A REVIEW OF DECISIONS RENDERED BY THE SUPREME COURT OF CANADA BETWEEN JANUARY 1 AND DECEMBER 31, 2021, IN CRIMINAL CAUSES OR MATTERS

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 Supreme Court of Canada in the time-period of January 1 to December 31, 2021, that 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 the subject matters considered in that decision.

The Supreme Court of Canada considered a multitude of issues involving criminal law, including defences, evidence and procedure, in 2021. Let us start with the Supreme Court's consideration of the *Canadian Charter of Rights and Freedoms*.

THE CHARTER

Sections 7 & 15-Youth Criminal Justice Act Appeals-Unreasonable Verdicts:

In ***R. v. C.P.***, 2021 SCC 19, May 7, 2021, the accused, a young offender, was convicted of the offence of sexual assault. He appealed from conviction, arguing that the verdict was unreasonable. He also argued that section 37(10) of the *Youth Criminal Justice Act*, which denies young persons an automatic right to appeal to the Supreme Court of Canada in certain circumstances, a right of appeal which is available to adults, violated sections 7 and 15(1) of the *Charter* and was therefore unconstitutional.

The appeal was dismissed. The Supreme Court of Canada held that the verdict was not unreasonable and that section 37(10) *Youth Criminal Justice Act* does not violate section 7 or section 15(1) of the *Charter*.

Unreasonable Verdict:

The Supreme Court of Canada indicated that "[w]hen a verdict is reached by a judge sitting alone and explained in reasons for judgment, there are two bases on which a court of appeal may find the verdict unreasonable. First, a verdict is unreasonable if it is not one that a 'properly instructed jury acting judicially, could reasonably have rendered' [and] A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached 'illogically or irrationally'…This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge" (at paragraphs 28 and 29).

The Supreme Court concluded that "there is no basis for finding the verdict to be unreasonable" (at paragraph 38).

Section 7 of the Charter:

The Court noted that two elements "must be established in order to show a violation of s. 7: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice…In this appeal, the requirements of the first step are readily satisfied, as a limit on young persons' right to appeal to this Court engages residual liberty interests that are cognizable under s. 7…The outcome thus hinges on whether this deprivation is in accordance with the principles of fundamental justice" (at paragraphs 125 and 126).

The Supreme Court concluded that "denying young persons an automatic right to a hearing in this Court where a court of appeal judge has dissented on a question of law cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system. This Court has steadfastly affirmed in various contexts that 'there is no constitutional right to an appeal', let alone an automatic one at the apex of the judicial system, including in circumstances that unequivocally engaged liberty interests and principles of fundamental justice that are cognizable under s. 7" (at paragrah133).

Section 15(1) of the Charter:

The Court indicated that "[a] law or a government action will contravene this guarantee: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage…The issue is whether it draws a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. In this respect, it should also be borne in mind that age-based distinctions are generally a 'common and necessary way of ordering our society' and are 'not strongly associated with discrimination and arbitrary denial of privilege'" (at paragraphs 141 and 142).

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

Section 11(b):

In ***R. v. Lai***, 2021 SCC 52, December 8, 2021, the accused was convicted of the offence of sexual assault. On appeal (2021 BCCA 105), he argued that the trial judge erred in not entering a stay of proceedings based on unreasonable delay pursuant to section 11(b) of the *Charter*. The appeal was dismissed (Butler JA, dissenting). A majority of the Court of Appeal held that though the trial judge erred in concluding that the accused's decision to re-elect a trial in the Supreme Court was an exceptional circumstance, the overall delay was justified by the parties' reasonable reliance on the law as it existed pre-*Jordan*.

