A REVIEW OF DECISIONS RENDERED BY THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR IN CRIMINAL CAUSES OR MATTERS (JANUARY 1 TO DECEMBER 31, 2021)

JUDGE WAYNE GORMAN
THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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Introduction:

The purpose of this paper is to review those decisions rendered by the Court of Appeal for Newfoundland and Labrador between the time-period of January 1 to December 31, 2021, which involved criminal causes or matters. The key to the use of this paper is the index. It has been cross-referenced so that each decision can be located by a page number based upon its subject matters.

In 2021, the Court of Appeal for Newfoundland and Labrador considered a number of issues involving criminal law, including offences, evidence and sentencing.

Let us start with the Court of Appeal's consideration of the defence of entrapment.

DEFENCES

Entrapment:

In ***R. v. Brown***, 2021 NLCA 27, May 10, 2021, the accused was convicted of three counts of child luring, contrary to section 172.1(1) of the *Criminal Code*. The charges arose as a result of the accused's communications with a fictional child created by an undercover police officer. At his trial, the accused applied for a stay of proceedings to be entered, arguing that he had been entrapped. The trial judge dismissed the application. The accused appealed to the Court of Appeal.

The appeal was dismissed. The Court of Appeal noted that "[i]t is clear from the decision in *Ghotra*, which dealt with child luring, that a website on the internet may constitute a location for purposes of an undercover police investigation. However, the police must have a reasonable suspicion, based on objectively discernable facts, that child luring is occurring on the targeted website. As discussed in *Ghotra* and *Ahmad*, the virtual location must be carefully delineated and tightly circumscribed to avoid 'random virtue testing'; that is, providing individuals with the opportunity to commit offences that they likely would not otherwise have committed" (at paragraph 13).

The Court of Appeal concluded that "there is no basis on which to conclude that the trial judge erred in dismissing Mr. Brown's application for a stay of the charges based on the doctrine of entrapment" (at paragraphs 18, 19 and 22):

> The undercover officer explained why he had a legitimate, reasonable suspicion that child luring was occurring on the identified website. The trial judge accepted that the officer's reasonable suspicion was grounded in

> objectively discernable facts, and referred to the officer's evidence that he had used that website previously…
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> Each investigation must be assessed on its own facts. In this case, the fact that communications on this particular site had led to child luring charges in the past was a valid basis on which the trial judge found the necessary reasonable suspicion to ground the undercover investigation. The Crown is not required to reach back to validate the rationale that led to the first charge on the targeted location, as suggested by Mr. Brown.
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> The same circumstances were at play in this case. The requirement for reasonable suspicion, established by objectively discernable facts, to ground the investigation has been demonstrated.

EVIDENCE

First and Third Party Records:

In ***R. v. Stone***, 2021 NLCA 55, November 29, 2021, the accused were charged with the offence of fraud on May 8, 2015. In February of 2019, they applied for a stay of proceedings to be entered, arguing that they had not been tried in a reasonable period of time, contrary to section 11(b) of the *Charter*.

The application was granted and the stay entered. The trial judge held that a significant portion of the delay was attributable to the Crown having failed to obtain "computer hard drives, which was generated during the Defendants' employment", which the trial judge characterized as 'first party disclosure' and therefore the responsibility of the Crown" (at paragraph 8).

The Crown appealed. The appeals were allowed and new trials ordered.

The Court of Appeal held that "the information sought by the Defendants in relation to a potential defence was not in the possession or control of the Crown. The investigative file and any obviously relevant information had been disclosed to the Defendants…In this case, there was no basis on which to conclude that the Crown ought to have obtained or the Coast Guard ought to have supplied to the Crown the information sought by the Defendants. The Defendants sought the information for the purpose of establishing a defence to the charges. This is properly characterized as third party disclosure which would be obtained from the Coast Guard, subject to the appropriate procedure" (at paragraphs 37 and 38).

Hearsay-Principled Exception: Where Necessity is High, is Less Reliability Required?

In ***R. v. Furey***, 2021 NLCA 59, December 23, 2021, the accused was convicted of a number of offences, including assault. He appealed from conviction, arguing that "the trial judge erred in admitting, for the truth of its contents, an out-of-court statement given by one of the complainants (Paul Worrall), who subsequently died of unrelated causes".

The appeal was allowed and a new trial ordered. In ruling that the statement was admissible, the trial judge had indicated that "where necessity is high, less reliability is required".

Admissibility:

The majority of the Court of Appeal noted that the "analysis to determine the admissibility of an out-of-court statement where the declarant is unavailable to testify at the trial begins with a consideration of necessity and reliability" However, the majority of the Court of Appeal rejected the proposition that "where there is greater necessity, less reliability is acceptable". The majority concluded that "increased necessity does not have the effect of reducing the threshold of reliability that is required in order to render an out-of-court statement admissible. Reliability is a key component when assessing whether an out-of-court statement by a deceased person is admissible for the truth of its contents. It follows that the trial judge erred insofar as she relied on and applied the erroneous statement of the law" (at paragraphs 5 and 13).

