A SUMMARY OF RECENT JUDGMENTS IN CRIMINAL CAUSES OR MATTERS

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JUDGE WAYNE GORMAN
PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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CHARTER-SECTIONS 8 AND 10(B)

R. v. BARRETT, 2021 NLSC 123, OCTOBER 1, 2021.

FACTS: In executing a search warrant, the police used a battering ram to gain entry into the accused's residence. The accused argued that this constituted an unreasonable search in contravention of section 8 of the *Charter*.

After being arrested and released, the police went to the accused's residence to speak to him. They did not advise him of his right to contact counsel. He spoke to them. He argued that he was detained and that section 10(b) of the *Charter* was breached.

HELD: Justice McGrath held that neither provision of the *Charter* was breached.

Section 8:

In concluding that the search was not unreasonable, Justice McGrath concluded as follows (at paragraphs 99 to 101):

> In the circumstances before me, I find that a lapse of thirty seconds from the first knock to forced entry is a reasonable period of time in which to allow an occupant to realize police are present, take any safety actions and then answer the door.
>
> With respect to the use of a battering ram to gain entry, I was not presented with any cases in which the use of a battering ram, on its own, was found to amount to an unreasonable execution of a warrant to search. I find that the use of this manner of entry in these circumstances was not unreasonable after the occupant was allowed sufficient time to answer the door.
>
> I therefore find that the accused has failed to establish on a balance of probabilities that Mr. Barrett's rights under section 8 of the *Charter* were violated by the manner in which the warrant was executed on July 10, 2015.

Section 10(b):

In holding that the accused had not been detained, Justice McGrath concluded as follows (at paragraphs 113 to 115):

> Having considered the factors in *Grant*, in the circumstances before me. I find that the accused has not proven on a balance of probabilities that he was psychologically detained when he was questioned on September 14, 2016.
>
> While Mr. Barrett would clearly conclude that he was being singled out for focused investigation on these child pornography charges, he had already been arrested on those same charges and was released. More will be said of the potential requirement to recaution later in this decision.
>
> Further, I have considered the totality of the police conduct and the particular circumstances of Mr. Barrett and find that a reasonable person in Mr. Barrett's circumstances would not conclude that he had been deprived of the liberty of choice.

SEARCH WARRANTS-AMPLIFICATION

R. v. Duncan, 2021 ONCA 673, October 1, 2021, at paragraphs 14 and 15:

> Amplification of an affidavit is a flexible remedy. A motion judge has a broad discretion. In exercising that discretion, the nature of the defect in the affidavit is important. If the affiant acted honestly and in good faith in preparing and presenting the affidavit, amplification or excision of parts of the affidavit must be considered by the motion judge.
>
> Even if the affiant acted honestly and in good faith, amplification of the affidavit cannot go so far as to undermine the requirement of prior judicial authorization for the warrant or the order. Nor, however, is amplification limited to errors or omissions in the affidavit which are so minor as to have little, if any, relevance to the ultimate legality of the authorization.

STATUTORY INTERPRETATION

R. v. Khill, 2021 SCC 37, October 14, 2021, at paragraph 77:

> The proper interpretation of s. 34(2)(c) emerges from following the basic principles of statutory interpretation: reading the words of the statute in their entire context, in their grammatical and ordinary sense, harmonious with the

scheme and object of the statute (*R. v. Zora*, 2020 SCC 14, at para. 33*; 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).

EVIDENCE-HEARSAY-NECESSITY

R. v. ROWE, 2021 ONCA 684, OCTOBER 6, 2021

FACTS: The accused was acquitted at trial of charges of possession of cocaine for the purpose of trafficking and possession of the proceeds of crime. At his trial, the Crown applied to have the statement of a recanting witness (Ms. Simpson) admitted for the truth of its contents under the principled exception to the rule against hearsay. That application was dismissed. In dismissing the application, the trial judge made the following comments concerning the necessity requirement:

> I will assume for present purposes that necessity is made out although I have reservations on the point. It is true that the Crown has been deprived of the fulsome description of a drug transaction which appears in Ms. Simpson's statement to police. There is, however, reliable evidence from other sources which would permit the jury to infer that a drug transaction took place without considering Ms. Simpson's statement for the truth of its contents.
>
> [Emphasis added by the Court of Appeal.]

The Crown appealed, arguing that the trial judge erred in applying the necessity requirement for the admission of hearsay evidence.

HELD: The appeal was allowed and a new trial ordered.

The Court of Appeal concluded that the trial judge "erred by approaching necessity from the perspective of what he thought the Crown needed to 'make out its case.' Every participant in a criminal trial operates within their own zone of responsibility. That is how fair trials that lead to just verdicts are best achieved. It was for the Crown, not the trial judge, to determine what evidence was necessary to prosecute the matter; it was for the trial judge to adjudicate upon any admissibility issues that might have arisen from the Crown's decisions in that regard" (at paragraph 40). The Court of Appeal indicated that "[u]nder the principled exception to the rule against hearsay, necessity is not measured by the overall strength of the case of the party seeking admission of the statement for the truth of its contents. That is, '[t]he criterion of necessity […] does not have the sense of 'necessary to the prosecution's case': *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 933" (at paragraph 41).

The Court of Appeal also indicated that "necessity is measured by availability. Sometimes a hearsay statement becomes unavailable because a witness goes missing, dies, or is otherwise unavailable to testify. And sometimes a statement becomes unavailable because a witness is present and available to testify, but refuses to do so or, as in this case, recants the earlier statement. In the case of a recantation, the 'recanting witness holds the prior statement, and thus the relevant evidence, 'hostage':' *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 799. In these circumstances, necessity arises from the unavailability of the testimony that would otherwise reflect the content of the prior relevant statement: *Khelawon*, at para. 78…Accordingly, '[w]here a witness recants from a prior statement, necessity is established': *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 22. It is that simple. The focus then turns to threshold reliability" (at paragraphs 42 and 43).

SENTENCE-ASSAULT-PARTNER

R. v. WATKINS, 2021 NLSC 127, OCTOBER 7, 2021.

FACTS: The accused was convicted of assaulting his partner and sentenced to seven months of imprisonment. He appealed from sentence, arguing that "the sentencing judge erred in principle by: (a) creating a judicial category of sentences for assault by choking or strangling an intimate partner, contrary to the ruling of the Supreme Court of Canada in *R. v. M. (T.E.)*, [1997] S.C.R. 948, 114 C.C.C. (3d) 436 at paragraphs 32 - 33; and (b) relying on a study from a medical journal without providing notice to the parties…During oral argument, the Crown conceded that at the time of the commission of the offences on August 21, 2019, the maximum allowable sentence for a conviction under section 266(b) was six months pursuant to section 787(1). On September 19, 2019, an amendment to section 787(1) came into effect, increasing the maximum penalty to two years less a day" (at paragraphs 3 and 4).

The circumstances of the assault were described as follows (at paragraphs 12 and 13):

> In essence, in the early morning hours of August 21, 2019, Mr. Watkins and his girlfriend (Ms. X.) returned to his residence after having been at a bar. An argument ensued after Ms. X suggested inviting a person they had met earlier in the evening back to engage in sexual activity. Mr. Watkins became very upset and started calling Ms. X. various hurtful/sexualized epithets. She responded by pouring a container of water over his head. Mr. Watkins then grabbed her by the throat with one hand and pushed her against the wall and

> held her there for approximately 30 seconds before letting go. Ms. X. described a sensation of not being able to talk or breathe and losing her eyesight.
>
> After this incident, Mr. Watkins followed her around the apartment and grabbed her by the throat a second time and held his grip for approximately 10 to 15 seconds before letting go. Ms. X. escaped from the apartment and while outside Mr. Watkins grabbed her by the throat for the third time, this time using both hands pushing her head back and then "head-butting" her before letting go

HELD: The appeal was allowed and the sentence reduced to a period of five months of imprisonment.

