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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SENTENCE-BREAK & ENTRY-RESIDENCE-AGGRAVATED ASSAULT

R. v. GREEN, 2021 NLSC 139, OCTOBER 28, 2021.

FACTS: The accused pleaded guilty to the offence of break and entry. He entered the victim's residence with a knife and stabbed the victim.

HELD: Justice Noel imposed a period of five years of incarceration for each offence, to be served concurrently.

YOUTH CRIMINAL JUSTICE ACT-WITNESSES-OATH

R. v. K.C., 2021 ONCA 776, NOVEMBER 1, 2021.

FACTS: The accused, a young person pursuant to the *Youth Criminal Justice Act*, was convicted of the offence of sexual assault. He appealed from conviction, arguing that the trial judge erred in allowing witnesses to testify without being affirmed or taking an oath.

HELD: The Ontario Court of Appeal agreed that the judge erred and ordered a new trial.

The Court of Appeal noted that as a result of section 142 of the *YCJA*, section 802(3) of the *Criminal Code*, which requires that every witness "shall be examined under oath", applied (section 14 of the *Canada Evidence Act*, provides an alternative to an oath by way of solemn affirmation).

The Court of Appeal held that it was "not able to conclude that the accused suffered no prejudice in this case" (at paragraph 8).

THIRD PARTY SUSPECT EVIDENCE

R. v. Hudson, 2021 ONCA 772, November 1, 2021, at paragraphs 188 to 190:

> It is open to an accused charged with an offence to adduce evidence that tends to show that another person committed the offence with which the accused is charged. The evidence offered in support may be direct, or circumstantial, or a combination of both: *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), at p. 167, aff'd [1977] 2 S.C.R. 824. The evidence must be relevant and of sufficient probative value to warrant its reception. As a result, courts have been disinclined to admit evidence about alternate or third party suspects unless the suspect is sufficiently connected by other circumstances with the crime charged to give the proposed evidence some probative value: *McMillan*, at p. 757; *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, at paras. 46-47.

> Evidence of the disposition of a known alternate or third party suspect is admissible to establish commission of the offence charged by that person provided that person is connected to the offence by other evidence. Absent such a nexus, the disposition evidence would lack any probative value: *McMillan*, at p. 758; *R. v. Murphy*, 2012 ONCA 573, 292 C.C.C. (3d) 122, at para. 19.
>
> To put the third party or alternate suspect issue in play at a criminal trial, the defence must show that there is some basis upon which a reasonable jury properly instructed, could acquit on the basis of the defence. Absent a sufficient connection between the third party and the offence, the defence will lack the required air of reality and fail *in limine*: *Grandinetti*, at para. 48.

ASSAULT-APPLICATION OF FORCE-COVID AND COUGHING

R. v. PRUDEN, 2021 ABPC 266, OCTOBER 28, 2021.

FACTS: The accused was charged with the offence of assault. The evidence at the trial established that while at a bar, the accused removed his mask and intentionally coughed in close proximity to one of the bar's employees.

HELD: The accused was convicted. Judge Lamoureux noted that "[w]hile it is clear, that physical touching, even if minimal, is an application of force sufficient to sustain a conviction, the more difficult issue arises when the application of force cannot be seen with the naked eye. The Court can have no difficulty convicting an individual who coughs and spits as the application of force is visible to the naked eye, in the saliva transmitted through the act of coughing. But, what about the force which produces a bodily substance which cannot be seen with the naked eye - the microscopic respiratory droplet or aerosol produced from lung air during a cough?" (at paragraph 46).

In convicting the accused of the offence of assault, Judge Lamoureux concluded that an application of force had occurred (at paragraphs 55 and 56):

> The Court interprets the term "force" as that word is used in section 265(1)(a) of the *Criminal Code of Canada* to include a force created by the movement of gas molecules which are inhaled and exhaled during the course of taking air into the lungs and expelling air from the lungs. The basic mechanism of breathing, to inhale and to exhale lung air, is caused simply by differences in air pressure of the atmosphere and air pressure within the lungs. The force created by the act of breathing is the result of differences in pressures between atmospheric air and air pressure within the lung. Air pressure is a force at the molecular level in the same manner as physical force visible to the naked

> eye. This is basic science, uncontroverted, and not requiring any expert opinion.
>
> Accordingly, when Mr. Pruden engaged in an intentional act of coughing, he was emitting a force consisting of lung air molecules into the atmosphere. The COVID virus, which is spread through airborne transmission, can be found in the exhaled breath of a potentially infected person. The virus is part of the respiratory droplets dispersed into the atmosphere through coughing. When this occurs in a closed space, such as a room, in close proximity to others located in that room, the COVID virus can be emitted into the surrounding air in the room. This, is an act of force within the definition of force in section 265(1)(a) of the *Criminal Code of Canada*. Mr. Pruden, by his own testimony, is convicted of the offence of assault by coughing pursuant to section 266 of the *Criminal Code of Canada*. The Crown has proven the *actus reus* and the *mens rea* beyond a reasonable doubt.

JUDICIAL PERSPECTIVES OF COMMUNITY-BASED DISPOSALS (ISSUES PAPER, SCOTTISH SENTENCING COUNCIL, OCTOBER 28, 2021).

In "early 2021, the Council carried out a consultative exercise with sentencers across Scotland, with a view to identifying any gaps or barriers to provision of community-based disposals and to ascertain what might improve judicial confidence in community-based interventions" (at paragraph 4).

The Council summarized its conclusions in the following manner (at paragraphs 14 to 18):

> Community-based disposals, in appropriate cases, are commonly viewed by sentencers as providing a greater chance of rehabilitation and, in general terms, as a more cost-effective alternative to imprisonment.7 It is our impression that sentencers feel that the sentencing process is generally well supported by justice social workers, who they understand are often carrying out a difficult task in challenging circumstances. Nevertheless, we believe there are opportunities for improvements and a summary of the key issues we wish to highlight for attention follow.
>
> Sentencers generally feel that they are aware of the programmes and services available and that they can access the necessary information to make appropriate sentencing decisions but not all feel they have a full awareness of what is available.
>
> We consider that judicial awareness could be improved, and the sentencing process might therefore be expedited by: the provision of greater information

in Criminal Justice Social Work Reports (CJSWRs) about available local authority and third sector initiatives; enhanced engagement with service providers; and a database of the resources available. We consider that this would be particularly valuable to practitioners and sheriffs who move across jurisdictions, as local variations in available services can affect sentencing options.

There is a perceived need among sentencers for greater consistency in the provision of community-based programmes and services. These should be made available for a wider range of offending and to address a wider range of issues. Sentencers have, for example, observed gaps in unpaid work opportunities for specific categories of person (for example those with mental health difficulties, women and young people) or offending (for example domestic abuse).