The Curative Proviso:

The majority of the Court of Appeal held that "the trial judge's error in applying an incorrect principle of law in determining the admissibility of Paul Worrall's statement could not be characterized as harmless or trivial. Further, from the perspective of the appellate court, it cannot be said that the evidence is so overwhelming that the trier of fact would inevitably convict…In the result, I am satisfied that the curative proviso would not apply on the facts of this case" (at paragraphs 25 and 26).

Social Media Evidence: The Admissibility of Screenshots of Facebook Postings:

In ***R. v. Martin***, 2021 NLCA 1, January 4, 2021, the accused was charged with a number of weapon offences. At his trial, the Crown sought to introduce into evidence six screenshots depicting posts purportedly from the accused's Facebook page. The screenshots were provided to the police by an anonymous source. Some of the officers that testified were able to identify the accused and his apartment as being depicted in the screenshots.

The trial judge concluded that the evidence was inadmissible and the accused was acquitted. The Crown appealed from acquittal.

The Court of Appeal described the issue raised in the following manner:

> The issue on appeal is whether the trial Judge erred in excluding the screenshot evidence. Resolution involves determining whether the screenshot evidence was authenticated so as to meet the test for admissibility.

The appeal was allowed. The Court of Appeal indicated that Facebook posts "fall within the definition of electronic documents in section 31.8 of the *Canada Evidence Act*" (at paragraph 25). The Court of Appeal held the "fact that the purported Facebook posts were captured in screenshots and tendered as such, in the absence of credible evidence that screenshot technology could have or did alter the Facebook posts depicted in the screenshots, is immaterial. What requires authentication are the Facebook posts depicted in the screenshots, which appear to be posts from Mr. Martin's Facebook" (at paragraph 29).

The Court of Appeal indicated that "the threshold for admissibility of authenticated electronic documents is low…common law principles respecting admissibility of evidence and the provisions of the Act govern the admissibility of electronic documents. Authentication of electronic documents for the purpose of admissibility under section 31.1 is established by meeting the low standard of "some evidence of the tendered document is what purports to be" (at paragraphs 31 and 43).

The Court of Appeal held that section 31.1 of the *Canada Evidence Act* "does not require a determination that the electronic evidence is in fact what it purports to be… What is required is only some evidence that is logically probative of whether the electronic document is what it purports to be. Whether the electronic document will be relied on is a matter for the judge in weighing and balancing all of the admissible evidence and finally determining the case…Admissibility of electronic evidence

remains governed by general evidentiary principles, which in this case is simply that there be some relevant evidence of probative value to support a finding that the electronic document is what it appears to be" (at paragraph 47 and 50).

The Court of Appeal concluded that "the judge erred in failing to admit the screenshots of the Facebook posts purporting to be from Mr. Martin's Facebook. The low threshold required by the provisions of the Act regarding authentication and system integrity was met for the purposes of admissibility" (at paragraph 74).

Video Recordings:

In ***R. v. Phillips***, 2021 NLCA 51, October 27, 2021, 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).

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).

OFFENCES

Break and Entry-Deemed Entry-Section 350 of the Criminal Code:

In ***R. v. Barnes***, 2021 NLCA 15, March 18, 2021, the accused was convicted of the offence of break and entry in to a residence. He appealed from conviction, arguing, in part, that the trial judge had not concluded how he had entered the residence.

The appeal was dismissed. The Court of Appeal referred to section 350 of the *Criminal Code* and held that the trial judge's failure to determine how the accused entered the residence was not fatal (at paragraphs 34 to 37):

> Returning to the present case, while the judge did not make any factual determination as to how exactly Mr. Barnes gained entry into the

> complainant's residence, this is not fatal to the conviction. Nor is it fatal that there is no specific reference in the judgment to section 350(b)(ii).
>
> What is important is that, having considered the totality of the evidence, the judge found that the complainant had not invited Mr. Barnes to the residence and that there was no consent to him being there. Additionally, there was no evidence to support any other potential legal justification or excuse for Mr. Barnes's presence there, and no suggestion that any other legal justification was in play.
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> The judge specifically rejected Mr. Barnes's evidence that he was invited to the residence and that the complainant had opened the door and let him in. Had Mr. Barnes's evidence been accepted, a legal justification would have existed for his presence in the residence, and there would have been no deemed break and entry under section 350. However, this was not what the judge found.
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> Pursuant to section 348(2)(a), evidence that Mr. Barnes broke and entered into the complainant's residence is (in the absence of evidence to the contrary) proof that he did so "with intent to commit an indictable offence". As the judge rejected Mr. Barnes's evidence that he was invited to the residence and was there with the complainant's consent, there was no evidence to the contrary to rebut the statutory presumption of intent to commit an indictable offence.

The Cargo Securement Regulations:

In ***R. v. Martin***, 2021 NLCA 16, March 23, 2021, the accused were convicted of an offence, contrary to section 31(1)(a) of the *Cargo Securement Regulations*, NLR 152/04. They had been transporting a load of oversized No. 1 steel. The trial judge concluded that this constituted "waste or scrap metal" within the meaning of those words in section 31(1)(a). The conviction was affirmed on appeal to the summary conviction appeal court. The accused sought leave to appeal to the Court of Appeal.

