A REVIEW OF DECISIONS RENDERED BY THE SUPREME COURT OF CANADA BETWEEN JANUARY 1, 2022 AND DECEMBER 31, 2022, 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, 2022, to December 31, 2022, that involved criminal causes or matters. The key to using 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. We will start with the Court's consideration of the *Canadian Charter of Rights and Freedoms*.

THE CHARTER

Sections 7 and 15(1)-Conditional Sentences-Sections 742.1(c) and 742.1(e)(ii) of the Criminal Code:

In ***R. v. Sharma***, 2022 SCC 39, November 4, 2022, the accused pleaded guilty to importing a controlled substance contrary to section 6(1) of the *Controlled Drugs and Substances Act*. A conditional sentence was statutorily barred by sections 742.1(c) [offences with a maximum term of imprisonment of 14 years or life] and 742.1(e) [offences, prosecuted by indictment, having a maximum term of imprisonment of 10 years and involving the import, export, trafficking, or production of drugs].

The sentencing judge imposed a period of incarceration as required. However, the Ontario Court of Appeal held that the two provisions were overbroad and discriminatory, thereby violating sections 7 and 15(1) of the *Charter*. The Court of Appeal imposed a sentence of "time served". The Crown appealed.

The appeal was allowed and the period of incarceration imposed by the sentencing judge was restored. The Supreme Court concluded as follows (at paragraphs 3 and 4):

> …The impugned provisions do not limit Ms. Sharma's s. 15(1) rights. While the crisis of Indigenous incarceration is undeniable, Ms. Sharma did not demonstrate that the impugned provisions created or contributed to a disproportionate impact on Indigenous offenders, relative to non-Indigenous offenders, as she must show at the first step of the s. 15(1) analysis.
>
> Nor do the impugned provisions limit Ms. Sharma's s. 7 rights. Their purpose is to enhance consistency in the conditional sentencing regime by making imprisonment the typical punishment for certain serious offences and categories of offences. And that is what they do. Maximum sentences are a

> reasonable proxy for the seriousness of an offence and, accordingly, the provisions do not deprive individuals of their liberty in circumstances that bear no connection to their objective.

Sections 1 and 7 of the Charter-the Sex Offender Information Registration Act-Sections 490.012 and 490.013(2.1) of the Criminal Code:

In ***R. v. Ndhlovu***, 2022 SCC 38, October 28, 2022, the accused was convicted of two counts of sexual assault against two complainants. The sentencing judge imposed a period of imprisonment and issued the mandatory lifetime national sex offender registry registration order, pursuant to section 490.012(1) and 490.013(2.1) of the *Criminal Code*. Section 490.012 requires that a registration order be issued for designated sexual offences and section 490.013(2.1) requires that a lifetime registration order be issued for offenders convicted of more than one designated offence.

The Supreme Court of Canada held that sections 490.012 and 490.013(2.1) of the *Criminal Code* infringe s. 7 of the *Charter*, and cannot be saved by s. 1. They declared both provisions to be of no force or effect. However, they suspended the declaration in respect of section 490.012 for one year. As regards section 490.013(2.1), the Supreme Court made the declaration immediately retroactive.

In making this distinction between the declarations of invalidity, the Supreme Court concluded as follows (at paragraphs 140 and 142):

Section 490.12:

> A declaration of invalidity is presumed to operate retroactively (*R. v. Albashir*, 2021 SCC 48, at paras. 34 and 38). However, in this case, a retroactive application of the declaration at the conclusion of the suspension could frustrate the compelling public interests that require a period of transition, creating uncertainty and removing the protection that justifies the suspension in the first place (paras. 46, 52 and 72). Specifically, a retroactive declaration would undermine the purpose of the suspension (i.e., ensuring high-risk offenders are registered on *SOIRA* for public safety). Moreover, a prospective declaration of invalidity would not unduly prejudice offenders who have been registered since 2011 but whose rights under s. 7 are still violated. Those offenders will be able to ask for a personal remedy pursuant to s. 24(1) of the *Charter* in order to be removed from the registry if they can demonstrate that *SOIRA's* impacts on their liberty bears no relation or is grossly disproportionate to the objective of s. 490.012.

Section 490.13(2.1):

> With respect to lifetime registration, the Crown conceded a suspension would not be appropriate. We agree: an immediate declaration is appropriate given those offenders will remain registered and there is no "gap" for Parliament to fill. As a result, the existing provisions that dictate a length of registration will operate, pending any new constitutional provision that would target offenders who commit more than one offence. For instance, those convicted of offences with a maximum term of imprisonment of 2 to 5 years will receive a 10-year registration order, while those convicted of an offence with a maximum term of imprisonment of 10 to 14 years would receive a 20-year registration order (s. 490.013(2)). Here, there is no compelling reason to rebut the presumption of retroactive application of the declaration of invalidity. Section 490.013(2.1) is therefore declared invalid. Because the declaration affects all those impacted by the enactment of the provision since 2011, offenders who are subject to a lifetime order pursuant to this provision after having been convicted of more than one sexual offence without an intervening conviction can seek a s. 24(1) remedy to change the length of their registration.

Charter-Sections 8 and 24(2)-Strip Searches:

In ***R. v. Ali***, 2022 SCC 1, January 19, 2022, the accused was convicted of the offence of possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*.

The evidence presented against him at his trial, included drugs found as a result of a strip search. The Alberta Court of Appeal noted (2020 ABCA 344) that "when [the accused] was strip searched three white baggies containing cocaine were found in his 'butt crack area'" (at paragraph 3).

The Court of Appeal indicated that on the *voir dire* to determine if the drugs found as a result of the search was admissible, Constable Darroch [the lead investigator] testified that he had been told by another officer (Constable Odorski) that he had seen the accused "reaching towards his nether region". Though Constable Odorski testified on the *voir dire*, he "was never asked any questions about these observations, either in chief or during his cross-examination. It was Constable Darroch who testified that he had obtained this information from Constable Odorski, and that he had relied on that information in deciding to recommend a strip search" (at paragraphs 9 and 10). Constable Darroch passed on the information he received

from Constable Odorski to the Staff-Sergeant who made the decision to proceed with the strip search.

The accused appealed from conviction. The Alberta Court of Appeal (with Veldhuis J.A. dissenting), dismissed the accused's appeal from conviction. It concluded that the trial judge did not err in holding that the strip search was reasonable. The Court of Appeal indicated that the trial judge "was not required to find, as a matter of fact, that the appellant 'reached towards his nether region'. If such a finding had been necessary to sustain a conviction, it could only have been made based on admissible evidence. The trial judge, however, was only required to decide if, at the time the decision was made to conduct a strip search, the police team had 'reasonable and probable grounds' to conduct that search. That depended on the information known to, believed, and reasonably relied on by the police team, specifically the Staff Sergeant. The fact that some of it may have been inadmissible as evidence at a trial was irrelevant" (at paragraph 15).

The accused appealed as of right to the Supreme Court of Canada.

The appeal, with a dissent, was dismissed.

The Supreme Court held that the police had reasonable grounds to conduct the strip search and that Constable Darroch "could reasonably rely on the information from Cst. Odorski as a factor in deciding whether he had reasonable and probable grounds to request the strip search".

In a dissenting judgment, Côté J., concluded that the "Crown failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*". However, Justice Côté concluded that the evidence obtained as a result of the strip search was admissible and that the conviction should be affirmed.

The Supreme Court's decision was rendered orally in the following manner:

> MOLDAVER J. (Brown, Rowe and Jamal JJ. concurring) — Mr. Ali appeals as of right to this Court. A majority of the Alberta Court of Appeal affirmed his conviction for possession of cocaine for the purpose of trafficking. They found that the trial judge did not err in determining that the police's strip search of Mr. Ali, incident to his lawful arrest, complied with s. 8 of the *Canadian Charter of Rights and Freedoms* in accordance with the principles governing strip searches set out by this Court in *R. v. Golden,* 2001 SCC 83, [2001] 3 S.C.R. 679.

A majority of this Court agrees with the conclusion of the majority of the Court of Appeal and would dismiss the appeal. Where a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest (see *Golden*, at para. 99). These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest (see *Golden*, at paras. 94 and 111).

Like the majority of the Court of Appeal, we are satisfied that there were reasonable and probable grounds justifying the strip search: the police had confidential source information that their target was in possession of a large quantity of cocaine and that he kept most of his drugs on his person; Mr. Ali was found next to a table with drugs, other than cocaine, and with items consistent with drug trafficking, including a scale, money, and a ringing cell phone; Mr. Ali's pants were partially down as he was being arrested; and one of the officers reported seeing Mr. Ali reaching towards the back of his pants. Viewed in its totality, this was clearly some evidence suggesting the possibility that Mr. Ali had concealed drugs, particularly cocaine, in and around the area of his buttocks.

We would not give effect to Mr. Ali's argument that a hearsay error arose because the officer who requested the strip search, Cst. Darroch, testified that he was told by another officer, Cst. Odorski, that Mr. Ali was reaching towards the back of his pants, and Cst. Odorski did not refer to this in his testimony at trial. Mr. Ali now concedes that Cst. Darroch's testimony was not inadmissible hearsay because it was not entered for the truth of its contents; the question, he maintains, was whether Cst. Darroch could reasonably rely on the information from Cst. Odorski as a factor in deciding whether he had reasonable and probable grounds to request the strip search. Defence counsel chose not to cross examine either officer about this information. It stood uncontradicted. This tactical choice undermines Mr. Ali's submission that it was unreasonable for Cst. Darroch to rely on Cst. Odorski's information.

For these reasons, we would dismiss the appeal.

CÔTÉ J. — I agree with the majority's disposition of the appeal, but for different reasons.

In my view, the respondent Crown failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*. As such, I find that Mr. Ali's s. 8 *Charter* rights were violated, substantially for the reasons of Veldhuis J.A., at paras. 27-61.

However, I part ways with Veldhuis J.A. with respect to the proper remedy. Relying on *Golden*, at paras. 118-19, Mr. Ali argues that this Court should substitute an acquittal because conducting an analysis under s. 24(2) of the *Charter* would be a mere theoretical exercise.

I disagree. As in Golden, I acknowledge that Mr. Ali has already served his custodial sentence. Nevertheless, he remains subject to restrictions to his liberty, including a firearms prohibition and a DNA order. As such, determining whether the evidence ought to be admitted will have tangible consequences, both for Mr. Ali and for the public.

Moreover, the facts of this case are plainly distinguishable from *Golden*. The strip search in *Golden* was coercive and forceful, conducted in a public area without authorization from a senior officer, and may have jeopardized the accused's health and safety. The search of Mr. Ali has none of these characteristics. It is undisputed that it was conducted in a reasonable manner. In my view, it is worthwhile to assess whether admitting evidence obtained as a result of the *Charter* breach would do further damage to the repute of the justice system.

I further acknowledge that, as the courts below found no breach of s. 8 in this case, they did not consider whether the evidence should be excluded under s. 24(2). However, I accept the Crown's submission that the record before this Court is sufficient to determine whether the admission of the evidence would bring the administration of justice into disrepute. Therefore, I see no utility in sending the matter back for redetermination. In these circumstances, it is open to this Court to conduct its own first-instance s. 24(2) analysis (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 75).

Applying the three lines of inquiry from *R. v. Grant*, [1993] 3 S.C.R. 223, I would not exclude the evidence.

First, the seriousness of the police conduct in this case was at the lowest end of the spectrum. Cst. Darroch believed in good faith that he had the requisite grounds to strip search Mr. Ali. He relayed his grounds to his superior officer,

> who authorized the search at the police station. I see no basis to suggest that the police wilfully disregarded Mr. Ali's *Charter* rights. This factor favours admission.
>
> Second, the impact of the strip search on Mr. Ali's privacy interests, while serious, was somewhat attenuated by the reasonable manner in which it was conducted. At trial, counsel for Mr. Ali noted the search was "as humane as possible given the circumstances" (trial transcript, A.R., at p. 173). In my view, this factor tips only moderately in favour of exclusion.
>
> The final *Grant* inquiry strongly favours admission. Mr. Ali was in possession of 65 grams of crack cocaine. The Crown would have no case without this evidence. There is a strong societal interest in adjudicating this case on its merits.
>
> On balance, I conclude that excluding the evidence would bring the administration of justice into disrepute. To be clear, I would emphatically re-affirm the principles arising from *Golden* and the high threshold the Crown must meet to justify a warrantless strip search. However, while the Crown failed to meet that threshold in this case, the conduct of the police did not undermine the integrity of the justice system. Therefore, I would not exclude the evidence.
>
> For the foregoing reasons, I would dismiss the appeal and affirm the conviction.

Charter-Section 8-Search Incidental to Arrest-Residences:

In ***R. v. Stairs***, 2022 SCC 11, April 8, 2022, the police received a 9-1-1 complaint concerning an alleged intimate partner assault in a residence. They went to the residence and entered after knocking and receiving no answer. The accused was arrested inside the residence and they noted injuries to the complainant. While inside the residence, the police conducted a limited visual search. They saw a clear container and a plastic bag in plain view containing methamphetamine, seized it and charged the accused with a drug possession offence.

At trial, the drugs were ruled to be admissible and the accused was convicted. An appeal to the Ontario Court of Appeal was dismissed. A majority holding that the police conducted a lawful search incidental to the arrest. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed.

The Supreme Court of Canada indicated that the "baseline common law standard for search incident to arrest requires that the individual searched has been lawfully arrested, that the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest, and that the search is conducted reasonably the common law standard for a search of a home incident to arrest must be modified, depending on whether the area searched is within or outside the physical control of the arrested person…Where the area searched is within the arrested person's physical control, the common law standard continues to apply. However, where the area is outside their physical control, but it is still sufficiently proximate to the arrest, a search of a home incident to arrest for safety purposes will be valid only if" (at paragraphs 6 and 8):

- the police have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and
- the search is conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

Defining the Surrounding Area of the Arrest:

The Supreme Court pointed out that "whether an area is sufficiently proximate to the arrest is a contextual and case-specific inquiry. The key question is whether there is a 'link between the location and purpose of the search and the grounds for the arrest'" (at paragraphs 60). In the context of a search inside a residence, "the police must meet a higher standard: they must have reason to suspect that the search will address a valid safety purpose" (at paragraph 61).

The Nature of Reasonable Suspicion:

The Supreme Court held that "[w]hen the police search incident to arrest in a home for safety purposes, they must have reason to suspect that a search of areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused. This modified standard, which is stricter than the basic common law standard, respects the privacy interests in the home while allowing the police to effectively fulfil their law-enforcement responsibilities" (at paragraph 65).

The Court indicated that "[r]easonable suspicion is a higher standard than the common law standard for search incident to arrest...to establish reasonable suspicion, the police require a constellation of objectively discernible facts assessed against the totality of the circumstances giving rise to the suspicion of the risk. This assessment must be 'fact-based, flexible, and grounded in common sense and

practical, everyday experience'…In addition, the police must have reason to suspect that the search will address the risk" (at paragraphs 67 and 68).

Finally, the Court held that "[w]hether the circumstances of a particular case give rise to reasonable suspicion must be assessed based on the totality of the circumstances…Relevant considerations include (a) the need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that the contemplated risk actually exists" (at paragraph 69).

Nature and Extent of the Search:

The Supreme Court held that the "search incident to arrest power only permits police to search the surrounding area of the arrest… As a general rule, the police cannot use the search incident to arrest power to justify searching every nook and cranny of the house. A search incident to arrest remains an exception to the general rule that a warrant is required to justify intrusion into the home. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion" (at paragraphs 79 and 80).

A Summary:

The Court summarized the principles that apply when the police seek to conduct a search incidental to an arrest inside a residence, in the following manner (at paragraph 82):

> In summary, a search of a home incident to arrest for safety purposes will comply with s. 8 of the *Charter* when the following requirements are met:
>
> (1) The arrest was lawful.
>
> (2) The search was incident to the arrest. The search will be incident to arrest when the following considerations are met:
>
> (a) Where the area searched is within the arrested person's physical control at the time of the arrest, the common law standard must be satisfied.
>
> (b) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the police must have reason to suspect that the search will further the objective of police and public safety, including the safety of the accused.