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

> MOLDAVER J. — *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 32, states as follows:
>
> > Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. [Emphasis in original.]
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> In this case, the appellant, Mr. Lai, had the statutory right to re-elect when he did — but he waited 15 months to re-elect after his trial dates were set in Provincial Court. This was despite being informed by Crown counsel that he could preserve his trial dates by re-electing earlier. Nonetheless, he waited 7 months after that warning to exercise his right to re-elect. This conduct had the direct result of losing the trial dates that were set in Provincial Court and causing an additional delay of 13 months.
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> The trial judge rejected Mr. Lai's explanation regarding the re-election. Based on the trial judge's own findings and conclusions, the re-election was not done legitimately to respond to the charges. To that extent, the trial judge erred in not characterizing the delay as defence delay and deducting it as such.
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> For these reasons, a majority of the Court would dismiss the appeal.
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> Justice Côté is dissenting. She would have allowed the appeal substantially for the reasons of Butler J.A.

Sections 11(d) and (f)-Peremptory Jury Challenges:

In ***R. v. Chouhan***, 2021 SCC 26, June 25, 2021, the accused was charged with first degree murder. On the day set for jury selection (September 19, 2019), amendments to the *Criminal Code*, which abolished peremptory challenges, came into force. The accused argued that the amendments only operated prospectively, thus they did not apply to his trial. In addition, he argued that the application of the amendments to his trial would violate section 11(d) of the *Charter*. The trial judge rejected these arguments. The trial proceeded and the accused was convicted.

An appeal to the Ontario Court of Appeal was allowed and a new trial was ordered. The Supreme Court indicated that the Court of Appeal, per Watt J.A., "agreed with the trial judge that the amendments to the *Criminal Code* were constitutional, but he disagreed on their temporal scope. In his opinion, the abolition of peremptory challenges could not apply to accused persons whose right to a jury trial had vested by the time the amendments were proclaimed into force on September 19, 2019. This was the case for Mr. Chouhan, as his first degree murder charge pre-dated September 19, 2019. Accordingly, he was deprived of his substantive right to peremptory challenges under the former rules and a new trial was required" (at paragraph 6).

Appeals were taken to the Supreme Court of Canada. The Court described the issues raised as being the following:

> (a) Does the abolition of peremptory challenges violate the rights of accused persons under ss. 11(d) and 11(f) of the *Charter*?
>
> (b) If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?

The appeal was allowed and the conviction was restored. A majority of the Court held that (1) the abolition of peremptory challenges does not violate sections 11(d) or (f) of the *Charter*; and (2) the amendments apply retroactively.

Does the abolition of peremptory challenges violate the rights of accused persons under ss. 11(d) and 11(f) of the *Charter*?

The majority concluded as follows (at paragraphs 83 and 85):

> In summary, we are of the view that the abolition of peremptory challenges does not infringe the s. 11(d) rights of accused persons. The existing protections of the independence and impartiality of the jury, which we have canvassed above, continue to protect against an infringement of the s. 11(d) right. In appropriate cases, we also highlight the ongoing role of robust and targeted jury instructions, challenges for cause, and judicial stand asides in protecting the integrity of the jury process.
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> … Section 11(f) offers no greater protection of impartiality than the specific guarantee of impartiality enshrined in s. 11(d). With respect to representativeness, the jurisprudence of this Court is clear that the right to a representative jury does not entitle the accused to proportionate representation at any stage of the jury selection process, including the final stage of selecting jurors to serve on the trial jury (*Kokopenace*, at para. 70). Section 11(f)'s guarantee of representativeness requires the state to provide a fair opportunity for a broad cross-section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and by delivering jury notices to those who have been selected (*Kokopenace*, at para. 61). These aspects of jury selection are not affected by the abolition of peremptory challenges.

(b) If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?

The majority concluded as follows (at paragraph 103):

> …the amendments abolishing peremptory challenges are purely procedural and apply immediately to all jury selection processes commencing on or after September 19, 2019. They do not affect any of the accused's relevant substantive rights, namely the right to a fair trial, to an independent and impartial tribunal, or to a jury.

