les allégations de conduite irrégulière du poursuivant, notamment de conduite partisane, seront encore présentées et évaluées en fonction de la doctrine de l’abus de procédure, qui établit la norme applicable pour établir l’existence d’une conduite irrégulière ainsi que la réparation convenable (voir *Power*, p. 615-616; *O’Connor*, p. 465-468).

[31] Aucune preuve n’indique que les poursuivants ont agi irrégulièrement dans les affaires qui nous occupent. Les intimés disent toutefois qu’une telle preuve n’est pas nécessaire. À leur avis, le principe de l’indépendance de la poursuite requiert à la fois que le poursuivant soit indépendant *et* qu’une personne raisonnable le perçoive ainsi. Le ministre, disent-ils, n’est indépendant ni dans les faits, ni en apparence. Ils soulignent que le ministre est un membre du Cabinet qui n’est pas lié par les conventions d’indépendance applicables au procureur général, et que le rôle « quasi judiciaire » du ministre est incompatible avec les fonctions de

the respondents argue that the law's conferral on the Minister of authority over appeals in the military justice system violates s. 7 of the *Charter*.

[32] I cannot agree. The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard.

[33] It follows that Parliament's conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*.

[34] It is conceivable that a statute could create a prosecutorial framework that genuinely casts doubt on a prosecutor's independence, for example, by requiring the prosecutor to take partisan or other improper considerations into account in the exercise of prosecutorial discretion. But short of such a statutory regime, and in the absence of "conspicuous evidence" of partisan conduct in a particular case, there is no violation of s. 7 of the *Charter*.

[35] The respondents did not press the argument that the law violates s. 11(d) of the *Charter*, except to suggest that an abusive prosecution may taint the entire judicial process. In my view, the argument that the law violates the right to an independent tribunal cannot succeed.

[36] I conclude, accordingly, that the impugned provisions of the *National Defence Act* do not violate s. 7 or s. 11(d) of the *Charter*.

contrôle et d'administration qu'il exerce à l'égard des Forces armées canadiennes. En conséquence, les intimés soutiennent que l'octroi par la loi au ministre d'un pouvoir sur les appels interjetés au sein du système de justice militaire viole l'art. 7 de la *Charte*.

[32] Je ne peux partager cet avis. À l'instar du procureur général ou des autres fonctionnaires exerçant une fonction de poursuivant, le ministre a droit au bénéfice d'une forte présomption qu'il exerce son pouvoir discrétionnaire en matière de poursuites indépendamment de toute considération partisane. Le simple fait que le ministre est membre du Cabinet n'écarte pas cette présomption. En effet, la loi présume que le procureur général — lui aussi membre du Cabinet — peut faire abstraction des obligations partisans et en fait abstraction dans l'exercice de ses responsabilités de poursuivant. Il n'y a aucune raison impérieuse de traiter le ministre différemment à cet égard.

[33] Par conséquent, l'octroi par le législateur au ministre d'un pouvoir sur les appels interjetés au sein du système de justice militaire ne viole pas l'art. 7 de la *Charte*.

[34] Il se peut qu'une loi instaure un cadre de poursuite qui jette réellement un doute sur l'indépendance d'un poursuivant, par exemple en exigeant de lui qu'il tienne compte de considérations partisans ou d'autres considérations illégitimes dans l'exercice de son pouvoir discrétionnaire. Mais faute d'un tel régime législatif et à défaut d'une « preuve [qui] démontre clairement » l'existence d'une conduite partisane dans un cas donné, il n'y a pas violation de l'art. 7 de la *Charte*.

[35] Les intimés n'ont pas plaidé que la loi viole l'al. 11d) de la *Charte*, si ce n'est qu'en laissant entendre qu'une poursuite abusive peut vicier l'intégralité du processus judiciaire. À mon avis, l'argument voulant que la loi viole le droit à un tribunal indépendant ne saurait être retenu.

[36] Je conclus donc que les dispositions contestées de la *Loi sur la défense nationale* ne violent ni l'art. 7 ni l'al. 11d) de la *Charte*.

B. *Did the Military Judge in the Cawthorne Matter Err in Declining to Grant a Mistrial?*

[37] The Crown says that the Court Martial Appeal Court should not have disturbed the military judge's considered decision to not grant a mistrial. It argues that the evidence of O.S. Cawthorne's former girlfriend was not inadmissible, but that even if it was, the military judge correctly applied the proper law. The respondent says that the inadmissibility of the evidence is not properly before this Court, and further that the military judge erred in dismissing the motion for a mistrial.

[38] I would give effect to this ground of appeal. Even if the evidence in question was inadmissible, of which I am not convinced, the military judge did not err in declining to grant a mistrial.

[39] The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial "falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised": *ibid.* That discretion is not absolute, but "its exercise must not be routinely second-guessed by the court of appeal": *ibid.*

[40] The majority of the Court Martial Appeal Court did not ask itself whether the judge had erred in declining to grant a mistrial, but instead focused on the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The curative proviso applies only when an error has been established. The issue on appeal is the following: Did the military judge commit a reviewable error in declining to grant a mistrial? Only if the answer to that question is yes do we turn to the curative proviso.

B. *Dans l'affaire Cawthorne, le juge militaire a-t-il commis une erreur en refusant d'annuler le procès?*

[37] Le ministère public affirme que la Cour d'appel de la cour martiale n'aurait pas dû modifier la décision réfléchie du juge militaire de ne pas annuler le procès. Il soutient que le témoignage de l'ex-petite amie du mat 3 Cawthorne n'était pas inadmissible, et que même s'il l'était, le juge militaire a correctement appliqué les bonnes règles de droit. L'intimé affirme que la Cour n'est pas saisie à bon droit de la question de l'inadmissibilité du témoignage et ajoute que le juge militaire a commis une erreur en rejetant la requête en annulation du procès.

[38] Je suis d'avis de faire droit à ce moyen d'appel. Même si le témoignage en cause était inadmissible, ce dont je ne suis pas convaincue, le juge militaire n'a pas commis d'erreur en refusant d'annuler le procès.

[39] Les principes juridiques relatifs à l'annulation d'un procès ont été examinés par le juge LeBel dans les motifs qu'il a rédigés dans *R. c. Khan*, 2001 CSC 86, [2001] 3 R.C.S. 823. Lorsqu'une erreur survient au cours du procès, le juge du procès peut, pour décider s'il convient d'annuler le procès, se demander si l'erreur a été corrigée ou s'il est possible d'y remédier lors du procès (par. 79). La décision d'annuler le procès ou non « relève du pouvoir discrétionnaire du juge, qui doit vérifier s'il existe un danger réel que l'équité du procès ait été compromise » (*ibid.*). Ce pouvoir discrétionnaire n'est pas absolu, mais « la cour d'appel doit se garder d'en mettre systématiquement l'exercice en doute après coup » (*ibid.*).

[40] Les juges majoritaires de la Cour d'appel de la cour martiale ne se sont pas demandé si le juge avait commis une erreur en refusant d'annuler le procès. Ils se sont plutôt concentrés sur la disposition réparatrice du sous-al. 686(1)(b)(iii) du *Code criminel*, L.R.C. 1985, c. C-46. La disposition réparatrice ne s'applique que lorsqu'une erreur est établie. La question en litige est la suivante : Le juge militaire a-t-il commis une erreur susceptible de révision en refusant d'annuler le procès? Ce n'est que

The Court Martial Appeal Court erred in failing to ask itself the right question: see *Khan*, at para. 19, per Arbour J.

[41] In my view, the military judge did not err in declining to grant the motion for a mistrial. As LeBel J. stated in *Khan*, at paras. 80-82:

A decision on whether an incident has affected trial fairness in a way which would warrant declaring a mistrial must take into account any corrective measure which has been brought, or could be brought, by the judge to remedy the irregularity

Thus, when a trial judge realizes that an error has occurred but decides not to order a mistrial, the court should consider the remedy selected by the judge, if any, as one of the elements in its assessment of whether the trial has been or has appeared unfair. If the remedy chosen by the judge consisted of a warning to the jury on what they should or should not consider in reaching their verdict, the ability of a jury to follow instructions must be recognized, although this reality is obviously subject to its own limits. . . .

Thus, we should not presume that jurors are incapable of following instructions given by the judge. On the contrary, when the judge issues a clear and forceful warning about the use of some information, we are entitled to presume that it diminishes the danger that the jury will misuse this information when rendering its verdict. [Emphasis added.]

[42] Here, the decision not to grant a mistrial was within the military judge's discretion. He made a reasonable attempt to remedy the error through two instructions, one immediate and another mid-trial. In his mid-trial instruction, he instructed the panel to disregard the evidence because it was both "unreliable and prejudicial". Nothing suggested to the judge that the panel was unwilling or unlikely to follow his instruction. I would not interfere with his decision.

si la réponse à cette question est affirmative que nous pouvons recourir à la disposition réparatrice. La Cour d'appel de la cour martiale a fait erreur en ne se posant pas la bonne question (voir *Khan*, par. 19, la juge Arbour).

[41] À mon avis, le juge militaire n'a pas commis d'erreur en refusant de faire droit à la requête en annulation du procès. Comme l'a dit le juge LeBel dans l'arrêt *Khan*, par. 80-82 :

Pour décider si un incident a porté atteinte à l'équité du procès de manière à en justifier l'annulation, il faut tenir compte de toute mesure réparatrice que le juge a prise ou pouvait prendre afin de remédier à l'irrégularité . . .

Par conséquent, lorsque le juge du procès se rend compte d'une erreur commise sans pour autant décider d'annuler le procès, la cour devrait considérer la réparation choisie par le juge, le cas échéant, comme l'un des éléments à prendre en compte pour déterminer si le procès a été ou a paru inéquitable. Si la réparation choisie par le juge consiste en une mise en garde au jury sur ce que celui-ci devrait ou ne devrait pas prendre en considération pour rendre son verdict, il faut reconnaître la capacité du jury de suivre des directives même s'il va de soi que, dans les faits, cette capacité a des limites qui lui sont inhérentes. . .

Nous ne devons donc pas présumer que les jurés sont incapables de suivre les directives données par le juge. Au contraire, lorsque le juge fait une mise en garde claire et ferme sur l'utilisation de certains renseignements, nous pouvons présumer que le risque que le jury fasse mauvais usage de ces renseignements pour rendre son verdict s'en trouve réduit. [Je souligne.]

[42] Ici, la décision de ne pas annuler le procès relevait du pouvoir discrétionnaire du juge militaire. Ce dernier a raisonnablement tenté de remédier à l'erreur en donnant deux directives, une première sur-le-champ et une autre à mi-procès. Dans cette dernière directive, il a demandé au jury de ne pas tenir compte du témoignage en question parce qu'il était à la fois [TRADUCTION] « non digne de foi et préjudiciable ». Rien ne laissait croire au juge que le jury n'était pas disposé à respecter cette directive ou qu'il n'allait vraisemblablement pas la respecter. Je suis d'avis de ne pas modifier sa décision.

V. Conclusion

[43] In the Cawthorne matter, I would dismiss O.S. Cawthorne's motion to quash the appeal. Section 245(2) of the *National Defence Act* is constitutional. The Minister's appeal is allowed and the convictions entered at trial against O.S. Cawthorne are reinstated.

[44] In the Gagnon and Thibault matter, I would allow the Minister's appeal. Section 230.1 of the *National Defence Act* is constitutional. The matter is remitted to the Court Martial Appeal Court for the hearing of the appeals on the merits.

Motion to quash appeal dismissed. Appeals allowed.

Solicitor for the appellant: Canadian Military Prosecution Service, Ottawa.

Solicitor for the respondents: Defence Counsel Services, Gatineau.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions of Quebec: Director of Criminal and Penal Prosecutions of Quebec, Québec.

V. Conclusion

[43] Dans l'affaire Cawthorne, je suis d'avis de rejeter la requête en cassation de l'appel présentée par le mat 3 Cawthorne. Le paragraphe 245(2) de la *Loi sur la défense nationale* est constitutionnel. Le pourvoi du ministre est accueilli et les déclarations de culpabilité inscrites à l'issue du procès contre le mat 3 Cawthorne sont rétablies.

[44] Dans l'affaire Gagnon et Thibault, je suis d'avis d'accueillir le pourvoi du ministre. L'article 230.1 de la *Loi sur la défense nationale* est constitutionnel. L'affaire est renvoyée à la Cour d'appel de la cour martiale pour qu'elle entende les appels sur le fond.

Requête en cassation de l'appel rejetée. Pourvois accueillis.

Procureur de l'appelante : Service canadien des poursuites militaires, Ottawa.

Procureur des intimés : Service d'avocats de la défense, Gatineau.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante la procureure générale du Québec : Procureure générale du Québec, Québec.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le directeur des poursuites criminelles et pénales du Québec : Directeur des poursuites criminelles et pénales du Québec, Québec.

Tab 9:

R. v. Clark, 2005 SCC 2

Daryl Milland Clark *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

INDEXED AS: R. v. CLARK

Neutral citation: 2005 SCC 2.

File No.: 29976.

2004: November 2; 2005: January 27.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Disorderly conduct — Indecent acts — Public place — Criminal Code prohibits wilfully doing indecent act in public place — Whether masturbating in illuminated room before uncovered window while unknowingly being observed by neighbours is indecent act in public place — Whether living room “public place” within meaning of ss. 150 and 173(1)(a) of Criminal Code — Meaning of word “access” in definition of “public place” in s. 150 of Criminal Code.

The accused was observed masturbating near the uncovered window of his illuminated living room by neighbours from the privacy of their darkened bedroom, across contiguous back yards, from a distance of 90 to 150 feet. The police were summoned. They observed the accused from “just below the navel up” from the neighbour’s bedroom and “from about maybe the neck or the shoulders up” from street level. The accused was charged under ss. 173(1)(a) and 173(1)(b) of the *Criminal Code*. Section 173(1) makes it an offence to wilfully do an indecent act (a) “in a public place in the presence of one or more persons”, or (b) “in any place, with intent thereby to insult or offend any person”. The trial judge convicted the accused under s. 173(1)(a) after finding he had converted his living room into a “public place” but acquitted him under s. 173(1)(b) after finding that it did not appear the

Daryl Milland Clark *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l’Ontario *Intervenant*

RÉPERTORIÉ : R. c. CLARK

Référence neutre : 2005 CSC 2.

N° du greffe : 29976.

2004 : 2 novembre; 2005 : 27 janvier.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D’APPEL DE LA
COLOMBIE-BRITANNIQUE

Droit criminel — Inconduite — Actions indécentes — Endroit public — Code criminel interdisant de commettre volontairement une action indécente dans un endroit public — La personne qui, sans savoir que des voisins l’observent, se masturbe dans une pièce éclairée, près d’une fenêtre dont les rideaux sont ouverts, commet-elle une action indécente dans un endroit public? — Un salon est-il un « endroit public » au sens de l’art. 150 et de l’art. 173(1)a) du Code criminel? — Sens du mot « accès » dans la définition de l’expression « endroit public » à l’art. 150 du Code criminel.

À partir de leur chambre à coucher non éclairée qui était située à une distance de 90 à 150 pieds de l’endroit où se trouvait l’accusé et qui donnait sur leurs arrière-cours contiguës, des voisins ont vu l’accusé se masturber près de sa fenêtre de salon alors que les rideaux étaient ouverts et que la pièce était éclairée. Les policiers appelés sur les lieux ont pu apercevoir l’accusé « jusqu’en dessous du nombril » lorsqu’ils se trouvaient dans la chambre à coucher des voisins en question, et d’« à peu près à partir du cou ou des épaules en montant » lorsqu’ils étaient au niveau de la rue. Des accusations fondées sur les al. 173(1)a) et 173(1)b) du *Code criminel* ont été portées contre l’accusé. Aux termes du par. 173(1), est coupable d’une infraction quiconque commet volontairement une action indécente a) « dans un endroit public en présence d’une ou de plusieurs

accused knew he was being watched or intended to insult or offend any person. The Supreme Court and the Court of Appeal of British Columbia upheld the conviction. The Court of Appeal concluded that the accused had “intentionally conducted himself in an indecent way, seeking to draw the attention of others”.

Held: The appeal should be allowed. The accused’s conviction is vacated and an acquittal entered.

The facts as found by the trial judge do not support the accused’s conviction. The accused’s act was not committed in a “public place” within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*. A “public place” is defined in s. 150 as “any place to which the public have access as of right or by invitation, express or implied”. “Access” means “the right or opportunity to reach or use or visit” and not the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within. Interpreting “public place” as contemplating physical as opposed to visual access renders the whole of s. 173(1) more coherent and is consistent with Parliament’s legislative distinction in the *Criminal Code* between conduct that is criminal because it occurs “in a public place” and conduct that is criminal because it is “exposed to public view” or “open to public view”. [11-14] [42-51]

The Court of Appeal erred by departing from the trial judge’s appreciation of the evidence in the absence of a finding that he had committed a palpable and overriding error. It also erred in finding that the conviction was supported by case law that expands the meaning of a “public place” to include the place where the witnesses to an indecent act are physically situated. Even if correctly decided, this case law does not support the conviction since the accused’s act did not occur in a public place within the expanded meaning. [9-10] [24-32]

Although the definition of “*endroit public*” in the French version of s. 150 contains no equivalent of the

personnes », ou b) « dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un ». Le juge du procès a déclaré l’accusé coupable quant à l’accusation fondée sur l’al. 173(1)a), après avoir conclu qu’il avait converti son salon en « endroit public », mais il l’a acquitté relativement à celle fondée sur l’al. 173(1)b), après avoir conclu qu’il ne paraissait ni avoir su qu’on l’observait et ni avoir eu l’intention d’insulter ou offenser quelqu’un. La Cour suprême et la Cour d’appel de la Colombie-Britannique ont confirmé la déclaration de culpabilité. La Cour d’appel a décidé que l’accusé s’était « volontairement conduit d’une manière indécente, cherchant à attirer l’attention d’autrui ».

Arrêt : Le pourvoi est accueilli. La déclaration de culpabilité de l’accusé est annulée et un acquittement est inscrit.

Les faits constatés par le juge du procès n’étaient pas la déclaration de culpabilité de l’accusé. L’action de l’accusé n’a pas été commise dans un « endroit public » au sens de l’art. 150 et de l’al. 173(1)a) du *Code criminel*. À l’article 150, l’expression « endroit public » est définie comme étant « [t]out lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite ». Le terme « accès » désigne la « [p]ossibilité d’aller, de pénétrer dans (un lieu), d’entrer », et non la capacité d’une personne qui n’a pas accès, de droit ou sur invitation, à un lieu de voir ou d’entendre de l’extérieur — par une fenêtre dont les rideaux sont ouverts ou par une porte ouverte — ce qui se passe à l’intérieur. L’ensemble du par. 173(1) devient plus cohérent si on rattache l’expression « endroit public » à l’accès physique plutôt que visuel, et cette interprétation s’harmonise avec la distinction que le législateur établit, dans le *Code criminel*, entre la conduite qui est criminelle parce qu’elle est adoptée « dans un endroit public » et celle qui est criminelle parce qu’elle est adoptée « à la vue du public ». [11-14] [42-51]

La Cour d’appel a eu tort de s’écarter de l’appréciation que le juge du procès a faite de la preuve, en l’absence de conclusion que ce dernier avait commis une erreur manifeste et dominante en la faisant. Elle a également eu tort de conclure que la déclaration de culpabilité était étayée par la jurisprudence qui élargit le sens de l’expression « endroit public » en considérant qu’elle vise l’endroit où se trouvent les personnes qui sont témoins d’une action indécente. Même si elle était correcte, cette jurisprudence n’étaye aucunement la déclaration de culpabilité étant donné que l’action de l’accusé n’a pas été commise dans un endroit public au sens élargi. [9-10] [24-32]

Même si la définition de l’expression « endroit public » contenue dans la version française de l’art. 150

word “includes” found in the definition of “public place” in the English version, there is no need to choose between versions because both contemplate physical as opposed to visual access. [39-41]

Cases Cited

Explained: *R. v. Keir* (1919), 34 C.C.C. 164; *R. v. Buhay* (1986), 30 C.C.C. (3d) 30; *R. v. Thallman* (1863), 9 Cox C.C. 388; **referred to:** *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. Clifford* (1916), 26 D.L.R. 754; *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hutt v. The Queen*, [1978] 2 S.C.R. 476.

Statutes and Regulations Cited

An Act to amend the Criminal Code and the Canada Evidence Act, R.S.C. 1985, c. 19 (3rd Supp.), s. 7.
An Act to amend the Criminal Code (prostitution), R.S.C. 1985, c. 51 (1st Supp.), s. 1.
Criminal Code, R.S.C. 1985, c. C-46, ss. 150, 173, 174, 213.
Criminal Code, S.C. 1953-54, c. 51, ss. 158, 159.

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Canadian Oxford Dictionary. Edited by Katherine Barber. Toronto: Oxford University Press, 2001, “access”.
 Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Hall and Saunders JJ.A.) (2003), 185 B.C.A.C. 87, 303 W.A.C. 87, [2003] B.C.J. No. 1594 (QL), 2003 BCCA 408, affirming a decision of Lander J. upholding the accused’s conviction for wilfully committing an indecent act in a public place in the presence of one or more persons. Appeal allowed.

Gil D. McKinnon, Q.C., for the appellant.

ne comporte aucun terme équivalent au verbe « *includes* » figurant dans la définition de l’expression « *public place* » contenue dans la version anglaise de cet article, il n’est pas nécessaire de choisir entre ces versions étant donné qu’elles visent toutes les deux l’accès physique plutôt que visuel. [39-41]

Jurisprudence

Arrêts interprétés : *R. c. Keir* (1919), 34 C.C.C. 164; *R. c. Buhay* (1986), 30 C.C.C. (3d) 30; *R. c. Thallman* (1863), 9 Cox C.C. 388; **arrêts mentionnés :** *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Toneguzzo-Norvell (Tutrice à l’instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *R. c. Clifford* (1916), 26 D.L.R. 754; *R. c. Daoust*, [2004] 1 R.C.S. 217, 2004 CSC 6; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Hutt c. La Reine*, [1978] 2 R.C.S. 476.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 150, 173, 174, 213.
Code criminel, S.C. 1953-54, ch. 51, art. 158, 159.
Loi modifiant le Code criminel et la Loi sur la preuve au Canada, L.R.C. 1985, ch. 19 (3^e suppl.), art. 7.
Loi modifiant le Code criminel (prostitution), L.R.C. 1985, ch. 51 (1^{er} suppl.), art. 1.

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.
 Nouveau *Petit Robert*. Paris : Le Robert, 2003, « accès ».

POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (les juges Huddart, Hall et Saunders) (2003), 185 B.C.A.C. 87, 303 W.A.C. 87, [2003] B.C.J. No. 1594 (QL), 2003 BCCA 408, qui a confirmé une décision du juge Lander qui avait confirmé la déclaration de culpabilité d’avoir commis volontairement une action indécente dans un endroit public en présence d’une ou de plusieurs personnes, prononcée contre l’accusé. Pourvoi accueilli.

Gil D. McKinnon, c.r., pour l’appelant.

M. Joyce DeWitt-Van Oosten and Kenneth D. Madsen, for the respondent.

Christine Bartlett-Hughes, for the intervener.

The judgment of the Court was delivered by

FISH J. —

I

The appellant stands convicted for having masturbated near the uncovered window of his illuminated living room.

He was first noticed by Mrs. S., a neighbour who was watching television with her two young daughters in their partially lit family room. Mrs. S. moved to another room for a better view and then alerted her husband. Together, they observed the appellant for 10 to 15 minutes from the privacy of their darkened bedroom, across contiguous backyards, from a distance of 90 to 150 feet.

The police were summoned and the appellant was charged under both s. 173(1)(a) and s. 173(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

Section 173(1)(a) makes it an offence to wilfully perform an indecent act “in a public place in the presence of one or more persons”; s. 173(1)(b), on the other hand, makes it an offence to wilfully commit an indecent act “in any place, with intent thereby to insult or offend any person”.

According to the trial judge, it did not appear that the appellant knew he was being watched. Nor did the appellant intend “to insult or offend any person”. Indeed, the trial judge found that there was “an escalation of [the appellant’s] activity” when Mrs. S. left her partially illuminated family room, from which she could presumably be seen by the appellant. “[A]nd”, the trial judge added, “there is nothing to suggest . . ., in fact, to the contrary, that [the

M. Joyce DeWitt-Van Oosten et Kenneth D. Madsen, pour l’intimée.

Christine Bartlett-Hughes, pour l’intervenant.

Version française du jugement de la Cour rendu par

LE JUGE FISH —

I

L’appelant a été reconnu coupable de s’être masturbé près de sa fenêtre de salon alors que les rideaux étaient ouverts et que la pièce était éclairée.

M^{me} S. — une voisine qui regardait la télévision avec ses deux fillettes dans leur salle familiale à demi éclairée — a été la première à l’apercevoir. Celle-ci a alerté son mari après s’être rendue dans une autre pièce pour mieux voir. À partir de leur chambre à coucher non éclairée qui était située à une distance de 90 à 150 pieds de l’endroit où se trouvait l’appelant et qui donnait sur leurs arrière-cours contiguës, ils ont tous les deux observé l’appelant, à son insu, pendant 10 à 15 minutes.

La police, appelée sur les lieux, a porté contre l’appelant des accusations fondées sur les al. 173(1)(a) et 173(1)(b) du *Code criminel*, L.R.C. 1985, ch. C-46.

Aux termes de l’al. 173(1)(a), est coupable d’une infraction quiconque commet volontairement une action indécente « dans un endroit public en présence d’une ou de plusieurs personnes »; par ailleurs, aux termes de l’al. 173(1)(b), est coupable d’une infraction quiconque commet volontairement une action indécente « dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un ».

Selon le juge du procès, l’appelant paraissait ignorer qu’on l’observait. Il n’avait pas non plus l’intention d’« insulter ou offenser quelqu’un ». En fait, le juge du procès a conclu qu’il y avait eu [TRADUCTION] « une intensification de l’activité » de l’appelant lorsque M^{me} S. a quitté la salle familiale à demi éclairée où l’appelant aurait vraisemblablement pu l’apercevoir. Le juge du procès a ajouté que [TRADUCTION] « rien n’indique [. . .] — et, en

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appellant] was aware that [Mrs. S.] was watching from the darkened bedroom window”.

6 The trial judge was satisfied, however, that the appellant had “converted” his living room into a public place and had, in that “public place”, wilfully committed an indecent act in the presence of one or more persons.

7 On these findings, the trial judge acquitted the appellant under s. 173(1)(b) but found him guilty under s. 173(1)(a). His appeals to the Supreme Court and Court of Appeal of British Columbia were dismissed.

8 In affirming the appellant’s conviction, the Court of Appeal nonetheless concluded that the appellant “intentionally conducted himself in an indecent way, seeking to draw the attention of others (members of the public) to himself on the evening in question” ((2003), 185 B.C.A.C. 87, 2003 BCCA 408, at para. 10). It was “an inescapable inference from the facts”, said the Court of Appeal, “that what the appellant was doing here was acting in an exhibitionist manner and seeking to draw attention to himself in a residential neighbourhood while he was in view of other residents” (para. 5).

9 The appellant submits that the Court of Appeal, in this regard and in other respects as well, departed impermissibly from the trial judge’s appreciation of the evidence. With respect, I agree. But since I would in any event allow the appeal on other grounds, I find it sufficient for present purposes simply to reaffirm the governing principles. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. “Palpable and overriding error” is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian*

fait, c’est plutôt le contraire — que [l’appellant] savait que [M^{me} S.] l’observait par la fenêtre de sa chambre à coucher non éclairée ».

Toutefois, le juge du procès était persuadé que l’appellant avait « converti » son salon en endroit public et qu’il avait, dans cet « endroit public », commis volontairement une action indécente en présence d’une seule ou de plusieurs personnes.

Après avoir tiré ces conclusions, le juge du procès a acquitté l’appellant relativement à l’accusation fondée sur l’al. 173(1)(b), mais l’a déclaré coupable quant à celle fondée sur l’al. 173(1)(a). Ses appels devant la Cour suprême et la Cour d’appel de la Colombie-Britannique ont été rejetés.

En confirmant la déclaration de culpabilité de l’appellant, la Cour d’appel a néanmoins décidé que celui-ci [TRADUCTION] « s’[était] volontairement conduit d’une manière indécente, cherchant à attirer l’attention d’autrui (les membres du public) au cours de la soirée en question » ((2003), 185 B.C.A.C. 87, 2003 BCCA 408, par. 10). Selon la Cour d’appel, [TRADUCTION] « on peut seulement inférer des faits de la présente affaire que l’appellant a adopté un comportement exhibitionniste et qu’il cherchait à s’attirer l’attention du voisinage en s’exposant à la vue d’autres résidents » (par. 5).

L’appellant soutient qu’à cet égard, notamment, la Cour d’appel s’est écartée à tort de l’appréciation que le juge du procès a faite de la preuve. En toute déférence, je suis d’accord avec lui. Mais puisque, de toute manière, je suis d’avis d’accueillir le pourvoi pour d’autres motifs, j’estime qu’il suffit simplement, en l’espèce, de réaffirmer les principes applicables. Les cours d’appel ne peuvent pas modifier les inférences et conclusions de fait du juge du procès, à moins qu’elles soient manifestement erronées, non étayées par la preuve ou par ailleurs déraisonnables. De plus, l’erreur imputée doit être clairement relevée. Il faut aussi démontrer qu’elle a influé sur le résultat. Les mots « erreur manifeste et dominante » expriment de manière concise et éloquente cette norme bien établie : voir *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Hodgkinson c. Simms*, [1994] 3 R.C.S.

ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

It has not been suggested that the trial judge in this case committed a palpable and overriding error in his appreciation of the evidence. This appeal therefore falls to be decided by applying the law as set out by Parliament to the facts as found by the trial judge.

Section 173(1)(a) of the *Code* makes it an offence to wilfully perform an indecent act “in a public place in the presence of one or more persons”. In virtue of s. 150, “‘public place’ includes any place to which the public have access as of right or by invitation, express or implied”. Parliament has distinguished legislatively in Part V of the *Criminal Code* — the context that concerns us here — between conduct that is prohibited “in a public place” and conduct that is prohibited if it is “exposed to public view”. We should not by judicial interpretation frustrate Parliament’s manifest intention by merging these two different foundations of criminal liability.

Parliament has also created two different offences in ss. 173(1)(a) and 173(1)(b) of the *Criminal Code*. The former concerns indecent acts committed in a public place in the presence of one or more persons; the latter, indecent acts committed in any place, public or private, with intent to insult or offend any person. Here, the appellant was acquitted under s. 173(1)(b). His conviction under s. 173(1)(a) can therefore not be supported, as it was to some extent in the Court of Appeal, on grounds that were resolved finally and in the appellant’s favour when he was acquitted by the trial judge under s. 173(1)(b).

I agree with the appellant’s submission that his living room was not a public place within the meaning of s. 173(1)(a). The living room of his private home

377; *Toneguzzo-Norvell (Tutrice à l’instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33.

Personne n’a laissé entendre que le juge du procès avait commis, en l’espèce, une erreur manifeste et dominante dans son appréciation de la preuve. Le présent pourvoi doit donc être tranché par l’application des règles de droit énoncées par le législateur aux faits constatés par le juge du procès.

L’alinéa 173(1)a) du *Code* interdit à quiconque de commettre volontairement une action indécente « dans un endroit public en présence d’une ou de plusieurs personnes ». À l’article 150, l’expression « endroit public » est définie comme étant « [t]out lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite ». Dans le contexte qui nous occupe en l’espèce, à savoir la partie V du *Code criminel*, le législateur établit une distinction entre la conduite prohibée « dans un endroit public » et la conduite prohibée si elle est adoptée « à la vue du public ». Les tribunaux doivent éviter de contre-carrer l’intention manifeste du législateur au moyen d’une interprétation confondant ces deux différents fondements de responsabilité criminelle.

Le législateur a également créé deux infractions distinctes aux al. 173(1)a) et 173(1)b) du *Code criminel*. Le premier alinéa porte sur les actions indécentes commises dans un endroit public en présence d’une seule ou de plusieurs personnes, et le second, sur les actions indécentes commises dans un endroit quelconque, public ou privé, avec l’intention d’insulter ou offenser quelqu’un. Dans le cas qui nous occupe, l’appelant a été acquitté relativement à l’accusation portée en vertu de l’al. 173(1)b). Sa déclaration de culpabilité fondée sur l’al. 173(1)a) ne saurait donc être justifiée, comme l’a fait dans une certaine mesure la Cour d’appel, par des motifs sur lesquels le juge du procès s’est prononcé de manière définitive et en faveur de l’appelant en examinant l’accusation portée contre lui en vertu de l’al. 173(1)b).

Je retiens l’argument de l’appelant voulant que son salon ne soit pas un endroit public au sens de l’al. 173(1)a). Le salon de sa résidence privée n’était

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was not a place “to which the public [had] access as of right or by invitation, express or implied”. From both the text and the context, it seems obvious to me that “access”, as used here, means “the right or opportunity to reach or use or visit”: *The Canadian Oxford Dictionary* (2001), at p. 7. I do not believe it contemplates the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within.

14 In my respectful view, the trial judge thus erred in concluding that the appellant’s living room had been “converted” by him into a public place simply because he could be seen through his living room window and, though he did not know this, was being watched by Mr. and Mrs. S. from the privacy of their own bedroom 90 to 150 feet away.

15 I shall explain more fully below why I would allow the appeal on this ground alone. First, however, a closer look at the facts and the proceedings below.

II

16 The appellant was first noticed by Mrs. S. while she was watching television with her two young daughters in their family room, which was lit up only by the television screen and by light from the adjoining kitchen. Mrs. S. agreed with counsel’s suggestion that, from there, she “didn’t really see anything untoward other than some movement”. But for reasons that she explained at trial, Mrs. S. was troubled and, to get “a better angle to view”, she “ran” to her bedroom and then summoned her husband.

17 From that vantage point, Mr. and Mrs. S. observed the appellant for 10 or 15 minutes. Taking care to escape his notice, they looked out through the uncovered part of their bedroom window, below their partially lowered blinds. And, to ensure that the appellant was in fact doing what he appeared to

pas un lieu « auquel le public a[vait] accès de droit ou sur invitation, expresse ou implicite ». D’après le texte et le contexte, il me paraît évident que le terme « accès », utilisé dans cette phrase, signifie « [p]ossibilité d’aller, de pénétrer dans (un lieu), d’entrer » : *Le Nouveau Petit Robert* (2003), p. 15. Cette disposition n’envisage pas, selon moi, la capacité d’une personne qui n’a pas accès, de droit ou sur invitation, à un lieu de voir ou d’entendre de l’extérieur — par une fenêtre dont les rideaux sont ouverts ou par une porte ouverte — ce qui se passe à l’intérieur.

J’estime donc, en toute déférence, que le juge du procès a commis une erreur en concluant que l’appelant avait « converti » son salon en endroit public du seul fait qu’on pouvait l’apercevoir par la fenêtre de son salon et que, même s’il ne se doutait de rien, M. et M^{me} S. l’observaient à partir de leur chambre à coucher située à une distance de 90 à 150 pieds de là.

J’expliquerai davantage plus loin les raisons pour lesquelles je suis d’avis d’accueillir le pourvoi pour ce seul motif. Cependant, je vais commencer par examiner de plus près les faits et les décisions des instances inférieures.

II

La première à apercevoir l’appelant a été M^{me} S. qui regardait la télévision avec ses deux fillettes dans leur salle familiale éclairée uniquement par l’écran du téléviseur et la lumière provenant de la cuisine. M^{me} S. s’est dite d’accord avec l’avocat lorsqu’il a indiqué qu’à partir de cet endroit elle [TRADUCTION] « n’avait vraiment rien remarqué d’anormal, sauf un mouvement ». Mais, pour les motifs que M^{me} S. a expliqués au procès, tracassée, elle [TRADUCTION] « a couru » jusqu’à sa chambre à coucher pour « mieux voir » et a ensuite demandé à son mari de l’y rejoindre.

À partir de cet endroit, M. et M^{me} S. ont observé l’appelant pendant 10 à 15 minutes. Prenant garde d’être aperçus, ils ont regardé par la fenêtre de leur chambre, en dessous du store partiellement baissé. Pour confirmer ce que l’appelant leur paraissait être en train de faire, M. S. est allé chercher des

them to be doing, Mr. S. fetched a pair of binoculars and a telescope. He also tried, unsuccessfully, to videotape the appellant in action.

Mr. and Mrs. S. were understandably concerned. In the words of Mr. S., they feared that the appellant was “masturbating to our children”. They therefore called the police.

The first officer arrived within five minutes. From the bedroom of Mr. and Mrs. S., the officer could see the appellant from “just below the navel up”. The appellant had his hand in front of him “and there was a hand motion consistent with somebody masturbating”. At the back of the house, looking up to the appellant’s living room from street level, the officer could only see the appellant “from about maybe the neck or the shoulders up because of the angle”.

It did not appear to the trial judge “that [the appellant] actually knew he was being watched”. There was nothing to suggest, the trial judge said, “that [the appellant] was aware that [Mrs. S.] was watching from the darkened bedroom window”. He found that the evidence in fact indicated the contrary. The appellant was, however, seen by Mrs. S. and “could easily have been seen by the children, but apparently was not”.

On these facts, the trial judge concluded that the appellant had wilfully committed “an indecent act . . . in a public place in the presence of one or more persons”, thereby committing the offence set out in s. 173(1)(a) of the *Criminal Code*.

The trial judge was not satisfied, however, that the appellant had committed this indecent act “with intent thereby to insult or offend any person”, as required by s. 173(1)(b) of the *Code*. He therefore acquitted the appellant of the charge laid against him under that section.

The appellant’s conviction under s. 173(1)(a) was affirmed by the Court of Appeal for British Columbia. He now appeals to this Court, with leave, from the decision of the Court of Appeal.

jumelles et un télescope. Il a également tenté, en vain, de filmer l’appelant à l’aide d’un caméscope.

M. et M^{me} S. étaient, bien entendu, inquiets. Pour reprendre les termes de M. S., ils craignaient que l’appelant se [TRADUCTION] « masturbe en regardant dans la direction de [leurs] enfants ». Ils ont donc appelé la police.

Le premier policier est arrivé en moins de cinq minutes. De la chambre à coucher de M. et M^{me} S., le policier était en mesure d’apercevoir l’appelant [TRADUCTION] « jusqu’en dessous du nombril ». L’appelant avait la main devant lui [TRADUCTION] « et paraissait se masturber ». De l’endroit où il se trouvait dans l’arrière-cour de l’appelant, au niveau de la rue, le policier ne pouvait voir ce dernier qu’[TRADUCTION] « à peu près à partir du cou ou des épaules en montant, vu l’angle de son regard ».

Selon le juge du procès, [TRADUCTION] « [l’appelant] paraissait ignorer qu’on l’observait ». Le juge a ajouté que rien ne permettait de croire que [TRADUCTION] « [l’appelant] savait que [M^{me} S.] l’observait par la fenêtre de sa chambre à coucher non éclairée ». Il a conclu qu’en fait la preuve indiquait le contraire. M^{me} S. a toutefois observé l’appelant et [TRADUCTION] « les enfants auraient pu aisément le voir, mais il semble que non ».

Compte tenu de ces faits, le juge a décidé que l’appelant avait commis volontairement « une action indécente [. . .] dans un endroit public en présence d’une ou de plusieurs personnes », perpétrant ainsi l’infraction créée à l’al. 173(1)a) du *Code criminel*.

Cependant, il n’était pas convaincu que l’appelant avait commis cette action indécente « avec l’intention d’ainsi insulter ou offenser quelqu’un », comme l’exige l’al. 173(1)b) du *Code*. Il a donc acquitté l’appelant relativement à l’accusation portée contre lui en vertu de cette disposition.

La Cour d’appel de la Colombie-Britannique a confirmé la déclaration de culpabilité de l’appelant fondée sur l’al. 173(1)a). Il se pourvoit maintenant, avec l’autorisation de notre Cour, contre l’arrêt de la Cour d’appel.

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III

24 In affirming the appellant's conviction, the Court of Appeal relied primarily on *R. v. Keir* (1919), 34 C.C.C. 164 (N.S.S.C.), and *R. v. Buhay* (1986), 30 C.C.C. (3d) 30 (Man. C.A.).

25 The accused in *Keir* had exposed himself while standing in a private lane next to a public street, from which he was seen by passing girls. Harris C.J., in separate but concurring reasons, held that "[i]t was always the law that if this offence was committed in a place visible to any one passing along the streets it was punishable" (p. 166). For this proposition, Harris C.J. relied entirely on English case law, notably *R. v. Thallman* (1863), 9 Cox C.C. 388.

26 *Thallman*, however, merely underlines the differences between the English common law and the offence set out in s. 173(1)(a) of the *Criminal Code*. This distinction was well explained, albeit with some regret, by Middleton J., dealing with the predecessor to s. 173(1)(a) in *R. v. Clifford* (1916), 26 D.L.R. 754 (Ont. S.C.), at pp. 755-56:

In numerous English cases the offence was committed on private property, but in such a place as to be easily visible to passers-by or the occupants of adjacent houses: e.g., *Thallman's Case* (1863), L. & C. 326.

Unfortunately, in our statute this element of visibility to the public seems to have been lost sight of, and the act is punishable only when committed in any place to which the public have or are permitted to have access.

27 Harris C.J., relying in *Keir* on the English common law relating to indecent exposure, failed to appreciate this distinction.

28 Speaking for the other four judges in *Keir*, Mellish J. approached the matter differently, at p. 167:

III

En confirmant la déclaration de culpabilité de l'appelant, la Cour d'appel s'est principalement fondée sur la décision *R. c. Keir* (1919), 34 C.C.C. 164 (C.S.N.-É.), et l'arrêt *R. c. Buhay* (1986), 30 C.C.C. (3d) 30 (C.A. Man.).

Dans l'affaire *Keir*, l'accusé s'était exhibé debout dans une allée privée adjacente à la voie publique, où de jeunes passantes l'avaient aperçu. Dans des motifs distincts mais concordants, le juge en chef Harris a statué qu'[TRADUCTION] « [i]l est bien établi en droit qu'une telle infraction est toujours punissable si elle est commise à la vue de tous les passants dans une rue » (p. 166). Ce faisant, le juge en chef Harris s'est entièrement fondé sur la jurisprudence anglaise, plus particulièrement sur l'affaire *R. c. Thallman* (1863), 9 Cox C.C. 388.

Toutefois, l'affaire *Thallman* fait simplement ressortir les différences entre la common law anglaise et l'infraction créée à l'al. 173(1)a) du *Code criminel*. En examinant la disposition antérieure à l'al. 173(1)a), dans la décision *R. c. Clifford* (1916), 26 D.L.R. 754 (C.S. Ont.), p. 755-756, le juge Middleton a bien expliqué cette distinction, en en regrettant quelque peu l'existence :

[TRADUCTION] Dans de nombreuses affaires survenues en Angleterre, l'infraction a été commise sur une propriété privée, mais dans un endroit bien à la vue des passants ou des occupants des maisons adjacentes : prenons l'exemple de l'affaire *Thallman* (1863), L. & C. 326.

Malheureusement, cet élément d'exposition à la vue du public semble avoir été oublié dans notre loi, et l'action n'est punissable que si elle a été commise dans un lieu auquel le public a accès ou auquel il est autorisé à avoir accès.

Dans la décision *Keir*, le juge en chef Harris ne s'est pas rendu compte de cette distinction en appliquant la common law anglaise en matière d'exhibitionnisme.

S'exprimant au nom des quatre autres juges, dans la décision *Keir*, le juge Mellish a abordé la question différemment, à la p. 167 :

I think this was an indecent act done in the street, a place to which the public have access and that the accused was properly convicted. . . . The gist of the offence is the exposure and if the exposure is wilful and in sight of persons then in a public place, I think it is an exposure in such place and in the presence of such persons within the meaning of sec. 205 of the Code. [Emphasis added.]

For Mellish J., an indecent act is thus committed not only where the offender is performing it, but also in the place where the witnesses to it are physically situate. I am not at all persuaded that *Keir* was correctly decided. But even if it was, *Keir* affords no support for the conviction in this case, since the appellant's indecent act did not occur in a public place, even within the expanded meaning of *Keir*.

In *Buhay* the accused was charged under the predecessor to s. 173(1)(a). Standing in the front doorway to his house, he had exposed himself to two boys on the street. The trial judge acquitted Mr. Buhay on the ground that he had been charged under the wrong provision: while a lewd comment uttered by the accused in that case afforded sufficient evidence of his intent to insult or offend, warranting a conviction under the predecessor to s. 173(1)(b), the indecent act did not occur in a public place and was therefore not caught by what is now s. 173(1)(a).

The Court of Appeal allowed the Crown's appeal, relying essentially on *Keir*. For the reasons explained, I find that *Keir* does not support a conviction in the present case. Neither does *Buhay*, since it rests on the same inapplicable considerations.

With respect, the authorities relied on here by the Court of Appeal in affirming the appellant's conviction are thus of no comfort to its conclusion.

[TRADUCTION] J'estime qu'il s'agissait d'une action indécente commise dans la rue, un lieu auquel le public a accès, et que l'accusé a été déclaré coupable à juste titre. [. . .] L'exhibitionnisme est l'élément essentiel de l'infraction et je crois que la personne qui s'exhibe volontairement devant des personnes qui se trouvent alors dans un endroit public se rend coupable d'exhibitionnisme dans un endroit et en présence de personnes, au sens de l'art. 205 du Code. [Je souligne.]

Selon le juge Mellish, l'action indécente est donc commise non seulement là où le contrevenant l'accomplit, mais également là où se trouvent les personnes qui en sont témoins. Je ne suis pas du tout convaincu que la décision *Keir* est correcte. Toutefois, même si elle l'était, elle n'étaye aucune-ment la déclaration de culpabilité en l'espèce, étant donné que l'action indécente de l'appelant n'a pas été commise dans un endroit public, même au sens élargi que lui donne cette décision.

Dans l'arrêt *Buhay*, l'accusé a été inculpé en vertu de la disposition antérieure à l'al. 173(1)(a). Debout dans l'embrasement de la porte d'entrée de sa résidence, il s'était exhibé devant deux garçons dans la rue. Le juge du procès a acquitté M. Buhay parce que l'accusation portée contre lui n'était pas fondée sur la disposition applicable : même si un commentaire obscène de l'accusé dans cette affaire était une preuve suffisante de son intention d'insulter ou d'offenser, laquelle preuve justifiait une déclaration de culpabilité fondée sur la disposition antérieure à l'al. 173(1)(b), l'action indécente n'avait pas été commise dans un endroit public et n'était donc pas visée par ce qui est devenu l'al. 173(1)(a).

Se fondant essentiellement sur la décision *Keir*, la Cour d'appel a accueilli l'appel du ministère public. Pour les raisons déjà expliquées, je conclus que la décision *Keir* n'étaye pas une déclaration de culpabilité en l'espèce, pas plus que l'arrêt *Buhay*, étant donné qu'il repose sur les mêmes considérations inapplicables.

En toute déférence, la jurisprudence que la Cour d'appel a invoquée en l'espèce pour confirmer la déclaration de culpabilité de l'appelant n'étaye donc aucunement la conclusion à laquelle elle est parvenue.

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IV

33 The appellant does not contest the trial judge's finding that he committed an "indecent act" within the meaning of s. 173(1)(a) of the *Criminal Code*. He concedes, at least implicitly, that masturbating in an illuminated room near an uncovered window visible to neighbours can be "indecent" within the meaning of that section.

34 The appellant contends, however, that he did not wilfully commit this indecent act "in a public place in the presence of one or more persons", as required by s. 173(1)(a). He raises three grounds: first, that his living room was not a "public place" within the meaning of s. 173(1)(a); second, that the complainants were "surreptitiously watching him from beneath the blinds of a window in their own private bedroom some distance away" — and, therefore, not "in his presence", as likewise required by s. 173(1)(a); third, that he cannot be said to have wilfully committed an indecent act in the presence of anyone, since the trial judge found there was no evidence that he knew he was being observed.

35 The appellant argues, in addition, that the Court of Appeal erred in resting its conclusion of guilt on its own view of the evidence, which differed in important respects from the findings of the trial judge. I find it unnecessary to add here to what I have said earlier concerning this branch of the matter.

36 The appellant submits that his appeal succeeds if any one of his grounds is maintained. I agree and, as mentioned earlier, I would allow the appeal on the first ground — that the act imputed to him was not committed "in a public place", within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*. While there is thus no need to canvass the remaining grounds, I should not be understood to have concluded that they are without merit.

V

37 It is common ground that the appeal must succeed if the appellant did not commit an indecent act

IV

L'appellant ne conteste pas la conclusion du juge du procès voulant qu'il ait commis une « action indécente » au sens de l'al. 173(1)a) du *Code criminel*. Il reconnaît, à tout le moins implicitement, qu'il peut être « indécent », au sens de cette disposition, de se masturber dans une pièce éclairée, près d'une fenêtre aux rideaux ouverts et à la vue de ses voisins.

L'appellant prétend, toutefois, qu'il n'a pas commis volontairement cette action indécente « dans un endroit public en présence d'une ou de plusieurs personnes », comme l'exige l'al. 173(1)a). Il soulève trois moyens : premièrement, son salon n'est pas un « endroit public » au sens de l'al. 173(1)a); deuxièmement, les plaignants [TRADUCTION] « l'observaient subrepticement, de loin, par l'ouverture en dessous du store de leur fenêtre de chambre à coucher », et non « en sa présence », comme l'exige également l'al. 173(1)a); troisièmement, on ne peut pas lui reprocher d'avoir commis volontairement une action indécente en présence de quelqu'un, vu que le juge du procès a conclu que rien ne prouvait qu'il se savait observé.

L'appellant ajoute que la Cour d'appel a commis une erreur en fondant sa conclusion de culpabilité sur sa propre appréciation de la preuve, laquelle diffère à d'importants égards des conclusions du juge du procès. J'estime qu'il n'est pas nécessaire ici d'ajouter quoi que ce soit à ce qui a déjà été dit au sujet de cet aspect de l'affaire.

L'appellant prétend qu'il aura gain de cause si l'un ou l'autre des moyens qu'il soulève est retenu. Je suis d'accord avec lui et, comme nous l'avons vu, je suis d'avis d'accueillir le pourvoi pour le premier motif qu'il invoque, à savoir que l'action qui lui est reprochée n'a pas été commise « dans un endroit public », au sens de l'art. 150 et de l'al. 173(1)a) du *Code criminel*. Bien qu'il ne soit donc pas nécessaire d'examiner les autres moyens, je ne veux pas que l'on croie que je les ai considérés non fondés.

V

Nul ne conteste que le pourvoi doit être accueilli si l'appellant n'a pas commis une action indécente

in a public place within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*.

These provisions read:

150. In this Part,

. . .

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

150. Les définitions qui suivent s’appliquent à la présente partie.

« endroit public » Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite.

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

173. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque volontairement commet une action indécente:

a) soit dans un endroit public en présence d’une ou de plusieurs personnes;

b) soit dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un.

It will be immediately noticed that the French version of s. 150 contains no equivalent of “includes” in the English text. The appellant submits that the French definition is thus exhaustive in its terms, narrower than the English and common to both versions. The French definition, in the appellant’s view, must therefore prevail: *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6, at paras. 26-37.

The respondent considers that there is “no discordance between the French and English text on the characteristics that make a place “public”

dans un endroit public au sens de l’art. 150 et de l’al. 173(1)a) du *Code criminel*.

Voici le texte de ces dispositions :

150. Les définitions qui suivent s’appliquent à la présente partie.

« endroit public » Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite.

150. In this Part,

. . .

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

173. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque volontairement commet une action indécente :

a) soit dans un endroit public en présence d’une ou de plusieurs personnes;

b) soit dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un.

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

D’emblée, on constate que la version française de l’art. 150 ne comporte aucun terme équivalent au verbe « *includes* » de la version anglaise. L’appelant soutient que la définition française est donc formulée de manière exhaustive, plus restrictive que la définition anglaise et commune aux deux versions. La définition française doit donc, selon lui, avoir préséance : *R. c. Daoust*, [2004] 1 R.C.S. 217, 2004 CSC 6, par. 26-37.

L’intimée considère qu’il n’existe [TRADUCTION] « aucune antinomie entre les textes français et anglais quant aux caractéristiques qui rendent un endroit

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(emphasis in original). In the respondent's words, the issue is whether "private property, when exposed to public view, is a 'place' to which the 'public have access as of right or by invitation, express or implied'".

41 There is thus no need to choose in this case between the English and French versions of s. 150. The parties agree that both versions require public access by right or invitation: their disagreement is limited to the meaning of "access" in this context.

42 On that issue, which is decisive in this case, the appellant submits that ss. 150 and 173(1)(a) contemplate physical access to the place in which the impugned act was committed; the respondent, that visual access is sufficient. In my view, the appellant's position is supported by the prevailing rules of statutory construction. The respondent's position is not.

43 It is now well established that "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": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

44 As a matter of semantics, the "ordinary" meaning of a disputed term will, of course, often vary with the context in which it is being used. Thus, for example, "access" has one "ordinary meaning" in relation to the rights of non-custodial parents, another as regards on-line computing, and yet another with respect to a place.

45 Section 150 of the *Criminal Code* uses the word "access" in reference to a "place" — in this case, a private home. And our concern is with access to that place "as of right or by invitation". In common usage, "access" to a place to which one is invited or where one has a right to be refers to entering, visiting or using that place — and not, as I said earlier,

"public" » (souligné dans l'original). Pour reprendre les termes de l'intimée, la question est de savoir si [TRADUCTION] « une propriété privée, exposée à la vue du public, constitue un "lieu" auquel le "public a accès de droit ou sur invitation, expresse ou implicite" ».

Dans le cas qui nous occupe, il n'est donc pas nécessaire de choisir entre la version française et la version anglaise de l'art. 150. Les parties s'accordent pour dire que les deux versions exigent l'accès du public, de droit ou sur invitation; leur désaccord est limité au sens du mot « accès » dans ce contexte.

Au sujet de cette question déterminante en l'espèce, l'appellant fait valoir que l'art. 150 et l'al. 173(1)a visent l'accès physique au lieu où l'action reprochée a été accomplie; pour l'intimée, l'accès visuel suffit. À mon avis, la thèse de l'appellant est étayée par les règles ordinaires d'interprétation législative. Celle de l'intimée ne l'est pas.

Il est maintenant bien établi qu'« il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, où la Cour cite E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

Du point de vue sémantique, il va sans dire que le sens « ordinaire » d'un terme litigieux dépend souvent du contexte dans lequel ce terme est utilisé. Par exemple, le mot « accès » a un « sens ordinaire » dans le cas des droits des parents non gardiens, un autre dans le domaine de la téléinformatique et encore un autre lorsqu'il est question d'un lieu.

L'article 150 du *Code criminel* emploie le mot « accès » relativement à un « lieu » — en l'espèce, une résidence privée. Et c'est l'accès « de droit ou sur invitation » à ce lieu qui nous intéresse. Dans la langue courante, l'« accès », de droit ou sur invitation, qu'une personne a à un lieu signifie qu'elle peut y pénétrer, le visiter ou l'utiliser — et non, comme

to looking or listening in from the outside. When we are told that someone has access, as of right or by invitation, to an apartment, a workshop, an office, or a garage, this does not signify to us a mere opportunity or ability to look through a window or doorway and to see what is happening inside.

This “grammatical and ordinary sense” of “access” in relation to a place must, of course, be read harmoniously with the legislative context that concerns us here and the intention of Parliament as it appears from the *Criminal Code: Bell ExpressVu* and *Rizzo & Rizzo Shoes*.

I begin with the immediate legislative context.

First, interpreting “public place” in a manner consistent with physical as opposed to visual access, renders the whole of s. 173(1) more coherent. The offences under ss. 173(1)(a) and 173(1)(b) are circumscribed in distinct ways. Section 173(1)(a) prohibits indecent acts in public places, while s. 173(1)(b) prohibits indecent acts in any place — public or private — when they are committed with intent to insult or offend.

Moreover, as I mentioned earlier, Parliament has distinguished in the *Code* between conduct that is criminal because it occurs in a public place and conduct that is criminal because it is exposed to public view. Section 173(1)(a), as we have seen, grounds liability in the fact that the prohibited act is committed in a public place. The offence of nudity is set out in the very next section of the *Code*:

174. (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

Section 174(1) makes it perfectly clear that the definition of “public place” in s. 150 of the *Criminal Code* was not meant to cover private places exposed

je l’ai mentionné précédemment, qu’elle peut, de l’extérieur, voir ou entendre ce qui se passe à l’intérieur de ce lieu. Lorsqu’on nous dit qu’une personne a accès, de droit ou sur invitation, à un appartement, à un atelier, à un bureau ou à un garage, nous ne comprenons pas qu’elle a simplement la possibilité ou la capacité de voir, par la fenêtre ou par la porte, ce qui se passe à l’intérieur de ces lieux.

Il va de soi que ce « sens ordinaire et grammatical » du mot « accès » utilisé relativement à un lieu doit s’harmoniser avec le contexte législatif qui nous intéresse en l’espèce et avec l’intention du législateur qui se dégage du *Code criminel : Bell ExpressVu* et *Rizzo & Rizzo Shoes*.