Judicial category of assault on an intimate partner for purposes of sentencing:

In imposing sentence, the sentencing judge indicated that "[t]he judiciary must send a clear message that men who choke or strangle their present or former intimate partners will be sentenced to significant periods of incarceration".

The accused argued that "the sentencing judge erred in principle in establishing 'a hard and fast rule', thereby limiting his discretion.

In rejecting this proposition, Justice Browne concluded (at paragraph 16):

> … I conclude that the sentencing judge was simply emphasizing the seriousness of the assault by choking and headbutting, and the pressing concern of intimate partner violence. Therefore, I find the sentencing judge did not err in principle.

Introduction of a medical study without notice to the parties:

Justice Browne concluded (at paragraph 20):

> I accept the position of Mr. Watkins' counsel that where a judge intends to rely on a study regarding the incidence of a crime he/she/they should provide notice to the parties. However, while I find this constitutes an err in principle, I do not find that it had an impact on the sentence imposed by the judge as I also accept the Crown's position that it was relied upon solely for the purpose of providing the social context.

Imposition of a term of seven months' incarceration under section 266(b):

Justice Browne stated that "[h]aving considered all of the circumstances, I conclude that a fit sentence in this case would be a period of five months' imprisonment consecutive" (at paragraph 32).

REASONS FOR JUDGMENT

R. v. P.N., 2021 NSCA 68, OCTOBER 7, 2021.

FACTS: The accused was convicted of the offence of sexual assault. He appealed from conviction, arguing in part, that the trial judge "erred by making positive determinations of the complainant's credibility on the basis of the absence of contradictory evidence". At the trial, a potential witness (Joey) was not called to testify.

In convicting the accused, the trial judge stated:

> In speaking about it at trial, Ms. [L.] said she recalled what happened and added that Mr. [N.] also peed in the kitchen sink. The fact that Ms. [L.] added this and put Mr. [N.]'s friend Joey into the equation, in my mind, enhances her credibility. If it had not occurred, it would have been so easy to have Joey testify that he did not witness these events.
>
> I am not suggesting that the accused has the labouring oar to prove his innocence. I only mention it to explain why I believe the Complainant. In so doing I find that all of the elements of sexual assault have been proved beyond a reasonable doubt and, accordingly, I find Mr. [N]. guilty of the offence of sexual assault contrary to s. 271(1)(a) of the *Criminal Code*.
>
> [Court of Appeal's emphasis added]

HELD: The appeal was allowed and a new trial was ordered. The Court of Appeal indicated that "[t]o say this line of reasoning is troublesome is an understatement. The trial judge committed two errors" (at paragraph 70):

> 1. He used the absence of potentially troublesome credibility detractors (Joey's evidence) in enhancing the credibility of Ms. Q.;
>
> 2. His remarks can be interpreted as placing the evidentiary burden upon the defence to call a witness to the stand to contradict Ms. Q., and the failure to do so enhanced the credibility of Ms. Q.

The Court of Appeal concluded that the "trial judge's error with respect to the role of the non-existent evidence was further accentuated when he suggested that it would have been 'easy' for Joey to have been called as a witness. This could only have been a remark directed at the defence. It was predicated on the notion that if Joey's evidence could have contradicted Ms. Q., then it would have been easy for the defence to have him testify to this effect. The trial judge implied that the defence's failure to call the witness had the effect of enhancing the credibility of Ms. Q."

DEFENCE OF THE PERSON

R. v. KHILL, 2021 SCC 37, OCTOBER 14, 2021.

FACTS: The accused was charged with second-degree murder. He twice shot a person he saw looking through his truck. At his trial, he argued the shooting was justified as defence of the person. He was acquitted.

On appeal, the Ontario Court of Appeal set aside the acquittal and ordered a new trial. The Court of Appeal concluded that the trial judge had erred in instructing the jury on self defence, particularly in falling to explain the impact of section 34(2)(c) of the *Criminal Code* ("In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors…(c) the person's role in the incident".).

The accused appealed to the Supreme Court of Canada. The Supreme Court noted that the "correct interpretation of "the person's role in the incident" lies at the heart of this appeal".

HELD: The appeal was dismissed. The Supreme Court held that "[w]hile the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances, the jury must take into account the extent to which the accused played a role in bringing about the conflict to answer that question. It needs to consider whether the accused's conduct throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge…In the present case, this jury was not instructed to consider the effect of Mr. Khill's role in this incident on the reasonableness of his response and I am satisfied this was an error of law that had a material bearing on the jury's verdict" (at paragraphs 4 and 5).

Defence of the Person:

The Supreme Court noted that the present self-defence provision is "more open and flexible and additional claims of self-defence will be placed before triers of fact…Replacing preliminary and qualifying conditions with reasonableness factors also means these factors must be considered in all self-defence cases in which they are relevant on the facts. By contrast, under ss. 34 to 37 of the prior regime, some requirements were only engaged in certain situations, depending on which of those provisions governed. For example, while the former s. 37 required that the force used be no more than necessary, there was no similar requirement under the former s. 34(2) (*Hebert*, at para. 16). Now, however, the proportionality of an accused's actions in response to a threat is always a discrete factor to be considered under s. 34(2)(g). It may be a deciding factor, even where the accused was an otherwise innocent victim of circumstance" (at paragraphs 44 and 45). The Court indicated that there is a "requirement to consider certain factors — including proportionality and the availability of other means to respond to the use or threat of force — in every case in which they are relevant, regardless of the genesis of the confrontation or the features of the dispute" (at paragraph 46).

The Three Inquiries Under Section 34:

The Supreme Court indicated that section 34(1) involves three inquiries: "(1) the catalyst; (2) the motive; and (3) the response" (at paragraph 51).

(1) The Catalyst — Paragraph 34(1)(a): Did the Accused Believe, on Reasonable Grounds, that Force Was Being Used or Threatened Against Them or Another Person?

The Supreme Court indicated that this "element of self-defence considers the accused's state of mind and the perception of events that led them to act…Importantly, the accused's actual belief must be held 'on reasonable grounds'. Good reason supports the overlay of an objective component when assessing an accused's belief under s. 34(1)(a) and in the law of self-defence more generally. As self-defence operates to shield otherwise criminal acts from punitive consequence, the defence cannot depend exclusively on an individual accused's perception of the need to act. The reference to reasonableness incorporates community norms and values in weighing the moral blameworthiness of the accused's actions" (at paragraphs 52 and 53).

The Court noted that "[r]easonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of

criminal subcultures…Similarly, the ordinary person standard is 'informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms'…The question is not therefore what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive… Reasonableness is ultimately a matter of judgment and '[t]o brand a belief as unreasonable in the context of a self-defence claim is to declare the accused's act criminally blameworthy'" (at paragraphs 56 to 58).