Section 24(2) of the Charter:

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

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

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

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

> We would dismiss this appeal, substantially for the thorough reasons of Justice Griffin on behalf of the majority of the Court of Appeal. We agree that the trial judge erred in his analysis under s. 24(2) of *the Canadian Charter of Rights and Freedoms* by considering *Charter*-compliant police behaviour as mitigating.
>
> We also agree that the trial judge erred by improperly conducting the overall balancing — whether including the evidence would bring the administration of justice into disrepute — within the first two factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The language of *Grant* is clear: this overall balancing occurs at the end (para. 85). Judges must first consider whether each of the three factors weigh in favour of inclusion or exclusion of the evidence before asking whether — having regard to all factors — inclusion of the evidence would bring the administration of justice into disrepute. Conducting overall balancing within the first two *Grant* factors waters down any

> exclusionary power these factors may have. This type of analysis undermines the purpose and application of s. 24(2).
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> With respect, however, we are unable to agree with the majority of the Court of Appeal that the trial judge properly considered all relevant *Charter*-infringing state conduct under the first *Grant* factor. The trial judge considered the *Charter*-infringing state conduct related to only two of the three s. 8 breaches. Failing to consider state conduct that resulted in the third breach — the clearing search — was an error. Regardless of whether the third breach was caused by the first two breaches, and regardless of the fact that it was considered necessary in the wake of Constable Sinclair's unlawful entry, it was nonetheless a breach of Mr. Reilly's s. 8 *Charter*-protected rights and must be considered under the first *Grant* factor. Trial judges cannot choose which relevant *Charter*-infringing state conduct to consider.
>
> The trial judge committed errors that required the majority of the Court of Appeal to conduct a fresh s. 24(2) analysis. In our view, we do not lack jurisdiction to consider alleged errors in the majority's fresh analysis. We see no reason to interfere with their fresh analysis. Accordingly, we would dismiss the appeal and affirm the exclusion of evidence and the order for a new trial.

EVIDENCE

Circumstantial:

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

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

> At the end of the day, I do not say that every trier of fact would inevitably have reached the same conclusion as the trial judge did: see Villaroman at para 69. I am satisfied, however, that the trial judge did not reverse the onus of proof in this case or lose sight of his obligation to assess reasonable doubt in light of all the circumstances before the Court. He considered the evidence as well as the absence of evidence relied on by the accused. He carefully addressed the 'gaps' pointed to by the defence (i.e., the absence of evidence) and explained why he rejected them. No other rational inferences arising from

> the absence of evidence have been suggested by counsel and I am unable to think of any that are not purely speculative.
>
> …
>
> It follows that I would not accede to the appellants' submission that the verdicts were unreasonable.

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

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

PROCEDURE

Appeals-Inconsistent Verdicts

In ***R. v. R.V.***, 2021 SCC 10, March 12, 2021, the accused was charged with the offences of sexual assault, invitation to sexual touching, and sexual interference. He elected to be tried by a judge and jury. The jury convicted him of the latter two offences, but acquitted him of the offence of sexual assault. He appealed from conviction, arguing that the verdicts were inconsistent and therefore unreasonable. The Supreme Court noted that a "jury renders inconsistent verdicts when it finds an accused both guilty and not guilty of the same conduct…For an appellate court to interfere with a conviction on the ground that it is inconsistent with an acquittal, the court must find that the guilty verdict is unreasonable" (at paragraphs 1 and 28). The Crown argued that "the apparent inconsistency in the verdicts rendered by the jury in the present case could be explained by the erroneous jury instructions [in relation to the sexual assault charge], such that the guilty verdicts could not be considered unreasonable".

The accused's appeal to the Ontario Court of Appeal was allowed. A majority of the Court of Appeal "held that there was no legal error in the jury instructions and

that the convictions for sexual interference and invitation to sexual touching were unreasonable, as they were inconsistent with R.V.'s acquittal on the sexual assault charge. The majority quashed R.V.'s convictions and substituted verdicts of acquittal".