The engagement we have carried out suggests that one of the greatest challenges to judicial confidence in community-based disposals concerns limitations of resources to support their management and delivery. A more consistent approach to the development and funding of these disposals to support their more consistent provision, robust management and successful completion would enhance judicial confidence and might be expected to support an increase in the use of community-based disposals through the provision of more sentencing options.

REVOCATION OF FIREARM LICENCE-APPLICATION FOR REVIEW-SECTION 74(1) OF THE *FIREARMS ACT*

BRUCE v. A.G. OF CANADA (NLPC), 2021 NLPC 0121PA00792, NOVEMBER 5, 2021.

FACTS: The Chief Firearms Officer revoked the applicants' firearm licence. He applied for a review pursuant to section 74(1) of the *Firearms Act*.

HELD: The application was dismissed. Judge Harris noted that a review of a revocation "is not a trial *de novo*. The court is limited to an assessment of the reasonableness of the administrative decision. Even if the court may have come to a different conclusion, it cannot substitute its own decision for that of the administrative body as long as its decision was reasonable" (at paragraph 22).

In dismissing the application, Judge Harris concluded as follows (at paragraphs 30 and 31):

> Having reviewed the information available to the investigating Firearms Officer at the time of her review, I find that the revocation was reasonable in all the circumstances. There was recent disclosure of suicidal ideation, there were ongoing issues surrounding hallucinations and delusions despite the Applicant's apparent compliance with medication regimes. Unfortunately, the investigating Firearms Officer was not able to speak directly to the Applicant due to his hospitalization. Of course, this may have had no impact on the decision. Ultimately, it may have offered the Applicant some insight into the reasoning of the investigating Firearms Officer and the opportunity to participate in the process.
>
> The Applicant was concerned that the decision to revoke was based solely upon his mental illness and had repeated that he had never acted in a violent manner nor been charged with a violent offence. It is clear from the reasons provided by the investigating Firearms Officer that the concern was with the noted suicidal ideations and expressions of self-harm. Possible self-directed violence is a legitimate concern under the umbrella of "public safety".

SENTENCE-SECOND DEGREE MURDER

R. v. BRAGG, 2021 NLSC 145, NOVEMBER 4, 2021.

FACTS: The offender pleaded guilty to having committed the offence of second-degree murder. The accused strangled the victim, causing her death.

HELD: Justice Burrage imposed a parole ineligibility period of ten years.

THE APPLICATION OF W.(D.) AND THE ADMISSIBILITY OF DOUBLE HEARSAY

R. v. HOFFMAN, 2021 ONCA 781, NOVEMBER 5, 2021.

FACTS: The accused was convicted of the offence of manslaughter. The evidence at the trial established that the victim (Mr. Kenyi) was killed after being swarmed by a number of people. A Crown witness (Mr. Ojha) testified that the accused was not involved. However, he had provided a statement to the police incriminating the accused. This statement was admitted by the trial judge for the truth of its contents as a principled exception to the hearsay prohibition.

The accused appealed from conviction. He argued that "the trial judge erred in failing to give a direction pursuant to the decision in *R. v. W.(D.)*, [1991] 1 S.C.R 742, relating to exculpatory evidence given by key witness Peter Ojha (the '*W.(D.)*

direction'). Second, he contends that the trial judge erred by misdirecting the jury on double hearsay that may have been contained in a '*K.G.B.* statement' made by Peter Ojha that was admitted into evidence" (at paragraph 2).

HELD: The Ontario Court of Appeal concluded that the trial judge erred in both respects. It ordered that a new trial be conducted.

W.(D.):

The Court of Appeal suggested that it "is settled that the *W.(D.)* principles apply to the evaluation of the credibility of exculpatory evidence given by any witness, including Crown witnesses…if a witness gives exculpatory evidence, a *W.(D.)* direction will be required even if that same witness also gives an inculpatory version of events" (at paragraphs 40 and 41).

The Court of Appeal concluded that "the trial judge erred in failing to direct jurors to apply the principles in *W.(D.)* when evaluating the testimony of Mr. Ojha. Without such direction, there can be no confidence that the jury understood the legal principles they were to apply. In my view, this non-direction amounted to a misdirection" (at paragraph 55).

Double Hearsay:

The Court of Appeal indicated that "[i]t is settled law that 'a prior inconsistent statement [such as Mr. Ojha's *K.G.B.* statement] can only be admitted for the truth of its contents under the principled approach if the evidence contained in the statement would be admissible through the witness's testimony at trial'…Further, it is trite law that a witness cannot offer hearsay evidence in their testimony unless that hearsay evidence qualifies for admission pursuant to a hearsay exception. It follows that hearsay that is itself embedded in another wise admissible *K.G.B.* statement will not be admissible unless that embedded 'double hearsay' qualifies for admission pursuant to its own hearsay exception…Put simply, inadmissible double hearsay cannot ride into evidence on the coattails of admissible hearsay evidence" (at paragraph 58).

The Court of Appeal concluded that the trial judge erred in directing the jury "that in the case of Mr. Ojha they could use his previous statement 'as evidence of what happened'" (at paragraph 68).

PARTIES TO THE OFFENCE-SECTIONS 21 AND 22 OF THE *CRIMINAL CODE*

R. v. COWAN, 2021 SCC 45, NOVEMBER 5, 2021.

FACTS: The accused was charged with the offence of robbery. The evidence led at the trial indicated that the robbery was committed by two individuals. The Crown argued that the accused should be convicted on the basis that he was one of the principals (section 21) or on the basis of having counselled the commission of the offence (section 22).

The trial judge rejected both propositions and the accused was acquitted. On appeal, a majority of the Saskatchewan Court of Appeal set aside the acquittal and ordered a new trial. The accused appealed from conviction. The Supreme Court indicated that the primary issue raised was: "Did the trial judge err in his assessment of Mr. Cowan's guilt as a party on the basis of abetting or counselling?"

HELD: The appeal was dismissed.

The Supreme Court indicated that "[f]or the purposes of determining criminal liability, the *Criminal Code* does not distinguish between principal offenders and parties to an offence…Sections 21 and 22 of the *Criminal Code* set out the various ways in which an accused may participate in and be found guilty of a particular offence. Those provisions codify both liability for an accused who participates in an offence by actually committing it, under s. 21(1)(a) (principal liability); and liability for an accused who participates in an offence by, for example, abetting or counselling another person to commit the offence, under s. 21(1)(c) or s. 22(1) (party liability)" [at paragraphs 29 and 30].

The Supreme Court indicated that the Crown "is not required to prove the identity of 'the principal' or their specific role in the commission of the offence for party liability to attach". The "essential elements of abetting are well established. The *actus reus* of abetting is doing something or omitting to do something that encourages the principal to commit the offence…As for the *mens rea*, it has two components: intent and knowledge…The abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence" (at paragraphs 31 and 32).