> (3) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the nature and the extent of the search must be tailored to the purpose of the search and the heightened privacy interests in a home.

Conclusion:

The Supreme Court concluded that the police "had reason to suspect that there was a safety risk in the basement living room and that their concerns would be addressed by a quick scan of the room, which was the least intrusive manner of search possible in the circumstances. It follows that Mr. Stairs' s. 8 *Charter* rights were not breached, and the drug evidence was properly admitted" (at paragraph 10).

Charter-Sections 8, 9 & 24(2), Search Incidental to Arrest, Investigative Detentions, Power of Arrest and Strip Searches:

In ***R. v. Tim***, 2022 SCC 12, April 14, 2022, the accused, during a motor vehicle accident investigation, was seen by a police officer trying to hide a small ziplock bag containing a single yellow pill. The officer recognized the pill as gabapentin, which he mistakenly believed was a controlled substance under the *Controlled Drugs and Substances Act*. The accused was arrested.

After the accused was arrested, the police conducted four searches. They conducted a pat-down search of the accused and a search of his car incident to arrest, through which they found fentanyl, other illegal drugs, and ammunition. A second pat-down search was conducted after the police saw bullets fall out of the accused' pants, during which a loaded handgun also fell from the accused's pants. Finally, the accused was strip searched at the police station but nothing was found.

At trial, the accused applied to exclude the evidence obtained during the searches. He argued that the arrest and the search violated sections 8 and 9 of the *Charter*. The trial judge dismissed the application, holding that the warrantless arrest did not violate section 9 of the *Charter*, as the officer had reasonable and probable grounds to believe that an offence had been committed. He admitted the evidence and convicted the accused of several drug and firearm offences. A majority of the Alberta Court of Appeal found no breach of section 8 or section 9 of the *Charter* and dismissed the accused's appeal. An appeal was taken to the Supreme Court of Canada.

The appeal was dismissed, though the Supreme Court found that violations of sections 8 and 9 of the *Charter* had occurred.

The Supreme Court held the "police breached s. 9 of the *Charter* by arresting the appellant based on a mistake of law about the legal status of gabapentin. They then breached s. 8 of the *Charter* by searching his person and car incident to the unlawful arrest. However, the subsequent pat-down search of the appellant was a lawful search incident to a parallel investigative detention for the traffic collision investigation. In addition, the strip search at the police station was a lawful search incident to arrest for possession of a prohibited firearm. Although all the impugned evidence was 'obtained in a manner' that breached the *Charter*, I would not exclude it under s. 24(2). The *Charter* breaches were at the less serious end of the scale of culpability and only moderately impacted the appellant's *Charter*-protected interests. On the other side of the ledger, the evidence was reliable and essential to the prosecution of serious offences. In my view, weighing these considerations, the admission of the evidence would not bring the administration of justice into disrepute" (at paragraph 4).

Did the Police Infringe Section 9 of the Charter by Arresting the Appellant Based on a Mistake of Law?

The Supreme Court held that "an arrest based on a mistake of law is unlawful and infringes s. 9 of the *Charter*…Canadian law has long held that an arrest based on a mistake of law is unlawful, even if the mistake is made in good faith. The concept of 'reasonable and probable grounds' for arrest relates to the facts, not the existence of an offence in law. A police officer makes a mistake of law when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not" (at paragraphs 20 and 36).

The Supreme Court concluded that the "arresting officer's subjective belief that he had reasonable and probable grounds to arrest the appellant was based on a mistake of law, and thus was not — and could not be — objectively reasonable. The arrest was consequently unlawful and arbitrary, contrary to s. 9 of the *Charter*" (at paragraph 39).

Did Any of the Four Searches Infringe Section 8 of the Charter?

The Supreme Court held that "the first two searches breached s. 8 of the *Charter*, but the third and fourth searches did not" (at paragraph 44).

The Supreme Court held that "the initial pat-down search of the appellant's person and the search of his car incident to arrest falter" because "the appellant was not lawfully arrested. Thus, the first two searches necessarily breached s. 8 of the *Charter*" (at paragraph 50).

The Supreme Court concluded that the "third search was a lawful search incident to investigative detention relating to the traffic collision investigation…[The accused] was lawfully detained as part of a traffic collision investigation, even if he could not be lawfully detained as part of a drug investigation… When there are concealed bullets, there may be a concealed gun. The further pat-down search of the appellant's person, in which the officer dislodged a loaded handgun by merely touching the outside of the appellant's pants, was also conducted reasonably. This search did not breach s. 8 of the *Charter*" (at paragraphs 52, 59, and 64).

In relation to the strip search, the Supreme Court held that it "was incident to [the] weapons arrest, because it was for the purpose of discovering concealed weapons or evidence related to the offence for which the appellant was lawfully arrested…Strip searches unquestionably 'represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them'… However, the strip search here was minimally intrusive, as it was conducted reasonably, in a manner consistent with this Court's guidelines for strip searches…It was performed at the police station, it was limited to the appellant's underwear waistband, and the appellant wore his underwear throughout the search… I therefore conclude that the strip search did not infringe s. 8 of the *Charter*" (at paragraphs 68 and 69).

Section 24(2) of the Charter:

The Supreme Court concluded that "admission of the evidence would not bring the administration of justice into disrepute" (at paragraph 99):

> I have concluded that the first line of inquiry under *Grant* pulls weakly toward exclusion and the second does so moderately, but the third pulls strongly toward admission. In my view, on these facts, the final balancing does not call for exclusion of the evidence to protect the long-term repute of the justice system. A relatively inexperienced police officer made an honest mistake about the legal status of gabapentin, a prescription drug that is traded on the street and that the appellant tried to hide during a lawful traffic collision investigation. That led to an arrest and searches incident to arrest, and to the discovery of a loaded gun, ammunition, and fentanyl — a drug that has been described as "public enemy number one" (*R. v. Parranto*, 2021 SCC 46, at para. 93, per Moldaver J.). Excluding this evidence would simply punish the police — which is not the purpose of s. 24(2) — and would damage, rather than vindicate, the long-term repute of the criminal justice system.

Charter-Sections 9, 10(a), 10(b) and 24(2):
Evidence-Confessions-Cautions:
Powers of Arrest:

In ***R. v. Beaver***, 2022 SCC 54, December 9, 2022, the accused (Beaver and Lambert) were convicted of the offence of manslaughter. After they made a 9-1-1 call, they were arrested and subsequently confessed to having killed the deceased. The Crown conceded that breaches of sections 9, 10(a) and 10(b) occurred.

The Background:

When the police arrived at the residence from which the 9-1-1 call was received, they detained the accused under what they described as the *Medical Examiners Act*, legislation that did not exist. The Supreme Court noted that the police "had meant to refer to Alberta's *Fatality Inquiries Act*, R.S.A. 2000, c. F-9, but this *Act* provides no detention powers" (at paragraph 10). Both accused were "cautioned" and advised of their right to contact counsel. Lambert indicted that he wanted to speak to a lawyer and did so at the police station. Beaver declined the opportunity to do so.

At the police station, detectives began to speak to Lambert. Before the interview was completed, they learned that neither Lambert nor Beaver had been "arrested". They arrested both for murder. The police spoke to Lambert again. They cautioned him, advised him that he had been arrested for murder and facilitated further contact with counsel. After Lambert spoke to counsel, he was interviewed for twelve hours. He confessed to killing the deceased (Mr. Bowers).

When the police spoke to Beaver at the police station, they repeated an earlier vague and unsatisfactory caution and advised him of his right to contact counsel. Beaver declined again to do so. Approximately thirteen hours later, he admitted to having killed Mr. Bowers during a fight.

The Supreme Court indicated that it was "not disputed that the police officers who attended the scene in response to the 9-1-1 call breached the appellants' *Charter* rights by detaining them and taking them to the police station without lawful authority. It is also not disputed that when homicide detectives realized that their colleagues had unlawfully detained the appellants, they promptly tried to make a 'fresh start' by advising them of their *Charter* rights and then arresting them for murder. When questioned separately, the appellants initially denied any knowledge of how Bowers had died. Eventually, however, they both confessed to killing Bowers during a fight, mopping up his blood, and dragging his body to the bottom of the stairs to make his death look like an accident. At issue at trial was the admissibility of these confessions" (at paragraph 3).

At the trial, the trial judge ruled that the confessions were admissible. Both were subsequently convicted of the offence of manslaughter. On appeal, the Alberta Court of Appeal dismissed the accuseds' appeals from conviction. Both accused were granted leave to appeal to the Supreme Court of Canada. The Supreme Court indicated that "[o]nly Beaver appeals the voluntariness of his confession. Both Beaver and Lambert claim that their confessions should be excluded under s. 24(2) of the *Charter*" (at paragraph 5).

The Appeal:

The Supreme Court of Canada indicated that the appeals raised three issues (at paragraph 1):

> (1) the voluntariness of one of the appellants' confessions under the common law confessions rule; (2) whether the police had reasonable and probable grounds to arrest the appellants for murder; and (3) whether the appellants' confessions were "obtained in a manner" that breached the *Canadian Charter of Rights and Freedoms* because the police failed to make a "fresh start" from earlier *Charter* breaches, and if their confessions were so obtained, whether they must be excluded under s. 24(2).

The Supreme Court's Decision:

The appeals were dismissed. A majority (5:4) of the Supreme Court agreed "with the lower courts that Beaver's confession was voluntary and thus admissible under the common law confessions rule". It also agreed "that the police had reasonable and probable grounds to arrest the appellants for murder". Finally, it concluded that "the homicide detectives made a 'fresh start' from the *Charter* breaches arising from the appellants' unlawful detention for Lambert but not for Beaver. Thus, only Beaver's confession was obtained in a manner that breached the *Charter*. Balancing the lines of inquiry under s. 24(2) of the *Charter*". The majority concluded "that admitting Beaver's confession into evidence would not bring the administration of justice into disrepute" (at paragraph 6).

Was Beaver's confession voluntary?

The Supreme Court indicated that the "common law confessions rule provides that a confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that the confession was voluntary…The application of the confessions rule is necessarily flexible and contextual. When assessing the voluntariness of a confession, the 'trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive

the accused of their free choice to speak to a person in authority'…The trial judge must consider all relevant factors, including the presence of threats or promises, the existence of oppressive conditions, whether the accused had an operating mind, any police trickery that would 'shock the community', and the presence or absence of a police caution. These factors are not a checklist that supplants a contextual inquiry" (at paragraphs 45 and 48).

This Case:

In this case, the Supreme Court concluded that the trial judge "properly applied the relevant legal principles in deciding that Det. Hossack's interview of Beaver raised no concern as to the voluntariness of his confession. Because Beaver has not established that any palpable and overriding error infected the trial judge's findings of fact, I must defer to his conclusion that Beaver's confession was voluntary" (at paragraph 68).

Did the police have reasonable and probable grounds to arrest the accused for murder?

The Supreme Court pointed out that the "police have statutory authority to arrest a person without a warrant under s. 495 of the *Criminal Code*, R.S.C. 1985, c. C-46. The applicable part of s. 495 in this appeal, s. 495(1)(a), allows a peace officer to arrest a person without a warrant if, on reasonable grounds, they believe the person has committed or is about to commit an indictable offence" (at paragraph 71).

The Supreme Court indicated that the "essential legal principles governing a warrantless arrest are settled" (at paragraph 72):

> 1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51; *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 26; *R. v. Tim*, 2022 SCC 12, at para. 24).
>
> 2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 17). Subjective grounds for arrest are often established through the police officer's testimony (see, for example, *Storrey*, at p. 251; *Latimer*, at para. 27; *Tim*, at para. 38). This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal (*R. v. G.F.*, 2021 SCC 20, at para. 81; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4).

3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (*Storrey*, at pp. 250-51; *Latimer*, at para. 26; *Tim*, at para. 24).

4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism" (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 64-65). Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45 and 47; *MacKenzie*, at para. 63). The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition" (*Chehil*, at para. 47).

5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete" (*R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.). Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'" (*R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22, per Fairburn J.A. (as she then was), citing *MacKenzie*, at para. 73).

6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a *reasonable possibility* of crime, while reasonable and probable grounds requires a *reasonable probability* of crime (*Chehil*, at para. 27; *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1166). At the same time, police do not require a *prima facie* case for conviction before making an arrest (*Storrey*, at p. 251; *Shepherd*, at para. 23; *Tim*, at para. 24). Nor do the police need to establish that the offence was committed on a balance of probabilities (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; see also *R. v. Henareh*, 2017 BCCA 7, at para. 39 (CanLII); *R. v. Loewen*, 2010 ABCA 255, 490 A.R. 72, at para. 18). Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the

offence" (*MacKenzie*, at para. 74 (emphasis deleted); *Debot*, at p. 1166). A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information" (*Mugesera*, at para. 114; see also *R. v. Al Askari*, 2021 ABCA 204, 28 Alta. L.R. (7th) 129, at para. 25; *R. v. Omeasoo*, 2019 MBCA 43, [2019] 6 W.W.R. 280, at para. 30; *R. v. Summers*, 2019 NLCA 11, 4 C.A.N.L.R. 156, at para. 21). The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest (*Chehil*, at para. 34; *Shepherd*, at para. 23; *R. v. Ha*, 2018 ABCA 233, 71 Alta. L.R. (6th) 46, at para. 34; *R. v. MacCannell*, 2014 BCCA 254, 359 B.C.A.C. 1, at paras. 44-45; *R. v. Rezansoff*, 2014 SKCA 80, 442 Sask. R. 1, at para. 28; E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (3rd ed. (loose-leaf)), at § 5:40).

7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest (*R. v. Biron*, [1976] 2 S.C.R. 56, at p. 72; *R. v. Brayton*, 2021 ABCA 316, 33 Alta. L.R. (7th) 241, at para. 43; *Ha*, at paras. 20-23; *R. v. Montgomery*, 2009 BCCA 41, 265 B.C.A.C. 284, at para. 27; Ewaschuk, at § 5:40).

8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds (*Debot*, at pp. 1166-67).

This Case:

In this case, the Supreme Court held that the "trial judge's factual findings confirm that Det. Vermette's belief that the appellants were connected to Bowers' death was objectively reasonable when he directed their arrest. Far from having a mere suspicion, Det. Vermette had compelling and credible information that the appellants had motive to kill Bowers, that they had the opportunity to act on this motive, and that Bowers' death was suspicious" (at paragraph 81).

The Supreme Court concluded that "[e]xamining all the information before Det. Vermette — including the appellants' motive to kill Bowers, the opportunity they had to act on this motive, and the evidence that Bowers' death was suspicious — through the eyes of a reasonable person with the knowledge, training, and experience comparable to such a seasoned homicide detective, I conclude that Det. Vermette had objectively reasonable and probable grounds to arrest the appellants for murder. Det. Vermette's grounds went well beyond a hunch or intuition and objectively

justified his reasonable belief that the appellants were involved in Bowers' killing" (at paragraph 88).

Should the accuseds' confessions be excluded under s. 24(2) of the Charter?

The Supreme Court concluded that the "police breached s. 9 by unlawfully detaining the appellants at the scene and by transporting them to the police station while they were being 'investigatively detained' under the non-existent *Medical Examiners Act*. There was no basis to place the appellants under investigative detention at common law because, at the time of their detention, there was no 'clear nexus' between them and Bowers' death, and it had not been established that Bowers' death resulted from a recent criminal offence…Nor, at the time, was there statutory authority to arrest the appellants under the more onerous reasonable and probable grounds standard in s. 495(1)(a) of the *Criminal Code*. The police also breached s. 10(a) of the *Charter* by failing to give the appellants a legally valid reason for their detention and breached s. 10(b) because the appellants did not know the jeopardy they faced while they were unlawfully detained…Finally, the police breached Lambert's s. 10(b) rights by asking him questions in the police car after he had said that he wanted to speak to a lawyer" (at paragraph 90).

The "Obtained in a Manner" Threshold Requirement:

The Supreme Court indicated that "[t]here are two components to determining whether evidence must be excluded under s. 24(2). The first component — the *threshold requirement* — asks whether the evidence was 'obtained in a manner' that infringed or denied a *Charter* right or freedom. If the threshold requirement is met, the second component — the *evaluative component* — asks whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute" (at paragraph 94).