The Crown appealed to the Supreme Court of Canada. The Supreme Court indicated that this "case provides us with an opportunity to clarify the approach to be followed when verdicts are alleged to be inconsistent. While the basic principles underlying inconsistent verdicts have been established by this Court, we have yet to explicitly consider the impact of legally erroneous jury instructions on the inconsistent verdicts inquiry. In doing so here, I seek to achieve a just balance between judicial integrity and fairness to the accused, while respecting the role of juries in our justice system" (at paragraph 4).

The appeal was allowed and the convictions were reinstated. The Supreme Court indicated that "the Crown can seek to reconcile apparently inconsistent verdicts by showing, to a high degree of certainty, that the acquittal was the product of a legal error in the jury instructions, that the legal error did not impact the conviction, and that the error reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct. If the Crown discharges its burden, appellate intervention on the conviction is not warranted because the verdicts are not actually inconsistent and thus not unreasonable on the basis of inconsistency" (at paragraph 5).

The Supreme Court concluded, per Justice Modaver, that "in the present case, I am respectfully of the view that the trial judge misdirected the jury on the charge of sexual assault by leaving the jury with the mistaken impression that the element of 'force' required for sexual assault was different than the element of 'touching' required for sexual interference and invitation to sexual touching. In particular, the failure to instruct the jury in clear terms that the 'force' required to establish sexual assault was one and the same as the 'touching' required to establish the other two offences constituted non-direction amounting to misdirection. The effect of this error on the apparently inconsistent verdicts is significant. A review of the charge to the jury as a whole enables me to conclude, with a high degree of certainty, that the error was material to the acquittal. Equally, I am satisfied that the error did not impact on the convictions; rather, it reconciles the apparent inconsistency in the verdicts. Accordingly, the verdicts are not actually inconsistent and the convictions are not unreasonable on the basis of inconsistency" (at paragraph 6).

The Legal Error:

The Supreme Court noted that sections 151, 152 and 271 of the *Criminal Code* "use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature… as a legal term of art, the element of force has been interpreted to include any form of touching…Put simply, although the words "touch" or "touching" and "force" are distinct, in some circumstances, including those that apply here, they mean the same thing in law" (at paragraphs 51 and 52).

The Supreme Court concluded, at paragraph 60, that the "trial judge needed to instruct the jury on how the three offences related to each other. She should have either clarified the relationship between the elements of touching and force, or simply used the word "touching" to describe all three offences. Alternatively, since the trial judge chose not to provide a copy of the charge, she could have indicated on the decision tree that force and touching were, in effect, interchangeable terms. Without any of these clarifications, I am satisfied that the trial judge's non-direction amounted to misdirection".

Appeals-Unreasonable Verdict-Expert Evidence:

In ***R v. Waterman***, 2021 SCC 5, January 22, 2021, the accused was convicted by a jury of the offence of sexual assault. At the trial, the complainant testified that after he had provided a statement to the police, he received counselling and recalled further details.

The accused appealed from conviction, arguing that the verdict was unreasonable. The conviction was overturned by a majority of the Newfoundland and Labrador Court of Appeal (2020 NLCA 18). Three separate judgments were filed.

Justice Welsh concluded that expert evidence was necessary (see paragraphs 23 to 25). Justice White concluded that "the evidence of the complainant was not credible, and could not have been accepted by a fact-finder, acting judicially" (see paragraphs 58 to 67).

Justice Butler would have dismissed the appeal. She noted that the issue of the necessity of expert evidence "was not argued on the appeal" (at paragraphs 75 and 76) and concluded as follows (at paragraph 95):

> The identified inconsistencies do not go to the core evidence which established the elements of the offences. The jury decided after considering the evidence as a whole, that it believed the complainant's core evidence. It was open to the jury to conclude that, as between the complainant on the one hand and the appellant and his wife on the other, they believed the complainant. It was open to the jury to decide that the complainant provided an adequate explanation for the inconsistencies and that his demeanor did not give cause to question his credibility. Each of these tasks are the domain of the trier of fact. It is up to them "to determine what effect the passage of time might have had and how vulnerable the witness was in light of his or her age and the factual content" (*R. v. R.P.*, at para. 17). In such a case the accused's guilt would be the only reasonable conclusion available on the totality of the evidence (*Villaroman*, at para. 55).