Je commence par le contexte législatif immédiat.

Premièrement, l’ensemble du par. 173(1) devient plus cohérent si on rattache l’expression « endroit public » à l’accès physique plutôt que visuel. Les infractions créées aux al. 173(1)(a) et 173(1)(b) sont définies différemment. L’alinéa 173(1)(a) interdit les actions indécentes dans un endroit public, alors que l’al. 173(1)(b) les interdit dans un endroit quelconque — public or privé — lorsqu’elles ont pour but d’insulter ou d’offenser.

De plus, comme je l’ai déjà mentionné, le législateur établit dans le *Code* une distinction entre la conduite qui est criminelle parce qu’elle est adoptée dans un endroit public et celle qui est criminelle parce qu’elle est adoptée à la vue du public. Comme nous l’avons vu, c’est le fait de commettre l’action prohibée dans un endroit public qui engage la responsabilité à l’al. 173(1)(a). L’infraction de nudité est créée par la disposition suivante du *Code* :

174. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, sans excuse légitime, selon le cas :

a) est nu dans un endroit public;

b) est nu et exposé à la vue du public sur une propriété privée, que la propriété soit la sienne ou non.

Le paragraphe 174(1) montre clairement que l’expression « endroit public » définie à l’art. 150 du *Code criminel* n’est pas censée viser les endroits

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to public view. Were it otherwise, s. 174(1)(b) would be entirely superfluous.

51 Section 150 applies equally to s. 174(1) and s. 173(1)(a). If “public place” does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(a). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form simultaneously, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.

52 Section 213(1) of the *Code* provides further support, if any were needed, for the proposition that the grammatical and ordinary meaning I have ascribed to “access” is consistent with its legislative context and with Parliament’s intention in enacting s. 150. Section 213(1) makes it an offence for anyone “in a public place or in any place open to public view” to commit certain specified acts for the purposes of prostitution.

53 The underlined, alternative route to liability in s. 213 was added by R.S.C. 1985, c. 51 (1st Supp.), s. 1. Parliament shortly thereafter directed its attention to s. 173, adding subs. (2): see R.S.C. 1985, c. 19 (3rd Supp.), s. 7. The respondent notes, correctly, that s. 213, unlike s. 173, is not in Part V of the *Criminal Code* and suggests that it was amended in response to comments by this Court in *Hutt v. The Queen*, [1978] 2 S.C.R. 476. This may well be so, but Parliament is deemed to act deliberately. It is therefore not unreasonable to suppose that Parliament, when it expanded s. 213 to include places open to public view, did not add similar language to s. 173(1)(a) because it did not intend acts committed in such places to be caught under the latter section.

54 I think it inappropriate for this Court to do now what Parliament declined to do then and remains free in its wisdom to do still.

privés exposés à la vue du public. S’il en était autrement, l’al. 174(1)b) serait complètement superflu.

L’article 150 s’applique aussi bien au par. 174(1) qu’à l’al. 173(1)a). Si, pour les besoins du par. 174(1), l’expression « endroit public » n’englobe pas les endroits privés exposés à la vue du public, il doit sûrement en être de même en ce qui concerne l’al. 173(1)a). Je m’empresse de souligner que le par. 173(1) et l’art. 174 du *Code criminel* ont été adoptés en même temps sous leur forme actuelle, en tant qu’art. 158 et 159, lorsque le *Code* a été modifié et adopté comme S.C. 1953-54, ch. 51. Le législateur ne peut pas avoir voulu que des mots identiques aient des sens différents dans deux dispositions consécutives et connexes du même texte législatif.

Le paragraphe 213(1) du *Code* renforce — à supposer que ce soit nécessaire — la proposition selon laquelle le sens ordinaire et grammatical que j’ai attribué au mot « accès » s’harmonise avec son contexte législatif et avec l’intention qu’avait le législateur en adoptant l’art. 150. Aux termes du par. 213(1), est coupable d’une infraction quiconque commet, « dans un endroit soit public soit situé à la vue du public », certaines actions précises dans le but de se livrer à la prostitution.

L’autre fondement souligné de la responsabilité a été ajouté à l’art. 213 par L.R.C. 1985, ch. 51 (1^{er} suppl.), art. 1. Peu après, le législateur a ajouté le par. (2) à l’art. 173 : voir L.R.C. 1985, ch. 19 (3^e suppl.), art. 7. L’intimée fait remarquer, à juste titre, que, contrairement à l’art. 173, l’art. 213 ne figure pas dans la partie V du *Code criminel*, et elle indique qu’il a été modifié à la suite des observations de notre Cour dans l’arrêt *Hutt c. La Reine*, [1978] 2 R.C.S. 476. Quoiqu’il puisse bien en être ainsi, le législateur est réputé agir de propos délibéré. Il n’est donc pas déraisonnable de supposer que, en élargissant l’art. 213 de manière à inclure les endroits exposés à la vue du public, le législateur n’a pas ajouté des termes semblables à l’al. 173(1)a) parce qu’il ne voulait pas que cet alinéa s’applique aux actions commises à ces endroits.

J’estime qu’il n’appartient pas à notre Cour de faire ici ce que le législateur, dans sa sagesse, s’est librement abstenu de faire jusqu’à maintenant.

VI

For all of these reasons, as indicated at the outset, I would allow the appeal, vacate the appellant's conviction and enter an acquittal.

Appeal allowed.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitor for the intervener: Ministry of the Attorney General of Ontario, Toronto.

VI

Pour tous ces motifs, comme je l'ai indiqué au départ, je suis d'avis d'accueillir le pourvoi, d'annuler la déclaration de culpabilité de l'appelant et d'inscrire un acquittement.

Pourvoi accueilli.

Procureur de l'appelant : Gil D. McKinnon, Vancouver.

Procureur de l'intimée : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant : Ministère du Procureur général de l'Ontario, Toronto.

Tab 10:

R. v. Clayton, 2021 BCCA 24

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Clayton*,
2021 BCCA 24

Date: 20210121
Docket: CA45683

Between:

Regina

Respondent

And

Larry Daniel Clayton

Appellant

Before: The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
November 18, 2016 (conviction) (*R. v. Clayton*, 2016 BCSC 2153,
New Westminster Docket X078546).

Counsel for the Appellant
(via videoconference):

B.R. Anderson

Counsel for the Respondent
(via videoconference):

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

Place and Date of Hearing:

Vancouver, British Columbia
December 1, 2020

Place and Date of Judgment:

Vancouver, British Columbia
January 21, 2021

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Abrioux

Summary:

The appellant was convicted of assault and unlawful confinement following a trial by judge alone in the BC Supreme Court. He and the complainant had been in an intimate relationship and her pregnancy was a source of conflict. On appeal, the appellant argued the trial judge erred in refusing to direct the complainant to answer questions in cross-examination about whether she had an abortion, and if so, when. Held: Appeal dismissed. The information sought by the defence was relevant to its theory about the complainant's motive to lie, and was therefore relevant to her credibility. However, the trial judge did not err in refusing to direct the complainant to answer the questions. The Crown put the information sought on the record. Once that information was before the judge, it was no longer a live issue and there was no need to cross-examine the complainant to obtain the same information. The appellant was not prevented from arguing his theory on motive, nor was he otherwise limited in his defence.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:**Introduction**

[1] After a trial by judge alone in the Supreme Court of British Columbia, the appellant was convicted of assault and unlawful confinement, contrary to ss. 266 and 279(2) respectively, of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant and the complainant had been involved in an intimate relationship. The charges arose from the complainant's allegations that the appellant assaulted her and forced her into his car, verbally abusing and threatening her. The conflict centered on the complainant's pregnancy with the appellant's child about which she did not wish to speak to the appellant.

[3] The appellant represented himself at trial except that pursuant to s. 486.3(3) of the *Criminal Code*, the judge appointed counsel to cross-examine the complainant ("counsel"). During cross-examination, counsel asked the complainant whether she had had an abortion. The complainant replied that she did not feel comfortable answering that question. Counsel then asked the judge to direct the complainant to answer the question. The Crown had disclosed to the appellant both the fact and date of the abortion, which the Crown admitted for the record.

[4] Following submissions, the judge declined to order the complainant to answer the questions proposed by counsel (the fact and the date of the abortion). The judge said he was fully aware the complainant was pregnant when the assault and unlawful confinement allegations arose and that the appellant would be upset if she were not going to have the baby. In light of the circumstances, including the Crown's "admission", the matter was not in issue. Accordingly, the judge did not "see any point in putting the witness through it".

[5] The sole ground of appeal is whether the appellant's trial was unfair because the judge declined to order the complainant to answer counsel's proposed questions.

[6] In my opinion, the judge properly exercised his discretion not to order the complainant to respond to the questions. I would therefore dismiss the appeal.

The Evidence at Trial

[7] The complainant was the key witness at trial. The outcome depended primarily on the judge's assessment of her credibility. In support of the complainant's evidence, the Crown adduced a surveillance video from outside of the complainant's home. It showed part of her interaction with the appellant at the material time. Three police officers and one civilian gave evidence as to the authenticity of the surveillance video. The Crown also adduced text messages the appellant had sent to the complainant after the allegations arose. There is no issue on appeal regarding either the surveillance video or the text messages. One of the police officers who attended the complainant's home on March 1, 2015, to take her statement testified that she seemed fearful.

[8] The appellant did not testify. He called one witness who gave uncontroversial evidence related to the surveillance video.

The Complainant's Evidence

[9] To give context to the issue on appeal, I will review the complainant's evidence in some detail.

[10] At the time of trial, the complainant was 24 years old. She immigrated to Canada in 2003 and had been living in British Columbia ever since.

[11] The complainant met the appellant in October 2014. Early in their relationship, things went well. After a month, however, the complainant testified that the appellant became jealous and controlling. In one incident in November 2014, he yelled, swore, and damaged her cellular phone upon seeing another man's name on her call display. There were other instances of yelling and expressions of jealousy by the appellant, but the two remained friends.

[12] On the morning of February 27, 2015, the appellant appeared unannounced at the complainant's home and drove her to work. He said he wanted to talk to her. He was aware she was pregnant and was concerned about her intentions regarding the baby. The complainant testified that he wanted her to have this baby. Later that day, the appellant picked up the complainant from work and drove her home.

[13] On the evening of February 27, 2015, the complainant went to a nightclub in New Westminster. On arriving, she noticed the appellant, despite their lack of plans to see each other. He again asked to talk to her, but the complainant declined. She also later declined the appellant's request to drive her home. At about 2:00 a.m., the complainant took a taxi home with her friend, Chad.

[14] The taxi dropped off the complainant in front of a house next door to her home. She saw the appellant's car in the driveway. It was approximately 2:30 a.m. The complainant testified that as she walked towards her home, the appellant got out of his car and said again that he wanted to talk to her. She refused. The appellant asked who was in the taxi with her, to which she responded, "It was Chad." She testified that the appellant then "lost it" and punched a gate.

[15] The complainant went through the gate, but tripped and landed flat on her back. The appellant was then on top of her, straddling her body, threatening her, and yelling a lot. The complainant said he grabbed her neck and she fainted.

[16] When the complainant eventually got up, she said the appellant took her to his car and put her in the front passenger seat. (In her examination-in-chief, the complainant was asked if she tried to move away from the appellant when he was taking her to his car. She testified that she did not because the appellant said he was going to punch her in the face.) She testified that she tried to get out of the car, but the appellant said, “Don’t even try”. The complainant was scared. Once the appellant started driving the car away from the complainant’s home, the complainant attempted to call 9-1-1 but the appellant took away her cellular phone. The complainant testified that the appellant drove her to a parking lot in the Guildford area (the “parking lot”), a neighbourhood in Surrey, and during the car ride, he kept yelling at her and calling her names. He was angry. She “zoned out” and awoke with her head on the appellant’s lap in the parking lot. The appellant then said, “If you try anything ... I’m going to do it again”.

[17] While the two were in the appellant’s car in the parking lot, the appellant used his cellular phone to call a friend named “Ty”. The complainant testified that she heard the appellant say, “If you don’t hear back from me by this time ... go take care of [the complainant]’s family”, which the complainant understood meant to kill her family. The appellant had referred to her by her nickname.

[18] The appellant eventually drove to the complainant’s home. She testified that she “zoned out” and did not recall what was said or whether the appellant followed her into the house as she was “so weak ... and tired.” She later recalled that the appellant had walked her to the door before eventually leaving.

[19] The next day, the complainant called her workplace and said she was sick. The appellant returned to her home. The complainant testified that he stayed almost the whole day and said at one point, “You can’t keep me away from my child”. By then she had decided “what [she] was going to do with the baby”, but did not tell the appellant. (The trial judge inferred from this that she had decided to have an abortion.) Later that day, the complainant’s sister called the police who attended and took a statement.

[20] The complainant was shown a surveillance video taken from a camera attached to the outside of the house where she lived with her sister and her brother. The camera had a view towards the street. It showed the road in front of the property and the driveway leading up to the gate that led to the entrance of the complainant's home.

[21] The complainant provided identification commentary on the video surveillance footage. Its clarity was poor, so without the assistance of the complainant, it was not possible to identify her or the appellant as the two people depicted.

[22] The first of the videos began at 2:55 a.m. on February 28, 2015. The complainant described the appellant's car coming into view, then parking by her house. The next video, timestamped 3:15:59 a.m., showed a taxi pass by the front of the complainant's house and stop out of view. The complainant testified that she walked away from the taxi towards her house. The appellant got out of his car and stood by the gate leading to the side of the house. She described backing up near the gate with the appellant approaching her, screaming. He moved aside from the gate and she walked along the side of the house, out of view of the camera. The incident described above—where she landed on the ground with the appellant straddling her—then followed.

[23] At 3:21:42 a.m. of the footage, the complainant described the appellant holding her while he walked toward the car. He opened the car door to the front passenger seat, put her in, shut the door, and got into the driver's seat. The video showed the front passenger door opening and shutting when the car drove away.

[24] At 4:29:37 a.m. of the footage, the complainant testified that she saw the appellant's car return and pull into the driveway. She was in the car then. At 5:08 a.m., both she and the appellant got out of the car and walked towards the gate.

[25] The complainant testified that her sister later called the police as the complainant was too scared to call. The complainant received text messages from the appellant after the alleged assault and unlawful confinement and after it had been reported to the police. The text messages showed the appellant was upset about the complainant seeing another man while she was pregnant with the appellant's child. The text messages also reflected his upset about having to deal with the police because of her sister's complaint.

[26] In the days following the text messages and after the appellant's exchanges with the police, the complainant and the appellant got together. The complainant testified the appellant had no where to go, so she got him a hotel room. She visited him there and he apologized to her.

[27] In cross-examination, the complainant refused to answer the question as to whether she had had an abortion. The judge's exercise of discretion not to order her to answer the question, or the follow-up question as to "when", forms the basis of this appeal. I will address this issue after reviewing the reasons of the trial judge, to which I now turn.

The Reasons of the Trial Judge

[28] I will also review in some detail the reasons of the trial judge to further situate the relevance of the proposed questions on cross-examination.

[29] The trial judge observed that the most important witness by far was the complainant and that his decision rested primarily on an assessment of her credibility. The judge thoroughly reviewed the complainant's evidence. He also reviewed the video surveillance footage together with the complainant's identification commentaries, and the content of the text messages the appellant sent to the complainant after the allegations arose.

[30] The judge found the text messages "went to" post-event conduct relating to the credibility of the complainant and to the appellant's conduct towards her. The judge found the text messages to be part and parcel of the narrative of the events of

the day in question and shortly thereafter. In the texts, the appellant referred to the complainant as a “baby killer”. The judge found this corroborative of the complainant’s evidence that the appellant was threatening toward her and corroborative of her allegation that she was not safe.

[31] The judge noted that the appellant, relying on his allegation of the complainant’s lack of credibility and the alleged unreliability of the video evidence, took the position that the Crown had failed to prove the offences.

[32] The judge was satisfied the video surveillance recordings were an accurate depiction of the events outside the complainant’s home in the early morning of February 28, 2015. While the recordings could not support a positive identification, they depicted a person who resembled the complainant and a male who exited the parked car and confronted the complainant. That evidence corroborated the testimony of the complainant regarding, in particular, the confrontation between her and the appellant.

[33] The trial judge considered counsel’s submissions challenging the complainant’s credibility, specifically (at para. 32):

- The complainant misled the police as to the extent of her relationship with Mr. Clayton by saying Mr. Clayton was not her boyfriend in spite of being in an intimate relationship with Mr. Clayton on an almost daily basis since the fall of 2014.
- The complainant did not mention to police the incident in November 2014 when Mr. Clayton was upset and broke her cell phone which she considered to be a violent act. She had told the police that the incidents of February 28, 2015 were the first occasion Mr. Clayton had been violent.
- At the preliminary inquiry the complainant had testified as to getting off work at 6 p.m. on February 27, 2015 but at trial stated she had gotten off work at 3 p.m. and regarding the same day provided inconsistent answers as to whether she had asked Mr. Clayton to pick her up or whether he had appeared at work uninvited by her.
- At the conclusion of her cross-examination, the complainant was asked:
 - Q. I’m going to suggest to you that you went - - you went into the vehicle voluntarily.
 - A. No.
 - Q. And you were not assaulted and you were not confined.

- A. I don't have a doubt. There was assault, but I did not go to the vehicle against my will [sic].

[34] The judge responded to the attacks on the complainant's credibility in this way:

[33] There were other areas where the complainant's credibility was raised. After having reviewed her evidence overall, I agree that there were responses from the complainant that were inconsistent or incorrect and there were matters in respect of which she failed to advise police or which she did not mention in her testimony at the preliminary inquiry. Regarding matters that were not referred to prior to her evidence at trial such as not having told the officers that she was pregnant, her answers depended upon what she was asked in the first instance, in other words, she did omit some matters, such as how Mr. Clayton had grabbed her neck while on the ground on the sidewalk beside the house and whether she had gone unconscious. In a situation where a woman has been threatened and left frightened, it is not unusual that she may omit some description of what occurred, likely unintentionally, due to the situation and the stress of answering the questions of a police officer. Overall, I found the inconsistencies in her evidence to be inconsequential and do not relate to any assault or confinement.

[34] Regarding the statement by the complainant that she "did not go into the vehicle against my will", that evidence was entirely inconsistent with her answer to the previous question she had been asked, i.e. that she went into the vehicle voluntarily to which she answered "no". I conclude in this instance that she either misspoke or was confused when she then stated she did not go to the vehicle against her will. Video evidence of her getting to and into the car corroborated the appearance that she did not get into the Cadillac voluntarily.

[35] The judge discussed the elements of assault and unlawful confinement and said there was no evidence of consent before him.

[36] Overall, the judge found the frailties in the complainant's evidence to be inconsequential and unrelated to the assault or unlawful confinement charges. He found her evidence with respect to the offences was reliable and credible. The judge explained his reasons for so concluding (at para. 63):

- The video evidence, especially of the scene when the complainant was pushed towards and into the Cadillac is corroborative of her evidence.
- Any inconsistencies in her evidence are not in respect of the actual assaults and confinement but relate to other matters which are not elements of the offences.

- During the early hours of February 28, 2015, the complainant experienced a highly emotional and frightening exchange with Mr. Clayton who “lost it”, according to the complainant and who continued to berate her steadily until eventually returning her to her home hours later. She also testified that she fainted or was “out” on occasion which is understandable, considering she encountered an extremely dangerous and threatening experience. The temperament of Mr. Clayton, including his threats, are also consistent with the text messages that he sent her after the police became involved. He was very emotional over her pregnancy and attempted to continue his control over her.
- She also testified at trial that she had not consumed drugs or alcohol and so would be more likely to accurately recollect what may have happened subject to having fainted.
- The complainant’s evidence was consistent with her wanting to end the relationship and trying to get away from him when he was pressing her regarding her pregnancy. She avoided him at the night club and said she did not want to talk.
- The complainant’s evidence was consistent with Mr. Clayton’s use of physical and psychological confinement when she was in the car. She had no meaningful escape routes/means of being released from confinement.
- The complainant clarified that when she said that Mr. Clayton was “someone that she used to know” she meant that once she’d been hurt by Mr. Clayton, she had treated him as if she’d put him to one side (See transcript, Feb 1, 2016, p. 63, ll. 43-46).
- The complainant was quite reticent to discuss her pregnancy and abortion with the police. Her reticence is likely due to the fact that she is from a prominent South Sudanese family who are adherents of Roman Catholicism and would not tolerate extramarital relations (See transcript, Feb 1, 2016, p. 64 l. 25 - p. 65, l. 26).

[37] In the result, the judge was satisfied beyond a reasonable doubt that the appellant assaulted the complainant on more than one occasion in the early morning of February 28, 2015. He accepted the evidence of the complainant that the appellant held the front of her neck while straddling over top of her at the side of the house. Those actions caused the complainant to have pain in her neck area and to briefly pass out. The judge also accepted that the appellant screamed and threatened to punch the complainant in the face. All of these actions, in his view, satisfied the definition of assault.

[38] The trial judge also found the appellant had committed another assault by pushing the complainant, against her will, towards and into his car. He considered it likely that a further assault took place inside the car in the parking lot, but noted that the evidence was inadequate to prove it.

[39] The judge additionally considered that when the appellant pushed the complainant towards his car, opened the door and pushed her inside before driving off, he committed the offence of unlawful confinement.

[40] Noting there was no evidence to contradict the video surveillance footage and the evidence of the complainant, the judge convicted the appellant of assault and unlawful confinement as charged.

The Issue

[41] The only ground of appeal is whether the judge erred in not ordering the complainant to answer the question(s) posed in cross-examination as to whether she had had an abortion (and if so, when). The appellant says the judge erred in concluding that because the evidence sought did not go to the ultimate issue of guilt or innocence, it was irrelevant.

The Impugned Ruling on Cross-Examination

[42] Toward the end of the complainant's cross-examination, she refused to answer the question on which this appeal is centered. The exchange was as follows:

Q Okay. What -- what happened to the -- to the child?

THE COURT: What happened to the what?

[COUNSEL]:

Q The -- the child that the two of you have.

A What does this have to do with anything?

Q Well, unfortunately I have to ask you the question.

A Well, I can't answer that.

Q Sorry, are you -- you're refusing to answer that question?

A I don't feel comfortable answering that question.

Q All right. Did you have an abortion?

A I can't answer that.

[COUNSEL]: I'd like a direction that the witness answer the question, please.

[43] The trial judge asked the complainant to step out of the courtroom while he received submissions on the issue. The Crown noted the complainant was "clearly uncomfortable answering that question" and informed the court that disclosure provided to the appellant made clear that the complainant did have an abortion. The trial judge expressed concern about whether the question was relevant. The Crown offered to "put ... on the record" the fact that the complainant had an abortion and the date on which the abortion took place if it was important to the defence.

[44] The judge asked counsel to clarify whether "[t]hat's what you want to know", being the fact and timing of the abortion. Counsel confirmed it was. Counsel submitted the evidence was relevant to "the context of the relationship and the context of the argument that they were having", which "related to the pregnancy, what was going to happen with the child". He further submitted the information was relevant to the appellant's theory as to "why this witness is saying that this happened". In particular, counsel pointed to the temporal link between the complainant finding out she was pregnant and the allegations arising. He submitted this was important because the complainant was from a conservative Catholic family and the question of "what to do about" the pregnancy out of wedlock would be "a serious issue that must have caused her a lot of angst".

[45] Counsel then alluded to the fact that cross-examination is often "the only method to uncover the truth in a matter." The judge responded by noting that "you've got what we understand to be the truth in that she did have the abortion". The judge recognized that the appellant clearly did not want the complainant to have an abortion.

[46] Counsel responded that he also wanted to establish the timing of the abortion. The judge asked why that was relevant. Counsel responded that the timing of the abortion relative to her reporting the allegations to the police was relevant to her motive. Essentially, the theory was that she reported the matter to the police so

that she could deal with her pregnancy without having to “answer to Mr. Clayton for what happened”.

[47] The Crown agreed that “timing might be relevant” and there was a good faith basis for the question. Crown counsel offered to make an admission that the complainant had had an abortion on March 2, 2015. This would “achieve what [the defence] wants to achieve without having to make the witness more uncomfortable.” The defence could put to the complainant their theory that she fabricated the events and she could “choose to accept it or deny it or continue to say she’s uncomfortable”.

[48] The judge refused to direct the complainant to answer the questions at issue:

THE COURT: I’m here to decide whether or not there is an assault and whether or not there is a confinement. I’m fully aware of the circumstances that she was pregnant at the time and your client, you know, would be, you know, upset if she wasn’t going to have the baby or whatever.

From this perspective, that’s fully -- I can understand that. I don’t think it’s going to make any difference to me one way or the other as to how -- you know, the outcome of this matter [indiscernible/microphone not functioning] as to whether or not she had an abortion.

Regarding the admission on the record, I think that’s -- that’s there, and I know when. And I appreciate those circumstances. But if she says yes or no, that “I didn’t have an abortion” or “I did have an abortion” and when, in these circumstances is unnecessary and it’s just -- I don’t think I need to hear that at all, and I don’t see any point in putting the witness through it if it’s not -- not an issue, and it isn’t an issue, so that’s what happens.

[49] It is significant that in his closing argument, the appellant submitted the complainant had made up the allegations against him because she and her sister wanted the appellant “out of the way”. He contended that the complainant’s family was pressing her to have an abortion and “she wasn’t willing to have the abortion if [he] was there”.

Applicable Legal Principles

Standard of Review

[50] The parties disagree on the standard of review. The appellant says the standard is correctness as it is a question of law whether the judge erred in taking an overly restrictive view of relevance in the context of cross-examination. The Crown's position is that the judge's assessment of the probative value and prejudicial effects of the evidence, and his management of cross-examination, is owed deference on appeal. In my view, both parties are correct.

[51] Whether the threshold requirement of relevance is met is a question of law reviewable on a correctness standard; it would be a legal error to admit irrelevant evidence. However, not all relevant evidence is necessarily admissible. A judge's decision to exclude relevant evidence where its probative value is outweighed (or, for defence-led evidence, substantially outweighed) by its prejudicial effect involves the exercise of discretion. Absent reliance on improper legal principles, the judge's conclusion in this regard is owed deference: *R. v. Araya*, 2015 SCC 11 at para. 31; *R. v. Ansari*, 2015 ONCA 575 at para. 112, leave to appeal ref'd (2016), [2015] S.C.C.A. No. 487.

[52] The judge's decision as to how to best manage cross-examination is also owed deference. As this Court held in *R. v. Podolski*, 2018 BCCA 96 at para. 369, leave to appeal ref'd (2019), [2018] S.C.C.A. No. 322, "[a]bsent the kind of unwarranted interference in cross-examination that denies an accused the right to make full answer and defence, this is a matter of trial management with which an appellate court should not lightly interfere."

The Right to Cross-Examination

[53] It is common ground the accused has the right to cross-examine witnesses without significant or unwarranted constraint. This right is part of the accused's constitutional right to make full answer and defence. Cross-examination is particularly important where credibility is a central issue at trial: *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663–65.

[54] Nor is it disputed that as a general rule, witnesses must answer questions put to them as long as the questions are relevant and otherwise admissible. Where a question asked is relevant and otherwise admissible, and where the trial judge directs the witness to answer the question, a witness's continued refusal to answer is an affront to the authority of the court, requiring a remedy. The trial judge has broad discretion regarding the best way to handle such a situation: *R. v. Arradi*, 2003 SCC 23 at paras. 32, 34–35.

[55] But as the Crown submits, witnesses are not obliged to answer irrelevant questions, and trial judges are not obliged to direct them to do so. Rather, a judge has a duty to inquire into and determine the relevance of a question before ordering a reluctant witness to answer it: *R. v. Fields* (1986), 28 C.C.C. (3d) 353 at 358–59 (Ont. C.A.).

Relevance and the Admissibility of Evidence

[56] Evidence must be relevant to a material issue in order to be admissible: *R. v. Calnen*, 2019 SCC 6 at para. 107, *per* Martin J., dissenting on other grounds. The relevance threshold is a low one that will be met where the evidence has some tendency to make the proposition for which it is advanced more likely than it would be in the absence of the evidence: *Calnen* at paras. 108, 142. Despite the low threshold, evidence is irrelevant if the inference it is adduced to support is speculative, equivocal, or unreasonable: *R. v. White*, 2011 SCC 13 at para. 167.

[57] To be material, “the evidence must be relevant to a *live* issue”: *Calnen* at para. 109 (emphasis in original). Materiality can relate directly to an issue that must be decided in the case, or it can relate to information that assists the trier of fact in assessing the quality of the other evidence, such as the credibility of the witnesses. This is sometimes referred to as “primary” and “secondary” materiality: David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at 35.

[58] As stated, even if evidence is relevant to a live issue, it may be excluded where the judge is of the view that the probative value of the evidence is outweighed by its prejudicial effect. When the issue relates to defence-led evidence, its probative value must be substantially outweighed by its prejudicial effect: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 611. The probative value inquiry is an assessment of the strength of the evidence, the extent to which it supports the inferences sought to be drawn from it, and the extent to which the matters it tends to prove are at issue in the proceedings: *Ansari* at para. 110. The prejudicial effect relates to the “costs” of admitting the evidence, such as the risk it will be used improperly, or will distract from the real issues in the trial: *Ansari* at paras. 105–108.

The Appellant’s Position

[59] The appellant submits the complainant’s pregnancy was a “crucial contextual piece” of the case and its outcome was the “heart and soul” of the conflict between the parties. He submits there was an element of unfairness to the manner in which the parties were permitted to adduce evidence of their theories of the case in this regard: the Crown was permitted to adduce text messages of the appellant’s post-event conduct that corroborated the complainant’s version of events. But the appellant was not permitted to cross-examine the complainant on the outcome of the pregnancy, which was important to his ability to establish the complainant’s motive to lie.

[60] In particular, the appellant argues he was prevented from asking the complainant about whether her family would “disown” her if she did not have an abortion. He also submits he was prevented from testifying about his conversation at the hotel with the complainant about why she was “doing this” as those questions had not been put to the complainant.

[61] The appellant contends the trial judge’s ruling was based on an incorrect view of relevance that required the answers sought to relate directly to the issue of guilt or innocence. He argues an accused should be permitted to cross-examine on any question that is relevant to the issues and for which there is a good faith basis. The

Crown at trial conceded these points. Accordingly, there was no reason not to allow the cross-examination on these questions. The appellant further submits the complainant's discomfort with the proposed question was not a proper reason not to allow the cross-examination.

[62] Finally, the appellant contends the Crown's admission on the fact and timing of the abortion does not "change the calculus". The appellant was not obliged to accept the veracity of the information provided by the Crown, which was based on the complainant's unrecorded statement to a police officer. As noted in the dissenting judgment in *R. v. R.V.*, 2019 SCC 41 at para. 115, an accused's ability to make full answer and defence depends not just on the fact of cross-examination, but also on the accused's ability to control the rhythm of that process. The effectiveness of cross-examination could be significantly blunted if the Crown could replace that right on any given topic with an admission of its choosing. The ability to control the cross-examination was particularly important because the appellant was already somewhat limited in his ability to conduct his own defence due to the appointment of counsel for the cross-examination of the complainant.

Discussion/Analysis

[63] I agree with the appellant's submission that evidence does not have to relate directly to an issue that must be resolved in the case—such as whether the elements of the offences of assault and unlawful confinement were proved—to be "relevant". More precisely, evidence need not be relevant to an issue of "primary materiality" in order to be admissible.

[64] As earlier described, evidence must be relevant to a material issue to be admissible. Evidence has "secondary materiality" when it assists the trier of fact in assessing the quality of the evidence adduced to prove the issues in the case—in other words, where it assists in assessing the evidence that has "primary materiality".

[65] In this case, the appellant submits the evidence was relevant to establishing the complainant's motive to lie. Whether the complainant had a motive to lie about the allegations was relevant to her credibility: if she had a reason to lie, it is more likely she was in fact lying when she gave her evidence. Evidence relevant to establishing a motive to lie is material because it assists the trier of fact in deciding whether to believe the complainant's evidence, which forms the basis of the Crown's ability to prove the elements of the offences.

[66] This raises the question of whether the fact and timing of the complainant's abortion were relevant to establishing this motive to lie. The appellant's theory was that the complainant was motivated to fabricate the allegations so the appellant would be "out of the way", allowing the complainant to have the abortion that he did not want her to have. In many cases, there would not be a "logical link", as the Crown puts it, between the complainant having had an abortion after she gave her police statement and the likelihood that she lied about the appellant's conduct. However, given the complainant's evidence that the appellant was following her and threatening her about the status of her pregnancy, I accept that in this case, the fact the complainant had the abortion some time after giving her police statement has some tendency to make it more likely that she lied about the allegations to get the appellant out of the way than it would be in the absence of that evidence. Accordingly, the fact and timing of the abortion were relevant to a material issue in the case.

[67] Nevertheless, the trial judge did not err in refusing to direct the complainant to answer counsel's questions about the fact and timing of the abortion. This is because the Crown's "admission" that the complainant had an abortion on March 2, 2015, provided the defence with the very information sought in order to argue its theory. The important point for the defence theory was that the abortion occurred some time after the report to police. The information the Crown put on the record aligned with this theory. While there may be circumstances in which a proposed admission is unacceptable for various reasons (see e.g., *Araya* at paras. 31–38), in this case, the defence was not prejudiced when Crown counsel put the information

on the record rather than having it elicited through cross-examination of the complainant.

[68] It is in this context that the judge's comment that there was no "point in putting the witness through it if it's not ... an issue" must be read. Once the trial judge had the information that the defence sought to elicit on cross-examination of the complainant, that information was no longer a live issue. Thus, there was no need to cross-examine the complainant to obtain the same information. In other words, the information was no longer "material" as defined in *Calnen* at para. 109.

[69] The scope of the trial judge's ruling was narrow: it related only to the fact and timing of the abortion. The defence was not prevented from asking the complainant about her family's views on whether she should have an abortion, how they would react if she did or did not have an abortion, or whether certain answers she gave the appellant in the hotel room as to her motives were true.

[70] The record reflects a thorough cross-examination of the complainant on matters related to her pregnancy and relevant to the appellant's theory. For example, counsel asked the complainant about her personal views on her pregnancy. He suggested it was a problem and she agreed. The complainant acknowledged she was fairly religious, she was raised in the Catholic faith, and still followed its tenets. She agreed the church was opposed to premarital sex and unwed mothers. She also agreed that learning she was pregnant was quite stressful for her.

[71] Counsel asked the complainant about her family's background and views on her pregnancy. She agreed she came from a prestigious family, and her parents were religious and socially conservative. The complainant further agreed with counsel's suggestion that her family, culture, and church would disapprove of her out-of-wedlock pregnancy. The complainant was cross-examined on whom she had told about her condition, and about the conflict with the appellant over the pregnancy. She agreed he wanted her to have his baby and was very concerned about the outcome of the pregnancy.

[72] Further, the complainant agreed with counsel that the idea of reporting the alleged offences to the police came from her sister and friends. It was not her idea and she was afraid to make the call to the police.

[73] Finally, counsel did put the appellant's theory to the complainant. Counsel suggested that she and her sister had made up the allegations because she did not want the appellant's input into what happened to the baby. The complainant denied having made up the allegations.

[74] In sum, I see no basis for the appellant's submissions that he was somehow limited in his defence. In the circumstances, the judge's ruling was a reasonable exercise of his discretion and trial management powers.

Disposition

[75] In the result, I would dismiss the appeal.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Tab 11:

R. v. M.D., 2021 BCCA 339

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. M.D.*,
2021 BCCA 339

Date: 20210924
Docket: CA46676

Between:

Regina

Respondent

And

M.D.

Appellant

Restriction on publication: A publication ban has been imposed under section 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify complainants or witnesses, referred to in this judgment by the initials Y.D. and K.D. This publication ban applies indefinitely unless otherwise ordered.

Restriction on publication: A publication ban has been automatically imposed under section 110(1) of the *Youth Criminal Justice Act* restricting the publication of information that would identify a young person referred to in this judgment by the initials M.D. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Restriction on publication: A publication ban has been automatically imposed under section 111(1) of the *Youth Criminal Justice Act* restricting the publication of information that would identify young persons, referred to in this judgment by the initials Y.D. and K.D., as having been a victim or witness. This publication ban applies indefinitely, unless the information is published by that young person under s. 111(2) or the court has ordered publication.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated June 7, 2018 (*R. v. [M.D.]*, Fort St. John Dockets 3187-1, 3187-2-A).

Counsel for the Appellant, appearing via
videoconference:

B. Zargarian

Counsel for the Respondent, appearing via
videoconference:

L. Bantourakis

Place and Date of Hearing:

Vancouver, British Columbia
November 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia
September 24, 2021

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant challenges his conviction for two counts of sexual touching based on multiple grounds: the judge's alleged misapprehension of the evidence; erroneous inflation of the weight of a complainant's evidence; failure to apply R. v. W.(D.) correctly; and insufficient reasons. Held: Appeal dismissed. Nothing suggests the judge misapprehended the evidence and her findings on credibility are entitled to appellate deference; she did not inflate the weight of the evidence improperly; she did not err in analyzing reasonable doubt; and she sufficiently explained the basis for the verdict.

Reasons for Judgment of the Honourable Madam Justice Dickson:

[1] This appeal concerns the manner in which the trial judge treated evidence and reached conclusions on two sexual touching charges involving young children. The appellant, M.D., was 12 to 13 years old when the alleged touching occurred. The complainants, his neighbours, Y.D. and K.D., were five to six years old and four to five years old, respectively. By the time of trial, the appellant was 16, Y.D. was 10 and K.D. was eight.

[2] The judge found that, despite certain frailties, the evidence of the complainants was credible and reliable on the essential elements of the offences. She also found the appellant's evidence denying the allegations was "not implausible" and that it was unclear "how many times [the appellant] engaged in sexual touching of Y.D. and K.D." Nevertheless, the judge was satisfied on the whole of the evidence that the appellant's bare denial did not raise a reasonable doubt and that there were "at least" two incidents described by Y.D. and two described by K.D. which occurred "substantially in the manner that they outlined in their testimony". As a result, she found the appellant guilty of both counts with which he was charged.

[3] On appeal, the appellant contends that the judge misapprehended the evidence, failed to grapple with its weaknesses and erroneously inflated the weight to which some of it was entitled. He also contends that she erred in applying the principles enunciated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 and failed to provide sufficient reasons to justify her lack of reasonable doubt. In my view, the judge

made no such errors and her reasons are sufficient. To explain that view, I will outline the salient details of the evidence, the impugned reasons and the positions of the parties, then address the governing principles and their application in this case.

Background

[4] The appellant lived with his parents on the outskirts of a small city in northern British Columbia throughout the period in question. Their home was located in a somewhat isolated area and the appellant was homeschooled. Y.D. and K.D. were young brothers who lived next door and, like the appellant, were homeschooled. Despite their age difference, until the alleged sexual touching was reported the three boys played together frequently at the appellant's home.

[5] In March 2015, Y.D. told his mother that the appellant had touched him and K.D. sexually. Approximately four weeks later, she reported the disclosure to the police. Shortly thereafter, an officer trained in child interviewing techniques interviewed Y.D., then seven years old, and K.D., then six years old. The interviews were videotaped. Based on their content, the appellant was charged with sexually touching Y.D. and K.D. between June 2013 and December 2014.

Evidence at Trial

[6] The trial took place over four days in August 2017 and January 2018. The evidence was presented on a *voir dire* to enable rulings to be made on the admissibility of Y.D. and K.D.'s videotaped statements to police and their hearsay statements to their mother. Crown counsel called the interviewing officer, the complainants' mother, and Y.D. and K.D., and played the videotaped statements while Y.D. and K.D. were testifying. Defence counsel called the appellant, his father and his mother. After the witnesses were examined and cross-examined, the judge invited the parties to make their closing submissions in writing, which they did.

[7] The judge ultimately admitted the videotaped statements of Y.D. and K.D. for the truth of their contents under s. 715.1 of the *Criminal Code*. However, citing *R. v. Khelawon*, 2006 SCC 57, she ruled their hearsay statements to their mother

regarding the sexual touching were inadmissible because they were not necessary. As a result, while the adult witnesses provided some peripheral evidence, the evidence that dealt directly with the sexual touching allegations was that of Y.D. and K.D. in their videotaped statements and their *viva voce* testimony, and the testimony of the appellant denying the allegations.

Y.D.

[8] Y.D. was seven years old when the officer interviewed him. It was obvious from his statement that he was reluctant to speak to her about the sexual touching allegations. In the early stages of the interview, Y.D. said that he had told his mother about “it” and did not want to talk about “it” ever again. He also said that he was too embarrassed to talk about “it” and he felt “like I’m going to like a place for bad people.”

[9] As the interview progressed, Y.D. identified various body parts on a cartoon image of a boy. When doing so, he pointed to the penis and commented that he had seen the appellant’s penis two or three times when he was “peeing” outside. Shortly thereafter, he told the officer “it happened in the shed sometimes it happened behind the shed and it happened behind the giant water barrel”. In response to follow-up questions, he said that “it” had happened “three one and four times” and agreed with the officer that added up to “eight times”.

[10] On further questioning, Y.D. told the officer that “it” first happened “two summers ago” in the shed after “[the appellant] was kind of talking about talking about talking about it and then I’m like stop it then he’s like I’m not gonna be your friend anymore and then I’m like okay I’ll do it”. At that point, Y.D. was still unwilling to say what “it” was, but he did agree to draw a picture. Then he drew a picture and told the officer it showed the appellant putting his penis in Y.D.’s mouth when they were inside the shed, where, he remarked, there was “a big mountain of stuff” and a window. He also said that after this happened the appellant told him “well done”, they left the shed and they jumped on the trampoline.

[11] Y.D. went on to say the second time “it” happened was that same summer when he and the appellant were hiding behind the shed by the hedges. On this occasion, he said, the appellant “sticked his penis my butt” for “half a minute”, which “kind of hurted”. He also said that, while this was happening, the appellant’s “penis was growing” and “then he he he um took it out then he wiped it”, after which “it just hurted painfully then it then it stopped in a minute”. When the officer asked if there was anything else Y.D. could remember, he replied “and I sucked his balls”, which he said happened “one winter ago” in the greenhouse when the appellant told him “do it” and “I won’t be your friend” so “then I did it”. After making this statement, Y.D. agreed with the officer that he had told her about three times and confirmed, “there’s no more times”.

[12] Y.D. also spoke about other matters during the police interview. For example, he told the officer that when he did not tell the truth at home “I just get away with it” and that “one time I stealed candy” from the table. Near the end of the interview, Y.D. said that his brother, K.D., had done “worsier things” with the appellant, but that he (Y.D.) did not see them happen. Rather, he said, K.D. “told me” and could “tell you hisself”.

[13] As I have noted, Y.D. was ten years old when he testified. Near the beginning of his testimony, he told the judge that it was hard to talk about what had happened and that he thought the appellant “was my friend” but he “did this to me and my brother”. While he was testifying, Crown counsel played Y.D.’s videotaped statement, which he adopted as true with a few minor corrections. When Crown counsel asked if there was anything else Y.D. wanted to tell the judge that he had not told the officer, he replied “no”.

[14] On cross-examination, defence counsel asked Y.D. questions about some of his general behavioural habits before addressing the sexual touching allegations. During the general questioning, Y.D. testified that he and K.D. sometimes called one another “a liar”. In answering questions regarding sexual matters, he said that he saw the appellant’s penis around ten times when he (the appellant) was not

“peeing”. He agreed with defence counsel that this was more times than he told the officer.

[15] Y.D. said there was “one thing” that he did not mention to the officer, namely, that the appellant would sometimes get angry with him for doing things like asking too many questions. When this happened, he said, the appellant would pin him down on the bed, pull down his own pants and yell “shut up”. He also said he had seen the appellant’s penis so many times that he really could not remember, but “all I know is that it’s happened way more times than eight”. In explaining the change in his account, he testified that he was “little” when he spoke to the officer and he did not remember then how many times it had happened, but that he remembered better now.

[16] Near the end of the cross-examination, defence counsel asked Y.D. if he remembered a time when he walked into the appellant’s home screaming “penis, penis, penis, penis”. Y.D. replied “yeah”, then “no, I told -- I didn’t do that”. When defence counsel asked, “what did you do then”, Y.D. replied “where did you -- who -- who told you that”. Then he said he did not think he had done that, but there was a time when the appellant told him to take off his pants, he refused and he told the appellant’s mother, who responded by calling him a liar.

K.D.

[17] K.D. was six years old when the officer interviewed him. Like his brother, he was reluctant to speak about the sexual touching allegations. Near the beginning of the interview, the officer raised the topic of the truth, at which point K.D. stated “whatever my brother did I did it” and “I did lies before ... I did a bad thing and then I runned away ... and that was a lie”. When the officer asked why he was there, K.D. replied “because I don’t wanna talk about it”.

[18] K.D. went on to describe the appellant as a “bad friend”, but when the officer asked why he said that he would not or could not talk about “it”. As the interview progressed, he agreed to draw a picture and, when the officer asked what the appellant was doing in the picture, he stated, “you know”, “what [Y.D.] told you right”

and “I’m mad it’s what happened to Y.D. I’m telling you”. When the officer asked K.D. to say it “with your mouth”, he replied “I forget” and “I don’t know I don’t know”.

[19] Later in the interview, the officer referred to K.D.’s picture and commented that she noticed he drew the appellant’s penis. She asked how K.D. would know what the appellant’s penis looked like. He replied, “because I just know,” then said “I don’t know too good because that’s not look like it that doesn’t look like it”. Eventually, K.D. said that “it” happened six times in the summer in the shed “‘cause [the appellant] was hiding”. He also pointed on the picture to what he said was the appellant’s penis and stated, “it made me feel bad,” although he could not say why. When the officer said “but something happened”, he replied “yup,” and then repeated, “I forget what happened”.

[20] By the time of trial, K.D. was eight years old. As she did with Y.D., Crown counsel played his videotaped statement when he was on the stand. K.D. testified that he was “scared” when he spoke with the officer and that, while he was feeling “a little better than frightened,” he still did not feel comfortable talking about what had happened. However, he said, he would try.

[21] When Crown counsel was playing his statement, K.D. interrupted and said, “there’s one more place it happened too. It happened in his room once too”. When Crown counsel asked about the portion of the statement where K.D. told the officer “I forget,” he said that he had not actually forgotten and was just scared to talk about it. He also said that the appellant made him feel bad “because he did something wrong that wasn’t really right to do”.

[22] K.D. went on to testify that the appellant did “really bad things” to him and Y.D. in the shed, that “my brother was there watching” and that “[Y.D.] had the same trauma that happened to me too”. He said the “really bad things” involved his body and that his “bum” was touched, but he did not really remember how it felt afterward and he did not want to talk about what had happened. On further questioning, K.D. said that he and the appellant took their pants off and he could see the appellant’s penis, which looked “big” and touched him “in a sort of way”. He said that he did not

really know how many times it happened in the shed, but “it was more than once, I know that”.

[23] As to what happened in the appellant’s bedroom, K.D. testified, “[the appellant] turned it into a game” of truth or dare. He said that he did not want to talk about the dare, but “something bad happened”. Later in his testimony, K.D. said that he saw the appellant’s penis when they were playing truth or dare, that the appellant’s penis was big and that the appellant’s penis touched his mouth. He also said that he could not remember if the bedroom door was open or closed when this happened or if the appellant’s mother was around the house.

[24] On cross-examination, defence counsel challenged K.D.’s statement that he felt frightened when the officer interviewed him. K.D. responded that, while he was not afraid of the officer, he was afraid to talk to her about what happened with the appellant. He also testified that, during the interview, he felt “embarrassed” and, at one point, “inside [he] felt [he] was going to cry”. He testified further that he and Y.D. did not talk with one another about the interviews except “a little” when they watched the videotapes.

[25] Near the end of the cross-examination, defence counsel put it to K.D. that he did not tell the officer the things he had testified to in court because those things did not happen. K.D. responded to this assertion with seeming bewilderment, stating simply “what?”. Defence counsel repeated the assertion, at which point K.D. replied, “no, I remember it happened definitely ... I just didn’t know how to explain it in the right path”. Defence counsel also put it to K.D. that he did not tell the officer he and Y.D. were both in the shed watching when the appellant touched each of them sexually. K.D. agreed he did not tell her that and stated this was “because I was still afraid”. He went on to state that he was present when Y.D. spoke to their mother and “spilled the juice”.

The Appellant

[26] The appellant, then 16, testified that Y.D. and K.D. played at his house “mostly every day” during the period in question. He said they usually played

outside on the trampoline or kicking balls and occasionally they played inside. The appellant denied ever having pulled down Y.D. or K.D.'s pants, but testified that Y.D. did so to K.D. on the trampoline continuously and, as a result, the appellant told Y.D. if he did not stop he would not be allowed to keep bouncing. The appellant also acknowledged that he sometimes urinated outside, but flatly denied all of the allegations of sexual touching.

[27] On cross-examination, the appellant testified that, as a homeschooler, he sometimes felt isolated from other children and agreed that he “kinda” had to teach himself about what happens in the outside world. He stated that he would not ask a family member about sex because he learned about it through wildlife documentaries on T.V., denied ever being curious about sex between human beings and claimed he had never experimented with sex, thought about sex or been curious about what sex would feel like. He also testified that he had fun “most of the time” when he played with Y.D. and K.D., but said the friendship ended after their regular presence became “annoying” and denied feeling sad or surprised when they stopped coming over to his house to play.

The Appellant's Mother

[28] The appellant's mother testified that Y.D. and K.D. played with the appellant at her home “off and on,” although the appellant did not enjoy playing with them. She described Y.D. and K.D. as “wild”, “rude” and “undisciplined” and stated she would check on them frequently when they came over because she was concerned about their destructiveness. She testified that Y.D. constantly picked on K.D. and tried to pull his pants down on the trampoline, and she described an incident in which she sent Y.D. home to change his wet clothes, which, she said, made him upset, angry and combative. She also testified that Y.D. “was always telling stories”, some of which K.D. contradicted, and that K.D. was always “in the shadow of [Y.D.]”.

Closing Submissions at Trial

[29] Both parties focused on credibility in their closing submissions, which they provided to the judge in written form.

[30] Defence counsel submitted that the videotaped statement showed K.D. was a controlled and relaxed young witness throughout the interview. He also submitted that, in the courtroom, Y.D. and K.D. could “run circles around all the adults” and that Y.D. was “acting,” although he “dropped his guard” when he uttered, “who told you” while under cross-examination about yelling “penis penis penis” in the appellant’s home. According to defence counsel, “[Y.D.] deviated from his script” when he answered in this manner and “[b]ut for that slip, he would have had us”.

[31] Defence counsel did not identify any specific inconsistencies within or between the testimony of Y.D. and K.D. in his closing submissions. However, he emphasized that both claimed their memories were better at trial than when they were interviewed, which, he argued, “is generally not human experience”. He characterized the appellant as “a sheltered young boy” who denied the allegations made against him by the two younger “more worldly” boys and submitted the appellant came across as “shy, scared and believable”. As to the appellant’s mother, defence counsel acknowledged that she presented as “flippant and arrogant,” but argued this could be attributable to nervousness and concern for her son.

[32] For her part, Crown counsel acknowledged that there were inconsistencies in Y.D. and K.D.’s evidence. However, she argued, those inconsistencies related to peripheral matters or were attributable to their young ages. She reviewed the evidence of Y.D. and K.D. in their videotaped statements and trial testimony in detail and submitted that, despite their obvious reluctance to talk about what had happened, their evidence was clear, credible and reliable on the essential elements of sexual touching.

[33] In support of her submission, Crown counsel argued there was no indication of fabrication, concoction or coaching in Y.D. or K.D.’s evidence. She noted that both boys described the appellant’s penis as “big” or “growing”, that both included details in recounting the incidents and that both produced significant drawings during the police interviews. She also submitted the evidence of the appellant’s mother

neither harmed nor assisted the defence case, but it did confirm aspects of the Crown's case, for example, her acknowledgement that she was not always around the boys when they played outside. In sum, Crown counsel submitted, based on the totality of the evidence, the Crown case was proven beyond a reasonable doubt on both counts.

Reasons for Judgment

[34] The judge began by addressing the admissibility issues. As I have noted, she ruled that the videotaped statements of Y.D. and K.D. were admissible pursuant to s. 715.1 of the *Criminal Code*. In outlining the criteria for their admissibility, the judge summarized the sexual touching allegations and the context within which they arose, namely, the neighbourhood-based friendship of the appellant, Y.D. and K.D. She also commented on her observations of Y.D. and K.D.'s in-court demeanour:

[24] The full videotape was played in the presence of Y.D. and K.D., and I was able to watch not only their demeanour as they listened to and watched the video, but also throughout the course of their examination in chief and cross-examination. Throughout, they answered very carefully questions which were open-ended and not leading, at least with respect to all material aspects of the investigation and the allegations. They were able to say that they did not understand a question and responded accordingly.

[35] Citing *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, the judge recognized that, when admitted, the videotaped statements, together with the *viva voce* evidence at trial, comprised the whole of the evidence in chief of Y.D. and K.D.: at paras. 15, 27. After going on to rule that the hearsay statements of Y.D. and K.D. to their mother were inadmissible, she turned to her assessment of the trial evidence.

[36] First, the judge identified the key issues for determination, namely, the credibility and reliability of the evidence of the witnesses. She stated the court should apply common sense when assessing the evidence of children and its strengths and weaknesses, citing *R. v. W.(R.)*, [1992] 2 S.C.R. 122. For example, she noted, a child's capacity to observe, recollect, understand and respond to questions in an intelligent and morally responsible way should be taken into account in the evaluation process. In addition, she stated, aspects such as honesty,

memory, suggestibility, and communication ability all form part of the necessary assessment: at paras. 41–42.

[37] Next, the judge summarized the background evidence. In doing so, she noted the evidence of the appellant’s mother, including her description of Y.D. and K.D. as “rude, wild, and undisciplined” and her apparent inability to say anything positive about Y.D. and K.D. However, she stated, the appellant’s mother did confirm “the various buildings on the property and that the shed contained tools and equipment”: at para. 48.

[38] Turning to the evidence of Y.D., the judge noted his embarrassment when he talked about the sexual touching incidents. She referred to the specificity of his evidence regarding “where the sexual activity took place, in the shed, sometimes behind the shed, behind the giant water barrel” and the picture that he drew when the officer interviewed him, including his detailed description of the shed’s interior: at paras. 49–50. She also mentioned other details such as Y.D.’s description of feeling pain when the appellant “stuck his penis in his butt,” the appellant’s penis growing and the appellant wiping his penis and his description of a separate incident in the greenhouse when he “sucked [the appellant’s] balls”: at paras. 51–52. Finally, she referred to Y.D.’s evidence regarding the appellant’s threats to stop being his friend and Y.D.’s statement that he responded by agreeing to “do it”: at para. 53.

[39] Then the judge dealt with the evidence of K.D. In doing so, she noted that in his videotaped statement, without prompting, K.D. told the officer “[w]hatever my brother says, it happened. I get it. I had it as well and all that happened to Y.D.”: at para. 54. After describing other aspects of the statement, she also noted that K.D. spontaneously added to its content when he was testifying:

[58] K.D. added to his videotaped statement at trial. It was quite spontaneous. When he was listening to the videotaped statement, without prompting, he interjected and said, “Oh, one more place it happened. It happened in his room once.”

[59] He described how [the appellant] took him to the shed and his brother there, and they were watching. He said, “It was really bad things to us in the shed.” Indicated that the incident involved his body, specifically his bum.

That [the appellant] took off his pants, he felt like it was wrong, but he really did not know what he should be doing or what to say.

[60] The incident in the bedroom involved his mouth. He said that [the appellant's] penis touched his mouth and that [the appellant's] penis was big.

[40] The judge went on to refer to K.D.'s evidence that he was "standing there watching" in the shed when the appellant touched Y.D. sexually. In particular, she said, K.D. testified that "[w]e don't talk to each other about what happened because I already saw what happened to us": at para. 61.

[41] After reviewing the standard of proof, the burden of proof and some of the leading authorities, including *W.(D.)*, the judge outlined the essential elements of the offence of sexual touching. She emphasized the need to consider the whole of the evidence and stated, "it is not a question of choosing between the Crown's version and that of the defence". She also stated she was mindful that a contradiction in a child's testimony should not be given similar effect to such a flaw in an adult's testimony and that a child may not be able to recount details of an event, but "this does not mean that they have misconceived what happened to them and who did it": at paras. 72–73.

[42] The judge concluded her reasons with a section entitled "Analysis". Under the heading "Y.D.'s evidence," she stated that Y.D. told the officer and the court what happened in a genuine and articulate manner that showed he understood the questions and was able to answer them despite his embarrassment: at para. 74. She stated further that Y.D.'s evidence was not fanciful or illogical, that he provided "a believable level of detail regarding the specifics of the incidences" and that nothing suggested he was coached, prompted or had anything to gain. On the contrary, she remarked, "I think he was sad that he had lost a friend": at paras. 75–76.