Leave to appeal was denied. The Court of Appeal held that "there is no reasonable possibility of success on this appeal". The Court of Appeal concluded as follows (at paragraph 13):

> The language of section 31(1)(a) is clear and unambiguous. The change in language from "shredded scrap metal" found in the previous provision (section 3(4)(c) of the *Load Security Regulations*, NLR 1008/96), does not

> support a conclusion that, under the current provision, only scrap metal "up to 40 millimetres in diameter" must be covered. The reference to "40 millimetres" is to "sand, gravel, crushed stone, slag, salt or a mixture of them in the form of particles". Those materials are clearly separated from "waste or scrap metal" by the word "or". As stated by the appellate judge, the only reasonable interpretation of the unambiguous language of the section is that all scrap metal in a load being transported in the Province must be covered.

Leaving the Scene of an Accident:

In ***R. v. Reid***, 2021 NLCA 13, February 23, 2021, the accused was convicted of the offence of failing to stop at the scene of an accident, contrary to the former section 252(1) of the *Criminal Code* [now section 320.16(1)]. He had intentionally struck another person with a vehicle and left the scene. He appealed from conviction, arguing that the word "accident" in section 252 does not include intentionally striking a pedestrian.[1]

The appeal was dismissed. The Court of Appeal held that that the "intention of the driver is not an element of 'accident'. This interpretation, treating 'accident' as synonymous with 'incident', is supported by the sample synonyms referred to above, and by two factors within the context of section 252" (at paragraphs 22 and 23):

> Firstly, the language within section 252 – "with intent to escape civil or criminal liability" – contemplates that "accident" can include intentional criminal acts. That is because (except for strict liability crimes) there is no criminal liability, and therefore no possibility of intent to escape criminal liability, unless the act was intentional, or involved some form of *mens rea*, such as knowledge, recklessness, or willful blindness.

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[1]

The Former Wording (section 252(1)):	The Present Wording (Section 320.16(1)):
Every person commits an offence who has the care, charge or control of a vehicle … that is involved in an accident with (a) another person, … and with intent to escape civil or criminal liability fails to stop the vehicle, … give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.	Everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance.

> Secondly, section 252 is concerned with the harm of drivers leaving the scene without leaving a name, or without rendering assistance to an injured person. Whether an unintended collision or an intended collision, the objective of guarding against the public harm of leaving the scene remains the same. That public harm occurred here, with Mr. Reid driving away without rendering assistance to the injured Mr. Mulcahy.

The Court of Appeal concluded that "[w]ithin the context of section 252, 'accident' contemplates any incident in which a person operates a vehicle so as to cause injury to another person or vehicle, and it includes intentional conduct on the part of the accused. There was no error by the trial judge in convicting Mr. Reid under section 252" (at paragraph 26).

PROCEDURE

Appeals-Appointment of Counsel:

In ***R. v. D.R.***, 2021 NLCA 54, November 24, 2021, the accused was convicted of the offence of sexual interference. He appealed from conviction and applied for counsel to be appointed pursuant to section 684 of the *Criminal Code*.

The application was denied. Justice O'Brien concluded as follows (at paragraphs 52 to 55):

> In summary, because Mr. R does not have the means to pay for counsel and has been refused representation by Legal Aid, he satisfies the first two factors in Ryan. However, and without determining whether there is a serious issue to be dealt with on appeal, I would conclude that, even if a serious issue on appeal was apparent, the appeal can be properly argued and decided without counsel being assigned to assist Mr. R and the Court.
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> As such, having considered the factors in Ryan in the context of this application, and having concluded that the requirements for this Court to assign counsel have not been met, I would dismiss the application.
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> Although counsel has not been assigned, Mr. R is entitled to proceed with the appeal on his own behalf and have it heard and decided by this Court. At the hearing of this application the Court set filing deadlines for Mr. R's written submissions (i.e. his factum) and the Crown's factum in response. As there is a cross-appeal on sentence, an additional factum will need to be filed on behalf

> of the Crown and Mr. R regarding the sentence appeal. Once the materials have been filed with the Court, either party may request a hearing date.
>
> Accordingly, the application is dismissed.

Appeals: Competency of Counsel:

In ***R. v. White***, 2021 NLCA 39, June 25, 2021, the accused was convicted of the offence of aggravated assault. He appealed from conviction, arguing that he received ineffective assistance from counsel. In particular, he argued that his counsel elected to have him tried in the provincial court without consulting him.

The appeal was allowed and a new trial ordered. A majority of the Court of Appeal held that a "miscarriage of justice" had occurred (at paragraph 25):

> In summary, I am satisfied that Mr. Matthews failed to provide competent representation for Mr. White at trial by failing to obtain informed instructions from Mr. White regarding the mode of trial. In the circumstances, that failure undermined the fairness of the proceedings and resulted in a miscarriage of justice.

Appeals-Jurisdiction-Section 830 of the Criminal Code:

In ***R. v. Chaulk*** 2021 NLCA 40, September 29, 2021, the accused was convicted of the offence of assault and sentenced to a period of conditional imprisonment. He filed a notice of appeal from sentence with the Court of Appeal pursuant to section 830 of the *Criminal Code*, which provides for appeals from a "determination of a summary conviction court".