The Crown appealed as of right to the Supreme Court of Canada. In a brief oral judgment, the Supreme Court set aside the Court of Appeal's decision and reinstated the conviction:

> MOLDAVER J. — The only issue on this unreasonable verdict appeal is whether the inconsistencies in the complainant's testimony are so significant that a conviction registered on the basis of his evidence is unreasonable as a matter of law. Although some of the inconsistencies are troubling, a majority of the Court is satisfied that the jury acted reasonably in believing the complainant.
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> The complainant accepted that his testimony was inconsistent with his prior statements. These inconsistencies were the focus of vigorous cross-examination, forceful closing submissions and a comprehensive jury charge, which the parties agree was free of errors. For his part, the complainant explained that counselling had helped improve his memory since his initial police statement. In the majority's view, it was for the jury to decide whether this explanation neutralized any reasonable doubt caused by the inconsistencies. In these circumstances, the lens of judicial experience causes us to yield to the wisdom of the jurors who had the advantage of hearing the complainant testify. We decline to second guess this determination.

> With respect, the majority disagrees that the Crown had to either lead further evidence on the complainant's counselling sessions or adduce expert evidence on the role that counselling can play in refining memory.
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> For these reasons, the majority would allow the appeal, set aside the acquittals and restore the convictions.
>
> Justices Brown and Rowe, dissenting, would dismiss the appeal, substantially for the reasons of Justice White.

Parties to an Offence-Section 21 of the Criminal Code:

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

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

> Mr. Strathdee appeals as of right to this Court under s. 691(2)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, on the basis that the Alberta Court of Appeal overturned his acquittal for unlawful act manslaughter and entered a conviction. The trial judge, sitting as judge alone, had acquitted Mr. Strathdee after considering joint/co-principal liability and abetting under s. 21(1)(a) and 21(1)(c), respectively, of the *Criminal Code* (2019 ABQB 479). The charges against Mr. Strathdee stemmed from a group assault in which several victims sustained multiple injuries and one victim, Mr. Tong, sustained a *single* stab wound which caused his death.
>
> We agree with the Court of Appeal that there is no basis for the view that the stabbing of Mr. Tong was a distinct act outside the scope of the group attack.
>
> Having regard to the findings of fact in paras. 137 and 156-59 (CanLII) of the trial decision, and the statement of law set out by the Court of Appeal at paras. 61, 66 and 68 of its decision, this Court affirms the result of the Alberta Court of Appeal that Mr. Strathdee is guilty of unlawful act manslaughter.
>
> We also wish briefly to clarify a statement of law in *R. v. Cabrera*, 2019 ABCA 184, 95 Alta. L.R. (6th) 258, aff'd *R. v. Shlah*, 2019 SCC 56. Any implication from *Cabrera* that joint/co-principal liability is automatically

> eliminated if the evidence demonstrates application of force by only a single perpetrator is not accurate. Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission. In the context of manslaughter, triers of fact should focus on whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained. Properly read, the discussion of party liability in *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, is fully consistent with the foregoing.
>
> Accordingly, we would dismiss the appeal.

Parties to an Offence-Sections 21 and 22:

In ***R. v. Cowan***, 2021 SCC 45, November 5, 2021, 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?"

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).

Declarations of Invalidity and Charges Laid After a Time Period in which a Suspension of the Declaration had Expired for Events that Occurred During the Time Period that the Suspension was in Effect:

In ***R. v. Albashir***, 2021 SCC 48, November 19, 2021, 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.

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.

Trials-Jury Selection-Appeals-Curative Proviso-Section 686(1)(b)(iv), of the Criminal Code:

In ***R. v. Esseghaier***, 2021 SCC 9, March 5, 2021, the accused were charged with terrorism offences. They elected to be tried by a judge and jury. Challenge for cause was allowed. During the selection of the jury, a dispute arose as to how the challenge process should proceed.