[43] The judge acknowledged that Y.D. changed his evidence on "the number of occasions," but found this did not detract from his consistency regarding the nature of the unwanted touching. Then she gave specific examples of some of the details

Y.D. provided and referred to the manner in which he produced his drawing in the police interview:

[77] He stood the long and rigorous cross-examination, and he continued to be firm and clear on the essential element of unwanted touching by [the appellant]. There were no inconsistencies that went to the heart of the matter, the nature of the offences, the essential elements remained consistent. Although he changed his evidence about the number of occasions, this did not detract from his consistency in the nature of the unwanted touching.

[78] In the videotaped statement, he was able to provide specific details about where the incidents occurred; for example, in and behind the shed, behind the water barrel, as he said they were hiding. [The appellant] and his mother both identified these locations and noted that these were hidden locations that were not visible to a person looking out from [the appellant's] house. He also recalled a window in the shed.

[78] Y.D.'s own drawing was produced in a spontaneous, uncoached manner, corroborating his evidence that [the appellant's] penis was in his mouth.

[44] Under the heading "K.D.'s evidence", the judge stated that K.D. made "his best effort" to talk about a naturally uncomfortable topic for a young child when he spoke with the officer. She said that he appeared more confident by the time he testified in court and explained that he did not know how to tell the officer about what had happened. She also noted that, while he was unable to articulate what happened during the interview, he was able to draw a picture "that best described it for him". She went on to say, "[t]here was nothing in his court testimony that would suggest he was making up these events" and she emphasized that testifying was embarrassing for him. Nevertheless, she stated, K.D. "did recall the essential elements that related to the unwanted sexual touching": at paras. 80–82.

[45] The judge found that, like Y.D., K.D. was an articulate, intelligent witness who gave evidence that did not appear to be coached or prompted. She stated that, although he was unable to provide a lot of detail, he referred to the incident in the shed and said, "the same thing happened to his brother as happened to him. He told the court about [the appellant's] penis and his bum": at paras. 83–84. She also commented that the court cannot expect open-ended questions to elicit the same level of detail from a child witness as that expected of an adult witness. However,

“Y.D. and K.D.’s evidence is not generic or vague in nature, but filled with details”: at paras. 85–86.

[46] As to the appellant’s evidence, the judge noted that he confirmed many surrounding circumstances, such as when and where the boys played together, and he conceded that, “they were often not in eyeshot of his mother and she did not dispute this, yet he has flatly denied the allegations of sexual touching”: at para. 87.

Then she said this:

[88] [The appellant’s] evidence is not implausible, nor did he contradict himself during the course of his testimony. It is likely that he would do otherwise in the course of a bare denial. However, in making a credibility assessment with respect to his evidence, the court cannot consider his testimony in isolation of the whole evidence.

[89] Does the denial, coupled with the whole of the evidence, leave a reasonable doubt? The strength of Y.D. and K.D.’s testimony becomes an important consideration in assessing credibility of [the appellant’s] denial.

[90] I am satisfied, on the whole of the evidence, that the bare denial of [the appellant] simply does not raise a doubt, given the credible evidence presented by Crown. Although it was not clear how many times [the appellant] engaged in sexual touching of Y.D. and K.D., I am satisfied, beyond a reasonable doubt, that there was at least two incidences described by Y.D. and two described by K.D., as detailed in their evidence, that did indeed occur substantially in the manner that they outlined in their testimony.

[47] Based on the foregoing review and analysis, the judge found the appellant guilty on both counts of the Information.

On Appeal

[48] The appellant raises four separate grounds of appeal, which grounds, he says, though distinct, are related. The first two concern the manner in which the judge handled the evidence; the second two, the manner in which she reached and explained her conclusions on reasonable doubt.

[49] According to the appellant, the judge misapprehended the evidence of Y.D., K.D. and the appellant’s mother by failing to grapple with some of its key elements when she found Y.D. and K.D. were credible witnesses. For example, he contends, she failed to grapple with both complainants’ admissions to lying in the past, Y.D.’s

admission to stealing candy and the testimony of the appellant's mother that Y.D. was "always telling stories" and influencing K.D. She also failed to grapple with the differing number of incidents Y.D. reported in his statement and testimony, with K.D.'s repeated appeals to his brother's account and his inconsistent reports in his statement and testimony, and with the difference between Y.D.'s claim that he did not see what the appellant did to K.D. and K.D.'s claim that Y.D. was present.

[50] In addition, and relatedly, the appellant contends, contrary to this Court's guidance in *R. v. Untinen*, 2017 BCCA 320, the judge inflated the weight of Y.D.'s evidence by treating the drawing he produced in the police interview as self-corroboration. In other words, he argues, she found that the drawing, which she admitted under s. 715.1 of the *Criminal Code*, "corroborated" Y.D.'s spoken evidence and, in doing so, added weight to Y.D.'s evidence based on mere consistency.

[51] The appellant contends further that the judge erred in applying the well-known principles in *W.(D.)* by engaging in a credibility contest between the complainants' evidence, on the one hand, and, on the other, the evidence of the appellant. In his submission, this led her to shift the burden of proof unintentionally and thus to misapply the principle of reasonable doubt.

[52] Finally, he says, the judge also failed to provide sufficient reasons to explain why she had no reasonable doubt on the whole of the evidence, particularly given her finding that his evidence was "not implausible" and that only two of the three incidents described by Y.D. were proven to the requisite standard. According to the appellant, in light of those findings, as in *R. v. Dick*, 2018 BCCA 343, the logical connection between the guilty verdicts and the basis for the verdicts is not clear.

[53] The Crown responds that the judge made no factual or legal errors in her handling of the evidence or the manner in which she reached and explained her decision. According to Crown counsel, in reality, the appellant is simply inviting this Court to substitute its own credibility findings for the judge's credibility findings based on a different interpretation of the evidence more favourable to the appellant.

However, that is not the role of an appellate court. Crown counsel also says the judge applied the correct burden and standard of proof and that read as a whole, in the context of the record, her reasons demonstrate why she reached the guilty verdicts: she accepted the credible evidence of Y.D. and K.D. and rejected the appellant's bare denial. Accordingly, she submits, this Court should dismiss the appeal.

Discussion

Did the judge misapprehend the evidence when she found Y.D. and K.D. were credible witnesses?

Legal Principles

[54] Whether a witness is credible is a factual question. In the absence of palpable (obvious) and overriding (material) error, credibility determinations made by a trial judge attract a high degree of appellate deference: *R. v. Vuradin*, 2013 SCC 38 at para. 11; *R. v. Thla Ceu*, 2018 BCCA 480 at para. 34.

[55] Appellate deference to credibility determinations is appropriate for obvious reasons. Trial judges enjoy the distinct advantage of having seen and heard the witnesses testify firsthand and, therefore, are in the best position to assess the truthfulness of their accounts. Assessing credibility involves a complex process of watching and listening to the witnesses, distilling the impressions that emerge from their testimony and reconciling the various versions of events as recounted: *R. v. Gagnon*, 2006 SCC 17 at para. 20; *R. v. Wright*, 2019 BCCA 327 at paras. 23–25. Accordingly, appellate courts have been repeatedly cautioned against substituting their own assessment of credibility for that of the trial judge when there is a reasonable basis for the trial judge's conclusions on credibility: *Gagnon* at paras. 22–23; *R. v. R.E.M.*, 2008 SCC 51 at para. 48.

[56] Assessing credibility may be particularly challenging and nuanced when it involves a child witness. Judges evaluate the evidence of young children differently from the evidence of adults: *R. v. Hernandez-Lopez*, 2020 BCCA 12 at para. 8. For example, courts have long recognized that children may experience the world

differently than adults and, therefore, details like the time, place and frequency of events may be missing from their recollections because such details may be less important to them. In addition, child witnesses may be more prone to suggestibility and less able to express themselves precisely than adult witnesses: *W.(R.)* at 133; *Hernandez-Lopez* at paras. 9, 18–21. This does not mean that the evidence of children is subject to a different standard of proof than the evidence of adults, but it does mean that when assessing the credibility of child witnesses trial judges should approach their evidence on a “common sense” basis, bearing in mind its strengths and weaknesses in each case. In particular, when the credibility of a child witness is determined “the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which [the witness] is testifying”: *W.(R.)* at 134.

[57] While the credibility determinations of trial judges are entitled to a high degree of deference, appellate courts will intervene to set aside a verdict if it results in a miscarriage of justice. The test for demonstrating a misapprehension of the evidence sufficient to justify such an intervention is stringent and well-established. In *R. v. Lohrer*, 2004 SCC 80, Justice Binnie affirmed the test set out in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.):

[2] ... The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction”.

[58] In *Morrissey*, Justice Doherty explained that 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 evidence”: at 538. Where a judge is mistaken as to the substance of material parts of the evidence and those mistakes play an essential part in the reasoning process that results in a conviction, the conviction is not based on the evidence and a miscarriage of justice results because the conviction is not a “true” verdict: at 541. It

follows that credibility determinations made by a trial judge must be based on a correct apprehension of the evidence because “[w]rong findings on what the evidence is destroy the basis of findings of credibility”: *R. v. Dewar*, 2001 BCCA 561 at para. 23, citing *Whitehouse v. Reimer* (1980), 116 D.L.R. (3d) 594 at 595 (Alta. C.A.).

[59] However, it is not enough for an appellant merely to suggest a different interpretation of the evidence or point to evidence that arguably weighs against a trial judge’s findings on credibility to justify appellate intervention based on a material misapprehension. Mere differences in the interpretation of the evidence do not demonstrate that the evidence was misapprehended. They simply reflect an appellant’s disagreement with the trial judge’s differing view of the evidence: *R. v. Swales*, 2014 BCCA 350 at para. 49. Nor does the fact that a judge does not discuss all of the evidence on a particular point mean that the judge ignored the evidence. Judges are not obliged to detail every aspect of their factual deliberations or spell out every finding or inference of fact or credibility: *R. v. Walle*, 2012 SCC 41 at para. 46; *Thla Ceu* at para. 47.

Application of Principles

[60] I see nothing in the judge’s reasons or the record to suggest that she misapprehended the evidence or otherwise made a palpable and overriding error in finding Y.D. and K.D. were credible witnesses. On the contrary, in my view, her findings in this regard are well supported and error-free. They are entitled to appellate deference.

[61] In assessing the credibility of Y.D. and K.D., the judge engaged in a “common sense” consideration of relevant factors, including the detailed nature of their accounts, their embarrassed but genuine demeanour in the police interviews and on the stand and their consistent descriptions of the essential elements of the offences under cross-examination. She also considered the consistency between their evidence and that of the appellant and his mother on the hidden nature of the locations behind the shed and the water barrel where Y.D. and K.D. said the sexual

touching occurred. In my view, her discussion of the evidence related to their credibility was reasonably thorough, clear and cogent. It also responded to the submissions made by counsel at trial.

[62] The judge did not address every point raised by the appellant on appeal in her reasons, but, as noted, she was not obliged to do so. For example, it was not necessary for her to deal specifically with the evidence that Y.D. and K.D. had lied in the past or that Y.D. had stolen candy. That evidence did not relate directly to the events in issue and their candid admissions could support findings that they were truthful witnesses as easily as detract from their credibility. Nor was it necessary for the judge to deal specifically with the conflict in their evidence on the peripheral matter of whether Y.D. was in the shed when the appellant touched K.D. sexually. Although defence counsel touched on that question in cross-examining K.D., he did not pursue it or raise it in cross-examining Y.D., nor did he address it in his closing submissions to the judge.

[63] The judge did deal expressly with the change in Y.D.'s account of the frequency with which he saw the appellant's penis, and perhaps how often the appellant touched him sexually, (it was unclear if he was referring to the former or the latter at some points in his statement and his testimony). In describing his evidence overall, she stated there were no inconsistencies that went "to the heart of the matter" and that the essential elements of the offences remained consistent. However, she also acknowledged that "[Y.D.] changed his evidence about the number of occasions" but found this did not detract from his consistency with respect to "the nature of the unwanted touching": at para. 77. This approach to evaluating Y.D.'s evidence on the peripheral matter of frequency and assessing his credibility bearing in mind the nature of the inconsistency aligned with the guidance of Supreme Court of Canada in *W.(R.)*. It did not represent a misapprehension of the evidence.

[64] The judge also dealt expressly with the change in K.D.'s account, or, more accurately, its supplementation on the stand compared to his account in the police

interview. She specifically noted the spontaneity of K.D.'s interjection as he watched the videotaped statement and testified that the appellant also touched him sexually once in his room, as well as his increased confidence when he was testifying at trial. She went on to conclude that K.D.'s additional disclosure was explained by his age, which was an available conclusion on the evidence. Further, she referred to K.D.'s statement in the interview that what happened to Y.D. also happened to him and to his testimony at trial that he and Y.D. were in the shed together during the events in question. In my view, nothing in her reasons or the record suggests that the judge misapprehended that evidence, or any other, in assessing K.D.'s credibility. Rather, she interpreted the evidence and its import differently than the appellant would have preferred.

[65] I am unpersuaded by this ground of appeal.

Did the judge erroneously inflate the weight of Y.D.'s evidence based on self-corroboration?

Legal Principles

[66] As David M. Paciocco (now Paciocco J.A.) explained in *The Perils and Potential of Prior Consistent Statements: Let's Get It Right*, (2013), 17 Can. Crim. L. Rev. 181, a prior consistent statement is a declaration made by a witness before taking the stand that is consistent with the testimony of the witness on the stand. Subject to certain exceptions, prior consistent statements are presumptively inadmissible because they generally lack probative force and are self-serving. When a prior consistent statement is admitted, its permissible use will be carefully limited. For example, such a statement may be used to rebut an allegation of recent fabrication or as circumstantial evidence to assist the trier of fact in assessing the truth of a witness's in-court testimony: *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. C.M.M.*, 2020 BCCA 56 at paras. 145–147.

[67] Presumptive inadmissibility mitigates the risk of unduly enhanced testimonial credibility based solely on the fact of repetition: *R. v. Ellard*, 2009 SCC 27 at para. 31. Mere consistency between a witness's out-of-court statement and in-court

testimony cannot serve to bolster or corroborate the witness's in-court testimony. Applied to evidence, the adjective "corroborative" generally connotes "the adding of strength or reinforcement from an independent source for the truth and accuracy of [a witness's] evidence": *R. v. Aksidan*, 2006 BCCA 258 at para. 44. When a witness repeats an account while testifying in a manner that is consistent with the witness's prior out-of-court account, the mere consistency between the two does not amount to "self-corroboration" or "add weight" to the in-court testimony, thus enhancing the witness's credibility: *Untinen* at paras. 52, 55.

[68] Pursuant to s. 715.1 of the *Criminal Code*, a videotaped statement made by a victim or witness under the age of 18 is admissible at trial subject to its adoption by the witness and other specified criteria. In such circumstances, the videotaped statement forms an integral part of the witness's in-court testimony in chief, as explained in *F.(C.C.)*.

[69] In *Untinen*, this Court rejected the Crown's submission that mere consistency between a videotaped statement admitted under s. 715.1 and a complainant's testimony at trial can add weight to, bolster or corroborate the complainant's account when testifying: at paras. 53, 56. However, speaking for the Court, Justice Fitch also affirmed that both consistencies and inconsistencies between a complainant's videotaped statement and trial testimony may be relevant for the purposes of credibility assessment, depending on the context and the use to which they are put:

[76] ... Where inconsistencies are raised to challenge the credibility of the complainant when a video statement is tendered, the truth-seeking function of the trial demands that the entirety of the complainant's account be scrutinized, including internal consistencies as between her video statement and trial testimony, in deciding whether the inconsistencies relied on by the defence so impact on the credibility or reliability of the complainant as to give rise to a reasonable doubt.

Application of Principles

[70] As noted, the judge ruled that Y.D.'s videotaped statement was admissible pursuant to s. 715.1 of the *Criminal Code* and, in doing so, recognized that the videotaped statement, together with his *viva voce* testimony, comprised the whole of

Y.D.'s direct evidence. Later in her reasons, when analyzing his evidence, she commented on the drawing that Y.D. produced in the course of the police interview. To repeat, she stated:

[79] Y.D.'s own drawing was produced in a spontaneous, uncoached manner, corroborating his evidence that [the appellant's] penis was in his mouth.

[71] Y.D. drew the picture as a means of communicating what the appellant had done to him, namely, put his penis in Y.D.'s mouth. His drawing, together with his contemporaneous explanation of what it depicted, formed part of the statement he made to the officer regarding the sexual touching. When he testified, Y.D. did not add anything to his videotaped statement in direct examination. As noted, he simply adopted the statement, including the drawing, without comment. Nor was he questioned under cross-examination about the nature of the drawing or the event it depicted.

[72] In my view, the judge's use of the word "corroborating" in the impugned sentence was poorly chosen and ambiguous. To the extent that she appears to have suggested the drawing corroborated Y.D.'s evidence that the appellant put his penis in his mouth, she misspoke. Nevertheless, in my view, it is obvious from the entire sentence, read closely, in the context of her reasons as a whole, that, contrary to the appellant's submission, the judge did not inflate the weight of Y.D.'s evidence by erroneously treating the drawing as a self-corroborating prior consistent statement. In particular, she did not compare Y.D.'s out-of-court account in the interview with his in-court testimony and rely on mere consistency between the two to "add weight" to his in-court testimony and thus enhance his credibility. In the circumstances, no such comparison was possible.

[73] The drawing was an integral element of the only account Y.D. ever gave of the appellant putting his penis in his mouth. Together with his contemporaneous explanation in the interview, it represented the totality of Y.D.'s evidence regarding that event, admissible at trial by virtue of s. 715.1 of the *Criminal Code*, and, as such, did not constitute "corroboration". However, the spontaneous and uncoached

manner in which he produced the drawing was a relevant consideration in assessing the credibility and reliability of that evidence, particularly given Y.D.'s young age and reluctance to express himself verbally. More specifically, Y.D.'s manner when he produced the drawing suggested that it depicted his genuine and personal recollection of the event thus alleged.

[74] Given the foregoing, in my view, the rule against self-corroboration was not engaged on the evidence. Although the judge expressed herself awkwardly, she did not inflate the weight of Y.D.'s evidence impermissibly by treating the drawing as a self-corroborating prior consistent statement or by considering the spontaneous and uncoached manner in which Y.D. produced the drawing in the interview.

[75] I would not give effect to this ground of appeal.

Did the judge err in applying the principles in *W.(D.)*?

Legal Principles

[76] The paramount question in every criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt as to the guilt of the accused: *Vuradin* at para. 21. In *W.(D.)*, the Supreme Court of Canada outlined a three-step framework designed to ensure that judges remain focused on the principle of reasonable doubt when an accused testifies: at 758. The purpose of the framework is to prevent judges from unintentionally basing a guilty verdict on a choice between believing the accused's evidence or the Crown's evidence, an error sometimes described as approaching the evidence as a credibility contest: *R. v. C.L.Y.*, 2008 SCC 2 at paras. 6–9; *R. v. L.(C.J.)*, 2004 MBCA 126 at para. 34.

[77] However, judges are not constrained by the form or sequence of the *W.(D.)* framework. The framework does not establish a sacrosanct formula that must be repeated word for word whenever an accused testifies: *C.L.Y.* at paras. 7–9. On the contrary, judges are free to undertake the necessary analysis as they see fit provided they give reasons the parties can understand and appellate courts can review. In particular, as Justice Charron stated in *R. v. Dinardo*, 2008 SCC 24, the

reasons must demonstrate that the judge seized the substance of the *W.(D.)* instruction in the context of a credibility assessment: at para. 23. The key in every case is whether the judge applied the correct burden and standard of proof, not the words used in applying them: *C.L.Y.* at paras. 6–9.

[78] In some cases, it will be apparent that the judge applied the correct burden and standard of proof even in the absence of an explanation for rejecting the accused’s evidence, particularly where the accused’s evidence involves a bare denial and the judge accepts credible contradictory evidence: *Vuradin* at paras. 13, 27. As explained in *R.E.M.*, where the judge finds a complainant’s evidence to be truthful on the criminal standard based on its strength and credibility, it necessarily follows that the accused’s denial was rejected where it conflicted with the evidence of the complainant. In such circumstances, the convictions themselves raise a reasonable inference that the accused’s denial, even if plausible, failed to raise a reasonable doubt: at para. 66. However, depending on the nature of the evidence, a judge may be obliged to explain why the testimony of the accused is disbelieved and why it does not raise a reasonable doubt for the parties to be able to understand the reasons for the guilty verdict and to permit appellate review: *Dick* at para. 27.

Application of Principles

[79] In this case, the judge identified the credibility and reliability of the witnesses as the key issue for determination at the outset of her reasons: at para. 41. She also reviewed the governing principles and leading authorities on the applicable onus and standard of proof: at paras. 62–73. After setting out the *W.(D.)* framework, she specifically stated that a judge must not “fall into the trap of deciding the guilt or innocence of the accused solely on the basis of whether the complainant or the accused was a more credible witness”: at para. 68. She also stated that “[i]t is not a question of choosing between the Crown’s version and that of the defence, but rather in considering the whole of the evidence, is the judge left with a reasonable doubt as to the guilt of the accused”: at para. 72.

[80] The judge went on to analyze the strength and credibility of Y.D. and K.D.'s evidence. Then she noted that the appellant confirmed many of the surrounding circumstances described by Y.D. and K.D., but flatly denied the sexual touching they alleged: at paras. 74–87. She characterized the appellant's evidence as "not implausible" and commented that he did not contradict himself when he was testifying. However, she stated, "in making a credibility assessment with respect to [the appellant's] evidence, the court cannot consider his testimony in isolation of the whole evidence": at para. 88. To repeat, she said this next:

[89] Does the denial, coupled with the whole of the evidence, leave a reasonable doubt? The strength of Y.D. and K.D.'s testimony becomes an important consideration in assessing credibility of [the appellant's] denial.

[90] I am satisfied, on the whole of the evidence, that the bare denial of [the appellant] simply does not raise a doubt, given the credible evidence presented by Crown. Although it was not clear how many times [the appellant] engaged in sexual touching of Y.D. and K.D., I am satisfied, beyond a reasonable doubt, that there was at least two incidences described by Y.D. and two described by K.D., as detailed in their evidence, that did indeed occur substantially in the manner that they outlined in their testimony.

[81] In my view, the judge's analysis on the reasonable doubt issue was free of error. I do not accept the appellant's submission that she found his plausible denial was uncontradicted and did not reject it, thus indicating that she engaged in a credibility contest and, based on her own findings, should have had a reasonable doubt. The judge conducted an appropriately reasoned and considered assessment of Y.D. and K.D.'s evidence and concluded that, despite some frailties, it was strong and credible. The evidence of Y.D. and K.D. starkly contradicted the appellant's bare denial, from which it necessarily followed that she rejected his denial and that, while "not implausible," it did not raise a reasonable doubt.

[82] Nor do I accept the appellant's submission that the judge misapplied the burden of proof given that "the number, location, and people involved in the incidents varied wildly" and that she had a doubt as to whether some of the sexual touching occurred, which logically should have extended to all of the allegations as nothing distinguished one from another.

[83] As the judge recognized, the evidence of Y.D. and K.D. was unclear on the peripheral matter of the frequency of the alleged sexual touching. However, as she also recognized, in cases involving child witnesses a lack of clarity on such matters does not necessarily cast doubt on the credibility of their accounts. Further, the record does not support the submission that Y.D. and K.D.'s evidence "varied wildly", nor do the reasons support the submission that the judge found some of the sexual touching they alleged was not proven beyond a reasonable doubt.

[84] As noted, Y.D. described three specific incidents of sexual touching: one depicted in the drawing when the appellant put his penis in his mouth; a second the "same summer" when the appellant "sticked his penis [in Y.D.'s] butt"; and a third "one winter ago" when "[Y.D.] sucked [the appellant's] balls". K.D. described the appellant touching his "bum" and his mouth with his "big" penis, which, he said, occurred "more than once", the latter of which he did not report in his police interview but testified to at trial. Taking into account the whole of the evidence, the judge found that at least two of the three incidents described by Y.D. and the two incidents described by K.D. occurred substantially as they outlined in their testimony.

[85] When read as a whole, in the context of the record, it is apparent from her reasons that, contrary to the appellant's submission, the foregoing was not a finding that the judge had a reasonable doubt that any of the specific incidents of sexual touching alleged by Y.D. or K.D. were unproven to the criminal standard. Rather, it was a positive finding that the judge had no reasonable doubt that any fewer than two of the incidents specifically described by Y.D. and the two described by K.D. crossed that bar. Moreover, even if the judge did have a reasonable doubt regarding some of their allegations (and nothing suggests that she did), she was entitled to accept some, all or none of Y.D. and K.D.'s evidence. While it may have been desirable for her to make more detailed findings, it was unnecessary given the nature of the charges: *R.E.M.* at paras. 63, 67. The fact that she did not do so does not mean that she misapplied the burden of proof.

[86] In my view, the appellant's argument is indistinguishable from that rejected by the Supreme Court of Canada in *Vuradin*, where the appellant argued the judge's acceptance of the complainant's evidence and failure to explain his rejection of a bare denial meant the judge misapplied the burden of proof by choosing the Crown's evidence over his evidence in a credibility contest. Like the Court in *Vuradin*, I find this argument unpersuasive in what I see as the substantially similar context in which it is advanced in this case.

[87] I would not give effect to this ground of appeal.

Did the judge fail to provide sufficient reasons?

Legal Principles

[88] Judges are obliged to give reasons sufficient to explain their decisions to the public, to explain the result to the parties and to enable meaningful appellate review of the correctness of their decisions. As Justice Binnie explained in *R. v. Sheppard*, 2002 SCC 26, in fulfilling these purposes reasons serve as the mechanism by which judges account to all concerned for their decisions and thus justice is both done and seen to be done: at paras. 15, 24–25. In addition, the task of articulating reasons enhances the quality of decisions by focusing the judge's attention on the salient issues, thus reducing the risk of error, and articulated reasons contribute, in turn, to the proper and uniform development of the law: *R.E.M.* at para. 12.

[89] Appellate courts adopt a functional approach when assessing the sufficiency of reasons, which they review in the context of the record, the live issues and the arguments of counsel. Appellate intervention will be justified only where the factual and legal basis for a decision is not intelligible in that the logical connection between the verdict and the basis for the verdict is not apparent. Reasons, read as a whole and in context, must show why the judge made the decision challenged on appeal. In cases that turn on determinations of credibility, appellate courts assess the sufficiency of reasons in light of the deference generally afforded to credibility findings. Accordingly, deficiencies in a judge's credibility analysis will rarely merit

intervention on the basis that the reasons are insufficient: *R.E.M.* at paras. 35, 37, 49, 54; *Dinardo*, at para. 26; *Vuradin* at paras. 10–13.

[90] In *Dick*, this Court applied the principles developed in *R.E.M.*, *Dinardo* and *Vuradin* to a decision where the judge convicted the appellant without analyzing key aspects of his testimony in which he denied its commission and provided a starkly different account of the event in question than that of the complainant. As I have explained, depending on the nature of the evidence, in some cases a judge will be obliged to explain why the testimony of the accused is disbelieved and why it does not raise a reasonable doubt for a guilty verdict to be understandable. In overturning the conviction in *Dick*, this Court concluded that the detailed testimony of the accused was not so inherently implausible that it was incapable of raising a reasonable doubt in the context of the evidence and the live issues. That being so, it was unclear if the judge had seized and applied the substance of the *W.(D.)* instruction and, therefore, the reasons did not permit meaningful appellate review.

Application of Principles

[91] In my view, it is clear from the judge's reasons and the record why she found the appellant guilty of both counts of sexual touching. In other words, her reasons are sufficient to explain her decision to the public and the appellant and to enable meaningful appellate review.

[92] As previously discussed, the judge conducted a thorough, clear and cogent assessment of Y.D. and K.D.'s evidence, including its strengths and frailties, and concluded they were credible and reliable witnesses. Given the strength and content of their credible testimony, which she accepted, she also rejected the appellant's bare denial and found it did not raise a reasonable doubt. As in *Vuradin*, in the context of the evidence and the live issues, no further explanation was necessary — the reasons illuminated the logical connection between the verdict and the basis for the verdict. Unlike the reasons at issue in *Dick*, as also discussed, it was clear that the judge seized the substance of the matter and, in finding the

appellant guilty, properly applied the burden of proof and the principles underlying *W.(D.)*.

[93] I would not give effect to this ground of appeal.

Conclusion

[94] For all of the foregoing reasons, I would dismiss the appeal.

“The Honourable Madam Justice Dickson”

I AGREE:

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

Tab 12:

R. v. Dixon, 1998 1 S.C.R. 244

Spencer Dixon Appellant

v.

Her Majesty The Queen Respondent

INDEXED AS: R. v. DIXON

File No.: 25834.

1997: December 5; 1998: February 19.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Constitutional law — Charter of Rights — Fundamental justice — Duty to disclose — Accused convicted of aggravated assault — Crown not disclosing statements made by four individuals — Summary of statements included in police reports provided to defence counsel at trial — Appropriate test for determining whether Crown's inadvertent failure to disclose relevant material violated accused's right to disclosure — If right to disclosure violated, appropriate test for determining whether constitutional right to make full answer and defence impaired — Effect to be given to defence counsel's lack of due diligence — Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Three persons were injured in a brawl where the attackers surrounded their victims in turn and kicked and pummelled them. Two victims (Gillis and Charman) were badly injured and a third (Watts) was permanently and very seriously injured. The accused, who was tried with four others, was convicted of aggravated assault of Watts. Significantly, he was found guilty both as a principal and as a party (aiding or abetting) under s. 21 of the *Criminal Code*. During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports which included summaries of statements given by four individuals. Two statements indicated that the persons making them had not witnessed the assaults. The third (Tynes') stated that the person was with the Crown's main identification witness in the vicinity of the assaults. It also described that witness' clothing that night. The fourth (Daye's) indicated that the person witnessed two of the assaults, identified the location of some of the accused during the assaults and identified some of the assailants. It impli-

Spencer Dixon Appellant

c.

Sa Majesté la Reine Intimée

RÉPERTOIRÉ: R. c. DIXON

N° du greffe: 25834.

1997: 5 décembre; 1998: 19 février.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit constitutionnel — Charte des droits — Justice fondamentale — Obligation de divulguer — Accusé déclaré coupable de voies de fait graves — Omission du ministère public de divulguer les déclarations de quatre personnes — Résumé des déclarations contenu dans les rapports de police remis à l'avocat de la défense au procès — Critère à utiliser pour déterminer si l'omission par inadvertance du ministère public de communiquer des documents pertinents a violé le droit de l'accusé à la divulgation — En cas de violation du droit à la divulgation, critère à utiliser pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière garanti par la Constitution — Importance à accorder au manque de diligence raisonnable d'un avocat de la défense — Charte canadienne des droits et libertés, art. 7, 24(1).

Trois personnes ont été blessées lors d'une bagarre au cours de laquelle les agresseurs ont encerclé leurs victimes à tour de rôle et les ont battues à coups de pied et à coups de poing. Deux des victimes (Gillis et Charman) ont été blessées grièvement et la troisième (Watts) a subi des blessures très graves et permanentes. L'accusé, qui a subi son procès en même temps que quatre autres personnes, a été reconnu coupable de voies de fait graves contre Watts. Fait révélateur, il a été déclaré coupable à la fois comme auteur principal de l'infraction et comme participant à celle-ci (aider ou encourager), au sens de l'art. 21 du *Code criminel*. Au cours du procès, les avocats de tous les accusés ont obtenu copie des rapports de police qui comprenaient des résumés des déclarations de quatre personnes. Deux des déclarations indiquaient que leurs auteurs n'avaient pas été témoins des voies de fait. La troisième (celle de Tynes) révélait que son auteur était en compagnie du principal témoin à charge en matière d'identification, près de l'endroit où les voies de fait ont été commises. Elle décrivait aussi les vêtements

cated the accused in an assault for which he was neither charged nor convicted and contradicted the evidence of the main identification witness in certain respects.

None of the four statements was produced by the Crown and this gave rise to a ground of appeal based on the Crown's failure to disclose information as required by s. 7 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal dismissed the appeals. It admitted fresh evidence, however, which indicated that counsel had not only transcripts and statements that made reference to some of the persons whose statements were not disclosed but also a chart and cross-reference sheet. The accused's counsel also reviewed the police occurrence reports and decided that nothing in the four statements referred to in those reports would assist the accused in making full answer and defence. The other counsel came to the same conclusion on the basis of the summaries. At issue were: (1) what was the appropriate test to be used in determining whether the Crown's inadvertent failure to disclose relevant material violated the accused's right to disclosure; (2) if the right to disclosure were violated, what was the appropriate test to determine whether the *Charter* right to make full answer and defence was impaired; and (3) in determining whether that right had been impaired, what was the effect to be given to defence counsel's lack of due diligence.

Held: The appeal should be dismissed.

(1) *The Crown's Duty to Disclose*

Where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he or she has also established the impairment of his or her *Charter* right to disclosure. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. The Crown accordingly may fail to disclose information which meets the *Stinchcombe* threshold but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process.

que ce témoin portait le soir en question. La quatrième (celle de Daye) indiquait que son auteur avait été témoin de deux cas de voies de fait, précisait l'endroit où certains accusés se trouvaient pendant que les voies de fait étaient commises et identifiait certains des agresseurs. Elle impliquait l'accusé dans des voies de fait dont il n'a été ni inculpé ni reconnu coupable, et contredisait, à certains égards, la déposition du principal témoin en matière d'identification.

Aucune des quatre déclarations n'a été produite par le ministère public, ce qui a donné lieu à un moyen d'appel fondé sur l'omission du ministère public de divulguer des renseignements comme il est tenu de le faire en vertu de l'art. 7 de la *Charte canadienne des droits et libertés*. La Cour d'appel a rejeté les appels. Elle a toutefois admis une nouvelle preuve qui indiquait que les avocats disposaient non seulement de transcriptions et de déclarations qui mentionnaient certaines personnes dont les déclarations n'ont pas été divulguées, mais encore d'un plan et d'une feuille de renvoi. L'avocat de l'accusé a aussi examiné les rapports de police et a estimé qu'il n'y avait rien dans les quatre déclarations mentionnées dans ces rapports qui aiderait l'accusé à présenter une défense pleine et entière. Les autres avocats sont arrivés à la même conclusion, sur la foi des résumés. Il s'agit de déterminer: (1) le critère à appliquer pour déterminer si l'omission par inadvertance du ministère public de communiquer tous les documents pertinents a violé le droit de l'accusé à la divulgation, (2) en cas de violation du droit à la divulgation, le critère à appliquer pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière garanti par la *Charte*, et (3) pour établir s'il y a eu atteinte à ce droit, l'importance à accorder au manque de diligence raisonnable de l'avocat de la défense.

Arrêt: Le pourvoi est rejeté.

(1) *L'obligation de divulguer du ministère public*

Lorsqu'un accusé démontre l'existence d'une possibilité raisonnable que les renseignements non divulgués auraient été utilisés pour réfuter la preuve du ministère public, pour présenter un moyen de défense ou, par ailleurs, pour prendre une décision qui aurait pu avoir une incidence sur la façon de présenter la défense, il se trouve également à établir l'existence d'une atteinte au droit à la divulgation que lui garantit la *Charte*. Le droit à la communication de tous les documents pertinents est large et vise les documents qui peuvent n'avoir qu'une importance secondaire par rapport aux questions fondamentales en litige. Le ministère public peut donc omettre de divulguer des renseignements qui satisfont au cri-

A court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility that the result at trial might have been different had the undisclosed material been produced. The right to full disclosure is just one component of the right to make full answer and defence. The *Charter* right to make full answer and defence is not necessarily impaired solely because the right to disclosure was violated.

The Crown need not produce what is clearly irrelevant. Here, the first two statements had no relevant information at all and there was no reasonable possibility that they could have been of any use to the accused at trial. Both the third (Tynes') and fourth (Daye's) statements met the low threshold for disclosure and should have been disclosed.

(2) *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1) of the Charter*

In order to determine whether the right to make full answer and defence was impaired, a two-step analysis must be undertaken. First, to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. If an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due

tère préliminaire de l'arrêt *Stinchcombe*, mais qui ne pourraient absolument pas compromettre le bien-fondé du résultat atteint ou l'équité globale du procès. Une cour peut bien conclure à la violation du droit à la divulgation que la *Charte* garantit à un accusé, tout en refusant d'accorder un nouveau procès à titre de réparation si elle juge que le procès a été foncièrement équitable et qu'il n'y avait aucune possibilité raisonnable que le résultat au procès aurait été différent si la documentation non communiquée avait été produite. Le droit à la divulgation complète n'est qu'une composante du droit à une défense pleine et entière. Il n'y a pas nécessairement atteinte au droit à une défense pleine et entière garanti par la *Charte*, du seul fait qu'il y a eu violation du droit à la divulgation.

Le ministère public n'est pas tenu de produire ce qui n'a manifestement aucune pertinence. En l'espèce, les deux premières déclarations ne contenaient aucun renseignement pertinent, et il n'y avait aucune possibilité raisonnable qu'elles aient été de quelque utilité à l'accusé au procès. Les troisième et quatrième déclarations (celles de Tynes et de Daye, respectivement) satisfaisaient toutes les deux au critère préliminaire peu élevé fixé pour la divulgation et auraient dû être divulguées.

(2) *L'atteinte au droit à une défense pleine et entière et la réparation à accorder en vertu du par. 24(1) de la Charte*

Pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière, il faut entreprendre une analyse en deux étapes. Premièrement, pour évaluer le bien-fondé du résultat, il faut examiner les renseignements non divulgués pour déterminer l'incidence qu'ils auraient pu avoir sur la décision de rendre un verdict de culpabilité. Si une cour d'appel est convaincue qu'il y a une possibilité raisonnable que les renseignements non divulgués influent, à première vue, sur le bien-fondé de la déclaration de culpabilité, un nouveau procès devrait être ordonné. Même si les renseignements non divulgués n'influent pas eux-mêmes sur le bien-fondé du résultat atteint au procès, l'incidence de la non-divulgation sur l'équité globale du procès doit être prise en considération à la deuxième étape de l'analyse. On le fera en évaluant, sous l'angle d'une possibilité raisonnable, les questions qui auraient pu être posées aux témoins ou les possibilités de recueillir d'autres éléments de preuve que la défense aurait pu avoir si les renseignements pertinents avaient été divulgués.

Pour examiner l'équité globale du procès, il faut tenir compte de la diligence dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation par le minis-

diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information and yet remained passive as a result of a tactical decision or lack of due diligence, it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial process.

All these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

Here, the accused had the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affected the reliability of his conviction as a principal in the aggravated assault and his conviction for aiding or abetting the assault; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. First, the accused did not demonstrate that the non-disclosure of the statements affected each of the alternative conclusions referred to in s. 21(1) of the *Code* — that he either kicked or beat the victim, helped to administer the beating or encouraged the beating. Second, the non-disclosure did not affect the overall fairness of the trial. The third statement (Tynes') and the fourth (Daye's), on their faces, would have had no impact on the reliability

of the Crown's case. The failure of the Crown to disclose relevant material to the defence is a factor that the trial judge must take into account in determining whether the Crown's case is made out. The failure of the Crown to disclose relevant material to the defence is a factor that the trial judge must take into account in determining whether the Crown's case is made out. The failure of the Crown to disclose relevant material to the defence is a factor that the trial judge must take into account in determining whether the Crown's case is made out.

La réponse à la question de savoir s'il y a lieu d'ordonner la tenue d'un nouveau procès pour le motif que l'omission de divulguer du ministère public a rendu le procès inéquitable comporte un processus d'évaluation et de pondération. Si l'avocat de la défense savait ou aurait dû savoir, sur la foi d'autres renseignements divulgués, que le ministère public avait omis par inadvertance de divulguer de l'information, et qu'il n'a rien fait en raison d'une décision tactique ou d'un manque de diligence raisonnable, il serait difficile de retenir un argument selon lequel l'omission de divulguer a nui à l'équité du procès.

Il convient de bien pondérer tous ces facteurs. Dans les cas où la pertinence de la preuve non divulguée est très élevée à première vue, la tenue d'un nouveau procès devrait être ordonnée pour ce motif seulement. Dans ces circonstances, il ne sera pas nécessaire d'examiner l'incidence des possibilités perdues de recueillir d'autres éléments de preuve par suite de l'omission de divulguer. Cependant, si la pertinence des renseignements non divulgués est relativement peu élevée, une cour d'appel devra déterminer si la défense a perdu des possibilités réalistes. À cette fin, la diligence raisonnable ou le manque de diligence raisonnable dont l'avocat de la défense aura fait preuve en tentant d'obtenir la divulgation constituera un facteur très important à retenir pour décider d'ordonner ou non la tenue d'un nouveau procès.

En l'espèce, il incombait à l'accusé de démontrer (i) qu'il est raisonnablement possible que les déclarations non divulguées aient influé sur le bien-fondé de sa déclaration de culpabilité en tant qu'auteur principal des voies de fait graves et de sa déclaration de culpabilité d'avoir aidé ou encouragé à perpétrer ces voies de fait, ou (ii) qu'il est raisonnablement possible que la non-divulgation des déclarations ait nui à l'équité globale du procès. Premièrement, l'accusé n'a pas prouvé que l'omission de divulguer les déclarations a influé sur chacune des autres conclusions mentionnées au par. 21(1) du *Code*, à savoir qu'il a donné des coups de pied à la victime ou l'a battue, qu'il a aidé à la battre ou qu'il a encouragé à le faire. Deuxièmement, la non-divulgation n'a pas nui à l'équité globale du procès. Les troisième et

of the conviction. The Crown's failure to disclose did not deprive the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. A significant factor in reaching this conclusion was defence counsel's lack of due diligence in pursuing disclosure.

Defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure.

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365, aff'd [1996] 3 S.C.R. 1126; *R. v. S.E.S.* (1992), 100 Sask. R. 110; *R. v. McAnespie*, [1993] 4 S.C.R. 501.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).
Criminal Code, R.S.C., 1985, c. C-46, s. 21(1).

APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 156 N.S.R. (2d) 81, 461 A.P.R. 81, [1997] N.S.J. No. 20 (QL) (*sub nom. R. v. McQuaid (Dixon Appeal)*), dismissing the accused's appeal from his conviction for aggravated assault (1996), 148 N.S.R. (2d) 321 (*sub nom. R. v. McQuaid*), 429 A.P.R. 321, [1996] N.S.J. No. 81 (QL). Appeal dismissed.

quatrième déclarations (celles de Tynes et de Daye, respectivement) n'auraient eu, à première vue, aucune incidence sur le bien-fondé de la déclaration de culpabilité. L'omission de divulguer du ministère public n'a pas privé la défense de la possibilité de poser d'autres questions aux témoins ou de recueillir d'autres éléments de preuve découlant des documents non communiqués. Un facteur important qui a été pris en considération pour tirer cette conclusion est le manque de diligence raisonnable dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation.

L'avocat de la défense n'a, en aucun temps, le droit de supposer que tous les renseignements pertinents ont été divulgués à la défense. Tout comme l'obligation de divulguer du ministère public est constante, et continue d'exister durant tout le procès, il en est de même de l'obligation de l'avocat de la défense de faire preuve de diligence raisonnable en tentant d'obtenir la divulgation. Si l'avocat de la défense ne fait rien lorsqu'il sait que des renseignements pertinents n'ont pas été divulgués, cela justifiera souvent, à tout le moins, une conclusion à un manque de diligence raisonnable et pourra, dans certains cas, justifier une déduction que l'avocat a pris une décision stratégique de ne pas tenter d'obtenir la divulgation.

Jurisprudence

Arrêts mentionnés: *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *R. c. Egger*, [1993] 2 R.C.S. 451; *R. c. Chaplin*, [1995] 1 R.C.S. 727; *R. c. Carosella*, [1997] 1 R.C.S. 80; *R. c. Collins*, [1987] 1 R.C.S. 265; *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763; *R. c. Bramwell* (1996), 106 C.C.C. (3d) 365, conf. par [1996] 3 R.C.S. 1126; *R. c. S.E.S.* (1992), 100 Sask. R. 110; *R. c. McAnespie*, [1993] 4 R.C.S. 501.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 24(1).
Code criminel, L.R.C. (1985), ch. C-46, art. 21(1).

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (1997), 156 N.S.R. (2d) 81, 461 A.P.R. 81, [1997] N.S.J. No. 20 (QL) (*sub nom. R. c. McQuaid (Dixon Appeal)*), qui a rejeté l'appel interjeté par l'accusé contre sa déclaration de culpabilité de voies de fait graves (1996), 148 N.S.R. (2d) 321 (*sub nom. R. c. McQuaid*), 429 A.P.R. 321, [1996] N.S.J. No. 81 (QL). Pourvoi rejeté.

L. W. Scaravelli, for the appellant.

Kenneth W. F. Fiske, Q.C., and *Richard B. Miller*, for the respondent.

The judgment of the Court was delivered by

CORY J. — Three issues arise in this appeal:

- (1) What is the appropriate test to be used to determine whether the Crown's inadvertent failure to disclose relevant material constituted a violation of the appellant's right to disclosure under s. 7 of the *Canadian Charter of Rights and Freedoms*?
- (2) Where an appellant's right to disclosure is violated, what is the appropriate test to be used to determine whether his or her *Charter* right to make full answer and defence was also thereby impaired?
- (3) In determining whether an appellant's right to make full answer and defence was impaired, what effect is to be given to defence counsel's lack of due diligence?

Several aspects of these issues are common to the appeals of Spencer Dixon, Herman McQuaid, Guy Leaman Robart, Cyril Joseph Smith and Stacey Skinner, all of whom were tried together on charges of aggravated assault arising out of the same factual circumstances. All five appeals were heard together by this Court. These reasons will address the common aspects, and separate reasons will deal with any issues that are unique to the other appeals.

I. Factual Background

On September 10, 1994, a fraternity hosted a party in Halifax. The evening was uneventful until a young woman named Shannon Burke became involved in a physical confrontation with Terrence Dixon, a young man whom she claimed was the father of her child. Terrence Dixon dragged Burke out of the fraternity house with others following. Two young men who had attended the party —

L. W. Scaravelli, pour l'appellant.

Kenneth W. F. Fiske, c.r., et *Richard B. Miller*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE CORY — Le présent pourvoi soulève trois questions:

- (1) Quel critère faut-il appliquer pour déterminer si l'omission par inadvertance du ministère public de communiquer tous les documents pertinents a constitué une violation du droit à la divulgation, garanti à l'appellant par l'art. 7 de la *Charte canadienne des droits et libertés*?
- (2) En cas de violation du droit d'un appellant à la divulgation, quel critère faut-il appliquer pour déterminer s'il y a eu également, de ce fait, une atteinte au droit à une défense pleine et entière que lui garantit la *Charte*?
- (3) Pour déterminer s'il y a eu une atteinte au droit d'un appellant à une défense pleine et entière, quelle importance faut-il accorder au manque de diligence raisonnable de l'avocat de la défense?

Plusieurs aspects de ces questions sont communs aux pourvois de Spencer Dixon, Herman McQuaid, Guy Leaman Robart, Cyril Joseph Smith et Stacey Skinner, qui ont tous été jugés ensemble relativement à des accusations de voies de fait graves découlant des mêmes circonstances. Les cinq pourvois ont été entendus simultanément par notre Cour. Les présents motifs traiteront de ces aspects communs, et des motifs distincts porteront sur les questions propres aux autres pourvois.

I. Les faits

Le 10 septembre 1994, une confrérie d'étudiants donnait une fête à Halifax. La soirée s'était déroulée sans incident jusqu'à ce qu'une jeune femme du nom de Shannon Burke en vienne aux coups avec Terrence Dixon, un jeune homme qu'elle prétendait être le père de son enfant. Terrence Dixon a traîné Burke à l'extérieur de la maison de la confrérie et ils ont été suivis par d'autres personnes.

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Rob Gillis and John Charman — attempted to intervene and help Burke. This confrontation escalated and expanded to include a number of young men who attacked Gillis and Charman. Gillis fell to the ground, hit the back of his head and began bleeding badly. A circle formed around Charman, he was hit from behind and had his teeth knocked out.

Deux jeunes hommes qui avaient participé à la fête — Rob Gillis et John Charman — ont essayé d'intervenir et d'aider Burke. L'affrontement s'est envenimé et a pris de l'ampleur au point d'inclure un certain nombre de jeunes gens qui ont attaqué Gillis et Charman. Gillis s'est affaissé, sa tête a heurté le sol et il s'est mis à saigner abondamment. Un cercle s'est formé autour de Charman, qui a été frappé par derrière et a eu les dents brisées.

⁴ Darren Watts went to the aid of his friend Charman. As soon as he did, the circle of men that had formed around Charman switched its attention to Watts. One from that group knocked him to the ground with a single punch. The men in the group kicked him and continued to do so repeatedly until they fled across the street. The vicious beating left Watts permanently disabled. He underwent two operations including the partial removal of the frontal lobe of his brain. He had to undertake extensive rehabilitation treatment, and has lost the use of his left side. His cognitive and motor skills have not returned to the levels he enjoyed before the assault.

Darren Watts est allé au secours de son ami Charman. Aussitôt, les hommes qui avaient encerclé Charman se sont tournés vers Watts. L'un de ceux-ci l'a envoyé au sol d'un seul coup de poing. Les membres de ce groupe lui ont donné des coups de pied et ont continué à le faire jusqu'au moment où ils se sont enfuis de l'autre côté de la rue. Watts s'est retrouvé handicapé de façon permanente à la suite de cette violente raclée. Il a subi deux opérations, dont l'ablation partielle du lobe frontal de son cerveau. Il a dû se soumettre à des traitements intensifs de réadaptation et a perdu l'usage du côté gauche. Il n'a pas retrouvé les capacités cognitives et motrices qu'il avait avant de subir les voies de fait en cause.

⁵ Six men, including the five appellants, were convicted of committing an aggravated assault on Darren Watts. At the same trial, the appellant Cyril Smith was also convicted of the aggravated assault of Rob Gillis. The appellants Herman McQuaid and Stacey Skinner were convicted of the aggravated assault of John Charman.

Six hommes, dont les cinq appelants, ont été reconnus coupables de voies de fait graves contre Darren Watts. Lors du même procès, l'appellant Cyril Smith a également été reconnu coupable de voies de fait graves contre Rob Gillis. Les appelants Herman McQuaid et Stacey Skinner ont été reconnus coupables des voies de fait graves dont a été victime John Charman.

⁶ During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports. The reports included summaries of statements given by Terris Daye, Terrance Tynes, Travia Carvery and Edmond Levia, none of which had been produced by the Crown. After conviction and sentencing, trial counsel for all of the accused except Skinner met to discuss appeal issues. The statements were produced by the Crown after this meeting at the request of counsel for one of the accused. One of the grounds raised in the appeal pertained to the Crown's failure to disclose these statements.

Au cours du procès, les avocats de tous les accusés ont obtenu copie des rapports de police. Ces rapports comprenaient des résumés des déclarations de Terris Daye, Terrance Tynes, Travia Carvery et Edmond Levia, qui n'avaient pas été produites par le ministère public. Après les déclarations de culpabilité et le prononcé des sentences, les avocats de tous les accusés à l'exception de Skinner se sont rencontrés pour discuter des questions d'appel. Les déclarations ont été produites par le ministère public après cette rencontre, à la demande de l'avocat de l'un des accusés. L'un des moyens d'appel concernait l'omission du ministère public de divulguer ces déclarations.

The Nova Scotia Court of Appeal admitted fresh evidence by way of counsel's affidavits as to their conduct in pursuing disclosure prior to and during the trial. The affidavits reveal that by the time the preliminary inquiry was held during the week of June 5, 1995, counsel for all accused determined that the same material had been disclosed to all of them. This disclosure did not include the four missing statements or any reference to the fact that these statements had been taken. However, counsel had received a transcript of the sworn statement given by Danny Clayton — the Crown's main identification witness — in which Clayton identified Terris Daye and Terrance Tynes as eyewitnesses to the assaults. Counsel also received the statements of Stephen (Dee) Nelson, Nathaniel Robart and Michael Barton, all of whom referred to three of the four individuals whose statements were not disclosed, including Terris Daye. The Court of Appeal observed that all counsel also received a chart dated October 13, 1994 and a cross-reference sheet dated October 14, 1994. While it is not clear exactly when these documents were received, the Court of Appeal found that defence counsel probably had them prior to the preliminary inquiry, and certainly prior to trial. The chart indicates that Tynes, Daye, Carvery and Levia were in the immediate vicinity when the assaults took place. The cross-reference sheet also suggests that a statement was taken from Terris Daye.

Counsel for all accused met for a pre-trial conference with Crown counsel, Mr. Craig Botterill, on January 4, 1996. At that time, Mr. Botterill invited all counsel to attend at his office and copy any of the material in the Crown's file. Counsel representing Cyril Smith attended on behalf of counsel for Spencer Dixon and counsel for Herman McQuaid. Counsel for Guy Robart and counsel for Stacey Skinner attended separately. All three counsel who attended Mr. Botterill's office stated in their affidavits that the four undisclosed

La Cour d'appel de la Nouvelle-Écosse a admis une nouvelle preuve sous forme d'affidavits des avocats au sujet de ce qu'ils avaient fait pour tenter d'obtenir la divulgation avant et pendant le procès. Les affidavits révèlent qu'au moment où l'enquête préliminaire a eu lieu durant la semaine du 5 juin 1995, les avocats de tous les accusés ont estimé qu'ils s'étaient tous vu communiquer la même documentation. Cette divulgation ne comprenait pas les quatre déclarations manquantes ni aucune mention du fait que ces déclarations avaient été recueillies. Cependant, les avocats avaient reçu une transcription de la déclaration sous serment de Danny Clayton, le principal témoin à charge en matière d'identification, dans laquelle celui-ci identifiait Terris Daye et Terrance Tynes comme étant des témoins oculaires des voies de fait. Les avocats ont aussi reçu les déclarations de Stephen (Dee) Nelson, Nathaniel Robart et Michael Barton, qui parlaient tous de trois des quatre individus dont les déclarations n'ont pas été divulguées, y compris Terris Daye. La Cour d'appel a fait observer que tous les avocats avaient reçu un plan daté du 13 octobre 1994 et une feuille de renvoi datée du 14 octobre 1994. Bien qu'on ne sache pas exactement quand ces documents ont été reçus, la Cour d'appel a conclu que les avocats de la défense les avaient probablement en leur possession avant l'enquête préliminaire, et sûrement avant le procès. Le plan montre que Tynes, Daye, Carvery et Levia se trouvaient dans les environs immédiats lorsque les voies de fait ont été commises. La feuille de renvoi laisse également supposer qu'une déclaration a été obtenue de Terris Daye.

Le 4 janvier 1996, les avocats de tous les accusés ont tenu une conférence préparatoire au procès avec le substitut du procureur général, M^e Craig Botterill. Maître Botterill a alors invité tous les avocats à se rendre à son bureau et à reproduire l'un ou l'autre des documents contenus dans le dossier du ministère public. L'avocat qui représentait Cyril Smith s'y est rendu pour le compte des avocats de Spencer Dixon et de Herman McQuaid. L'avocat de Guy Robart et celui de Stacey Skinner s'y sont rendus séparément. Les trois avocats qui se sont rendus au bureau de M^e Botterill ont déclaré, dans leurs affidavits, que les quatre déclara-

statements were not in the Crown's file when they reviewed it prior to trial.

rations non divulguées ne se trouvaient pas dans le dossier du ministère public lorsqu'ils l'ont examiné avant le procès.

⁹ The trial began on Monday, February 5, 1996. At some point after the trial commenced, Mr. Scaravelli, counsel for Spencer Dixon, asked a police constable for copies of the occurrence reports. Approximately 160 pages of original reports were produced a short time later. Mr. Scaravelli brought these reports to the attention of other counsel, and by Thursday, February 8, 1996, all counsel had copies of the police occurrence reports, which made reference to the four undisclosed statements.

Le procès a débuté le lundi 5 février 1996. Quelque temps après l'ouverture du procès, M^e Scaravelli, l'avocat de Spencer Dixon, a demandé à un policier des copies des rapports de police. Environ 160 pages de rapports originaux ont été produites peu après. Maître Scaravelli a soumis ces rapports à l'attention des autres avocats et, le jeudi 8 février 1996, tous les avocats avaient des copies des rapports de police, qui faisaient état des quatre déclarations non divulguées.

¹⁰ By Monday, February 12, 1996, when he had completed his review of the police occurrence reports, Mr. Scaravelli was aware that four statements had been taken by the police and had not been disclosed by the Crown. However, based on summaries of the statements included in the occurrence reports, he decided there was nothing in the statements that would assist the accused in making full answer and defence. He stated in his affidavit that he was confident that all relevant information had been disclosed by the Crown, and he therefore did not pursue the matter further. By that same date three other defence counsel, Mr. Katsihtis, Mr. O'Neill and Mr. Coady, representing Cyril Smith, Herman McQuaid and Guy Robart respectively, were also aware that four witness statements had not been disclosed by the Crown. They too decided, on the basis of the summaries, not to request disclosure of the statements. Ms. Cain-Grant, counsel for the appellant Skinner, had acted in only one other criminal trial. She believed the summaries in the occurrence reports to be the complete statements given to police and as a result did not seek further disclosure.