Section 22(1) of the Criminal Code:

In relation to this provision, the Supreme Court stated (at paragraphs 35 and 36):

> The *actus reus* is the "deliberate encouragement or active inducement of the commission of a criminal offence" (*R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at para. 29 (emphasis deleted)). The person deliberately encouraged or actively induced by the counsellor must also actually participate in the offence (para. 63, per Charron J., dissenting on other grounds; *Criminal Code*, s. 22(1)). As for the *mens rea*, the counsellor must have "either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct" (*Hamilton*, at para. 29).
>
> While one of the requisite elements of counselling is the actual participation in the offence by the person counselled, that person can participate not only as a principal, but also as a party. This is reflected by the wording of s. 22(1), which states that an accused is a party if they "counse[l] another person to be a party to an offence and that other person is afterwards a party to that offence". The precise manner of participation is irrelevant, since whether the person counselled is a principal or a party, "[t]he focus on a prosecution for counselling is on the counsellor's conduct and state of mind, not that of the person counselled".

Application to this Case:

The Supreme Court concluded that the trial judge erred in focusing "on the identity of a given principal, whether or not the Crown identified specific individuals as principals to the offence. Rather, all that was required was for him to find that Mr. Cowan had encouraged at least one of the individuals who participated in the commission of the offence, be it as a principal (abetting or counselling) or a party (counselling). Respectfully, the trial judge erred in failing to recognize this" (at paragraph 44).

CONTEMPT OF COURT

R. c. Marion, 2020 QCCQ 6715, per Galiatsatos, J.C.Q., at paragraphs 25 to 29 [translation]:

> At common law, provincial court judges have the inherent jurisdiction to punish for contempt of court, provided that it is committed *in* facie.
>
> That power is intended to ensure the orderly conduct of the proceedings and to protect the integrity of the process.
>
> It must be used with restraint.
>
> In the normal course, a three-step summary process is followed:
>
> 1) The judge who witnesses conduct potentially constituting contempt of court cites the perpetrator to appear to respond to the charge, informs him or her of the right to counsel, and sets a date for the hearing;
> 2) The accused may then provide an explanation or apologize to purge the contempt. Although the judge must consider those explanations and apologies, he or she is not obliged to accept them. In other words, providing an apology – even a sincere one – after taking a step back will not automatically absolve the person cited. At the end of the hearing in question, the judge decides whether the evidence establishes the guilt of the person cited beyond a reasonable doubt.
> 3) If the person is convicted of contempt of court, natural justice requires that he or she be given the opportunity to make submissions on sentencing. At this stage, a sincere apology may constitute a mitigating factor.
>
> The *actus reus* of contempt of court consists of conduct that seriously interferes with or obstructs the administration of justice or conduct that causes a serious risk of interference or obstruction with the administration of justice. The fault requirement calls for deliberate or intentional conduct, or conduct which demonstrates indifference akin to recklessness. The *mens rea* may consist of the intention to depreciate the authority of the court.

CHARTER-SECTIONS 7, 8, 10(B), 24(1) & 24(2)

R. v. HAYES, 2021 NLPC 1020A00188, NOVEMBER 9, 2021.

FACTS: The accused is charged with the offence of trafficking, contrary to section 5(1) of the *Controlled Drugs and Substances Act*. He applied for a judicial stay of proceedings to be entered and for evidence to be excluded, alleging a number of breaches of the *Charter*.

The evidence at the application established that the accused was arrested in a motorcycle clubhouse after the police entered without a search warrant and with their firearms drawn. The accused was advised of his right to contact counsel and indicated he wished to do so. He was taken to the police station, where the police delayed his contact with counsel while processing him and a number of other individuals. While at the police station, the police found a baggie with a white substance in the accused's pocket.

HELD: The application for a stay was denied. The application for the exclusion of evidence (the baggie and white substance) was granted. Judge Fowler concluded that sections 7 and 8 of the *Charter* were not breached, but section 10(b) was breached by the police delaying the accused's access to counsel.

Judge Fowler concluded as follows:

Section 8 of the Charter-the Warrantless Entry:

> [59] Based on the totality of the evidence I am satisfied that Mr. Hayes was present when the police entered the Outlaws Motorcycle Club clubhouse on February 23, 2020, at approximately 3:30 in the morning. There was no evidence put before me to demonstrate that Mr. Hayes was a member of the motorcycle club or that he had any form of possession, control or ownership over the building. There was no evidence of his historical use of the property or of his having any ability to regulate access to the location. There was no evidence to demonstrate on a subjective or on an objective level of any expectation of privacy.
>
> [60] I am not satisfied that Mr. Hayes demonstrated on a balance of probabilities that he had a reasonable expectation of privacy in the Outlaws Motorcycle Club clubhouse and therefore the application under s. 8 of the *Charter* is dismissed.

Section 10(b) of the Charter:

> [72] Police are required to be proactive in implementing an accused's right to speak with counsel. It is possible that the most efficient manner of implementing the requirement of speaking with counsel when dealing with

multiple arrested individuals is to deal with them one person at a time, however, no evidence was presented to demonstrate that this was the case.

[73] Cst. Skinner was not aware of any special measures set up for phones and he believed that there was no opportunity for Mr. Hayes to speak with legal counsel until 4:57 am. He made no further inquiries while waiting in the garage bay. Sgt. Skinner had ensured that there was transportation from the clubhouse to the detachment but he had not made any mention of considering plans or limitations to allow multiple accused to speak with counsel.

[74] The Crown has the burden of demonstrating that any delay was reasonable. In the circumstances and I am not satisfied on a balance of probabilities that the 27-minute delay was reasonable.

The Stay Application:

[82] Mr. Hayes' rights were breached when he was kept in the police car at the police station for an extended period of time while waiting to be "processed" before being given the opportunity to speak to legal counsel. The Crown failed to demonstrate that the delay was reasonable, however, the police made no efforts to illicit any information from the accused. There were items seized from the Applicant after his arrest.

[83] I am not satisfied that the Accused's right to a fair trial will be "manifested, perpetuated or aggravated," by allowing the trial to continue. The police were attempting to deal with an evolving situation and I do not find that the police were acting in bad faith while waiting at the detachment. There were no efforts to gain any additional information from the Accused. The primary evidence for the Crown in this case will be the testimony of the Operatives and that evidence is not related to anything that happened after the Accused was arrested. Allowing the trial to continue will not affect the Accused's right to a fair trial.

Section 24(2) of the Charter:

[92] Exclusion is not automatic and s. 24(2) requires, "an approach which balances the competing relevant factors, with a view to maintaining the long-term repute of the administration of justice," (see *R. v. Hobeika*, 2020 ONCA 750 at para. 83).

[93] Balancing the three lines of inquiry, I conclude that the appropriate remedy in this case is that any evidence obtained as a direct result of the arrest and detention of Mr. Hayes is to be excluded. For clarity, the baggies with white residue that were seized from the Accused at the RCMP detachment in

the early morning hours of February 23, 2020, cannot be entered into evidence at trial.