(2) The Motive — Paragraph 34(1)(b): Did the Accused Do Something for the Purpose of Defending or Protecting Themselves or Another Person from that Use or Threat of Force?

The Court held that the "second element of self-defence considers the accused's personal purpose in committing the act that constitutes the offence. Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears" (at paragraph 59).

The Supreme Court indicated that the "range of reasonable responses will be different depending on whether the accused's purpose is to defend property, effect an arrest, or defend themselves or another from the use of force" and that "great care is needed to properly articulate the threat or use of force that existed at a particular point in time so that the assessment of the accused's action can be properly aligned to their stated purpose" (at paragraphs 60 and 61).

(3) The Response — Paragraph 34(1)(c): Was the Accused's Conduct Reasonable in the Circumstances?

Finally, the Court indicated that the third inquiry under section 34(1)(c) "examines the accused's response to the use or threat of force and requires that 'the act committed [be] reasonable in the circumstances'. The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon" (at paragraph 62).

The Supreme Court suggested that the new provision has "expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the provision dictates, the starting point is that reasonableness will be measured according to 'the relevant circumstances of the person, the other parties and the act'. This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused — including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1))" (at paragraph 64).

However, the Supreme Court of Canada also indicated that "the focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time…Section 34(1)(c) asks whether the 'act committed is reasonable in the circumstances'….Courts must therefore avoid treating the assessment of the reasonableness of the *act* under s. 34(1)(c) as equivalent to reasonable *belief* under s. 34(1)(a). Beyond honest but reasonable mistakes, judges must remind juries that the objective assessment of s. 34(1)(c) should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences…the question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act….Parliament's choice of a global assessment of the reasonableness of the accused's otherwise unlawful actions represents the most significant modification to the law of self-defence" (at paragraphs 65, 67, 69 and 70).

The Meaning of the Accused's "Role in the Incident" in Section 34(2)(c):

The Court held "that 'the person's role in the incident' refers to the person's conduct — such as actions, omissions and exercises of judgment — during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances. It calls for a review of the accused's role, if any, in bringing about the conflict. The analytical purpose of considering this conduct is to assess whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge" (at paragraph 74).

The Supreme Court indicated that "this factor includes, but is not limited to, conduct that could have been classified as unlawful, provocative or morally blameworthy under the prior provisions or labelled 'excessive"…a 'person's role in the incident'

"was intended…to ensure the trier of fact considers how all relevant conduct of the accused in the incident contributed to the final confrontation" (at paragraph 75).

The Court held that the "analytical purpose of considering the person's 'role in the incident' is its relevance to the reasonableness assessment where there is something about what the accused did or did not do which led to a situation where they felt the need to resort to an otherwise unlawful act to defend themselves. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis. Where self-defence is asserted, courts have always been interested in who did what. The fact that the victim was the cause of the violence often weighed heavily against them…The phrase 'role in the incident' captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. In this way, the trier of fact called upon to evaluate this factor will determine how that person's role impacts the 'equities of the situation'… Section 34(2)(c) therefore draws attention to a key question: who bears what responsibility for how this happened? The extent to which the accused bears responsibility for the ultimate confrontation or is the author of their own misfortune may colour the assessment of whether the accused's act was reasonable… the trial judge will inquire into whether the accused bears some responsibility for the final confrontation and whether their conduct affects the ultimate reasonableness of the act in the circumstances" (at paragraphs 85, 86 and 14).

A Summary:

The Supreme Court summarized its conclusions by indicating that "the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances" (at paragraphs 123 and 124):

> In sum, the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances. To answer that question, as Parliament's inclusion of a "person's role in the incident" indicates, fact finders must take into account the extent to which the accused played a role in bringing about the conflict or sought to avoid it. They need to consider whether the accused's conduct throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.
>
> The phrase enacted is broad and neutral and refers to conduct of the person, such as actions, omissions and exercises of judgment in the course of the

> incident, from beginning to end, that is relevant to whether the act underlying the charge was reasonable — in other words, that, as a matter of logic and common sense, could tend to make the accused's act more or less reasonable in the circumstances. The conduct in question must be both temporally relevant and behaviourally relevant to the incident. This is a conjunctive test. This includes, but is not limited to, any behaviour that created, caused or contributed to the confrontation. It also includes conduct that would qualify under previous concepts, like provocation or unlawfulness, but it is not limited to or circumscribed by them. It therefore applies to all relevant conduct, whether lawful or unlawful, provocative or non-provocative, blameworthy or non-blameworthy, and whether minimally responsive or excessive. In this way, the accused's act, considered in its full context and in light of the "equities of the situation", is measured against community standards, not against the accused's own peculiar moral code (Paciocco (2014), at p. 290; Phillips, at para. 98).

Application to this Case:

In concluding that a new trial was required, the Supreme Court held that the "instruction on s. 34(2)(c) should have directed the jury to consider the effect of the risks assumed and actions taken by Mr. Khill: from the moment he heard the loud banging outside and observed his truck's illuminated dashboard lights from the bedroom window to the moment he shot and killed Mr. Styres in the driveway. The importance of s. 34(2)(c) is obvious where an accused's actions leading up to a violent confrontation effectively eliminate all other means to respond with anything less than deadly force. Where a person confronts a trespasser, thief or source of loud noises in a way that leaves little alternative for either party to kill or be killed, the accused's role in the incident will be significant…The error is significant and might reasonably have had a material bearing on the acquittal when considered in the concrete reality of the case. In the end, even if the jury considered Mr. Khill to have played a major role in instigating the fatal confrontation between him and Mr. Styres, this fact alone would not necessarily render his actions unreasonable or preclude him from successfully making a claim of self-defence" (at paragraphs 130 and 141).

SENTENCE-BLACK OFFENDERS

R. v. MORRIS, 2021 ONCA 680, OCTOBER 8, 2021.

FACTS: The accused, referred to in the judgment as a "Black offender", was convicted of a firearm offence. The trial judge imposed a period of one day of imprisonment followed by eighteen months of probation.

HELD: The appeal was allowed. The Court of Appeal concluded that an appropriate sentence was a period of incarceration of two years less a day.

The Court of Appeal concluded as follows (at paragraphs 56, 91, 97, 122 and 123):

> A sentencing judge has a specific and focused task. A sentencing judge must impose a sentence tailored to the individual offender and the specific offence. While evidence relating to the impact of anti-Black racism on an offender will sometimes be an important consideration on sentencing, the trial judge's task is not primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles and objectives of sentencing laid down in Part XXIII of the *Criminal Code*...
>
> There can be no doubt that evidence on sentencing, describing the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances. The evidence is not only admissible, it is, in many cases, essential to the obtaining of an accurate picture of the offender as a person and a part of society.
>
> There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour.
>
> …the rationale offered in *Gladue* and *Ipeelee* for applying the restraint principle differently in respect of Indigenous offenders does not apply to

> Black offenders. Although there can be no doubt that the impact of anti-Black racism on a specific offender may mitigate that offender's responsibility for the crime, just as with Indigenous offenders, there is no basis to conclude that Black offenders, or Black communities, share a fundamentally different view of justice, or what constitutes a "just" sentence in any given situation. The Indigenous offender's culture and historical relationship with non-Indigenous Canada is truly unique. That uniqueness explains the very specific and exclusive reference to "Aboriginal offenders" in s. 718.2(e).
>
> Although we would not equate Black offenders with Indigenous offenders, for the purposes of s. 718.2(e), the *Gladue/Ipeelee* jurisprudence can inform the sentencing of Black offenders in several respects: see *Borde*, at para. 30. Just as with the discrimination suffered by Indigenous offenders, courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances. Similarly, in considering the restraint principle, courts should bear in mind well-established over-incarceration of Black offenders, particularly young male offenders. Finally, as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances.