The Supreme Court of Canada described what occurred in the following manner:

> At the time, the *Criminal Code* provided two procedures for trying challenges for cause — rotating triers and static triers. Mr. Jaser wanted rotating triers. He also wanted the trial judge to exercise his common law discretion to exclude prospective jurors from the courtroom during the challenge for cause process. If his request could not be satisfied, he wanted static triers.
>
> The trial judge refused Mr. Jaser's request, concluding that trial judges no longer had the authority to exclude unsworn jurors where the rotating triers process was being used. In any event, he would not have exercised the discretion even if he had it. To grant Mr. Jaser's request would be to expose the sworn jurors — members of the jury — to the potentially partial comments of prospective jurors and, thereby, risk undermining trial fairness. The trial judge thus imposed static triers in accordance with Mr. Jaser's alternate position. Mr. Esseghaier, who rejected the authority of the Criminal Code in its entirety, made no submissions as to the appropriate procedure for trying the challenges for cause.

The accused were convicted. They appealed. The Ontario Court of Appeal ordered a new trial, holding that the jury selection process was flawed and that the conviction could not be upheld through resort to the *Criminal Code's* procedural curative proviso in section 686(1)(b)(iv). The Crown appealed to the Supreme Court of Canada.

Section 686(1)(b)(iv) states as follows:

> On the hearing of an appeal against a conviction . . . the court of appeal
>
> (b) may dismiss the appeal where
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby.

The appeal was allowed and the convictions restored.

Jury Selection:

The Supreme Court indicated that it agreed "with the Court of Appeal that the jury for both Mr. Esseghaier and Mr. Jaser was improperly constituted. The trial judge erred in both his primary and alternative conclusions with respect to Mr. Jaser's application…With respect to the trial judge's primary finding, it was not disputed before us that the trial judge erred in concluding that the introduction of static triers in 2008 ousted the common law discretion to exclude prospective jurors while using rotating triers. The discretion existed" (at paragraphs 31 and 32).

Section 686(1)(b)(iv):

However, the Supreme Court also held that error could be cured by applying section 686(i)(b)(iv).

That Supreme Court held that the word "jurisdiction" in the section "is directed solely to the trial court's capacity to try the relevant class of offence, as defined by Parliament" (at paragraphs 47 and 48):

> For the purposes of the proviso, "jurisdiction" is concerned only with the trial court's capacity to deal with the "subject-matter of the charge", as it is only a lack of subject-matter jurisdiction ("ratione materiae") that [translation] "deprive[s] the court *ab initio* of all jurisdiction"…To this end, the jurisdictional question under s. 686(1) □(b)(iv) is directed solely to the trial court's capacity to try the relevant class of offence, as defined by Parliament. It is not concerned with the timing of the procedural error, nor with its consequences for the appellant's trial. Such inquiries into the nature and consequence of the error, including whether it was one of application of the rules of the *Criminal C*ode or an error arising from the application of judicially legislated rules, are best left to the prejudice analysis.
>
> In summary, the phrase "jurisdiction over the class of offence" is to be interpreted in accordance with the jurisdictional provisions established by Parliament in the *Criminal Code*. Jurisdiction can therefore be understood as follows:
>
> > (1) Where the appellant was convicted of an indictable offence listed in s. 469, the jurisdictional requirement will be met only where the trial court was the superior court.

> (2) Where the appellant was convicted of an indictable offence not listed in s. 469, the jurisdictional requirement will be met where the trial took place in either the provincial court or superior court.
>
> (3) Where the appellant was convicted of a summary conviction offence, the jurisdictional requirement will be met only where the trial court was the provincial court.
>
> Hybrid offences will fall into categories (2) or (3) once the Crown has made a valid decision as to how to proceed.