"Fresh Start" and the Threshold Requirement:

The Supreme Court indicated that "evidence will not be 'obtained in a manner' that breached the *Charter* when the police made a 'fresh start' from an earlier *Charter* breach by severing any temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. In some cases, the police may make a 'fresh start' by later complying with the *Charter*, although subsequent compliance does not result in a 'fresh start' in every case. The inquiry must be sensitive to the facts of each case" (at paragraph 97).

The Supreme Court indicated that "[w]hen undertaking the case-specific factual inquiry into whether the police effected a 'fresh start', some potentially illustrative indicators" that a trial judge should consider include (at paragraph 103):

> • Whether the police informed the accused of the *Charter* breach and dispelled its effect with appropriate language (*R. (D.)*, at p. 882). What constitutes appropriate language will vary with the circumstances of the case. In some cases, it may be sufficient to say, "we're going to start over"; in other cases, more detailed or specific language may be needed to remove the taint from the earlier *Charter* breach;
>
> • Whether the police cautioned the accused after the *Charter* breach but before the impugned evidence was obtained (*Plaha*, at para. 53; *Hamilton*, at paras. 58-59; *Woods*, at para. 9). Ideally, this would involve both a primary caution ("You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence" (*Singh*, at para. 31; *Manninen*, at p. 1237)), and a secondary caution ("Your decision to speak to the police should not be influenced by anything you have already said to the police or the police have already said to you" (*Manninen*, at p. 1238));
>
> • Whether the accused had the chance to consult counsel after the *Charter* breach but before the impugned evidence was obtained (*Manchulenko*, at para. 69; *Woods*, at paras. 5 and 9; *R. v. Dawkins*, 2018 ONSC 6394, at para. 62 (CanLII));
>
> • Whether the accused gave informed consent to the taking of the impugned evidence after the *Charter* breach (*Simon*, at para. 74);
>
> • Whether and how different police officers interacted with the accused after the *Charter* breach but before the impugned evidence was obtained (see *Lewis*, at para. 32; *Woods*, at para. 9; *McSweeney*, at para. 62; *I. (L.R.) and T. (E.)*, at p. 526; *Dawkins*, at para. 62); and
>
> • Whether the accused was released from detention after the *Charter* breach but before the impugned evidence was obtained.

This Case:

In this case, the Supreme Court concluded that in assessing whether a "fresh start" had been made, the trial judge "erred in law by failing to apply the correct legal test and by applying an incorrect legal principle" (at paragraph 104).

Lambert:

However, the Court concluded that the "police took several steps that collectively severed any contextual connection between the breach of Lambert's *Charter* rights arising from his unlawful detention and his confession. These steps also rendered any temporal connection with the *Charter* breaches remote. Finally, there was also no causal relationship between the *Charter* breaches and Lambert's confession. Lambert's confession was thus not 'obtained in a manner' that breached the *Charter*…By taking the steps described above, the police ensured that Lambert's confession was not 'obtained in a manner' that breached the *Charter*. It is therefore unnecessary to consider the evaluative component of s. 24(2) for Lambert. Since Lambert's confession was admissible, I would dismiss his appeal and confirm his conviction for manslaughter" (at paragraphs 108 and 112).

Beaver:

The Court held that in Beaver's "case it cannot be said that an intervening consultation with counsel severed any connection between the *Charter* breaches arising from his unlawful detention and his eventual confession". The Court indicated that the police "failed to dissociate [their] interaction with Beaver from the earlier *Charter* breaches and actively maintained a contextual connection between Beaver's initial unlawful detention and his confession. Thus, even after Beaver had been lawfully arrested and made aware of the jeopardy he faced, his confession was contextually linked to the earlier Charter breaches…Beaver's confession was thus 'obtained in a manner' that breached the *Charter*. It is therefore necessary to consider whether it should be excluded under s. 24(2) of the *Charter*" (at paragraphs 113 to 115).

Application of Section 24(2) of the Charter:

The Supreme Court indicated that "[s]ection 24(2) of the *Charter* is not an automatic exclusionary rule precluding the admission of all unconstitutionally obtained evidence. Such evidence will only be excluded when the accused establishes that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute…Balancing the relevant considerations under s. 24(2) is a qualitative determination that is not capable of mathematical precision" (at paragraph 117).

The Supreme Court described the nature of the three lines of inquiry required by section 24(2) in the following manner (at paragraphs 120, 123 and 129 to 131):

> The first line of inquiry under s. 24(2) considers whether the Charter-infringing state conduct is so serious that the court needs to dissociate

> itself from it. This inquiry requires the court to situate the *Charte*r-infringing conduct on a scale of culpability. At one end of the scale is conduct that constitutes a wilful or reckless disregard of *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from Charter standards. At the other end of the scale are less serious *Charter* breaches, including breaches that are inadvertent, technical, or minor or those that reflect an understandable mistake. The more severe the state's *Charter*-infringing conduct, the greater the need for courts to disassociate themselves from it.
>
> The second line of inquiry under s. 24(2) considers the impact of the *Charter* breach on the accused's *Charter*-protected interests. This inquiry involves identifying the interests protected by the relevant *Charter* right and evaluating the extent to which the *Charter* breach "actually undermined the interests protected by the right" (*Gran*t, at para. 76). As with the first line of inquiry, the court must situate this impact on a spectrum. The greater the impact on the accused's *Charter*-protected interests, the greater the risk that admission of the evidence would suggest that *Charter* rights are of little actual avail to citizens, thus breeding public cynicism and bringing the administration of justice into disrepute.
>
> The third line of inquiry under s. 24(2) considers societal concerns and asks whether the truth-seeking function of the criminal trial process would be better served by the admission or the exclusion of the evidence (*Grant*, at para. 79). Relevant factors under this inquiry include the reliability of the evidence, the importance of the evidence to the prosecution's case, and the seriousness of the offence at issue… while the seriousness of the offence has the potential to "cut both ways" (*Grant*, at para. 84), the public has a heightened interest in seeing serious offences such as manslaughter and obstruction of justice adjudicated on the merits…Excluding reliable evidence critical to the Crown's case, such as Beaver's confession, can also undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute.

Final Balancing:

The Supreme Court indicated that the "final step in the s. 24(2) analysis involves weighing each line of inquiry to determine whether admitting the evidence would bring the administration of justice into disrepute. This balancing has a prospective function: it aims to ensure that evidence obtained through a *Charter* breach does not cause further damage to the justice system. It is also societal in scope: its goal is not to punish the police but to address systemic concerns involving the broad impact of admitting the evidence on the long-term repute of the justice system… It is possible

that admitting evidence obtained by particularly serious *Charter*-infringing conduct will bring the administration of justice into disrepute, even if the conduct did not have a serious impact on the accused's *Charte*r-protected interests (*Le*, at para. 141). But where the cumulative weight of the first two lines of inquiry is overwhelmed by a compelling public interest in admitting the evidence, the administration of justice will not be brought into disrepute by its admission" (at paragraphs 133 and 134).

This Case:

The Supreme Court concluded that "the third line of inquiry is central to the s. 24(2) weighing exercise in this case. The first two lines of inquiry, taken together, do not make a strong case for excluding Beaver's confession. Only the seriousness of the *Charter* breaches strongly favours exclusion. The second line of inquiry pulls neither towards nor against exclusion because the breaches had minimal impact on Beaver's *Charter*-protected interests. The cumulative weight of the first two lines of inquiry is overwhelmed by a compelling public interest in admitting Beaver's confession. This evidence is crucial to the prosecution's case against an offender who allegedly killed another person and then tried to obstruct the police investigation. On a proper balancing of the lines of inquiry under s. 24(2), I conclude that admitting Beaver's confession would not bring the administration of justice into disrepute" (at paragraph 135).

The Minority Judgment:

On behalf of the minority, Justice Martin indicated that she parted "ways with the majority on two points" (at paragraphs 139 and 140):

> First, on whether it was lawful for the lead investigator, after learning of the circumstances of the appellants' unlawful detention, to immediately arrest them for murder and direct their continued questioning. I conclude that the information relied on to direct the appellants' arrests does not come close to the particularized probability required to meet the reasonable grounds standard. The arrests were a blatant attempt to salvage the investigation in the face of what officers knew were multiple serious violations of the appellants' *Charter* rights. The accumulation of breaches of well-established *Charter* standards in this case requires that the evidence be excluded as a remedy under s. 24(2) of the *Charter* to avoid bringing further disrepute to the administration of justice.
>
> Second, the test for inclusion under s. 24(2) is long established and well known. The focus is on the connection between the breach and the evidence obtained, with reference to temporal, contextual, and causal elements…There

> is simply no need to speak in terms of whether or not there was somehow a "fresh start" for those who have breached *Charter* rights. Indeed, the notion of a "fresh start" is an unhelpful and potentially misleading concept that has no place in the s. 24(2) analysis. It divides what is to be a holistic analysis into before and after segments and operates to cure and/or remove *Charter* breaches from the analysis, thus placing a heavy finger on the scale of s. 24(2).

Charter-Sections 10(b) and 24(2)-Detention and a Second Opportunity to Consult Counsel:

In ***R. v. Lafrance***, 2022 SCC 32, July 22, 2022, the police arrested the accused on March 19, 2015, at his residence. He was asked to come to the police station to provide a statement regarding an alleged murder. The police drove him to the police station, took him to a secure environment therein, and interviewed him for over three hours. On April 7, 2015, the police arrested the accused for that murder. The accused spoke to legal aid counsel. The police conducted an interview with the accused. Several hours into the interview, the accused asked to call his father because that would be his "only chance of getting a lawyer". The police did not allow him to call his father. The accused subsequently confessed to having committed the murder.

At his trial, the accused sought to have the confession excluded, arguing that he been had detained by the police March 19, but not advised of his right to contact counsel. He also argued that section 10(b) of the *Charter* was breached on April 7, when the police would not allow him to contact his father.

The trial judge admitted the confession, concluding that the accused had not been detained on March 19 and that police were not required to allow him to call his father. A majority of the Alberta Court of Appeal allowed his appeal, excluded the confession, and ordered a new trial. The Crown appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court concluded that the police had detained the accused on March 19, breached section 10(b) of the *Charter* by failing to inform him of his right to counsel and committed a second breach of section 10(b) on April 7, by refusing to allow the accused to contact a lawyer through his father. Finally, the Court held that these were serious breaches and admitting the evidence thereby obtained would bring the administration of justice into disrepute.

March 19, Detention:

The Supreme Court indicated that "[p]sychological detention exists where an individual is legally required to comply with a direction or demand by the police, or

where ‘a reasonable person in [that individual’s] position would feel so obligated’ and would ‘conclude that he or she was not free to go’” (at paragraph 22).

The Court concluded that in this case the “*Grant f*actors… weigh decisively” in favour of finding that the accused was detained on March 19 (at paragraphs 63 and 64):

> All three *Grant f*actors — the circumstances giving rise to the encounter, the nature of the police conduct, and the particular characteristics or circumstances of the individual — weigh decisively here, on the facts of this case, in favour of finding that Mr. Lafrance was first detained when he, a young Indigenous man with minimal police exposure, was awoken in the early morning by the police inside his home, and commanded to get dressed and leave. He continued to be detained throughout the encounter, including outside the home, in the police van and in the interview room of the police station, all of which involved the near-continuous supervision and presence of the police, until the conclusion of his interview on March 19, and I so find.
>
> It follows that police were required to inform Mr. Lafrance of his s. 10(b) right to counsel and to afford him the opportunity of exercising it, and breached that right by failing to do so. My colleagues say that this conclusion means that the combination of an accused young person and the execution of a search warrant will always result in a finding of detention (para. 160). But that is not so; it is only where the police execute a warrant in a way that leads the reasonable person in the accused’s shoes to believe that, in the entirety of the circumstances, he or she is not free to leave, that a detention would arise. Such was the case here: given the overwhelming force in which a team of police officers arrived at Mr. Lafrance’s home, ordered him to get dressed and leave his home, and monitored his every movement, the officers should have recognized that a reasonable person in Mr. Lafrance’s shoes would feel obliged to comply with their demands and would conclude that he or she was not free to go. In such situations, the police should have informed him of his rights under s. 10(b) of the *Charter*. I will turn to the consequences of this breach below, after considering his encounter with police on April 7.

April 7, A Second Consultation with Counsel:

The Supreme Court indicated that “[s]ection 10(b) does not confer the right to have a lawyer present during a police investigation. And, a single consultation with a lawyer is constitutionally sufficient, absent a change in circumstances or new developments that suggest that the choice faced by the accused has been ‘significantly altered, requiring further advice on the new situation, in order to fulfill

the purpose of s. 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not' (*Sinclair*, at para. 65). Such a change in circumstances or new development is not demonstrated, the Court added, where police engage in 'the common . . . tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against [them]'" (at paragraph 69).

However, the Court also indicated that *Sinclair* recognizes "that the implementational component of s. 10(b) imposes upon police a further obligation: to provide a detainee with a reasonable opportunity to consult counsel again if a change in circumstances or a new development makes this necessary to fulfill s. 10(b)'s purpose (para. 53). Three non-exhaustive categories of exceptional circumstances triggering this duty were identified (at paras. 49-52): (1) the police invite the accused to take part in non-routine procedures that counsel would not consider at the time of the initial consultation; (2) there is a change in jeopardy that could affect the adequacy of the advice received during the initial consultation; and (3) there is reason to question the detainee's understanding of his rights" (at paragraph 72).

The Court held that in this case "[t]here was ample reason here to question Mr. Lafrance's understanding of his s. 10(b) right, bringing his circumstances within the third *Sinclair* category. While it is true that general confusion or a 'nee[d] for help' is not a ground for further consultation with counsel (*Sinclair*, at para. 55), Mr. Lafrance was not, as my colleagues say, experiencing 'mere confusion' or 'discomfort' (paras. 177-83 (emphasis deleted)). To explain, and as my colleagues acknowledge, a 'changed circumstance' can arise '[w]hen there is reason to question the detainee's understanding of his s. 10(b) right' (para. 172). That is this case. His confusion was an 'objective indicat[or] that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so' (*Sinclair*, at para. 55). And this is because the information to which he had a right under s. 10(b) had not been conveyed, either at all or in a manner he understood" (at paragraph 86).

Section 24(2):

The Supreme Court concluded that "[t]aken together, the three *Grant* lines of inquiry confirm that the admission of the evidence would bring the administration of justice into disrepute. These were two serious breaches with a correspondingly significant impact on the s. 10(b) rights of Mr. Lafrance. The first and second lines of inquiry therefore present a strong case for exclusion of the evidence. On the other hand, society's interest favours admission of the evidence, but not strongly. Taken cumulatively, the strength of the first two lines of inquiry overwhelms the moderate

impact on society's interest in the truth-seeking function of the criminal trial process" (at paragraph 104).

Charter-Sections 10(b) and 24(2)-Detentions:
Evidence-Confessions-Cautions:

In ***R. v. Tessier***, 2022 SCC 35, October 14, 2022, the accused was convicted of the offence of murder. At his trial, the Crown was allowed to introduce a statement the accused made to the police at the police station. The accused had not been advised of his right to contact counsel or cautioned by the police that he had the right to remain silent or that his statement could be used in evidence, before providing the statement.

The trial judge concluded that the statement had been provided voluntarily and the accused had not been detained. On appeal, the Alberta Court of Appeal ordered a new trial, holding that the trial judge erred in admitting the statement. The Crown appealed to the Supreme Court of Canada.

The Supreme Court indicated that the appeal raised "the following two issues" (at paragraph 38):

- Firstly, in the pre-detention phase of the criminal investigation, how did the absence of a caution during police questioning affect the voluntariness of Mr. Tessier's statements under the confessions rule? Was he unfairly denied a meaningful choice to speak to police such that his statements must be considered as involuntary and thus inadmissible?

- Secondly, was Mr. Tessier psychologically detained in breach of his *Charter* rights and, if so, what impact did that have on the admissibility of his statements? In particular, should attendance at a police station for an officer-requested meeting be treated as a detention, absent steps taken by the police to communicate the contrary?