EVIDENCE-CIRCUMSTANTIAL

In ***R. v. Dingwall***, 2021 SCC 35, October 8, 2021, the accused was convicted of a firearm offence. She appealed from conviction, arguing that the trial judge had erred in considering the circumstantial evidence presented.

An appeal to the British Columbia Court of Appeal was dismissed. The Court of Appeal, per Newbury J.A., concluded as follows (at paragraphs 51 and 53):

> At the end of the day, I do not say that every trier of fact would inevitably have reached the same conclusion as the trial judge did: see *Villaroman* at para 69. I am satisfied, however, that the trial judge did not reverse the onus of proof in this case or lose sight of his obligation to assess reasonable doubt in light of all the circumstances before the Court. He considered the evidence

> as well as the absence of evidence relied on by the accused. He carefully addressed the 'gaps' pointed to by the defence (i.e., the absence of evidence) and explained why he rejected them. No other rational inferences arising from the absence of evidence have been suggested by counsel and I am unable to think of any that are not purely speculative.
>
> …
>
> It follows that I would not accede to the appellants' submission that the verdicts were unreasonable.

The accused's appeal to the Supreme Court of Canada was dismissed. In a brief oral judgment, the Court stated:

> We would dismiss the appeal substantially for the reasons of Newbury J.A., at paras. 51 and 53. We would add that notwithstanding a misstatement of law with respect to circumstantial evidence set out by the trial judge in para. 9(b) of his reasons (2017 BCSC 1457 (CanLII)), the trial judge properly applied the law with respect to circumstantial evidence. Accordingly, no reliance need be placed on the curative authority under s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46 . Finally, we would note that while the Court of Appeal, in paras. 39 and 50, addressed the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, the scope and application of that rule is not before this Court.

SENTENCE-PROVIDING ASSISTANCE TO THE POLICE

T, R. v [2021] EWCA Crim 1474, October 14, 2021, at paragraph 8:

> In our view, the judge needs to look at all the factors in the round when considering the extent, if at all, of any reduction in sentence for information provided to the authorities. Whilst it is legitimate, therefore, to consider the extent of any financial reward already received by the accused in this context, it must be remembered that these two incentives – a financial reward and a reduction in sentence – are complementary means of demonstrating to offenders "that it is worth their while to disclose the criminal activities of others for the benefit of the law-abiding public in general" (Simon (1988) 87 Cr App R 407 at 411). It would undermine the proper functioning of this tried and tested means of gaining valuable intelligence if an accused was to conclude that having been rewarded financially any reduction in sentence would be slight, non-existent or significantly reduced. It follows, that unless

> the financial reward has been exceptionally generous, this factor will play only a small, if any, part in the judge's calculation.

CHARTER-SECTIONS 8 AND 24(2)

R. v. ANDREOPOULOS, 2021 0119A01108 (NLPC), OCTOBER 1, 2021.

FACTS: The accused are charged with an offence pursuant to the *Controlled Drugs and Substances Act*. Evidence led at a pre-trial application established that on "March 26, 2019, police conducted a warrantless search and seizure of a large plywood crate at the Midland Transport warehouse in Mount Pearl".

The accused argued that this constituted a breach of section 8 of the *Charter* and that any evidence located should be excluded pursuant to section 24(2).

HELD: The application was granted. Judge Marshall held that the search violated section 8 of the *Charter*. In deciding to exclude the evidence, Judge Marshall concluded as follows (at paragraph 132):

> If I were to admit the evidence obtained in this case, I would be sending the message that Charter protected rights account for little in the context of shipped freight and I would essentially be endorsing a police state 34 approach in these situations. This would clearly be contrary to the public interest.

SEARCH WARRANTS-MULTIPLE APPLICATIONS AND JUDGE SHOPPING

The issue of whether multiple applications for a search warrant can constitute improper "judge shopping", was recently considered by the Ontario Court of Appeal on October 19, 2021, in ***R. v. Bond***, 2021 ONCA 730. At paragraphs 28 to 33, the Court stated:

> I begin by observing that I do not think that there should be a bright-line rule that the police cannot make a second application for a warrant if the first application is rejected. It needs to be recalled that there is no appeal from the initial refusal: see *R. v. Campbell*, [2014] O.J. No. 6541 (S.C.), at para. 40.

On this point, I agree with what Thackray J.A. said in *R. v. Duchcherer*, 2006 BCCA 171, at para. 29:

> The procedure of applying successively for search warrants cannot reasonably be said, as such, to be an abuse of process or a "subversion" of the judicial system. Within the process there can, of course, be abuses that would lead to such a finding. It will be a fact driven decision in each case whether the circumstances amount to an abuse of process.

My second contextual observation is that the second judge considering whether to grant the search warrant is not sitting in appeal of the first judge's decision nor in review of that judge's decision by way of prerogative writ. As Thackray J.A. said in *Duchcherer*, at para. 17, "where a judge knows of the previous application to a justice of the peace for a search warrant, but exercises his own discretion, it is a hearing *de novo*, not a review of the decision of the justice of the peace.": see also *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. C.A.), at para. 41.

This court in *Colbourne*, at para. 42 began to address the issue of whether a warrant could be granted on a second application. I agree with Doherty J.A. that "had the second information been the same as the first information, the initial refusal would have played a much more significant role in how the second Justice of the Peace exercised his or her discretion." While it does play a role and should be considered by the second application judge, the fact a warrant request has been rejected is not determinative to the second request. This is supported by Doherty J.A.'s further reasoning in *Colbourne*, at para. 42, that he "need not decide whether I would go so far as to say that two applications based on the same information are improper even if full disclosure of the initial refusal is made."

Turning to the merits of the appellant's submission on this issue, in my view, the disclosure to the second application judge of the previous refusal and the reasons for that refusal ensured the openness and transparency of the process that the appellant submits was lacking. Those factors were endorsed by McMahon J. in *Campbell*, at para. 56:

> In submitting the materials the officer should ensure the ITO includes the particulars of the earlier refusal, including the time, name of the judicial officer, and the reasons of refusal.

> A copy of any reason or endorsement provided by the judicial officer who refused the warrant should be an appendix to the ITO.

As the trial judge noted in the footnote dealing with the judge-shopping issue, the police complied with these factors. The second application judge, who issued the search warrant, was fully apprised of the previous application, its timing, the fact that it had been rejected, and the reasons for the rejection. He was well-positioned to consider the application *de novo*.

CHARTER-SECTION 12-SENTENCE-DISTRIBUTION OF CHILD PORNOGRAPHY, BREACH OF A RELEASE ORDER AND THEFT

R. v. BARRY, 2021 NLPC 0820A00060, OCTOBER 19, 2021.

FACTS: The accused "was convicted at trial of transmitting child pornography. He pleaded guilty to a number of theft offences, as well as some concomitant breaches of bail conditions, but pleaded not guilty and had a trial and was convicted of transmitting child pornography…The reasons for convicting him of the child pornography offence are reported at *R. v. Barry, Keith*, 2021 CarswellNfld 145 (P.C.) and *R. v Barry*, 2021 CanLII 39102 (NL PC). In brief, the accused had left a message on a telephone messaging system in which he said that he had had sex with a fifteen year old".