REASONS FOR SENTENCE

R. v. Gaudet, 2021 PECA 15, November 10, 2021, at paragraphs 13 and 14:

> Reasons for sentence need not be lengthy and in fact can be pithy, but they do need to deal with the material facts and issues in dispute. Read in context with the evidence and submissions of counsel, reasons need to make the foundation of the decision discernable.
>
> The issues of premeditation/impulsivity, mental health, remorse, and incidence of crime are relevant and material. One can only arrive at a proper proportionate sentence upon making findings on these issues. In this case, these issues were not reconciled in the stated reasons for judgment. As a result, the reasons do not inform the reader – the offender, the public, the appeal court – whether those integral factors were decided, and if so how they were weighed in the decision-making process. Absent those explanations, the reasons rendered leave the impression that they were not reconciled, and that appears to have led the sentencing judge to focus too much attention on one issue; Gaudet's youthfulness. This constitutes an error in principle which had an impact on sentence. As a result, the sentence should be set aside.

STARTING POINTS, SENTENCING RANGES, AND SENTENCING FOR FENTANYL TRAFFICKING CONSIDERED BY THE SUPREME COURT OF CANADA

R. v. PARRANTO, 2021 SCC 46, NOVEMBER 12, 2021.

FACTS: The accused (Felix and Parranto) pleaded guilty to a number of offences involving trafficking in fentanyl. Felix was sentenced to a period of seven years of imprisonment and Parranto was sentenced to a period of eleven years of imprisonment. The Crown appealed from the sentences imposed. The Alberta Court of Appeal set a starting point sentence of nine years for wholesale fentanyl trafficking and increased Felix's global sentence to ten years and Parranto's sentence to fourteen years. The accused appealed to the Supreme Court of Canada.

HELD: The appeals were dismissed. The Supreme Court rendered four judgments. Based upon my reading of them, it appears that the Court's majority decided:

> 1. The appeals should be dismissed and the sentences imposed by the Court of Appeal affirmed; and

2. Starting points are a permissible, provided they are not used to curtail a deferential sentencing standard of appellate review.

Per Wagner C.J. and Brown, Martin and Kasirer JJ:

The four Justices concluded that "the sentences imposed on these offenders by the respective sentencing judges were demonstrably unfit. The Court of Appeal's intervention was therefore appropriate". However, they started of their reasons by stating that their judgment was "not an endorsement of starting points as they have sometimes been enforced at the Court of Appeal of Alberta, but rather a revised understanding, bringing them into conformance with the standard of appellate review and principles and objectives of sentencing" (at paragraph 3). [Justices Abella and Karakatsanis JJ, in a concurring opinion on this point, indicated that they agreed with Wagner C.J. and Brown, Martin and Kasirer JJ, that "starting points are a permissible form of appellate sentencing guidance, provided that starting points are not used to curtail the highly deferential sentencing standard of appellate review" (at paragraph 205)].

The four Justices noted that "[p]roportionality is the organizing principle in reaching this goal. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading 'Fundamental principle' (s. 718.1). Accordingly, '[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender' (*R. v. Friesen*, 2020 SCC 9, at para. 30). The principles of parity and individualization, while important, are secondary principles… Despite what would appear to be an inherent tension among these sentencing principles, this Court explained in *Friesen* that parity and proportionality are not at odds with each other. To impose the same sentence on unlike cases furthers neither principle, while consistent application of proportionality will result in parity (para. 32). This is because parity, as an expression of proportionality, will assist courts in fixing on a proportionate sentence (para. 32). Courts cannot arrive at a proportionate sentence based solely on first principles, but rather must "calibrate the demands of proportionality by reference to the sentences imposed in other cases" (para. 33)…Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is 'committed in unique circumstances by an offender with a unique profile' (para. 58). This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case" (at paragraphs 10 to 12).

As regards sentencing ranges and starting points, the Justices concluded that they "are simply different paths to the same destination: a proportionate sentence" (at paragraph 25):

> …irrespective of the preferred sentencing methodology, the purpose of the modality is to assist the sentencing judge in achieving the objectives and principles of sentencing, primarily proportionality. Ranges and starting points are simply different paths to the same destination: a proportionate sentence. Courts of appeal have discretion to choose which form of guidance they find most useful and responsive to the perceived needs of their jurisdiction, which may vary across the country. As long as that guidance conforms to the principles and objectives of sentencing in the *Code*, this Court should respect the choices made by appellate courts. Both sentencing ranges and starting points, where properly applied and subject to the correct standard of review on appeal, are consistent with the *Code*. It is not this Court's role to decide which form of guidance is superior, nor would it be desirable to confine appellate courts to giving one or another form of quantitative guidance.

The Key Principles:

The Justices described the "key principles" as follows (at paragraph 36):

> 1. Starting points and ranges are not and cannot be binding in theory or in practice (*Friesen*, at para. 36):
>
> 2. Ranges and starting points are "guidelines, not hard and fast rules", and a "departure from or failure to refer to a range of sentence or starting point" cannot be treated as an error in principle (*Friesen,* at para. 37);
>
> 3. Sentencing judges have discretion to "individualize sentencing both in method and outcome", and "[d]ifferent methods may even be required to account properly for relevant systemic and background factors" (*Friesen*, at para. 38, citing *Ipeelee*, at para. 59); and,
>
> 4. Appellate courts cannot "intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied" (*Friesen*, at para. 37). The focus should be on whether the sentence was fit and whether the judge properly applied the principles of sentencing, not whether the judge chose the right starting point or category (*Friesen,* at para. 162).
>
> These principles settle the matter. Contrary to the Crown's submission, it is not an open question whether sentencing judges are free to reject the starting-point approach. Sentencing judges retain discretion to individualize

> their approach to sentencing "[f]or this offence, committed by this offender, harming this victim, in this community" (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 80 (emphasis in original)). There is no longer space to interpret starting points (or ranges) as binding *in any sense*. [The Court's emphasis]

How are Sentencing Judge's to Apply Starting Points and Ranges?

In relation to this question, the Justices indicated that starting points and ranges "do not relieve the sentencing judge from considering all relevant sentencing principles" (at paragraphs 44 and 45):

> While not binding, however, sentencing ranges and starting points *are* useful tools because they convey to sentencing judges an appreciation of the gravity of the offence. And, as we have already observed, they offer judges a place to begin their thinking. When applying these tools, sentencing judges must individualize the sentence in a way that accounts for both aspects of proportionality: the gravity of the offence and the offender's individual circumstances and moral culpability. At the stage of individualizing the sentence, the sentencing judge must therefore consider "all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them" (*Ipeelee*, at para. 75). Those factors and circumstances may well justify a significant downward or upward adjustment in the sentence imposed.
>
> Starting points also do not relieve the sentencing judge from considering all relevant sentencing principles. The principles of denunciation and deterrence are generally built into starting points and reflected in ranges, but those objectives "cannot be allowed to obliterate and render nugatory or impotent other relevant sentencing objectives" (*R. v. Okimaw*, 2016 ABCA 246, 340 C.C.C. (3d) 225, at para. 90). When conducting an individualized analysis, sentencing judges are expected to account for other relevant sentencing objectives, including rehabilitation and restraint. Indeed, this Court has held that the 1996 sentencing reforms were intended to both ensure courts consider restorative justice principles and to address the problem of over-incarceration in Canada (*Gladue*, at para. 57; *Proulx*, at paras. 16-20). Sentencing judges have discretion over which objectives to prioritize (*Nasogaluak*, at para. 43; *Lacasse*, at para. 54) and may choose to weigh rehabilitation and other objectives more heavily than "built-in" objectives like denunciation and deterrence. Appellate courts should not lose sight of these principles — nor the deferential standard of review — when reviewing sentences that depart from a starting point or range.