The Court of Appeal indicated that the issue to be considered was "whether this Court has jurisdiction to hear the appeal under s. 830".

The Court of Appeal held that it did not have jurisdiction to do so.

The Court of Appeal noted that section 829 of the *Criminal Code* "identifies the court that has jurisdiction to hear such an appeal. It states that a summary conviction appeal under s. 830 is to be made to an 'appeal court'. The term 'appeal court' is defined ins. 829, and means the 'superior court of criminal jurisdiction for the province'" (at paragraph 8).

The Court of Appeal concluded that "the term 'Supreme Court' in s. 2 of the *Code*, as it relates to Newfoundland and Labrador, does not implicitly include the Court of Appeal…As such, the Court of Appeal is not an 'appeal court' for the purposes of s. 829, and does not have jurisdiction to hear the appeal under s. 830. The Supreme Court has jurisdiction in this regard" (at paragraphs 39 and 40).

Appeals-Reasons:

In ***R. v. Kennedy***, 2021 NLCA 42, July 5, 2021, the accused was convicted of the offence of sexual assault. He appealed against conviction. He argued that "the trial judge made factual findings or inferences that cannot be supported by the evidence".

The appeal was dismissed. The Court of Appeal concluded as follows (at paragraphs 22 and 28):

> I am satisfied, for the reasons set out below, that the trial judge's factual findings and inferences were reasonably supported by the evidence.
>
> …
>
> It is not the role of this Court to determine whether there is a reasonable doubt respecting whether there was vaginal intercourse. The issue for this Court is whether the trial judge made an error of law or fact in his application of the principle of reasonable doubt. At paragraph 24 of *Vokurka*, Hoegg J.A. (quoting Fish J. in *Clark*) noted that appellate courts may not interfere with factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. There was no error made by the trial judge in his application of the principle of reasonable doubt, and no error in inferring that there was oral sex and vaginal intercourse. Those inferences were reasonably supported by the evidence.

Appeals-Reasons:

In ***R. v. Martin***, 2021 NLCA 48, August 24, 2021, the Court of Appeal held that a trial judge's reasons for convicting must comply with the following requirements (at paragraph 7):

> • the reasons must demonstrate that the judge had seized the substance of the critical issue of a reasonable doubt in the context of a credibility assessment;

- sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings;

- a trial judge is not required to set out every finding or conclusion in the process of arriving at the verdict;

- rarely will the deficiencies in the trial judge's credibility analysis merit intervention on appeal;

- a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error; and

- the accused is entitled to know why the trial judge is left with no reasonable doubt.

Appeals-Unreasonable Verdicts:

In ***R. v. Potter***, 2021 NLCA 11, February 11, 2021, the accused was convicted of first-degree murder. He appealed from conviction, arguing in part, that a verdict of guilty of first degree murder was unreasonable.

The appeal was dismissed. The Court of Appeal concluded there was "no basis on which to conclude that the verdict of guilty of first degree murder was unreasonable" (at paragraph 53).

Case Management Conferences-Section 551.3 of the Criminal Code-Access to Transcripts:

In ***R. v. Stone***, 2021 NLCA 12, February 22, 2021, criminal charges laid against the accused were stayed based upon a breach of section 11(b) of the *Charter*. The Crown appealed. The Crown also applied to have access to "transcripts of pre-trial case management conferences, which were not available to the judge who heard the section 11(b) application".

The application was allowed. Justice Welsh noted that a "decision by a case management judge on an issue under section 551.3(1)(g) binds the parties for the remainder of the trial (section 551.3(4)). The binding decision applies whether the case management judge or a different judge hears the trial (section 551.1(4))" [at paragraph 4]. In addition, rule 7.05 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, indicates that "[u]nless otherwise ordered, conferences shall be held in the absence of the public…A conference held

under subrule (2) shall be recorded and the recording thereof shall remain sealed unless a judge orders otherwise".

In interpreting these two provisions, Justice Welsh held (at paragraphs 7(3) and 8):

> Applying rule 7.05(3), absent an order from a judge unsealing the recording, the contents of a case management conference would not be available for purposes of the trial. This result is inconsistent with section 551.3(1)(g) of the *Code* which provides that certain decisions made at a case management conference are binding for the remainder of the trial. Because of that binding nature, those decisions must be available for purposes of the trial, and must form part of the record for purposes of an appeal.
>
> In summary, rules 7.05(2) and (3) must be read in a manner consistent with section 551.3(1)(g) of the *Criminal Code*. Decisions made pursuant to that section will form part of the record for purposes of the trial and an appeal. For other issues, to avoid the above discussed concerns and considerations, and pending a possible review of the rules, a decision whether to unseal all or portions of a case management conference should be made by the trial judge, who is "a judge" who may make an order pursuant to rule 7.05(3).

Conclusion:

Justice Welsh concluded that "the panel that hears the appeal should determine whether to consider all or portions of the transcripts of the recordings of the case management conferences… Accordingly, I would allow the application to the extent that counsel may make written and oral submissions regarding whether the recordings should or should not be considered, and, if considered, what the effect may be on the substance of the appeal. I would leave the final decision regarding access to and use of the recordings of the case management conferences to the panel hearing the appeal" (at paragraphs 15 and 16).