The appeal was allowed and the conviction reinstated. The Supreme Court held that the accused was not detained and therefore section 10(b) of the *Charter* was inapplicable. In addition, the Court held that "failure to provide a caution is not in itself fatal to admissibility". However, the Court also indicated that the "absence of a caution for a suspect constitutes *prima facie* evidence that they were unfairly denied their choice to speak to the police". In such a circumstance, the Crown must "show that the absence of a caution did not undermine the suspect's free choice to

speak to the police as part of the contextual examination of voluntariness" (at paragraphs 7, 8 and 9).

Absence of a Caution:

The Supreme Court held that if "a court reaches the conclusion that a person was a suspect, the absence of a police caution is not merely one factor among others to be considered. Rather, it is *prima facie* evidence of an unfair denial of the choice to speak to police, and courts must explicitly address whether the failure created an unfairness in the circumstances (see *Oland*, at para. 42). It cannot be washed aside in the sea of other considerations. Instead, it serves to impugn the fairness of the statement and must be addressed, by the Crown, in the constellation of circumstances relevant to whether the accused made a free choice to speak. In discharging its burden to prove beyond a reasonable doubt that a statement was voluntary, the Crown will need to overcome this *prima facie* evidence of unfairness" (at paragraph 83).

The Court summarized the elements of the "confession rule" in the following manner (at paragraph 89):

> In summary, the confessions rule always places the ultimate burden on the Crown to prove beyond a reasonable doubt that a statement made by an accused to a person in authority was made voluntarily. When an accused brings a voluntariness claim with respect to police questioning that did not include a caution, the first step is to determine whether or not the accused was a suspect. If the accused was a suspect, the absence of a caution is *prima facie* evidence of an unfair denial of choice but not dispositive of the matter. It is credible evidence of a lack of voluntariness that must be addressed by the court directly. Depending on the circumstances, it is potentially relevant to different *Oickle* factors as well as any other considerations pertinent to voluntariness. However, the absence of a caution is not conclusive and the Crown may still discharge its burden, if the totality of the circumstances allow. The Crown need not prove that the accused subjectively understood the right to silence and the consequences of speaking, but, where it can, this will generally prove to be persuasive evidence of voluntariness. If the circumstances indicate that there was an informational deficit exploited by police, this will weigh heavily towards a finding of involuntariness. But if the Crown can prove that the suspect maintained their ability to exercise a free choice because there were no signs of threats or inducements, oppression, lack of an operating mind or police trickery, that will be sufficient to discharge the

> Crown's burden that the statement was voluntary and remove the stain brought by the failure to give a caution.

This Case:

The Supreme Court concluded that the "voluntariness issue in this case is about fairness. Mr. Tessier did not argue that any of the statements made to Sgt. White were inaccurate. No reliability concerns arise. Rather, the case is about whether Mr. Tessier was treated unfairly by police such that he was denied a meaningful choice to speak to them. Nothing about the circumstances of his statements suggests this. Mr. Tessier was well aware of the nature of the investigation and sought to manage the information conveyed to Sgt. White in a manner that suited him. There were no threats or police tricks, nor was there an atmosphere of oppression. Accepting that he erred in deciding that Mr. Tessier was not a suspect during the interviews of March 17, 2007, the trial judge's conclusions that Mr. Tessier's statements were voluntary and that he exercised a free choice to speak should not be disturbed" (at paragraph 102).

Detention:

The Supreme Court held that the "psychological detention question in this case is governed by the three factors discussed in *Grant* and affirmed in *Le*. Psychological detention exists where an individual is legally required to comply with a direction or demand by the police, or where 'a reasonable person in [that individual's] position would feel so obligated' and would 'conclude that he or she was not free to go'" (at paragraph 105).

This Case:

The Supreme Court concluded that in this case, the "three *Grant* factors weigh against finding that Mr. Tessier was detained" (at paragraph 107):

> All three *Grant* factors weigh against finding that Mr. Tessier was detained. The initial contact was in the form of a general inquiry, and Mr. Tessier would not have felt singled out for a focussed investigation given that he knew others were being interviewed as well. Mr. Tessier attended the detachment through his own means. Although the situation changed when Sgt. White asked a series of pointed questions that suggested police thought Mr. Tessier was culpably involved, a reasonable person in his shoes would not have felt obliged to comply in the circumstances. Mr. Tessier was aware that police were investigating the homicide of his friend and, when challenged, he

> provided an exculpatory narrative and sought to direct suspicions elsewhere. At no point did Sgt. White state or imply that Mr. Tessier would not be free to go. Instead, after denying his involvement, Mr. Tessier used that moment to relieve the increased pressure on him by going outside for a smoke. Mr. Tessier clearly possessed the agency to leave the interview room and, crucially, he declined to cooperate with the DNA sample upon his return after consulting with his friend.

Charter-Section 11(b):

In ***R. v. Boulanger***, 2022 SCC 2, February 9, 2022, the Supreme Court of Canada considered section 11(b) of the *Charter* in the context of defence delay. In upholding the stay entered by the trial judge, the Court rendered the following oral judgment:

> KASIRER J. — The Crown appeals from a majority decision of the Quebec Court of Appeal upholding, in favour of the respondent, a stay of proceedings entered because of the violation of his constitutional right to be tried within a reasonable time. The majority found a net delay of 35 months and 2 days (1,066 days), which exceeds the ceiling set in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.
>
> The issue in the appeal is whether two particular delays — a first period of 84 days and a second of 112 days — must be attributed to the defence because of its conduct.
>
> With regard to the period of 84 days, we agree with Chamberland J.A., dissenting in the Court of Appeal, that the delay between March 1 and May 24, 2018 resulted from illegitimate defence conduct and must therefore be attributed to the respondent.
>
> It is true that the characterization of delay is a question of law and that the trial judge was not bound by the respondent's admission in this regard. However, the trial judge did not provide any explanation, even an implicit one, to clarify why he was rejecting the admission for this period (reasons of Chamberland J.A., at para. 173). Since he chose to go against the parties' suggestion, and in the absence of submissions by them on this specific point, it was especially important that the trial judge provide reasons explaining what he had decided and *why* (see *R. v. G.F.*, 2021 SCC 20, at paras. 71-74). With respect, he did not do so.
>
> Moreover, as the dissenting judge suggested, it is not sufficient that the step taken by the respondent be legitimate for the delay not to be attributable to

him. In this case, it is the *manner* in which the defence conducted itself with respect to its motion for an unredacted copy of the information that was illegitimate, particularly because of how late that motion was brought. It was not until 15 months after being given the redacted document that the defence decided to bring its motion, even though the parties had already been debating the redaction of other documents for several months (reasons of Chamberland J.A., at paras. 179-84, properly relying in particular on *R. v. Rice*, 2018 QCCA 198, 44 C.R. (7th) 83, at para. 60; see also *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 32).

In the circumstances, the entire 84-day delay between March 1 and May 24, 2018 is attributable to the defence. The motion for an unredacted copy of the information in support of the search warrant and the motion challenging the warrant itself were intrinsically connected, since, according to the defence, it was not possible to hear the challenge to the warrant without settling the debate over redaction. By delaying the filing of the motion for an unredacted copy of the information, the respondent necessarily delayed the hearing on the challenge to the warrant. He must therefore be held responsible for the delay between the day he raised the issue of an unredacted copy of the information (March 1, 2018) and the day the motion challenging the warrant was finally to be heard (May 24, 2018).

With regard to the second period in issue, namely the period of 112 days between May 21 and September 10, 2019, the Crown's ground of appeal must be dismissed. The majority was correct to intervene, because this delay could not be attributed entirely to the respondent despite the fact that his counsel was unavailable on certain dates.

This Court did of course explain in *Jordan* that where the court and the Crown are ready to proceed but the defence is not, the resulting delay is attributable to the defence (para. 64). All participants in the criminal justice system, including the defence, must take a proactive approach in order to prevent unnecessary delay by targeting its root causes (*Cody*, at para. 36). That being said, in some cases, the circumstances may justify apportioning responsibility for delay among these participants rather than attributing the entire delay to the defence.

Here, the parties had asked the judge as early as November 2018 to add a third trial date to the two dates already scheduled in January 2019. Their request was denied. On the first day of the trial in January 2019, it became clear that

the two scheduled dates would not be enough, in part because of the prosecution's changes in strategy. Even though they discussed potential dates for the continuation of the trial and counsel for the respondent informed the judge and the prosecution that she would be unavailable on certain dates in May 2019, the judge proposed and insisted on a date in September 2019 without considering the possibility of continuing the trial on an earlier date when both parties were available. The judge had therefore known since November 2018 that an additional day would be needed, and in January 2019, when he was assessing potential availability for the continuation of the trial, proximity to the *Jordan* ceilings had to be taken into consideration (*R. v. K.G.K.*, 2020 SCC 7, at para. 61). That being said, it was not until August 7, 2019 that the respondent informed the prosecution of his intention to file a motion under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. Therefore, in addition to the conduct of defence counsel and the prosecution's changes in strategy, it was because of institutional delay and the court's lack of initiative that no other date was offered sooner (reasons of Cournoyer J.A., at para. 148).

In the particular circumstances of this case, we are of the view that it is "fair and reasonable" to apportion responsibility for the 112-day delay and to attribute up to half of the delay between June 1, 2019 (the day after the last date on which counsel for the respondent was unavailable) and September 10, 2019 (the actual date on which the trial continued) to the defence (*R. v. K.J.M.*, 2019 SCC 55, at para. 96). Even calculating from this premise, since the total delay between these two dates is 101 days, we attribute 51 days (June 1 to July 22, 2019) to the defence. A delay of 10 days (between May 21 and 31, 2019) should also be attributed to the respondent given the concession he made in the Court of Appeal (reasons of Cournoyer J.A., at para. 150, fn. 83).

In the end, in addition to the period identified by the majority of the Court of Appeal, a delay of 84 days (period of March 1 to May 24, 2018) and a delay of 61 days (from May 21 to 31, 2019 and from June 1 to July 22, 2019) are attributable to the defence. This brings the total number of days attributable to the defence to 225, and the net delay to 950 days, or more than 31 months. The 30-month *Jordan* ceiling has therefore been exceeded and the delay is presumed to be unreasonable. No exceptional circumstance has been raised to justify exceeding the ceiling.

> It should be noted that the respondent was charged in June 2016, close to the date on which the decision in *Jordan* was rendered. The expectation today is that such a situation would not happen again.
>
> For these reasons, the Court dismisses the appeal and upholds the stay of proceedings entered by the trial judge.

Charter-Section 11(b):

In ***R. v. Ste-Marie***, 2022 SCC 3, February 10, 2022, the Court, in upholding the trial judge's decision not to enter a stay for unreasonable delay, rendered the following oral judgment:

> The appeal from the judgment of the Court of Appeal of Quebec (Montréal), Numbers 500-10-006180-168, 500-10-006181-166, 500-10-006182-164 and 500-10-006190-167, 2020 QCCA 1118, dated September 3, 2020, was heard on February 10, 2022, and the Court on that day delivered the following judgment orally:
>
> [TRANSLATION]
> KASIRER J. — The Crown appeals from a judgment of the Quebec Court of Appeal quashing four convictions and entering a stay of proceedings in favour of the respondents because of a violation of their right to be tried within a reasonable time. The appellant asks that the stay of proceedings be set aside and that the case be remanded to the Court of Appeal for a decision on the nine grounds of appeal that it chose not to address, as it found it unnecessary to do so in the circumstances
>
> On September 14, 2009, the respondents were charged with laundering proceeds of crime, conspiracy and criminal organization offences. In 2014 and 2015, they filed motions for a stay of proceedings under ss. 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*. On September 17, 2015, before this Court rendered its decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, the Court of Québec dismissed the motions, finding that a stay of proceedings was not an appropriate remedy. Because the judge found a 77-month delay between the charges and the anticipated end of the trial, he held that s. 11(b) of the *Charter* had been infringed. However, he declined to enter a stay of proceedings on the ground that the accused had not been prejudiced by the delay. On this point, the judge held that [TRANSLATION] "there is as much prejudice resulting from the charge, and not from the unreasonable delay", and that there was a "clear and compelling" societal

interest in having the accused stand trial (Court of Québec reasons, A.R., vol. I, at p. 60). The judgment of conviction was rendered on June 22, 2016.

In the Court of Appeal's view, the judge had no choice but to enter a stay of proceedings after finding an infringement of s. 11(b) (citing *R. v. Rahey*, [1987] 1 S.C.R. 588). The Court of Appeal declined to review the trial judge's reasons concerning the infringement of s. 11(b), finding that the appeal record was not sufficiently complete to permit it to determine whether the judge's assessment of the delays was inadequate or wrong.

In this Court, the Crown acknowledges that the trial judge made an error, but it takes the view that the error was not determinative of the outcome. It argues that the Court of Appeal erred in entering a stay of proceedings in reliance on the trial judge's erroneous and premature conclusion that s. 11(b) had been infringed.

With respect, the trial judge erred in assessing the prejudice suffered by the accused at the remedy stage rather than considering it in determining whether s. 11(b) had been infringed, in accordance with the criteria applicable at the time set out in *R. v. Morin*, [1992] 1 S.C.R. 771. Despite that error, however, a functional analysis of his reasons shows that he considered the relevant factors and reached the correct conclusion, namely that the motions for a stay of proceedings should be dismissed. Although he was mistaken about the stage of the analysis at which prejudice had to be considered, his refusal to enter a stay of proceedings nonetheless makes it possible to conclude that s. 11(b) was not infringed based on the *Morin* criteria. The Court of Appeal failed to make this finding (paras. 17-18).

In the circumstances, we are all of the view that the Court of Appeal erred in entering the stay of proceedings that the judge had himself denied.

With respect, the Court of Appeal erred in refusing to re-examine the unreasonableness of the delays on the ground that the record before it was incomplete. On appeal, the Crown filed a statement of admissions by the parties — filed by the parties at trial under s. 655 of the *Criminal Code*, R.S.C. 1985, c. C-46 — that contained a detailed chronology of events, the content of which was not analyzed at all by the Court of Appeal. In our opinion, the evidence in the record allowed the appeal judges to carry out that analysis. It should be noted that a statement of admissions by the parties was not part of the appeal records in the cases on which the Court of Appeal relied, at para. 14

of its reasons, to justify its refusal to re-examine the delays in this case. Although a court is not bound by admissions of law, a joint statement may be useful on appeal and may help reduce the delays leading to the infringement alleged by an accused (see, e.g., *R. v. Bryant*, 2021 QCCA 1807, at para. 3).

The evidence in the record shows that the respondents directly caused most of the delays of which they complain and that they attempted to derail the trial by filing multiple applications, motions and interlocutory appeals, which were unsuccessful for the most part. These delays are largely but not exclusively attributable to the defence and must be subtracted from the total delay.

The respondents also caused additional delays by insisting that a certain lawyer represent them despite a clear conflict of interest. In 2011, the preliminary inquiry judge found that Mélanie and Dax Ste-Marie could not be represented by the same lawyer. As a result, they represented themselves. Despite the conflict of interest, they continued to insist that the lawyer retained by their father, Michel Ste-Marie, represent all three of them. They maintained that position for more than two years. That course of conduct was of course untenable and caused additional delay.

We reach the same conclusion with respect to Richard Felx. Although the conflict of interest did not directly involve him, he never expressed concern about the delays caused by his co-accused. Moreover, the prosecution offered him his own preliminary inquiry several times, but he always refused.

Jordan reaffirmed the principle, which is applicable in this case, that the defence should not be allowed to benefit from its own delay-causing conduct or from its tactics aimed at causing delay (paras. 60 and 63; see *Morin*, at p. 802; *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1227-28).

The appellant argues that once the deductions are made, the net delay is 35 months at the most (A.F., at para. 41). The respondents Mélanie Ste-Marie, Dax Ste-Marie and Richard Felx refer to this same calculation in their factum (R.F., at para. 37).