The theft and breach of release order offences were described as involving the "accused going into the relevant store premises and walking out with a box of beer or meat without paying for it. In two cases, on November 19, 2020, and January 17, 2021, he was also in breach of a bail condition which prohibited him from going back to Farrell's store".

At the sentence hearing, the accused argued that the mandatory minimum penalty for a breach of section 163.1 (one year of imprisonment) violated section 12 of the *Charter*.

HELD: The *Charter* application was allowed and a period of ninety days of imprisonment was imposed for the distribution of child pornography offence. Judge Porter concluded as follows (at paragraph 24):

> As indicated above, the imposition of a year in jail for leaving one telephone message containing references to having sex with a fifteen year old is grossly disproportionate. I remind myself here of two things. First, Hoegg J.A. said at para 65 of *R. v Butler*, 2019 NLCA 21 that a year is a long time. Second, the Chief Justice of Canada has equated the imposition of a grossly disproportionate sentence with cruel and unusual punishment. S. 12 of the *Charter* provides that the accused has a right to be free from cruel and unusual punishment.

The Theft and Breach of Release Order Offences:

A joint submission, seeking period of 100 days was presented. This was endorsed by Judge Porter.

SECTION 24(2) OF THE CHARTER

In ***R. v. Reilly***, 2021 SCC 38, October 14, 2021, the accused was convicted of robbery and firearms-related offences. While investigating two armed robberies, the police went to the accused's residence to arrest him. When the accused did not come to the door for a curfew check, as required by a probation order, the police entered through an unlocked rear sliding door. The police then knocked on the accused's bedroom door and arrested him. They performed a clearing search of the residence and observed evidence related to the robberies. The police obtained a search warrant in part based on observations from the clearing search.

The accused appealed to the British Columbia Court of Appeal, arguing that the trial judge erred in not excluding the evidence seized, pursuant to s. 24(2) of the *Charter*.

The appeal was allowed and a new trial ordered. A majority of the Court of Appeal (per Griffin JA), held that the trial judge erred in failing to conduct an overall assessment of whether the administration of justice would be brought into disrepute by admission of the evidence.

The Crown appealed to the Supreme Court of Canada. In a brief oral judgment, the appeal was dismissed. The Court stated:

> We would dismiss this appeal, substantially for the thorough reasons of Justice Griffin on behalf of the majority of the Court of Appeal. We agree that the trial judge erred in his analysis under s. 24(2) of *the Canadian Charter of Rights and Freedoms* by considering *Charter*-compliant police behaviour as mitigating.
>
> We also agree that the trial judge erred by improperly conducting the overall balancing — whether including the evidence would bring the administration of justice into disrepute — within the first two factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The language of *Grant* is clear: this overall balancing occurs at the end (para. 85). Judges must first consider whether each of the three factors weigh in favour of inclusion or exclusion of the evidence before asking whether — having regard to all factors — inclusion of the evidence would bring the administration of justice into disrepute. Conducting overall balancing within the first two *Grant* factors waters down any exclusionary power these factors may have. This type of analysis undermines the purpose and application of s. 24(2).
>
> With respect, however, we are unable to agree with the majority of the Court of Appeal that the trial judge properly considered all relevant *Charter*-infringing state conduct under the first *Grant* factor. The trial judge considered the *Charter*-infringing state conduct related to only two of the three s. 8 breaches. Failing to consider state conduct that resulted in the third breach — the clearing search — was an error. Regardless of whether the third breach was caused by the first two breaches, and regardless of the fact that it was considered necessary in the wake of Constable Sinclair's unlawful entry, it was nonetheless a breach of Mr. Reilly's s. 8 *Charter*-protected rights and must be considered under the first *Grant* factor. Trial judges cannot choose which relevant *Charter*-infringing state conduct to consider.
>
> The trial judge committed errors that required the majority of the Court of Appeal to conduct a fresh s. 24(2) analysis. In our view, we do not lack jurisdiction to consider alleged errors in the majority's fresh analysis. We see no reason to interfere with their fresh analysis. Accordingly, we would dismiss the appeal and affirm the exclusion of evidence and the order for a new trial.

CHARTER-SECTION 8-INSPECTION SEARCHES-FISHERIES ACT

R. v. ROWE & ROWE, 2021 CANLII 101082 (NL PC), OCTOBER 18, 2021.

FACTS: The accused were charged with a violation of the *Fisheries Act*. The Crown sought to introduce evidence obtained after a warrantless search of a vessel. The accused argued that the search violated section 8 of the *Charter* and that any evidence obtained should be excluded pursuant to section 24(2) of the *Charter*.

The circumstances of the search were described by Judge Linehan in the following manner:

> Fisheries officer Holwell was the first witness. In May of 2019, he received information from another fisheries officer in Fogo that Rodney Rowe was hauling fishing gear belonging to Stephen Rowe in contravention of the Fisheries Act. He then reviewed a computer database called the Vehicle Monitoring System [VMS] that captures various data related the movement of fishing vessels. After that review, he believed that Rodney Rowe had contravened the *Fisheries Act*. He then sought a search warrant for Rodney Rowe's vessel and outlined his reasonable and probable grounds for that belief in an information to obtain. This was submitted to a justice on May 7, 2019 who denied the warrant on the basis of insufficient grounds. Having been advised that he lacked the reasonable grounds to get a search warrant he decided to "fall back" on the inspection powers in s. 49 of the *Fisheries Act*. He then decided to undertake an inspection of Rodney Rowe's vessel when it returned to port on May 9, 2019 to "ensure compliance" with the Fisheries Act. Upon entering the vessel, he and fisheries officer Pardy went directly to the wheelhouse. Fisheries officer Pardy obtained the vessel's log book and the licence. Fisheries officer Holwell also inspected a book by the vessel's wheel. Fisheries officer Holwell compared the above materials to the relevant VMS data he had brought with him. He then determined that he now had reasonable and probable grounds to believe that Rodney Rowe had made false reports in the vessel log book and thereby contravened the Fisheries Act. Rodney Rowe was arrested and in the search incident to arrest various items were seized. Rodney Rowe was then released. On Cross, fisheries officer Holwell was asked a number of questions about his beliefs based his review of the VMS data. In the end, this affirmed that fisheries officer Holwell's belief was more akin to a suspicion of illegal activity and consistent with the decision of the authorizing justice that there were insufficient reasonable and probable grounds. He then decided to conduct an inspection to ensure

compliance with the *Fisheries Act*. However, he acknowledged that this inspection was focused on the wheelhouse and no broad inspection of the vessel from bow to stern was undertaken. He acknowledged that this occurred in the very early morning hours, but that he had occasionally conducted other inspections at such times. He was asked why he looked at the book on the wheelhouse desk and he stated that it was the "captain's book" and in his experience would commonly be expected to contain information on fishing activity. Such books supplement the log book entries and would contain more detail for the captain. He disagreed that this was beyond the scope of a s. 49 inspection. While inspecting the "captain's book" book he found three (3) sheets of paper with gear locations. However, he disputed that the three sheets of paper formed part of his reasonable and probable grounds to arrest Rodney Rowe as the comparison of the VMS data to the log book was sufficient, in his mind.