The Justices noted that "[w]here sentencing judges choose to refer to the starting point or range, they are not precluded from considering any factor that is 'built in' as mitigating in the individual circumstances, and they retain the discretion to consider and weigh all relevant factors in their global assessment of a fit sanction. This comports with the principle that the sentencing judge must always consider all relevant individual circumstances in reaching a fit sentence tailored to the offender before the court" (at paragraph 46).

This Case:

The Justices concluded that "the Court of Appeal did not err in setting a starting point for wholesale fentanyl trafficking" (at paragraph 55).

Mr. Felix:

The Justices also agreed that "the seven-year sentence imposed [upon Mr. Felix] at first instance was demonstrably unfit. It is clear the sentencing judge misapprehended the gravity of the offence… we emphasize that the commission of wholesale trafficking offences in fentanyl may very well be expected to attract more significant sentences as the harm to the end user and the devastating consequences to communities plagued by addiction is not contested" (at paragraphs 67 and 73).

Mr. Parrento:

The Justices held that "the 11-year global sentence imposed at first instance was demonstrably unfit and Court of Appeal [*sic*] did not abrogate the standard of review in intervening. There is no reason for this Court to disturb the sentence of 14 years imposed by the Court of Appeal" (at paragraph 77).

Gladue Principles:

In relation to the application of the *Gladue* principles to Mr. Parrento, the Justices concluded (at paragraphs 80 and 81):

> Mr. Parranto's background circumstances can be said to have played a part in bringing him before the court. Against this must be weighed the reality that Mr. Parranto committed the second set of offences less than three months after being released on bail for the first set of offences. This suggests that

> restorative justice principles such as rehabilitation are less salient in this case compared to other objectives including protection of the public.
>
> Based on the gravity of the offence, *Gladue* factors and the aggravating and mitigating circumstances, we agree with the Court of Appeal that a global sentence of 14 years is appropriate.

Justice Moldaver:

Justice Moldaver held that the "sentences imposed by the sentencing judges in both cases were demonstrably unfit. They fall markedly below the range of sentences that are warranted in cases like this, involving the directing minds of largescale fentanyl trafficking operations. In such cases, more severe sentences than those imposed by the Court of Appeal would have been justified; however, in the circumstances, the Court of Appeal cannot be faulted for failing to impose higher sentences than those sought by the Crown at the sentencing hearings" (at paragraph 84).

Justice Moldaver also indicated that "[w]ith respect to the role of starting points in sentencing, I agree with my colleague, Rowe J" (at paragraph 85).

Justice Rowe:

Justice Rowe also concluded that the appeals from sentence should be dismissed. However, he held that the "starting-point approach pioneered by the Court of Appeal of Alberta is, in theory and in practice, contrary to Parliament's sentencing regime and this Court's jurisprudence. The starting-point approach undermines the discretion of sentencing judges and departs from the standard of deference required by appellate courts. As a result, it thwarts the imposition of proportionate and individualized sentences" (at paragraph 102).

Abella and Karakatsanis JJ:

As noted earlier, these two Justices indicated that they agreed with Wagner C.J. and Brown, Martin and Kasirer JJ, that "starting points are a permissible form of appellate sentencing guidance, provided that starting points are not used to curtail the highly deferential sentencing standard of appellate review". However, they would have allowed the appeals and restored the sentences imposed by the trial judges. They concluded that "neither trial judge made an error in principle, nor was either sentence demonstrably unfit" (at paragraphs 205 and 206).

CHARTER- SECTIONS 9, 10(B) AND 24(2)

R. v. TUTU, 2021 ONCA 805, NOVEMBER 12, 2021.

FACTS: A police officer (Constable Hankin), while on routine patrol, parked his police vehicle behind a car parked in a parking lot. The officer thought the car was unoccupied. When he got to the driver's side window, the officer saw that the accused was sitting in the driver's seat. He spoke to the accused and the accused was arrested after giving two false names. A search of the vehicle resulted in the police finding a Glock handgun. Constable Hankin did not advise the accused of his right to counsel until after he had examined the handgun.

At his trial, the accused argued that he had been detained and that a breach of section 10(b) of the *Charter* had occurred. He sought exclusion of the handgun. The trial judge held that the accused was not detained until he was arrested. The handgun was admitted and the accused was convicted. He appealed to the Ontario Court of Appeal.

HELD: The appeal was allowed. The evidence was excluded and the accused acquitted. The Court of Appeal held that "the detention occurred when PC Hankin discovered that the car was occupied after he had blocked it from moving" (at paragraph 8).

The Ontario Court of Appeal concluded as follows (at paragraphs 21 and 22):

> …the circumstances giving rise to the encounter in this case support a finding that a reasonable person, in the appellant's position, would believe he was detained when the police, having obstructed his car, approached it or knocked on the window. A reasonable person would see this as a directed personal inquiry: see *Thompson*, at paras.53-54; *Grant*, at para. 41; Le, at para. 42.
>
> The appellant was psychologically detained from the outset of his interaction with PC Hankin, well before his initial arrest. As in Thompson, the police conduct was "authoritative from the outset": at para. 55. PC Hankin blocked the movement of the appellant's car with his marked police cruiser. He was in a police uniform. Nothing about the officer's initial interaction with the appellant would have diminished the perception of a reasonable person in the appellant's circumstances that he was detained. PC Hankin told the occupants to put out the joint, to turn the music down, to produce identification, and to wait while he did a computer check of their names. He also asked whether they possessed a marijuana licence.