Prejudice:

The Supreme Court held that there was "clearly no prejudice to Mr. Esseghaier or Mr. Jaser for two reasons: (1) the static triers procedure used, though incorrect, was enacted by Parliament specifically for the purpose of ensuring a fair trial by an independent and impartial jury; and (2) both the trial judge and static triers performed their duties with the requisite care and attention to protect Mr. Esseghaier and Mr. Jaser's rights under the *Canadian Charter of Rights and Freedoms*. It follows that no substantial wrong or miscarriage of justice has occurred" (at paragraph 53).

OFFENCES

Attempting to Obstruct the Course of Justice:

In ***R. v. Morrow***, 2021 SCC 21, May 19, 2021, the accused was convicted of the offence of attempting to obstruct the course of justice. The accused had been charged with the offence of criminal harassment in relation to his former girlfriend. He was released on a recognizance that included a condition prohibiting him from having contact with her.

The evidence at the trial indicated that after being released, the accused went to the complainant's home and "told her how she could contact the Crown's office to get the charges against him dropped. He also grabbed the complainant and forcibly kissed her. The complainant testified that she felt pressured and scared and did not want to kiss the appellant, but went along with it to get him out of the house" (see 2020 ABCA 407, at paragraph 1).

The accused's appeal to the Alberta Court of Appeal was dismissed. In dismissing the appeal, the majority concluded as follows (at paragraphs 16 and 17):

> The gravamen of this offence is the doing of any act for the purpose of, or which has a tendency to, obstruct justice. Dissuading someone from testifying or from pursuing criminal charges can be such an act. The context of the act, the circumstances under which it occurred, and the relationship between the parties, both past and present, all inform a trial judge's assessment of whether obstruction has been made out. Deference is owed to a trial judge, who had the benefit of hearing the testimony, assessing the credibility of that testimony, and understanding how the alleged obstruction occurred, in his assessment of the intention behind the impugned conduct. See *R v Esau*, 2009 SKCA 31 at para 50.
>
> The appellant submits that there was no criminal intent in providing the complainant here with information as to how she could withdraw the charges. However, it was for the trial judge to determine whether the attempt to persuade the complainant to drop the charges and the provision of information as to how she could go about doing that amounted to improper pressure and therefor represented an attempt to pervert justice. The context clearly supports the inference made by the trial judge. The appellant knew that he had just recently been charged with harassing the complainant and that he had signed a recognizance promising not to contact her. Despite this, he went to her home to pressure her to drop the charges. He was persistent and refused to leave the home for over two hours. He sexually assaulted her. The complainant testified she was afraid. The trial judge inferred that the appellant knew his attendance at the complainant's home would have a significant impact on her and concluded that his actions were undertaken with intent to dissuade the complainant from proceeding with the prosecution. The inference that the appellant applied pressure on the complainant for an improper purpose was available on the record. No palpable and overriding error has been demonstrated.

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

> A majority of the Court is of the view that the appeal should be dismissed, substantially for the reasons of the majority of the Court of Appeal at paras. 16 and 17 of its judgment. As the majority observed, the record clearly supports the inference drawn by the trial judge that Mr. Morrow's conduct represented

> an attempt to dissuade the complainant, by corrupt means, from giving evidence. Mr. Morrow knew he had recently been charged with criminal harassment and that he was bound not to contact the complainant. Despite this, he attended her home uninvited and engaged her in a prolonged and distressing discussion about the process for withdrawing the charges and her reasons for bringing them. The complainant testified that the exchange made her feel "[p]ressured to please" Mr. Morrow and to get him out of the house (A.R., vol. II, at p. 30). Shortly thereafter, Mr. Morrow sexually assaulted her, which served to exacerbate her concerns. On the basis of this evidence, it was open for the trial judge to find that Mr. Morrow's intention was to apply pressure on the complainant and ultimately to manipulate her into dropping the charges against him. The fact that Mr. Morrow may have also been motivated by a desire to rekindle his relationship with the complainant did not undermine the availability of this finding.
>
> There was also evidence that contradicted Mr. Morrow's position that he was simply responding to a request for information. The complainant made no such request to Mr. Morrow and she did not expect, nor was she interested in, the information he provided.
>
> In these circumstances, and having regard to the fact that survivors of domestic abuse are particularly vulnerable to acts of intimidation and manipulation, the trial judge's verdict was reasonable. There is no basis for appellate intervention.