Fisheries officer Pardy was the next witness. His involvement was at the request of fisheries officer Holwell and he played a primarily supportive role. He obtained the background information from fisheries officer Holwell prior to entering the vessel. He arrested Rodney Rowe at the request of fisheries officer Holwell and informed him of his rights. The search of the vessel was conducted subsequent to the arrest. Following the search, Rodney Rowe was advised he was no longer under arrest and the fisheries officers left the vessel with the items they had seized.

HELD: The application was denied. Judge Linehan concluded as follows (at paragraphs 21 to 23):

Rodney Rowe was operating a vessel engaged in a highly regulated fishery. Inspections powers are included in the legislation to ensure compliance with the Act and regulations for participants such as Rodney Rowe. The inspection comprised the viewing of a licence, a log book and a "captain's book". The first two would be required to be maintained on the vessel and both would be expected to be subject to regular review and inspection. The "captain's book", as described by fisheries officer Holwell would commonly be used by the operator to supplement the basic information contained in the log book and would relate to the operation of the vessel in the regulated activity. As such, there would be a similar expectation that it would be subject to review and inspection.

> Having reviewed the foregoing in light of the totality of the circumstances, I have determined that the applicants have not established that Rodney Rowe had a reasonable expectation of privacy in respect of the items examined during the inspection. Additionally, had that threshold been reached, I would held that the s. 49 inspection was exercised reasonably in the same circumstances.
>
> Therefore, I find that the applicants have failed to establish a breach of section 8 of the *Charter*.

PROCEEDING IN THE ABSENCE OF THE ACCUSED

KHAN, R. v [2021] EWCA CRIM 1526, OCTOBER 21, 2021.

FACTS: The Crown sought a "restraining order" against the accused. The hearing proceeded in the absence of the accused, who arrived late. The circumstances were described, by the Court of Appeal for England and Wales, in the following manner (at paragraphs 7 to 9):

> The hearing on 18 September 2020 was listed at 10am. A full transcript of the proceedings has been obtained. At 09.56, the Applicant emailed the court to advise that his train was slightly delayed. Shortly after, he also telephoned the court office but did not provide an estimated time of arrival. When the case was called on at 10am, the Applicant was not present. The Judge observed: "I am slightly surprised that he is not here. He is normally fairly keen to have his say." The clerk of the Court informed the Judge that an email had been received from the Applicant stating that he had been delayed. The Judge adjourned the hearing, sitting again shortly before 11am. The Applicant had still not arrived, and no further indication had been received as to his likely arrival time.
>
> The Prosecution initially sought a warrant for the Applicant's failure to surrender to bail. However, the Judge invited representations as to whether he should proceed in the Applicant's absence. The prosecuting advocate agreed that there was "no reason why [the court] should not proceed [in his absence] because he knows very well of today's hearing". The Judge referred to R -v- Jones [2003] 1 AC 1 and identified that, in deciding whether to proceed in the Applicant's absence, he had to have regard to (1) the circumstances of the Applicant's behaviour in absenting himself, in particular whether the behaviour was voluntary, (2) whether an adjournment would resolve the

> matter, (3) the length of any adjournment, (4) whether the Applicant wished to be represented, (5) the extent of any disadvantage of the defendant not being able to present his account of events, and (6) the risk of the court reaching an improper conclusion. There was a general public interest in the matter being resolved in a reasonable time.
>
> Without hearing any further submissions from the Crown, the Judge concluded that the Applicant was aware that the Prosecution intended to apply for a restraining order and that 70 minutes was not a "slight delay". He therefore concluded that the Applicant had waived his right to be heard and the matter should proceed in his absence. He added that "if he turns up during the hearing, we will deal with it, as and when".

The accused appealed, seeking to have the restraining order quashed.

HELD: The appeal was allowed and the restraining order quashed. The Court of Appeal concluded that the hearing was “procedurally unfair” (at paragraphs 25 to 29):

> We have some sympathy for the Judge, who had dealt with previous hearings with the Applicant. However, we have reached the conclusion that the hearing on 18 September 2020 was procedurally unfair. The decision whether to proceed in a defendant's absence must be taken cautiously. The Judge correctly identified the authority of Jones, but he did not invite the prosecution's submissions, or apparently assess the relevant factors before deciding to proceed in the defendant's absence. Frustrating though the delay was, the Applicant had communicated to the Court that he was on his way. The Court was about to hear evidence in support of the application for the restraining order. The Defendant was not represented. Proceeding in his absence meant, first, that he would not hear the prosecution's evidence; second, he would be unable to cross-examine the prosecution witnesses; third, he would not have the opportunity to present any evidence (including giving evidence himself) in his defence; and fourth, he would not be able to make submissions to the Judge as to whether a restraining order was necessary, and, if so, in what terms and for what period.
>
> As was clear from his police interview, the key points of the Applicant's defence were (a) he denied making all the relevant telephone calls; and (b) he claimed that his email address had been accessed without his consent. As such, there was a substantial disadvantage to the defendant in proceeding in his

absence. As became clear during the hearing of the appeal, the Applicant's case was not that his email account had been "hacked", as that term is conventionally understood, but that the complainant had accessed his email account by using his password without his permission. Although there was no clear indication of when the defendant was likely to arrive, the likely adjournment was going to be a matter of hours not days.

Whilst, ultimately, it will be for the judge to weigh the relevant factors identified in Jones and, if fairly performed, an appeal court is unlikely to interfere with the judge's assessment, the Judge did not apparently carry out an assessment of the factors, and gave no reasoned decision, before deciding to proceed in the Applicant's absence.

This unfairness was compounded, after the Applicant finally arrived, by the Judge not giving him a fair opportunity (a) to be told what had happened; and (b) to apply to the Judge to reopen the application for a restraining order. The Applicant was a litigant in person who presented with possible mental health issues. One of the problems of proceeding in the defendant's absence was that, when he did arrive (as was clearly envisaged as a real likelihood), he would not know what evidence had been given against him. His ability, therefore, to respond to that evidence or make submissions to the Court on it was significantly impaired. The Judge dealt with the issue of potentially reopening the case in little more than three lines of the transcript. He did not explain to the Applicant that he could apply to the Court to reopen the case, or give him a fair opportunity to do so. The Judge summarily refused to reopen the case and did not give reasons for the refusal. As a result, a restraining order was imposed upon the Applicant after a hearing that was procedurally unfair.

The nature of the procedural unfairness meant that the Applicant had not had an opportunity (a) to cross-examine the witnesses called in support of the application for a restraining order; (b) to advance evidence in his own defence (including giving evidence himself and being cross-examined); or (c) to make submissions on whether the evidence demonstrated that a restraining order was necessary, and upon the terms and duration of any order. In short, the Applicant did not receive a fair trial.

DISMISSAL FOR WANT OF PROSECUTION

R. v. FABIAN, 2021 NWTCA 9, OCTOBER 20, 2021.

FACTS: "The assigned Crown prosecutor arrived at the Yellowknife airport two minutes late and was not allowed to board the airplane to Hay River. The presiding docket court judge in Hay River invited defence counsel to apply for dismissal of all of the charges on the docket for want of prosecution. In the end, 50 charges against 12 accused persons were dismissed… When the Crown prosecutor realized that she had missed the airplane, she called the Hay River Court Registry to ask for the dial-in information so that she could appear by telephone. This request was consistent with the Practice Direction regarding Covid 19, which confirmed that counsel could appear remotely. At least one defence counsel was also appearing by telephone. The clerk, however, advised the Crown prosecutor that the presiding judge had denied her application to appear by telephone" (see paragraphs 1 and 2).