Assuming for the sake of argument that the residual delay exceeds the ceiling set in *Jordan*, the presumption of unreasonableness may be rebutted on the basis of the transitional exceptional circumstance (*Jordan*, at paras. 96-97). The transitional exceptional circumstance may apply where it is shown that "the time the case has taken is justified based on the parties' reasonable

> reliance on the law as it previously existed" (*R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 68). In *R. v. Rice*, 2018 QCCA 198, at para. 202 (CanLII), Vauclair J.A. noted that, for this purpose, the court may examine the conduct of the accused: [TRANSLATION] "[t]he absence of haste is an indicator of the lack of concern the accused has for delays and may be helpful in assessing prejudice". This is in line with the factual determination made by the trial judge in this case, who found that the prejudice complained of by the respondents did not result from delay. In this situation, in light of the transitional exceptional circumstance identified in *Jordan*, it should be concluded that s. 11(b) of the *Charter* was not infringed and that the trial judge was right to dismiss the motions for a stay of proceedings.
>
> For these reasons, we would allow the appeal, set aside the stay of proceedings and remand the case to a new panel of the Quebec Court of Appeal for consideration of the other grounds of appeal that remain outstanding.

Charter-Section 11(b) and Re-Trials:

In ***R. v. J.F.***, 2022 SCC 17, May 6, 2022, the accused was charged in February 2011, with a number of sexual offences in relation to his daughter. Six years later, he was acquitted on all counts. On June 13, 2018, the Quebec Court of Appeal set aside the acquittals and ordered a new trial.

Prior to the second trial commencing, the accused applied for a stay of proceedings to be entered, alleging a breach of section 11(b) of the *Charter*. The application was granted and a stay was entered. In doing so, the application judge combined the delays for the first trial and second trials. An appeal to the Quebec Court of Appeal was dismissed. The Crown was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court described the issues raised in the following manner (at paragraph 2):

> This appeal affords the Court an opportunity to decide whether the Jordan framework applies when a motion for a stay of proceedings for unreasonable delay is brought in the course of a retrial. Two questions arise: (1) After a new trial is ordered, can an accused file a s. 11(b) motion for a stay of proceedings based on delay in the accused's first trial? (2) Do the presumptive ceilings established in *Jordan* apply to retrial delay?

The appeal was allowed and the stay was set aside. The Supreme Court held that the *Jordan* framework applies to retrials (at paragraphs 3 and 4):

> …an accused must raise the unreasonableness of trial delay in a timely manner. As a general rule, in the context of a single trial, an accused who believes that their right to be tried within a reasonable time has been infringed must act diligently and apply for a remedy before their trial is held. However, an accused may in some circumstances be justified in bringing such an application later, as is the case exceptionally on appeal. That being said, when an accused brings an application after an appeal court has ordered a new trial, the accused will no longer be able to raise the delay from their first trial. Only the retrial delay will be counted in calculating delay based on the presumptive ceilings applicable under the Jordan framework.
>
> The ceilings set in *Jordan* apply to retrial delay. The framework established in that case protects the right of an accused to be tried within a reasonable time pursuant to s. 11(b), and that provision equally guarantees this right to an accused who is tried a second time. Although it is generally accepted that retrials must be prioritized when scheduling hearings and that they will be shorter than first trials, I do not think it is appropriate to adopt different presumptive ceilings for retrials. The *Jordan* framework is flexible enough to be adapted to the specific circumstances of an accused who is retried.

(1) After a new trial is ordered, can an accused file a s. 11(b) motion for a stay of proceedings based on delay in the accused's first trial?

The Supreme Court held that that "the computation of delay restarts at zero when a new trial is ordered… Since the adoption of the *Jordan* framework, which requires an accused to take appropriate action in a timely manner, an accused cannot bring a s. 11(b) motion during a retrial based on delay in their first trial" (at paragraph 55).

(2) Do the presumptive ceilings established in Jordan apply to retrial delay?

The Supreme Court held that "[a]fter a new trial is ordered, the accused regains the status of a person charged with an offence and the Crown once again has a duty to bring the accused to trial within a reasonable time. Delay following such an order is trial delay and therefore falls within *Jordan*…Where a s. 11(b) motion is brought in the course of a retrial, it is the delay in that trial that remains the focus of the analysis…a court must begin by calculating the total delay between the order for a new trial and the actual or anticipated end of that trial" (at paragraphs 61, 73, and 77).

This Case:

The Supreme Court indicated that "[i]n this case, the respondent did not act in a timely manner. Neither before nor during his first trial did he raise an infringement of his right to be tried within a reasonable time. Nor did he make an argument to this effect in the Court of Appeal after the Crown decided to appeal the verdict. It was not until a few months before his retrial was to be held that he brought his s. 11(b) motion" (at paragraph 74).

The Court concluded that a stay was inappropriate because "the order was made by the Court of Appeal on June 13, 2018. At the time the motion for a stay of proceedings was argued, the anticipated end of the trial was April 18, 2019, and the total delay was estimated at 10 months and 5 days. None of the delay was attributable to the defence. This delay is well below the 30-month presumptive ceiling applicable to the first trial" (at paragraph 77).

Charter-Section 11(b):

In ***R. v. Safdar***, 2022 SCC 21, May 18, 2022, charges laid against the accused were stayed at trial on the basis of a breach of section 11(b) of the *Charter*. The Crown's appeal was allowed by the Ontario Court of Appeal. The accused appealed to the Supreme Court of Canada. The Supreme Court dismissed the appeal and issued the following brief oral judgment:

> Brown J. — The appellant, Syed Adeel Safdar, was tried for offences related to the abuse of his wife. At the conclusion of evidence and submissions, he applied for a stay based on a breach of his right under s. 11(b) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time. The trial judge heard the application while preparing his decision on the trial proper, then reserved that decision and granted the stay. In his reasons for ordering a stay, he also advised that he had completed his reserved trial decision, which remained under seal pending the outcome of any appeal from his stay order.
>
> The Crown appealed the stay order, arguing that, on the authority of this Court's decision in *R. v. K.G.K.*, 2020 SCC 7 (which was not available to the trial judge), the trial judge had erred by including as part of the total delay the period from the end of the evidence and argument to the release of the stay decision. Absent that error, the total delay fell under 30 months. The Court of Appeal for Ontario agreed, set aside the stay order and referred the matter back to the trial judge to release his decision on the trial proper. Mr. Safdar now appeals the Court of Appeal's decision to this Court.

> We agree with the Court of Appeal that *K.G.K.* is dispositive of the central issue in this appeal. For the purposes of determining whether the total delay exceeded the *Jordan* presumptive ceiling, the time between the conclusion of evidence and argument, and the bringing of the s. 11(b) application in this case, should not have been counted (*K.G.K.*, at paras. 31 and 33; *R. v. J.F.*, 2022 SCC 17, at para. 27).
>
> Nor, in our view, and despite Mr. Hasan's able submissions before us, has Mr. Safdar established that the total delay of 29.25 months was markedly longer than reasonable delay in the broader context of the trial (*K.G.K.*, at paras. 3, 23 and 54-55), taking into account the length of time taken for the application, the moderate complexity of the case, and other institutional factors that he raises (*K.G.K.*, at paras. 65 and 68-72).
>
> We also agree with the Court of Appeal's disposition of the other issues raised by Mr. Safdar in this appeal, substantially for the reasons it gives.

Charter-Sections 1 and 12, Multiple Murders, Section 745.51 of the Criminal Code:

In ***R. v. Bissonnette***, 2022 SCC 23, May 27, 2022, the accused was convicted of multiple counts of first degree murder. Section 745.51 of the *Criminal Code* allowed for the imposition of consecutive parole ineligibility periods in cases involving multiple murders. The accused argued that this provision contravened section 12 of the *Charter*. The trial judge agreed, but imposed a period of forty years of parole eligibility. The accused appealed. The Quebec Court of Appeal allowed the appeal, declared section 745.51 to be unconstitutional and set parole ineligibility at twenty-five years. The Crown appealed to the Supreme Court of Canada.

The appeal was dismissed and section 745.51 was "declared to be of no force or effect retroactively to the time it was enacted" (at paragraph 26). The Supreme Court held that section 745.51 "is contrary to s. 12 of the *Charter* and is not saved under s. 1" (at paragraph 4). The Court concluded as follows (at paragraphs 6 to 9):

> Section 12 of the *Charter* prohibits the state from imposing a punishment that is grossly disproportionate in relation to the situation of a particular offender and from having recourse to punishments that, by their very nature, are intrinsically incompatible with human dignity.
>
> The provision challenged in this case allows the imposition of a sentence that falls into this latter category of punishments that are cruel and unusual by nature. All offenders subjected to stacked 25-year ineligibility periods under s. 745.51 *Cr. C.* are doomed to be incarcerated for the rest of their lives

> without a realistic possibility of being granted parole. The impugned provision, taken to its extreme, authorizes a court to order an offender to serve an ineligibility period that exceeds the life expectancy of any human being, a sentence so absurd that it would bring the administration of justice into disrepute.
>
> A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity. Such a sentence is degrading insofar as it negates, in advance and irreversibly, the penological objective of rehabilitation. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. This conclusion that a sentence of imprisonment for life without a realistic possibility of parole is incompatible with human dignity is not only reinforced by the effects that such a sentence may have on all offenders on whom it is imposed, but also finds support in international and comparative law.
>
> To ensure respect for the inherent dignity of every individual, s. 12 of the *Charter* requires that Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance. In practical terms, this means that every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of an ineligibility period of 50 years, which is the minimum ineligibility period resulting from the exercise of judicial discretion under the impugned provision in cases involving first degree murders.

Charter-Sections 1 and 12-Section 33.1 of the Criminal Code:

In ***R. v. Brown***, 2022 SCC 18, May 13, 2022, the accused was charged with the offences of break and entry and committing the offence of aggravated assault therein and the offence of break and entry and committing the offence of mischief. Prior to the offences occurring, the accused had consumed alcohol and "magic mushrooms". The accused was acquitted at trial. The trial judge concluded that the accused was in a "substance intoxication delirium" that was so extreme as to be "akin to automatism". The Alberta Court of Appeal set aside the acquittal for the offence of break and entry and committing the offence of aggravated assault and entered a conviction.

An appeal was taken to the Supreme Court of Canada.

The Supreme Court indicated that the appeal "before this Court turns on the circumstances in which persons accused of certain violent crimes can invoke self-induced extreme intoxication to show that they lacked the general intent or voluntariness ordinarily required to justify a conviction and punishment. Similar matters are at the heart of the Crown appeals in *R. v. Sullivan* and *R. v. Chan*, for which judgments are rendered simultaneously with this case (*R. v. Sullivan*, 2022 SCC 19) (the '*Sullivan* and *Chan* appeals'). The Court is asked in all three cases to decide upon the constitutionality of *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32 ('Bill C-72'), in light of, on the one hand, the principles of fundamental justice and the presumption of innocence guaranteed to the accused by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and, on the other, Parliament's aims to protect victims of intoxicated violence, in particular women and children, and hold perpetrators to account" (at paragraph 3).

The Supreme Court held "the common law rule that drunkenness, absent clear scientific evidence of automatism, is not a defence to general intent crimes, including crimes of violence such as sexual assault" remains "intact" (at paragraph 4). However, the Supreme Court concluded that "[t]o deprive a person of their liberty for that involuntary conduct committed in a state akin to automatism — conduct that cannot be criminal — violates the principles of fundamental justice in a system of criminal justice based on personal responsibility for one's actions. On its face, not only does the text of s. 33.1 fail to provide a constitutionally compliant fault for the underlying offence set out in its third paragraph, it creates what amounts to a crime of absolute liability" (at paragraph 9).

Section One:

In relation to section 1 of the *Charter*, the Court held that "[t]he violations of the rights of the accused in respect of the principles of fundamental justice and the presumption of innocence occasioned by s. 33.1 are grave. Notwithstanding Parliament's laudable purpose, s. 33.1 is not saved by s. 1 of the *Charter*. The legitimate goals of protecting the victims of these crimes and holding the extremely self-intoxicated accountable, compelling as they are, do not justify these infringements of the *Charter* that so fundamentally upset the tenets of the criminal law. With s. 33.1, Parliament has created a meaningful risk of conviction and punishment of an extremely intoxicated person who, while perhaps blameworthy in some respect, is innocent of the offence as charged according to the requirements of the Constitution" (at paragraph 13).

Conclusion:

The Supreme Court concluded that section 33.1 is of "no force or effect" and restored the acquittal entered at the trial (at paragraph 14):

> In the case of Mr. Brown, and on the strength of the findings of fact at trial, the conclusion may be plainly stated. Mr. Brown might well be reproached for choosing to drink alcohol and ingest magic mushrooms prior to the harm suffered by Ms. Hamnett, but that blame cannot ground criminal liability for the aggravated assault that occurred while he was in a state of delirium akin to automatism. On a constitutional standard, he did not commit the guilty act of aggravated assault voluntarily and he was incapable of forming even the minimally-required degree of *mens rea* required for conviction of that offence. In my respectful view, to punish him in these circumstances, however exceptional they might be, would be intolerable in a free and democratic society. The law imposes the solemn and onerous duty on this Court to declare s. 33.1 unconstitutional (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 497). For the reasons that follow, I would set aside the judgment of the Court of Appeal, declare s. 33.1 to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and restore Mr. Brown's acquittal rendered at trial.

In ***R. v. Sullivan & Chan***, 2022 SCC 19, May 19, 2022, a companion case to ***Brown***, Mr. Sullivan "was charged with several offences, including aggravated assault and assault with a weapon. In unrelated circumstances, Thomas Chan also fell into an impaired state after he voluntarily ingested 'magic mushrooms' containing a drug called psilocybin. Mr. Chan attacked his father with a knife and killed him and seriously injured his father's partner. He was tried for manslaughter and aggravated assault" (at paragraph 1).

Mr. Sullivan was convicted of the two assault charges. Mr. Chan was convicted of the offences of manslaughter and aggravated assault.

The Ontario Court of Appeal held that section 33.1 of the *Criminal Code* violated sections 7 and 11(d) of the *Charter* and was not saved by section 1 of the *Charter*. The Court of Appeal set aside the convictions entered against Mr. Sullivan and ordered a new trial in relation to the offences of which Mr. Chan was convicted.

The Crown appealed from both to the Supreme Court of Canada. The appeal in ***Sullivan***, in addition to raising the constitutionality of section 33.1, also raised an issue involving *stare decisis* [summarized later under a separate heading, at page 69].

The Supreme Court, relying on its decision in ***Brown***, concluded as follows (at paragraphs 5 to 8):

> In *R. v. Brown*, 2022 SCC 18, released concurrently with the reasons for judgment in these appeals, I conclude that s. 33.1 violates the *Charter* and is of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. That conclusion is equally applicable to the Crown's appeals in the cases at bar.
>
> As respondent, Mr. Sullivan has raised an issue relating to the character and force of a s. 52(1) declaration of unconstitutionality issued by a superior court. He argued before us that the trial judge had been bound by a previous declaration by a superior court judge in the province that held s. 33.1 to be of no force and effect. The issue raised by Mr. Sullivan provides an opportunity to clarify whether a declaration made under s. 52(1) binds the courts of coordinate jurisdiction in future cases due to the principle of constitutional supremacy, or whether the ordinary rules of horizontal *stare decisis* apply. As I shall endeavour to explain, *stare decisis* does apply and the trial judge was only bound to that limited extent on the question of the constitutionality of s. 33.1. The right approach can be stated plainly. Superior courts at first instance may not be bound if the prior decision is distinguishable on its facts or if the court had no practical way of knowing that the earlier decision existed. Otherwise, the decision is binding and the judge may only depart from it if one or more of the exceptions helpfully explained in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply.
>
> In the result, I would dismiss the Crown's appeal in the case of Mr. Sullivan and confirm the acquittals entered by the Court of Appeal.
>
> As respondent in his appeal before this Court, Mr. Chan seeks leave to cross-appeal and, if granted, he asks that we substitute an acquittal for the order of a new trial. I would reject Mr. Chan's arguments on this point. In my view, Mr. Chan's application for leave to cross-appeal must be quashed for want of jurisdiction. I would reject his alternative argument that this Court order a stay of proceedings in respect of the very serious violent charges brought against Mr. Chan because the requirements for a stay have not been made out. In the result, I would confirm the Court of Appeal's order of a new trial.