SENTENCE-SEXUAL ASSAULT

R. v. SNELGROVE, 2021 NLSC 149. NOVEMBER 12, 2021.

FACTS: The accused, a police officer, was convicted of the offence of sexual assault. The circumstances were described, in part, in the following manner:

> …the Complainant, a young woman who, having had a bit too much to drink, sought Cst. Snelgrove's assistance in getting home. At the time Cst. Snelgrove was a member of the Royal Newfoundland Constabulary. He was on duty, dressed in his uniform and sitting in his police car in front of the Supreme Court building in St. John's, Newfoundland and Labrador. He was in the process of writing up his notes after depositing an arrested person at the lockup located in the basement of the Supreme Court. It was there, in the parking lot of the Supreme Court, that the Complainant approached Cst. Snelgrove for help. She testified that she didn't want to take a cab home for fear of being sexually assaulted. She decided to repose her trust in a police officer.
>
> Upon arriving at her home the Complainant discovered that she was locked out. Cst. Snelgrove assisted her in getting a window to her basement apartment open. She entered her apartment and opened the door. Cst. Snelgrove entered and, thereafter, the activity that the jury found to be a sexual assault, occurred.
>
> For the purposes of my sentencing decision I find that the Complainant did not consent to the application of sexual force by Cst. Snelgrove and, at all material times, he was in a position of authority owing to his occupation, his dress and the fact that he was on duty, at the time of the interaction between them.

HELD: Justice Khaladkar imposed a period of four years of imprisonment.

ADVERTENT COLLUSION VERSUS INADVERTENT TAINTING

R. v. C.G., 2021 ONCA 809, November 16, 2021, at paragraphs 27 to 32:

> The trial judge said that collusion was a factor in assessing the defence evidence. While the trial judge did not characterize the collusion as between "advertent collusion" and what is commonly called "inadvertent collusion", as the Crown submitted before us, a fair reading of his reasons demonstrates that the trial judge acceded to the Crown's submission that the defence evidence was tainted by "inadvertent collusion". The difficulty with the trial judge's conclusion on this point is two-fold. First, it is implicit in his

comments that the trial judge accepted that the evidence of the defence witnesses was diminished by this "inadvertent collusion". Yet the trial judge never explains how he took the "inadvertent collusion" into account in his assessment of the defence evidence, apart from stating that he does not dismiss the defence evidence on this ground alone. Second, in spite of his evident acceptance that tainting had occurred, the trial judge failed to explore how the "inadvertent collusion" altered the evidence of each of the defence witnesses, if at all.

As I have intimated, the term "collusion" has been used to describe two different phenomena. The first is deliberate or "advertent collusion", that is, where witnesses get together and fashion their evidence in concert in order to appear to be reciting a consistent and reliable story. The other, commonly referred to as "inadvertent collusion", occurs where one witness discusses the events with another witness with the consequence that the evidence of one or both of them may be altered. Put another way, a witness' evidence may be "inadvertently" impacted by the fact that they have heard the evidence of other witnesses which "can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events": *R. v. B. (C.)* (2003), 171 C.C.C. (3d) 159 (Ont. C.A.), at para. 40. This point was made in *R. v. F. (J.)* (2003), 177 C.C.C. (3d) 1 (Ont. C.A.), where Feldman J.A. said, at para. 77:

> The reliability of a witness's account can be undermined not only by deliberate collusion for the purpose of concocting evidence, but also by the influence of hearing other people's stories, which can tend to colour one's interpretation of personal events or reinforce a perception about which one had doubts or concerns.

While the issue of collusion most often arises when a court is considering the admissibility of similar fact evidence, it is an issue that has relevance to the evaluation of a witness' evidence in general.

As this case illustrates, it is unfortunate that the term "inadvertent collusion" has been coined. As I will explain, "advertent collusion" affects the credibility of evidence. "Inadvertent collusion", or accidental tainting, does not do so. It affects only the reliability of such evidence. As a result, an entirely different analysis is required in determining the impact that "inadvertent collusion" may have on the evidence in question. Yet the term "inadvertent collusion" obscures this because the term "collusion" connotes conspiracy, which is a

credibility concern. It would be better if the term "inadvertent collusion" was avoided and replaced by the term "inadvertent tainting". Given that the term "inadvertent collusion" was used during the matter before us, I will continue to refer to "inadvertent collusion" but as I say, that is a term that would best be avoided going forward.

I will begin with advertent collusion. It is self-evident that this first form of collusion is particularly problematic. Deliberate collusion among witnesses will inevitably undermine the credibility of the evidence given. No court would be comfortable relying on evidence from witnesses who have gotten together and decided on what they are going to say when questioned under oath, at least not without independent corroborating evidence establishing that their evidence is reliable, notwithstanding the collusion.

The second form of collusion, "inadvertent collusion", is more difficult. The fact that one witness has heard what another witness will say, or for that matter has even discussed what another person's recollections were, does not mean that either witness is not telling the truth, or is not giving their independent recollection, or that their evidence has been tainted. Indeed, even where the evidence of one of the parties to the discussion is inadvertently affected by what another person has said, the account of that other person may not change. For example, in this case, it is possible that when, during the joint meeting with the defence lawyer, the appellant's wife offered reasons why the appellant could not be guilty, the appellant did innocently incorporate those reasons into his testimony, but that does not mean that his wife's observations were inaccurate or that her testimony had changed as a result of their discussion. Nor does it necessarily follow that the appellant's testimony became unreliable. He may have recognized from his own knowledge the truth and importance of what his wife had observed. The key point is that, unlike advertent collusion which corrupts the evidence of all participants, where inadvertent collusion has occurred, a close examination is required to determine what impact that innocent sharing of information may have had on the evidence of each of the witnesses who is a party to the exchange…

SENTENCE- ASSAULT AND BREACH OF RELEASE ORDER

R. v. KEARNEY, 2021 NLPC 0820A00188, NOVEMBER 17, 2021.

FACTS: The accused was convicted of two counts of assault and two counts of breach of a release order. One of the assaults was in relation to his former partner

and one of the breach of release order offences involved him having contact with her in violation of a no-contact condition. The circumstances were described, in part, as follows:

> Through their investigation police learned that all parties had been socializing at the bar. George Kearney was sat by his wife Amanda Hodder at the bar when all of a sudden he had leaned over and hit her in the face. Amanda Hodder ran out of the bar and into the kitchen area and called 911. Leon Walsh then approached George Kearney to try and calm him down and the Accused responded by punching Leon Walsh in the face, knocking out one of his front teeth. Leon Walsh hit the accused back and held him to the ground until the police arrived.
>
> On October 16, 2020 Amanda Hodder contacted the RCMP and advised that she fears that George Kearney is going to come home as he has not followed his conditions not to contact her. A statement was obtained from Angela Walsh who advised the Accused had contacted her via text message multiple times on September 28 and 29, 2020.
>
> Amanda Hodder provided a statement advising the Accused had contacted her vis text message (September 26, 27, 28, 29, 30, October 1, 2, 3, 4, 5, 9, 10, 11 & 12) and via telephone calls (October 3, 5 & 9).

HELD: Judge Porter imposed a period of 180 days of incarceration, followed by 1 year of probation. The individual sentences were as follows:

> Assault on Mr. Walsh, 90 days;
>
> Assault on Ms. Hodder, 60 days, concurrent;
>
> Breach of no-contact order, 60 days, consecutive; and
>
> Breach of alcohol prohibition, 28 days, consecutive.