The Crown appealed against the dismissals of the indictable offences to the Northwest Territories Court of Appeal.

HELD: The appeals were allowed and the dismissals were set aside

The Court of Appeal indicated that trial judges "undoubtedly have an inherent discretion to control the proceedings before them…They can deal with matters such as the absence of counsel, but they must exercise their discretion in accordance with normal procedural expectations and in a manner consistent with the due administration of justice" (at paragraph 7).

The Court of Appeal concluded that the trial judge committed an "an error of principle" in dismissing the charges "merely to send a message to the Crown prosecutor's office" (at paragraphs 8 and 9):

> The only reason given for the trial judge's decisions to dismiss for want of prosecution was the repeated instances of Crown counsel missing the airplane to Hay River. Persistent non-attendance is obviously undesirable and unacceptable, but the trial judge's remedy was disproportionate to the problem.
>
> Ensuring the efficient flow of criminal prosecutions is admittedly important, especially having regard to the busy dockets faced by Canadian trial courts. However, the public has an interest in the due administration of justice,

> including the prosecution of criminal offences. The matters before the court that morning involved some serious charges, including weapons offences, assaults, death threats, breaches of release orders, impaired driving charges, and unlawfully being in a dwelling house. Some of those charged with impaired driving had prior convictions for that same offence. It was an error of principle to dismiss these serious charges merely to send a message to the Crown prosecutor's office: ***R. v Young***, 2015 ONCA 926 at para. 6; ***R. v Siciliano***, 2012 ONCA 168 at para. 9; ***R. v Hendon Justices, ex parte Director of Public Prosecutions***, [1994] QB 167 at p. 174 (Div Ct).

In addition, the Court of Appeal concluded that there were a number of "procedural problems with the approach taken" (at paragraphs 11 to 14):

> There were also procedural problems with the approach taken. The Crown prosecutor was never given an opportunity to explain why she was late. The record does not disclose whether she knew that some of her colleagues had recently run into the same problem. If she had been allowed to make submissions by telephone, she could have explained the circumstances, and the trial judge could have expressed his displeasure on the record, in open court.
>
> Further, no explanation was given for why the Crown prosecutor was denied the opportunity to appear by telephone. This was authorized by the practice direction, and the Crown prosecutor was under no obligation to fly down and appear in person. Nothing on the docket compelled the personal attendance of counsel. The Crown prosecutor was not given an opportunity to make submissions on the subject. The trial judge never gave reasons for withdrawing the permission, contained in the practice direction, to appear remotely.
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> In addition, trial judges should not initiate steps in the proceedings, especially those that invite a particular outcome: ***R. v Simpson***, 2017 NWTCA 6 at para. 24, [2017] 8 WWR 361. Generally speaking, the parties are the ones who should raise the issues, and the judge's invitation to apply for dismissal undermined the appearance of the court's impartiality.
>
> Finally, the Crown was not given a fair opportunity to present its case in response to the applications to dismiss for want of prosecution: ***R. v Thomas***, 2012 ABCA 176 at para. 6. Specifically, the Crown was not able to point out that many of the scheduled appearances were procedural only, that some of

> the charges were serious, and that the public had a legitimate interest in the prosecution of the charges. No submissions were made on the proper test to be applied or on whether dismissal was a proportionate remedy.

INJURING OR ENDANGERING ANIMALS, SECTION 445(1), CRIMINAL CODE

R. v. ANDERSON & ROSSITER, 2021 NLPC 1419A00316, OCTOBER 22, 2021.

FACTS: The accused were convicted of killing a cat (Mittens), contrary to section 445(1)(a) of the *Criminal Code*. Judge Cole described the circumstances involved, in the following manner (at paragraphs 3 and 4):

> Ms. Anderson had voluntarily assumed responsibility for a cat whose original owner had died. Ms. Anderson had agreed to provide the cat with a home when requested by a local rescue group who knew Ms. Anderson had been friends with the cat's owner and she would therefore be familiar with the cat. The rescue group continued to support the cat financially.
>
> At trial it was established that on September 10th, 2019, Ms. Anderson and Mr. Rossiter entered the bathroom in Ms. Anderson's apartment with an axe, a garbage bag, and the cat. When they came out there was something in the garbage bag but it was not moving. The cat has not been seen since and the witness at trial did not see the cat come out of the bathroom. These are the only details the Court has around the death of the cat.

HELD: Judge Cole concluded that the sentencing precedents she reviewed showed "a range of sentence from a conditional discharge to 2 years imprisonment" (at paragraph 46). She imposed a period of five months of incarceration in relation to both offenders, concluding as follows (at paragraph 56):

> When I consider the circumstances of this offence, the circumstances of both Ms. Anderson and Mr. Rossiter, as well as the aggravating and mitigating factors, I am satisfied that a fit sentence is 5 months imprisonment followed by two years probation. This will be accompanied by a lifetime ban under section 447 of the *Criminal Code*.

THE AVOIDANCE OF JUDICIAL STEREOTYPICAL REASONING

R. v. Adebogun, 2021 SKCA 136, October 20, 2021, at paragraph 29:

> …the line between proper common-sense assumptions about ordinary human conduct and ungrounded assumptions or impermissible prejudicial or stereotypical reasoning can be a fine one for triers of fact to walk. To stay on the right side of that line, judges must take care to ensure that their assessments remain grounded in the evidence. As Leurer J.A. explained in his dissenting reasons in *R v Mehari*, 2020 SKCA 37 at para 78 452 DLR (4th) 413, reversed 2020 SCC 40, 452 DLR (4th) 410), "there is a difference between relying on generalizations and stereotypes that are abstract in nature and drawing inferences that are tied to the actions of a particular person in particular circumstances". The use of common-sense reasoning and the incorporation of common human experience into the analysis are proper, provided the analysis remains tied to, and rooted in, specific consideration of the evidence offered at trial (see, for example: *R v F.B.P.*, 2019 ONCA 157 at para 9; and *R v Cepic*, 2019 ONCA 541 at paras 22–23, 376 CCC (3d) 286). As was noted in both *Pastro* and *J.C.*, it is not an error for a judge to come to a conclusion that may align with a stereotypical expectation, as long as that conclusion is drawn from the evidence in the record, rather than the product of an unsupported assumption or generalization about how an individual would be expected to behave in a given situation (see also: *R v Quartey*, 2018 SCC 59 at para 3, [2018] 3 SCR 687; *Greif* at para 65; and *Paulos* at paras 33, 35–37).

PARTIES TO AN OFFENCE-SECTION 21 OF THE CRIMINAL CODE

In ***R. v. Strathdee***, 2021 SCC 40, October 15, 2021, the accused was charged with the offence of manslaughter. He was acquitted. On appeal, the Alberta Court of Appeal set aside the acquittal and entered a conviction. The accused appealed as of right to the Supreme Court of Canada.

The appeal was dismissed. In a brief oral judgment, the Supreme Court stated:

> Mr. Strathdee appeals as of right to this Court under s. 691(2)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, on the basis that the Alberta Court of Appeal overturned his acquittal for unlawful act manslaughter and entered a conviction. The trial judge, sitting as judge alone, had acquitted Mr. Strathdee after considering joint/co-principal liability and abetting under s. 21(1)(a) and

21(1)(c), respectively, of the *Criminal Code* (2019 ABQB 479). The charges against Mr. Strathdee stemmed from a group assault in which several victims sustained multiple injuries and one victim, Mr. Tong, sustained a *single* stab wound which caused his death.