Costs Against the Crown:

In ***R. v. Billiard***, 2021 NLCA 44, July 15, 2021, the accused was charged with the offences of operating a motor vehicle while impaired by alcohol and while having a blood alcohol content exceeding 80 milligrams of alcohol in 100 millilitres of blood, contrary to the former sections 253(1)(a) and (b) of the *Criminal Code*.

On the day before the date set for trial, the Crown decided not to call any evidence and the charges were dismissed. The accused and his counsel had travelled to the Province from Alberta to appear at the trial. The accused applied for an order of costs against the Crown. The order was granted by the trial judge and subsequently affirmed on appeal to the summary conviction appeal court. The Crown appealed to the Court of Appeal.

The appeal was allowed and the order of costs was set aside. The Court of Appeal indicted that "[t]here was no evidence that Crown counsel acted in bad faith or with an improper motive" and that costs therefore should not have been ordered (at paragraphs 28 to 31):

> Mr. Billiard also submits that Crown counsel failed to meet the standard of reasonable conduct because he and his counsel were not advised until the day before the scheduled trial that the Crown intended not to call any evidence. This would not ordinarily have been unusual or problematic. A final review of the evidence and law by Crown counsel just prior to trial is to be expected, and may lead to a conclusion by counsel "on the steps of the courthouse" not to proceed with the charges. While this may cause inconvenience for the accused and the court, and may result in what turns out to be unnecessary expense to be incurred by the accused, in the absence of some special consideration such as bad faith, this could not be said to constitute a departure from reasonable standards expected of the Crown.
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> The issue was exacerbated in this case because Mr. Billiard, who was working in Alberta, had chosen to be represented by counsel located in Alberta. That choice resulted in time and expenses related to travel…
>
> Had Mr. Billiard chosen to be represented by local counsel, the issue would not have arisen. His choice was, of course, open to him, but cannot form the basis for a conclusion that the Crown should be responsible for those costs absent a marked and unacceptable departure from the reasonable standards expected of the prosecution.
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> Both the trial and appellate judges erred in the application of the legal standard to the facts. Their conclusions demonstrate a misapprehension of the law, which sets a high threshold before an order for costs may be made against the Crown in a criminal matter.

Jury Charges-Correction of Crown Counsel's Comments:

In ***R. v. MacLean***, 2021 NLCA 24, April 29, 2021, the offender was convicted of the offence of sexual assault, contrary to section 271 of the *Criminal Code*. The offender appealed from conviction, arguing that the Crown's comments to the jury reversed the burden of proof.

The appeal was dismissed. The Court of Appeal concluded that the trial judge's jury charge remedied any misstatement made by the Crown (at paragraph 39):

> The jury instructions were adequate, and in particular, sufficient to remedy any prejudice arising from Crown counsel's closing submissions. The judge properly explained the legal principles to be applied to the mistake of age defence, the burden of proof for that defence, and how the evidence related to the defence. There was no prejudice to trial fairness.

Jury Charges-Manslaughter:

In ***R. v. Pope***, 2021 NLCA 47, August 18, 2021, the accused was convicted of the offence of second degree murder. He appealed from conviction, arguing, in part, that the trial judge erred in instructing the jury in relation to the offence of manslaughter.

The appeal was allowed and a new trial ordered. A majority of the Court of Appeal concluded that the trial judge "erred by failing to properly instruct the jury on the included offence of manslaughter. The difference between murder and manslaughter, particularly regarding the question of intent, was not explained with sufficient clarity" (at paragraph 34).

CHARTER

Section 11(b):

In ***R. v. Stone***, 2021 NLCA 55, November 29, 2021, the accused were charged with the offence of fraud on May 8, 2015. In February of 2019, they applied for a stay of proceedings to be entered, arguing that they had not been tried in a reasonable period of time, contrary to section 11(b) of the *Charter*.

The application was granted and the stay entered. The trial judge held that a significant portion of the delay was attributable to the Crown having failed to obtain "computer hard drives, which was generated during the Defendants' employment",

which the trial judge characterized as 'first party disclosure' and therefore the responsibility of the Crown. The Crown submits that the information constitutes third party disclosure, which would be the responsibility of the defence" (see paragraph 8).

The Crown appealed. The appeals were allowed and new trials ordered.

In setting aside the stay, the Court of Appeal held that "the reduction in delay to 38 months occasioned from the third party disclosure issue together with the 11 months reduction related to unavailability and change of counsel results in a total delay of 27 months, which is less than the presumptive ceiling of 30 months delay...It is unnecessary, then, to consider whether there were exceptional circumstances on the facts of this case that would rebut the presumption that a delay exceeding 30 months is unreasonable. (See *Jordan*, at paragraphs 68 and 69; Cody, at paragraphs 64 to 71.)" [at paragraphs 45 and 46].