THE IMPACT OF DECLARATIONS OF INVALIDITY AND CHARGES LAID DURING A PERIOD THAT A DECLARATION HAS BEEN SUSPENDED

R. v. ALBASHIR, 2021 SCC 48, NOVEMBER 19, 2021.

FACTS: The accused were charged with the offence of living on the avails of sex work, contrary to section 212(1)(j) of the *Criminal Code*. The Supreme Court of Canada, in ***Canada (Attorney General) v. Bedford***, [2013] 3 S.C.R. 1101, had found this provision to be unconstitutional and void, but suspended the declaration of invalidity for one year. The accused were charged after the suspension expired, but the offences were alleged to have occurred during the one-year period of suspension.

The trial judge quashed the charges against both accused on the basis that once the ***Bedford*** suspension expired, the offence was unconstitutional. On appeal, the British Columbia Court of Appeal allowed the Crown's appeals and entered convictions. The accused appealed to the Supreme Court of Canada.

HELD: The appeals were dismissed.

The Supreme Court indicated that "[t]his case requires us to determine the legal consequences of suspending declarations of invalidity of a criminal offence. In particular, can persons who commit that offence prior to the expiry of the suspension be convicted once the suspension expires and the declaration takes effect? The answer depends on whether the declaration (or any remedial legislation) has retroactive or purely prospective application". The Court noted that "[r]etroactive declarations change the law for all time, both reaching into the past and affecting the future. Once the declaration takes effect, the law is deemed to have been invalid from the moment of its enactment. Conversely, when the declaration is purely prospective, the law was valid from its enactment but is invalid once the declaration takes effect" (at paragraph 2). The Court also noted that in ***Bedford***, it "did not explicitly state whether this declaration would apply retroactively or purely prospectively at the conclusion of the period of suspension" (at paragraph 3).

The Supreme Court held that the "purpose animating the suspension in Bedford was to avoid the deregulation of sex work (thus maintaining the protection of vulnerable sex workers) while Parliament crafted replacement legislation. In light of that purpose, I conclude that the declaration of invalidity was purely prospective, effective at the end of the period of suspension. Thus, the appellants were liable under s. 212(1)(j) for their conduct during the suspension period, and could be

charged and convicted under this provision even after the suspension expired" (at paragraph 6).

Conclusion:

The Supreme Court summarized its conclusion in the following manner (at paragraph 72):

> A suspended declaration of invalidity may be purely prospective where the purpose of the suspension requires such a temporal application. In *Bedford*, this Court's remedy was purely prospective, because the purpose of the suspension — avoiding deregulation that would leave sex workers vulnerable — would be frustrated by a retroactive remedy. As the remedy was purely prospective, the appellants could be charged for their conduct prior to the declaration taking effect. Thus, an accused could be convicted for conduct caught by s. 212(1)(j) before the effective date of the declaration. However, an accused who could demonstrate that their personal rights were prejudiced by the constitutional infirmity could seek relief under s. 24(1), provided their conduct did not undermine the public interests the suspension was designed to protect.

ADMISSIBILITY OF ADMISSIONS TO PROBATION OFFICERS

R. v. BROWNE, 2021 ONCA 836, NOVEMBER 24, 2021.

FACTS: The accused was convicted of the offence of manslaughter. At his trial, the Crown led evidence connecting the accused to the scene of the offence through his telephone number. The accused had provided this number to his probation officer who provided it to the police.

The Ontario Court of Appeal indicated that the "probation officer testified on the *voir dire* that the provision of a phone number was not required as part of the probation order, and failure to provide a phone number would not result in a breach of the probation order".

The accused appealed from conviction. The Ontario Court of Appeal indicated that the accused argued that "the trial judge erred in not finding that his provision of the phone numbers was a compelled statement taken in violation of s. 7. He submits that the trial judge failed to consider that two probation officers explained to him that he could be prosecuted for violating his probation order. Further, he argues that he was

subjected to a high level of coercion to provide his phone number and that he was in an adversarial relationship with the probation officers".

HELD: The appeal was dismissed.

The Court of Appeal found the accused's submissions to be "unpersuasive". It stated that the trial judge "carefully considered these issues, and I concur with and adopt his analysis. As noted, the appellant did not testify, and thus there was no direct evidence that he felt coerced to provide his telephone number. Nor am I satisfied that coercion can be inferred in the circumstances. The intake form filled out by the appellant indeed included a section that asked for a 'telephone number, where you can be reached.' However, the probation officer testified that the order did not have a term that a phone number be provided. Further, she testified that she did not tell the appellant that the failure to provide a phone number would be considered a breach of the probation order" (at paragraph 60).

APPROVED SCREENING DEVICE DEMANDS

HOUNSELL v. R, 2021 CANLII 116748 (NL PC), NOVEMBER 17, 2021.

FACTS: The accused is charged with breaching sections 320.14(1)(a) and (b) of the *Criminal Code*. He applied for exclusion of an analysis of his breath conducted by an approved screening device. He argued that the obtaining of his breath sample violated section 8 of the *Charter* because the demand was invalid. He submitted that it was invalid because the officer involved (Sgt. Gardner) "failed to wait for 15 minutes prior to utilizing the ASD, as required by his training to eliminate the possibility of a false reading associated with the presence of mouth alcohol" (at paragraph 11).

HELD: The application was dismissed. Judge Linehan concluded as follows (at paragraphs 15 and 16):

> …I have determined that Sgt. Gardner's subjective belief was honestly held. I accept that he did not believe that there was credible evidence to indicate the suspect had recently consumed alcohol so as to jeopardize the accuracy of the ASD. In terms of the objective analysis, there was no credible evidence of actual recent consumption from the Applicant. Sgt. Gardner considered the presence of the beer can in his overall grounds. However, he did not see the Applicant drink from the can or place it in the back seat. His decision to proceed with the ASD immediately, as opposed to waiting for 15 minutes to account for the mere possibility that there was mouth alcohol, was objectively

reasonable as was his reliance on the results obtained. A lawful arrest, breath demand and provision of samples followed.

Therefore, I find that the Applicant has failed to establish on balance that a breach of section 8 of the *Charter* occurred.

APPEALS-APPOINTMENT OF COUNSEL

R. v. D.R., 2021 NLCA 54, NOVEMBER 24, 2021.

FACTS: 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*.

HELD: 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.
>
> 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.
>
> 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.