EVIDENCE

Admissions & Hearsay:

In ***R. v. Schneider***, 2022 SCC 34, October 7, 2022, the accused was convicted of the offence of murder. At his trial, the Crown led evidence from the accused's brother

who testified that he overheard the accused say to his wife on the phone: "I did it" or "I killed her". However, the brother also testified that he could not remember word-for-word what the accused had said. He indicated that what he heard was "along those lines".

On appeal to British Columbia Court of Appeal, the conviction was set aside and a new trial ordered. The Court of Appeal concluded that the brother's description of what he heard was not capable of meaning and therefore not relevant.

The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issues raised in the following manner:

> ..whether what the witness overheard had meaning, such that it was relevant to an issue at trial. Second, whether what the witness overheard was admissible under an exception to the general exclusionary rule against hearsay. Third, whether the trial judge appropriately refused to exclude the evidence on the basis that the probative value outweighed the prejudicial effect.

The appeal was allowed and the conviction restored. The Supreme Court answered each question in the affirmative. The Supreme Court held that '[w]hat the witness overheard the accused say on the phone was capable of non-speculative meaning such that it was relevant; it was admissible under the 'party admission' exception to hearsay; and there is no basis to disturb the trial judge's decision to admit the evidence" (at paragraph 2).

Relevance:

In concluding that the brother's evidence was relevant and therefore admissible, the Supreme Court concluded "there was sufficient context for the jury to give meaning to the words that the brother overheard" (at paragraphs 63 and 64):

> The brother's testimony regarding the overheard conversation was relevant. First, there was sufficient context for the jury to give meaning to the words that the brother overheard, such that the evidence overcomes the low threshold for (logical) relevance. Second, it is not fatal that the brother was uncertain as to the exact words that he heard the accused say. The equivocal nature of the brother's testimony is a factor for consideration when weighing the probative value against the prejudicial effect. It also relates to ultimate reliability and

> believability; but those are for the trier of fact in weighing the evidence, rather than the judge in the relevance analysis.
>
> The trial judge needed to determine whether, on the basis of all the evidence, the jury could give meaning (in a way that was not speculative) to what the brother testified that he overheard. The context extended beyond the narrow scope that the majority of the Court of Appeal applied. Other evidence properly informed the brother's testimony as to what he overheard. In the days leading up to the phone call at issue, the accused and the brother had spoken about the victim. During these conversations, the accused admitted he had done "something bad", told the brother that it was "true" (A.R., vol. II, at pp. 107, 111 and 113), and the brother said that the accused was "remorsefully sad. Glad to get it off his chest, per se" (p. 121). On the day of the phone call: the accused told the brother where the victim's body was; the brother was with the accused when he attempted suicide; and the brother was with the accused in the time leading up to the phone call to his wife. Finally, the brother testified that the accused referred to the victim at the opening of the call. The brother was present, although standing approximately 10 feet away, for the entire call.

The Court described ***Ferris*** as "good law", but suggested that it "must be carefully read" (at paragraph 72). It indicated that that ***Ferris*** "should not be understood as standing for the proposition that incomplete recollection of a party admission leads to exclusion of such evidence or that it is only 'micro context' that can inform meaning and, thus, relevance. In assessing (logical) relevance, what matters is whether the evidence tends to increase or decrease the probability of the existence of a fact at issue" (at paragraph 76).

The Court indicated that it is important to "bear in mind the difference between relevance and ultimate reliability. How well the brother could recall the words said by the accused relates to the latter, which is a question for the trier of fact. Few people would remember the exact words used in a recent conversation that they listened to intently. Nonetheless, many of us would be able to recall the gist of that conversation. The rules of evidence must respond to this reality. Probative value analysis and the weight given to the evidence by the trier of fact are sufficient mechanisms to address frailties of memory. These frailties do not also need to be addressed when determining relevance" (at paragraph 71).

Hearsay:

The Supreme Court held that the brother's evidence "was hearsay and, thus, inadmissible under the general exclusionary rule. However, the brother's evidence was that the accused had, by his words, admitted responsibility for Ms. Kogawa's death. This evidence is something that a party said or did and relates to an issue at trial…As such, the evidence is a party admission and comes within a recognized exception to the general exclusionary rule" (at paragraph 78).

Evidence-Circumstantial:

In ***R. v. Vernelus***, 2022 SCC 53, December 6, 2022, the accused was convicted of the offences of possession of a firearm and breach of a recognizance. The evidence at the trial indicated that a motor vehicle in which the accused two other individuals were present, was stopped by the police. A search of a bag resulted in the police finding a firearm. DNA from one of the other occupants of the vehicle was found on the firearm.

The trial judge rejected the accused's testimony as regards a lack of knowledge of the presence of the firearm.

A majority of the Court of Appeal of Quebec dismissed an appeal from conviction. The accused appealed to the Supreme Court of Canada as of right. .

The appeal was dismissed. The Supreme Court rendered a brief oral judgment [translation]:

> Kasirer J. — The Court is of the view that the appeal should be dismissed for the reasons given by Moore J.A. for the majority of the Court of Appeal.
>
> We agree with the majority that it was reasonable for the trial judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt (see R. v. Villaroman, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 71, cited by the majority in this case at para. 41 of its reasons).
>
> All of the grounds of appeal are without merit.
>
> First, the trial judge made no error in applying the test set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at p. 758. She wholly rejected the defence evidence while concluding that it did not raise a reasonable doubt. Finding that there was

strong circumstantial evidence relating to possession, the judge was faced with a lack of evidence that could counter the inference of guilt reasonably arising from the Crown's evidence. Nothing in the judge's reasons suggests that she used the rejection of the defence evidence as positive evidence of guilt. The majority of the Court of Appeal made the same observation at para. 36 of its reasons, finding that [translation] "the judge's rejection of the appellant's testimony, due to its inconsistencies, became determinative of and fatal to the outcome of his defence".

Second, the majority of the Court of Appeal did not err in applying Villaroman. The "only reasonable inference" criterion obviously does not mean that guilt had to be the only possible or conceivable inference.

The dissenting judge on appeal stressed that it was [translation] "reasonable and not speculative to infer that Mr. Daniel may have placed the firearm in the bag" (para. 28 (footnote omitted)). This is indeed a plausible theory given the fact that Mr. Daniel was sitting beside the bag and that his DNA was found on the firearm. However, as the majority of the Court of Appeal noted, whether or not it was the appellant who placed the firearm in the bag [translation] "is immaterial" (para. 38). Insofar as the prosecution established that the firearm had not been placed there without the appellant's knowledge or against his will, all of the elements of possession were present. The trial judge could therefore conclude that the only reasonable inference was that the firearm had been concealed in the bag with the appellant's full knowledge.

Third, the trial judge did not err in referring to the appellant's calm reaction when he was arrested for possession of a firearm. As the majority noted, the judge did not use this to evaluate the appellant's credibility during his testimony, but rather to assess, as one element of the circumstantial evidence, the appellant's knowledge of the fact that the firearm was in his bag (majority reasons, at para. 37).

For these reasons, the appeal is dismissed.

Evidence-Hearsay:

In ***R. v. Furey***, 2022 SCC 52, December 2, 2022, the accused was convicted of a number of offences, including the offence of assault. At the trial, Judge Skanes ruled that a statement provided by a witness who had subsequently died was admissible.

On appeal, a majority of the Court of Appeal of Newfoundland and Labrador (2021 NLCA 59), differed, concluding as follows (at paragraph 13):

> …increased necessity does not have the effect of reducing the threshold of reliability that is required in order to render an out-of-court statement admissible. Reliability is a key component when assessing whether an out-of-court statement by a deceased person is admissible for the truth of its contents. It follows that the trial judge erred insofar as she relied on and applied the erroneous statement of the law.

The Crown appealed to the Supreme Court of Canada as of right.

The appeal was allowed and the convictions were reinstated. The Supreme Court concluded that the trial judge did not err. It rendered a brief oral judgment in which it specified that it "has never said that reliability becomes more flexible as necessity increases":

> We are of the view that the appeal should be allowed. The trial judge did not err in admitting the hearsay evidence on the *voir dire*.
>
> However, we would emphasize that the necessity of receiving hearsay evidence is never so great that the principled approach's requirement of threshold reliability can be sacrificed. Admitting unreliable hearsay evidence against an accused compromises trial fairness, risks wrongful convictions and undermines the integrity of the trial process (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 47-49).
>
> This Court has recognized that necessity and reliability — making up the principled approach to hearsay evidence — "work in tandem"; in particular, "if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed" (*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 72). Indeed, "[i]n the interest of seeking the truth, the very high reliability of the statement [can] rende[r] its substantive admission necessary" (*Khelawon*, at para. 86, citing *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764).
>
> However, this Court has never said that reliability becomes more flexible as necessity increases. While the indicia of reliability required to address specific hearsay concerns may vary with the circumstances of each case (*Khelawon*, at para. 78), threshold reliability must be established in every case. As this Court affirmed in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, "the

threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents" (para. 32, citing *Khelawon*, at para. 49). Indeed, where this Court has considered the out-of-court statements of deceased declarants, we have consistently insisted on "circumstantial guarantee[s] of trustworthiness" (*R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 937-38), or "a sufficient substitute basis for testing the evidence" (*Khelawon*, at para. 105). Thus, in all cases, whatever may be the degree of necessity, such evidence must meet the requirement of threshold reliability in order to be admissible.

That said, we do not read the trial judge's reasons as based on a relaxed threshold of reliability. Rather, they show that she applied the reliability threshold described by this Court in *Bradshaw*, at para. 31. She remarked that the statement was video-recorded, "reasonably contemporaneous with the events and was given to police without hesitation" (*voir dire* reasons, at paras. 28-29, reproduced in A.R., vol. I, at p. 12). She also considered corroborative evidence, and determined that the explanations alternative to the statement's truth "would seem unlikely" (para. 44). Based on these considerations, she concluded "that contemporaneous cross-examination, while preferable as in any case, would not likely add much to the process of determining the truth of what [the declarant] said in his statement" (para. 46).

Thus, we are satisfied that the trial judge's reasons, read as a whole, show that she properly applied the law relating to the admission of hearsay evidence, and did not relax the minimum threshold of reliability. We agree with the dissent in the Court of Appeal that the references in the final paragraphs of the trial judge's reasons do not undermine her previous conclusion that threshold reliability was established.

For these reasons, we allow the appeal, set aside the order of the Court of Appeal, and restore the respondent's convictions.

DEFENCES

Provocation:

In ***R. v. Alas***, 2022 SCC 14 April 21, 2022, the accused was convicted of the offence of murder. The trial judge declined to put the defence of provocation to the jury, concluding that it did not have an air of reality. On appeal, the Ontario Court of

Appeal disagreed and ordered a new trial. The Crown appealed to the Supreme Court of Canada.

The Supreme Court allowed the appeal and reinstated the conviction. In a brief oral judgment, the Court stated:

> The Chief Justice — Mr. Alas was convicted at trial of second degree murder after he stabbed the deceased six times during an altercation at a bar. A majority of the Ontario Court of Appeal (MacPherson J.A. dissenting) overturned this verdict and ordered a new trial. The Crown appeals to this Court as of right. The sole issue is whether there was an air of reality to the defence of provocation, such that the trial judge erred in failing to put the defence to the jury. This offence pre-dated the amendment to the provocation provision, which applies to offences committed on or after July 17, 2015.
>
> We find no error in the trial judge's determination that there was no air of reality to the defence of provocation.
>
> The standard of review for whether there is an air of reality to the defence of provocation is correctness (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 55).
>
> The key issue here is whether there is sufficient evidential basis as to the fourth element of the provocation defence — that the accused acted on the sudden.
>
> Taking the evidence at its highest for the accused, for present purposes, the subjective element of the test for provocation has not been met. The accused did not react "on the sudden" before there was time for his passion to cool. It is beyond the range of reasonable inferences to say that Mr. Alas' reaction to the deceased making a punching/lunging motion at the women was "on the sudden"; rather, it was the culmination of an altercation that Mr. Alas both instigated and anticipated. As he indicated in his statement to the police:
>
> > a) Mr. Alas was aware that the deceased had an altercation with his friend earlier in the evening, during which the deceased closed a door on her head.
> >
> > b) Mr. Alas was so upset about the deceased's conduct that he wanted to hit the deceased in the head with a pool cue. He cooled down and did not take this course of action.

c) When his fiancée and friend went outside to smoke, he told them that he would follow if he saw the deceased go outside as well: ". . . if I see this guy get up and come out, I'm coming . . . I'll be right behind him" (A.R., vol. II, at p. 103).

d) Mr. Alas observed the deceased preparing to leave the bar. In anticipation, he went outside to join the two women.

e) When the deceased came out of the bar, he looked at Mr. Alas' friend. In response to this look, Mr. Alas responded: ". . . [w]hat the fuck is wrong with you? Do you have a problem"? A verbal altercation ensued involving Mr. Alas, the deceased, and the two women (A.R., vol .II, at p. 104).

f) During the verbal altercation, Mr. Alas retrieved a knife from his pants pocket and moved it to his jacket pocket "just in case". With the knife gripped in his hand, he stared at the deceased. At his police interview, Mr. Alas said that he stared at the deceased in this way in order to "le[t] him know like if you do anything, um, I would jump on you" (A.R., vol. II, at pp. 167-68).

g) When Mr. Alas saw the deceased making a fist directed at the women, he immediately jumped in and stabbed him in the throat, although he said that he "wanted to stab him . . . in his chest" (A.R., vol. II, at p. 171). He stabbed the deceased five more times after that.

Accordingly, the appeal is allowed and the conviction is restored.

EVIDENCE

Private Records-Sections 278.1 to 278.94 of the Criminal Code:

In ***R. v. J.J.***, 2022 SCC 28, June 30, 2022, the accused (JJ and Shane Reddick) were both charged with the offence of sexual assault. They sought to introduce private records of the complainants that were in their possession. This required an application and hearing in accordance with sections 278.92 to 278.94 of the *Criminal Code*. The accused submitted that the screening process in these provisions violated sections 7, 11(c) and 11(d) of the *Charter* and was therefore inapplicable.

The Supreme Court of Canada described their arguments in the following fashion (at paragraph 12):

> The main arguments of the respondents J.J. and Mr. Reddick were as follows. the impugned provisions force the defence to disclose both its strategy and the details of its proposed evidence to the Crown prior to trial, thereby violating the right to silence and the privilege against self-incrimination. Second, the impugned provisions provide complainants with advanced notice of defence evidence and the purposes for which it is being adduced. As a result, complainants will be able to tailor their responses during examination-in-chief and cross-examination. This detracts from the right to make full answer and defence and from the truth-seeking function of trial. Finally, complainant participation in *voir dires* threatens trial fairness, as it disrupts the structure of a criminal trial, inserts a third-party adversary into the process, and undermines the role of the Crown.

The Supreme Court held that "[p]roperly construed, ss. 278.92 to 278.94 of the *Criminal Code* do not infringe upon ss. 7, 11(c), or 11(d) of the *Charter*" (at paragraph 13).

Sections 276 to 278.94:

The Supreme Court indicated that "records that do not fall within one of the enumerated categories [see section 278.1] but are nevertheless included within the scope of the regime are records which contain personal information about complainants for which they have a reasonable expectation of privacy…non-enumerated record will only be captured by s. 278.1, in the context of the record screening regime, if the record contains information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity" (at paragraphs 41 and 42).

The Court summarized the procedure to be followed pursuant to sections 276 and 278.1 in the following manner (at paragraphs 69 to 72):

> The presiding judge should first determine if the proposed evidence contains information that falls under s. 276. If the evidence falls under both ss. 276 and 278.1, as stated above, the judge should assess the evidence as s. 276 evidence.

If the proposed evidence does not fall under s. 276, the judge should then determine whether it is a "record" under s. 278.1. If the evidence does not come within one of the enumerated categories, the inquiry should focus on whether it contains personal information for which there is a reasonable expectation of privacy. Where the evidence is found to be an enumerated or non-enumerated record, the record screening regime is engaged.