Section 12:

In ***R. v. MacLean***, 2021 NLCA 24, April 29, 2021, the offender was convicted of the offence of sexual assault, contrary to section 271 of the *Criminal Code*. The offence involved the offender, who was twenty-one years of age, having sexual intercourse, with a twelve year-old girl. A period of ninety days of imprisonment was imposed. The trial judge held that the minimum mandatory sentence prescribed for this offence (one year of imprisonment) infringed section 12 of the *Charter*. The Crown appealed from the sentence imposed. The Court of Appeal considered the constitutionality of the minimum mandatory penalty.

The Court of Appeal concluded that the minimum mandatory sentence prescribed by Parliament infringed section 12 of the *Charter*. The Court of Appeal indicated, at paragraph 43, that the "analytical process to follow when a mandatory minimum sentence is challenged is set out by the majority in *Nur*. First, the court must determine what constitutes a proportionate sentence for the offence based on the objectives and principles of sentencing in the *Criminal Code* (para. 46). Second, it must decide, bearing the proportionate sentence in mind, whether applying the mandatory minimum would result in a grossly disproportionate sentence for the offender before the court (para. 46). Third, if the sentence is not grossly disproportionate for that offender, the court must then consider whether any 'reasonably foreseeable applications' of the provision will result in grossly disproportionate sentences for other offenders (para. 77). If the answer to either of

the last two questions is yes, then the mandatory minimum sentence is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter* (para. 46)".

The Court of Appeal held that there "was no error in the trial judge's conclusion that the mandatory minimum sentence in s. 271(a) fails the 'reasonably foreseeable applications' test. I do not intend to reproduce the hypotheticals used by the trial judge as the 'reasonably foreseeable applications'. These, and others canvassed in similar court decisions, collectively establish that the mandatory minimum one-year term can result in a grossly disproportionate sentence... The Crown conceded at the outset of this appeal that a s. 12 *Charter* infringement is this matter could not be justified by s. 1" (at paragraphs 46 and 51).

SENTENCING

Internet Luring-Accessing Child Pornography-Making Sexually Explicit Material Available to a Child-Consecutive Sentences:

In ***R. v. Clarke***, 2021 NLCA 8, January 21, 2021, the accused pleaded guilty to four counts of internet luring, one count of making sexually explicit material available to a child, and one count of accessing child pornography, contrary to sections 172.1(1)(a), 171.1(1)(b) and 163.1(4.1) of the *Criminal Code*. The Court of Appeal noted that the "four counts of luring involved four different children – B.I., L.G., T.W., and D.R. The children ranged in age from 12 to 15. The duration of the luring activity varied among the victims – the briefest duration was two days and the longest was eight months. There was no in-person contact with the children, and no direct request for in-person contact".

A period of eight years of imprisonment was imposed. It was ordered to be served on a consecutive basis to a period of imprisonment of three years and two months imposed on an earlier date for similar offences. The accused appealed from sentence.

The appeal was allowed and the sentence reduced to five years of imprisonment. The Court of Appeal held that "the trial judge's rationale for imposing initial sentences for the luring offences, before adjusting for totality, at the top of, and above, the established range of sentence, involved erroneous consideration of the appellant's *modus operandi* as an aggravating factor. The method employed by the appellant was not an exceptional – or even unusual – use of the internet to communicate with children for the purpose, in this case, of accessing child pornography. It was the same method employed by the offenders in all of the sentencing precedents referenced by the judge, and is the method contemplated by,

and implicit within, the *Criminal Code* provision that makes internet luring a criminal offence" (at paragraph 26).

The Court of Appeal concluded that the "established range of sentence for internet luring is one to two years, based on the comments of Karakatsanis J. (in a concurring judgment) at paragraph 177 of *R. v. Morrison*, 2019 SCC 15: 'In most cases proceeding by indictment, the appropriate range will be from 12 to 24 months'. The trial judge determined that the appropriate sentences for the appellant, before adjusting for totality, would be two years each for the internet luring of T.W., L.G., and B.I. and three years for the internet luring of D.R. It was an error, justifying appellate intervention, for the judge to rely on this aggravating factor to justify initial sentences at the top, and above, the established range of sentence" (at paragraph 28).

Section 718.3(7)-Consecutive Sentences and Totality:

The Court of Appeal indicated that it agreed "that the provisions for consecutive sentences set out in s. 718.3(7) must be read together with s. 718.2(c), but I do not agree that the discretion available to achieve a proper totality of sentence allows a judge to disregard the provisions of s. 718.3(7) that mandate consecutive sentences. Reading ss. 718.3(7) and 718.2(c) together does not allow concurrent sentences where consecutive sentences are mandated. The language of s.718.3 (7) is clear and unambiguous: '… the court shall direct that a sentence … be served consecutively …' This provision eliminates judicial discretion to order concurrent sentences for the offences caught by s. 718.3(7). It is not for the courts to pass upon either the wisdom or the necessity for these provisions of the *Criminal Code*; it is for the courts to give effect to the intention of Parliament expressed in the clear language of the *Criminal Code*, except where *Charter* considerations apply" (at paragraph 71).

Consecutive to the Unexpired Sentence:

The Court of Appeal indicated it agreed "with the trial judge that there is no principled basis upon which to order that the current sentence be served on a concurrent basis to the sentences previously imposed. If all these charges (the ones currently the subject of this sentencing appeal and the earlier ones relating to the youngest and oldest victim) had been heard together, consecutive sentences would have been required by virtue of s. 718.3(7). In the circumstances the five year sentence imposed here should be consecutive to the unexpired previous sentences" (at paragraph 76).