SENTENCING-ANIMAL CRUELTY-SECTION 445.1 OF THE CRIMINAL CODE

R. v. Chen, 2021 ABCA 382, November 25, 2021, at paragraphs 38 to 40:

> Denunciation encompasses society's demonstration of its disapproval of the act in question. Theoretically, it reflects a set of commonly held values. As has already been discussed, society's understanding of animal protection as an important value has increased; I repeat the observation of this court in *Alcorn*, that "cruelty to animals is incompatible with civilized society": para 42. Denunciation is clearly an applicable principle when sentencing for such conduct.
>
> The purpose of deterrence is to discourage the offender and others in the community from committing the offence. Animals feel pain and suffer; they are not merely property and deserve protection under the criminal law. All animals not living in the wild, including companion animals, livestock, and animals in industrialized production settings, are under the complete dominion of human caretakers and are highly vulnerable to mistreatment and exploitation at the hands of those caretakers. They are at the mercy of those who are expected to care for them and, unlike some other victims of crime, are incapable of communicating their suffering. Sentences for animal cruelty must reflect these realities, and the primary focus must be on deterrence and denunciation.
>
> While deterrence and denunciation are the primary sentencing principles, other sentencing principles are also engaged. The amendments to the animal cruelty provisions in the *Criminal Code* do not speak only of punishment, but also protection for the animal victim. The intervenor, Animal Justice, urges a nuanced approach to sentencing, with consideration of specific deterrence including conditions that will reduce the potential for repeat offending and ensure the offender is not in a position to harm animals, rehabilitation to help the offender understand the impact of his or her actions, and reparations to acknowledge harm and ensure care is available for the animal victim. These will all be relevant considerations in sentencing for animal cruelty offences, depending on the circumstances. For example, greater consideration should be paid to prohibition orders to ensure the offender is no longer in a position to harm animals, and reparations to ensure provision of short and long-term veterinary care for the animal. Section 447.1(1)(a) permits an order prohibiting the offender from owning or residing with an animal. In

circumstances where there is a reasonable risk of future harm to the animal, or any animal, an appropriate order should be made to prevent such harm.

SUPPLEMENTAL REASONS

R. v. CD, 2021 NUCA 21, November 25, 2021, at paragraphs 13 and 14:

> …trial judges have an inherent ability to edit oral reasons, for example, by correcting the grammar or method of expression or by adding citations: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc.***, 2021 ABCA 16 at para. 61. On the other hand, an express reservation of the right to edit or supplement does not enlarge the scope or nature of enhancements of reasons that are permissible.
>
> The issue of "supplemental reasons" can arise in different contexts:
>
> > (a) A trial judge may simply declare an outcome with "reasons to follow": e.g. ***R. v Teskey***, 2007 SCC 25, [2007] 2 SCR 267 (verdict); ***R. v Sundman***, 2021 BCCA 53 at paras. 55-56 (mid-trial rulings);
> >
> > (b) The trial judge may have lengthy reasons prepared, and essentially finalized, but due to the length read only a summary, followed by immediate release of the longer version: e.g. ***R. v Vander Leeuw***, 2021 ABCA 61 at para. 9.
> >
> > (c) The trial judge may announce his or her decision, but then correct that decision when an obvious error or illegality is identified: e.g. ***R. v Vader***, 2019 ABCA 191 at paras. 56-57, 89 Alta LR (6th) 146.
> >
> > (d) The trial judge gives reasons that appear to deal with all the issues, and outline all of his or her reasons, but then releases truly "supplemental" reasons that add arguments or issues: e.g. ***Perpetual Energy*** at para. 61.
>
> The scope of permissible variations between the original oral reasons and the supplemental reasons varies with the context. In general terms, a trial judge may edit oral reasons for punctuation, grammatical errors, citations and the like, but may not revise, correct, or reconsider the words actually spoken or make changes of substance: ***R. v Wang***, 2010 ONCA 435 at para. 9, 256 CCC (3d) 225; ***R. v Desmond***, 2020 NSCA 1 at paras. 24-25, 384 CCC (3d) 461.

SENTENCING-YOUTHFULNESS AS A MITIGATING FACTOR

R. v. Kollie, 2021 ABCA 389, November 26, 2021, at paragraphs 12 to 17:

> The youthfulness of an offender is potentially relevant to sentencing…As noted, the extent to which the youthfulness of the offender will be mitigating is not a constant and depends on the circumstances of the offence and the offender: ***R. v Evans***, 2019 ONCA 715 at para. 303, 147 OR (3d) 577.
>
> Youthfulness is not an automatic mitigating factor with all offences. As summarized by C. Ruby, Sentencing (10th ed), (Toronto: LexisNexis, 2020) at §5.190: "As offences become more serious, particularly in crimes of violence, the mitigating effects of age decrease and deterrence goes to the forefront". This concept is confirmed in the leading Alberta case on the topic, ***R. v Johnas***, 1982 ABCA 331 at paras. 12-15, 41 AR 183. Murder is by definition a violent offence, but in this case, the offence also engaged many aggravating factors.
>
> Youthfulness can be a mitigating factor because youthful offenders may have a lower moral culpability due to their immaturity, and they may have greater prospects for rehabilitation. In this case, however, the appellant has not demonstrated any lower moral culpability. The robbery was carefully planned, not impulsive. The assailants brought two weapons with them and used them both.
>
> Even though the appellant was 23 years old at the time of sentencing, he never expressed nor showed any remorse for this serious offence against a stranger, which was motivated by personal gain. After the murder, he travelled to Edmonton to celebrate his crime; he has not expressed any regret over that either. He refused to fully cooperate in the preparation of the presentence report requested by his counsel, thereby limiting the ability of the trial judge to conclude that rehabilitation was a realistic prospect. The burden of proof of that potentially mitigating factor was on him: *Criminal Code*, s. 724(3)(b).
>
> The mitigating effect of youthfulness also depends on whether the offender has prior experience in the criminal justice system. Where the offender has been the subject of previous sentences that might have aided in his rehabilitation, but has continued to offend, and has breached conditions of the prior sentences, the mitigating effect of youthfulness diminishes. In this case, the appellant was in breach of a weapons prohibition previously imposed on him, which justifies an extension of the period of parole ineligibility. As a

> standalone offence, the breach of the weapons prohibition would usually result in a consecutive sentence. He was also in breach of the conditions of his bail. His failure to respect limitations imposed on him does not enhance his prospects of rehabilitation. He had 21 youth convictions, including three for violence and one related to weapons.

SECTION 11(B) OF THE CHARTER-FIRST AND THIRD PARTY DISCLOSURE

R. v. STONE, 2021 NLCA 55, NOVEMBER 29, 2021.

FACTS: 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 Court of Appeal indicated that "[t]he issues to be considered in this appeal are", in part (at paragraph 11):

> Did the trial judge err in concluding that obtaining information from computer hard drives used by the Defendants during their employment is properly characterized as first party, not third party disclosure?
>
> Did the trial judge err by deducting from the total delay only a portion of the delay occasioned when Mr. Stone changed counsel?

HELD: The appeals were allowed and new trials ordered.

First Party or Third Party Disclosure:

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).

The Court of Appeal concluded that "it was the responsibility of the Defendants to make a timely application for third party disclosure of the information they sought. In the circumstances, the delay that occurred as a result of their conduct, 15 months and 20 days, would properly be deducted from the total delay. This would reduce the delay to about 38 months for purposes of the *Jordan* analysis" (at paragraph 42).

Section 11(b) of the Charter:

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].