A non-enumerated record will be caught by the record screening regime if it contains information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. This assessment considers the content and context of the record. Electronic communications are subject to this analysis like all forms of records. In addition, records of an explicit sexual nature not covered by s. 276 because they concern the subject matter of the charge will often attract a reasonable expectation of privacy and fall under the record screening regime.

When it is unclear whether the evidence is a "record", counsel should err on the side of caution and initiate Stage One of the record screening process. To be clear, under the record screening regime, the accused will be in possession or control of the evidence at issue, and they will know the context in which the evidence arose. For this reason, the accused will be well equipped to discern whether the evidence is a "record" and to make submissions on this point, if need be.

OFFENCES

Failure to Provide the Necessaries of Life, Section 215 of the Criminal Code:

In ***R. v. Goforth***, 2022 SCC 25, June 10, 2022, the accused was charged with second degree murder and unlawfully causing bodily harm in relation to two foster children. The charges were predicated on the accused's alleged failure to provide the necessaries of life to the children, causing their death. The accused was convicted by a jury of manslaughter and unlawfully causing bodily harm. The convictions were set aside by the Saskatchewan Court of Appeal on the basis of errors in the trial judge's charge to the jury. The Crown appealed to the Supreme Court of Canada.

The Supreme Court described the issues raised by the appeal in the following manner (at paragraph 19):

> (1) Did the trial judge err by improperly instructing the jury on the *mens rea* requirement for s. 215 (failure to provide necessaries of life)? Specifically, did the trial judge err by intermingling the required foreseeability standard for s. 215 with the required foreseeability standard for manslaughter or unlawfully causing bodily harm?
>
> (2) Did the trial judge err by failing to instruct the jury on Mr. Goforth's circumstances as a secondary caregiver during the *mens rea* instruction for s. 215?
>
> (3) Did the trial judge err by failing to explain what is meant by a marked departure from the conduct of a reasonably prudent person in the circumstances?

The appeal was allowed and the convictions reinstated. The Supreme Court concluded (at paragraph 3):

> In my view, the majority of the Court of Appeal erred by failing to take a functional approach in its assessment of the jury charge. This Court has long held that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed. The ultimate question in this appeal is whether the jury was properly instructed such that appellate intervention was unwarranted. In my view, while the charge was not perfect, the jury was nonetheless properly instructed. None of the issues raised in connection with the jury charge warranted appellate intervention.

(1) The Mens Rea Requirements:

The Supreme Court indicated that "the *mens rea* requirement for s. 215 is established when the Crown proves that the accused's conduct constitutes 'a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child'… In order to satisfy the *mens rea* requirement for either manslaughter or unlawfully causing bodily harm, the Crown needed to prove — in addition to establishing the *mens rea* for s. 215 — that it was objectively foreseeable, to a reasonable person in the circumstances of the accused, that the failure to provide necessaries of life to the children would lead to a risk of bodily harm which was

neither trivial nor transitory (*Creighton*, at pp. 44-45). This is a lower foreseeability standard than what is required for s. 215, as the foreseeability of death or of permanent endangerment to health is not required. Therefore, when the offence under s. 215 is the predicate offence for either manslaughter or unlawfully causing bodily harm, if the Crown proves the requisite *mens rea* requirement for s. 215, then, by necessary implication, the additional *mens rea* requirement for manslaughter or unlawfully causing bodily harm will be satisfied" (at paragraphs 27 and 31).

The Charge:

The Supreme Court concluded that "when read as a whole, the trial judge's instructions functionally conveyed the necessary legal principles. The jury charge was not perfect. The trial judge did not make a clear distinction between the required foreseeability standard for s. 215 and the required foreseeability standard for manslaughter or unlawfully causing bodily harm. She routinely juxtaposed the two different foreseeability requirements without clearly alerting the jury to how the respective foresight standards corresponded to the respective offences" (at paragraph 35).

(2) Did the Trial Judge Err by Failing to Instruct the Jury on Mr. Goforth's Circumstances as a Secondary Caregiver During the Mens Rea Instruction or Section 215?

The Supreme Court indicated that the "law is clear that personal characteristics of an accused, short of incapacity, are irrelevant in assessing objective *mens rea*…Overall, the jury was well aware of all the circumstances that Mr. Goforth argued prevented him from foreseeing the risk of harm to the children. Indeed, on any reasonable view of the case, this, more than anything else, would appear to explain why Ms. Goforth was convicted of second degree murder whereas Mr. Goforth was convicted of unlawful act manslaughter. I have no hesitation in concluding that the jury was properly instructed and that it rightly rejected Mr. Goforth's defence that his circumstances prevented him from foreseeing the risk of harm to the children" (at paragraphs 41 and 53).

(3) Did the Trial Judge Err by Failing to Explain What Is Meant by a Marked Departure From the Conduct of a Reasonably Prudent Person in the Circumstances?

The Supreme Court indicated that the "alleged marked departure in this case relates to whether a reasonable person would have foreseen that failing to provide food or fluids to young children — one of whom ultimately died as a result of brain injury that developed following a cardiac arrest caused by malnutrition and dehydration — would result in a risk of danger to life or of permanent endangerment to health. Given

this context, the jury was easily able to assess whether the failure to provide food or fluids to young children constituted a marked departure from the standard of care of a reasonably prudent person in the circumstances" (at paragraph 56).

Offences-First Degree Murder & Unlawful Confinement:

In ***R. v. Sundman***, 2022 SCC 31, July 21, 2022, the accused was charged with the offence of first degree murder. It was alleged that he killed the victim (Mr. McLeod) during an unlawful confinement. The circumstances of the murder were described by the Supreme Court in the following manner (at paragraph):

> On the day of Mr. McLeod's murder, the appellant unlawfully confined him in a moving pickup truck and repeatedly assaulted him by hitting him with a handgun. Mr. McLeod jumped from the truck when it slowed to make a turn but was then chased on foot by the appellant and two accomplices. When Mr. McLeod ran for his life, the appellant shot him at least three times but did not manage to kill him. As he lay wounded, Mr. McLeod was shot and killed at close range by one of the accomplices.

The trial judge acquitted the accused of first degree murder and convicted him of second degree murder. The trial judge held that the victim was not confined at the time he was killed. On appeal, the British Columbia Court of Appeal entered a conviction for first degree murder. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court concluded as follows (at paragraph 5):

> Mr. McLeod was still unlawfully confined when he escaped from the truck and ran for his life. Even though Mr. McLeod was not *physically restrained* outside the truck, he continued to be *coercively restrained* through violence, fear, and intimidation. He was deprived of his liberty and was not free to move about according to his inclination and desire. The appellant then murdered him while unlawfully confining him. These two distinct criminal acts were part of a continuous sequence of events forming a single transaction. They were close in time and involved an ongoing domination of Mr. McLeod that began in the truck, continued when he escaped from the truck and ran for his life, and ended with his murder. The appellant is therefore guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.

The Offence of Unlawful Confinement:

The Supreme Court indicated that "[t]o establish unlawful or forcible confinement under s. 279(2) of the *Criminal Code*, the Crown must prove that (1) the accused confined another person; and (2) the confinement was unlawful…At its core, unlawful confinement involves a deprivation of a person's liberty…Unlawful confinement occurs if, for any significant time period, a person is coercively restrained or directed contrary to their wishes, so that they cannot move about according to their own inclination and desire…The person need not be restricted to a particular place or physically restrained…The restraint can be through violence, fear, intimidation or psychological or other means…The purpose of the confinement is not relevant" (at paragraph 21).

This Case:

The Supreme Court held that the trial judge erred in law "in concluding that Mr. McLeod "managed to escape his confinement" by jumping from the truck, and that "at the time Mr. McLeod was shot, his confinement had ended" (para. 288). The trial judge appears to have concluded that because Mr. McLeod was no longer physically restrained outside the truck, he was no longer unlawfully confined. However, physical restraint in a particular place is sufficient but not necessary to establish unlawful confinement. Even if Mr. McLeod were no longer physically restrained outside the truck, he remained coercively restrained through acts of violence, fear, and intimidation as he ran for his life. He continued to be deprived of his liberty and could not move about according to his inclination and desire" (at paragraph 42).

The Supreme Court concluded that the "unlawful confinement and the murder were part of one continuous sequence of events forming a single transaction. The unlawful confinement and the murder were close in time — in fact, Mr. McLeod was still unlawfully confined at the time of his death. The unlawful confinement and the murder also involved an ongoing course of domination consisting of intimidation, fear, and violence. The course of domination started in the truck, continued when Mr. McLeod jumped from the moving truck and was chased by the appellant and his accomplices, and ended with his murder. The two criminal acts were also distinct: the unlawful confinement — including the restriction of Mr. McLeod's freedom of movement inside and outside the truck and the ongoing acts of violence, fear, and intimidation — was distinct from and not consumed by the shooting. These conclusions amply justified a verdict of first degree murder" (at paragraph 49).

Offences-Sexual Assault:
Defences-Consent:
Procedure-Appeals-Entering a Conviction:
Procedure-Application of the Kienapple Principle:

In ***R. v. A.E.***, 2022 SCC 4, February 15, 2022, the accused was acquitted at trial of the offence of sexual assault. On appeal (2021 ABCA 172), a conviction was entered. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court of Canada concluded that the trial judge erred in applying a principle of "broad advance consent" and that the entering of the convictions by the Court of Appeal was appropriate. In a brief oral judgment, the Court stated:

> We would dismiss the appeals and uphold A.E. and T.C.F.'s convictions for sexual assault. The trial judge erred in law, in that he essentially applied a principle of "broad advance consent" (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 99). Consent must be linked to the sexual activity in question, it must exist at the time the activity occurs, and it can be withdrawn at any time (*Barton*, at para. 88; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 17). The trial judge failed to address the scope of the complainant's consent to sexual activity and failed to consider whether her consent was withdrawn. Accordingly, the trial judge's determination that the complainant had subjectively consented to the sexual activity in question was not entitled to deference.
>
> As this Court set out in *R. v. Cassidy*, [1989] 2 S.C.R. 345, in order to substitute a conviction on an appeal from acquittal, "all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue" (pp. 354-55). The *Cassidy* test is met in this case, thereby permitting a substituted conviction under s. 686(4)(b)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge's explicit and implicit findings demonstrate that both A.E. and T.C.F. continued, and A.E. escalated the sexual interactions with the complainant even after she cried out "No", without taking any steps to find out if she was withdrawing her consent. Specifically, A.E. slapped the complainant's buttocks, and T.C.F. continued to engage the complainant in sexual activity and ordered her to perform fellatio. In the circumstances, T.C.F.'s assertion of an honest but mistaken belief in consent lacks an air of reality and is unsupported by any reasonable steps (*Criminal Code*, s. 273.2(b); *Barton*, at para. 122). Finally, in view of

our conclusion that the *Cassidy* test is met here, we need not comment on Martin J.A.'s statement of the test for substituted convictions, found at para. 91 of his reasons.

With respect to the allegations of bias raised by A.E., we are all of the view that nothing asserted by him called into any question the integrity and impartiality of the Court of Appeal of Alberta in this case.

The appellant A.E. also asks this Court to stay his conviction for sexual assault under *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, on the basis that it is a lesser included count within his conviction for sexual assault with a weapon. We would not give effect to this submission. In these circumstances, the offences involve different subsets of facts and address different forms of harm (see *R. v. M. (R.)*, 2020 ONCA 231, 150 O.R. (3d) 369, at para. 52). Specifically, the charge of sexual assault with a weapon addresses the injuries that the complainant suffered as a result of the use of the toothbrush, as well as the elevated risk that it brought about.

We note that the Court of Appeal of Alberta addressed other issues in *obiter*, including: T.C.F.'s liability for sexual assault with a weapon; whether surreptitious recording constitutes fraud vitiating consent; and whether consent to sexual activity can be given in situations involving intentional bodily harm. In the circumstances, it is unnecessary for us to address these issues.

In the result, the appeals from conviction are dismissed and the matters are remitted to the Court of Queen's Bench for sentencing.

PROCEDURE

Appeals-Finding of Fact:
Defences-Defence of the Person:

In ***R. v. Brunelle***, 2022 SCC 5, March 17, 2022, the accused was convicted of the offences of assault with a weapon and aggravated assault. In convicting the accused, the trial judge rejected the excuse of defence of the person. On appeal, the Quebec Court of Appeal set aside the conviction. The Crown appealed to the Supreme Court of Canada.

The appeal was allowed and the conviction restored. In an oral judgement, the Court stated [translation]:

> The Chief Justice — The Crown appeals as of right from a decision of the Quebec Court of Appeal. It argues that the majority overstepped its appellate role by reassessing the evidence without identifying any error in the trial judge's reasoning.
>
> The accused claims that he acted in self-defence pursuant to s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46. As this Court recently noted in *R. v. Khill*, 2021 SCC 37, three components must be present for this defence to be successful: (1) the catalyst; (2) the motive; and (3) the response (para. 51).
>
> The trial judge rejected the theory of self-defence. In her view, the second criterion for this defence was not met. She did not believe that the accused had used force to defend or protect himself from the use or threat of force. In light of her assessment of the evidence, she found rather that the accused had acted out of vengeance. She therefore convicted him of aggravated assault, assault with a weapon and possession of a weapon for a purpose dangerous to the public peace.
>
> The majority of the Court of Appeal allowed the accused's appeal, set aside the guilty verdicts and ordered a new trial on the ground that the trial judge had erred in analyzing the second criterion for self-defence.
>
> Bachand J.A., dissenting, would instead have dismissed the appeal. Noting that the trial judge's finding was supported by the evidence, he concluded that it was reasonable and entitled to deference.
>
> We are all of the view that the majority of the Court of Appeal erred in intervening in this case, and we agree in part with the reasons of Bachand J.A.
>
> When a verdict is reached by a judge sitting alone, there are two bases on which a court of appeal may be justified in intervening because the verdict is unreasonable: (1) where the verdict cannot be supported by the evidence; or (2) where the verdict is vitiated by illogical or irrational reasoning (*R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3).
>
> While the unreasonableness of a verdict is a question of law, the assessment of credibility is a question of fact (*R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 10). A trial judge's assessment of the credibility of witnesses may

be rejected only where it "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). As Bachand J.A. correctly pointed out, the question in this case was therefore not [translation] "whether the finding that the [accused] acted out of vengeance was the only one reasonably open to the judge in light of the evidence adduced", but rather "whether that finding is sufficiently supported by the evidence and involves no palpable and overriding error" (para. 58, citing *Beaudry*). Bachand J.A. completed his remarks by noting that the trial judge could find beyond a reasonable doubt that the respondent had acted out of vengeance and not for the purpose of defending himself.

We are all of the view that the majority of the Court of Appeal failed to consider the trial judge's privileged position in assessing the evidence (see *Beaudry*, at para. 62). The majority faulted the trial judge for failing to consider certain evidence, but it did so without clearly identifying a palpable and overriding error in her analysis. However, "[t]he mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference" (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 72). The majority could not simply substitute its opinion for that of the trial judge with respect to the assessment of the credibility of witnesses (*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 23). In the absence of a reviewable error, it should have shown deference.

Nor could the majority of the Court of Appeal assert that the trial judge's finding on the second criterion for self-defence was [translation] "vitiated by faulty underlying reasoning" (para. 54). A verdict may be considered unreasonable where it is based on illogical or irrational reasoning, such as where the trial judge makes a finding that is essential to the verdict but incompatible with evidence that is uncontradicted and not rejected by the judge (*Beaudry*, at para. 98; Sinclair, at para. 21). Here, the inference drawn by the trial judge from the evidence was not incompatible with the evidence adduced. On the contrary, her approach was coherent and supported by evidence that was neither contradicted nor rejected. There were no grounds for intervention.

For these reasons, we are all of the view that the appeal should be allowed, the guilty verdicts entered by the Court of Québec restored, and the respondent Daniel Brunelle ordered to report to prison authorities within 72 hours of this judgment.