Le lundi 12 février 1996, après avoir examiné les rapports de police, M^e Scaravelli savait que le ministère public n'avait pas divulgué quatre déclarations recueillies par la police. Toutefois, se fondant sur les résumés des déclarations contenus dans les rapports de police, il a estimé qu'il n'y avait rien dans ces déclarations qui aiderait l'accusé à présenter une défense pleine et entière. Il a dit, dans son affidavit, qu'il était persuadé que le ministère public avait divulgué tous les renseignements pertinents, et n'est donc pas allé plus loin. À ce moment-là, trois autres avocats de la défense, M^{es} Katsihtis, O'Neill et Coady, qui représentaient Cyril Smith, Herman McQuaid et Guy Robart respectivement, savaient également que le ministère public n'avait pas divulgué quatre déclarations de témoins. Ils ont eux aussi décidé, sur la foi des résumés, de ne pas demander la divulgation des déclarations. Maître Cain-Grant, l'avocate de l'appelant Skinner, n'avait participé qu'à un seul autre procès criminel. Elle croyait que les résumés contenus dans les rapports de police étaient les déclarations complètes faites à la police et n'a donc pas tenté d'obtenir la communication d'autres documents.

II. Decisions Below

A. *Nova Scotia Supreme Court* (1996), 148 N.S.R. (2d) 321

II. Les juridictions inférieures

A. *Cour suprême de la Nouvelle-Écosse* (1996), 148 N.S.R. (2d) 321

¹¹ At the trial for the assault on Darren Watts, Saunders J. made very careful and comprehensive

Lors du procès pour voies de fait contre Darren Watts, le juge Saunders a tiré des conclusions de

findings of fact. He found that the five appellants were part of the group of men who surrounded Watts and were responsible for his beating. Saunders J. found that the appellants, as part of the group around Watts, were there either to beat Watts, to encourage the beating or to stand shoulder to shoulder to entrap him. Applying s. 21(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, he found all were guilty of committing an aggravated assault on Darren Watts.

The Crown relied heavily on the testimony of Danny Clayton, who admitted to participating in the aggravated assault on Darren Watts and who testified in return for immunity. Clayton was the only Crown witness to identify Watts's assailants. His character was questioned. Further, he was an accomplice. Saunders J. very carefully scrutinized his evidence. He fully recognized the frailties of eyewitness testimony, but found that they were minimized by Clayton's presence at and participation in the assault. Clayton also knew the appellants personally, and had grown up with them and lived with them in the same community. These factors were found to have strengthened his evidence of identification. Further, Saunders J. found that Clayton's evidence was supported, in material respects, by the other evidence adduced. As a result, he was not left with the sense that it would be unsafe to convict the appellants of the aggravated assault of Darren Watts. On the basis of Clayton's testimony and all the evidence presented he was satisfied beyond a reasonable doubt of their guilt.

Saunders J. also accepted Clayton's testimony that Cyril Smith struck Rob Gillis, and found Smith guilty of the aggravated assault on Gillis. Saunders J. further noted that both Stacey Skinner and Herman McQuaid admitted to striking John Charman in their police statements. These admissions supported Clayton's testimony that Stacey Skinner and a man whom Clayton tentatively identified as Stephen (Dee) Nelson struck John

fait très minutieuses et détaillées. Il a conclu que les cinq appelants faisaient partie du groupe d'hommes qui avaient entouré Watts et qui étaient responsables de la raclée qu'il avait reçue. Le juge Saunders a conclu que les appelants, en tant que membres du groupe qui avait entouré Watts, avaient été là pour battre Watts ou pour encourager d'autres à le faire, ou encore pour se serrer les coudes afin de l'empêcher de s'échapper. Appliquant le par. 21(1) du *Code criminel*, L.R.C. (1985), ch. C-46, il les a tous reconnus coupables de voies de fait graves contre Darren Watts.

Le ministère public s'est fortement appuyé sur le témoignage de Danny Clayton, qui a admis avoir participé aux voies de fait graves contre Darren Watts et a témoigné en échange de l'immunité. Clayton est le seul témoin à charge qui a identifié les agresseurs de Watts. Sa moralité a été mise en doute. De plus, il était complice. Le juge Saunders a examiné très attentivement son témoignage. Il a parfaitement reconnu les faiblesses de la déposition du témoin oculaire, mais il a conclu que celles-ci étaient minimisées par le fait que Clayton avait assisté et participé aux voies de fait. Clayton connaissait aussi les appelants personnellement et avait grandi et vécu avec eux dans la même collectivité. Il a été jugé que ces facteurs avaient renforcé sa preuve d'identification. En outre, le juge Saunders a conclu que le témoignage de Clayton était étayé, à certains égards importants, par d'autres éléments de preuve. Par conséquent, il n'avait pas le sentiment qu'il serait risqué de déclarer les appelants coupables de voies de fait graves contre Darren Watts. Compte tenu du témoignage de Clayton et de tous les éléments de preuve présentés, il était convaincu hors de tout doute raisonnable qu'ils étaient coupables.

Le juge Saunders a également accepté le témoignage de Clayton selon lequel Cyril Smith avait frappé Rob Gillis, et il a reconnu Smith coupable des voies de fait graves dont Gillis a été victime. Le juge Saunders a souligné de plus que, dans leurs déclarations à la police, Stacey Skinner et Herman McQuaid avaient tous deux admis avoir attaqué John Charman. Ces aveux étayaient le témoignage de Clayton voulant que Stacey Skinner

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Charman. The trial judge concluded that Skinner and McQuaid had committed an aggravated assault on Charman.

B. *Nova Scotia Court of Appeal* (1997), 156 N.S.R. (2d) 81

¹⁴ The principal issue before the Court of Appeal was whether the failure to disclose the four witness statements impaired the appellant's right to make full answer and defence. Chipman J.A., writing for the majority, noted that the parties agreed there was no improper motive in the Crown's failure to disclose the statements, and that the only potentially material statement was that of Terris Daye.

¹⁵ Chipman J.A. found that trial counsel for the appellant did not seek the missing statements or bring the failure to disclose the statements to the attention of the trial judge at the earliest opportunity as they were required to do. It was his opinion that once the Crown produced the police occurrence reports during the course of the trial, defence counsel must have known that four statements had been taken by the police and had not been produced by the Crown. In his view, counsel had a choice at that point — "call for the statements or live without them" (p. 93). He found that certain contradictions between the summary of Daye's statement and Clayton's testimony would have prompted counsel who had any interest in the statements to investigate these discrepancies further. Chipman J.A. concluded that a tactical decision had been made at trial not to pursue disclosure of these statements, and that a contrary position was only taken following conviction. He observed that a lack of due diligence on the part of defence counsel is an important factor in determining whether to order a new trial.

¹⁶ However, the majority went on to dismiss the appeal on the basis that the undisclosed material was of no weight. Chipman J.A. held that on appeal from a conviction, where the Crown has

et un homme que Clayton a identifié non sans hésitation comme étant Stephen (Dee) Nelson aient attaqué John Charman. Le juge du procès a conclu que Skinner et McQuaid avaient commis des voies de fait graves contre Charman.

B. *Cour d'appel de la Nouvelle-Écosse* (1997), 156 N.S.R. (2d) 81

La principale question dont était saisie la Cour d'appel était de savoir si l'omission de divulguer les quatre déclarations de témoins avait porté atteinte au droit de l'appelant à une défense pleine et entière. Le juge Chipman a fait remarquer, au nom de la cour à la majorité, que les parties ont convenu qu'aucun motif répréhensible ne sous-tendait l'omission du ministère public de divulguer les déclarations et que la seule déclaration susceptible d'être pertinente était celle de Terris Daye.

Le juge Chipman a conclu que l'avocat de l'appelant n'a pas réclamé les déclarations manquantes ni porté à l'attention du juge du procès l'omission de divulguer ces déclarations, dès que possible comme il était tenu de le faire. Il était d'avis que, dès que le ministère public eut produit les rapports de police au cours du procès, l'avocat de la défense devait savoir qu'il n'avait pas produit quatre déclarations recueillies par la police. À son avis, l'avocat devait alors faire un choix: [TRADUCTION] «demander les déclarations ou s'en passer» (p. 93). Il a jugé que certaines contradictions entre le résumé de la déclaration de Daye et le témoignage de Clayton auraient dû inciter tout avocat qui avait un intérêt dans les déclarations à examiner davantage ces divergences. Le juge Chipman a conclu qu'une décision tactique de ne pas tenter d'obtenir la divulgation de ces déclarations avait été prise au procès et qu'un point de vue contraire n'a été adopté qu'après la déclaration de culpabilité. Il a fait observer que le manque de diligence raisonnable de l'avocat de la défense est un facteur important pour déterminer s'il y a lieu d'ordonner la tenue d'un nouveau procès.

Toutefois, les juges majoritaires ont rejeté l'appel pour le motif que la documentation non communiquée n'avait aucune valeur probante. Le juge Chipman a statué que, lors d'un appel contre une

failed to provide full disclosure, an appellant must show “that there is a reasonable probability that had the non-disclosed material been disclosed, the result might have been different” (p. 104). He then considered the materiality of Terris Daye’s statement in light of this test and concluded that it did not undermine “the overwhelming body of evidence indicat[ing] that there was a circle of black males surrounding and beating Watts” (p. 111). Though Chipman J.A. recognized that there were inconsistencies among the witnesses, he found a surprising unanimity about this circle, which was described from various different vantage points. He further found that Daye either did not see or was unwilling to admit to seeing who attacked Watts, and concluded that there was no reasonable probability that had this statement been available at or prior to the trial, the result might have been different.

Chipman J.A. therefore rejected the appellant’s argument that because Daye’s statement contradicted Clayton’s testimony as to the location of some of the accused during the attack on Watts, it could have been used to weaken Clayton’s credibility. He similarly rejected the argument that Daye’s description of inner and outer circles surrounding Darren Watts supported evidence given by other Crown witnesses suggesting that the number of Watts’s attackers was limited to three or four men. Chipman J.A. further noted that the summary of Daye’s statement in the police occurrence report included this description of two circles around Watts, and thus counsel did not lose a realistic opportunity to garner and present evidence flowing from this statement. Chipman J.A. held that there was nothing in the statement that opened any avenue of pre-trial investigation not already available to diligent counsel.

Bateman J.A., in dissent, disagreed with the majority’s conclusion that to merit a new trial, an appellant must show a reasonable probability that the result might have been different had the non-disclosed material been produced. She held that

déclaration de culpabilité, si le ministère public n’a pas effectué une divulgation complète, l’appellant doit montrer [TRADUCTION] «qu’il y a une probabilité raisonnable que le résultat aurait été différent si la documentation non communiquée avait été produite» (p. 104). Il a ensuite examiné la pertinence de la déclaration de Terris Daye en fonction de ce critère et a conclu qu’elle ne minait pas [TRADUCTION] «la preuve accablante que des noirs avaient entouré et battu Watts» (p. 111). Tout en reconnaissant que les témoins se contredisaient sur certains points, le juge Chipman a constaté une surprenante unanimité au sujet de ce cercle de gens, qui a été décrit à partir de points d’observation différents. Il a également conclu que Daye n’avait pas vu ou ne voulait pas admettre avoir vu ceux qui avaient attaqué Watts et il a statué qu’il n’y avait aucune probabilité raisonnable que le résultat aurait été différent si cette déclaration avait été disponible pendant ou avant le procès.

Le juge Chipman a donc rejeté l’argument de l’appellant selon lequel, parce que la déclaration de Daye contredisait le témoignage de Clayton quant à l’endroit où certains accusés se trouvaient pendant que Watts était attaqué, on aurait pu s’en servir pour miner la crédibilité de Clayton. Il a rejeté de la même façon l’argument selon lequel la description que Daye a donnée des cercles intérieur et extérieur formés autour de Darren Watts était les dépositions d’autres témoins à charge qui laissaient entendre que Watts n’avait été attaqué que par trois ou quatre hommes. Le juge Chipman a aussi noté que le résumé de la déclaration de Daye, contenu dans le rapport de police, comportait cette description de deux cercles autour de Watts, et ainsi, que l’avocat n’avait pas perdu une possibilité réaliste de recueillir et de présenter des éléments de preuve découlant de cette déclaration. Le juge Chipman a décidé que la déclaration ne contenait rien qui donnait ouverture à une enquête préliminaire et dont n’aurait pas déjà disposé un avocat diligent.

Le juge Bateman, dissidente, a exprimé son désaccord avec la conclusion des juges majoritaires que, pour mériter un nouveau procès, un appellant doit établir l’existence d’une probabilité raisonnable que le résultat aurait été différent si la

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any inquiry into the materiality of undisclosed information must include a generous assessment of the reasonable possibility that the non-disclosure impaired the preparation of the defence and fairness of the trial process, and that this inquiry encompassed more than a consideration of the reliability of the result. It was her opinion that there was enough information in Daye's statement to make it a potentially important resource in assisting with the preparation and presentation of the defence. She could not say that had Daye's statement been available to the defence, there was no reasonable possibility that the result might have been different, nor could she find that the fairness of the trial was not affected. She thus held that the right of the appellant to make full answer and defence was impaired by the Crown's non-disclosure.

documentation non communiquée avait été produite. Elle a statué que tout examen de la pertinence de renseignements non divulgués doit comprendre une évaluation généreuse de la possibilité raisonnable que la non-divulgaration ait nui à la préparation de la défense et à l'équité du procès, et que cet examen va plus loin que le bien-fondé du résultat. Elle était d'avis que la déclaration de Daye contenait assez de renseignements pour pouvoir être sensiblement utile à la préparation et à la présentation de la défense. Elle ne pouvait pas dire que, si la défense avait disposé de la déclaration de Daye, il n'y aurait eu aucune possibilité raisonnable que le résultat soit différent, et elle ne pouvait pas non plus conclure que l'équité du procès n'avait pas été compromise. Elle a donc jugé que l'omission de divulguer du ministère public avait porté atteinte au droit de l'appellant à une défense pleine et entière.

19 Bateman J.A. also disagreed with her colleagues' conclusion that trial counsel for the appellant had failed to exercise due diligence. She shared the majority's concerns that failure by counsel for the various appellants to provide answers to questions posed at the appeal hearings, the lack of information in the affidavits of defence counsel as to their knowledge of the statement, and the unexplained interest in the statements subsequent to trial gave rise to suspicions that some or all of them may have made a strategic decision not to pursue disclosure. However, she did not conclude that trial counsel for the appellant had made a tactical choice to ignore the Crown's non-disclosure. She would have granted the appellant's request for a new trial.

Le juge Bateman n'était pas d'accord non plus avec la conclusion de ses collègues que l'avocat de l'appellant au procès n'avait pas fait preuve de diligence raisonnable. Elle partageait les craintes des juges majoritaires que l'omission des avocats des divers appelants de répondre aux questions posées lors des audiences en appel, l'absence d'information dans les affidavits des avocats de la défense relativement à leur connaissance de la déclaration et leur intérêt inexpliqué dans les déclarations à la suite du procès ne fassent soupçonner que certains ou la totalité d'entre eux avaient pris la décision stratégique de ne pas tenter d'obtenir la divulgation. Cependant, elle n'a pas conclu que l'avocat de l'appellant au procès avait adopté comme tactique de passer sous silence l'omission de divulguer du ministère public. Elle aurait fait droit à la demande de nouveau procès de l'appellant.

III. Analysis

A. *The Crown's Duty to Disclose*

III. Analyse

A. *L'obligation de divulguer du ministère public*

20 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. Relevance was

Dans l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, il a été jugé que le ministère public est tenu de communiquer tous les documents pertinents qu'il a en sa possession, pourvu qu'ils ne soient pas protégés. Un document est pertinent si la défense peut raisonnablement s'en servir pour

described in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467, in this way:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed — *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

Clearly the threshold requirement for disclosure is set quite low. As a result, a broad range of material, whether exculpatory or inculpatory, is subject to disclosure. See *Stinchcombe*, *supra*, at p. 343. In particular, "all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses" (p. 345). The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. See *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 742.

The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, at p. 106:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

réfuter la preuve du ministère public. L'arrêt *R. c. Egger*, [1993] 2 R.C.S. 451, décrit ainsi la question de la pertinence, à la p. 467:

Une façon de mesurer la pertinence d'un renseignement dont dispose le ministère public est de déterminer son utilité pour la défense: s'il a une certaine utilité, il est pertinent et devrait être divulgué — *Stinchcombe*, précité, à la p. 345. Le juge qui effectue le contrôle doit déterminer si l'accusé peut raisonnablement utiliser la communication des renseignements pour réfuter la preuve et les arguments du ministère public, pour présenter un moyen de défense ou autrement pour parvenir à une décision susceptible d'avoir un effet sur le déroulement de la défense comme, par exemple, de présenter ou non une preuve.

Manifestement, le critère préliminaire fixé pour la divulgation est fort peu élevé. Par conséquent, une vaste gamme de documents, qu'ils soient disculpatoires ou inculpatatoires, sont assujettis à la communication. Voir l'arrêt *Stinchcombe*, précité, à la p. 343. En particulier, «toute déclaration obtenue de personnes qui ont fourni des renseignements pertinents aux autorités devrait être produite, même si le ministère public n'a pas l'intention de citer ces personnes comme témoins à charge» (p. 345). L'obligation de divulguer du ministère public est donc déclenchée chaque fois qu'il y a une possibilité raisonnable que le renseignement soit utile à l'accusé pour présenter une défense pleine et entière. Voir *R. c. Chaplin*, [1995] 1 R.C.S. 727, à la p. 742.

L'obligation qui incombe au ministère public de communiquer des documents engendre un droit constitutionnel correspondant de l'accusé à la communication de tous les documents qui satisfont au critère préliminaire de l'arrêt *Stinchcombe*. Comme l'écrivait récemment le juge Sopinka au nom de notre Cour à la majorité dans l'arrêt *R. c. Carosella*, [1997] 1 R.C.S. 80, à la p. 106:

Le droit à la communication de documents qui satisfont au critère préliminaire établi dans *Stinchcombe* est l'un des éléments du droit de présenter une défense pleine et entière qui est lui un principe de justice fondamentale visé à l'art. 7 de la *Charte*. Le fait de manquer à cette obligation constitue une atteinte aux droits constitutionnels de l'accusé, sans qu'il soit nécessaire de prouver l'existence d'un préjudice additionnel.

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Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

Ainsi, lorsqu'un accusé démontre l'existence d'une possibilité raisonnable que les renseignements non divulgués auraient été utilisés pour réfuter la preuve du ministère public, pour présenter un moyen de défense ou, par ailleurs, pour prendre une décision qui aurait pu avoir une incidence sur la façon de présenter la défense, il se trouve également à établir l'existence d'une atteinte au droit à la divulgation que lui garantit la *Charte*.

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However, a finding that an accused's right to disclosure has been violated does not end the analysis. As Sopinka J. wisely observed in *Carosella*, *supra*, at p. 100, an appellate court must be careful not to "confus[e] the obligation to establish a breach of the right [to full answer and defence] with the burden resting on the appellant in seeking a stay". Similarly, the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. It follows that the Crown may fail to disclose information which meets the *Stinchcombe* threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy of a new trial under s. 24(1) of the *Charter*, since no harm has been suffered by the accused.

Toutefois, la conclusion qu'il y a eu violation du droit d'un accusé à la divulgation ne met pas fin à l'analyse. Comme le juge Sopinka l'a fait observer judicieusement dans *Carosella*, précité, à la p. 100, une cour d'appel doit se garder de «confond[re] l'obligation d'établir la violation du droit [à une défense pleine et entière] avec l'obligation qui incombe à l'appelant lorsqu'il sollicite l'arrêt des procédures». De même, le critère initial auquel il faut satisfaire pour établir la violation du droit à la divulgation est distinct, sur le plan de l'analyse, de l'obligation dont il faut s'acquitter pour mériter un nouveau procès à titre de réparation. Le droit à la communication de tous les documents pertinents est large et vise les documents qui peuvent n'avoir qu'une importance secondaire par rapport aux questions fondamentales en litige. Il s'ensuit que le ministère public peut omettre de divulguer des renseignements qui satisfont au critère préliminaire de l'arrêt *Stinchcombe*, mais qui ne pourraient absolument pas compromettre le bien-fondé du résultat atteint ou l'équité globale du procès. Dans ces circonstances, rien ne justifierait d'accorder un nouveau procès à titre de réparation en vertu du par. 24(1) de la *Charte*, puisque l'accusé n'a subi aucun préjudice.

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It will be necessary later to explore in greater depth the nature of the burden to be discharged to merit a new trial. Now it will suffice to observe that for the purposes of this first stage of the analysis, an appellate court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility the result at trial might have been different had the undisclosed material been produced. The right to

Il sera nécessaire plus tard d'examiner plus en profondeur la nature de l'obligation dont il faut s'acquitter pour mériter un nouveau procès. Il suffit, pour l'instant, de faire observer qu'aux fins de cette première étape de l'analyse une cour d'appel peut bien conclure à la violation du droit à la divulgation que la *Charte* garantit à un accusé, tout en refusant d'accorder un nouveau procès à titre de réparation si elle juge que le procès a été foncièrement équitable et qu'il n'y avait aucune possibilité raisonnable que le résultat du procès aurait été dif-

full disclosure is just one component of the right to make full answer and defence. It does not automatically follow that solely because the right to disclosure was violated, the *Charter* right to make full answer and defence was impaired.

Was the Appellant's Right to Disclosure
Breached at Trial?

The appellant has based his appeal on the failure to disclose all four witness statements, despite the finding of the Nova Scotia Court of Appeal that "[i]t was apparent from the argument that Daye's statement is the only one of the four non-disclosed statements relied on as material to the issue of full answer and defence" (p. 88). Both the majority and dissenting reasons were restricted to a consideration of Daye's statement. However, the majority evaluated the undisclosed statements solely in relation to their impact on the result reached at trial, and did not consider each statement in relation to the threshold issue as to whether there had been a breach of the appellant's *Charter* right to disclosure, although both issues may well have been collapsed into one. As a result, it will be appropriate to consider whether the failure to disclose each of the four statements violated the appellant's right to disclosure of relevant material.

The four statements may be briefly summarized as follows:

- (1) The statement of Travia Carvery dated September 16, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (2) The statement of Edmond ("T.J.") Levia dated September 22, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (3) The statement of Terrance Tynes dated September 21, 1994, reveals that he was in the

férent si la documentation non communiquée avait été produite. Le droit à la divulgation complète n'est qu'une composante du droit à une défense pleine et entière. Il ne s'ensuit pas automatiquement qu'il y a atteinte au droit à une défense pleine et entière garanti par la *Charte*, du seul fait qu'il y a eu violation du droit à la divulgation.

Le droit de l'appellant à la divulgation
a-t-il été violé au procès?

L'appellant a fondé son pourvoi sur l'omission de divulguer les quatre déclarations de témoins, malgré la conclusion de la Cour d'appel de la Nouvelle-Écosse [TRADUCTION] «qu'il ressortait de cet argument que la déclaration de Daye est la seule des quatre déclarations non divulguées à être invoquée comme étant pertinente relativement à la question de la défense pleine et entière» (p. 88). Tant les motifs majoritaires que les motifs de dissidence se limitaient à un examen de la déclaration de Daye. Cependant, les juges majoritaires ont évalué les déclarations non divulguées uniquement en fonction de leur incidence sur le résultat atteint au procès et n'ont pas étudié chaque déclaration en fonction de la question préliminaire de savoir s'il y avait eu violation du droit à la divulgation garanti à l'appellant par la *Charte*, même si les deux questions avaient bien pu être ramenées à une seule. Par conséquent, il conviendra de se demander si l'omission de divulguer chacune des quatre déclarations a violé le droit de l'appellant à la communication des documents pertinents.

Les quatre déclarations peuvent se résumer brièvement ainsi:

- (1) La déclaration de Travia Carvery, en date du 16 septembre 1994, indique qu'il était dans la maison de la confrérie d'étudiants lorsque les voies de fait ont été commises et qu'il n'a été témoin d'aucune des raclées.
- (2) La déclaration d'Edmond («T.J.») Levia, en date du 22 septembre 1994, indique qu'il était dans la maison de la confrérie d'étudiants lorsque les voies de fait ont été commises et qu'il n'a été témoin d'aucune des raclées.
- (3) La déclaration de Terrance Tynes, en date du 21 septembre 1994, révèle qu'il se trouvait

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vicinity of the assaults. He also states that he was with Danny Clayton, the Crown's main identification witness, while Shannon Burke and Terrence Dixon were arguing, and that he left the scene with Clayton. Tynes also describes the clothing he was wearing that night;

- (4) The statement of Terris Daye dated September 19, 1994, indicates that he witnessed two of the assaults. Daye identifies the location of some of the accused during these assaults, and identifies some of the assailants. Daye specifically implicates the appellant in the assault of John Charman, though it is possible that Daye was referring to the assault of Rob Gillis. The appellant was convicted of the assault on Darren Watts only.

près de l'endroit où les voies de fait ont été commises. Il déclare également qu'il était en compagnie de Danny Clayton, le principal témoin à charge en matière d'identification, pendant que Shannon Burke et Terrence Dixon se querellaient, et qu'il a quitté les lieux avec Clayton. Tynes décrit aussi les vêtements qu'il portait ce soir-là.

- (4) La déclaration de Terris Daye, en date du 19 septembre 1994, indique qu'il a été témoin de deux des cas de voies de fait. Daye précise où certains des accusés se trouvaient pendant que ces voies de fait étaient commises et identifie certains des agresseurs. Daye implique expressément l'appelant dans les voies de fait contre John Charman, même s'il est possible qu'il parlait alors des voies de fait contre Rob Gillis. L'appelant n'a été reconnu coupable que des voies de fait contre Darren Watts.

²⁷ The Crown has an obligation to disclose all information, whether inculpatory or exculpatory, that could "reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence" (*Egger, supra*, at p. 467). Even so, "[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra*, at p. 339). The statements of Carvery and Levia contain no relevant information at all, and there is no reasonable possibility that their statements could have been of any use to the appellant at trial.

Le ministère public est tenu de divulguer tous les renseignements, inculpataires ou disculpatoires, que «l'accusé [pourrait] raisonnablement utiliser [...] pour réfuter la preuve et les arguments du ministère public, pour présenter un moyen de défense ou autrement pour parvenir à une décision susceptible d'avoir un effet sur le déroulement de la défense comme, par exemple, de présenter ou non une preuve» (*Egger*, précité, à la p. 467). Même là, «[s]i le ministère public pêche, ce doit être par inclusion. Il n'est toutefois pas tenu de produire ce qui n'a manifestement aucune pertinence» (*Stinchcombe*, précité, à la p. 339). Les déclarations de Carvery et Levia ne contiennent aucun renseignement pertinent, et il n'y a aucune possibilité raisonnable que leurs déclarations aient été de quelque utilité à l'appelant au procès.

²⁸ To minimize the risk of inadvertent non-disclosure, the Crown might well choose to disclose even those witness statements that do not initially appear to be relevant. The defence obviously knows its case better than the Crown, and something which seems irrelevant could have significance to the defence. However it is clear that neither Carvery nor Levia had any further participation in the incident or in the investigation or prosecution of the appellant. Their statements were

Pour réduire au minimum le risque de non-divulgaration par inadvertance, le ministère public pourrait bien choisir de divulguer même les déclarations de témoins qui ne semblent pas pertinentes au départ. Évidemment, la défense connaît mieux sa preuve que le ministère public, et quelque chose qui semble non pertinent au ministère public pourrait avoir de l'importance pour la défense. Il est clair, toutefois, que ni Carvery ni Levia n'ont participé davantage à l'incident ou encore à l'enquête

irrelevant and the Crown did not breach its obligation to disclose relevant material by failing to produce them.

However, the same thing cannot be said of the statement of Terrance Tynes, even though it seems to contain very little relevant information. It is significant that Tynes places himself in the vicinity of the assaults, though he does not identify any of the assailants. He also states he was with Danny Clayton for some part of the evening. Though Tynes does not contradict or add anything to Clayton's evidence, the fact that Tynes was with Clayton at some point during the assaults may have been of some use to the defence. Tynes's description of his clothing on the night in question may also have been of some use to the defence in cross-examining those Crown witnesses who could not identify Watts's assailants by name and who had to describe the appearance of the men they saw. Although the statement is of marginal value, it does meet the threshold articulated in *Stinchcombe* and should have been disclosed.

The statement of Terris Daye should also have been disclosed. Daye implicates the appellant in the assault of Rob Gillis, for which he was neither indicted nor convicted. Daye also makes certain incriminating remarks about the appellant in the course of his statement, such as "Spencer punched and kicked this guy. He likes to kick." Daye's statement also contradicts the evidence given by Clayton in certain respects, and as a result it could possibly have been of some use in challenging Clayton's credibility. These aspects of Daye's statement will have to be considered in greater detail in considering whether the appellant's *Charter* right to make full answer and defence was impaired by the Crown's non-disclosure of this statement. Once again, this statement meets the threshold set out in *Stinchcombe* and should have been disclosed. It follows that the appellant's right

ou aux poursuites concernant l'appelant. Leurs déclarations n'étaient pas pertinentes et le ministère public n'a pas manqué à son obligation de communiquer tous les documents pertinents en omettant de les produire.

Cependant, on ne peut pas en dire autant de la déclaration de Terrance Tynes, même si elle semble contenir très peu de renseignements pertinents. Il est révélateur que Tynes affirme qu'il se trouvait à proximité de l'endroit où les voies de fait ont été commises, et qu'il n'identifie aucun des agresseurs. Il déclare également avoir été en compagnie de Danny Clayton pendant une partie de la soirée. Quoique Tynes ne contredise pas le témoignage de Clayton ou n'y ajoute rien, le fait qu'il ait été en compagnie de Clayton à un certain moment, pendant que les voies de fait étaient commises, aurait pu être d'une certaine utilité pour la défense. La description que Tynes donne des vêtements qu'il portait le soir en question aurait pu également être utile à la défense lors du contre-interrogatoire des témoins à charge qui ne pouvaient pas identifier les agresseurs de Watts par leur nom et qui devaient décrire l'apparence des hommes qu'ils avaient vus. Bien que cette déclaration n'ait qu'une importance secondaire, elle satisfait effectivement au critère préliminaire de l'arrêt *Stinchcombe* et aurait dû être divulguée.

La déclaration de Terris Daye aurait dû elle aussi être divulguée. Daye implique l'appelant dans les voies de fait commises contre Rob Gillis, au sujet desquelles il n'a été ni mis en accusation ni reconnu coupable. Daye a aussi fait, dans sa déclaration, certaines remarques incriminantes au sujet de l'appelant, comme par exemple: [TRADUCTION] «Spencer a frappé cet homme à coups de poing et à coups de pied. Il aime donner des coups de pied.» La déclaration de Daye contredit également le témoignage de Clayton à certains égards et, par conséquent, elle aurait pu être utile pour attaquer la crédibilité de Clayton. Ces aspects de la déclaration de Daye devront être étudiés de plus près en examinant la question de savoir si l'omission du ministère public de divulguer cette déclaration a porté atteinte au droit à une défense pleine et entière que la *Charte* garantit à l'appelant. Encore

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to disclosure was infringed by the Crown's inadvertent failure to produce these two statements.

B. *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1)*

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The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the *Stinchcombe* threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the *Stinchcombe* threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidence is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial.

une fois, cette déclaration satisfait au critère préliminaire de l'arrêt *Stinchcombe* et aurait dû être divulguée. Il s'ensuit qu'il y a eu atteinte au droit de l'appelant à la divulgation, du fait que le ministère public a omis par inadvertance de produire ces deux déclarations.

B. *L'atteinte au droit à une défense pleine et entière et la réparation à accorder en vertu du par. 24(1)*

Le droit à la divulgation n'est qu'une composante du droit à une défense pleine et entière. Bien qu'il puisse y avoir violation du droit à la divulgation, il se peut qu'il n'y ait aucune atteinte au droit à une défense pleine et entière par suite de cette violation. En fait, différents principes et normes s'appliquent pour déterminer si la divulgation devrait avoir lieu avant la déclaration de culpabilité et pour déterminer l'effet d'une omission de divulguer après la déclaration de culpabilité. Par exemple, lorsque la documentation non communiquée peut être examinée au procès, le juge qui préside l'audience l'évaluera en fonction du critère préliminaire de l'arrêt *Stinchcombe* pour déterminer si, en dissimulant cette documentation, le ministère public a manqué à son obligation de divulguer. Dans l'affirmative, une ordonnance de production ou peut-être l'ajournement sera la réparation appropriée. Il est évident que ces réparations ne sont plus disponibles après une déclaration de culpabilité. Une cour d'appel doit alors déterminer non seulement si les renseignements non divulgués satisfont au critère préliminaire de *Stinchcombe*, mais encore si l'omission de divulguer du ministère public a porté atteinte au droit de l'accusé à une défense pleine et entière. Si une cour d'appel conclut que l'omission de divulguer du ministère public a porté atteinte au droit à une défense pleine et entière, la réparation à accorder dépendra de la gravité de l'atteinte à ce droit. Lorsque, comme en l'espèce, l'accusé a subi son procès devant un juge seul, qui a fourni des motifs détaillés à l'appui de sa décision, et que les éléments de preuve non divulgués peuvent être examinés, une cour d'appel est particulièrement bien placée pour évaluer l'incidence de l'omission de divulguer sur la capacité de l'accusé de présenter une défense pleine et entière à son procès.

At this point, something should also be said about the standard to be met by an accused who asserts that the right to make full answer and defence was impaired. It is trite but worth repeating that in all cases where a person claims that a *Charter* right has been violated, he or she must prove on a balance of probabilities that the violation occurred. Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the *Charter* right in question was infringed or denied. See *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277.

The evidence required to meet this burden and the factors to be considered will differ according to the particular right at issue and the particular remedy sought. For example, where a court is persuaded that undisclosed information meets the *Stinchcombe* threshold, an accused has met his burden to establish a violation of his *Charter* right to disclosure. As noted above, the appropriate remedy for such a violation is, at trial, an order for production or an adjournment. Where non-disclosure is raised on an appeal from a conviction, an accused must, as a threshold matter, establish a violation of the right to disclosure. Further, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose.

This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. See *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, at p. 776; *Stinchcombe*, *supra*, at p. 348. Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's

À ce moment-ci, il faudrait aussi parler de la norme à laquelle doit satisfaire l'accusé qui soutient qu'il y a eu atteinte à son droit à une défense pleine et entière. Même si cela peut sembler banal, il vaut la peine de répéter que, dans toutes les affaires où une personne allègue une violation d'un droit garanti par la *Charte*, elle doit prouver l'existence de cette violation selon la prépondérance des probabilités. Donc, avant d'accorder quelque réparation que ce soit en vertu du par. 24(1), il faut conclure qu'il était davantage probable qu'il y avait eu violation ou négation du droit en question garanti par la *Charte*. Voir *R. c. Collins*, [1987] 1 R.C.S. 265, à la p. 277.

La preuve requise pour s'acquitter de cette obligation et les facteurs à prendre en considération différeront selon le droit en cause et la réparation réclamée. Par exemple, lorsqu'un tribunal est convaincu que les renseignements non divulgués satisfont au critère préliminaire de l'arrêt *Stinchcombe*, l'accusé s'est acquitté de son obligation d'établir l'existence d'une violation du droit à la divulgation que lui garantit la *Charte*. Comme nous l'avons vu, une ordonnance de production ou l'ajournement est la réparation qu'il convient d'accorder pour une telle violation au procès. Lorsque la question de la non-divulgence est soulevée dans le cadre d'un appel contre une déclaration de culpabilité, l'accusé doit commencer par établir l'existence d'une violation du droit à la divulgation. De plus, il incombe à l'accusé de démontrer, selon la prépondérance des probabilités, que l'omission de divulguer a porté atteinte à son droit à une défense pleine et entière.

Il est satisfait à cette obligation lorsque l'accusé démontre qu'il y a une possibilité raisonnable que la non-divulgence ait influé sur l'issue ou l'équité globale du procès. Voir les arrêts *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763, à la p. 776; *Stinchcombe*, *précité*, à la p. 348. Imposer un critère fondé sur une possibilité raisonnable permet d'établir un juste équilibre entre l'intérêt qu'a l'accusé à subir un procès équitable et l'intérêt qu'a le public dans l'administration efficace de la justice. On reconnaît ainsi la difficulté qu'il y a à reconstituer fidèlement le procès et on évite l'effet non souhaitable de

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disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

miner les obligations de divulgation du ministère public. C'est le résultat auquel on arriverait si, en dissimulant des renseignements ayant relativement peu de valeur probante, le ministère public se trouvait dans une meilleure situation qu'en les divulguant. Cependant, la possibilité raisonnable, dont l'existence doit être démontrée selon ce critère, ne doit pas être purement hypothétique. Elle doit se fonder sur les utilisations raisonnablement possibles de la preuve non divulguée ou sur les moyens d'enquête raisonnablement possibles dont l'accusé a été privé à la suite de la non-divulgation. S'il est prouvé qu'une telle possibilité existe, il y a alors eu atteinte au droit à une défense pleine et entière.

35 Once an accused establishes impairment of the right to make full answer and defence as a result of the Crown's failure to disclose, he or she is entitled to a remedy under s. 24(1). Again, it is at this stage that the degree of impairment or prejudice to the accused's rights must be assessed and considered in relation to the remedy sought. For example, an accused who seeks the extraordinary remedy of a stay of proceedings must not only establish, on a balance of probabilities, that the right to make full answer and defence was impaired, but must also demonstrate irreparable prejudice to that right. See *Carosella, supra*, at p. 112. By contrast, where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more.

L'accusé qui établit que l'omission de divulguer du ministère public a porté atteinte à son droit à une défense pleine et entière a droit à une réparation fondée sur le par. 24(1). Encore une fois, c'est à cette étape que la gravité de l'atteinte portée aux droits de l'accusé ou du préjudice causé à ceux-ci doit être évaluée et examinée en fonction de la réparation demandée. Par exemple, l'accusé qui réclame la réparation exceptionnelle qu'est l'arrêt des procédures doit non seulement établir, selon la prépondérance des probabilités, qu'il y a eu atteinte à son droit à une défense pleine et entière, mais encore qu'un préjudice irréparable a été causé à ce droit. Voir *Carosella*, précité, à la p. 112. Par contre, lorsque la réparation demandée est un nouveau procès, l'accusé a seulement besoin de convaincre la cour d'appel de la possibilité raisonnable que l'omission de divulguer ait influé sur l'issue ou l'équité globale du procès, rien de plus.

36 Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two-step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information

Donc, pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière, il faut entreprendre une analyse en deux étapes fondée sur ces considérations. Premièrement, pour évaluer le bien-fondé du résultat, il faut examiner les renseignements non divulgués pour déterminer l'incidence qu'ils auraient pu avoir sur la décision de rendre un verdict de culpabilité. Évidemment, la tâche sera plus facile si l'accusé a subi son procès devant un juge seul et si des motifs ont été exposés à l'appui de la déclaration de culpabilité. Si, à la première étape, une cour d'appel est convaincue

affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe*, *supra*, at p. 341, defence counsel's duty to be duly diligent was described in this way:

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclo-

qu'il y a une possibilité raisonnable que les renseignements non divulgués influent, à première vue, sur le bien-fondé de la déclaration de culpabilité, un nouveau procès devrait être ordonné. Même si les renseignements non divulgués n'influencent pas eux-mêmes sur le bien-fondé du résultat atteint au procès, l'incidence de la non-divulgaration sur l'équité globale du procès doit être prise en considération à la deuxième étape de l'analyse. On le fera en évaluant, sous l'angle d'une possibilité raisonnable, les questions qui auraient pu être posées aux témoins ou les possibilités de recueillir d'autres éléments de preuve que la défense aurait pu avoir si les renseignements pertinents avaient été divulgués. Bref, la possibilité raisonnable que les renseignements non divulgués aient porté atteinte au droit à une défense pleine et entière a trait non seulement au contenu des renseignements eux-mêmes, mais encore aux possibilités réalistes d'examiner les utilisations possibles des renseignements non divulgués aux fins de l'enquête et de la cueillette d'éléments de preuve.

Pour examiner l'équité globale du procès, il faut tenir compte de la diligence dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation par le ministère public. Le manque de diligence raisonnable est un facteur important pour déterminer si la non-divulgaration par le ministère public a nui à l'équité du procès. Dans l'arrêt *Stinchcombe*, précité, à la p. 341, l'obligation qu'a l'avocat de la défense de faire preuve de diligence raisonnable est ainsi décrite:

Quand l'avocat de l'accusé prend connaissance d'une omission du ministère public de respecter son obligation de divulguer, celui-ci doit, dès que possible, signaler cette omission au juge du procès. L'observation de cette règle permettra au juge du procès de remédier, autant que faire se peut, à tout préjudice causé à l'accusé et d'éviter ainsi un nouveau procès. Voir *Caccamo c. La Reine*, [1976] 1 R.C.S. 786. L'omission de l'avocat de la défense de ce faire constituera un facteur important à retenir pour déterminer, lors d'un appel, s'il y a lieu d'ordonner la tenue d'un nouveau procès.

Pour que le système de justice pénale fonctionne efficacement et équitablement, l'avocat de la défense doit faire preuve de diligence raisonnable en réclamant activement la divulgation par le

sure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:

... the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

See also *R. v. S.E.S.* (1992), 100 Sask. R. 110 (C.A.), at p. 121.

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Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. See *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-3.

ministère public. La nature même du processus de divulgation l'expose à l'erreur humaine et à la contestation. En tant qu'officier de justice, l'avocat de la défense est tenu de faire preuve de diligence en tentant d'obtenir la divulgation. Lorsque l'avocat prend ou devrait prendre connaissance, à partir de documents pertinents produits par le ministère public, d'une omission de communiquer d'autres documents, il ne doit pas rester passif. Il doit plutôt tenter diligemment d'en obtenir la communication. Ce principe est bien énoncé par la Cour d'appel de la Colombie-Britannique dans l'arrêt *R. c. Bramwell* (1996), 106 C.C.C. (3d) 365 (conf. par [1996] 3 R.C.S. 1126), à la p. 374:

[TRADUCTION] ... le processus de divulgation met en cause à la fois le ministère public et la défense. Ce n'est pas un processus dans lequel l'avocat de la défense n'a aucun rôle à jouer, si ce n'est de recevoir l'information de façon passive. Le processus de divulgation vise à assurer que l'accusé ne soit pas privé d'un procès équitable. À cette fin, le substitut du procureur général doit divulguer tout ce qui est en sa possession et qui n'est pas manifestement non pertinent pour la défense, mais la défense doit également jouer son rôle en réclamant de manière diligente au substitut du procureur général la divulgation en temps opportun. De plus, lorsque, comme en l'espèce, l'avocat de la défense prend une décision tactique de ne pas tenter d'obtenir la communication de certains documents, le tribunal sera généralement indifférent à un plaidoyer selon lequel il n'y a pas eu communication complète de ces documents.

Voir également *R. c. S.E.S.* (1992), 100 Sask. R. 110 (C.A.), à la p. 121.

La réponse à la question de savoir s'il y a lieu d'ordonner la tenue d'un nouveau procès pour le motif que l'omission de divulguer du ministère public a rendu le procès inéquitable comporte un processus d'évaluation et de pondération. Si l'avocat de la défense savait ou aurait dû savoir, sur la foi d'autres renseignements divulgués, que le ministère public avait omis par inadvertance de divulguer de l'information, et qu'il n'a rien fait en raison d'une décision tactique ou d'un manque de diligence raisonnable, il serait difficile de retenir un argument selon lequel l'omission de divulguer a nui à l'équité du procès. Voir l'arrêt *R. c. McAnespie*, [1993] 4 R.C.S. 501, aux pp. 502 et 503.

In sum, all these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial. This balancing process must now be applied to this appeal.

Application to this Appeal

(a) *The Appellant's Conviction under Section 21(1) of the Criminal Code*

It is significant to the disposition of this appeal that the trial judge found that the appellant was guilty both as a principal and as a party under s. 21(1) of the *Criminal Code*. That section provides:

- 21. (1)** 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.

The trial judge's reasons for convicting the appellant for the aggravated assault of Darren Watts under s. 21(1) of the *Code* were expressed forcefully and with great clarity. He stated (at p. 324):

The identity of the man or men who jumped up and down on Darren Watts, and the identity of the man who pushed away his friends so as to get a better angle, or more space, to take a vicious three step kick at his head, described at various times as a "soccer", "grey cup", or "killer kick", cannot be affirmed. I find that the group

Somme toute, il convient de bien pondérer tous ces facteurs. Dans les cas où la pertinence de la preuve non divulguée est très élevée à première vue, la tenue d'un nouveau procès devrait être ordonnée pour ce motif seulement. Dans ces circonstances, il ne sera pas nécessaire d'examiner l'incidence des possibilités perdues de recueillir d'autres éléments de preuve par suite de l'omission de divulguer. Cependant, si la pertinence des renseignements non divulgués est relativement peu élevée, une cour d'appel devra déterminer si la défense a perdu des possibilités réalistes. À cette fin, la diligence raisonnable ou le manque de diligence raisonnable dont l'avocat de la défense aura fait preuve en tentant d'obtenir la divulgation constituera un facteur très important à retenir pour décider d'ordonner ou non la tenue d'un nouveau procès. Ce processus de pondération doit maintenant être appliqué au présent pourvoi.

Application au présent pourvoi

a) *La déclaration de culpabilité de l'appellant fondée sur le par. 21(1) du Code criminel*

Il importe de souligner, pour trancher le présent pourvoi, que le juge du procès a déclaré l'appellant coupable à la fois comme auteur principal de l'infraction et comme participant à celle-ci, au sens du par. 21(1) du *Code criminel*. Ce paragraphe se lit ainsi:

- 21. (1)** 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.

Le juge du procès a exposé avec vigueur et grande clarté les raisons pour lesquelles il a déclaré l'appellant coupable de voies de fait graves contre Darren Watts, en vertu du par. 21(1) du *Code*. Il a dit (à la p. 324):

[TRADUCTION] On ne peut pas confirmer l'identité de l'homme ou des hommes qui ont sauté sur Darren Watts ni celle de l'homme qui a écarté ses amis afin de jouir d'un meilleur angle, ou de plus d'espace, pour reculer de trois pas et lui donner un violent coup de pied à la tête, qui a été décrit à maintes reprises comme un «botté

that formed a circle around Darren Watts and were responsible for his savage beating comprised at least seven black males, those being these six accused and the Crown witness, Danny Clayton. There were possibly others in that circle which surrounded Mr. Watts, whose identities are best known to his assailants. However, their names and level of participation that night are irrelevant for the purposes of this trial, as I am satisfied beyond a reasonable doubt of the guilt of each of these six accused in the aggravated assault of Darren Watts.

It is well settled that mere presence at the scene of a crime is not sufficient to support a finding of culpability. (*Dunlop and Sylvester v. The Queen* [[1979] 2 S.C.R. 881]). Something more is required. Here, the Crown relies upon s. 21(1) of the *Criminal Code*, the effect of which is to make equally culpable the person who actually commits the offense, and any person who aids or abets in committing the offense. While I am convinced beyond a reasonable doubt as to the guilt of these six accused on all counts based on the testimony of their accomplice, Danny Clayton, were it necessary, I would also be prepared to say that each of the accused and Danny Clayton were parties to the aggravated assault of Darren Watts as charged on the Indictment, within the meaning of s. 21(1). I am satisfied the men in the circle were all there for the same reasons: to kick or beat Darren Watts; or help in administering the beating; or encourage it; or stand — as observed by others — shoulder to shoulder so as to form a circle thereby ensnaring Darren Watts and preventing him from getting away or stopping others from coming to his rescue. [Emphasis added.]

de soccer», un «botté de Coupe Grey» ou un «méchant coup de pied». Je conclus que le groupe qui a encerclé Darren Watts et qui a été responsable de la raclée sauvage qu'il a reçue comprenait au moins sept noirs, soit les six accusés et le témoin à charge, Danny Clayton. Il y avait peut-être d'autres personnes dans ce cercle qui s'est formé autour de M. Watts, dont les agresseurs connaissent mieux l'identité. Cependant, leurs noms et leur degré de participation ce soir-là ne sont pas pertinents pour les fins du présent procès, car je suis convaincu hors de tout doute raisonnable que chacun de ces six accusés est coupable des voies de fait graves dont a été victime Darren Watts.

Il est bien établi que la seule présence sur les lieux d'un crime ne suffit pas à justifier une déclaration de culpabilité. (*Dunlop et Sylvester c. La Reine* [[1979] 2 R.C.S. 881]). Il faut quelque chose de plus. En l'espèce, le ministère public s'appuie sur le par. 21(1) du *Code criminel*, qui a pour effet de rendre aussi coupables l'une que l'autre la personne qui commet réellement l'infraction et celle qui aide ou encourage la perpétration de l'infraction. Bien que je sois convaincu hors de tout doute raisonnable de la culpabilité de ces six accusés relativement à tous les chefs d'accusation, en raison du témoignage de leur complice, Danny Clayton, je serais également disposé à dire, si cela était nécessaire, que chacun des accusés et Danny Clayton ont participé, au sens du par. 21(1), aux voies de fait graves contre Darren Watts, tel que mentionné dans l'acte d'accusation. Je suis persuadé que les hommes qui formaient le cercle étaient tous là pour les mêmes raisons: donner des coups de pied à Darren Watts ou le battre, ou aider à le battre ou encourager d'autres à le faire, ou encore — comme d'autres l'ont fait observer — se serrer les coudes de manière à former un cercle afin d'empêcher Darren Watts de s'échapper ou d'empêcher d'autres personnes de venir à sa rescousse. [Je souligne.]

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The appellant bears the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affect the reliability of his conviction as a principal in the aggravated assault on Darren Watts, and the conviction for aiding or abetting the assault on Watts; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. It must be remembered that as a result of the appellant's conviction under s. 21(1) of the *Code*, he must show that the undisclosed statements affected each of the alternative conclusions referred to in the subsection, specifically, that the

Il incombe à l'appelant de démontrer (i) qu'il est raisonnablement possible que les déclarations non divulguées influent sur le bien-fondé de sa déclaration de culpabilité en tant qu'auteur principal des voies de fait graves contre Darren Watts, et de sa déclaration de culpabilité d'avoir aidé ou encouragé à perpétrer les voies de fait contre Watts, ou (ii) qu'il est raisonnablement possible que la non-divulgaration des déclarations ait nui à l'équité globale du procès. Il faut se rappeler que, par suite de sa déclaration de culpabilité fondée sur le par. 21(1) du *Code*, l'appelant doit prouver que l'omission de divulguer les déclarations a influé

appellant either kicked or beat Darren Watts; helped to administer the beating; or encouraged the beating. In my opinion, the appellant has not discharged this burden.

(b) *Materiality of Tynes's Statement*

There is little to say in relation to the materiality of Tynes's statement. It neither adds to nor contradicts the identification evidence given by Danny Clayton. Tynes makes no reference to the appellant at all. Neither does his description of his own clothing and appearance that night have any impact on the appellant's conviction. It is apparent that, on its face, Tynes's statement could not have had any impact on the reliability of the appellant's conviction at trial. The possibility that Tynes's statement could have been used to garner additional evidence will be considered later in relation to the fairness of the trial process.

(c) *Materiality of Daye's Statement*

It is significant that Daye states very clearly that he only witnessed two of the assaults that took place on the night in question, and definitely implies that he did not witness the assault of Darren Watts. Indeed, he has little to offer in relation to the assault on Watts, beyond the description of two circles of people around the victim and the location of the assault. This paucity of detail stands in stark contrast to Daye's description of the other two assaults, in which he implicates the appellant.

Thus, in terms of direct impact on the appellant's conviction, the statement is of no consequence. Daye not only has little to say about the assault on Watts, he in fact makes highly incriminating statements about the appellant. It follows that there is no reasonable possibility that Daye's statement, on its face, could directly affect the reliability of the result reached at trial.

sur chacune des autres conclusions mentionnées dans le paragraphe, plus précisément celles qu'il a donné des coups de pied à Darren Watts ou l'a battu, qu'il a aidé à le battre ou qu'il a encouragé à le faire. À mon avis, l'appelant ne s'est pas acquitté de cette obligation.

(b) *La pertinence de la déclaration de Tynes*

Il y a peu de choses à dire au sujet de la pertinence de la déclaration de Tynes. Elle n'ajoute rien à la preuve d'identification présentée par Danny Clayton et elle ne la contredit pas non plus. Tynes ne mentionne aucunement l'appelant. La description de ses propres vêtements et de son apparence ce soir-là n'a également aucune incidence sur la déclaration de culpabilité de l'appelant. Il appert qu'à première vue la déclaration de Tynes n'aurait pu avoir aucune incidence sur le bien-fondé de la déclaration de culpabilité de l'appelant prononcée au procès. La possibilité que la déclaration de Tynes aurait été utilisée pour recueillir d'autres éléments de preuve sera examinée plus loin en fonction de l'équité du procès.

(c) *La pertinence de la déclaration de Daye*

Il est révélateur que Daye déclare très clairement qu'il n'a été témoin que de deux des cas de voies de fait qui ont été commises le soir en question et qu'il laisse nettement entendre qu'il n'a pas été témoin des voies de fait contre Darren Watts. En réalité, il a peu à offrir au sujet des voies de fait contre Watts, outre sa description de deux cercles de personnes autour de la victime et de l'endroit où les voies de fait ont été commises. Ce manque de détails contraste vivement avec la description que Daye donne des deux autres cas de voies de fait, dans laquelle il implique l'appelant.

Ainsi, la déclaration n'a aucune incidence directe sur la déclaration de culpabilité de l'appelant. Non seulement Daye a-t-il peu de choses à dire au sujet des voies de fait contre Watts, mais encore il fait, en réalité, des déclarations très incriminantes au sujet de l'appelant. Il s'ensuit qu'il n'y a aucune possibilité raisonnable que la déclaration de Daye aurait, à première vue, influé directement sur le bien-fondé du résultat atteint au procès.

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It now must be considered whether the statement could have had some indirect impact. The identification of the appellant as one of the men who assaulted Darren Watts rested to a large extent on Clayton's credibility. As a result, any contradictions that exist between Daye's statement and the evidence given by Clayton are relevant to the appellant's defence and could potentially affect the reliability of the conviction. The significant contradictions may be summarized in this way:

- i. Daye stated that the appellant and Damon Cole assaulted "#1 guy" (it appears Daye was referring to the assault on Rob Gillis). Clayton testified that Cyril Smith and Damon Cole assaulted Rob Gillis.
- ii. When asked whether he saw Cyril Smith punch, hit or kick anyone, Daye responded, "No". Clayton testified that Cyril Smith assaulted Rob Gillis.
- iii. Daye stated that he did not see Stacey Skinner hit anyone, though he knew that Skinner had admitted to an assault in his own statement to police. Clayton testified that Skinner assaulted Charman and Watts. It should also be noted that Skinner admitted to the assault on Charman in his statement to the police.
- iv. Daye stated that he could not remember Guy Robart hitting anyone. Clayton testified that Robart assaulted Watts.
- v. Daye stated that one group of men ran toward the hospital across from the fraternity house, and then another group joined them. Clayton testified that there was a single group — the one that assaulted Darren Watts — that ran to the hospital. This was supported by the testimony of another

Il faut maintenant se demander si la déclaration aurait pu avoir une incidence indirecte. L'identification de l'appellant comme étant l'un des hommes qui ont commis des voies de fait contre Darren Watts reposait en grande partie sur la crédibilité de Clayton. Par conséquent, toute contradiction qui existe entre la déclaration de Daye et le témoignage de Clayton est pertinente relativement à la défense de l'appellant et est susceptible d'influer sur le bien-fondé de la déclaration de culpabilité. Les contradictions importantes peuvent se résumer ainsi:

- i. Daye a déclaré que l'appellant et Damon Cole ont commis des voies de fait contre le «premier homme» (il semble que Daye faisait allusion aux voies de fait contre Rob Gillis). Clayton a témoigné que Cyril Smith et Damon Cole ont commis des voies de fait contre Rob Gillis.
- ii. Lorsqu'on lui a demandé s'il avait vu Cyril Smith battre quelqu'un ou frapper quelqu'un à coups de poing ou à coups de pied, Daye a répondu «Non». Clayton a témoigné que Cyril Smith a commis des voies de fait contre Rob Gillis.
- iii. Daye a déclaré ne pas avoir vu Stacey Skinner frapper quelqu'un, même s'il savait que Skinner avait admis avoir commis des voies de fait dans sa propre déclaration à la police. Clayton a témoigné que Skinner a commis des voies de fait contre Charman et Watts. Il y a lieu également de noter que Skinner a admis avoir commis des voies de fait contre Charman dans sa déclaration à la police.
- iv. Daye a déclaré ne pas pouvoir se rappeler si Guy Robart avait frappé quelqu'un. Clayton a témoigné que Robart a commis des voies de fait contre Watts.
- v. Daye a déclaré qu'un seul groupe d'hommes s'est dirigé en courant vers l'hôpital situé en face de la maison de la confrérie et qu'un autre groupe l'a ensuite rejoint. Clayton a témoigné qu'un seul groupe — celui qui avait commis des voies de fait contre Darren Watts — avait couru vers l'hôpital. Cela a

Crown witness, Blaine McQueen. The “single cohesive group” theory was a significant part of the Crown’s theory at trial.