Conclusion:

The Court of Appeal concluded as follows (at paragraphs 77 and 78):

> An appropriate sentence, taking account of the principle of totality, is five years broken down as follows:
>
> - Luring of B.I. for the purpose of accessing child pornography s. 172.1(1)(a) – one year [reduced, for totality, from an otherwise appropriate sentence of 14 months];
> - Luring of L.G. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
> - Luring of T.W. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive;
> - Luring of D.R. for the purpose of accessing child pornography s. 172.1(1)(a) – one year consecutive [reduced, for totality, from an otherwise appropriate sentence of 18 months];
> - Making sexually explicit material available to D.R. s. 171.1(1)(b) – six months concurrent;
> - Accessing child pornography from D.R. s. 163.1(4.1) – one year consecutive.
>
> I would not interfere with the ancillary orders made by the trial judge under ss. 737 (victim surcharge), 487.051(1) (DNA sample), 161 (prohibition on certain activities involving potential contact with children), 109(3) (weapons prohibition), 490.013(2.1) (sex offender registration).

Joint Submissions-Manslaughter, Robbery, Forcible Confinement, Arson, and Breaches of Court Orders:

In ***R. v. Lucas***, 2021 NLCA 14, March 9, 2021, the accused pleaded guilty to the offences of manslaughter, home invasion robbery, forcible confinement, arson, and breaches of court orders. Counsel agreed by way of a joint sentencing submission that period of seven years and six months of imprisonment be imposed. The trial judge rejected the joint submission and, having given Mr. Lucas the opportunity to withdraw his guilty plea, imposed a term of imprisonment of twelve years and six months. The accused appealed.

The appeal was dismissed. The Court of Appeal indicated that the "test to be applied in assessing a joint sentencing submission is discussed in *Anthony-Cook*, at paragraphs 32 to 48. Essentially, the question is whether the proposed sentence 'would bring the administration of justice into disrepute or is otherwise contrary to the public interest'…While the public interest test engages elements that are not undertaken for purposes of a conventional sentencing, it does not follow that considerations relevant in a conventional sentencing have no place in assessing a joint submission. In particular, depending on the circumstances, a frame of reference from which to conduct the assessment may be necessary in order to determine whether a joint submission is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system", or the joint submission would cause 'an informed and reasonable public to lose confidence in the institution of the courts' (paragraph 11, above). For example, in this case, the trial judge reviewed case law to ascertain the sentences that the offences may have attracted in a conventional setting. That said, care must be taken with the manner in which such information is used when assessing a joint submission because the focus must remain on the public interest criteria" (at paragraphs 11 and 19).

Conclusion:

The Court of Appeal concluded that the sentencing judge did not err in rejecting the joint sentencing submission (at paragraphs 48 to 50):

> In the result, the trial judge was satisfied, on balance, that, applying the *Anthony-Cook* test, the joint sentencing submission must be rejected. The judge considered the circumstances and rationale underpinning the joint submission, including the submissions of counsel regarding benefits to the Crown and concessions made by Mr. Lucas. It has not been demonstrated and there is no basis on which to find that the trial judge erred.
>
> In summary, the trial judge gave clear and cogent reasons for rejecting the joint submission. He applied the analysis framed in *Anthony-Cook* and concluded that the sentence was so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system", and that the sentence "would cause an informed and reasonable public to lose confidence in the institution of the courts". In addition, the judge followed the appropriate procedure, ultimately providing Mr. Lucas with the opportunity to withdraw his guilty plea.

> Having applied the appropriate legal principles, the trial judge did not err in rejecting the joint sentencing submission.

Sexual Assault:

In ***R. v. MacLean***, 2021 NLCA 24, April 29, 2021, the offender was convicted of the offence of sexual assault, contrary to section 271 of the *Criminal Code*. The offence involved the offender, who was twenty-one years of age, having sexual intercourse, with a twelve year-old girl. A period of ninety days of imprisonment was imposed. The Crown appealed from the sentence imposed.

The Court of Appeal indicated that "the reasons of the trial judge reveal that primary consideration was not given to denunciation and deterrence, and instead, was given to the sentencing objective of rehabilitation…The failure to give primary consideration to the objectives of denunciation and deterrence, where s. 718.01 is engaged, is an error in principle" (at paragraphs 55 and 56).

In increasing the sentence imposed to a period of three years of imprisonment, the Court of Appeal concluded as follows (at paragraph 75):

> There was no guilty plea by Mr. MacLean in the current matter, but several of the other factors set out in A.B., including, single sexual encounter, not in a position of trust, no previous criminal record, good prospects for rehabilitation, low risk of re-offending, and positive pre-sentence report, favour a sentence at the low end of the range that was set out in *Vokey*, *Barrett*, *Payne*, *R.B.*, and *A.B.* Considering the facts and circumstances unique to the current matter, an appropriate sentence for Mr. MacLean is three years. This duration satisfies the objectives of sentencing, with primary consideration given to denunciation and deterrence, and satisfies the parity principle.