We agree with the Court of Appeal that there is no basis for the view that the stabbing of Mr. Tong was a distinct act outside the scope of the group attack.

Having regard to the findings of fact in paras. 137 and 156-59 (CanLII) of the trial decision, and the statement of law set out by the Court of Appeal at paras. 61, 66 and 68 of its decision, this Court affirms the result of the Alberta Court of Appeal that Mr. Strathdee is guilty of unlawful act manslaughter.

We also wish briefly to clarify a statement of law in *R. v. Cabrera*, 2019 ABCA 184, 95 Alta. L.R. (6th) 258, aff'd *R. v. Shlah*, 2019 SCC 56. Any implication from *Cabrera* that joint/co-principal liability is automatically eliminated if the evidence demonstrates application of force by only a single perpetrator is not accurate. Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission. In the context of manslaughter, triers of fact should focus on whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained. Properly read, the discussion of party liability in *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, is fully consistent with the foregoing.

Accordingly, we would dismiss the appeal.

ADMISSIBILITY OF EXTRINSIC MISCONDUCT EVIDENCE

R. v. Cole, 2021 ONCA 759, October 27, 2021, at paragraphs 82 to 85:

As Binnie J. made clear in *Handy*, at para. 76, "[t]he principal driver of probative value … is the connectedness (or *nexus*) that is established between the similar fact evidence and the offences alleged". Connectedness refers to the logical chain of permissible reasoning that enables the extrinsic evidence to inform the issue the evidence is offered to prove. Therefore, for a proper

evaluation of connectedness to occur, the issue that the extrinsic misconduct evidence bears upon must be precisely identified: *Luciano*, at para. 230.

Evidence of extrinsic misconduct which does no more than "blacken" an accused's character is inadmissible: *Handy*, at para. 31. In other words, a chain of reasoning between the extrinsic misconduct evidence and the issue sought to be proved will not be permissible if its relevance depends on the inference that the extrinsic misconduct evidence shows the accused to have the kind of general discreditable disposition or bad character to be capable of committing the offence charged: *Handy*, at paras. 31-36, 65, and 68. To fortify a conviction by relying on the general inference that 'the accused is the type of person to commit this kind of offence so they may have done so' carries the risks of illogically and unfairly disregarding the possibility of rehabilitation, and encouraging the police to "round up the usual suspects": *Handy*, at para. 38.

In addition, convicting a person because of the type of individual they are, rather than what they are proved to have done, is contrary to the basic principle that an accused person is presumed innocent unless and until the Crown proves that they have committed the specific offence alleged: *Luciano*, at para. 219; *Handy*, at para. 43.

Therefore, if evidence depends solely on a forbidden chain of general reasoning for its connectedness, its probative value will not outweigh its prejudice. Even if the evidence does not depend for its relevance on a forbidden chain of reasoning, the evidence will not be admissible if the probative value of the evidence relating to the permissible inference does not outweigh the prejudicial effect the evidence will have.

SENTENCE-LEAVING THE SCENE OF AN ACCIDENT-SECTION 320.16 CRIMINAL CODE

R. v. Y, 2021 NLPC 0821A00026, OCTOBER 27, 2021.

FACTS: The accused was convicted of leaving the scene of an accident, contrary to section 320.16 of the *Criminal C*ode. The circumstances of the offence was described as follows (at paragraph 9):

The accused at Bar struck another car and then fled the area. She went approximately half a kilometre before leaving the road and driving behind a commercial building. The driver of the other vehicle followed her. The

accused was seen as she drove back out to the road a few minutes later. Nobody was hurt as a result of the collision, although there was a serious amount of repair work required to put the other vehicle back to the condition it had been in prior to the conclusion.

HELD: Judge Porter imposed a period of ninety days of imprisonment, to be served on a conditional basis, a period of probation and a twelve-month driving prohibition.

EVIDENCE-VIDEO RECORDINGS

R. v. PHILLIPS, 2021 NLCA 51, OCTOBER 27, 2021.

FACTS: The accused was convicted of the offence of second-degree murder. The Court of Appeal noted that the "incident was captured on an audio/video recording from the bar. The audio recording captured the continuous sound from the entire incident, and the video recording captured the incident without interruption at the slower than usual speed of one frame per second" (at paragraph 5).

The accused appealed from conviction, arguing in part that "the slow video recording did not accurately depict the shooting" (at paragraph 11).

HELD: The appeal was dismissed. The Court of Appeal held that "the video recording, and Mr. Phillips' argument that the video recording at one frame per second did not accurately capture the shooting of Mr. Wellman were before the jury. It was for the jury to decide what evidence to accept and what to reject" (at paragraph 31).

SECTION 12 OF THE CHARTER-REGULATORY OFFENCES-MINIMUM MANDATORY FINES

BÉDARD C. DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES, 2021 QCCA 377, MARCH 4, 2021.

FACTS: The accused was convicted of the offence of acting as a building contractor without holding a licence, contrary to section 46 of the *Building Act*. The minimum mandatory penalty being a fine of $10,481, pursuant to section 197.1 of the *Act*. The trial judge found that the minimum penalty infringed section 12 of the *Charter*. On appeal, this decision was set aside. The accused appealed to the Quebec Court of Appeal.

HELD: The appeal was dismissed. The Court of Appeal indicated that "…it is well established that the purpose of the regulatory penal law system differs significantly from that of the criminal law system…This distinction is important and, in my view, must be taken into account in analyzing a provision that prescribes a minimum mandatory fine for the violation of a regulatory requirement. This does not mean that

every constitutional challenge of such a fine is doomed to failure, but it is an important factor to be weighed in the balance…Legislatures often use minimum mandatory fines to deter individuals from conducting themselves in a certain manner or engaging in activities without the necessary authorizations" (at paragraphs 49 to 51).

The Court of Appeal concluded as follows (at paragraphs 77 to 79):

> In short, given the legislature's objectives in enacting ss. 46 and 197.1 of the *Act*, coupled with the existence of a statutory scheme whereby persons who have violated s. 46 of the *Act* can avail themselves of terms and conditions for the payment of the fine or, if their financial means do not allow for such payment, whereby they can potentially avail themselves of alternative solutions for paying the fine by other means, I find, as the Superior Court judge did, that the $10,481 minimum fine set out in s. 197.1 of the *Act* is not, in the case at bar, a punishment that is "abhorrent and intolerable" and "outrages standards of decency", thereby infringing s. 12 of the *Charter*, whether one considers the appellant's specific situation or the reasonable hypothetical situations.
>
> My finding, however, does not imply that a minimum fine can never constitute cruel and unusual punishment under s. 12 of the *Charter* merely because offenders can avail themselves of terms and conditions for paying the fine or alternative solutions for doing so. These elements must certainly be taken into account, but they are not determinative because, all in all, the factors as a whole, including the nature of the prohibited conduct and the amount of the fine, are what determine whether a minimum punishment, in a given context, is *abhorrent and intolerable*. In light of this finding, it is clearly unnecessary to address s. 1 of the *Charter.*
>
> I therefore propose that the Court dismiss the appeal.