It seems to me that these relatively insignificant contradictions could not possibly affect the reliability of the appellant’s conviction under s. 21(1) for the assault on Darren Watts. As to (i), it is not reasonably possible that Daye’s identification of the appellant as one of Gillis’s assailants would undermine the credibility of Clayton’s identification of the appellant as one of Watts’s assailants. This very minor contradiction on a peripheral issue could not raise a doubt in the trial judge’s mind regarding the appellant’s conviction for the assault on Watts. The contradictions referred to in (ii), (iii) and (iv) are based on Daye’s recollection and observation of the events in question. Once again, it is not reasonably possible that these gaps in Daye’s memory and observations would undermine Clayton’s credibility in the mind of the trial judge regarding the appellant’s participation in the assault on Watts. It must be remembered that the trial judge carefully scrutinized all of Clayton’s evidence and was convinced of his credibility. On this aspect he stated (at pp. 327-28):

I was impressed by the way he conducted himself while testifying. I watched him listened to him intently. Nothing of what he said or how he said it caused me to be left with any reasonable doubt of his positive identification of these six accused as being responsible for the aggravated assault of Darren Watts. . . .

While testifying Mr. Clayton left me with the clear impression that he was responding carefully and honestly to questions posed by counsel. Simply to illustrate, I noted that occasionally he asked questions of the cross-examiner to be sure that he understood the question before responding. He never appeared evasive, or argumentative, or attempting to cast himself or his answers in the best possible light. He acknowledged the

été étayé par le témoignage d’un autre témoin à charge, Blaine McQueen. La thèse d’«un seul groupe cohésif» a constitué une partie importante de l’argumentation du ministère public au procès.

Il me semble que ces contradictions relativement peu importantes ne pouvaient absolument pas influencer sur le bien-fondé de la déclaration de culpabilité qui a été prononcée contre l’appelant, en application du par. 21(1), relativement aux voies de fait contre Darren Watts. Quant à l’alinéa (i), il n’est pas raisonnablement possible que l’identification par Daye de l’appelant comme étant l’un des agresseurs de Gillis minerait la crédibilité de Clayton quand il identifie l’appelant comme étant l’un des agresseurs de Watts. Cette contradiction très mineure concernant une question secondaire ne pouvait pas susciter un doute dans l’esprit du juge du procès quant à la déclaration de culpabilité de l’appelant relative aux voies de fait contre Watts. Les contradictions mentionnées aux alinéas (ii), (iii) et (iv) sont fondées sur le souvenir que Daye avait des événements en question et sur l’observation qu’il en avait faite. Encore une fois, il n’est pas raisonnablement possible que ces lacunes dans les souvenirs et les observations de Daye mineraient la crédibilité de Clayton dans l’esprit du juge du procès en ce qui concerne la participation de l’appelant aux voies de fait contre Watts. Il faut se rappeler que le juge du procès a examiné attentivement toute la preuve de Clayton et qu’il était convaincu de sa crédibilité. À cet égard, il a dit (aux pp. 327 et 328):

[TRADUCTION] J’ai été impressionné par la façon dont il s’est comporté pendant son témoignage. Je l’ai observé et écouté attentivement. Rien dans ses propos ou dans sa façon de les tenir n’a suscité chez moi un doute raisonnable quant à son identification positive de ces six accusés comme étant responsables des voies de fait graves contre Darren Watts. . .

Pendant son témoignage, M. Clayton m’a donné nettement l’impression de répondre minutieusement et honnêtement aux questions des avocats. Simplement à titre d’exemple, j’ai noté qu’il a parfois posé des questions au contre-interrogateur pour s’assurer qu’il avait bien compris la question avant d’y répondre. Il ne s’est jamais montré évasif ni belliqueux ou encore soucieux de se présenter ou de présenter ses réponses sous le

obvious. Sometimes the form of the question posed resulted in an unsolicited response which, in my eyes, bolstered Clayton's credibility. When referred to previous statements where questions were asked using compound phrases like "kicking and punching" Clayton attempted to carefully draw a distinction. His answers to difficult questions were reasonable. He met them head on. . . .

In light of these comments it is unrealistic to think that the minor contradictions apparent in Daye's statement would have had the effect of undermining Clayton's credibility. Quite simply, they do not render the appellant's conviction unreliable.

47 As to (v), the Crown's theory of a single cohesive group is only significant in its application to the group of men who assaulted John Charman and then turned on Watts. Daye's statement that two groups of men left the scene does nothing to contradict this theory. This contradiction does not suggest in any way that the appellant's conviction is unreliable.

48 Lastly, Daye's description of an inner and outer circle around Watts indirectly supports the evidence of Lloyd Finter, the commissioner at the hospital across the street from the fraternity house. Mr. Finter testified that he saw a group of about 12 people surrounding Watts, and that four men were administering the beating. The majority of the Court of Appeal noted that Mr. Finter differed from the majority of the other witnesses who testified as to the number of attackers, but that Mr. Finter left his vantage point or turned away from the attacks on at least six separate occasions.

49 No less than 12 other Crown witnesses described a group comprised of some 7 to 10 men around Watts. Moreover, the actual number of men who struck Watts that night is immaterial to the appellant's conviction, based on s. 21(1) of the *Code*. Thus, even if it were to be assumed that

meilleur jour possible. Il admettait ce qui était évident. Parfois, la forme de la question posée entraînait une réponse non sollicitée, ce qui, à mes yeux, donnait de la crédibilité à Clayton. Lorsqu'on le ramenait à des déclarations antérieures dans lesquelles des questions avaient été posées à l'aide d'expressions comme «donner des coups de pied et des coups de poing», Clayton essayait d'établir soigneusement une distinction. Les réponses qu'il a données à des questions difficiles étaient raisonnables. Il était direct. . .

Compte tenu de ces observations, il est irréaliste de penser que les contradictions mineures qui ressortent de la déclaration de Daye auraient eu pour effet de miner la crédibilité de Clayton. Tout simplement, elles ne rendent pas douteuse la déclaration de culpabilité de l'appellant.

Quant à l'alinéa (v), la thèse d'un seul groupe cohésif préconisée par le ministère public n'est importante que dans son application au groupe d'hommes qui ont commis des voies de fait contre John Charman et qui se sont ensuite tournés vers Watts. La déclaration de Daye selon laquelle deux groupes d'hommes ont quitté les lieux ne contredit aucunement cette thèse. Cette contradiction ne laisse nullement entendre que la déclaration de culpabilité de l'appellant est douteuse.

Enfin, la description que Daye a donné des cercles intérieur et extérieur formés autour de Watts étaye indirectement le témoignage de Lloyd Finter, le commissionnaire de l'hôpital situé de l'autre côté de la rue, en face de la maison de la confrérie. Monsieur Finter a témoigné qu'il avait vu un groupe d'environ 12 personnes entourer Watts et que quatre hommes étaient en train de donner la raclée. La Cour d'appel a noté, à la majorité, que le témoignage de M. Finter différait de celui de la majorité des autres personnes qui ont témoigné quant au nombre d'agresseurs, mais que M. Finter avait quitté son point d'observation ou tourné le dos aux attaques à au moins six reprises.

Pas moins de 12 autres témoins à charge ont parlé d'un groupe composé d'environ 7 à 10 hommes qui entouraient Watts. De plus, le nombre réel d'hommes qui ont frappé Watts ce soir-là n'est pas pertinent relativement à la déclaration de culpabilité de l'appellant, fondée sur le par. 21(1) du

Daye's description of an inner circle of some undefined number of men around Darren Watts could affect the trial judge's conclusion based on Clayton's identification testimony that the appellant was one of the men who actually struck Darren Watts, this still would have no impact on the trial judge's conclusion that the appellant aided or abetted the assault on Watts. It is thus clear that there is no reasonable possibility that these statements affect the reliability of the result reached at trial, particularly since the appellant was convicted as both a principal and a party to the assault on Darren Watts.

(d) *Fairness of the Trial Process*

Though both Daye's and Tynes's statements, on their face, have little, if any, impact on the reliability of the result reached at trial, the appellant would nevertheless be entitled to a new trial if he were to show that the failure to disclose these statements affected the overall fairness of the trial process. This would be the result if the Crown's failure to disclose deprived the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. In the circumstances of this case, the fairness of the trial process was not affected by the Crown's failure to disclose. A significant factor in reaching this conclusion is defence counsel's lack of due diligence in pursuing disclosure.

In order to place the Crown's failure to disclose in the proper context, it is necessary to review the disclosure process followed in this case. First, prior to the preliminary inquiry, the Crown provided counsel with a transcript of the videotaped deposition of Danny Clayton. The following passage is included in this statement:

Code. Ainsi, même si on devait présumer que la description que Daye a donnée d'un cercle intérieur formé autour de Darren Watts par un nombre indéterminé d'hommes pourrait influencer sur la conclusion du juge du procès fondée sur le témoignage d'identification de Clayton, selon lequel l'appellant était l'un des hommes qui ont vraiment frappé Darren Watts, cela n'aurait encore aucune incidence sur la conclusion du juge du procès que l'appellant a aidé ou encouragé la perpétration des voies de fait contre Watts. Il est donc clair qu'il n'y a aucune possibilité raisonnable que ces déclarations influent sur le bien-fondé du résultat atteint au procès, étant donné particulièrement que l'appellant a été reconnu coupable à la fois à titre d'auteur principal des voies de fait contre Darren Watts et à titre de participant à ces voies de fait.

d) *L'équité du procès*

Même si, à première vue, les déclarations de Daye et de Tynes ne peuvent avoir que peu d'incidence sur le bien-fondé du résultat atteint au procès, l'appellant aurait néanmoins droit à un nouveau procès s'il démontrait que l'omission de divulguer ces déclarations a nui à l'équité globale du procès. Ce serait le cas si l'omission de divulguer du ministère public avait privé la défense de la possibilité de poser d'autres questions aux témoins ou de recueillir d'autres éléments de preuve découlant des documents non communiqués. Dans les circonstances de la présente affaire, l'omission de divulguer du ministère public n'a pas nui à l'équité du procès. Un facteur important qui a été pris en considération pour tirer cette conclusion est le manque de diligence raisonnable dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation.

Pour situer dans le contexte approprié l'omission de divulguer du ministère public, il est nécessaire d'examiner le processus de divulgation suivi en l'espèce. Premièrement, avant l'enquête préliminaire, le ministère public a fourni aux avocats une transcription de la déposition sur vidéocassette de Danny Clayton. Le passage suivant figure dans cette déclaration:

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Q. Could Terrance Tynes, Terrence Day [sic], Nathaniel Robart and Michael Barton see the beating taking place on Darren Watts?

A. Most likely, yeah. Most likely, yeah.

Q. Do you recall where they were standing when Mr. Watts was being beaten?

A. I really can't recall where they were standing though, but I know they were on the corner.

Q. They were right there?

A. Um.

Q. Were they there all — were they present also when the other frat guys were beaten?

A. Yeah.

Q. Were they? Okay. . . . [Emphasis added.]

Moreover, as Bateman J.A. noted in the Court of Appeal (at p. 137):

There is no suggestion that defence counsel were unaware, well in advance of trial, that Terris Daye was a possible eyewitness to all or some of the events that evening. He was clearly shown as such by the police material provided to the defence; Guy Robart, in his statement to the police, identified Terris Daye as one of the people who was kicking Darren Watts; counsel for at least one of the accused cross-examined the key Crown witness, Danny Clayton, about Terris Daye's role in the assault; Mr. Daye's name arises more than 20 times in the evidence of the proceedings.

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Indeed, on direct examination, Clayton testified that he attended the party with Tynes and Daye and left with them after the assaults took place. Counsel for the accused Guy Robart, on cross-examination, specifically asked Clayton about Daye's and Tynes's involvement in the assaults. In addition, in his own statement to the police, the appellant stated five times that he was with Tynes at the fraternity party, and that Tynes came out of the house with him when he followed Terrence Dixon and Shannon Burke onto the street. Clearly, defence counsel was well aware that both Daye and Tynes took some part in the events outside the fraternity

[TRADUCTION]

Q. Terrance Tynes, Terrence Day (sic), Nathaniel Robart et Michael Barton pouvaient-ils voir Darren Watts subir une raclée?

R. Fort probablement, ouais. Fort probablement, ouais.

Q. Vous rappelez-vous où ils se tenaient pendant que M. Watts était battu?

R. Je ne peux vraiment pas me rappeler où ils se trouvaient, mais je sais qu'ils étaient au coin.

Q. C'est là qu'ils étaient?

R. Hum.

Q. Étaient-ils tous là — étaient-ils présents également au moment où les autres gars de la confrérie étaient battus?

R. Ouais.

Q. Ils y étaient? D'accord. . . [Je souligne.]

En outre, le juge Bateman a fait remarquer en Cour d'appel (à la p. 137):

[TRADUCTION] Rien ne laisse supposer que les avocats de la défense ne savaient pas, bien avant le procès, que Terris Daye pouvait être un témoin oculaire de la totalité ou d'une partie des événements survenus ce soir-là. Il était nettement décrit comme tel dans les documents de la police fournis à la défense; dans sa déclaration à la police, Guy Robart a identifié Terris Daye comme étant l'un de ceux qui donnaient des coups de pied à Darren Watts; l'avocat d'au moins un des accusés a contre-interrogé le principal témoin à charge, Danny Clayton, au sujet du rôle de Terris Daye dans les voies de fait commises; le nom de M. Daye revient plus de 20 fois dans la preuve en l'espèce.

En réalité, lors de son interrogatoire principal, Clayton a témoigné avoir assisté à la fête en compagnie de Tynes et Daye, et être parti avec eux après que les voies de fait eurent été commises. L'avocat de l'accusé Guy Robart a expressément contre-interrogé Clayton au sujet de la participation de Daye et de Tynes aux voies de fait. De plus, dans sa propre déclaration à la police, l'appelant a mentionné à cinq reprises qu'il était avec Tynes à la fête de la confrérie et que Tynes est sorti de la maison avec lui quand il a suivi Terrence Dixon et Shannon Burke dans la rue. De toute évidence, l'avocat de la défense était bien au courant que

house that evening, and knew that they might have witnessed the assaults.

In light of this background, it is surprising that when he became aware of the Crown's non-disclosure of Daye's and Tynes's statements, defence counsel did not request them. Instead, defence counsel maintains he had no interest in receiving the police statements of named eyewitnesses, including the man who accompanied the appellant into the fray outside the fraternity house. This position assumes even greater significance in light of the summary of the statements included in the police occurrence reports. The material parts of the summary of Daye's statement read as follows:

After being given young offender caution and explained [*sic*] in detail, it was decided by Terris Daye that he would give a statement. He places himself and the other players at the Frat party, 1770 Robie Street he cannot describe the clothing being worn by others that night. He states he seen [*sic*] four white guys walking south on Robie Street following Terry Dixon and Shannon Burke who were arguing. He reviewed the four pictures of the victims and identified John Charman as the first guy who got hit and went down. He stated Damon Cole punched him first and Spencer Dixon kicked him when he was down, because that's what Spencer likes to do. He points out Dennis MacDonald as the second man being punched and he states Spencer Dixon did the punch and the kicking. Then he was unable to ID Robert Gillis' photo, but he knew Darren Watts' face from seeing it in the news. But he couldn't ID Watts as the man getting the beating that night. As it turns out Darren Watts was a friend of his brother Troy Daye.

Terris Daye after some questioning places himself on the outer circle surrounding Darren Watts. It is quite clear that he does not want to ID the key players as he is scared of them. Terris Daye places Cyril Smith, Danny Clayton, Terrance Tynes running west on Cedar Street after Guy Robart screams police. When questioned about the assault on the police officer he described that

Daye et Tynes avaient tous deux joué un rôle dans les événements survenus à l'extérieur de la maison de la confrérie ce soir-là, et il savait qu'ils pouvaient avoir été témoins des voies de fait.

Compte tenu de ces faits, il est étonnant que l'avocat de la défense n'ait pas demandé les déclarations de Daye et Tynes, lorsqu'il a pris connaissance de l'omission du ministère public de les divulguer. Il maintient plutôt qu'il n'avait pas intérêt à recevoir les déclarations faites à la police par des témoins oculaires nommément désignés, dont l'homme qui accompagnait l'appelant dans la bagarre survenue à l'extérieur de la maison de la confrérie. Ce point de vue revêt encore plus d'importance à la lumière du résumé des déclarations figurant dans les rapports de police. Les passages pertinents du résumé de la déclaration de Daye se lisent ainsi:

[TRADUCTION] Après avoir reçu la mise en garde destinée aux jeunes contrevenants et des explications détaillées, Terris Daye décide de faire une déclaration. Il dit que lui et les autres intervenants se trouvaient à la fête de la confrérie, au 1770, rue Robie; il ne peut pas décrire les vêtements portés par les autres ce soir-là. Il déclare avoir vu quatre blancs marcher en direction sud dans la rue Robie, derrière Terry Dixon et Shannon Burke qui se querellaient. Il a examiné les quatre photos des victimes et a identifié John Charman comme étant le premier gars à avoir été frappé et à s'être affaissé. Il a déclaré que Damon Cole lui a d'abord donné des coups de poing et que Spencer Dixon lui a donné des coups de pied lorsqu'il était par terre, parce que c'est ce que Spencer aime faire. Il désigne Dennis MacDonald comme étant le deuxième homme à recevoir des coups de poing et il déclare que c'est Spencer Dixon qui a donné les coups de poing et les coups de pied. Puis, il n'a pas pu identifier la photo de Robert Gillis, mais il connaissait le visage de Darren Watts parce qu'il l'avait vu au bulletin d'informations. Mais il ne pouvait pas identifier Watts comme étant l'homme qui avait reçu la raclée ce soir-là. Il s'est avéré que Darren Watts était un ami de son frère Troy Daye.

Après quelques questions, Terris Daye dit qu'il se trouvait dans le cercle extérieur formé autour de Darren Watts. Il est tout à fait évident qu'il ne veut pas identifier les principaux intervenants, car il les craint. Terris Daye affirme que Cyril Smith, Danny Clayton, Terrance Tynes couraient en direction ouest dans la rue Cedar après que Guy Robart eut crié «Police». Interrogé au

Guy and Nathaniel Robart ran in the same direction and were chased by the policeman. He described the police car as a burgundy shadow. . . . The writers were unable to get Daye to name any of the persons in the inner circle around Darren Watts. The mother seems to know more and if interviewed away from her son might give some useful information.

The occurrence reports were given to all defence counsel during the trial some days before Clayton testified.

54 In light of the damaging information about the appellant disclosed in the summary, it is not difficult to imagine that defence counsel might have made a tactical decision not to pursue disclosure. Nevertheless, defence counsel maintains in his affidavit filed with the Court of Appeal that he did not see anything in the summary that would help the accused in making full answer and defence and that “the reason [he] did not pursue the matter further is that [he] was confident at the time of trial, after having gone through the preliminary, that all relevant information was disclosed to the defence”.

55 It must be remembered that defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown’s disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel’s obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure. In this case, the summary in the occurrence report indicates that Daye’s statement would very likely meet the test for relevance set out in *Stinchcombe*. When defence counsel reviewed the occurrence report, he knew or should have known that the Crown had failed in its disclosure obligations. When this became apparent, defence counsel should have brought this matter to the attention of

sujet des voies de fait contre le policier, il a dit que Guy et Nathaniel Robart couraient dans la même direction et étaient poursuivis par le policier. Il a affirmé que la voiture de police était de couleur bourgogne. [. . .] Les rédacteurs n’ont pas pu obtenir de Daye qu’il nomme l’une ou l’autre des personnes qui formaient le cercle intérieur autour de Darren Watts. La mère semble en savoir plus et, si elle était interrogée en l’absence de son fils, elle pourrait peut-être donner des renseignements utiles.

Les rapports de police ont été remis à tous les avocats de la défense durant le procès, quelques jours avant le témoignage de Clayton.

Compte tenu des renseignements préjudiciables divulgués au sujet de l’appelant dans le résumé, il n’est pas difficile d’imaginer que l’avocat de la défense ait pu prendre une décision tactique de ne pas tenter d’obtenir la divulgation. Néanmoins, l’avocat de la défense maintient, dans son affidavit déposé en Cour d’appel, qu’il ne voyait rien dans le résumé qui aiderait l’accusé à présenter une défense pleine et entière et que [TRADUCTION] «la raison pour laquelle [il] n’a pas donné suite d’avantage à l’affaire est qu’[il] était persuadé au moment du procès, après le déroulement de l’enquête préliminaire, que tous les renseignements pertinents avaient été divulgués à la défense».

Il faut se rappeler que l’avocat de la défense n’a, en aucun temps, le droit de supposer que tous les renseignements pertinents ont été divulgués à la défense. Tout comme l’obligation de divulguer du ministère public est constante, et continue d’exister durant tout le procès; il en est de même de l’obligation de l’avocat de la défense de faire preuve de diligence raisonnable en tentant d’obtenir la divulgation. Si l’avocat de la défense ne fait rien lorsqu’il sait que des renseignements pertinents n’ont pas été divulgués, cela justifiera souvent, à tout le moins, une conclusion à un manque de diligence raisonnable et pourra, dans certains cas, justifier une déduction que l’avocat a pris une décision stratégique de ne pas tenter d’obtenir la divulgation. En l’espèce, le résumé contenu dans le rapport de police indique que la déclaration de Daye satisfierait fort probablement au critère de pertinence énoncé dans l’arrêt *Stinchcombe*. Lorsque l’avocat de la défense a examiné le rapport de

the trial judge at the earliest opportunity. In the circumstances of this case, the Court of Appeal was right to conclude that at this point, defence counsel was faced with a choice: “call for the statements or live without them” (p. 93).

When he was aware or should have been aware of the Crown’s failure to disclose Tynes’s statement, defence counsel was obliged to take appropriate steps. He failed to do so and thereby failed to exercise due diligence in pursuing disclosure. The appellant is in no position to argue that he lost an opportunity to garner evidence flowing from Tynes’s statement, since the failure to disclose it is to a significant extent attributable to defence counsel’s inaction. Similarly, the appellant cannot now complain that Daye’s statement was not disclosed. Indeed, his position is even less compelling in relation to this statement. The summary in the occurrence report, which was disclosed, refers to Daye’s description of an inner and outer circle around Watts. When the summary was disclosed, before Clayton testified, counsel could have requested disclosure, sought an adjournment, and would then have had sufficient opportunity to investigate this aspect of Daye’s statement. The summary also indicates a contradiction between Daye and Clayton as to who assaulted John Charman. Once again, counsel had the opportunity to pursue this apparent contradiction. The appellant cannot now claim the trial process was rendered unfair by virtue of the Crown’s failure to disclose.

IV. Disposition

I would dismiss the appeal.

police, il savait ou aurait dû savoir que le ministère public avait manqué à ses obligations en matière de divulgation. Lorsque cela est devenu évident, l’avocat de la défense aurait dû porter cette affaire à l’attention du juge du procès à la toute première occasion. Dans les circonstances de la présente affaire, la Cour d’appel a eu raison de conclure qu’à ce moment-là l’avocat de la défense devait faire un choix: [TRADUCTION] «demander les déclarations ou s’en passer» (p. 93).

Lorsqu’il s’est rendu compte ou aurait dû se rendre compte de l’omission du ministère public de divulguer la déclaration de Tynes, l’avocat de la défense était tenu de prendre les mesures appropriées. Il ne l’a pas fait et n’a donc pas fait preuve de diligence raisonnable en tentant d’obtenir la divulgation. L’appellant n’est pas en mesure de soutenir qu’il a perdu une possibilité de recueillir des éléments de preuve découlant de la déclaration de Tynes, puisque l’omission de la divulguer est en grande partie attribuable à l’inaction de l’avocat de la défense. De même, l’appellant ne peut pas maintenant se plaindre du fait que la déclaration de Daye n’a pas été divulguée. En réalité, le point de vue qu’il avance s’impose encore moins relativement à cette déclaration. Le résumé contenu dans le rapport de police, qui a été divulgué, mentionne la description que Daye a donnée des cercles intérieur et extérieur formés autour de Watts. Lorsque le résumé a été divulgué, avant le témoignage de Clayton, l’avocat aurait pu demander la divulgation et solliciter un ajournement, et il aurait eu alors une possibilité suffisante d’enquêter sur cet aspect de la déclaration de Daye. Le résumé révèle également une contradiction entre Daye et Clayton quant à l’identité de ceux qui ont commis des voies de fait contre John Charman. Encore là, l’avocat avait la possibilité d’exploiter cette contradiction apparente. L’appellant ne peut pas prétendre maintenant que l’omission de divulguer du ministère public a rendu le procès inéquitable.

IV. Dispositif

Je suis d’avis de rejeter le pourvoi.

Appeal dismissed.

Pourvoi rejeté.

Solicitors for the appellant: Scaravelli & Associates, Halifax.

Procureurs de l'appelant: Scaravelli & Associates, Halifax.

Solicitor for the respondent: The Nova Scotia Public Prosecution Service, Halifax.

Procureur de l'intimée: The Nova Scotia Public Prosecution Service, Halifax.

Tab 13:

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 14:

R. v. Fox, 2022 BCCA 404

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox*,
2022 BCCA 404

Date: 20221125
Dockets: CA46979; CA47391
Docket: CA46979

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

-and-

Docket: CA47391

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Horsman

On appeal from: Orders of the Provincial Court of British Columbia, dated August 19, 2020 (conviction) (*R. v. Fox*, Vancouver Docket 244069-6-B), and November 26, 2020 (conviction) (*R. v. Fox*, Vancouver Docket 244069-7-B).

Oral Reasons for Judgment

The Appellant, appearing in person:

P.H. Fox

Counsel for the Respondent:

D.M. Layton, K.C.

Place and Date of Hearing:

Vancouver, British Columbia
November 25, 2022

Place and Date of Judgment:

Vancouver, British Columbia
November 25, 2022

Summary:

Appeals CA46979 and CA47391 arising from convictions for breach of probation orders. The appellant was found guilty of criminally harassing his former wife by creating a website in her name that was designed to denigrate, humiliate and intimidate her with the goal of ruining her life and causing her to commit suicide. The first probation order prohibited the appellant from publishing, disseminating, or making publicly available any information about his ex-wife. The second probation order required the appellant within 48 hours of his release from custody to take steps to ensure any website relating to his former wife was no longer available on the internet or otherwise. Held: appeals dismissed. There is no merit to either appeal. The appellant admitted to creating and publishing the website containing information about his former wife and maintained he would never take it down. The appellant was convicted by his own words.

[1] **STROMBERG-STEIN J.A.:** These are reasons of the Court.

[2] In 2017, a jury found Patrick Fox guilty of criminally harassing his former spouse and of being in possession of firearms in an unauthorized place. Underlying his conviction was Mr. Fox's creation of a website in the name of his former spouse, which was designed to denigrate, humiliate and intimidate her, and which contained private information about her family, friends, and associates. Mr. Fox's stated goal was to ruin her life and cause her to commit suicide.

[3] On November 10, 2017, now Associate Chief Justice Holmes sentenced Mr. Fox to a period of incarceration followed by three years' probation (the "Holmes Order"). Condition 12 of the Holmes Order prohibited Mr. Fox from publishing, disseminating, or making publicly available any information about Mr. Fox's ex-wife. Mr. Fox was released on December 30, 2018, and the Holmes Order came into effect.

[4] On March 12 or 13, 2019, someone notified the media and Crown counsel that there was a new website that replicated the content of the earlier website, and added allegations of corruption in relation to Mr. Fox's criminal harassment trial. Disclosure materials and transcripts from the jury trial were posted on the website. On March 18, 2019, Vancouver Police Department Detective Constable ("DC") Fontana confirmed that the website was publicly accessible.

[5] In June 2019, DC Fontana received a letter dated June 6 from Mr. Fox indicating that he had created a new website hosted in the name of his ex-wife under a new domain. He asked to be charged with breach of probation and criminal harassment.

[6] On June 24, 2019, DC Fontana interviewed Mr. Fox. During this interview, Mr. Fox advised DC Fontana that he had created and was running or maintaining the website.

[7] On December 4, 2019, Mr. Fox was charged with breaching the Holmes Order between March 7 and March 21, 2019, by making publicly available the website domain.

[8] At the trial of the breach of the Holmes Order before Judge Phillips, Mr. Fox admitted he created and published the website, and was bound by the Holmes Order during the period covered by the Information. DC Fontana was the sole witness at trial. Mr. Fox did not testify. His defence was the Crown could not prove whether he published the website before the probation order came into effect, and his failure to take down the website was not a breach of the order. The position of the Crown was that it did not matter when the website was published, because it was “publicly available” during the relevant time described in the Information.

[9] Judge Phillips concluded the Crown had proved the probation breach beyond a reasonable doubt, as the probation condition prohibiting the making of the information in issue publicly available “directly or indirectly ... in any manner whatsoever”. On August 19, 2020, Judge Phillips convicted Mr. Fox of breaching the Holmes Order, and her reasons give rise to Mr. Fox’s conviction appeal No. CA46979.

[10] We will now consider the merits of the appeal from Phillips P.C.J., as this impacts the appeal from Rideout P.C.J. Mr. Fox argues his conviction is unreasonable as the judge erred in law in interpreting the probation order,

misapprehended evidence, and provided insufficient reasons. In our view, there is no merit to any of these grounds of appeal.

[11] There was no dispute the probation order was effective on December 30, 2018. There is no dispute the Crown could not prove when anything was posted on the website, including if it was before the probation order came into effect. The dispute revolved around the interpretation of Condition 12 of the Holmes Order. Contrary to Mr. Fox's view, there was overwhelming evidence in support of Judge Phillips' conclusion Mr. Fox made information referring to his ex-wife publicly available "directly or indirectly ... in any manner whatsoever" during the period of his probation, and specifically between March 7 and March 21, 2019, as indicated on the Information. The website contained essentially the same content as the website that led to Mr. Fox's criminal harassment conviction. In his police interview with DC Fontana, Mr. Fox admitted he was running or maintaining the website; his letter to DC Fontana suggested he was involved in running or maintaining the website, he admitted publishing the website and creating some of the content, and he asked to be charged with criminal harassment. The evidence was overwhelming, from the mouth of Mr. Fox, that he breached Condition 12 of the Holmes Order.

[12] The judge, in her reasons for conviction, misquoted Mr. Fox's comment in his letter to DC Fontana: "Particularly, since my publishing the new website, I have engaged in exactly the same conduct". In fact, Mr. Fox wrote: "Particularly, since by publishing the new website, I have engaged in exactly the same conduct". It is a word without a difference in the context of the meaning of the sentence, and does not change the meaning of what he wrote. In our view, this error did not play an essential role in the judge's reasoning process in convicting Mr. Fox.

[13] We would dismiss Mr. Fox's appeal from conviction on CA46979.

[14] Judge Phillips sentenced Mr. Fox to 6 months' incarceration and 6 months' probation (the "Phillips Order"). The Phillips Order included a condition that required

Mr. Fox to take down the website within 48 hours of his release from custody, as follows:

Within 48 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, [your former spouse] or any of her friends, relatives[,] employers or co workers, including the websites published under the domain [website domain name deleted] and [website domain name deleted] are no longer available via the [I]nternet or by any other means.

[15] We would note Mr. Fox has filed a notice of abandonment in relation to his sentence appeal.

[16] On August 20, 2020, Mr. Fox was released from custody and the Phillips Order came into effect.

[17] On September 17, 2020, Mr. Fox was arrested and charged with breaching the Phillips Order for failing to take down the website between August 19, 2020, and September 16, 2020. Mr. Fox was interviewed by DC Dent on September 17, 2020. The interview was video and audio-recorded.

[18] At the trial on November 26, 2020, DC Dent testified that on September 16, 2020, he accessed one of the website domain names referred to in the Phillips Order. Its home page contained an entry dated August 19, 2020, at 1:53 p.m., which was written as a first person letter to David Eby, then the Attorney General of British Columbia. The entry referred to the proceedings before Phillips P.C.J., and referred to the probation condition that required he take down the website within 48 hours of his release: "I told the judge 'that's just not going to happen'." He emphasized "how ineffectual and impotent the Canadian justice system is. They can't even make a little pissant nobody like myself take down a website. They can lock me up for [the] rest of my life, but I will never take down the website." He noted 48 hours had passed and the website was still online. He referred to the *R. v. Fox* section as exposing corruption and collusion of Crown, defence counsel and the judge. He indicated by the time Mr. Eby read the letter "I will probably be back in custody, but

in case you haven't figured it out, I just don't give a fuck." Mr. Fox contends this letter was written the day before the probation order came into effect. We would note the accuracy of the date on the letter was not established at trial.

[19] With the agreement of Mr. Fox, rather than playing the video of his police interview, DC Dent was permitted to testify about statements recorded in a Task Action Report that Mr. Fox made during the 65-minute interview. During this interview, Mr. Fox makes various inculpatory statements. He now maintains DC Dent misstated what he said during the interview, and his inculpatory statements were said in a sarcastic and joking manner. However, the Division has viewed the video, which forms part of the new evidence Mr. Fox seeks to adduce on appeal, and Mr. Fox's assertions are not accurate.

[20] At the commencement of the interview, Mr. Fox told DC Dent it was important to have a good quality audio and video recording of the interview so he could put it on the website later; he admitted the website had been updated by someone, and referred to a number of details on the website, but he did not admit to personally posting anything; he said a lot more content needed to be added to the website, but that it was very time consuming and "I haven't been the most productive"; he said he had been ordered to take down the website but he believed it was not illegal and it exposes misconduct and corruption in the criminal justice system and of his "evil, horrible cunt of an ex-wife"; he had been waiting to be arrested and was surprised it took the police so long; he had viewed the access logs for the website and could see that various city, police and government agencies had visited it, but he believed a website's access logs could be seen by anyone clicking on the website. When asked by DC Dent what it would take for him to take down the website, Mr. Fox said he wanted the government to admit that everything on his website is true, for the government to admit he did not commit criminal harassment and overturn all his convictions, and for his ex-wife to get throat cancer and to die a slow, miserable death. He said that never in his life would he take down the website, and locking him up in jail was not going to stop or change anything. He stated he was a software

engineer and evidenced great detail about how to remove a website from the internet.

[21] In cross-examination, DC Dent acknowledged he could not say whether Mr. Fox had transferred ownership or control of the website to someone else after the probation order was made on August 19, 2020.

[22] Mr. Fox did not testify. He argued at trial that he never admitted owning or controlling the website or publishing anything on it. He submitted that any statements he made about posting more information on the website reflected his future plans once the probation order expired. His position was the Crown had not established that he did not, within 48 hours of his release from custody, remove the website, and it was possible the website was taken down within 48 hours of his release and subsequently put back online. Mr. Fox said there was a gap in the evidence, and it had not been proven beyond a reasonable doubt that he failed to comply with the probation order.

[23] Judge Rideout convicted Mr. Fox of breaching the Phillips Order by failing to take down the website. In doing so, he concluded:

[19] There were statements made by Mr. Fox that clearly implicated him beyond a reasonable doubt in relation to access to the website, social media, or other publication which was prohibited by Judge Phillips. What happened within forty-eight hours remains uncertain and perhaps only speculation as to what took place, and I am not going to speculate what happened. The point is that the information contained in the website was available via the [I]nternet between the dates as set out [on the Information]. It is more than clear that it was the accused who was involved in that website. Ownership aside, he was inputting the information and from his own mouth himself, essentially convicted himself.

[24] Judge Rideout sentenced Mr. Fox to one year of incarceration and one year of probation, on the same terms as the Phillips Order. Mr. Fox has appealed both his conviction and sentence (CA47391). We are only addressing the conviction appeal at this time.

[25] On the conviction appeal, he alleges that the Crown failed to make timely pre-trial disclosure of his interview with DC Dent, or provide a witness list; there was

Crown, police and judge misconduct amounting to an abuse of process; the judge erred in admitting the David Eby letter; the judge erred by finding DC Dent credible and reliable; the judge erred in interpreting the probation order; and the verdict is unreasonable.

[26] In our view, there is no merit to any of the grounds of appeal. The judge did not err in admitting the highly relevant David Eby letter, or in finding the police witness credible and reliable. There is no evidence of Crown, police or judge misconduct, and no abuse of process. With respect to disclosure, there is no evidence of prejudice from the late disclosure. Disclosure was complicated by the fact that, in the past, Mr. Fox had abused the implied confidentiality of Crown disclosure by posting it on the website, and he failed to return to the Crown a laptop that contained electronic disclosure. Mr. Fox clearly anticipated that the interview with DC Dent would be led in evidence at his trial. Mr. Fox's letter of October 31 anticipated that the Crown's case would include his "admissions". Mr. Fox received the full electronic disclosure package three days before the start of the trial, which included the Task Action Report and DC Dent's will-say. Mr. Fox agreed at trial, in answer to questions from Judge Rideout, that he had received disclosure in relation to his interview with DC Dent. Mr. Fox agreed that the Crown did not need to play the video of the interview, and he was not raising any objection to the admission of evidence about the interview through the testimony of DC Dent. He did not ask for an adjournment to allow himself more time to review the electronic disclosure. At trial was the time to raise any prejudice arising from late disclosure, and not for the first time on appeal.

[27] As Judge Rideout said, Mr. Fox "from his own mouth himself, essentially convicted himself."

[28] Finally, Mr. Fox's argument that Judge Rideout misinterpreted Condition 4 of the Phillips Order is also without merit. Mr. Fox suggests that Condition 4 only required him to temporarily make the website publicly inaccessible in the 48 hours following his release from custody, at which time he was then free to make the

website available again. This interpretation would lead to an absurd result. On this interpretation, Mr. Fox could comply with the terms of his probation by temporarily taking down the website for a matter of seconds, provided that this occurred in the 48 hours after his release from custody, following which he was free to make the website publicly available on an indefinite basis. This interpretation is contrary to the plain wording of the Phillips Order and its surrounding context. It would defeat the very purpose of the probation order in protecting Mr. Fox's ex-wife from continued harm. The correct interpretation of Condition 4 of the Phillips Order is that it required Mr. Fox to take all necessary steps to ensure that the website was not available during the entire currency of his probation order, and that he had to do so within 48 hours of his release. Judge Rideout did not err in interpreting Condition 4 in this manner.

[29] We would dismiss Mr. Fox's appeal from conviction on CA47391.

[30] The final matter we must deal with relates to Mr. Fox's applications to introduce new evidence on appeal in the form of affidavits and transcripts, as well as Crown disclosure. The *Palmer* criteria are applicable, and we have considered the most recent application by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22. Some of the material Mr. Fox seeks to admit relates directly to the proceedings, in the form of transcripts of pre-trial proceedings. However, some relates to other or subsequent proceedings. To the extent the materials relate directly to the two appeals before this Court, only the material which includes the paper disclosure package sent to Mr. Fox on the Rideout matter, and the flash drives of the video and audio police interview and the transcription of the police interview will be admitted. The balance of the new evidence, in the form of affidavits and transcripts, will not be admitted as this is material that is not relevant to a decisive or potentially decisive issue, or that could have affected the result at trial.

[31] We would dismiss Mr. Fox's appeals from conviction on CA46979 and CA47391.

"The Honourable Madam Justice Stromberg-Stein"

"The Honourable Mr. Justice Hunter"

"The Honourable Madam Justice Horsman"

Tab 15:

R. v. Lohrer, 2004 SCC 80

Allan Wayne Lohrer *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. v. LOHRER

Neutral citation: 2004 SCC 80.

File No.: 30160.

2004: December 10.

Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Evidence — Misapprehension of evidence — Accused convicted of aggravated assault and uttering threats — Test applicable to setting aside of convictions on basis of trial judge's misapprehension of evidence not met — Convictions upheld.

The accused was convicted of aggravated assault and of uttering threats, and a majority of the Court of Appeal upheld the convictions. The dissenting judge would have set aside the convictions and ordered a new trial as he concluded that the misapprehensions of the evidence found in the trial judge's reasons were such that it could not be said the accused received a fair trial.

Held: The appeal should be dismissed.

To set aside a conviction on appeal on the basis that the trial judge misapprehended the evidence, the misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge, and the errors thus identified must play an essential part not just in the narrative of the judgment but in the reasoning process resulting in a conviction. This test is not met in this case. There is no indication that the trial judge erred in his assessment of the evidence in a manner that could have affected the outcome.

Allan Wayne Lohrer *Appellant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ : R. c. LOHRER

Référence neutre : 2004 CSC 80.

N° du greffe : 30160.

2004 : 10 décembre.

Présents : Les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE

Droit criminel — Preuve — Interprétation erronée de la preuve — Accusé déclaré coupable relativement à des accusations de voies de fait graves et de profération de menaces — Non-respect du critère applicable pour annuler les déclarations de culpabilité pour cause d'interprétation erronée de la preuve par le juge du procès — Déclarations de culpabilité confirmées.

L'accusé a été reconnu coupable relativement à des accusations de voies de fait graves et de profération de menaces, et la Cour d'appel, à la majorité, a confirmé les déclarations de culpabilité. Le juge dissident aurait annulé les déclarations de culpabilité et ordonné la tenue d'un nouveau procès, après avoir conclu que, en raison de l'interprétation erronée de la preuve qu'il a constatée dans les motifs du juge du procès, il était impossible de dire que l'accusé avait subi un procès équitable.

Arrêt : Le pourvoi est rejeté.

Pour annuler une déclaration de culpabilité à l'issue d'un appel fondé sur le moyen voulant que le juge du procès ait mal interprété la preuve, l'interprétation erronée de la preuve doit porter sur l'essence plutôt que sur des détails. Elle doit avoir une incidence importante plutôt que secondaire sur le raisonnement du juge du procès, et les erreurs ainsi relevées doivent avoir joué un rôle capital non seulement dans les motifs du jugement, mais encore dans le raisonnement à l'origine de la déclaration de culpabilité. Ce critère n'est pas respecté en l'espèce. Rien n'indique que l'appréciation de la preuve par le juge du procès était erronée au point de pouvoir influencer sur l'issue de l'affaire.

Cases Cited

Applied: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. C. (R.)*, [1993] 2 S.C.R. 226, rev'g (1993), 81 C.C.C. (3d) 417.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(a)(i), (iii).

APPEAL from a judgment of the British Columbia Court of Appeal (2003), 186 B.C.A.C. 58, 306 W.A.C. 58, [2003] B.C.J. No. 1952 (QL), 2003 BCCA 457, upholding the accused's convictions for aggravated assault and uttering threats. Appeal dismissed.

Shawn P. Buckley, for the appellant.

Kenneth Madsen, for the respondent.

The judgment of the Court was delivered orally by

BINNIE J. — This is an appeal as of right from convictions of the appellant for aggravated assault and uttering a threat. A majority of the B.C. Court of Appeal affirmed the convictions. Hollinrake J.A. dissented. He found applicable to this case what was said by Doherty J.A. of the Ontario Court of Appeal in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, as follows at p. 221:

Where a trial judge is mistaken 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, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict.

Later in the same paragraph, Doherty J.A. stated:

If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

Jurisprudence

Arrêts appliqués : *R. c. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. c. C. (R.)*, [1993] 2 R.C.S. 226, inf. (1993), 81 C.C.C. (3d) 417.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 686(1)(a)(i), (iii).

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2003), 186 B.C.A.C. 58, 306 W.A.C. 58, [2003] B.C.J. No. 1952 (QL), 2003 BCCA 457, confirmant les déclarations de culpabilité de l'accusé relativement à des accusations de voies de fait graves et de profération de menaces. Pourvoi rejeté.

Shawn P. Buckley, pour l'appellant.

Kenneth Madsen, pour l'intimée.

Version française du jugement de la Cour rendu oralement par

LE JUGE BINNIE — Le présent pourvoi est formé de plein droit contre les déclarations de culpabilité de l'appellant relativement à des accusations de voies de fait graves et de profération de menaces. La Cour d'appel de la Colombie-Britannique, à la majorité, a confirmé les déclarations de culpabilité. Le juge Hollinrake, dissident, a considéré applicables en l'espèce les propos tenus par le juge Doherty dans l'arrêt de la Cour d'appel de l'Ontario *R. c. Morrissey* (1995), 97 C.C.C. (3d) 193, p. 221 :

[TRADUCTION] À mon avis, si un juge commet une erreur quant à l'essence d'un élément de preuve important et que cette erreur joue un rôle capital dans le raisonnement à l'origine de la déclaration de culpabilité, il s'ensuit que la déclaration de culpabilité de l'accusé n'est pas fondée exclusivement sur la preuve et ne constitue pas un verdict « juste ».

Le juge Doherty ajoute ceci plus loin dans le même paragraphe :

[TRADUCTION] Si un appellant peut démontrer que la déclaration de culpabilité repose sur une interprétation erronée de la preuve, force est de conclure, selon moi, que l'appellant n'a pas subi un procès équitable et qu'il a été victime d'une erreur judiciaire. Tel est le cas même si la preuve réellement produite au procès était susceptible d'étayer une déclaration de culpabilité.

We agree with these observations. Where a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, has been demonstrated an accused appellant is not bound to show in addition that the verdict cannot “be supported by the evidence” within the meaning of s. 686(1)(a)(i).

² *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction”.

³ The test is not met in this case. The only error identified by Hollinrake J.A. in his dissent appears at para. 55 of the judgment ((2003), 186 B.C.A.C. 58, 2003 BCCA 457), where he says:

For instance, the trial judge found that Ms. Colville’s “life was endangered from the repeated blows that she received”. There was no medical evidence that her life was endangered, and that finding in my opinion cannot be supported on the basis of an inference being drawn by the judge.

⁴ Ms. Colville was beaten about the head and body with a baseball bat. We prefer on that particular point what was said by the majority at para. 23, where Hall J.A. stated:

I do not consider that the trial judge misapprehended the evidence when he described the injury to Colville as “life threatening”. The fact is that fracture injury to the orbital area of the face is serious and can be life threatening.

Further along in the same paragraph Hall J.A. states:

The essential ingredients of this offence are contained in that definition [that is to say s. 268(1) of the *Criminal Code*] and by that definition, there can be no doubt but what happened to Colville was, at the very least, maiming or disfiguring.

Nous souscrivons à ces observations. L’accusé appellant qui démontre l’existence d’une erreur judiciaire, au sens du sous-al. 686(1)a)(iii) du *Code criminel*, L.R.C. 1985, ch. C-46, n’a pas à établir en plus que le verdict ne peut pas « s’appuyer sur la preuve », au sens du sous-al. 686(1)a)(i).

L’arrêt *Morrissey*, faut-il le souligner, établit une norme stricte. L’interprétation erronée de la preuve doit porter sur l’essence plutôt que sur des détails. Elle doit avoir une incidence importante plutôt que secondaire sur le raisonnement du juge du procès. Une fois ces obstacles surmontés, il faut en outre (le critère étant énoncé de manière conjunctive plutôt que disjunctive) que les erreurs ainsi relevées aient joué un rôle capital non seulement dans les motifs du jugement, mais encore « dans le raisonnement à l’origine de la déclaration de culpabilité ».

Ce critère n’est pas respecté en l’espèce. La seule erreur que le juge Hollinrake relève dans ses motifs dissidents figure au par. 55 de l’arrêt ((2003), 186 B.C.A.C. 58, 2003 BCCA 457) où il affirme ceci :

[TRADUCTION] Par exemple, le juge du procès a conclu que « les nombreux coups reçus par [M^{me} Colville] faisaient craindre pour sa vie ». Il n’y avait aucune preuve médicale que sa vie était en danger, et j’estime que cette conclusion ne peut pas être étayée par une inférence du juge.

Des coups de bâton de baseball avaient été portés à la tête et au corps de M^{me} Colville. À cet égard, nous préférons les propos que le juge Hall a tenus, au nom des juges majoritaires, au par. 23 :

[TRADUCTION] Je ne considère pas que le juge du procès a mal interprété la preuve lorsqu’il a affirmé que les blessures subies par M^{me} Colville « faisaient craindre pour sa vie ». En fait, une fracture dans la partie orbitaire du visage est grave et peut mettre la vie en danger.

Le juge Hall ajoute ceci, dans le même paragraphe :

[TRADUCTION] Les éléments constitutifs de la présente infraction sont énoncés dans cette définition [c’est-à-dire au par. 268(1) du *Code criminel*] et, compte tenu de cette définition, il ne fait aucun doute que le traitement subi par M^{me} Colville était, tout au moins, de nature à la mutiler ou à la défigurer.

In the course of his argument, the appellant mentioned a number of other alleged errors and inconsistencies in the trial judgment including his view that the trial judge had not adequately recognized the inconsistencies in the complainants' evidence. However, what the trial judge said was that there were no "major" inconsistencies in their evidence, a conclusion with which we agree. In any event he evidently did not consider the inconsistencies, which he recognized, to be fatal to the complainants' credibility on the material issues in dispute.

In our view, none of the errors urged by the appellant goes to "the substance of material parts" of the evidence that bears on an "essential part in the reasoning process" of the trial judge leading to the convictions.

We would apply to the trial judge in this case what was stated by Rothman J.A., dissenting in the result, in the Quebec Court of Appeal in *R. v. C. (R.)* (1993), 81 C.C.C. (3d) 417, where he said at p. 420:

I can see no indication that [the trial judge] failed to direct himself to the relevant issues or that he erred in his appreciation of the evidence in a manner that could have affected the outcome.

I emphasize the last phrase. The reasons of Rothman J.A. in dissent were adopted by a majority of this Court in restoring the conviction, reported in [1993] 2 S.C.R. 226.

In our view, the statement of Rothman J.A. in *C. (R.)* and the statement of Doherty J.A. in *Morrissey* both correctly emphasize the centrality (or "essential part") the misapprehension of the evidence must play in the trial judge's reasoning process leading to the conviction before the trial judgment will be set aside on appeal on that basis.

None of the errors alleged in this case meets this standard. The appeal is therefore dismissed.

Pendant son argumentation, l'appellant a allégué l'existence d'un certain nombre d'autres erreurs et contradictions dans le jugement de première instance. Il s'est dit d'avis notamment que le juge du procès n'avait pas suffisamment reconnu les contradictions du témoignage des plaignants. Cependant, le juge du procès a conclu, en réalité, que leur témoignage ne comportait aucune contradiction « majeure », conclusion à laquelle nous souscrivons. Quoi qu'il en soit, il n'a manifestement pas considéré que ces contradictions, dont il a reconnu l'existence, compromettaient la crédibilité des plaignants relativement aux questions litigieuses substantielles.

Selon nous, aucune des erreurs soulignées par l'appellant ne porte sur « l'essence d'un élément de preuve important » ayant joué « un rôle capital dans le raisonnement » du juge du procès, qui est à l'origine des déclarations de culpabilité.

Nous sommes d'avis d'appliquer au juge du procès en l'espèce les propos que le juge Rothman, dissident quant au résultat, a tenus dans l'arrêt de la Cour d'appel du Québec *R. c. C. (R.)* (1993), 81 C.C.C. (3d) 417, p. 420 :

[TRADUCTION] Je ne vois rien qui indique que [le juge du procès] n'a pas tenu compte des questions pertinentes ou que son appréciation de la preuve était erronée au point de pouvoir influencer sur l'issue de l'affaire.

Je souligne le dernier membre de phrase. Dans un arrêt publié à [1993] 2 R.C.S. 226, notre Cour, à la majorité, a souscrit aux motifs du juge Rothman, dissident, en rétablissant la déclaration de culpabilité.

Selon nous, les affirmations du juge Rothman dans l'arrêt *C. (R.)* et du juge Doherty dans l'arrêt *Morrissey* soulignent toutes les deux, à juste titre, le rôle central (ou « capital ») que l'interprétation erronée de la preuve doit jouer dans le raisonnement du juge du procès, qui est à l'origine de la déclaration de culpabilité, pour que le jugement de première instance puisse être annulé à l'issue d'un appel fondé sur ce moyen.

Aucune des erreurs alléguées en l'espèce ne satisfait à cette norme. L'appel est donc rejeté.

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Appeal dismissed.

*Solicitors for the appellant: Buckley & Company,
Kamloops.*

*Solicitor for the respondent: Ministry of Attorney
General, Vancouver.*

Pourvoi rejeté.

*Procureurs de l'appelant : Buckley & Company,
Kamloops.*

*Procureur de l'intimée : Ministère du Procureur
général, Vancouver.*

Tab 16:

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 17:

**R. v. Sugg (N.S.C.A.),
[1986] N.S.J. No. 224**

S.C.C. 01397

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

Hart, Morrison and Macdonald, JJ.A.

BETWEEN:

EDWIN ALBERT SUGG

appellant

-and-

HER MAJESTY THE QUEEN

respondent

Douglas L. MacLellan for the appellant

Linda D. Garber for the respondent

Appeal Heard: June 20, 1986

Judgment Delivered: June 25, 1986

THE COURT: Appeal by way of stated case allowed and acquittal ordered on charge under Code s. 666 (1) per reasons for judgment of Macdonald, J.A., Hart and Morrison, JJ.A. concurring.

Macdonald, J.A.:

This is an appeal by the appellant by way of stated case against his conviction made on November 18, 1985 by His Honour Judge R.A. MacDonald of the Provincial Court on the charge that he:

"at or near Antigonish in the County of Antigonish, Nova Scotia, on or about the 6th day of May 1985 Did while bound by a Probation Order made by Provincial Judge Ronald A. MacDonald, a Judge of the Provincial Magistrate's Court, on or about the 9th day of July, 1984, wilfully fail to comply with such Order, to wit:

Failed to pay half of restitution of \$7,000.00, jointly and severally with Alan Sugg, by May 1, 1985 as stated in the

Probation Order and did thereby commit an offence contrary to Section 666 of the Criminal Code of Canada."

The factual background is that the appellant and his brother Alan were convicted of stealing four foxes contrary to s. 294(a) of the Criminal Code. For such offence the appellant was, on July 9, 1984 sentenced to a term of 60 days imprisonment to be served on an intermittent basis together with probation. A term of the probation order was that Mr. Sugg make restitution in the amount of \$7,000.00 jointly and severally with his brother. The order required that a payment of \$3,500.00 be made by May 1, 1985 and the remaining \$3,500.00 be paid by July 1, 1986.

Judge MacDonald made the following findings of fact:

- "(a) That the accused had paid only the sum of \$210.00 of the \$3500.00 restitution ordered.
- (b) That the accused did not have the financial capacity to pay the entire amount of restitution ordered.
- (c) That the accused had not used his best efforts to pay the said restitution and should have been able to pay more than had been paid."

The conviction was based on the finding by the learned trial judge "that the accused had not paid as much as he should have paid during the year from July 9, 1984 to May 1, 1985".

The questions posed for our opinion by Judge MacDonald are:

- "1. Did I err in law in holding that the accused could be found guilty of wilfully failing to comply with a probation order requiring the payment of restitution in the amount of \$3,500.00 when I found as a fact that he could not have paid that amount?
- 2. Did I err in law by holding that the word (sic) 'wilfully' in a charge under 666 of the Criminal Code requires the crown to prove only that the accused did not use his best efforts to pay the restitution ordered in the probation order?"

Subsection (1) of Section 666 of the Criminal Code reads as follows:

"666.(l) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction."

On his trial the appellant testified that he was drawing unemployment insurance commission benefits, was making maintenance payments to his wife and child from whom he was separated and was financially unable to make any additional restitution payments.

The principal submission of counsel for the appellant is that once Judge MacDonald accepted the evidence of the appellant that he was financially unable to make payment of the \$3,500.00 installment due on May 1, 1985 he should have been acquitted. Such submission is based on the fact that the information alleges that the appellant was in breach of the probation order by not paying the \$3,500.00 installment. The finding of Judge MacDonald that the appellant could not make such payment negates, it is contended, the element of wilfulness.

Counsel for the respondent referred to the Manitoba County Court decision R. v. Kent, [1983] 3 W.W.R. 536 where it was held that:

"proof of the mere fact of non-payment gives rise to an inference of intention not to pay, sufficient to support a prima facie case. Proof of no application to vary, in addition to the fact of non-payment, is evidence of the willful nature of the failure to pay sufficient to support at the very least, a prima facie case."

In R. v. Sanderson (1984), 36 Sask. R. 261 (Sask. Q. B.) it was held that "proof of failure to pay is some evidence from which a trial judge may conclude that the necessary intent was present."

The Kent and Sanderson cases dealt with a situation where the Crown established a prima facie case by leading evidence of non-payment of a restitution provision in a probation order. In Kent such non-payment was coupled with a failure, as here, by the accused to make an application under subsection (3) of s. 663 of the Criminal Code for a variation in the terms of probation or to request relief, either absolutely or on such terms as the court might set, from the restitution condition of the probation order.

I agree with the ratio of the Kent and Sanderson cases. They are however of little if any assistance here. In the present case the Crown did establish, in my view, a prima facie case. The appellant however testified, and his evidence was accepted by the learned trial judge. The prima facie case was thus displaced.

Subsection (1) of s. 666 of the Criminal Code creates a full mens rea

offence. Judge MacDonald found as a fact that the appellant was financially unable to pay the amount of \$3,500.00 by May 1, 1985 as directed by the probation order. I agree with counsel for the appellant that such finding is incompatible with a wilful failure to make such payment.