Sexual Assault:

In ***R. v. Kennedy***, 2021 NLCA 42, July 5, 2021, the accused was convicted of the offence of sexual assault. The offence involved non-consensual vaginal intercourse and oral sex. He was sentenced to a period of forty-two months of imprisonment. He appealed against sentence. He argued that the sentence was unfit because it was based on "sexual activity that was not proven".

The appeal was dismissed. The Court of Appeal concluded as follows (at paragraphs 45 to 47):

> The appeal of sentence alleges the sentence is unfit because it was based on sexual activity that was not proven. I have determined that the trial judge made no errors in his factual findings and inferences, including his finding that the sexual activity included oral sex and vaginal intercourse. The sentence, based on those findings, was not demonstrably unfit.
>
> In *R. v. Freake*, 2012 NLCA 10, the offender, a former boyfriend, was staying with the complainant at her apartment. He admitted engaging in sexual intercourse, but testified it was consensual. The trial judge accepted the complainant's evidence that it was nonconsensual and that during the sexual intercourse the offender held his hand over her mouth. A sentence of four years was imposed. This Court upheld that four-year sentence and stated, at paragraph 23, "The range of sentence for sexual assault involving intercourse in circumstances such as this would be three to five years."
>
> This general range indicates that the three-year six-month sentence imposed in the appellant's circumstances was a reasonable sentence and deference is owed.

Trafficking-Cannabis:

In ***R. v. Murphy***, 2021 NLCA 3, January 8, 2021, the accused pleaded guilty to the offence of possession of cannabis for the purposes of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*. The sentencing judge suspended sentence and placed the accused on probation for two years. The Court of Appeal described the circumstances as follows:

> Mr. Murphy's role in the operation was to retrieve parcels which he knew contained cannabis from a residential dwelling in Mount Pearl and to deliver them to someone else. Mr. Murphy had recruited a person who agreed to receive the product from UPS and paid him $400 for each shipment.
> Four or five shipments of this nature had been made.
>
> 24.8 pounds of cannabis were seized from Mr. Murphy on January 10, 2017 having a street value between $168,600 and $224,800.

The Crown appealed from the sentence imposed. The appeal was dismissed. The Court of Appeal held that "Parliament's decision to reduce the maximum sentence for the *Cannabis Act* equivalent of the offence with which Mr. Murphy was convicted, reflects a diminution of the objective seriousness of the offence of possession for the purposes of trafficking in cannabis" (at paragraph 18). The Court of Appeal concluded as follows (at paragraphs 53 and 54):

> Given:
>
> > (a) the proximity of the sentencing judge's decision to the enactment of the *Cannabis Act* (which provided evidence of a reduction in the objective seriousness of the offence); and
> >
> > (b) the limited jurisprudence available to the sentencing judge;
>
> it has not been established that the sentence imposed in this case is a marked departure from sentences "customarily imposed" for similar offenders committing similar crimes.
>
> I conclude that the sentencing judge balanced uniformity in sentencing with his duty to consider the circumstances of the case before him.

Trafficking-Cocaine-Considering Restrictive Bail Conditions:

In ***R. v. Noseworthy***, 2021 NLCA 2, January 5, 2021, the accused was convicted of the offence of conspiracy to traffic in cocaine and cannabis marihuana, contrary to section 465(1)(c) of the *Criminal Code* and section 5(1) of the *Controlled Drugs and Substances Act*. The offences were described as a "large-scale, commercial conspiracy".

The sentencing judge imposed a period of twenty months of incarceration, having reduced the sentence he would have otherwise have imposed by one-third as a credit for restrictive bail conditions. The Crown appealed from the sentence imposed.

The Court of Appeal concluded that an appropriate sentence in this case would have been a period of forty-two months of imprisonment, but stayed the serving of the sentence based upon the accused having served the sentence imposed by the sentencing judge.

The Court of Appeal held that "the expected custodial sentence for mid-level trafficking in cocaine in a commercial operation would be in the range of four years" (at paragraph 35). However, the Court of Appeal also indicated though a "3.5 to 4 year sentencing range has been established for mid-level cocaine trafficking in this province, the cases demonstrate that the particular circumstances of the offence and the offender must be considered to determine whether a deviation from the range is justified" (at paragraph 44).

Bail Conditions:

The Court of Appeal held that the "case law illustrates that there may be rare cases when strict or harsh release conditions might be considered as a mitigating factor on sentencing. However, this is not one of those cases. Applying the principles outlined in the authorities, the conditions of release imposed upon Mr. Noseworthy would not warrant a reduction of sentence. As such, I would conclude that the judge's reliance on the pre-sentence release conditions to reduce the sentence by 10 months was an error in principle that had an impact on the sentence" (at paragraph 122).

CONCLUSION

As we have seen, during 2021, the Court of Appeal had dealt with a multitude of criminal issues, in particular sentencing. The Court of Appeal has set potential ranges for certain sexual offences against children and trafficking. Finally, it has considered the issue of joint submissions. On the latter, it will be interesting to see if this constitutes a lessening of the restrictive test that the Court of Appeal has applied over a number of years to the rejection of joint submissions by sentencing judges.