Sexual Assault-Capacity to Consent:

In ***R. v. G.F.***, 2021 SCC 20, May 14, 2021, the accused were convicted of the offence of sexual assault. The primary issue at trial was whether the complainant lacked the capacity to consent to the sexual activity that occurred because of intoxication. In convicting the accused, the trial judge concluded that the complainant "did not consent to the sexual activity".

On appeal, the Ontario Court of Appeal ordered a new trial. It concluded that the trial judge erred in failing "to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent" and in failing "to consider the issue of consent first and separately from the issue of capacity" (at paragraph 17).

The Crown appealed to the Supreme Court of Canada.

The Issues:

The Supreme Court stated that the appeal raised, among others, the following issues:

1. Did the trial judge err in his assessment of consent and capacity?
2. Were the trial judge's reasons sufficient?

The Supreme Court allowed the appeal and reinstated the convictions.

Consent and Capacity:

The Supreme Court indicated that "where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent…Thus, when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity" (at paragraph 24).

The Supreme Court also indicated that "capacity must be understood as a precondition to subjective consent as a matter of logic. Subjective consent requires the complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question…If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established" (at paragraphs 43 and 47).

The Supreme Court held that "for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things" (at paragraph 57):

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant's partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

Appellate Review of Trial Reasons:

Interestingly, the Supreme Court took the opportunity provided by this appeal to be very critical of Courts of Appeal for reversing trial judgments based upon assessments of the evidence. The Court indicated that "[d]espite this Court's clear

guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged…In three recent appeals as of right, this Court reinstated sexual assault convictions that were set aside on appeal, endorsing the reasons of a dissenting justice" (at paragraphs 76 and 77).

SENTENCING

Starting Points, Sentencing Ranges, and Sentencing for Fentanyl Trafficking:

In ***R. v. Parranto***, 2021 SCC 46, November 12, 2021, 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.

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).

THE YOUTH CRIMINAL JUSTICE ACT

Bail-Jurisdiction:

In ***R. v. T.J.M.***, 2021 SCC 6, January 29. 2021, the accused, a young offender, was charged with second degree murder, a section 469 *Criminal Code* offence. The Crown provided notice of its intention to seek an adult sentence. The accused elected to be tried in the Superior Court and sought judicial interim release. An issue arose as to what court had jurisdiction to consider the issue of judicial interim release, i.e., the Superior Court or the Provincial Court.

The Supreme Court of Canada held that "a superior court justice has jurisdiction to hear and decide an application for judicial interim release brought by a young person

charged with an offence listed in s. 469 of the *Criminal Code*. Further, that jurisdiction is held concurrently with the judges of the designated youth justice court for the province" (at paragraph 3). The Supreme Court explained that "a superior court justice…has jurisdiction to hear and adjudicate an application for judicial interim release of a young person charged with an offence listed in s. 469 of the *Criminal Code* and who has elected to be tried in the superior court, so does a judge of a court that has been designated by the province as a youth justice court. In other words, the jurisdiction is concurrent, and not exclusive to either of them" (at paragraph 25).

DEFENCES

Defence of the Person:

In ***R. v. Khill***, 2021 SCC 37, October 14, 2021, the accused was charged with second-degree murder. He twice shot a person he saw looking through his truck. At his trial, he argued the shooting was justified as defence of the person. He was acquitted.

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

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

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

Defence of the Person:

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

The Three Inquiries Under Section 34:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Summary:

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

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

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

Application to this Case:

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

CONCLUSION

As we have seen, during 2021, the Supreme Court of Canada considered a multitude of criminal issues. Of particular significance, the Court has clarified the issue of how a complainant's intoxication impacts the capacity to consent.