The learned trial judge in finding that the appellant wilfully failed to comply with the restitution provision of the probation order was obviously influenced by the fact that in his opinion the appellant did not use his best efforts to pay more than he did. The charge however is that the appellant wilfully failed to pay \$3,500.00 as directed by the probation order by May 1, 1985, not that he didn't make a more substantial payment than he did. Once Judge MacDonald found as he did that the appellant simply could not pay \$3,500.00 by May 1, 1985 then in my opinion it could not be said that the appellant wilfully failed to pay such amount. What is missing is the requisite criminal intent.

I would answer the two questions submitted for our opinion in the affirmative, allow the appeal, reverse and set aside the guilty verdict and direct that the appellant be acquitted on the charge set forth on the information herein.

J.A.

Concurred in:

Hart, J.A.

Morrison, J.A.

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF GUYSBOROUGH
NOVEMBER 18, 1985
SHERBROOKE
NOVA SCOTIA

IN THE PROVINCIAL MAGISTRATE'S COURT

HER MAJESTY THE QUEEN

VS

EDWIN ALBERT SUGG

CHARGE: Did while bound by a Probation Order made by Provincial Judge Ronald A. MacDonald, a Judge of the Provincial Magistrate's Court on or about the 9th day

of July, 1984, wilfully fail to comply with such Order, to wit:

Failed to pay half of restitution of \$7,000.00 jointly and severally with Alan Sugg, by May 1, 1985 as stated in the Probation Order and did thereby commit an offence contrary to Section 666 of the Criminal Code of Canada.

His Honour Ronald A. MacDonald, a Judge of the Provincial Magistrate's Court, Presiding;

Mr. R. J. Chisholm, Q.C., Acting on behalf of the Crown;

Mr. Doug MacLellan, Solicitor, acting on behalf of the Defendant;

Mrs. Alena C. MacDonald, Court Reporter;

Mr. Edwin Albert Sugg, Defendant;

D E C I S I O N

S.C.C. 01397

IN THE SUPREME COURT OF NOVA SCOTIA APPEAL DIVISION

BETWEEN:

EDWIN ALBERT SUGG

-and-

HER MAJESTY THE QUEEN

REASONS FOR JUDGMENT BY:
MACDONALD, J.A.

Tab 18:

R. v. Traverse, 2006 MBCA 7

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Charles R. Huband
Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel

B E T W E E N:

<i>HER MAJESTY THE QUEEN</i>	)	<i>J. P. Miller</i>
	)	<i>for the Appellant</i>
<i>Respondent</i>	)	
	)	<i>C. L. Sholdice</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard:</i>
	)	<i>September 20, 2005</i>
<i>BRYAN REUBEN TRAVERSE</i>	)	
	)	<i>Judgment delivered:</i>
<i>(Accused) Appellant</i>	)	<i>January 17, 2006</i>

STEEL J.A. (giving the first judgment at the invitation of Huband J.A.)

1 The accused has appealed his conviction and the sentence imposed for three counts of breach of a probation order. The Crown proceeded by way of indictment. The trial judge sentenced the accused to four months' incarceration (after taking into account the three and one-half months already spent in custody), followed by one year of supervised probation.

2 The court dismissed the appeal as to conviction at the hearing of the appeal, but reserved judgment with respect to the sentence appeal. See *R. v. Traverse*, 2005 MBCA 105.

FACTS

3 The accused is considered a high-risk offender, and, as such, his probation order is supervised by the Criminal Organization/High Risk Offender Unit (COHROU). This is a unit of Probation Services that monitors the compliance of offenders with the conditions of their probation orders. It provides offenders with 24-hour support.

4 The probation order that bound the accused at the time of the offences was comprised of the statutory conditions as well as 17 additional “optional” conditions. In particular, he was required to notify either his probation officer or the court if he changed his address. As well, he was required to adhere to a curfew and be available for curfew checks between the hours of 10:00 p.m. and 7:00 a.m. The trial judge found as a fact that the accused moved without notifying either his probation officer or the court and was not available for curfew checks on two particular occasions. She convicted him of three counts of breach of probation.

ADDITIONAL PERIOD OF INCARCERATION

5 The accused argues that the sentence imposed by the judge for the breach of probation was harsh, excessive and unfit in the circumstances. I do not agree. In this case, the sentencing judge felt that a period of incarceration was necessary because of the principle of individual deterrence. She stated:

In the recent number of years you’ve had a number of breaches of court orders so that tells me that whatever has happened in the past, you haven’t learned the lesson, so specific deterrence, that is, deterrence to you, is still something that I have to look at. What can

I do today that will hopefully make you, in the future, follow court orders?

6 After a very thorough review of all the principles of sentencing, as well as the circumstances of the offender and the offence, she concluded that a period of incarceration was appropriate based on the accused's background, the series of breaches and the nature of those breaches.

7 She then explained fully the rationale for the length of incarceration ordered. In particular, she noted that the accused received a period of approximately 11 months' incarceration the last two times he breached a probation order which contained a similar condition. It should also be noted that the sentence of an additional four months' incarceration (after taking into account time spent in pre-sentence detention) was concurrent on each of the three charges. In coming to her conclusion both as to the need for a period of incarceration and the length of that period, she made no error in principle and it cannot be said to be unfit.

FURTHER PERIOD OF PROBATION

8 Although the accused has a lengthy record dating back to 1974, they were for serious offences, resulting in incarceration for over two years. Consequently, the first adult period of probation did not commence for the accused until 1997. Since that time, as counsel for the accused submitted, there has been a steady stream of breaches of probation, resulting in even stricter probation orders and then in more breaches, for a total of nine breaches since 1998. As a result, the accused has been in almost continual involvement with the justice system and Probation Services since then.

9 Counsel argues that the accused has had such a long history of breaching probation orders that a further period of probation is simply useless and setting the accused up for failure. It is submitted that the further probation order simply perpetuates a vicious cycle of breaches and subsequent incarceration, and consequently, these breaches should have been dealt with by a sentence of incarceration only.

10 The sentencing judge considered the usefulness of a further period of probation and, in particular, considered the restrictive nature of the optional conditions. She was aware of the law that indicated that conditions on a probation order should not be so onerous as to make it inevitable that a breach will occur or that compliance is impossible. She understood the frustrations of living under such restrictions while at the same time acknowledged the necessity of those conditions in order to ensure the safety of the public. She specifically asked herself, “So the question then is should there be further probation.”

11 In the end, she concluded that the accused may not have received the full benefit of past probation orders, not only because of his resistance to counselling, but also because he had not spent any significant time out of custody. As she explained:

But my concern is that you’ve been out of custody for such a short period of time you have not yet benefited that much from the probation order, either in May of 2003 or in September of 2004. You were out for two weeks; you’ve been in custody since. So even though you’ve had some contact with Probation Services, for the last three and a half months you really haven’t benefited from the rehabilitative purpose of probation.

12 In addition, she deliberately made the conditions attached to her order less restrictive than the previous probation orders which would still be in effect after the accused was released from custody. In that way,

... then when my probation order kicks in it will be less strict. You will then have until some time next year to be on a less restrictive probation and then, if you don't breach it, maybe that's it for probation.

Now, again, that is within your control and that's why my order isn't as restrictive because I'm hoping you can look ahead and see something positive in the future so that will be an incentive for you to follow the order that is stricter when you get out of custody.

13 She made her rationale explicit. It was within her discretion to order a further period of probation. There was no error of law, and it was not unfit.

ABSTAIN FROM ALCOHOL

14 The accused argues that this condition is inappropriate because alcohol was not related to these particular breaches and therefore the condition is not linked to the offence.

15 Section 732.1(3)(c) of the *Criminal Code* gives the court the jurisdiction to order an accused to abstain from the consumption of alcohol or drugs. It is clear that a condition of a probation order must be reasonable. Certainly, if a probation condition is attached as a purely or primarily punitive measure, that would be unreasonable. See *R. v. Woroby (T.W.)* (2003), 173 Man.R. (2d) 178, 2003 MBCA 41, and *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.).

16 Moreover, a reasonable condition will generally be linked to the offence, but not always. It may be that although not linked to the specific offence, the condition is linked to the needs of the offender.

17 As long as there is a nexus between the offender and his rehabilitation and reintegration into society, the condition could be considered reasonable. In the case of *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311, 2000 ABCA 289, the Alberta Court of Appeal upheld a prohibition on drug and alcohol consumption even though these played no part in the commission of the crime.

18 In some cases, although the specific breach for which sentence is being imposed did not involve alcohol, it may be clear from the history of the accused that alcohol is an issue that affects the rehabilitation of the accused and the safety of the public. In the circumstances of this case, it seems clear that a condition abstaining from alcohol was reasonable in the circumstances. The accused had a history of being intoxicated in the past, becoming violent and committing serious offences. One of his progress reports identifies that he has significant difficulty with substance abuse. As the sentencing judge explained:

You must abstain absolutely from the consumption and possession of alcohol or other intoxicating substances. I'm absolutely convinced, even though you may be addicted and it may be difficult, that with your history this is a condition that's absolutely required for the protection of the public and so that means you must continue to abstain from alcohol, ...

LACK OF CONSENT OF ACCUSED TO PSYCHIATRIC TREATMENT

19 Next, the accused argues that a probation condition cannot, without his consent, order him to “attend for, participate in and complete any assessment, including any psychiatric assessments, to be used as part of the referral process for the treatment program offered by Dr. Lawrence Ellerby or any other such program.”

20 My reading of the transcript at sentencing and the reasons indicate that consent was provided. As a matter of fact, the judge considered the accused’s interest in taking these programs as a mitigating factor, which she took into account in her reasons for sentence. In her reasons, she states that the accused has indicated his desire to get some help and has spoken to Dr. Ellerby and wishes to get

... into his program and you want to co-operate in that treatment process. So certainly, if funding can be obtained for you to take that treatment program, that could go a long way to alleviating some concerns in terms of some of these active risk factors that you have that can be assessed on an ongoing basis. So if you carry through with that, and I’m prepared to accept that you’ve expressed that motivation at this point, then that is something that, in the long run, will assist everyone, the community and, moreover, yourself.

21 The inclusion of the condition in the order was to assist the accused in obtaining funding for the program. “If you follow through with what you now tell me you want to do, Probation Services, I understand, Ms. Lafontaine agrees that Dr. Ellerby’s program is a good one, she has to get funding for it because it costs money, but I gather she’s prepared to do that and make application.”

22 If the judge misunderstood and consent was not being provided, the accused could have said something. He was not shy. On two occasions, he

had a conversation with the judge while she was in the midst of delivering her reasons concerning his probation order.

IMPROPER DELEGATION OF POWER AND VAGUENESS

23 Section 732.1(2) of the *Criminal Code* sets out the mandatory conditions that must be attached to a probation order. Section 732.1(3) sets out the optional conditions that may be attached to a probation order. At the end of the section, s. 732.1(3)(h), there is a catch-all clause, which states:

- (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.

24 Under that section, the judge has a fair amount of discretion to attach additional conditions to the probation order so long as the conditions are certain, clear, reasonable, in accordance with principles under the *Canadian Charter of Rights and Freedoms* and not an improper delegation of judicial authority.

25 The accused takes exception to the condition imposed by the judge, presumably under that residual clause, which requires him to cooperate with the supervision and comply with the directions of COHROU of Probation Services. He argues this condition is vague and gives rise to concerns that the accused can be criminally charged for behaviour that is not easily predictable by the accused. In addition, it is submitted that the condition also fails to place limits on the extent to which COHROU can control the life of the accused and is therefore unreasonable.

26 The Crown argues that this condition is no different than the very
common condition requiring an accused to report to Probation Services as
directed.

27 I disagree with the Crown. The requirement to report is clear. A
person is to come to a place specified by Probation Services and indicate his
presence. The fact that Probation Services may control the method, place
and rate of reporting relates to the administrative details and not to the core
behaviour required.

28 There is no question that Probation Services, whether a specific unit
of the department or otherwise, may supervise the accused's compliance
with the conditions of the probation order placed upon him by the judge. So,
he may be ordered to report to Probation Services and Probation Services
may supervise him. But how is one to assess "cooperation with
supervision"? Either he breaches a term of the order or he does not.

29 Moreover, is it appropriate to order him to comply with the directions
of COHROU? What are those directions? Can Probation Services order the
accused to comply with further matters not arising from ensuring
compliance with the orders of the court?

IMPROPER DELEGATION

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.

33 So, a condition that required a young person to “[l]ive with mother and obey rules and curfew” was held to be not only too vague to be enforced, but also, as the actual terms were to be “fleshed out by someone else by way of delegation, it is over the line from administrative into judicial functioning.” See *R. v. F. (P.D.)* (1987), 57 C.R. (3d) 22 at 28 (Ont. Prov. Ct.). Similarly, in an oft-cited and early decision, *R. v. Beam* (1954), 109 C.C.C. 381 (Ont. C.A.), the impugned provision ordered the accused “from time to time promptly and faithfully obey the directions of the Probation Officer as to his habits of life and mode of living, and that he will work steadily.” Pickup C.J.O. held that “the learned Magistrate was

delegating to the Probation Officer the power to decide what habits of life and mode of living the appellant must follow during the period of his probation” (at p. 382). See also, *M.J.L., Re* (1990), 112 A.R. 231 (Prov. Ct.), where a condition was struck out which directed the accused to abide by “house rules,” and *R. v. Zarubin (G.)* (1994), 123 Sask.R. 161 (C.A.), which struck out a condition that ordered the “accused be assessed for anger management and follow instructions which may be prescribed” (underlining added).

34 It is not uncommon for conditions that are attacked for being improper delegation to also suffer from vagueness. Yet, vagueness is a different problem. Vagueness exists either where there is no delegation of these details, but the accused, who knows that he is bound by a condition of a probation order, cannot determine when he is at risk of breaching that condition or, in the alternative, where the condition is such that even with the provision of administrative details through delegation, the “knowledgeable” accused still runs the same risk.

35 Individuals should not be subjected to criminal sanction if they do not have fair notice of the prohibited conduct. As was stated by the Saskatchewan Court of Appeal in *Zarubin* (at para. 3):

Because a breach of a condition in a probation order can give rise to a charge under the **Code** against an accused it is important that it be drafted with specificity and clarity sufficient to enable it to serve as the foundation for a criminal charge should one be warranted.

36 The accused must have knowledge both of the conditions of the order and of the consequences of his conduct in wilful breach of those conditions. If a condition is vague, a probationer cannot determine when his conduct is

at risk of breaching that condition. A vague condition is an inherently unreasonable condition.

37 *R. v. Doe*, [2001] O.J. No. 3542 (QL) (C.J.), is one example of a case that deals with the vagueness inherent in the word “cooperate.” In that case, the court had the difficult task of determining whether the accused had failed to “cooperate” with the treatment program that was ordered; not because he failed to attend, but because he was less than enthusiastic when he did show up.

38 In David Berg, “Vagueness and Impossibility in Probation Conditions” (1996), 38 *Crim. L.Q.* 472, the author suggests that the precision of a condition can be tested by (at p. 493)

... asking him/herself the questions: What? How? When? Where? Who? The answers should be expressed explicitly by the wording of the condition itself, save where a permissible level of delegation must be allowed.

39 From the wording of this condition, the above questions cannot be satisfactorily answered. It may be that the directions of COHROU may include matters which are more restrictive than is already required of him by the other optional conditions. That is not only vague, it is improper delegation. This is different than an order which instructs the accused to follow the rules of a treatment program. Presumably, those rules and regulations of an institution are something that can be determined in advance and with certainty. Here, this is not simply a case of COHROU supervising the accused’s compliance with the conditions ordered by the judge. Here, one assumes, the accused is ordered to follow the directions of staff

members of COHROU as they might vary from time to time and from individual to individual.

CONCLUSION

40 Leave to appeal is granted with respect to the appeal as to sentence. The appeal is allowed only with respect to the condition of the probation order requiring the accused to “cooperate with and comply with the directions of the COHROU,” which condition I would order deleted from the probation order. I do not believe that its absence will affect the ability of Probation Services to supervise the accused’s compliance with the conditions of his probation order. If as a result of a change of circumstances it appears that I am incorrect, then s. 732.2(3) of the *Criminal Code* allows for changes.

41 With respect to the remainder of the grounds of appeal, the appeal is dismissed.

_____ J.A.

I agree: _____ J.A.

MONNIN J.A. (dissenting in part)

42 I have had the benefit of reviewing the reasons of Steel J.A. I am in agreement with those reasons save for her treatment of the condition on the accused's probation order that he cooperate with the supervision and comply with the directions of the Criminal Organization/High Risk Offender Unit (COHROU) of Probation Services. Contrary to my colleague, I do not see that condition as being vague or an improper delegation of judicial authority, but simply as a delegation of an administrative function.

43 In her reasons, Steel J.A. refers to *R. v. Tanner*, [1983] 6 W.W.R. 208 (Man. Prov. Ct.). It is instructive, in fact, to set out what Allen P.J. wrote with respect to the issue of delegation (at pp. 213-14):

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 these 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.

44 Conditions similar to the one being questioned have either been ordered or approved by other appellate courts. In *R. v. Grant* (1990), 105 A.R. 304 (C.A.), Hetherington J.A., in writing for the court, imposed the following condition on a probation order (at para. 3):

Accordingly, we allow the appeal and substitute for the sentence of imprisonment imposed by the trial judge a sentence of one day. We direct further that this woman is to be on probation for a period of six months. We add the following to the usual conditions of probation:

- (1) The appellant is to report as required by her probation officer;
- (2) She is to continue to cooperate with Social Services as long as her probation officer and social worker feel is necessary; and
- (3) She is to take the anger management course referred to by her counsel.

45 In the more recent decision of *R. v. Thompson (B.W.)* (2003), 183 B.C.A.C. 42, 2003 BCCA 308, Braidwood J.A. stated (at para. 19):

Accordingly, in these circumstances, I would grant leave to appeal, and I would set aside the judgment below and substitute a sentence of three months, which I am told will mean that he would be immediately released, plus the 24 months probation which was given below in the same terms therein. Those terms should also include that he will attend at the Surfside Recovery House, obey its rules and cooperate in the treatment provided.

46 If the issue really comes down to one of vagueness in the condition, I, contrary to my colleague, do not find the condition to be so vague that the accused cannot know what he can or cannot do. Specifically, he has to cooperate with the directions of COHROU. While it is not known in the minute details of everyday life what the COHROU directions might be, I am prepared to accept, as Allen P.J. did in *Tanner*, that judges have to defer day-to-day supervision to those who are more experienced and full-time employees in the field of rehabilitation.

47 Probation programs come and go, and their legitimate practices, rules and procedures, no doubt, change also. Accordingly, and perhaps pragmatically, a great many probation orders routinely order an accused to cooperate, follow or obey the directions of probation officers or other programs. I find such a condition to be an acceptable delegation of an administrative function.

48 In the result, I would also allow the leave being sought, but would dismiss the appeal.

J.A.

Tab 19:

R. v. Yumnu, 2012 SCC 73

Ibrahim Yumnu *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Canadian Civil Liberties Association,
British Columbia Civil Liberties Association,
Ontario Crown Attorneys' Association,
Information and Privacy Commissioner
of Ontario, David Asper Centre for
Constitutional Rights and Criminal Lawyers'
Association** *Intervenors*

- and -

Vinicio Cardoso *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Canadian Civil Liberties Association,
British Columbia Civil Liberties Association,
Ontario Crown Attorneys' Association,
Information and Privacy Commissioner
of Ontario, David Asper Centre for
Constitutional Rights and Criminal Lawyers'
Association** *Intervenors*

- and -

Tung Chi Duong *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Ibrahim Yumnu *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Association canadienne des libertés
civiles, Association des libertés civiles de
la Colombie-Britannique, Ontario Crown
Attorneys' Association, Commissaire à
l'information et à la protection de la vie
privée de l'Ontario, David Asper Centre for
Constitutional Rights et Criminal Lawyers'
Association** *Intervenants*

- et -

Vinicio Cardoso *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Association canadienne des libertés
civiles, Association des libertés civiles de
la Colombie-Britannique, Ontario Crown
Attorneys' Association, Commissaire à
l'information et à la protection de la vie
privée de l'Ontario, David Asper Centre for
Constitutional Rights et Criminal Lawyers'
Association** *Intervenants*

- et -

Tung Chi Duong *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

Attorney General of Alberta, Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Ontario Crown Attorneys' Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights and Criminal Lawyers' Association *Interveners*

Procureur général de l'Alberta, Association canadienne des libertés civiles, Association des libertés civiles de la Colombie-Britannique, Ontario Crown Attorneys' Association, Commissaire à l'information et à la protection de la vie privée de l'Ontario, David Asper Centre for Constitutional Rights et Criminal Lawyers' Association *Intervenants*

INDEXED AS: R. v. YUMNU

2012 SCC 73

File Nos.: 34090, 34091, 34340.

2012: March 14 and 15; 2012: December 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Jurors — Selection — Appellants convicted of first degree murder and conspiracy to commit murder — Prior to jury selection, Crown requesting that police conduct criminal record checks of prospective jurors and also provide comments on whether any prospective jurors were “disreputable persons” — None of the information received in response by Crown disclosed to defence — Whether it was appropriate to seek such information — Whether there should have been disclosure of same — Whether there is a reasonable possibility that such conduct affected trial fairness or gave rise to an appearance of unfairness, such that a miscarriage of justice occurred.

Following a trial in Barrie, Ontario, each of the appellants was convicted of two counts of first degree murder and two counts of conspiracy to commit murder. They appealed from their convictions, raising grounds relating to the adequacy of the trial judge's charge to the jury. While the appeals were under reserve, the appellants became aware of a “jury vetting” practice in the Barrie area, consisting of inquiries conducted by the police, at the behest of the Crown Attorney's office, as to whether potential jurors had a criminal record or whether they were otherwise “disreputable persons” who would be undesirable as jurors. It was

RÉPERTORIÉ : R. c. YUMNU

2012 CSC 73

N^{os} du greffe : 34090, 34091, 34340.

2012 : 14 et 15 mars; 2012 : 21 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Jurés — Sélection — Appellants déclarés coupables de meurtre au premier degré et de complot en vue de commettre un meurtre — Demande de la Couronne présentée à la police avant la sélection du jury pour que cette dernière procède à la vérification du casier judiciaire des candidats jurés et précise s'il s'agissait de « personnes peu recommandables » — Aucun des renseignements reçus par le ministère public n'a été communiqué à la défense — Une telle demande était-elle acceptable? — Ces renseignements auraient-ils dû être communiqués? — Existait-il une possibilité raisonnable qu'une telle conduite ait nui à l'équité du procès ou ait donné lieu à une apparence d'iniquité entraînant une erreur judiciaire?

À la suite d'un procès instruit à Barrie, en Ontario, chacun des appelants a été déclaré coupable sur deux chefs de meurtre au premier degré et sur deux chefs de complot en vue de commettre un meurtre. Ils ont interjeté appel de leur déclaration de culpabilité, faisant valoir des moyens fondés sur le caractère adéquat de l'exposé du juge du procès au jury. Alors que les appels étaient en délibéré, les appelants ont pris connaissance d'une pratique d'« évaluation des candidats jurés » ayant cours dans la région de Barrie, qui consistait en des vérifications effectuées par la police, à la demande du bureau des procureurs de la Couronne, pour savoir

ascertained that in the present case, vetting of the jury lists by the police in response to the Crown's request netted information about 10 individuals who remained in the pool of prospective jurors at the peremptory challenge stage of the proceedings. None of this information was shared with the defence. The appeals were reopened to consider evidence and arguments concerning the propriety of the vetting practice and its impact on the appellants' trial. The Court of Appeal dismissed all three appeals. With respect to the ground of appeal related to jury vetting, the Court of Appeal found that the Crown had failed to disclose information obtained from the jury vetting process that might have assisted the appellants in the exercise of their peremptory challenges, but it was not satisfied that the appellants suffered any prejudice from the Crown's failure to meet its disclosure obligations. The Court of Appeal held that there was no basis to conclude that the Crown's failure to disclose caused actual unfairness in the peremptory challenge process, or that the jury vetting practice created an appearance of unfairness.

Held: The appeals should be dismissed.

Jury vetting by the Crown and police gives rise to a number of concerns. First is the prospect of the Crown and police joining forces to obtain a jury favourable to their cause. Second is the fundamental precept of our justice system that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". Third is juror privacy. There are, however, countervailing interests at play that warrant some limited checking and some minimal intrusions into the private lives of potential jurors. Only those persons eligible to serve as jurors should be permitted to participate in the process. Under provincial statutes and the *Criminal Code*, a potential juror's criminal antecedents, and in some provinces his or her pending charges, may render that person ineligible for jury duty or result in his or her removal from the jury pool following a successful challenge for cause. Self-reporting is one way of screening potential jurors, but it has proved to be less than satisfactory. Accordingly, absent legislation to the contrary, the authorities should be permitted to do criminal record checks on potential jurors to determine whether they are eligible to serve as jurors. In addition, in those provinces where the eligibility criteria cover persons who have been charged with a criminal offence, this

si les candidats jurés avaient un casier judiciaire ou s'il s'agissait de « personnes peu recommandables » dont le ministère public ne voudrait pas comme jurés. Il a été déterminé que l'évaluation des tableaux des jurés effectuée en l'espèce par la police en réponse à la demande de la Couronne avait permis d'obtenir des renseignements au sujet de 10 personnes qui demeuraient inscrites au tableau des candidats jurés à l'étape des récusations péremptoires du processus. Ces renseignements n'ont pas été communiqués à la défense. Les appels ont été rouverts pour que soient examinés des éléments de preuve et des arguments concernant la légitimité de la pratique de l'évaluation et son incidence sur le procès des appelants. La Cour d'appel a rejeté les trois appels. Quant au moyen d'appel fondé sur l'évaluation, elle a conclu que le ministère public avait omis de communiquer des renseignements, obtenus lors de l'évaluation des candidats jurés, qui auraient pu aider les appelants à exercer leur droit de récusation péremptoire, mais elle n'était pas convaincue que les appelants avaient subi un préjudice du fait que le ministère public ne s'était pas acquitté de ses obligations de communication. Selon la Cour d'appel, il n'y avait pas de raison de conclure que l'omission du ministère public de communiquer des renseignements avait entraîné l'iniquité du processus de récusation péremptoire ou que la pratique de l'évaluation des candidats jurés créait une apparence d'iniquité.

Arrêt : Les pourvois sont rejetés.

L'évaluation des candidats jurés par le ministère public et la police suscite certaines préoccupations. Premièrement, il y a la perspective que le ministère public et la police unissent leurs efforts afin d'obtenir un jury favorable à leur cause. Deuxièmement, il y a le précepte fondamental de notre système de justice selon lequel « il est essentiel que non seulement justice soit rendue, mais également que justice paraisse manifestement et indubitablement être rendue ». Troisièmement, il y a la vie privée des jurés. Cependant, des intérêts opposés entrent en jeu et justifient quelques vérifications limitées et une intrusion minime dans la vie privée des candidats jurés. Seules les personnes habiles à remplir les fonctions de juré devraient être autorisées à participer au processus. Aux termes de lois provinciales et du *Code criminel*, les antécédents criminels d'un candidat juré — et, dans certaines provinces, les accusations qui pèsent contre lui — peuvent le rendre inhabile à remplir les fonctions de juré ou entraîner son retrait du bassin des candidats jurés par suite d'une récusation motivée. La déclaration volontaire est une manière d'écarter des candidats jurés, mais elle ne s'est pas révélée très satisfaisante. Par conséquent, sauf disposition contraire de la loi, les autorités devraient pouvoir vérifier le casier

is also something the authorities may properly check for. It is thus permissible for the Crown, with the assistance of the police, to do limited background checks using multiple police databases to identify potential jurors who, by virtue of their criminal conduct, are not eligible for jury duty. The imbalance resulting from the defence's inability to conduct such searches is overcome by the disclosure obligations placed on the Crown. Information received by the Crown that is relevant to the jury selection process must be turned over to the defence, thereby restoring the balance. In return, defence counsel, as officers of the court, must make disclosure to both the court and Crown counsel where they know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty or cannot serve on a particular case due to matters of obvious partiality.

When it is discovered at the appeal stage that information about prospective jurors which should have been disclosed at trial was not disclosed, persons who seek a new trial on the basis that this non-disclosure of information deprived them of their s. 7 *Charter* right to a fair trial must, at a minimum, establish that (1) the Crown failed to disclose information relevant to the selection process that it was obliged to disclose; and (2) had the requisite disclosure been made, there is a reasonable possibility that the jury would have been differently constituted. In addition to these two steps, in the event the jury would have been differently constituted, it may be that the Crown should then have the opportunity to show, on balance, that the jury was nonetheless impartial.

With respect to the appearance of unfairness, there must be conduct on the part of the Crown and the police, within and surrounding the jury selection process, that would constitute a serious interference with the administration of justice and offend the community's sense of fair play and decency. When conduct of that nature is found to exist, it matters not that the accused may otherwise have had a fair trial; nor is it necessary to find that the accused may have been wrongfully convicted. It is the conduct itself that gives rise to a miscarriage of justice and demands that a new trial be ordered.

judiciaire des candidats jurés afin de déterminer s'ils sont habiles à remplir les fonctions de juré. En outre, dans les provinces où les critères d'admissibilité visent les personnes qui ont été accusées d'une infraction criminelle, les autorités peuvent également vérifier ce fait à juste titre. Le ministère public est donc autorisé à effectuer, avec l'aide de la police, des vérifications limitées des antécédents au moyen de multiples bases de données de cette dernière afin d'identifier les candidats jurés qui, en raison de leur conduite criminelle, sont inhabiles à remplir les fonctions de juré. Tout déséquilibre engendré par l'impossibilité pour la défense de procéder à pareilles vérifications est compensé par les obligations de communication qui incombent au ministère public. Les renseignements reçus par le ministère public qui sont pertinents pour le processus de sélection des jurés doivent être transmis à la défense, ce qui rétablit l'équilibre. Pour sa part, l'avocat de la défense, en tant qu'auxiliaire judiciaire, communique les renseignements qu'il détient à la cour ainsi qu'au ministère public s'il sait ou a de bonnes raisons de croire qu'un candidat juré s'est livré à des activités criminelles qui le rendent inhabile à remplir les fonctions de juré ou ne peut siéger à l'instruction d'un procès donné pour des raisons de partialité évidente.

Lorsqu'on découvre à l'étape de l'appel que des renseignements concernant des candidats jurés n'ont pas été communiqués lors du procès alors qu'ils auraient dû l'être, ceux qui sollicitent la tenue d'un nouveau procès au motif que la non-communication les a privés de leur droit à un procès équitable garanti par l'art. 7 de la *Charte* doivent établir, à tout le moins, (1) que le ministère public n'a pas communiqué des renseignements pertinents pour le processus de sélection qu'il était tenu de communiquer; (2) que si la communication avait été faite dans les règles, il existe une possibilité raisonnable que le jury ait été composé différemment. Outre ces deux étapes, dans l'éventualité où le jury aurait été composé différemment, le ministère public se verrait alors accorder l'occasion de démontrer, suivant la prépondérance des probabilités, que le jury a néanmoins été impartial.

Quant à l'apparence d'iniquité, il faut de la part du ministère public et de la police une conduite, tant dans le cadre du processus de sélection des jurés que dans tout ce qui le concerne, qui constituerait une entrave sérieuse à l'administration de la justice et heurterait le sens du franc-jeu et de la décence qu'a la société. Lorsque les tribunaux concluent à l'existence d'une telle conduite, il importe peu que l'accusé ait subi un procès équitable; il n'est pas non plus nécessaire qu'ils concluent que l'accusé a été déclaré coupable à tort. C'est la conduite même qui est à l'origine de l'erreur judiciaire et qui commande la tenue d'un nouveau procès.

In the case at bar, the Court of Appeal acted as a court of first instance in respect of the jury vetting issue. In these circumstances, its findings, like those of a trial court, are entitled to deference. On the issue of trial fairness, there is no basis for interfering with the findings of the Court of Appeal on the impact — or the lack of impact — that the jury vetting practice had on the jury selection process. Although the Crown failed in its disclosure obligations, as found by the Court of Appeal, there was no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from the vetting process been disclosed. The appellants received a fair trial by an impartial jury.

As for the appearance of unfairness and the suggestion that the verdicts are the product of a miscarriage of justice, although aspects of the Crown's conduct were improper and should not be repeated, what occurred here did not constitute a serious interference with the administration of justice, nor was it so offensive to the community's sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice. The record checks were carried out in good faith and there was no attempt on the part of the police or the Crown to obtain a favourable jury. There is no basis for ordering a new trial.

Cases Cited

Referred to: *R. v. Latimer*, [1997] 1 S.C.R. 217; *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828.

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Canadian Charter of Rights and Freedoms, ss. 7, 11(d).
Criminal Code, R.S.C. 1985, c. C-46, ss. 626(1), 632(a) to (c), 633, 634, 635, 638(1)(a) to (f).
Juries Act, R.S.O. 1990, c. J.3, ss. 4(b) [am. 2009, c. 33, Sch. 2, s. 38(1)], 18.2 [ad. *idem*, s. 38(2)], 20.
Juries Act, S.N.S. 1998, c. 16, s. 4(e).
Jurors Act, R.S.Q., c. J-2, s. 4(j).
Jury Act, C.C.S.M. c. J30, s. 3(p), (r).
Jury Act, R.S.A. 2000, c. J-3, s. 4(h)(ii).
Jury Act, R.S.B.C. 1996, c. 242, s. 3(1)(q).
Jury Act, R.S.N.W.T. 1988, c. J-2, s. 5(a).
Jury Act, R.S.N.W.T. (Nu.) 1988, c. J-2, s. 5(a).
Jury Act, R.S.P.E.I. 1988, c. J-5.1, s. 5(i).
Jury Act, R.S.Y. 2002, c. 129, s. 5(a), (b).
Jury Act, S.N.B. 1980, c. J-3.1, s. 3(r).

En l'espèce, la Cour d'appel a agi comme un tribunal de première instance relativement à la question de l'évaluation des candidats jurés. Dans ce contexte, ses conclusions, à l'instar de celles d'un tribunal de première instance, commandent la déférence. En ce qui concerne l'équité du procès, il n'y a aucune raison de modifier les conclusions de la Cour d'appel relatives à l'incidence — ou à l'absence d'incidence — que l'évaluation des candidats jurés a eue sur le processus de sélection des jurés. Bien que le ministère public ait manqué à ses obligations de communication, il n'existait, selon la Cour d'appel, aucune possibilité raisonnable que le jury ait été composé différemment si les renseignements pertinents issus de l'évaluation avaient été fournis à la défense. Les appelants ont bénéficié d'un procès équitable devant un jury impartial.

Quant à l'apparence d'iniquité et à l'argument selon lequel les verdicts sont le fruit d'une erreur judiciaire, bien que certains aspects de la conduite du ministère public étaient inappropriés et ne devraient pas être répétés, ce qui s'est passé en l'espèce ne constituait pas une entrave sérieuse à l'administration de la justice, ni ne heurtait le sens du franc-jeu et de la décence qu'a la société au point où la procédure devrait être annulée pour cause d'erreur judiciaire. La vérification des dossiers a été menée de bonne foi et ni la police ni le ministère public n'ont tenté d'obtenir un jury favorable. Il n'y a aucune raison d'ordonner la tenue d'un nouveau procès.

Jurisprudence

Arrêts mentionnés : *R. c. Latimer*, [1997] 1 R.C.S. 217; *R. c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. c. Dixon*, [1998] 1 R.C.S. 244; *R. c. Taillefer*, 2003 CSC 70, [2003] 3 R.C.S. 307; *R. c. Davey*, 2012 CSC 75, [2012] 3 R.C.S. 828.

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Code criminel, L.R.C. 1985, ch. C-46, art. 626(1), 632(a) à c), 633, 634, 635, 638(1)(a) à f).
Juries Act, S.N.S. 1998, ch. 16, art. 4(e).
Jury Act, R.S.A. 2000, ch. J-3, art. 4h)(ii).
Jury Act, R.S.B.C. 1996, ch. 242, art. 3(1)(q).
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Loi sur le jury, L.R.Y. 2002, ch. 129, art. 5a), b).
Loi sur les jurés, C.P.L.M. ch. J30, art. 3p), r).
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APPEALS from a judgment of the Ontario Court of Appeal (Weiler, Gillese and Watt J.J.A.), 2010 ONCA 637, 269 O.A.C. 48, 260 C.C.C. (3d) 421, [2010] O.J. No. 4163 (QL), 2010 CarswellOnt 7383, upholding the convictions of the three accused for first degree murder and conspiracy to commit murder. Appeals dismissed.

Gregory Lafontaine, Vincenzo Rondinelli and Lori Anne Thomas, for the appellant Ibrahim Yumnu.

Catriona Verner and Kristin Bailey, for the appellant Vinicio Cardoso.

Timothy E. Breen, for the appellant Tung Chi Duong.

Michal Fairburn, Deborah Krick, John S. McInnes and Susan Magotiaux, for the respondent.

Frank Addario, for the intervener the Canadian Civil Liberties Association.

Nader R. Hasan and Gerald Chan, for the intervener the British Columbia Civil Liberties Association.

Paul J. J. Cavalluzzo and Shaun O'Brien, for the intervener the Ontario Crown Attorneys' Association.

Loi sur les jurys, L.R.O. 1990, ch. J.3, art. 4b) [mod. 2009, ch. 33, ann. 2, art. 38(1)], 18.2 [aj. *idem*, art. 38(2)], 20.
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POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (les juges Weiler, Gillese et Watt), 2010 ONCA 637, 269 O.A.C. 48, 260 C.C.C. (3d) 421, [2010] O.J. No. 4163 (QL), 2010 CarswellOnt 7383, qui a confirmé les déclarations de culpabilité prononcées contre les trois accusés pour meurtre au premier degré et complot en vue de commettre un meurtre. Pourvois rejetés.

Gregory Lafontaine, Vincenzo Rondinelli et Lori Anne Thomas, pour l'appellant Ibrahim Yumnu.

Catriona Verner et Kristin Bailey, pour l'appellant Vinicio Cardoso.

Timothy E. Breen, pour l'appellant Tung Chi Duong.

Michal Fairburn, Deborah Krick, John S. McInnes et Susan Magotiaux, pour l'intimée.

Frank Addario, pour l'intervenante l'Association canadienne des libertés civiles.

Nader R. Hasan et Gerald Chan, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Paul J. J. Cavalluzzo et Shaun O'Brien, pour l'intervenante Ontario Crown Attorneys' Association.

William S. Challis and Stephen McCammon, for the intervener the Information and Privacy Commissioner of Ontario.

Cheryl Milne and Lisa Austin, for the intervener the David Asper Centre for Constitutional Rights.

Anthony Moustacalis and Peter Thorning, for the intervener the Criminal Lawyers' Association.

Maureen McGuire, for the intervener the Attorney General of Alberta (34340).

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] These appeals require the Court to decide whether it is permissible for the Crown, in conjunction with the police, to conduct background checks on prospective jurors through the use of police databases — and if so, to what extent and for what purposes.

[2] On December 22, 2005, following a nine-month trial before Stong J. of the Ontario Superior Court of Justice and a jury, each of the appellants — Ibrahim Yumnu, Vinicio Cardoso, and Tung Chi Duong — was convicted of two counts of first degree murder and two counts of conspiracy to commit murder.

[3] All three appellants appealed from their convictions to the Ontario Court of Appeal. Their appeals were heard together on April 6 and 7, 2009 and on February 1, 2010. At the proceedings in April 2009, the appellants raised grounds of appeal relating to the adequacy of the trial judge's charge to the jury. At the end of the hearing on April 7, the court reserved its judgment.

[4] Several months later, while the appeals remained under reserve, the appellants became aware of a "jury vetting" practice that the Crown

William S. Challis et Stephen McCammon, pour l'intervenant le Commissaire à l'information et à la protection de la vie privée de l'Ontario.

Cheryl Milne et Lisa Austin, pour l'intervenant David Asper Centre for Constitutional Rights.

Anthony Moustacalis et Peter Thorning, pour l'intervenante Criminal Lawyers' Association.

Maureen McGuire, pour l'intervenant le procureur général de l'Alberta (34340).

Version française du jugement de la Cour rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Pour trancher les présents pourvois, la Cour est appelée à déterminer si le ministère public est autorisé à vérifier, de concert avec la police, les antécédents des candidats jurés au moyen des bases de données de cette dernière — et, si oui, dans quelle mesure et à quelles fins.

[2] Le 22 décembre 2005, à la suite d'un procès de neuf mois devant le juge Stong de la Cour supérieure de justice de l'Ontario et un jury, chacun des appelants — Ibrahim Yumnu, Vinicio Cardoso et Tung Chi Duong — a été déclaré coupable de deux chefs d'accusation de meurtre au premier degré et de deux chefs d'accusation de complot en vue de commettre un meurtre.

[3] Les trois appelants ont interjeté appel de leurs déclarations de culpabilité devant la Cour d'appel de l'Ontario. Leurs pourvois ont été entendus ensemble les 6 et 7 avril 2009 et le 1^{er} février 2010. Lors de l'audience tenue en avril 2009, les appelants ont fait valoir des moyens d'appel fondés sur le caractère adéquat de l'exposé du juge du procès au jury. À la fin de l'audience, le 7 avril, la cour a mis l'affaire en délibéré.

[4] Plusieurs mois plus tard, alors que les appels étaient toujours en délibéré, les appelants ont pris connaissance d'une pratique d'[TRADUCTION]

Attorney's office in Barrie, Ontario (the locale of the appellants' trial) and police forces throughout the Judicial District of Simcoe County (the geographic area from which the jurors were selected) had apparently been following for some years. The vetting consisted of inquiries conducted by the police, at the behest of the Crown Attorney's office, as to whether potential jurors had a criminal record or whether they were otherwise "disreputable persons" who would be undesirable jurors.

[5] Once the widespread nature of this practice became known, inquiries were made and the appellants ordered transcripts of the jury selection process. The parties then produced a record, including affidavits upon which cross-examinations were conducted, and the appeals were reopened.

[6] On February 1, 2010, the Court of Appeal heard arguments concerning the propriety of the vetting practice, including: its impact on the jury selection process and the composition of the jury; its impact on trial fairness; and, more broadly, its impact on the integrity of the criminal justice system and the administration of justice as a whole.

[7] On October 5, 2010, the Court of Appeal (Weiler, Gillese and Watt J.J.A.) released comprehensive reasons for judgment dismissing all three appeals (2010 ONCA 637, 269 O.A.C. 48). Writing for the court, Watt J.A. concluded that certain features of the jury vetting process were inappropriate and should not be repeated. Other aspects were acceptable, subject to the Crown complying with its disclosure obligations.

[8] In accordance with a concession from the Crown on appeal, Watt J.A. found that the Crown at trial had failed to disclose information obtained from the jury vetting process that might have assisted the appellants in the exercise of their peremptory challenges. In the end, however, he was

« évaluation des candidats jurés » à laquelle se livraient apparemment le bureau des procureurs de la Couronne de Barrie, en Ontario (le lieu du procès des appelants), et les corps policiers du district judiciaire du comté de Simcoe (la zone géographique d'où sont issus les jurés) depuis plusieurs années. L'évaluation consistait en des vérifications effectuées par la police, à la demande du bureau des procureurs de la Couronne, pour savoir si les candidats jurés avaient un casier judiciaire ou s'il s'agissait de [TRADUCTION] « personnes peu recommandables » dont le ministère public ne voudrait pas comme jurés.

[5] Après avoir été mis au fait du caractère largement répandu de cette pratique, les appelants ont fait des vérifications et ont demandé la transcription du processus de sélection des jurés. Les parties ont ensuite produit un dossier, y compris des affidavits sur la base desquels des contre-interrogatoires ont été menés, et les appels ont été rouverts.

[6] Le 1^{er} février 2010, la Cour d'appel a entendu les plaidoiries des parties concernant la légitimité de la pratique de l'évaluation, notamment : son incidence sur le processus de sélection des jurés et la composition du jury; son incidence sur l'équité du procès; et, de façon plus générale, son incidence sur l'intégrité du système de justice pénale et l'administration de la justice dans son ensemble.

[7] Le 5 octobre 2010, la Cour d'appel (les juges Weiler, Gillese et Watt) a publié les motifs détaillés du jugement par lequel elle a rejeté les trois appels (2010 ONCA 637, 269 O.A.C. 48). S'exprimant au nom de la cour, le juge Watt a conclu que certains aspects du processus d'évaluation des candidats jurés étaient inappropriés et ne devraient pas être répétés. D'autres aspects étaient acceptables, à condition que le ministère public s'acquitte de ses obligations de communication.

[8] En conformité avec une concession de la part du ministère public en appel, le juge Watt a conclu que celui-ci avait omis de communiquer au procès des renseignements, obtenus lors de l'évaluation des candidats jurés, qui auraient pu aider les appelants à exercer leur droit de récusation péremptoire. Au

not satisfied that the appellants suffered any prejudice from the Crown's failure to meet its disclosure obligations. In his view, there was no reasonable possibility that the jury would have been differently constituted had disclosure been made; nor was there a basis for concluding that the Crown's failure to disclose caused actual unfairness in the peremptory challenge process. Finally, it could not be said that the jury vetting practice created an appearance of unfairness that cast a pall over the entire proceeding. Accordingly, Watt J.A. rejected this ground of appeal. He also rejected the grounds relating to the alleged errors in the trial judge's final instructions to the jury.

[9] Before this Court, the appellants no longer challenge the adequacy of the trial judge's instructions to the jury. Rather, the appeals centre on the jury vetting issue and the Court of Appeal's treatment of it.

[10] In a nutshell, the appellants complain that the jury vetting undertaken by the police, at the behest of the Crown, was highly improper. It compromised the integrity of the jury selection process and resulted in a jury that, if not favourably disposed to the Crown, might well have been differently composed had the appellants received the disclosure to which they were entitled.

[11] On a more fundamental level, the appellants contend that the jury vetting conducted by the police, in conjunction with the Crown, strikes at the very heart of our criminal justice system and impinges on the sanctity of trial by jury that forms such a vital part of it. They say it raises the spectre of jury tampering and as such, it deserves this Court's unqualified condemnation.

[12] One of the appellants equates what occurred here to the situation in *R. v. Latimer*, [1997] 1

bout du compte, cependant, il n'était pas convaincu que les appelants avaient subi un préjudice du fait que le ministère public ne s'était pas acquitté de ses obligations de communication. Selon lui, il n'existait aucune possibilité raisonnable que le jury ait été composé différemment s'il y avait eu communication; il n'y avait pas non plus de raison de conclure que l'omission du ministère public de communiquer des renseignements avait entraîné l'iniquité du processus de récusation péremptoire. Enfin, selon la Cour d'appel, on ne pouvait pas dire que la pratique de l'évaluation des candidats jurés ait créé une apparence d'iniquité qui ait entaché toute l'instance. En conséquence, le juge Watt a rejeté ce moyen d'appel. Il a également rejeté les moyens d'appel se rapportant aux erreurs qui auraient été commises dans les directives finales du juge du procès au jury.

[9] Devant la Cour, les appelants ne contestent plus le caractère adéquat des directives du juge du procès au jury. Les pourvois portent plutôt sur la question de l'évaluation des candidats jurés et sur la façon dont elle a été traitée par la Cour d'appel.

[10] En résumé, les appelants se plaignent que l'évaluation en cause, effectuée par la police à la demande du ministère public, était tout à fait abusive. Selon eux, elle a compromis l'intégrité du processus de sélection des jurés et il en a résulté un jury qui, sans nécessairement être favorable au ministère public, aurait très bien pu être composé différemment si les renseignements auxquels les appelants avaient droit leur avaient été communiqués.

[11] À un niveau plus fondamental, les appelants soutiennent que l'évaluation des candidats jurés effectuée par la police, de concert avec le ministère public, va à l'encontre de l'essence même de notre système de justice pénale et influe sur le caractère sacré du procès devant jury qui joue un rôle vital dans ce système. Ils affirment que cela fait planer le spectre de la subornation de jury et que, à ce titre, cela mérite la condamnation absolue de la Cour.

[12] Un des appelants assimile les faits de l'es-pèce à la situation dans *R. c. Latimer*, [1997] 1

S.C.R. 217, where the police, with the approval of the Crown, approached prospective jurors and asked them to complete a questionnaire setting out their views on a number of issues pertinent to the case. In *Latimer*, this Court found that the conduct of the Crown constituted a flagrant abuse of process and an interference with the administration of justice. This gave rise to an appearance of unfairness and necessitated a new trial. According to the appellants, the conduct of the police and the Crown in the present case led to an appearance of unfairness and resulted in a miscarriage of justice. Hence, they request a new trial.

[13] For the reasons that follow, I am unable to accede to the appellants' arguments.

[14] On the issue of trial fairness, I see no basis for interfering with the findings of the Court of Appeal on the impact — or more accurately, the lack of impact — that the jury vetting practice had on the jury selection process. The appellants received a fair trial by an impartial jury.

[15] As for the appearance of unfairness and the suggestion that the verdicts are the product of a miscarriage of justice, I readily acknowledge that aspects of the Crown's conduct were improper and should not be repeated. Nonetheless, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community's sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.

[16] It follows, in my view, that there is no basis for ordering a new trial. I would accordingly dismiss the appeals.

II. Background

[17] The situation here is somewhat unique in that the Court of Appeal acted as a court of first instance in respect of the jury vetting issue. By that, I mean that the evidence pertinent to that issue

R.C.S. 217, affaire dans laquelle la police, avec l'approbation du ministère public, a demandé aux candidats jurés de remplir un questionnaire pour exposer leurs opinions sur un certain nombre de questions pertinentes dans cette affaire. Dans l'arrêt *Latimer*, la Cour a conclu que la conduite du ministère public constituait un abus de procédure flagrant et une entrave à l'administration de la justice. Cela créait une apparence d'iniquité et nécessitait la tenue d'un nouveau procès. Selon les appelants, la conduite de la police et du ministère public en l'espèce a engendré une apparence d'iniquité et entraîné une erreur judiciaire. Par conséquent, ils demandent la tenue d'un nouveau procès.

[13] Pour les motifs exposés ci-après, je ne puis souscrire aux arguments des appelants.

[14] En ce qui concerne l'équité du procès, je ne vois aucune raison de modifier les conclusions de la Cour d'appel relatives à l'incidence — ou, plus exactement, l'absence d'incidence — que l'évaluation des candidats jurés a eue sur le processus de sélection des jurés. Les appelants ont bénéficié d'un procès équitable devant un jury impartial.

[15] Quant à l'apparence d'iniquité et à l'argument selon lequel les verdicts sont le fruit d'une erreur judiciaire, je reconnais volontiers que certains aspects de la conduite du ministère public étaient inappropriés et ne devraient pas être répétés. Néanmoins, je ne suis pas persuadé que ce qui s'est passé en l'espèce constituait une entrave sérieuse à l'administration de la justice, ni que cela heurtait le sens du franc-jeu et de la décence qu'a la société au point où la procédure devrait être annulée pour cause d'erreur judiciaire.

[16] Il s'ensuit, selon moi, qu'il n'y a aucune raison d'ordonner la tenue d'un nouveau procès. Par conséquent, je suis d'avis de rejeter les pourvois.

II. Contexte

[17] La situation en l'espèce est plutôt unique du fait que la Cour d'appel a agi comme un tribunal de première instance relativement à la question de l'évaluation des candidats jurés. Je veux dire par

was assembled by the parties and the court made its findings of fact and carried out its legal analysis on the basis of that record. In these circumstances, the findings of the Court of Appeal, like those of a trial court, are entitled to deference.

[18] The decision of the Court of Appeal is replete with detail and I see no need to replicate the court's thorough review of the background facts, nor its comprehensive review of the jury selection process as a whole.

[19] The jury vetting practice at issue occurred in the context of the appellants' joint trial on two counts of first degree murder and two counts of conspiracy to commit murder. The trial was conducted in Barrie, Ontario. It commenced in January 2005 and lasted nine months.

[20] On December 13, 2004, prior to the commencement of the jury selection process, someone from the Court Services Branch of the Ministry of the Attorney General for Ontario provided a copy of the jury panel lists to the Crown Attorney's office in Barrie. The person responsible for providing the lists failed to comply with s. 20 of the *Juries Act*, R.S.O. 1990, c. J.3, which forbids disclosure of jury panel lists "until ten days before the sittings of the court for which the panel has been drafted". The return date of the first panel in this case was set for January 24, 2005.

[21] Upon receiving the lists, an administrative assistant in the Crown Attorney's office sent a copy of them to every police force with jurisdiction in the Judicial District of Simcoe County. Accompanying the lists was a standard-form memorandum which read as follows:

Please check the attached jury panel list, for the persons listed in your locality, and advise if any of them have criminal records. We are not able to provide birth dates.

là que la preuve se rapportant à cette question a été réunie par les parties et que la cour a tiré ses conclusions de fait et a procédé à l'analyse juridique à la lumière de ce dossier. Dans ce contexte, les conclusions de la Cour d'appel, à l'instar de celles d'un tribunal de première instance, commandent la déférence.

[18] L'arrêt de la Cour d'appel regorge de détails et il me paraît inutile de reprendre l'examen approfondi du contexte factuel auquel elle s'est livrée ou son exposé exhaustif du processus de sélection des jurés dans son ensemble.

[19] La pratique en cause, soit l'évaluation des candidats jurés, a eu cours dans le cadre du procès conjoint des appelants relativement à deux chefs d'accusation de meurtre au premier degré et à deux chefs d'accusation de complot en vue de commettre un meurtre. Le procès s'est déroulé à Barrie, en Ontario. Il a débuté en janvier 2005 et a duré neuf mois.

[20] Le 13 décembre 2004, avant le début du processus de sélection des jurés, un employé de la Division des services aux tribunaux du ministère du Procureur général de l'Ontario a fourni une copie des tableaux des jurés au bureau des procureurs de la Couronne de Barrie. La personne chargée de fournir les tableaux n'a pas respecté l'art. 20 de la *Loi sur les jurys*, L.R.O. 1990, ch. J.3, qui interdit la divulgation du tableau des jurés « avant les dix jours précédant la session pour laquelle le tableau a été choisi ». La date de retour du premier tableau des jurés en l'espèce avait été fixée au 24 janvier 2005.

[21] Lorsqu'elle a reçu les tableaux, une adjointe administrative du bureau du procureur de la Couronne en a envoyé une copie à chaque corps policier compétent du district judiciaire du comté de Simcoe. Les tableaux étaient accompagnés d'une note standard qui était libellée comme suit :

[TRADUCTION] Veuillez vérifier le tableau des jurés ci-joint, pour ce qui est des personnes de votre localité qui y sont mentionnées, et nous indiquer si certaines d'entre elles ont un casier judiciaire. Nous ne sommes pas en mesure de vous fournir les dates de naissance.

It would also be helpful if comments could be made concerning any disreputable persons we would not want as a juror. All we can ask is that you do your best considering the lack of information available to us.

Please relay the information by telephone to [the Crown Attorney's telephone number] on or before Wednesday, January 12, 2005.

[22] Information obtained in response to the memorandum was recorded on a copy of the jury panel lists kept at the Crown Attorney's office.

[23] I pause here to note that as of December 14, 2004, when the standard-form memorandum was sent to the various police forces in the Judicial District of Simcoe County, the Criminal Law Division of the Ontario Ministry of the Attorney General had not yet issued a Practice Memorandum on the subject of juror background checks. It was not until April 26, 2005, some four months into the trial, that the *draft* of the Practice Memorandum, referred to as PM [2005] No. 17, was circulated by email to Crown Attorneys throughout the province of Ontario. PM [2005] No. 17 came into effect on March 31, 2006, long after the trial in this matter had been completed, and was circulated to Crown Attorneys, as well as other organizations such as the Criminal Lawyers' Association of Ontario and the Law Society of Upper Canada. The salient features of the Practice Memorandum are reproduced below:

In choosing a jury, both Crown counsel and defence should have access to the same background information material. To that end, results of criminal record checks of potential jurors, if obtained by Crown counsel, should be disclosed to defence counsel. Crown counsel should not request police to undertake any further or other investigation into the list of jurors. Crown counsel should not request police to conduct out-of-court investigations into private aspects of potential jurors' lives.

Any concrete information provided by police to Crown counsel suggesting that a prospective juror may not be

Il serait également utile que vous fassiez des commentaires au sujet des personnes peu recommandables dont nous ne voudrions pas comme jurés. Tout ce que nous vous demandons, c'est de faire de votre mieux compte tenu des renseignements qui nous manquent.

Veuillez transmettre ces renseignements par téléphone au [numéro du procureur de la Couronne] d'ici le mercredi 12 janvier 2005.

[22] Les renseignements obtenus en réponse à la note ont été inscrits sur une copie des tableaux des jurés qui était conservée au bureau des procureurs de la Couronne.

[23] J'ouvre ici une parenthèse pour souligner que le 14 décembre 2004, date à laquelle la note standard a été envoyée aux divers corps policiers du district judiciaire du comté de Simcoe, la Direction des politiques en matière criminelle du ministère du Procureur général n'avait pas encore émis l'avis de pratique (PM) au sujet de la vérification des antécédents des jurés. Ce n'est que le 26 avril 2005, quelque quatre mois après le début du procès, que le *projet* d'avis de pratique, répertorié sous la référence PM [2005] n° 17, a été diffusé par courriel aux procureurs de la Couronne de la province de l'Ontario. Le PM [2005] n° 17 est entré en vigueur le 31 mars 2006, soit bien après la fin de l'instruction de la présente affaire et a été transmis aux procureurs de la Couronne ainsi qu'à d'autres organismes, notamment la Criminal Lawyers' Association of Ontario et le Barreau du Haut-Canada. Les points saillants de l'avis de pratique sont reproduits ci-après :

[TRADUCTION] Pour choisir le jury, le procureur de la Couronne et l'avocat de la défense devraient avoir tous deux accès aux mêmes renseignements concernant les antécédents. À cette fin, les résultats de la vérification du casier judiciaire des candidats jurés, si le procureur de la Couronne les obtient, devraient être communiqués à l'avocat de la défense. Le procureur de la Couronne ne devrait pas demander à la police de mener une enquête complémentaire ou supplémentaire sur les candidats figurant au tableau des jurés. Le procureur de la Couronne ne devrait pas demander à la police de mener des enquêtes extrajudiciaires sur des aspects privés de la vie des candidats jurés.

Tout renseignement concret que la police fournit au procureur de la Couronne qui laisse entendre qu'un

impartial should be disclosed to the defence. If background information relating to a prospective juror raises the issue of whether he/she is able to judge the case without bias, prejudice or partiality, Crown counsel should utilize the challenge for cause process to address these concerns. [Emphasis added.]

[24] The vetting practice undertaken in this case was not new. It had been in place since the late 1990s when it was discovered, in the context of an ongoing jury trial in Barrie, that a person who had been selected as a juror was in the process of serving an intermittent sentence for a hybrid offence (see *R. v. E.A.* (Ont. Ct. (Gen. Div.)), transcript of discussion on January 6, 1998 about jurors serving an intermittent sentence (respondent's authorities, vol. II, Tab 43, at pp. 34-38)). It is unclear whether the Crown in that case had proceeded by way of indictment so as to render the juror ineligible for jury duty under s. 4(b) of the *Juries Act* as it then read. Be that as it may, he had slipped through the cracks and the situation would have proved awkward, to say the least, if his sentencing obligations had prevented him from performing his jury duties.

[25] In the present case, vetting of the jury lists by the police in response to the Crown's memorandum netted information about a number of prospective jurors. For the most part, the information indicated that the person in question had no criminal record. In some instances, the prospective juror was referred to as a "victim/complainant". Other notations identified persons who "possibl[y]" had a criminal record or who may have been involved in a motor vehicle infraction.

[26] None of the information the Crown received about the prospective jurors was shared with the defence — at least not at the selection stage of the process. The record indicates that after the trial judge had excused a host of prospective jurors for reasons of personal hardship, and a challenge for

candidat juré n'est peut-être pas impartial devrait être communiqué à la défense. Si des renseignements concernant les antécédents d'un candidat juré soulèvent la question de savoir s'il est capable de juger l'affaire sans parti pris, préjugé ou partialité, le procureur de la Couronne devrait recourir à la récusation motivée afin de dissiper ces doutes. [Je souligne.]

[24] La pratique de l'évaluation adoptée en l'espèce n'était pas nouvelle. Elle était en place depuis la fin des années 1990, époque où l'on a découvert, durant un procès devant jury à Barrie, qu'une personne qui avait été choisie comme juré était en train de purger une peine discontinuée pour une infraction mixte (voir *R. c. E.A.* (C. Ont. (Div. gén.)), transcription de la discussion du 6 janvier 1998 au sujet des jurés purgeant une peine discontinuée (recueil de sources de l'intimée, vol. II, onglet 43, p. 34-38)). Le dossier dont nous disposons n'indique pas clairement si le ministère public avait intenté la poursuite par mise en accusation ce qui aurait rendu le juré inhabile à être membre d'un jury en application de l'al. 4b) de la *Loi sur les jurys* en vigueur à cette époque. Quoi qu'il en soit, il avait réussi à passer à travers les mailles du filet et la situation aurait été pour le moins embarrassante si les obligations rattachées à sa peine l'avaient empêché de remplir ses fonctions de juré.

[25] En l'espèce, l'évaluation des tableaux des jurés effectuée par la police en réponse à la note du ministère public a permis d'obtenir des renseignements au sujet d'un grand nombre de candidats jurés. Dans la plupart des cas, les renseignements indiquaient que la personne en question n'avait pas de casier judiciaire. Dans certains cas, le candidat juré était désigné [TRADUCTION] « victime/plaignant ». D'autres annotations se rapportaient à des personnes qui avaient [TRADUCTION] « possiblement » un casier judiciaire ou qui avaient peut-être commis une infraction relative à la conduite d'un véhicule à moteur.

[26] Aucun des renseignements qui ont été fournis au ministère public au sujet des candidats jurés n'a été communiqué à la défense — du moins pas à l'étape de la sélection. Selon le dossier, après que le juge du procès a dispensé un grand nombre de candidats jurés pour cause d'inconvénient personnel

cause on the basis of race had run its course, of the prospective jurors who remained in the pool at the peremptory stage of the proceedings, the Crown had information about 10 of them that it should have disclosed to the defence, but did not. Hence, the appellants entered the peremptory challenge phase of the process missing information that might have been useful in exercising their peremptory challenges.

[27] With respect to the 10 people in question, on my review of the record, of the three appellants before us, the appellant Yumnu is the only one who may have used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining to him at the end of the selection process.

III. Findings of the Court of Appeal

[28] As mentioned, the parties assembled a record for the Court of Appeal on the jury selection issue. On the basis of that record, the Court of Appeal made a number of findings that had a direct bearing on the outcome of the appeal. Those findings retain their importance at this stage and they are summarized below.

A. *Issue 1: The Effect of Non-Disclosure on Trial Fairness*

[29] First, the court reviewed the peremptory challenge phase of the process and determined that there was “no reasonable possibility that the jury would have been constituted differently had disclosure [of the pertinent information obtained from the vetting process] been made” (para. 122).

[30] Second, the court found that even though the Crown had not complied with its disclosure obligations, the defence knew or should have known

sérieux, et à la suite d’une demande de récusation motivée fondée sur la race, le ministère public détenait des renseignements sur 10 des candidats jurés qui demeuraient inscrits au tableau à l’étape des récusations péremptoires du processus, renseignements qu’il aurait dû communiquer à la défense, ce qu’il n’a pas fait. Par conséquent, les appelants ont amorcé l’étape des récusations péremptoires du processus privés de renseignements qui auraient pu leur être utiles pour exercer leur droit à ce type de récusation.

[27] En ce qui concerne ces 10 personnes, il ressort de l’examen du dossier que, parmi les trois appelants devant la Cour, M. Yumnu est le seul qui se serait peut-être prévalu d’une récusation péremptoire qu’il aurait pu conserver si les renseignements auxquels il avait droit lui avaient été communiqués. Cela dit, il restait à chacun des appelants, y compris à M. Yumnu, une ou plusieurs récusations péremptoires à la fin du processus de sélection.

III. Les conclusions de la Cour d’appel

[28] Tel qu’il a été mentionné, les parties ont constitué un dossier pour la Cour d’appel relativement à la question de la sélection du jury. À la lumière de ce dossier, la Cour d’appel a tiré un certain nombre de conclusions qui ont eu une incidence directe sur l’issue de l’appel. Ces conclusions conservent toute leur importance à ce stade-ci et elles sont résumées ci-après.

A. *Question 1 : l’effet de la non-communication sur l’équité du procès*

[29] Premièrement, la Cour d’appel s’est penchée sur l’étape des récusations péremptoires du processus et a jugé qu’il n’existait [TRADUCTION] « aucune possibilité raisonnable que le jury ait été composé différemment s’il y avait eu communication [des renseignements pertinents obtenus lors du processus d’évaluation] » (par. 122).

[30] Deuxièmement, la cour a conclu que même si le ministère public ne s’était pas acquitté de ses obligations de communication, la défense était au

about the jury vetting practice no later than six weeks into the trial when the investigating officer's notebook was turned over to defence counsel. The production of the officer's notebook was not an attempt on the Crown's part to belatedly comply with its disclosure obligations. Nonetheless, the notes contained a complete inventory of the checks undertaken by the investigating officer, including the names of prospective jurors and the information he had obtained about them. The notes also revealed that several police databases had been accessed and that information had been obtained about some of the prospective jurors that went beyond the question of whether they had a criminal record.

[31] Against that backdrop, in assessing the impact of the Crown's failure to comply with its disclosure obligations on the overall fairness of the trial process, the court considered it significant that five experienced defence counsel did not raise the issue of non-disclosure with the trial judge, either when they received the officer's notebook or during the seven and a half months of trial that followed. Nor did counsel raise the issue at the outset of the appeal. Moreover, throughout the course of the appeal, trial counsel provided no information about what they knew (or did not know) about the record checks, nor did they offer an explanation for their failure to raise the disclosure issue in a timely fashion. I note parenthetically that the answers to those questions remain unsatisfactory to this day.

[32] In the end, the court refused to give effect to the appellants' submission that their right to a fair trial had been impaired by the failure of the Crown to meet its disclosure obligations. Watt J.A. put the matter succinctly as follows: "In this case, [the appellants] have failed to demonstrate a reasonable possibility that the non-disclosure affected either the outcome of the trial or the overall fairness of the trial process" (para. 107).

courant de la pratique d'évaluation des candidats jurés, ou aurait dû l'être, au plus tard six semaines après le début du procès, lorsque le calepin de l'enquêteur a été remis aux avocats de la défense. La production de ce calepin ne constituait pas une tentative de la part du ministère public de s'acquitter tardivement de ses obligations de communication. Néanmoins, les notes comportaient l'inventaire complet des vérifications effectuées par l'enquêteur, notamment les noms des candidats jurés et les renseignements qu'il avait obtenus à leur sujet. Les notes révélaient également que plusieurs bases de données de la police avaient été consultées et que certains renseignements obtenus au sujet de certains des candidats jurés débordaient le cadre de la question de savoir s'ils avaient un casier judiciaire.

[31] Dans ce contexte, lorsqu'elle a évalué l'incidence de l'omission du ministère public de s'acquitter de ses obligations de communication sur l'équité globale du procès, la cour a jugé significatif le fait que cinq avocats de la défense chevronnés n'ont pas soulevé la question de la non-communication devant le juge du procès, ni lorsqu'ils ont reçu le calepin de l'enquêteur ni durant les sept mois et demi de procès qui ont suivi. Les avocats n'ont pas non plus soulevé la question dès le début de l'appel. En outre, pendant toute la durée de l'appel, les avocats des parties au procès n'ont ni fourni des renseignements concernant ce qu'ils savaient (ou ne savaient pas) au sujet de la vérification des dossiers, ni expliqué pourquoi ils n'avaient pas soulevé la question de la communication en temps opportun. J'ouvre une parenthèse pour souligner que, à ce jour, les réponses à ces questions ne sont toujours pas satisfaisantes.

[32] En fin de compte, la Cour d'appel a refusé de retenir l'argument des appelants selon lequel l'omission du ministère public de s'acquitter de ses obligations de communication avait porté atteinte à leur droit à un procès équitable. Le juge Watt a donné succinctement l'explication que voici : [TRADUCTION] « En l'espèce, [les appelants] n'ont pas démontré l'existence d'une possibilité raisonnable que la non-communication ait influé sur l'issue ou l'équité globale du procès » (par. 107).

B. Issue 2: Appearance of Unfairness

[33] Apart from defence counsel's failure to raise the jury issue with the trial judge, the Court of Appeal made two critical findings concerning the conduct of the Crown and the police.

[34] First, the court found that despite the scope of the Crown's request in the December 14, 2004 memorandum, "the purpose of the police inquiries was to determine whether a prospective juror had a criminal record" (para. 94). Second, the court found that in the circumstances, the conduct of the Crown and the police did not "reveal [a] colourable use of legitimate criminal record checks of prospective jurors to obtain a favourable jury" (para. 95).

[35] In the circumstances, the Court of Appeal declined to order a new trial on the basis of alleged improprieties surrounding the jury selection process. The Crown's conduct, though improper in certain respects, was far less egregious than the conduct engaged in by the Crown and police in *Latimer* — and, in the court's opinion, the jury vetting practice did not create an appearance of unfairness that necessitated a new trial.

IV. Analysis: The Acceptable Bounds of Jury Vetting

[36] Jury vetting by the Crown and police is a risky business. It gives rise to a number of concerns — some more troublesome than others — but all worthy of consideration.

[37] Foremost among the concerns is the prospect of the Crown and police joining forces to obtain a jury favourable to their cause. Nothing could do more harm to the criminal justice system; nothing could more readily bring the administration of justice into disrepute.

B. Question 2 : l'apparence d'iniquité

[33] Mis à part l'omission des avocats de la défense de soulever la question relative au jury devant le juge du procès, la Cour d'appel a tiré deux conclusions cruciales relativement à la conduite du ministère public et de la police.

[34] Premièrement, la cour a conclu que, malgré la portée de la demande du ministère public dans la note du 14 décembre 2004, [TRADUCTION] « les enquêtes policières avaient pour but de déterminer si un candidat juré avait un casier judiciaire » (par. 94). Deuxièmement, la cour a conclu que, dans les circonstances, la conduite du ministère public et de la police ne constituait pas « [une] utilisation détournée des vérifications légitimes du casier judiciaire des candidats jurés afin d'obtenir un jury favorable » (par. 95).

[35] Dans les circonstances, la Cour d'appel a refusé d'ordonner la tenue d'un nouveau procès parce que des irrégularités auraient entaché le processus de sélection des jurés. La conduite du ministère public, même si elle était inappropriée à certains égards, était beaucoup moins grave que la conduite reprochée au ministère public et à la police dans l'affaire *Latimer* — et, selon la cour, la pratique de l'évaluation des candidats jurés ne créait pas une apparence d'iniquité qui nécessitait la tenue d'un nouveau procès.

IV. Analyse : les limites acceptables de l'évaluation des candidats jurés

[36] L'évaluation des candidats jurés par le ministère public et la police est un exercice périlleux. Elle suscite un grand nombre de préoccupations — certaines plus problématiques que d'autres —, mais toutes dignes d'être prises en considération.

[37] Au premier rang des préoccupations, il y a la perspective que le ministère public et la police unissent leurs efforts afin d'obtenir un jury favorable à leur cause. Rien ne pourrait causer un tort plus grand au système de justice pénale; rien ne pourrait davantage déconsidérer l'administration de la justice.

[38] The mere thought of the Crown and the police “checking out” potential jurors carries with it the spectre of jury tampering and the evils associated with it. Care must be taken to guard against this. The integrity of our criminal justice system hangs in the balance.

[39] Closely aligned with the first concern is the fundamental precept of our justice system that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (*per* Lord Hewart C.J. in *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259).

[40] Appearances count. And regardless of the Crown’s good intentions, aligning itself with the police and using their vast resources to investigate potential jurors could be seen by some as incompatible with the Crown’s responsibility, as an officer of the court, to ensure that every accused receives a fair trial. Randomness and representativeness are two of the qualities we look for in juries. Widespread checking could give rise to a suggestion of stereotyping and arbitrariness in the selection process, particularly if it could be shown that peremptory challenges were being used to remove certain types or classes of people who would otherwise be eligible to serve as jurors.

[41] Another concern is juror privacy. Jurors give up much to perform their civic duty. In some instances, serving on a jury can be a difficult and draining experience. Long trials in particular can take a toll on an individual’s personal and professional life.

[42] Jury duty is precisely that — a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused. Once selected, jurors become judges of the facts. Their personal lives at

[38] La seule pensée que le ministère public et la police effectuent des vérifications sur les candidats jurés fait naître le spectre de la subornation de jury et les maux qui lui sont associés. Il faut prendre soin d’éviter cela. L’intégrité de notre système de justice pénale est en jeu.

[39] Le précepte fondamental de notre système de justice selon lequel [TRADUCTION] « il est essentiel que non seulement justice soit rendue, mais également que justice paraisse manifestement et indubitablement être rendue » (comme l’a dit le lord juge en chef Hewart dans *R. c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, p. 259) est étroitement lié au premier sujet de préoccupation.

[40] Les apparences comptent. Or, en dépit des bonnes intentions du ministère public, certains pourraient considérer que le fait de s’affilier à la police et d’utiliser ses vastes ressources pour enquêter sur les candidats jurés est incompatible avec la responsabilité qui lui incombe, à titre d’auxiliaire judiciaire, de s’assurer que chaque accusé bénéficie d’un procès équitable. Le caractère aléatoire et la représentativité sont deux qualités qu’on recherche chez un jury. Des vérifications à grande échelle pourraient donner à penser que le processus de sélection repose sur des caractéristiques stéréotypées ou arbitraires, particulièrement s’il pouvait être démontré que des récusations péremptoires ont servi à écarter certains types ou certaines catégories de personnes qui, sinon, auraient été habiles à remplir les fonctions de juré.

[41] Un autre sujet de préoccupation concerne la vie privée des jurés. En effet, ces derniers renoncent à beaucoup de choses pour accomplir leur devoir civique. Dans certains cas, faire partie d’un jury peut se révéler une expérience difficile et épuisante. Les longs procès, en particulier, peuvent avoir des effets négatifs sur la vie personnelle et professionnelle d’une personne.

[42] Le devoir de juré est précisément cela — un devoir. On ne demande pas aux gens de se porter volontaires; ils sont choisis aléatoirement et sont obligés de remplir les fonctions de juré sauf s’ils en sont dispensés. Lorsqu’ils ont été choisis, les jurés

that point are no more relevant than that of the presiding judge.

[43] Jurors deserve to be treated with respect. Subject to a few narrow exceptions, they are entitled to know that their privacy interests will be preserved and protected. I note that the subject of prospective jurors' privacy was addressed in a recent report of Ontario's Information and Privacy Commissioner, Ann Cavoukian: see *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report* (2009) ("IPC Report").

[44] The concerns that I have identified are very real and they are to be taken seriously. There are, however, countervailing interests at play that warrant some limited checking and some minimal intrusion into the private lives of potential jurors.

[45] Manifestly, only those persons eligible to serve as jurors should be permitted to participate in the process. Impartiality is equally essential. Those who serve as jurors must be capable of putting aside their biases, prejudices, and any tentative opinions they might hold about the case. In short, they must be able to render a true verdict according to the evidence.

[46] Section 626(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that "[a] person who is qualified as a juror according to . . . the laws of a province is qualified to serve as a juror in criminal proceedings in that province." Each province and territory in Canada has its own eligibility criteria for jurors. In Ontario, the province from which the present appeals originate, s. 4(b) of the *Juries Act* currently states that anyone who "has been convicted of an offence that may be prosecuted by indictment" and who has not been granted a pardon for that conviction, is ineligible to serve as a juror. I note that until 2010, s. 4(b) of the *Juries Act* provided that a person was ineligible to serve as a juror in Ontario if he or she "ha[d] been convicted of an indictable offence" and had not been granted a pardon. In the case of a hybrid offence,

deviennent les juges des faits. Leur vie personnelle n'est dès lors pas plus pertinente que celle du juge qui préside l'audience.

[43] Les jurés méritent d'être traités avec respect. Sous réserve de quelques exceptions bien précises, ils sont en droit de savoir que leur droit à la vie privée sera préservé et protégé. Je note que le sujet de la vie privée des candidats jurés a été traité dans un rapport récent de la commissaire à l'information et à la protection de la vie privée de l'Ontario, Ann Cavoukian : voir *Excessive Background Checks Conducted on Prospective Jurors : A Special Investigation Report* (2009) (« rapport de la CIPVP »).

[44] Les préoccupations dont j'ai parlé sont bien réelles et doivent être prises au sérieux. Cependant, des intérêts opposés entrent également en jeu et justifient quelques vérifications limitées et une intrusion minime dans la vie privée des candidats jurés.

[45] De toute évidence, seules les personnes habiles à remplir les fonctions de juré devraient être autorisées à participer au processus. L'impartialité est également essentielle. Celui qui remplit les fonctions de juré doit être capable de faire abstraction de tout parti pris, préjugé ou idée préconçue à l'égard de l'affaire. Bref, il doit être capable de rendre un verdict juste à la lumière de la preuve.

[46] Le paragraphe 626(1) du *Code criminel*, L.R.C. 1985, ch. C-46, prévoit que « [s]ont aptes aux fonctions de juré dans des procédures criminelles engagées dans une province les personnes qui remplissent les conditions déterminées par la loi provinciale applicable ». Chaque province et territoire du Canada a ses propres critères d'admissibilité pour les jurés. En Ontario, la province d'où émanent les présents pourvois, l'al. 4b) de la *Loi sur les jurys* prévoit actuellement qu'une personne qui « a été déclarée coupable d'une infraction qui peut faire l'objet d'une poursuite par voie de mise en accusation » et qui n'a pas bénéficié d'un pardon relativement à cette déclaration de culpabilité est inhabile à être membre d'un jury. Je note que jusqu'en 2010, l'al. 4b) de la *Loi sur les jurys* prévoyait qu'une personne était inhabile à être membre

this was interpreted to mean a conviction where the prosecutor chose to proceed by indictment (see IPC Report, at pp. 33-34). In 2010, the *Juries Act* was amended to broaden the scope of juror ineligibility (S.O. 2009, c. 33, Sch. 2, s. 38(1)). This amendment addressed the problem that criminal record databases do not record whether, in respect of hybrid offences, the Crown proceeded by way of summary conviction or by indictment. Other provinces have different eligibility requirements, including some that preclude persons “charged” with a criminal offence from serving on a jury. For instance, individuals are ineligible to serve as jurors: in Alberta, if “charged with a criminal offence” (*Jury Act*, R.S.A. 2000, c. J-3, s. 4(h)(ii)); in British Columbia, if “currently charged with an offence under the *Criminal Code*” (*Jury Act*, R.S.B.C. 1996, c. 242, s. 3(1)(q)); in Newfoundland and Labrador, if charged with an indictable offence (*Jury Act*, 1991, S.N.L. 1991, c. 16, s. 5(m)); and in Quebec, if charged or convicted of a “criminal act” (an indictable offence) (*Jurors Act*, R.S.Q., c. J-2, s. 4(j)) (for the relevant legislation in the other provinces and territories, see: *The Jury Act*, 1998, S.S. 1998, c. J-4.2, s. 6(h); *The Jury Act*, C.C.S.M. c. J30, s. 3(p) and (r); *Jury Act*, S.N.B. 1980, c. J-3.1, s. 3(r); *Juries Act*, S.N.S. 1998, c. 16, s. 4(e); *Jury Act*, R.S.P.E.I. 1988, c. J-5.1, s. 5(i); *Jury Act*, R.S.Y. 2002, c. 129, s. 5(a) and (b); *Jury Act*, R.S.N.W.T. 1988, c. J-2, s. 5(a); and *Jury Act*, R.S.N.W.T. (Nu.) 1988, c. J-2, s. 5(a)).

[47] Under s. 638(1)(c) of the *Code*, either the prosecutor or the accused may challenge a potential juror for cause on the basis that “[the] juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months”.

d’un jury en Ontario si elle « a[vait] été déclarée coupable d’un acte criminel » et n’avait pas bénéficié d’un pardon. Dans le cas de l’infraction mixte, cette disposition a été interprétée au sens de déclaration de culpabilité dans le cas où le poursuivant a choisi d’intenter une poursuite par mise en accusation (voir rapport de la CIPVP, p. 33-34). En 2010, la *Loi sur les jurys* a été modifiée afin d’élargir la portée de l’incapacité à exercer la fonction de juré (L.O. 2009, ch. 33, ann. 2, par. 38(1)). Cette modification a réglé le problème découlant du fait que les bases de données des casiers judiciaires n’indiquent pas si, dans le cas d’une infraction mixte, le ministère public a intenté une poursuite par procédure sommaire ou par mise en accusation. D’autres provinces ont des conditions d’admissibilité différentes, notamment certaines qui empêchent les personnes « accusées » d’une infraction criminelle de remplir les fonctions de juré. Par exemple, un individu est inhabile à être juré : en Alberta, s’il est [TRADUCTION] « accusé d’une infraction criminelle » (*Jury Act*, R.S.A. 2000, ch. J-3, sous-al. 4h)(ii)); en Colombie-Britannique, [TRADUCTION] « contre qui pèse une accusation portée en vertu du *Code criminel* » (*Jury Act*, R.S.B.C. 1996, ch. 242, al. 3(1)q); à Terre-Neuve-et-Labrador, s’il est accusé d’un acte criminel (*Jury Act*, 1991, S.N.L. 1991, ch. 16, al. 5m)); au Québec, s’il est sous le coup d’une accusation pour un « acte criminel » ou qui en a été déclaré coupable (*Loi sur les jurés*, L.R.Q., ch. J-2, al. 4j)) (pour ce qui est de la législation pertinente dans les autres provinces et territoires, voir : *Loi de 1998 sur le jury*, L.S. 1998, ch. J-4.2, al. 6h); *Loi sur les jurés*, C.P.L.M. ch. J30, al. 3p) et r); *Loi sur les jurés*, L.N.-B. 1980, ch. J-3.1, al. 3r); *Juries Act*, S.N.S. 1998, ch. 16, al. 4e); *Jury Act*, R.S.P.E.I. 1988, ch. J-5.1, al. 5i); *Loi sur le jury*, L.R.Y. 2002, ch. 129, al. 5a) et b); *Loi sur le jury*, L.R.T.N.-O. 1988, ch. J-2, al. 5a); *Loi sur le jury*, L.R.T.N.-O. (Nu.) 1988, ch. J-2, al. 5a)).

[47] Aux termes de l’al. 638(1)c) du *Code*, le poursuivant ou l’accusé peut récuser un candidat juré au motif que celui-ci « a été déclaré coupable d’une infraction pour laquelle il a été condamné à mort ou à un emprisonnement de plus de douze mois ».

[48] As is apparent, under provincial statutes and the *Criminal Code*, a potential juror's criminal antecedents — and in some instances, his or her pending charges — may render that person ineligible for jury duty or result in his or her removal from the jury pool following a successful challenge for cause. Self-reporting is one way of screening potential jurors who, by virtue of their involvement with the criminal law, are ineligible under provincial law from serving as jurors. In Ontario, at the time of the appellants' trial, a self-reporting questionnaire was sent to potential jurors asking:

7. HAVE YOU BEEN CONVICTED OF AN INDICTABLE OFFENCE FOR WHICH YOU HAVE NOT BEEN GRANTED A PARDON?

An indictable offence is a serious offence and does not include violations of provincial statutes such as traffic and liquor laws. Nor are some Criminal Code offences indictable; for example, causing a disturbance, taking a motor vehicle without the owner's consent and vagrancy are not indictable offences. A person who has been convicted of an indictable offence is ineligible to serve as a juror, unless he or she has subsequently been granted a pardon.

(IPC Report, Appendix 8)

[49] While useful, self-reporting has proved to be less than satisfactory. Under the regime that existed when the trial in this case was conducted, potential jurors may not have known whether the offence for which they had been convicted was an indictable offence (which would have included a hybrid offence only if the Crown had proceeded by way of indictment). Following the IPC Report in 2009 in Ontario, along with the amendment of the *Juries Act*, the self-reporting questionnaire has been improved and provides a more comprehensive explanation of what constitutes an indictable offence (see R.R.O. 1990, Reg. 680, Form 1, "Questionnaire about Qualifications for Jury Service"). Even with that, there is no certainty that prospective jurors will read the explanatory notes;

[48] Comme on le constate, aux termes de lois provinciales et du *Code criminel*, les antécédents criminels d'un candidat juré — et, dans certains cas, les accusations qui pèsent contre lui — peuvent le rendre inhabile à remplir les fonctions de juré ou entraîner son retrait du bassin des candidats jurés par suite d'une récusation motivée. La déclaration volontaire est une manière d'écarter les candidats jurés qui, en raison de leurs démêlés avec la justice, sont inhabiles à remplir les fonctions de juré en vertu d'une loi provinciale. En Ontario, au moment du procès des appelants, un questionnaire de déclaration volontaire envoyé aux candidats jurés leur posait la question suivante :

7. AVEZ-VOUS DÉJÀ ÉTÉ RECONNU(E) COUPABLE D'UN ACTE CRIMINEL POUR LEQUEL UN PARDON NE VOUS A PAS ÉTÉ ACCORDÉ?

Un acte criminel est une infraction criminelle grave, à l'exclusion des contraventions aux lois provinciales telles que les lois relatives à la circulation et à l'alcool. Quelques infractions au Code criminel ne constituent pas des actes criminels, par exemple, le fait de troubler la paix publique, la prise d'un véhicule à moteur sans le consentement du propriétaire et le vagabondage ne constituent pas des actes criminels. Une personne est inhabile à remplir les fonctions de juré si elle a été reconnue coupable d'un acte criminel, sauf si un pardon lui a été accordé par la suite.

(Rapport de la CIPVP, annexe 8)

[49] Malgré son utilité, la déclaration volontaire ne s'est pas révélée très satisfaisante. Sous le régime en vigueur lors de la tenue du procès en l'espèce, il se peut que les candidats jurés n'aient pas su si l'infraction dont ils avaient été reconnus coupables était un acte criminel (qui aurait englobé l'infraction mixte seulement si le ministère public avait intenté la poursuite par mise en accusation). À la suite du rapport de la CIPVP déposé en Ontario en 2009, en plus des modifications apportées à la *Loi sur les jurys*, le questionnaire de déclaration volontaire a été amélioré et explique de façon plus exhaustive ce qui constitue un acte criminel (voir R.R.O. 1990, Règl. 680, formule 1, « Questionnaire concernant les qualités requises pour remplir les fonctions de juré »). Malgré cela, il n'y a aucune

nor is it clear that those who do will fully understand them. Well-intentioned individuals may still provide inaccurate information. Moreover, the explanatory notes leave out broad categories of offences that could give rise to indictable convictions, such as income tax evasion. And finally, as reporting procedures are not uniform throughout the country, some are likely to produce more accurate responses than others. In short, self-reporting can result in relevant criminal background information slipping through the cracks. It is not a substitute for criminal record checks.

[50] It follows, in my view, that absent legislation to the contrary, the authorities should be permitted to do criminal record checks on potential jurors to determine whether they are eligible to serve as jurors under provincial law and/or whether they may be subject to a challenge for cause under s. 638(1)(c) of the *Code*. In those provinces where the eligibility criteria cover persons who have been charged with a criminal offence, this too is something the authorities may properly check for.

[51] In that narrow sense, I consider it permissible for the Crown, with the assistance of the police, to do limited background checks using police databases to identify potential jurors who, by virtue of their criminal conduct, are not eligible for jury duty under provincial law or who are subject to being challenged for cause under s. 638(1)(c) of the *Code*. I recognize that the defence bar does not have the same prerogative. It cannot avail itself of the information stored in police databases. But any resulting imbalance is, in my view, overcome by the disclosure obligations placed on the Crown. Information received by the Crown that is relevant to the jury selection process must be turned over to the defence, thereby restoring the balance.

certitude que les candidats jurés liront les notes explicatives, ni que ceux qui les liront les comprendront parfaitement. Des individus bien intentionnés pourraient tout de même fournir des renseignements inexacts. Qui plus est, les notes explicatives laissent de côté de grandes catégories d'infractions qui pourraient entraîner une condamnation pour acte criminel, notamment celle relative à l'évasion fiscale. Enfin, comme les procédures de déclaration ne sont pas uniformes partout au Canada, certaines d'entre elles sont susceptibles de donner lieu à des réponses plus exactes que d'autres. Bref, la déclaration volontaire peut laisser passer à travers les mailles du filet des renseignements pertinents relatifs aux antécédents criminels. Elle ne remplace pas la vérification du casier judiciaire.

[50] Il s'ensuit, selon moi, que, sauf disposition contraire de la loi, les autorités devraient pouvoir vérifier le casier judiciaire des candidats jurés afin de déterminer s'ils sont habiles à remplir les fonctions de juré aux termes d'une loi provinciale ou s'ils sont susceptibles de faire l'objet d'une récusation motivée fondée sur l'al. 638(1)c) du *Code*. Dans les provinces où les critères d'admissibilité s'appliquent aux personnes qui ont été accusées d'une infraction criminelle, les autorités peuvent également vérifier ce fait à juste titre.

[51] Dans ce sens strict, j'estime que le ministère public est autorisé à effectuer, avec l'aide de la police, des vérifications limitées des antécédents au moyen des bases de données de cette dernière afin d'identifier les candidats jurés qui, en raison de leur conduite criminelle, sont inhabiles à remplir les fonctions de juré aux termes d'une loi provinciale ou qui sont susceptibles de faire l'objet d'une récusation motivée fondée sur l'al. 638(1)c) du *Code*. Je reconnais que l'avocat de la défense ne bénéficie pas de la même prerogative. Il ne peut se servir des renseignements colligés dans les bases de données de la police. Toutefois, tout déséquilibre engendré est, à mon avis, compensé par les obligations de communication qui incombent au ministère public. Les renseignements reçus par le ministère public qui sont pertinents pour le processus de sélection des jurés doivent être transmis à la défense, ce qui rétablit l'équilibre.

[52] I also recognize that the Crown and the police are separate entities and that the police ought not to be seen as Crown agents tasked with the responsibility of investigating potential jurors for partiality, much less obtaining a jury favourable to the Crown's cause. But any perception of impropriety must be assessed in context, which in this case means taking into account the circumscribed nature of the police mandate and the important objective it serves. Viewed that way, I do not believe that a reasonable member of society would find it offensive for the Crown and the police to engage in the limited form of checking I consider permissible.

[53] In the course of performing valid criminal background checks through the use of police databases, the authorities may inadvertently come across information that falls outside the scope of the provincial eligibility criteria or the criteria specified in s. 638(1)(c) of the *Code*. For example, in Ontario, the authorities may learn that a prospective juror does not have a criminal record but that he or she is presently charged with a criminal offence, or perhaps even a provincial offence, that may render the prospective juror unsuitable or raise concerns about his or her ability to remain impartial. Equally, a database scan may reveal a potential juror's prior conviction for a pure summary offence (not captured by s. 4(b) of Ontario's *Juries Act* or s. 638(1)(c) of the *Code*) for which the person is currently serving an intermittent sentence, thereby calling into question his or her suitability for jury duty. Alternatively, the authorities may discover that a potential juror has been a complainant on a prior occasion and may, for that reason, find it difficult to remain impartial, either generally or in the particular circumstances of the case at hand.

[54] The authorities cannot set out to find this type of information — but if it comes to their attention in the course of performing valid criminal background checks, they need not turn a blind eye to it. It could form the basis for any of the following procedures in the courtroom:

[52] Je reconnais également que la police est une entité distincte du ministère public et ne doit pas être considérée comme un mandataire de ce dernier ayant pour mission de vérifier l'impartialité des candidats jurés, et encore moins de veiller à la constitution d'un jury bien disposé envers le ministère public. Il importe toutefois d'examiner en contexte toute perception d'irrégularité, ce qui suppose, en l'espèce, la prise en compte de l'étroitesse du mandat confié à la police et de l'importance des objectifs qu'il vise. Je ne crois pas qu'une personne raisonnable voyant les choses sous cet angle jugerait inconvenant que le ministère public et la police procèdent au type de vérification restreinte qui est, selon moi, acceptable.

[53] En effectuant des vérifications valides d'antécédents criminels au moyen des bases de données de la police, les autorités peuvent recueillir par inadvertance des renseignements qui débordent du cadre établi par les critères provinciaux en matière d'habilité ou les critères énoncés à l'al. 638(1)(c) du *Code*. Par exemple, en Ontario, les autorités pourraient apprendre qu'un candidat juré n'a pas de casier judiciaire, mais qu'il est actuellement inculpé d'une infraction criminelle, ou peut-être même d'une infraction provinciale, pouvant le rendre inapte ou susciter des doutes concernant sa capacité de demeurer impartial. De même, une recherche dans une base de données peut révéler qu'un candidat juré a été condamné pour une infraction punissable seulement sur déclaration de culpabilité par procédure sommaire (situation non visée par l'al. 4b) de la *Loi sur les jurys* de l'Ontario ou l'al. 638(1)(c) du *Code*) et purge une peine discontinuée, ce qui pourrait compromettre son aptitude à siéger comme juré. Les autorités peuvent aussi découvrir qu'un candidat juré a déjà été plaignant et qu'il peut lui être difficile, pour cette raison, de demeurer impartial, soit de façon générale soit dans l'affaire particulière qui sera instruite.

[54] Les autorités ne peuvent chercher à obtenir ce type de renseignements, mais s'il en ressort dans le cadre de vérifications d'antécédents criminels valablement effectuées, elles n'ont pas à s'en détourner. Ces renseignements peuvent servir aux démarches suivantes lors de l'instruction :

(1) a request to the trial judge to excuse the juror under s. 632(a) to (c) of the <i>Code</i> on grounds of obvious partiality, personal hardship, or other reasonable cause; (2) a request to the trial judge to stand the juror aside under s. 633 of the <i>Code</i> for reasons of personal hardship or any other reasonable cause, including potential partiality; (3) a request to challenge a juror for cause for any of the reasons set out in s. 638(1)(a) to (f) of the <i>Code</i>; and (4) a reason to exercise or refrain from exercising a peremptory challenge under ss. 634 and 635 of the <i>Code</i>.	(1) une demande fondée sur les al. 632a) à c) du <i>Code</i> visant à dispenser un juré pour partialité évidente, inconvenient personnel sérieux ou pour une autre raison valable; (2) une demande fondée sur l'art. 633 du <i>Code</i> visant la mise à l'écart du juré pour inconvenient personnel sérieux ou pour toute autre raison valable, dont la possibilité de partialité; (3) une demande visant la récusation d'un juré pour l'un des motifs prévus aux al. 638(1)a) à f) du <i>Code</i>; (4) la décision de procéder ou non à la récusation péremptoire en application des art. 634 et 635 du <i>Code</i>.

[55] Of course, it goes without saying that any information the authorities obtain that is relevant to the jury selection process must be disclosed to the defence. This would include information relevant to eligibility, s. 638(1)(c) and any of the other matters I have identified.

[55] Il va sans dire, bien sûr, que les autorités doivent communiquer à la défense tout renseignement obtenu qui est pertinent pour le processus de sélection des jurés, ce qui inclut les renseignements se rapportant à l'habileté, à l'application de l'al. 638(1)c) et à tous les autres éléments que j'ai mentionnés.

[56] Checking for a prospective juror's criminal record is not as easy as one might think. As Watt J.A. observed, at para. 92, jury panel lists lack crucial information the authorities need to ensure that the results of inquiries made through the various databases available to them are accurate. The more information the authorities have about the prospective juror — and by that I am referring to details such as full name, date of birth, fingerprint search number, and so on — the less intrusive the search need be. Access to one database, most likely the Canadian Police Information Centre ("CPIC"), will usually be all that is required.

[56] La vérification du casier judiciaire d'un candidat juré n'est pas aussi facile qu'on pourrait le penser. Comme l'a fait remarquer le juge Watt, au par. 92, d'importants renseignements, nécessaires pour assurer l'exactitude des résultats des recherches effectuées au moyen des diverses bases de données dont disposent les autorités, ne figurent pas aux tableaux des jurés. Plus les autorités possèdent de renseignements au sujet du candidat juré — et je parle ici de précisions comme le nom complet, la date de naissance, le numéro de recherche d'empreintes digitales, etc. — moins les recherches à effectuer seront intrusives. La consultation d'une seule base de données, probablement celle du Centre d'information de la police canadienne (« CIPC »), suffira habituellement.

[57] Contrast this with the situation where the authorities have virtually no information about the prospective juror other than his or her name and occupation. To be sure, this is problematic, especially when the individual has a common name.

[57] À l'opposé, la situation où les autorités n'ont pratiquement aucun autre renseignement que le nom et la profession du candidat juré est certainement problématique, en particulier lorsque le candidat porte un nom répandu. Le recoupement et la

Cross-referencing and cross-checking through the use of multiple databases may be the only means the authorities have to ensure that the right person is being checked. And even then, there can be no guarantees.

[58] Of course, the more databases accessed, the more likely it is that the authorities will come upon information that goes beyond a particular province's eligibility criteria as it relates to prior or ongoing criminal activity, or the criteria needed to bring a challenge for cause under s. 638(1)(c) of the *Code*. In other words, the broader the search, the greater the intrusion into the prospective juror's privacy interests.

[59] In an ideal world, it would be preferable if the persons doing the checking had available to them the information needed to do pinpoint searches through a single database. That would be one way of better protecting the privacy interests of prospective jurors.

[60] Ontario has taken some steps in this regard following the release of the IPC Report. Without going into detail, under s. 18.2 of the *Juries Act* (enacted in 2010, see S.O. 2009, c. 33, Sch. 2, s. 38(2)), the sheriff may request that a criminal record check be conducted using the CPIC database, on any person selected for inclusion on a jury panel. A questionnaire completed by the prospective juror and sent to the Provincial Jury Centre contains personal information that enables the Centre to engage in pinpoint searches.

[61] According to the Crown, such searches are conducted on a random basis and only cover about 10 percent of the names on panel lists (R.F., at para. 85, fn. 37). As such, they do not provide certainty that persons who are ineligible under s. 4(b) of the *Juries Act* or subject to being challenged under s. 638(1)(c) of the *Code* will be detected. Moreover, there is no legislative equivalent to s. 18.2 of the Ontario *Juries Act* in the territories and most of the other provinces.

contre-vérification au moyen de plusieurs bases de données peuvent être la seule façon pour les autorités de s'assurer que la recherche porte sur la bonne personne. Et même là, il n'existe aucune garantie.

[58] Bien entendu, plus les autorités consultent de bases de données plus elles sont susceptibles de découvrir des renseignements sortant du cadre établi par les critères relatifs à l'habilité des jurés dans une province donnée se rapportant à des activités criminelles passées ou actuelles ou par les critères applicables à la récusation pour le motif prévu à l'al. 638(1)c) du *Code*. Autrement dit, plus la recherche sera large plus l'atteinte au droit à la vie privée du candidat juré sera importante.

[59] Idéalement, il serait préférable que les personnes procédant à la vérification disposent des renseignements nécessaires pour effectuer des recherches précises dans une seule base de données. Ce serait là une façon de mieux protéger le droit à la vie privée des candidats jurés.

[60] L'Ontario a pris des mesures en ce sens par suite de la publication du rapport de la CIPVP. Sans entrer dans les détails, disons qu'aux termes de l'art. 18.2 de la *Loi sur les jurys* (entrée en vigueur en 2010, voir L.O. 2009, ch. 33, ann. 2, par. 38(2)), le shérif peut demander une vérification du casier judiciaire au moyen de la base de données du CIPC à l'égard de toute personne sélectionnée pour inscription à un tableau des jurés. Le questionnaire rempli par le candidat juré puis transmis au Bureau provincial de la sélection des jurés contient des renseignements personnels qui permettent à ce dernier d'effectuer des recherches précises.

[61] Selon le ministère public, ces recherches sont effectuées de façon aléatoire et elles ne portent que sur environ 10 pour 100 des noms figurant aux tableaux des jurés (m.i., par. 85, note 37). Elles ne peuvent donc garantir la détection des personnes inhabiles aux termes de l'al. 4b) de la *Loi sur les jurys* ou susceptibles d'être récusées en application de l'al. 638(1)c) du *Code*. En outre, les territoires et la plupart des autres provinces ne possèdent pas de disposition analogue à l'art. 18.2 de la *Loi sur les jurys* ontarienne.

[62] I propose to say no more about s. 18.2 of the *Juries Act*. Its impact, if any, on the Crown's right to have limited background checks conducted on potential jurors through the use of police databases is not before us. Nor is it our mandate to consider solutions that might better preserve and protect the privacy interests of prospective jurors, including the personnel who should be doing the checking and the means by which they may gain access to the pertinent information. Our task is to determine whether it was permissible for the authorities to perform the checks they did in the instant case and, if so, to what extent and for what purposes.

[63] The case before us deals with background prospective juror checks conducted through the use of police databases. For reasons already discussed, absent legislation to the contrary, I am satisfied that the authorities can use such databases to discover whether prospective jurors have engaged in criminal conduct that would render them ineligible to serve as a juror under provincial law, or subject them to a challenge for cause under s. 638(1)(c) of the *Code*. As well, absent legislation to the contrary, I am of the view that the authorities are entitled to access multiple databases, where necessary, to uncover the requisite information. As indicated, where this leads to the inadvertent discovery of other information that may be relevant to the jury selection process, the authorities need not turn a blind eye to it. It should be conveyed to the Crown and disclosed to the defence. That will go some way towards achieving the level playing field that should exist between the Crown and the defence during the jury selection process.

[64] To be clear, when I speak of information that is relevant to the jury selection process, I am *not* talking about matters of public knowledge, such as a prospective juror's general reputation in the community, nor am I referring to such things as feelings, hunches, suspicions, innuendo, or other such amorphous information. I am speaking rather about

[62] Je m'en tiendrai à cela au sujet de l'art. 18.2 de la *Loi sur les jurys*. La question de l'effet de cette disposition, le cas échéant, sur le droit du ministère public de faire vérifier les antécédents de candidats jurés au moyen de bases de données de la police ne nous a pas été soumise. Il ne nous appartient pas non plus d'envisager des solutions propres à mieux protéger le droit à la vie privée des candidats jurés, y compris des solutions quant au personnel à qui confier la vérification et quant aux moyens par lesquels il peut avoir accès aux renseignements pertinents. Notre tâche consiste à établir si les autorités pouvaient effectuer les vérifications qui ont été faites en l'espèce et, si oui, dans quelle mesure et à quelles fins.

[63] L'affaire qui nous occupe porte sur la vérification des antécédents des candidats jurés qui a été effectuée en utilisant les bases de données de la police. Pour les raisons déjà exposées, en l'absence de disposition contraire de la loi, je suis convaincu que les autorités peuvent se servir de telles bases de données pour découvrir si les candidats jurés se sont livrés à des activités criminelles qui les rendraient inhabiles à remplir les fonctions de juré en vertu d'une loi provinciale ou les exposeraient à une récusation motivée en vertu de l'al. 638(1)c) du *Code*. En l'absence de disposition contraire de la loi, j'estime en outre que les autorités ont le droit de consulter plusieurs bases de données, au besoin, pour découvrir les renseignements nécessaires. Comme je l'ai indiqué, lorsque ces démarches entraînent la découverte fortuite d'autres renseignements pouvant s'avérer pertinents pour le processus de sélection des jurés, les autorités n'ont pas à s'en détourner. Ces renseignements doivent être transmis au ministère public et communiqués à la défense. Cela contribuera à ce que ces derniers soient à armes égales dans le cadre du processus de sélection des jurés.

[64] En clair, lorsque je parle de renseignements qui sont pertinents pour le processus de sélection des jurés, je ne parle *pas* d'information de notoriété publique, telle la réputation générale du candidat juré au sein de la collectivité, ni d'impressions, d'intuitions, de soupçons, d'insinuations ou d'autres types de renseignements informels. Je parle plutôt

information that rises above the general and is both reasonably accurate and reliably based. At para. 76 of his reasons for the Court of Appeal, Watt J.A. made the following observation about the disclosure obligations of the Crown, with which I agree:

The disclosure obligations of the prosecutor are well defined. Circumscribed, not infinite. Those obligations are not co-extensive with the entire storehouse of information, knowledge and experience, in brief the stock-in-trade a prosecutor may acquire by exposure to daily appearances in the courts and interactions with the police, witnesses, victims and the communities at large in their jurisdiction. Equality of knowledge and community intelligence, like equivalence in skill and experience as between opposing counsel in a criminal trial, is not a constitutional requirement or a principle of fundamental justice.

[65] The question of there being a reciprocal obligation on the part of the defence to disclose information in its possession that could impact on the jury selection process was raised only tangentially on this appeal. It was not fully argued. Accordingly, I propose to limit my remarks to two situations where it is self-evident that defence counsel, as officers of the court, must make disclosure to both the court and Crown counsel to preserve the integrity of the process.

[66] First, where defence counsel know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty under provincial law or subject to being challenged for cause under s. 638(1)(c) of the *Code*, this should be disclosed.

[67] Second, where defence counsel know or have good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality, this too should be disclosed.

[68] The second situation comports with Rule 4.05 of the *Rules of Professional Conduct* of the

de renseignements qui sortent du domaine des généralités et qui sont raisonnablement exacts et proviennent de sources fiables. Je souscris à l'observation suivante du juge Watt au sujet des obligations de communication incombant au ministère public et formulée au par. 76 de ses motifs :

[TRADUCTION] Les obligations de communication du poursuivant sont bien définies. Elles sont circonscrites, non infinies. Elles ne recouvrent pas l'intégralité du bagage d'information, de connaissances et d'expérience, bref, des ressources qu'un poursuivant peut acquérir jour après jour devant les tribunaux et par la fréquentation quotidienne de la police, des témoins, des victimes et des diverses collectivités des ressorts où il exerce. L'égalité en matière de connaissances et de renseignements relatifs à la collectivité, tout comme l'équivalence des compétences et de l'expérience des avocats qui s'affrontent dans un procès criminel, n'est pas une exigence constitutionnelle ou un principe de justice fondamentale.

[65] La question de l'existence d'une obligation réciproque de la défense de communiquer les renseignements en sa possession qui pourraient influencer sur le processus de sélection des jurés n'a été abordée que de façon indirecte en l'espèce, et elle n'a pas fait l'objet d'un débat exhaustif. Par conséquent, je ne mentionnerai que deux situations où la préservation de l'intégrité du processus exige de toute évidence que l'avocat de la défense, en tant qu'auxiliaire judiciaire, communique les renseignements qu'il détient à la cour ainsi qu'au ministère public.

[66] Premièrement, lorsque l'avocat de la défense sait ou a de bonnes raisons de croire qu'un candidat juré s'est livré à des activités criminelles qui le rendent inhabile à remplir les fonctions de juré aux termes d'une loi provinciale ou peuvent entraîner sa récusation pour l'un des motifs prévus à l'al. 638(1)c) du *Code*, il doit le communiquer.

[67] Deuxièmement, lorsque l'avocat de la défense sait ou a de bonnes raisons de croire qu'un candidat juré ne peut siéger à l'instruction d'un procès donné pour des raisons de partialité évidente, il doit aussi le communiquer.

[68] La seconde situation s'accorde avec la règle 4.05 du *Code de déontologie* du Barreau du

Law Society of Upper Canada (online) and Rule 9, note 21 of the *Code of Professional Conduct* of the Canadian Bar Association (online). Under those rules, lawyers are permitted to investigate prospective jurors to ascertain any basis for a challenge, but in doing so, they must not directly or indirectly communicate with the juror or a member of his or her family. The rules further provide that when acting as an advocate, a lawyer must disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror

(a) has or may have an interest, direct or indirect, in the outcome of the case,

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any [party], or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness, . . .

[69] As for the first situation, I consider it axiomatic that as officers of the court, defence counsel who know or have good reason to believe that a prospective juror, by reason of his or her criminal conduct, is ineligible to serve as a juror under provincial law or is subject to being challenged for cause under s. 638(1)(c) of the *Code*, cannot remain mute. Disclosure must be made in such circumstances to protect the integrity of the process and the administration of justice at large.

[70] I conclude this aspect of my reasons with two trite but important observations.

[71] First, jury selection is not a game and it should not be approached as though it were. Winning and losing are concepts that ought not to be associated with it. The process is not governed by the strictures of the adversarial model, nor should it be, in my view. The idea at the end of the day is not to obtain a jury that is partial to one side or the other. We are looking for jurors who are eligible, impartial, representative and competent. The jury does not belong to the parties; it belongs to the people.

Haut-Canada (en ligne) et la règle 9, note 21 du *Code de déontologie professionnelle* de l'Association du Barreau canadien (en ligne). En vertu de ces codes, les avocats peuvent faire enquête sur les candidats jurés pour vérifier l'existence de motifs de récusation, mais, ce faisant, il leur est interdit de communiquer directement ou indirectement avec le candidat juré ou un membre de sa famille. Les dispositions prévoient également que l'avocat qui représente un client doit communiquer au juge et à l'avocat de la partie adverse les renseignements en sa possession sur le fait qu'un juré ou candidat juré

a) soit a ou peut avoir un intérêt direct ou indirect dans l'issue de la cause;

b) soit est connu du juge qui préside l'audience, d'un avocat en présence ou d'une des parties au litige, ou est lié de quelque façon que ce soit à l'un d'eux;

c) soit est connu d'une personne qui a comparu comme témoin ou qui risque de l'être, ou est lié de quelque façon que ce soit à une telle personne.

[69] S'agissant de la première situation, j'estime évident que l'avocat de la défense, dans son rôle d'auxiliaire judiciaire, qui sait ou a de bonnes raisons de croire qu'un candidat juré, du fait de sa conduite criminelle, est inhabile à remplir les fonctions de juré en vertu d'une loi provinciale ou est susceptible d'être récusé pour l'un des motifs prévus à l'al. 638(1)c) du *Code*, ne peut rester muet. Dans ce cas, la communication doit être faite afin de protéger l'intégrité du processus et l'administration de la justice en général.

[70] Je conclus cet aspect de mes motifs en faisant deux observations qui, bien qu'élémentaires, sont importantes.

[71] Premièrement, la sélection du jury n'est pas un jeu et on ne devrait pas l'entreprendre dans cet esprit. Il ne faut pas s'y engager avec l'idée de gagner ou de perdre. Il ne s'agit pas d'un processus soumis aux restrictions du modèle contradictoire, et à mon avis, il ne devrait pas l'être non plus. En définitive, l'objectif n'est pas d'avoir un jury qui serait partial envers l'une ou l'autre partie. Nous voulons des jurés habiles à exercer leurs fonctions, impartiaux, représentatifs et compétents. Le jury n'appartient pas aux parties, mais au public.

[72] Second, while there are various rules and regulations that govern the selection of juries, much of what occurs is rooted in custom. The process must take into account the needs of the people and the special problems that may exist in the locale or region in which the trial is being held. Flexibility is essential, as is common sense, good judgment and good faith on the part of those who play a central role in the process, including judges, Crown and defence counsel, the police, and court administration personnel. In the end, it is essential to keep in mind that from start to finish, the jury selection process is designed to make good on the constitutional promise, enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, that everyone charged with an offence has the right to be tried by an independent and impartial tribunal. Attempts by one side or the other to obtain a favourable jury are inimical to that ideal and the parties should be guided by this and conduct themselves accordingly.

V. Application to This Appeal

A. *Issue 1: The Effect of Non-Disclosure on Trial Fairness*

[73] Before considering the effect of non-disclosure on trial fairness as it relates to the instant case, I propose to set out the principles that apply when it is discovered, at the appeal stage, that information about prospective jurors which should have been disclosed at trial was not disclosed.

[74] In *R. v. Dixon*, [1998] 1 S.C.R. 244, and *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, this Court set out the principles that apply when information that should have been disclosed at trial is discovered for the first time at the appeal stage. Persons who seek a new trial on the basis that such non-disclosure deprived them of their right to a fair trial under s. 7 of the *Charter* must show that (1) the Crown failed to comply with its disclosure obligations, and (2) there is a reasonable possibility that the failure to disclose affected the outcome of the trial or the overall fairness of the trial process (*Taillefer*, at para. 71).

[72] Deuxièmement, si divers règlements et règles régissent la sélection du jury, il n'en demeure pas moins qu'elle repose en grande partie sur la coutume. Il est nécessaire que les besoins du public et les problèmes particuliers qui peuvent survenir dans la localité ou dans la région où le procès est tenu soient pris en compte. La souplesse est essentielle, tout comme le bon sens, le discernement et la bonne foi des principaux intervenants dans le processus, dont les juges, le ministère public et l'avocat de la défense, les policiers et les membres du personnel du greffe. Au bout du compte, il est essentiel de ne pas oublier que le processus de sélection des jurés est, du début à la fin, conçu pour honorer la garantie constitutionnelle consacrée à l'al. 11d) de la *Charte canadienne des droits et libertés*, selon lequel tout inculpé a le droit d'être jugé par un tribunal indépendant et impartial. Les efforts qu'une ou l'autre des parties met pour tenter d'obtenir un jury favorable à sa cause sont contraires à cet idéal. Les parties devraient s'en souvenir et agir en conséquence.

V. Application des principes en l'espèce

A. *Question 1 : l'effet de la non-communication sur l'équité du procès*

[73] Avant de me pencher sur l'effet de la non-communication sur l'équité du procès dans le contexte de la présente affaire, je propose d'énoncer les principes qui s'appliquent lorsqu'on découvre, à l'étape de l'appel, que des renseignements concernant des candidats jurés n'ont pas été communiqués lors du procès alors qu'ils auraient dû l'être.

[74] Dans les arrêts *R. c. Dixon*, [1998] 1 R.C.S. 244, et *R. c. Taillefer*, 2003 CSC 70, [2003] 3 R.C.S. 307, la Cour a énoncé les principes devant être appliqués lorsque des renseignements qui auraient dû être communiqués lors du procès sont découverts pour la première fois à l'étape de l'appel. Ceux qui sollicitent la tenue d'un nouveau procès au motif que la non-communication les a privés de leur droit à un procès équitable garanti par l'art. 7 de la *Charte* doivent établir : (1) que le ministère public ne s'est pas acquitté de ses obligations de communication; (2) qu'il existe une possibilité raisonnable que la non-communication ait influé sur l'issue ou sur l'équité globale du procès (*Taillefer*, par. 71).

[75] Adapting those principles to the issue at hand, I am of the view that persons who seek a new trial on the basis that non-disclosure of information about potential jurors deprived them of their s. 7 *Charter* right to a fair trial must, at a minimum, establish that: (1) the Crown failed to disclose information relevant to the selection process that it was obliged to disclose; and (2) had the requisite disclosure been made, there is a reasonable possibility that the jury would have been differently constituted.

[76] In addition to these two steps, as my colleague Karakatsanis J. points out at para. 55 of *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, in the event that the jury would have been differently constituted, it may be that the Crown should then have the opportunity to show, on balance, that the jury was nonetheless impartial. Since the present appeals can be resolved without addressing that issue, I propose to leave it for another day.

[77] For present purposes, I am prepared to accept that the Crown failed in its disclosure obligations. It is on step 2 that the appellants' case founders. As discussed earlier, the Court of Appeal found that there was no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from the vetting process been disclosed. Of the prospective jurors considered at the peremptory challenge stage of the proceedings, the Crown had information about 10 of them that it should have disclosed. With respect to those 10 people, Mr. Yumnu is the only appellant who used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining at the end of the selection process. On the record before it, the Court of Appeal was entitled to come to the conclusion that the jury would not have been composed differently had disclosure been made. I see no basis for interfering with that conclusion. It follows that the

[75] Adaptant ces principes à la question à examiner, j'estime que ceux qui sollicitent la tenue d'un nouveau procès au motif que la non-communication de renseignements concernant des candidats jurés les a privés de leur droit à un procès équitable garanti par l'art. 7 de la *Charte* doivent, à tout le moins, établir : (1) que le ministère public n'a pas communiqué des renseignements pertinents pour le processus de sélection qu'il était tenu de communiquer; (2) que si la communication avait été faite dans les règles, il existe une possibilité raisonnable que le jury ait été composé différemment.

[76] Outre ces deux étapes, comme le souligne ma collègue la juge Karakatsanis au par. 55 de *R. c. Davey*, 2012 CSC 75, [2012] 3 R.C.S. 828, dans l'éventualité où le jury aurait été composé différemment, peut-être toutefois qu'en pareils cas, la Couronne devrait se voir accorder l'occasion de démontrer, suivant la prépondérance des probabilités, que le jury a été impartial. Étant donné que les présents pourvois peuvent être tranchés sans aborder cette question, je propose d'attendre une autre occasion pour l'examiner.

[77] Pour les besoins de l'espèce, je suis disposé à admettre que le ministère public a manqué à ses obligations de communication. Or, la thèse des appelants ne franchit pas la deuxième étape. Comme je l'ai souligné précédemment, la Cour d'appel a conclu qu'il n'existait aucune possibilité raisonnable que le jury ait été composé différemment si les renseignements pertinents issus de l'avaient été fournis à la défense. De tous les candidats jurés retenus à l'étape des récusations péremptoires du processus, 10 étaient visés par des renseignements que le ministère public aurait dû communiquer. En ce qui concerne ces 10 personnes, M. Yumnu est le seul appellant à s'être prévalu d'une récusation péremptoire qu'il aurait pu conserver si les renseignements auxquels il avait droit lui avaient été communiqués. Cela dit, il restait à chacun des appelants, y compris à M. Yumnu, une ou plusieurs récusations péremptoires à la fin du processus de sélection. Compte tenu du dossier dont elle disposait, il était loisible à la Cour d'appel de conclure que le jury n'aurait pas été composé

appellants have not met the test, and their argument that the trial was unfair must fail.

B. Issue 2: Appearance of Unfairness

[78] That leaves one issue for discussion — did the Court of Appeal err in concluding that the conduct of the police and the Crown did not result in a miscarriage of justice?

[79] To be clear, when I speak of a miscarriage of justice in this context, I am referring to conduct on the part of the Crown and the police, within and surrounding the jury selection process, that would constitute a serious interference with the administration of justice and offend the community's sense of fair play and decency. When conduct of that nature is found to exist, it matters not that the accused may otherwise have had a fair trial; nor is it necessary to find that the accused may have been wrongfully convicted. It is the conduct itself that gives rise to a miscarriage of justice and demands that a new trial be ordered.

[80] With those principles in mind, I turn to the conduct of the Crown and the police in this case to determine whether it crossed the line and resulted in a miscarriage of justice. In concluding that it did not, I begin by reiterating two critical findings made by the Court of Appeal concerning the conduct of the Crown and the police.

[81] First, the court found that despite the scope of the Crown's request in the December 14, 2004 memorandum, the purpose of the police inquiries was to determine whether a prospective juror had a criminal record. Second, the court found that in the circumstances, the impugned conduct did not reveal a colourable use of legitimate criminal record checks to obtain a favourable jury.

différemment s'il y avait eu communication. Je ne vois aucune raison de modifier cette conclusion. Il s'ensuit que les appelants n'ont pas satisfait au test et que leur argument selon lequel le procès était inéquitable doit être rejeté.

B. Question 2 : l'apparence d'iniquité

[78] Il ne reste plus donc qu'une question à trancher : la Cour d'appel a-t-elle commis une erreur en concluant que la conduite de la police et du ministère public n'a pas entraîné une erreur judiciaire?

[79] Je tiens à préciser que lorsque je parle d'erreur judiciaire dans ce contexte, je fais allusion à la conduite du ministère public et de la police, tant dans le cadre du processus de sélection des jurés que dans tout ce qui le concerne, qui constituerait une entrave sérieuse à l'administration de la justice et heurterait le sens du franc-jeu et de la décence qu'a la société. Lorsque les tribunaux concluent à l'existence d'une telle conduite, il importe peu que l'accusé ait subi un procès équitable; il n'est pas non plus nécessaire qu'ils concluent que l'accusé a été déclaré coupable à tort. C'est la conduite même qui est à l'origine de l'erreur judiciaire et qui commande la tenue d'un nouveau procès.

[80] À la lumière de ces principes, j'examinerai la conduite du ministère public et de la police en l'espèce afin de déterminer s'ils sont allés trop loin et si leur conduite a entraîné une erreur judiciaire. Concluant par la négative, je commencerai d'abord en réitérant deux conclusions cruciales de la Cour d'appel concernant la conduite du ministère public et de la police.

[81] Premièrement, la cour a conclu que, malgré la nature des renseignements demandés par le ministère public dans la note du 14 décembre 2004, les recherches demandées à la police visaient à établir si un candidat juré avait un casier judiciaire. Deuxièmement, la cour a conclu que, compte tenu des circonstances, rien n'indiquait que la conduite reprochée constituait une façon détournée d'utiliser des vérifications légitimes du casier judiciaire afin d'obtenir un jury favorable.

[82] Those findings, which were open to the Court of Appeal to make, satisfy me that the record checks were carried out in good faith. There was no attempt on the part of the police or the Crown to uncover information about prospective jurors in an effort to obtain a favourable jury. In its December 14, 2004 memorandum to various police forces, the Crown should not have asked the police to go beyond criminal record checks and use their databases to provide “comments . . . concerning any disreputable persons we would not want as a juror” — although this may not have been clearly understood at the time, given that PM [2005] No. 17, the Practice Memorandum on juror background checks, had not been formalized and did not come into effect until March 31, 2006. Moreover, under the *Rules of Professional Conduct* of the Law Society of Upper Canada and the *Code of Professional Conduct* of the Canadian Bar Association, inquiries made by the parties for the purpose of exercising a challenge for cause were not prohibited. Be that as it may, certainly there was no attempt by the investigating officer to hide the information he obtained from the record checks, be it criminal record information or information that went beyond that. The additional information was recorded in his notebook and was there for anyone to see, including the five defence counsel who received a copy of his notes six weeks into the trial.

[83] The fact that the Crown and the police were acting in good faith is important — although not determinative — in assessing whether the conduct in question crossed the forbidden line.

[84] That brings me to the nature of the impugned information and the manner in which it was obtained.

[85] I have explained that it was permissible for the police to conduct criminal record checks to determine if a prospective juror was eligible to serve as a juror under provincial law and/or was subject to being challenged for cause under s. 638(1)(c) of the *Code*. I have also pointed out that

[82] Ces conclusions, que la Cour d’appel pouvait tirer, me convainquent que la vérification des dossiers a été menée de bonne foi. Ni la police ni le ministère public n’ont tenté d’obtenir des renseignements au sujet des candidats jurés dans le but d’obtenir un jury favorable. Dans la note du 14 décembre 2004 qu’il adressait à différents corps policiers, le ministère public n’aurait pas dû demander à la police d’aller au-delà de la vérification du casier judiciaire en se servant de ses bases de données et de formuler [TRADUCTION] « des commentaires [. . .] au sujet des personnes peu recommandables dont nous ne voudrions pas comme jurés » —, quoique, à cette date, il est possible qu’il n’eût pas bien compris qu’il ne pouvait agir ainsi, puisque l’avis de pratique PM [2005] n° 17, concernant la vérification des antécédents des jurés, n’était pas encore officiel et n’est entré en vigueur que le 31 mars 2006. En outre, suivant le *Code de déontologie* du Barreau du Haut-Canada et le *Code de déontologie professionnelle* de l’Association du Barreau canadien, les enquêtes faites par les parties à des fins de récusation motivée ne sont pas interdites. Quoi qu’il en soit, l’enquêteur n’a certes pas tenté de dissimuler les renseignements obtenus à la suite de la vérification des dossiers, qu’il s’agisse des renseignements sur les antécédents judiciaires ou d’autres renseignements. En effet, les autres renseignements étaient inscrits dans son calepin et étaient à la disposition de tous, notamment des cinq avocats de la défense qui ont reçu une copie de ses notes six semaines après le début du procès.

[83] Le fait que le ministère public et la police aient agi de bonne foi joue un rôle important — mais non décisif — pour savoir s’ils sont allés trop loin dans leur conduite.

[84] Cette réflexion m’amène à examiner la nature des renseignements contestés et la manière dont ils ont été obtenus.

[85] J’ai déjà expliqué que la police peut effectuer une vérification du casier judiciaire afin de déterminer si un candidat juré est habile à remplir les fonctions de juré en vertu d’une loi provinciale ou est susceptible d’être récusé pour l’un des motifs prévus à l’al. 638(1)(c) du *Code*. J’ai également

it can be very difficult to discover whether or not a particular person has a criminal record. The use of multiple police databases may be required to make the inquiry meaningful and, even then, certainty will not always be achieved.

[86] In carrying out legitimate criminal record checks, the police are liable to happen upon information that could be relevant to the selection process. As discussed, where that occurs, the police need not turn a blind eye to it. Rather, they should bring it to the Crown's attention and the Crown should disclose it to the defence.

[87] In this case, the investigating officer came upon information of that kind while conducting individual prospective juror record checks. He made it available to the Crown, as he should have. The Crown went wrong in failing to disclose it to the defence prior to the commencement of the selection process.

[88] While the failure to disclose was serious, it was not done for improper reasons. And in the end, according to the findings of the Court of Appeal, it had no impact on the composition of the jury, nor did it affect the outcome of the trial or the overall fairness of the trial process.

[89] In these circumstances, while the Crown should not have asked the police to use police databases to detect "disreputable persons", and while it should have disclosed to the defence information it received that may have been relevant to the selection process, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community's sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.

VI. Conclusion

[90] The appellants had a fair trial and I am not persuaded that the proceedings constituted a

souligné qu'il peut s'avérer très difficile de découvrir si une personne donnée possède un casier judiciaire. Ainsi, il peut être nécessaire d'utiliser de multiples bases de données de la police pour que l'enquête soit valable et, même dans ce cas, la certitude ne sera pas toujours acquise.

[86] Lorsqu'elle fait une vérification légitime de casiers judiciaires, la police risque de voir des renseignements qui pourraient être pertinents pour le processus de sélection. Comme je l'ai indiqué, dans ce cas, la police n'est pas tenue de fermer les yeux. Elle doit plutôt porter ces renseignements à l'attention du ministère public qui, lui, doit les communiquer à la défense.

[87] En l'espèce, l'enquêteur est tombé sur ce genre de renseignements pendant qu'il se livrait à la vérification des dossiers de chacun des candidats jurés. Il les a fournis au ministère public, comme il était tenu de le faire. Le ministère public, pour sa part, a eu tort de ne pas les communiquer à la défense avant le début du processus de sélection.

[88] Certes, la non-communication était grave, mais elle n'était pas fondée sur des raisons non valables. Et, au bout du compte, d'après les conclusions de la Cour d'appel, elle n'a eu aucune incidence sur la composition du jury et n'a pas non plus influé sur l'issue ou l'équité globale du procès.

[89] Dans ces circonstances s'il est vrai que le ministère public n'aurait pas dû demander à la police de se servir de ses bases de données pour repérer les [TRADUCTION] « personnes peu recommandables », et qu'il aurait dû communiquer à la défense les renseignements obtenus qui pouvaient être pertinents pour le processus de sélection, je ne suis toutefois pas convaincu que ce qui s'est passé en l'espèce constituait une entrave sérieuse à l'administration de la justice, ni que cela heurtait le sens du franc-jeu et de la décence qu'a la société justifiant l'annulation de la procédure pour cause d'erreur judiciaire.

VI. Conclusion

[90] Les appelants ont bénéficié d'un procès équitable et je ne suis pas convaincu que le processus

miscarriage of justice. Accordingly, I would dismiss the appeals from conviction.

Appeals dismissed.

Solicitors for the appellant Ibrahim Yumnu: Lafontaine & Associates, Toronto.

Solicitors for the appellant Vinicio Cardoso: Hicks Adams, Toronto.

Solicitors for the appellant Tung Chi Duong: Fleming, Breen, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Addario Law Group, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Ruby Shiller Chan Hasan, Toronto.

Solicitors for the intervener the Ontario Crown Attorneys' Association: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association: Anthony Moustacalis, Toronto; Brauti Thorning Zibarras, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

constituait une erreur judiciaire. Par conséquent, je suis d'avis de rejeter les pourvois interjetés à l'encontre des déclarations de culpabilité.

Pourvois rejetés.

Procureurs de l'appellant Ibrahim Yumnu : Lafontaine & Associates, Toronto.

Procureurs de l'appellant Vinicio Cardoso : Hicks Adams, Toronto.

Procureurs de l'appellant Tung Chi Duong : Fleming, Breen, Toronto.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Addario Law Group, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Ruby Shiller Chan Hasan, Toronto.

Procureurs de l'intervenante Ontario Crown Attorneys' Association : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureur de l'intervenant le Commissaire à l'information et à la protection de la vie privée de l'Ontario : Commissaire à l'information et à la protection de la vie privée de l'Ontario, Toronto.

Procureur de l'intervenant David Asper Centre for Constitutional Rights : Université de Toronto, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association : Anthony Moustacalis, Toronto; Brauti Thorning Zibarras, Toronto.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Tab 20:

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.

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Yule, Carolyn, and Rachel Schumann. “Negotiating Release? Analysing Decision Making in Bail Court” (2019), 61 *Can. J. Crimin. & Crim. Just.* 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.

Sarah Runyon, Garth Barriere and Michael Sobkin, for the appellant.

Éric Marcoux and Ryan Carrier, for the respondent.

Susan Reid, for the intervener the Attorney General of Ontario.

Susanne Elliott, for the intervener the Attorney General of British Columbia.

Christine Mainville, for the intervener the Criminal Lawyers’ Association of Ontario.

Jason B. Gratl and Toby Rauch-Davis, for the intervener the Vancouver Area Network of Drug Users.

Alexandra Luchenko, Roy W. Millen and Danny Urquhart, for the intervener the British Columbia Civil Liberties Association.

Danielle Glatt, for the intervener the Canadian Civil Liberties Association.

Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed., Toronto, Carswell, 2010 (loose-leaf updated 2019, release 1).

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Yule, Carolyn, and Rachel Schumann. « Negotiating Release? Analysing Decision Making in Bail Court » (2019), 61 *Rev. can. crim. just. pén.* 45.

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 et Michael Sobkin, pour l’appellant.

Éric Marcoux et Ryan Carrier, pour l’intimée.

Susan Reid, pour l’intervenant le procureur général de l’Ontario.

Susanne Elliott, pour l’intervenant le procureur général de la Colombie-Britannique.

Christine Mainville, pour l’intervenante Criminal Lawyers’ Association of Ontario.

Jason B. Gratl et Toby Rauch-Davis, pour l’intervenant Vancouver Area Network of Drug Users.

Alexandra Luchenko, Roy W. Millen et Danny Urquhart, pour l’intervenante British Columbia 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

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).

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 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'expliciterai 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.

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] 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.

[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] 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

[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).

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] 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

[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.

[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.

[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

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] 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] 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.

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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.

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Procureurs de l'intervenante l'Association québécoise des avocats et avocates de la défense : Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Tab 21:

**David Berg,
"Vagueness and Impossibility
in Probation Conditions" (1996),
38 Crim. L.Q. 472**

1996 38 C.L.Q. 472
Criminal Law Quarterly
1996

472 — Vagueness and Impossibility in Probation Conditions

David Berg

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Vagueness and Impossibility in Probation Conditions

David Berg *

Introduction

The law of sentencing in Canada will soon be undergoing a major revision as a result of Bill C-41 (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22, Royal Assent July 13, 1995 (to come into force by Order in Council)). The new law will articulate a purpose and a fundamental principle to sentencing. There will be a new category of disposition called the conditional sentence of imprisonment. Many other changes to existing categories of sentencing will be affected by this piece of legislation.

Changes to the sections of the *Criminal Code* that deal with probation will not be insignificant. However, one might have expected Parliament to have included in Bill C-41 some direction to the courts that would have served as a curative for two particular problems seen much too often in probation conditions. I am here referring to vagueness and impossibility. Both share at least one common characteristic *vis à vis* probation orders: they are usually avoidable. Bill C-41 could have included a section that would have assisted trial judges by directing, for example, that the issue of impossibility be examined for each condition prior to the binding of the offender by the probation order or that each condition be as self-contained as possible. Such statutory directions would have avoided the creation of such conditions as "To pay \$100,000 in 36 monthly and equal payments" (the offender was receiving welfare benefits at the time) and "The offender is to be in by 9pm." However, given the lack of any such direction in the new legislation, it is hoped that the following discussion will serve the function of cautionary tale.

Vagueness

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. For example, some probation orders include a condition that a specific number of hours of community service work is to be performed by the accused. In *R. v. Tanner*, Allen Prov. Ct. J., of the Manitoba Provincial Court, was faced with a preliminary application to determine the validity of this type of condition, to wit: "to carry out ninety-six hours of community work free of charge, terms, location and type of work to be arranged by Manitoba Probation Services".¹ Counsel for the accused argued that leaving the details of the community work, beyond the total number of hours, to the probation officer was an unauthorized delegation by the judge of his judicial function. However, Allen J. did not so find and stated:²

But I cannot see that the day-to-day supervision of probation 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. 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

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.

Vagueness in a condition of a probation order is not to be confused with this proper delegation by a court of the inherent but unstated administrative details of a probation condition. Vagueness exists either where there is no delegation of these details but the accused, who knows that he is bound by a condition of a probation order, cannot determine when he is in risk of breaching that condition or, in the alternative, where the condition is such that even with the provision of administrative details through delegation, the "knowledgeable" accused still runs the same risk. It would be equally true in either case to state that the risk could also run to performing more than was intended by the sentencing court. Valid here are the comments of Gonthier J., in *R. v. Nova Scotia Pharmaceutical Society* with reference to an imprecise law: "It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion."³

In *R. v. Butkans*,⁴ one of the grounds upon which the accused appealed to the Manitoba County Court was vagueness. Hewak Co. Ct. J. stated:⁵

His obligation under the probation order was clear and unequivocal and would not leave him in any doubt as to how much money he was to pay, where he was to pay it, and whose money this was. Accordingly, this ground of appeal is rejected.

A similar finding by Munroe J., of the British Columbia Supreme Court, comes from *R. v. Doiron*, also a 1972 decision:⁶

the said conditions of the probation order, read together, are so vague, uncertain and contradictory as to be incapable of rational interpretation or enforcement and are, therefore, void. The penal consequences of a breach of a probation order are such that a conviction may result only where the breach is proved beyond a reasonable doubt. In this case, neither the appellant nor his advisors *could reasonably be expected to know precisely what conduct or acts were prohibited by the probation order*. [Emphasis added.]

This test was applied directly by Hinkson J. of the same court in *R. v. Melnyk*.⁷

Neil Boyd observed in "An Examination of Probation",⁸ that⁹

What is especially troubling is that any given breach of a probation order potentially encompasses a wide range of non-criminal behaviour. Section 663(2) [now s. 737(2)] provides that an accused "shall keep the peace and be of good behaviour". Failure to "be of good behaviour" can expose the probationer to a term of imprisonment; conviction for a criminal offence is unnecessary. Other conditions can similarly expose the probationer to incarceration for non-criminal behaviour.

Behaviour that would otherwise be innocuous or, at least, which would not incur criminal sanctions could become the *actus reus* for the offence of breach of probation. Surely an important issue under s. 740(1) charge must be whether the accused could perceive that he was conducting himself in a manner that would put him in risk of breach of the condition. The question is one of knowledge and, barring vagueness, is dealt with at the stage of the binding of the accused by the probation order; the accused is there made aware of the conditions and attendant responsibilities (see s. 737(4) C.C.).

R. v. F. (P.D.) dealt with the condition of a probation order made under the Y.O.A. that the accused was to "[l]ive with mother and obey rules and curfew".¹⁰ Nasmith J. correctly differentiated between the two issues of vagueness and improper delegation of a judicial function. With reference to vagueness, the test was held to be that "the judge's order must not be too vague and must contain sufficient particularity".¹¹ The simple condition "to obey a curfew" was found to fail that test. The judgment nicely characterized the relationship between vagueness and improper delegation:¹²

In any event, it is with all of the above comments in mind that I have attempted to assess the probation term, and I have concluded that the youth court's failure to specify any times for the curfew, combined with the failure to specify clearly who is to set and govern the times, makes the term too vague to be enforced and, if it was to be fleshed out by someone else by way of delegation, it is over the line from administrative into judicial functioning, and the term is therefore unenforceable.

R. v. Hauck involved the probation condition "That the accused register in person for the driving without impairment program and participate in such program as directed."¹³ While the appeal to the Saskatchewan Court of Queen's Bench was made on the ground of improper delegation of judicial function, Walker J. could not¹⁴

avoid considering the order and circumstances as a whole and the proof of the element of "wilfulness" beyond a reasonable doubt. It becomes a question of what the order meant, who was entitled to give directions, what were the directions, were the various directions lawful directions, and, finally, was guilt established by the Crown beyond a reasonable doubt.

The accused had registered for the program and participated therein, albeit in a minimal fashion. The accused did not know whose direction he was to follow. There was some indication before the court that contradictory directions were offered as well as directions so broad as to be essentially meaningless (e.g., "You should watch your consumption of alcohol"). Given this vagueness, the court found that wilfulness had not been made out and therefore dismissed the Crown's appeal. Walker J. referred with favour to the test in *R. v. Shaver*, that a wilful act cannot be accidental or inadvertent and must relate to the condition of the probation order.¹⁵

Mens rea cannot be found in a s. 740(1) offence without the accused, who was bound by a probation order, having had knowledge both of the conditions of that order and of the consequences of his conduct in wilful breach of those conditions.¹⁶ If a condition is vague, a probationer cannot determine when his conduct is at risk of breaching that condition. Thus, analytically, vagueness negates the nexus between the condition and the wilful breach thereof — the knowledge of the condition and the knowledge of what constitutes a breach of that condition do not meet. In that context, intent cannot be said to exist.

In terminating this section, it is interesting to read A.D. Gold's comment in the *Criminal Law Quarterly*¹⁷ on "Charter of Rights — Vagueness". He described the process by which vague legislation is created. This process is, he ventured to guess, the same by which a judge creates a vague probation condition:¹⁸

vagueness is invisible to the author. When Parliament authors vague legislation, it has content clearly in mind. It, like all writers of vague sentences, knows what it means. As a result, it is difficult for the author to ignore this internal meaning and see that the words on paper are empty vessels. The difficulty is for readers, to whom the language put down fails to convey clear meaning.

Impossibility

So far in our discussion of s. 740(1), we have seen that a condition precedent for a successful prosecution under this section is the binding of the accused by the probation order. We have seen that inherent in this binding is the accused's knowledge that he is so bound, that certain conduct is contrary to the stated conditions of the probation order, and that engaging in this conduct puts the accused at risk of suffering criminal liability. It was seen to follow from this that a probation condition must clearly delineate the parameters of the risky conduct. We will now examine the situation that obtains where an accused who is bound by a probation order is faced with a condition that, while not vague, is nevertheless impossible to comply with.

Compliance with a condition of a probation order can be said to be impossible where factors outside of the control of the accused conspire to prevent the accused from fulfilling his obligations under that condition. We will refer to this situation as one of "factual impossibility". A second form of impossibility exists where the accused who is bound by a probation order can comply with the condition in question but in doing so he runs the risk of criminal liability or the abrogation of his fundamental legal

rights. We will refer to these situations as “legal impossibility”. Included in legal impossibility is a condition that would require the active participation of a non-bound third party.

Factual Impossibility

The issue here is whether or not an accused who is bound by a probation order can physically comply with a particular condition of that order due to factors outside of his control. Clearly, there can be no *actus reus* if compliance is impossible *ab initio* (we will not deal here with the topic of changing circumstances; note, however, that a probation order can be modified under s. 738). This issue is sometimes confused with that of reasonableness under s. 737(2); see below *passim*. Generally speaking, reasonableness refers to the condition in question being appropriate to the original offence. So, for example, in *R. v. Ziatas*,¹⁹ the Ontario Court of Appeal held that where an accused had been convicted of an assault with intent to resist arrest and the trial judge had made a probation order with a condition prohibiting his operation of a motor vehicle for a period of one year, the judge had²⁰

proceeded upon a wrong principle, inasmuch as he imposed this term of the probation order as an additional punishment to be imposed upon the accused, whereas his only power, if he had any jurisdiction to impose the condition under s. 663(2) [now s. 737(2)] of the *Criminal Code*, was to impose such reasonable conditions as he considered desirable for securing the good conduct of the accused and for preventing the repetition by him of the same offence or the commission of other offences. [Emphasis added.]

See, too, the decision in *R. v. Banks* (an uttering threats case) where the British Columbia Court of Appeal articulated the following test for reasonableness:²¹

In view of the fact that there is such a *close relationship* between the genuine apprehension of the former family and the restriction that was imposed in the probation order, this cannot be looked on as a case of banishment at all. [Emphasis added.]

These two views of reasonableness appear to be partially contradictory. The Ontario Court of Appeal held in *Ziatas* that the condition was to prevent the accused from recommitting the same offence. This is in harmony with the British Columbia Court of Appeal’s “close relationship test” (*per Banks*). But in *Ziatas* it was also held that it was reasonable for the condition to be designed to prevent the commission of any other offence. This is obviously a much broader power. However, the British Columbia Court of Appeal’s decision in *Banks* deals only with the specific offence branch of the *Ziatas* test. It is silent on the topic of prevention of the commission of any other offence. It cannot be said, therefore, that *Banks* contradicts *Ziatas* and the two holdings must be seen as consistent.

At any rate, reasonableness can here be defined as the relationship between the probation condition and the offence for which the accused was sentenced or discharged (and possibly any other criminal behaviour by the accused). This is clearly not the same issue as impossibility. A condition can be reasonable but at the same time impossible or unreasonable and still possible. Yet, we shall see that some decisions fail to distinguish between the two concepts. It is to be remembered that reasonableness is a specific statutory requirement for probation conditions (s. 737(2)(h)), while impossibility is but inherent in the section.

The British Columbia Court of Appeal dealt with the issue of impossibility in a probation order in *R. v. Dashner*.²² McFarlane J.A., writing for a unanimous court, remarked that²³

I think, however, that great care should be taken to ensure that restitution or reparation will not be made a condition of a probation order *unless the court is satisfied that the convicted person is able to pay* and that the circumstances come clearly within para. (e) particularly that the amount ordered represents “actual loss or damage sustained”. [Emphasis added.]

The Court of Appeal is dealing here with the separate issues of reasonableness and impossibility (this latter is the italicized portion of the preceding quotation). McFarlane J.A. continued his *ratio* (re: impossibility) with²⁴

I agree with the argument of counsel for the Crown that no separate or formal inquiry is a necessary preliminary to the prescribing of a condition under s. 663(2)(e) [now s. 737]. There should, however, in my opinion, be facts before the sentencing judge to show that the amount of restitution or reparation ordered is for actual loss or damage sustained by the person aggrieved or injured and that the convicted person has the means to pay it.

Unfortunately, the British Columbia Court of Appeal seems to confuse reasonableness with impossibility soon thereafter in *R. v. Stennes*.²⁵ Bull J.A., writing for the unanimous court, held that²⁶

In my view, considering the presentence report and what was before this learned Judge, I do not think that there is any suggestion, although this man was a member of the 101 Knights [a motor-cycle gang], that being a member of that club makes him a criminal or inclined to criminal activities when we are dealing with a motorcycle mechanic [the accused], *it would be unreasonable to direct that he should not associate with any motorcycle club or "gang"*, as the learned Judge referred to it. I see nothing which was before the learned sentencing Judge upon which he could properly pick out any persons with whom the appellant should not associate. In my view there was not sufficient evidence upon which the learned Judge could impose such a restrictive condition on the habits of this man. *I mention only that one of the names was the landlord at the home in which this appellant lived*, and it seems to me that the effect of an order of this kind goes too far and would make a complete change in this man's whole standard of living, without any suggestion that his association with these people has been to his detriment in the past.

All I say is that I think the learned Judge went beyond what was reasonable under the circumstances of this particular case. [Emphasis added.]

The probation order had been part of the trial court's disposition on a charge of attempted theft of "building material". Whether or not the condition was unreasonable (using either definition), it would virtually be impossible for a motor-cycle mechanic not to associate with members of a motor-cycle club, barring a court-ordered change of profession. Likewise, how was the accused here not to associate with his landlord? Even if "reasonable", the condition was one with which it was impossible to comply. The Court of Appeal did not draw out that distinction.

However, in *R. v. Strohm*, Branca J.A., of the same court, returned explicitly to the test in *Dashner*.²⁷

Following what was said by my brother McFarlane in *Regina v. Dashner*, and having regard to the fact that it was obviously impossible for this appellant to pay that sum by way of restitution, we think that the term in the probation order should be deleted.

The Ontario Court of Appeal, in *R. v. Colby*, reduced the quantum of the restitution upon concluding that the accused did not have the means to pay the full amount as ordered by the trial judge.²⁸

Impossibility seems to have been confused with reasonableness in *R. v. Gladstone*.²⁹ In that case, the accused appealed a probation condition that ordered him to surrender his fishing permit for a period of one month; the original charge had been made under the regulations of the *Fisheries Act* (B.C.). Hinds Co. Ct. J. allowed the appeal, stating that in his view³⁰

the condition attached by the learned Provincial Judge to the probation order was inappropriate for several reasons. First, having suspended sentence, he in effect punished the accused by depriving him of his permit to fish for a period of 30 days. Second, in view of the particular circumstances of the accused — that he was a native Indian, no longer employable, in receipt of social assistance, and who represented that he was catching fish to smoke for winter food for himself and his family — I am not persuaded that it was a "reasonable condition" within the general purview of s. 663(2)(h). Third, the primary purpose of the condition was not directed to the rehabilitation of the accused.

While the condition might fail on the other two grounds enunciated in the judgment, I cannot agree with Judge Hinds's second ground. The condition seems eminently "reasonable" in the sense that it was meant by the Court of Appeal in *Banks*. However,

the accused's circumstances as outlined by Judge Hinds indicate that the condition in question put the accused in a situation where either he could place his family in danger of starvation over the winter months by complying with the order or he could refuse to comply with the condition and run the risk of being charged with breach of probation. The issue, then, is impossibility and not reasonableness.

The Saskatchewan Court of Appeal looked at impossibility in *R. v. Munro*.³¹ Culliton C.J.S., speaking for the court, said³²

In the Court's opinion, the provision in the Probation Order that the respondent make restitution to the Bank of Nova Scotia in the amount of \$28,000, together with interest at prevailing rates from February, 1978, within the first six months of the probation period is neither practical nor reasonable. The Bank has a civil claim for any sum it can establish was misappropriated by the respondent. There is nothing to prevent the Bank from asserting that claim in a civil action . . . *Thus to avoid placing on the respondent a burden which in no way assists the Bank, and one which the respondent cannot possibly carry out*, I direct that the order for restitution within the first six months of probation be struck out. [Emphasis added.]

I think that the Court of Appeal used the term "practical" where it would have been better to make a reference to the inherent impossibility of the condition; "practical" is not particularly informative in this context. The Court of Appeal's view of impossibility is clear: the accused must be able to carry out the condition. The court deals with reasonableness through its concern that the condition places on the accused "a burden which in no way assists the Bank" (*i.e.*, the victim of the offence) given the existence of a claim in the civil courts. This would seem to restrict the definition of reasonableness dealt with at the beginning of this section; it is reasonable if there is a relationship between the condition and the offence absent the actual presence of another means to the end espoused by the condition. However, it can be argued that this restriction is only relevant for restitution conditions.

In *R. v. Hudson*,³³ the Ontario Court of Appeal seems to have found impossibility twice within the same probation order. In the matter of the restitution condition, the Court of Appeal held that as there had been no evidence before the trial judge showing that the accused could pay the relevant sum, the condition should not have been ordered. Impossibility would appear to be assumed in restitution matters unless the court is informed otherwise. Brooke J.A. also held that "This man is to be deported immediately upon his release and in those circumstances it would be improper to make a probation order for a period of three years";³⁴ the impropriety seemingly being that a probation order had been made where it would be impossible for the accused to comply with some or all of the order's conditions due to his deportation simultaneously with the activation of the order. Clearly, this would be a valid analysis only where any condition of the order would require the accused's presence within the jurisdiction of the court making the order or any jurisdiction referred to in s. 739 and, if there is such a requirement, in the absence of procedural mechanisms to transfer the probation order to the jurisdiction to where the accused was being deported (and to the best of the present writer's knowledge, no such mechanism exists between Canada and other jurisdictions).

Given that deportation is an act of the state whereby the physical freedom of the accused is negated, it would appear that it is not the *mens rea* of the offence that is affected thereby. Rather, it is that level of minimal intent required within the *actus reus* necessary to show voluntariness that is absent as a result of the deportation. Admittedly, an argument can be made here that the impossibility stems from a legal issue. However, I prefer the view that this is an example of factual impossibility due to the physical restraints placed on the accused by the deportation order; the accused does not have the option of choosing with which legal instrument he will comply.

Other Courts of Appeal have adopted or developed the view of the British Columbia Court of Appeal in *Dashner* with regard to impossibility in restitution conditions. In 1983, the Alberta Court of Appeal followed that case stating: "before putting such a term in a probation order [the trial judge] should make an inquiry as to the means of the prisoner to pay".³⁵ The Ontario Court of Appeal established, *in obiter*, the condition precedent that must obtain before a court could include a restitution condition in a probation order. This was in *R. v. Scherer*. Martin J.A. stated that³⁶

it is incumbent on the sentencing tribunal before making restitution or reparation a term of probation to satisfy itself that the term is one which can reasonably be performed during the period of probation.

The Nova Scotia Supreme Court (Appeal Division) decided the appeal in *R. v. Sugg* on June 25, 1986.³⁷ At trial, the Crown established a *prima facie* case that the accused had wilfully breached the restitution condition of his probation order. The accused led evidence to show that he had not had the financial means to fulfil the restitution condition. Nevertheless, the trial judge convicted him. The Appeal Division overturned the conviction and acquitted the accused. MacDonald J.A. for a unanimous court, wrote that:³⁸

Subsection (1) of s. 666 of the *Criminal Code* creates a full *mens rea* offence. [The trial judge] found as a fact that the appellant was financially unable to pay the amount of \$3,500 by May 1, 1985, as directed by the probation order. I agree with counsel for the appellant that such finding is incompatible with a wilful failure to make such payment.

While agreeing with the result, the present writer does not agree with the analysis of the Appeal Division. Once a court has ascertained impossibility (*i.e.*, the accused *could* not comply), wilfulness is no longer an issue; if a person cannot do something, whether he wants to or not is a moot point. Therefore, I would view impossibility as going to negate the *actus reus*, specifically, the minimal level of intent required to provide the voluntariness of the action. The same analytical error was made by the Quebec Court of Appeal in *R. v. Lazure*³⁹ and *R. v. Grandbois*.⁴⁰

There are some interesting implications in *R. v. Collard*⁴¹ for the issue of impossibility. Monnin C.J.M., was examining a breach of a restitution condition in this case. He stated that^{41a}

The Crown is hardly in a position to find out if the convicted person has assets, a bank account, investments, pension rights, bonds, shares or other cash assets, whether he is employed, his salary or any other personal circumstances which might affect his ability to pay. Further, it would take a squad of detectives to dig out such information. The convicted person is the only one who has full knowledge of his financial and personal affairs. If the Crown even attempted to secure this information from financial or other institutions, it might well be stopped short by the *Canadian Charter of Rights and Freedoms*.

Monnin C.J.M. seems to have been referring in this quotation to “full knowledge” at the time of trial for a breach of probation. With reference to the binding of the accused by a probation order, Monnin C.J.M. stated that the accused is made aware of the conditions of the probation order. Given these two facts, he found that there is no onus on the Crown to “negative any possible excuse for the failure to comply with a probation order”.⁴²

On the other hand, there is a defence against the Crown’s *prima facie* case open to the accused. This defence would be based on the accused’s full knowledge of his own affairs. But perhaps we can take this line of thinking a bit further. There is no logical reason why the circumstance of the accused’s full knowledge of his own financial affairs should not be viewed as obtaining at the time of the making of the probation order as well. It is doubtful, however, that we could go so far as to then say that silence on the part of the accused at the time of sentencing on the original charge is indicative of his ability to comply with the conditions of the order. However, there exist in s. 727 of the *Criminal Code* mechanisms that may be adaptable to s. 737(2) (*e*). In particular, s. 727(2)⁴³ reads:

(2) The court may require the offender, for the purposes of subsection (1), to disclose to the court, orally or in writing, particulars of the financial circumstances of the offender in the manner and form prescribed by the court.

There would still be the possible defences of vagueness of the condition or change in financial circumstances available to the accused. However, this inquiry would effectively negate the opportunity to raise a defence of impossibility *ab initio*.

The case of *R. v. Forrest* is one where the British Columbia Court of Appeal found impossibility within an absolute abstention from alcohol condition.⁴⁴ While intoxicated, the accused had assaulted two police officers and broken a store window. He was found guilty of the offence of mischief under \$1,000 and one count of assaulting a police officer. There was a joint submission to sentence. However, prior to passing sentence, the Court of Appeal noted that⁴⁵

The sentencing judge *appropriately* stated that he would require details of the offences and *details of the circumstances of the appellant* before he would be prepared to accede to the sentence suggested jointly by counsel. Thereupon the general circumstances of the offences and some circumstances of the appellant were expressed. [Emphasis added.]

One of the conditions of the probation order that was part of the sentencing judge's disposition in these matters was "Abstain absolutely from the consumption of any alcohol." It is unclear from the report of the case whether this was a paraphrase by the Court of Appeal of s. 737(2)(c), to wit: "Abstain from the consumption of alcohol either absolutely or on such terms as the court may specify", or whether the condition had been created under s. 737(2)(h).

Hinds J.A. speaking for a unanimous Court of Appeal, held that:⁴⁶

Looking at the other conditions of the probation order it is readily apparent that the conditions were attached in a desire to assist in the rehabilitation of this particular accused person. However, in my respectful view, the condition imposed upon a person such as this accused, who has a history of drinking to excess, that he abstain absolutely from the consumption of any alcohol, *is not entirely realistic*. I would substitute for that condition of the probation order the following: "Not to be found in a public place in an intoxicated condition". [Emphasis added.]

The words "is not entirely realistic" seem to indicate that he felt that it would be impossible for such a person as the accused to comply with that condition. The present writer fails to see how the Court of Appeal could come to this conclusion in the light of its earlier decisions with reference to the doctrines of probation impossibility and reasonableness.

The first question to be answered is whether the condition was reasonable. It is to be remembered that the accused had been under the influence of alcohol when he had committed the offences for which he had been convicted; this does not appear to have been denied at trial. Clearly, then, there was a "close relationship" (*per Banks*) between the offences and the condition and, therefore, the condition was reasonable. It is immaterial here whether the condition in question was made under s. 737(2)(c) or (h).

As the condition in question is reasonable, we must now determine whether it places the accused in a position where it would be impossible for him to comply with that condition. The *ratio* of the Court of Appeal decision in *Dashner* held that the trial judge had to be satisfied that the convicted person would be *able* to comply with the condition; see, as well, the same court's comments in *Stennes* and *Strohm*. The Court of Appeal, in the present case, was obviously aware of the joint submission and the subsequent inquiry by the trial judge prior to sentencing. Indeed, Hinds J.A. remarked on the appropriateness of such an inquiry. The trial judge appears to have been satisfied that the condition was one with which compliance was possible. Counsel for both sides at trial were found by the Court of Appeal to have been experienced. There does not seem to have been any fresh evidence before the Court of Appeal. Finally, alcoholics can and do abstain absolutely from alcohol; one need only think of the example of Alcoholics Anonymous. One can only conclude, therefore, that *Forrest* was decided wrongly.

Less problematic is the Court of Appeal's decision in *R. v. T. (M.)*.⁴⁷ In this case, the Court of Appeal agreed that a condition that required the young offender to maintain a radius of one block from any school, excepting certain situations, was "an almost impossible term to carry out" due to the location of the young offender's home.⁴⁸

Beyond the analytical errors referred to above, the Quebec Court of Appeal recently has confused the issues of reasonableness and impossibility in *R. v. Lussier*.⁴⁹ In a very brief oral judgment, an unanimous Court of Appeal found that a condition reading "Ne pas être en présence de gens a casier judiciaire sauf pour fins de travail, sauf les membres de sa famille" was "irréaliste et par conséquent déraisonnable". The Court of Appeal struck that condition from the probation order.

Legal Impossibility

The issue here is whether compliance with a condition of a probation order by an accused who is bound by that order would create a situation where that very compliance would force that accused into running the risk of criminal liability or abrogation of his fundamental rights or which relies on the compliance of a third party who is not bound by the condition.

A decision in Saskatchewan included the following condition in a probation order:⁵⁰

[the accused] shall not own or have custody and control of cattle during the period each year from December 1 st to March 31 st, unless they are inspected at the end of each month in that period by a qualified veterinarian who shall each time provide a written report to the [R.C.M.P.].

Clearly it would be legally impossible for the accused to force the veterinarian to come monthly and submit a written report to the police; the probation order did not bind the veterinarian. If the accused had cattle during the period in question and the veterinarian did not come for whatever reason or submit the report, it would seem that the accused could be charged with breaching this condition of his probation order; obviously, the wilfulness of such a breach would depend on the surrounding circumstances. It is also clear that this condition was a reasonable one given that the probation order was part of the court's disposition for a conviction for neglect of cattle.

Another circumstance where impossibility arises was dealt with by the Saskatchewan Court of Appeal in *R. v. Zarubin*.⁵¹ As a condition of his probation order, the accused was required to "carry out the lawful directions and instructions of the probation officer". At the time of the making of this probation order, the accused had been released from custody while his appeal on another conviction was pending. One of the conditions of his release was that he not communicate directly or indirectly "with any 'member' or 'employee' of the Government of Saskatchewan". The Court of Appeal found that as a probation officer in that province was an employee of that government, the accused had been put in an impossible situation, to wit: he could not comply with one undertaking without breaching the other. Another example of legal impossibility is to be found in the brief discussion in *R. v. R. (A.J.)*.⁵²

Section 7 of the Charter requires courts to respect the accused's right to life, liberty, and security of the person save where the principles of fundamental justice allow otherwise. Clearly, the conditions of a probation order must comply with s. 7, otherwise the accused can apply for a s. 24(1) remedy.

We will now examine several probation cases where the liberty and security of the accused was an issue.

In *R. v. Giordano*,⁵³ the New Brunswick Court of Appeal's decision is informed implicitly by the need to avoid placing the accused in a situation where he will have to comply with a judicially ordered violation of his right to personal security in order to avoid possible criminal charges:⁵⁴

we question the authority of a court to order any person on probation to take such drugs as he may be ordered to take. One must always bear in mind that a breach of probation is an offence punishable on summary conviction. It restricts the liberty of an individual by requiring a person to do or refrain from doing certain things. Any reasonable conditions in line with those enumerated in s. 663(2) [now s. 737(2)] may be added to the order but a court must be guarded in the extension of any wording beyond that which is contemplated by the section.

Anderson J.A. wrote the decision for a unanimous British Columbia Court of Appeal in *R. v. Rogers*.⁵⁵ In that case, the accused appealed from a sentence that included the following probation condition:

2. You will, under their direction, *seek and take whatever psychiatric assessment or treatment that can be arranged for you*, and you shall do that as you are directed by the Inter Ministerial Project office. [Emphasis added.]

The accused submitted that the part of the condition here emphasized was in violation of s. 7 of the Charter. Anderson J.A. agreed:⁵⁶

In my opinion, a probation order which compels an accused person to take psychiatric treatment or medication is an unreasonable restraint upon the liberty and security of the accused person. It is contrary to the fundamental principles of justice and, save in exceptional circumstances, cannot be saved by s. 1 of the Charter. Exceptional circumstances are not present here.

The court went on to explain the basis for its characterization of the condition as an “unreasonable restraint”.⁵⁷

While, as counsel for the Crown has stated, it is unlikely that an accused person would be subjected to unusual or dangerous medication or treatment, *that risk always exists*. In my opinion, it is the protection of the public which is the principal support for an order compelling the compulsory taking of treatment or medication. That is insufficient to save the order under s. 1 of the Charter. Other less drastic means are available to accomplish the purpose. [Emphasis added.]

Anderson J.A. then continued:⁵⁸

While the rehabilitation of the appellant is important, the court must consider the risks involved in permitting the appellant to be at liberty on probation. In other cases, where the trial judge finds as a fact that an accused is suffering from schizophrenia or a like illness and refuses to consent to prescribed treatment or medication, it might very well be that the trial judge would not agree to probation. *The risk to society might be too great and only incarceration may afford the necessary protection*. [Emphasis added.]

The court must weigh, in the absence of consent, the possible risk to the accused through “unusual or dangerous medication or treatment” on the one hand, with the protection of the public on the other. In that analysis, any amount of such risk to the accused apparently would tip the scales in his favour. However, the Court of Appeal found that such risk to the accused is always present. The Court of Appeal denies the possibility of such a condition being saved as a result of a s. 1 analysis given the existence of incarceration, *etc.*, as a less intrusive means of protecting society; presumably it would fail under the disproportionate impact head. It is unfortunate that the Court of Appeal does not discuss the medical risk element. On what facts is the court basing its finding that there is always the risk present that the psychiatric accused will be subjected to “unusual or dangerous” procedures?

The Court of Appeal changed the conditions of the accused’s probation order to reflect the above concerns. In particular, conditions 3 and 4 are relevant here:⁵⁹

3. You will thereafter attend as directed from time to time at the Inter Ministerial project for the purpose of receiving such medical counselling and treatment as may be recommended except that you shall not be required to submit to any treatment or medication to which you do not consent.

4. If you do not consent to the form of medical treatment or medication that is prescribed or recommended, you shall forthwith report to your Probation Officer and thereafter report daily to your Probation Officer.

The Ontario Court of Appeal dealt with the issue of non-consensual psychiatric treatment (not in the context of a probation order) in *Fleming v. Reid*.⁶⁰ Robins J.A. writing for the unanimous court, upheld the absolute right of the competent adult to complete control over his or her own medical care. This right is found at common law and is protected by s. 7 of the Charter. It was found by the court to apply to “mentally competent patients in psychiatric facilities” who⁶¹

like competent adults generally, are entitled to control the course of their medical treatment. Their right of self-determination is not forfeited when they enter a psychiatric facility. They may, if they wish, reject their doctor’s psychiatric advice and refuse to take psychotropic drugs. The fact that these patients, whether voluntary or involuntary, are hospitalized in a mental institution in order to obtain care and treatment for a mental disorder does not necessarily render them incompetent to make psychiatric treatment decisions.

This analysis is aimed at patients of psychiatric facilities. As they are patients, the Court of Appeal did not have to balance the right of the accused to be free from non-consensual risk to the security of his or her person with the protection of the public. The court refers briefly to the decision in *Rogers*, but did not draw out this important distinction.

In *R. v. Kieling*,⁶² the Saskatchewan Court of Appeal examined a condition similar to that in *Rogers*:⁶³

“you will accept treatment as may from time to time be recommended by Dr. Hunt or his nominee including the taking of prescribed medicine in the manner so prescribed”.

This condition had been made by a justice of the Court of Queen’s Bench upon a Crown appeal. Surprisingly, the Court of Appeal did not use an explicit s. 7 analysis in this matter. It was held that the question of law to be answered was whether the lower appellate court had the power to impose such a condition.

The condition in question was made under s. 737(2)(h). The Court of Appeal examined s. 737(2)(a) to (g) and found that these subsections dealt with affirmative conduct or abstention from conduct. It also found that conduct or abstention ordered under these subsections could have no negative consequences, nor present a risk to the accused, nor be of a type which in fairness should not be ordered in the absence of the consent of the accused. This tripartite test for conditions under s. 737(2)(a) to (g) is imported into s. 737(2)(h) by the words “such other” in that latter subsection. The Court of Appeal found that as the present condition failed this test on the third ground, it could not be held as valid. The Court of Appeal then deleted the offending part of the condition.

It is unfortunate that the Court of Appeal did not analyze “fairness” here in light of fundamental justice. It is also noteworthy that in *Rogers*, the British Columbia Court of Appeal was mainly concerned with the second ground of the test: risk to the accused.

Final Observations

Vagueness and impossibility in the conditions of a probation order are, for the most part, avoidable problems. A sentencing judge should examine the precision of a condition by asking him/herself the questions: What? How? When? Where? Who? The answers should be expressed explicitly by the wording of the condition itself, save where a permissible level of delegation must be allowed. Verbal clarification by the judge at sentencing is not a sufficient curative to vagueness as the accused may misunderstand or forget the explanation; this can occur even with the best of intentions on the part of the accused.

Likewise, the presence of factors creating a situation of factual or legal impossibility should be explored at sentencing.

With reference to psychiatric treatment and legal impossibility, we have seen that such probation conditions have been held to be in violation of s. 7 of the *Canadian Charter of Rights and Freedoms* (by the British Columbia Court of Appeal) or a common law duty of fairness (Saskatchewan Court of Appeal) and as such should not be ordered at all. Some courts have tried to get around this problem by ordering conditions like that ordered by the British Columbia Court of Appeal in *Rogers* (i.e., “If you do not consent to treatment or medication report daily to your Probation Officer”) quoted above in full. It will be interesting to see whether such “new” conditions survive court challenges.

Footnotes

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1 (1983), 36 C.R. (3d) 64, [1983] 6 W.W.R. 208 (Man. Prov. Ct.).

2 *Ibid.*, at pp. 71—2 C.R.

3 (1992), 74 C.C.C. (3d) 289 at p. 311, [1992] 2 S.C.R. 606, 15 C.R. (4th) 1.

4 [1972] 4 W.W.R. 262 (Man. Co. Ct.).

5 *Ibid.*, at p. 269.

6 (1972), 9 C.C.C. (2d) 137 (B.C.S.C.) at p. 140.

- 7 (1974), 19 C.C.C. (2d) 311, [1974] 6 W.W.R. 202 (B.C.S.C.).
- 8 (1977—78), 20 C.L.Q. 354.
- 9 *Ibid.*, at p. 356.
- 10 (1987), 57 C.R. (3d) 22 (Ont. Prov. Ct.).
- 11 *ibid.*, at p. 24.
- 12 *Ibid.*, at p. 28. See, too, this same judge's decision in *R. v. F. (A.)* (1990), 74 O.R. (2d) 107 (Prov. Ct.).
- 13 (1984), 32 Sask. R. 226 (Q.B.).
- 14 *Ibid.*, at p. 227.
- 15 (1977), 38 C.C.C. (2d) 545, 4 B.C.L.R. 354 (Co. Ct.).
- 16 See *R. v. Docherty* (1989), 51 C.C.C. (3d) 1, 72 C.R. (3d) 1, [1989] 2 S.C.R. 941.
- 17 (1992), 35 C.L.Q. 18.
- 18 *Ibid.*, at p. 20.
- 19 (1973), 13 C.C.C. (2d) 287 (Ont. C.A.). See, too, *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.).
- 20 *Ziata*, *ibid.*, at p. 288.
- 21 (1991), 3 C.R.R. (2d) 366 (B.C.C.A.) at p. 369, per Lambert J.A., leave to appeal to S.C.C. refused 3 C.R.R. 366n.
- 22 (1973), 15 C.C.C. (2d) 139, 25 C.R.N.S. 340, [1974] 2 W.W.R. 11 (B.C.C.A.).
- 23 *Ibid.*, at pp. 341—2 C.R.N.S.
- 24 *Ibid.*, at pp. 342—3 C.R.N.S.
- 25 (1975), 35 C.R.N.S. 123 (B.C.C.A.).
- 26 *Ibid.*, at p. 127.
- 27 See *R. v. Dashner* (1974), 15 C.C.C. (2d) 139, 25 C.R.N.S. 340, [1974] 2 W.W.R. 11 (B.C.C.A.), and *R. v. Strohm*, unreported (May 16, 1975, B.C.C.A.), per Branca J.A., quoted by C.C. Barnett Prov. Ct. J. in his article "Probation Orders under the Criminal Code" (1977), 38 C.R.N.S. 165 at p. 197.
- 28 *Ibid.*, at p. 200.
- 29 (1978), 40 C.C.C. (2d) 42, 2 C.R. (3d) S-9, [1978] 2 W.W.R. 75 1 (B.C. Co. Ct.).
- 30 *Ibid.*, at p. S-13 C.R.
- 31 (1979), 1 Sask. R. 93 (C.A.).
- 32 *Ibid.*, at pp. 95—6.
- 33 (1981), 65 C.C.C. (2d) 171.
- 34 *Ibid.*, at p. 173.
- 35 *R. v. Cardinal* (1983), 48 A.R. 3 19 (C.A.) at p. 320.
- 36 (1984), 16 C.C.C. (3d) 30, 42 C.R. (3d) 376, 5 O.A.C. 297 at p. 302 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 58 N.R. 80n.
- 37 (1986), 28 C.C.C. (3d) 569, 74 N.S.R. (2d) 51 (C.A.).
- 38 *Ibid.*, at p. 572 C.C.C.
- 39 (1987), 14 Q.A.C. 239, [1987] R.L. 558 (Que. C.A.).
- 40 (1988), 15 Q.A.C. 157 (Que. C.A.).
- 41 39 C.C.C. (3d) 471, [1987] 6 W.W.R. 564, 49 Man. R. (2d) 175 (C.A.).
- 41a *Ibid.*, at p. 473 C.C.C.
- 42 *Ibid.*
- 43 Enacted R.S.C. 1985, c. 23 (4th Supp.), s. 6, as yet unproclaimed.
- 44 (1992), 21 W.A.C. 293, 10 B.C.A.C. 293 (Hinds J.A.).
- 45 *Ibid.*, at p. 294 W.A.C.
- 46 *Ibid.*, at p. 296 W.A.C.
- 47 (1992), 29 W.A.C. 252, 17 B.C.A.C. 252, per Hollinrake J.A.
- 48 *Ibid.*, at p. 254 W.A.C.
- 49 Unreported, A.Q. No. 614 (Q.L.).

- 50 *R. v. Bocian* (1982), 16 Sask. R. 92 (Prov. Ct.) at p. 95.
 51 (1988), 73 Sask. R. 238 (C.A.).
 52.1989 Y.I. No. 66 (Q.L.).
 53 (1989), 96 N.B.R. (2d) 443 (C.A.).
 54 *Ibid.*, at p. 447. See, too, *R. v. Whittaker* (1989), 103 N.B.R. (2d) 146 (C.A.).
 55 (1990), 61 C.C.C. (3d) 481, 2 C.R. (4th) 192 (B.C.C.A.).
 56 *Ibid.*, at p. 488 C.C.C.
 57 *Ibid.*
 58 *Ibid.*
 59 *Ibid.*, at p. 489 C.C.C. Note that condition 4 has created a potential situation of factual impossibility.
 60 (1991), 82 D.L.R. (4th) 298, 4 O.R. (3d) 74, 48 O.A.C. 46 (C.A.).
 61 *Ibid.*, at p. 86 O.R.
 62 (1991), 64 C.C.C. (3d) 124, 92 Sask. R. 281 (C.A.).
 63 *Ibid.*, at p. 126 C.C.C.

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