Appeals-Ineffective Assistance of Counsel:

In ***R. v. White***, 2022 SCC 7, March 18, 2022, the accused was convicted after a trial in the Provincial Court of the offences of assault, aggravated assault, and mischief. The Crown had proceeded by way of indictment. His appeal to the Court of Appeal of Newfoundland and Labrador (Hoegg JA dissenting) was allowed on the basis that the accused's counsel failed to inform him of his ability to elect to be tried in the Supreme Court. The Court of Appeal ordered a new trial. The Crown appealed to the Supreme Court of Canada as of right.

The appeal was allowed and the matter was remitted to the Court of Appeal. In an oral judgment, the Supreme Court stated:

> Karakatsanis J. — This appeal as of right comes to us based on the dissent of Hoegg J.A. in the Court of Appeal of Newfoundland and Labrador. For the following reasons, we are all agreed to allow the appeal.
>
> The respondent, Trent White, was charged with several offences following an incident on a fishing vessel off the coast of Labrador in 2017. The charges included aggravated assault, an offence for which Mr. White had a right to choose between a trial in the Provincial Court, a trial in the Supreme Court before a judge alone, and a trial in the Supreme Court before a judge and jury (*Criminal Code*, R.S.C. 1985, c. C-46, s. 536(2)). His trial counsel told the court that Mr. White was electing for a trial in Provincial Court. He was later convicted of assault, aggravated assault, and mischief.
>
> Mr. White appealed, seeking a new trial on the basis of ineffective assistance of counsel. According to him, his trial counsel had failed to advise him of his choices and had elected for a Provincial Court trial on his behalf without discussion or instructions. Mr. White did not indicate, however, that he would have considered a different election, or that he would elect differently on a retrial.
>
> A majority of the Court of Appeal of Newfoundland and Labrador accepted Mr. White's uncontradicted evidence, allowed his appeal, and ordered a new trial. Reasoning that an election is one of the important rights of an accused, the majority concluded that his counsel's failure to advise his client, or to seek his instructions on the choice, undermined trial fairness and resulted in a miscarriage of justice, satisfying the test for ineffective assistance of counsel (para. 23 (CanLII)). Citing the Ontario Court of Appeal's decision in *R. v.*

Stark, 2017 ONCA 148, 347 C.C.C. (3d) 73, it explained that Mr. White was "not required to establish further prejudice" (para. 12).

We agree that the right to elect the mode of trial is an important right that should be exercised by the accused. But we do not agree that Mr. White has shown that the circumstances of this case resulted in a miscarriage of justice.

Rather, we agree with Hoegg J.A., in dissent, that ineffective assistance of counsel was not made out. Ineffective assistance has a "performance component" and a "prejudice component": for such a claim to succeed, the appellant must establish that (1) counsel's acts or omissions constituted incompetence; and (2) that a miscarriage of justice resulted (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 26). Here, Mr. White failed to state that he would have chosen differently had counsel informed him of his right to elect his mode of trial. Even accepting Mr. White's evidence that there was no discussion or consultation regarding his right of election, it did not rise to a miscarriage of justice in this case.

In *G.D.B.*, the Court explained that counsel's failure to discuss and obtain instructions on fundamental decisions relating to an accused's defence "may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice" (para. 34). *Stark* itself recognizes this at para. 32. However, the Court has never provided that the loss of those decisions alone warrants a new trial on ineffective assistance grounds. To the extent that Stark suggests otherwise, it is incorrect. The accused must, in most cases, demonstrate more than the loss of choice.

Although it did not address ineffective assistance of counsel, the Court in *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, explained that to withdraw a guilty plea on the basis that the accused was unaware of legally relevant consequences, an accused must show subjective prejudice. Subjective prejudice demanded that an accused demonstrate there was a "reasonable possibility" they would have acted differently (para. 6). The Court was unanimous that a mere failure to exercise an informed choice was insufficient. In our view, these principles also apply to an accused's election of the mode of trial.

Further, Mr. White's request for a new trial cannot succeed on the basis of an appearance of unfairness. The standard for establishing a miscarriage of justice on this basis is high; the defect must be "so serious that it shakes public confidence in the administration of justice" (*R. v. Davey*, 2012 SCC 75, [2012]

> 3 S.C.R. 828, at para. 51, quoting *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89). While the loss of his right to elect was serious, the facts of this appeal do not rise to that standard. Indeed, if Mr. White's convictions were set aside, and he proceeded with the same election on retrial, that could undermine public confidence in the administration of justice.
>
> Finally, even if Mr. White's loss of his election amounted to a procedural error under s. 536(2) of the *Criminal Code*, the Provincial Court retained jurisdiction to hear the matter, since the court had jurisdiction "over the class of offence" under s. 686(1)(b)(iv) of the Criminal Code (*R. v. Esseghaier*, 2021 SCC 9, at para. 48, fn. 2).
>
> For these reasons, we would allow the appeal and remand the matter to the Court of Appeal to address Mr. White's remaining grounds of appeal, which were not addressed below.

Procedure-The Scope of Case Management Authority:
Procedure-Trials-Curtailing Cross-Examination:

In ***R. v. Samaniego***, 2022 SCC 9, March 25, 2022, the accused and a co-accused (Mr. Serrano) were charged with illegal possession of a firearm. The accused and the co-accused had gone to a club, but a security guard would not allow the accused to enter the club. He allowed the co-accused, a good friend, to do so. The security guard testified that the accused became upset and threatened him with a gun he had in the waistband of his pants.

During cross-examination of the security guard, the trial judge prohibited counsel for the accused from pursuing four lines of inquiry: (1) whether there was a cocaine transaction between the co-accused and the security guard; (2) whether the security guard was scared at any time during the incident; (3) whether the security guard refused to identify the two accused; and (4) who dropped the gun and who picked it up.

The accused was convicted. His appeal to the Ontario Court of Appeal was dismissed. He appealed to the Supreme Court of Canada. The Court indicated that the appeal involved the following issues (at paragraph 15):

> -What is the scope of the trial management power?
>
> -Did the trial judge err by curtailing cross-examination in any of the four rulings?

> -If so, can the curative proviso be applied to sustain Mr. Samaniego's conviction?

The appeal was dismissed. The Supreme Court held that "three of the impugned rulings were free from error. The fourth ruling was erroneous in part…however, it occasioned no substantial wrong or miscarriage of justice" (at paragraph 5).

What is the scope of the trial management power?

The Supreme Court indicated that the "trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion…Judges may intervene to manage the conduct of trials in many ways, including restricting cross-examination that is unduly repetitive, rambling, argumentative, misleading" (at paragraphs 20 and 22).

Did the trial judge err by curtailing cross-examination in any of the four rulings?

The Court concluded that three of the four rulings illustrated no error.

(1) Whether there was a cocaine transaction between the co-accused and the security guard:

The Court held (at paragraph 37):

> …trial counsel repeatedly said that she wanted to ask about cocaine to demonstrate that Mr. Serrano went to the club to sell cocaine to, or buy cocaine from, the security guard. The trial judge was entitled to rely on the purpose articulated by counsel for the proposed line of questioning. Even though the judge did not explicitly use the words "good faith", her findings demonstrate that she answered the correct question: Was there a reasonable inference available on the facts that there was a cocaine transaction between Mr. Serrano and the guard? The judge found that the drug deal hypothesis was "completely speculative" and without any basis after reviewing the surveillance video. This finding is tantamount to finding that no reasonable inference could be drawn and, therefore, that there was no good faith basis to ask the questions (*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 48).

(**2) Whether the security guard was scared at any time during the incident:**

The Court held (at paragraph 43):

> …It was misleading to suggest that the security guard was not scared that day and only reference a passage of the police statement which supported this suggestion, knowing that elsewhere in the statement, he told the police he was scared. While not an irrelevant line of questioning, it would have been a needless waste of court time to allow trial counsel to pursue it, only to learn later that the questions were misleading and could only serve to distract or confuse the jury. The judge reasonably exercised her trial management power to stop this misleading questioning and correct it with an instruction to the jury.

(3) Whether the security guard refused to identify the two accused:

The Court held (at paragraph 54):

> The trial judge appropriately prevented trial counsel from pursuing this misleading line of questioning. The judge was entitled to rely on trial counsel's articulated purpose for her questions. Trial counsel's purpose was to suggest that the security guard refused to identify the two accused at the preliminary inquiry. This was simply not true. The guard's comment about not recalling whether the two persons in the video were the two accused must be taken in context. At the preliminary inquiry, the guard identified the two accused as those involved in the incident, both before and after the impugned comment. To suggest he refused to identify the accused was misleading.

(4) Who dropped the gun and who picked it up:

The security guard told the police that the co-accused dropped the gun in front of him at the club and picked it back up. At the preliminary inquiry, he initially testified that he was unsure who dropped the gun and picked it up, but subsequently adopted the contents of his statement to the police.

At the trial, the trial judge ruled that defence counsel "could challenge the security guard on the contents of his police statement and on his failing memory. She could not, however, question him about his first version of events before adopting his police statement as past recollection recorded. The trial judge decided that, since the

preliminary inquiry judge ruled that the guard's police statement was his evidence on that point, she could not go 'back behind that ruling'" (see paragraph 61).

The Court held that the trial judge erred (at paragraph 64):

> …It was incorrect for the judge to tell trial counsel she could not go "behind" the preliminary inquiry judge's ruling on past recollection recorded. Trial judges are not bound by evidentiary rulings made at the preliminary inquiry. More importantly, the guard's adoption of his police statement as true did not erase his different initial version of events. With respect, the trial judge erred in holding that there was no inconsistency trial counsel could probe, had she sought to do so. The remaining question is whether this error was fatal. In my view, it was not.

If so, can the curative proviso be applied to sustain Mr. Samaniego's conviction?

The Court held (at paragraph 78):

> Overall, I am satisfied that the judge's technical error caused no substantial wrong or miscarriage of justice. It is difficult to see how the prejudice alleged by Mr. Samaniego materialized. Trial counsel was able to vigorously challenge the security guard's credibility and repeatedly emphasize the primary defence theory that he was lying to protect Mr. Serrano. Furthermore, there was no indication that she wanted to ask the questions improperly barred by the trial judge. Even if she did want to pursue the line of questioning barred by the judge, this would likely have undermined — rather than supported — the primary theory advanced by Mr. Samaniego. In the context of this trial, the trial judge's error was harmless and would not have affected the outcome. There was no miscarriage of justice.

Trials-Considering a Complainant's Lack of Embellishment and Absence of Proof of a Motive to Lie-Application of W.(D.):

In ***R. v. Gerrard***, 2022 SCC 13, April 19, 2022, the accused was convicted of a number of intimate violence offences. The convictions were upheld on appeal, with a dissent. The accused appealed, as of right, to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court rendered the following oral judgment:

> Mr. Gerrard appeals his 13 domestic violence-related convictions to this Court, as of right, based upon a dissenting opinion at the Nova Scotia Court of Appeal. A majority of the Court of Appeal rejected his submissions that the trial judge erred both in her application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and her assessment of the complainant's credibility.
>
> We would dismiss the appeal. On the first issue, the trial judge instructed herself correctly on the *W.(D.)* test and its application. It is immaterial that the trial judge assessed the complainant's credibility before the accused's; this does not automatically demonstrate that she reversed the burden of proof (*R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 21). Rather, the trial judge's reasons demonstrate that she did not evaluate the complainant's evidence in isolation, but properly tested it against the evidence of other witnesses — including the accused — and offered cogent reasons for finding that the complainant's evidence was credible without improperly marginalizing that of Mr. Gerrard's or any of the other witnesses. Trial judges' reasons must be read generously, as a whole, and with the presumption that the judge knows the law (*R. v. G.F.*, 2021 SCC 20, at paras. 69 and 74). We see no reason to interfere with her analysis.
>
> On the second issue, we do not accept Mr. Gerrard's submission that the trial judge made improper credibility findings about the complainant regarding lack of motive to lie, lack of embellishment, and reluctance to report to the police and testify. The trial judge properly considered each of these factors in assessing the complainant's credibility as a direct response to Mr. Gerrard's defence at trial, namely that the complainant had long threatened to report him to the police and finally followed through with this threat by fabricating allegations because he made a derogatory comment about her to her daughter. Put another way, he alleged that she had a motive to lie and was, in fact, lying. Credibility findings are owed significant deference on appeal (*G.F.*, at para. 81). The trial judge's reasons were responsive to live issues at trial — raised by Mr. Gerrard — and reveal no error justifying intervention.
>
> Two of these factors warrant a few additional comments. Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence (*R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 10-11; *R. v. Ignacio*, 2021 ONCA 69,

> 400 C.C.C. (3d) 343, at paras. 38 and 52). Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility — neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations (*R. v. Swain*, 2021 BCCA 207, 406 C.C.C. (3d) 39, at paras. 31-33).
>
> Lack of embellishment may also be relevant in assessing a complainant's credibility and often arises in response to suggestions that the complainant has a motive to lie. But, unlike absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, lack of embellishment is not an indicator that a witness is more likely telling the truth because both truthful and dishonest accounts can be free of exaggeration or embellishment. Lack of embellishment cannot be used to bolster the complainant's credibility — it simply does not weigh against it. It may, however, be considered as a factor in assessing whether or not the witness had a motive to lie.
>
> For these reasons, we would dismiss the appeal.

Trials-Stereotypical Reasoning:

In ***R. v. D.R.***, 2022 SCC 50, December 1, 2022, the accused was charged with the offence of sexual assault, in relation to his granddaughter. After a trial, he was acquitted. The Crown appealed from acquittal, arguing that the trial judge erred in "assessing the complainant's (ABR) credibility by engaging in impermissible stereotypical reasoning". In acquitting the accused, the trial judge made reference to the complainant having a strong and normal relationship with her grandfather. The Crown appealed.

A majority of the Newfoundland and Labrador Court Appeal (White JA dissenting), allowed the appeal and a new trial was ordered. The Court of Appeal concluded that the trial judge's "introduction of the strength and normality of ABR's relationship

with her grandfather as a step in his analysis of whether DR committed the offences as charged is obfuscating and diversionary. It has no place in determining whether alleged sexual abuse has occurred" (at paragraph 37).

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:

> This is an appeal as of right from a decision of the Newfoundland and Labrador Court of Appeal setting aside acquittals and ordering a new trial in a case of sexual assault, among other offences.
>
> The accused is the grandfather of the complainant, who was between 7 and 10 at the time of the alleged offences. There was evidence that the complainant was happy to see the accused and exhibited no avoidant behaviour toward him. From this, the trial judge inferred that the complainant had a "strong and normal" relationship with the accused, which caused the trial judge to doubt the credibility of her testimony regarding the alleged offences. Writing for the majority, Hoegg J.A. observed that the trial judge "rested his reasonable doubt on his conclusion . . . that their strong and normal relationship meant that her grandfather could not have been sexually abusing her" (para. 34 (CanLII)).
>
> We agree with the majority of the Court of Appeal that this inference by the trial judge was rooted in stereotypical reasoning, rather than the entirety of the evidence, and that this constituted an error of law. While the trial judge set out other lines of reasoning relating to the complainant's credibility, his reliance on stereotypical inferences undermines his assessment of her credibility and, thus, his verdict. The majority of the Court of Appeal decided, correctly in the circumstances, that the trial judge's stereotypical reasoning had a material effect on the acquittal of the accused (see para. 61 and the heading for that paragraph).
>
> Accordingly, we would dismiss the appeal and order a new trial.

Vertical and Horizontal Stare Decisis:

In ***R. v. Sullivan***, 2022 SCC 19, May 13, 2022, the accused was convicted of two assault charges. The trial judge held that the defence of extreme intoxication akin to automatism was not available by virtue of section 33.1 of the *Criminal Code*.

On appeal, the accused argued that section 33.1 violated section 7 of the *Charter* (see earlier summary). In addition, he argued that "the trial judge had been bound by a previous declaration by a superior court judge in the province that held s. 33.1 to be of no force and effect".

The Supreme Court indicated that the "issue raised by Mr. Sullivan provides an opportunity to clarify whether a declaration made under s. 52(1) binds the courts of coordinate jurisdiction in future cases due to the principle of constitutional supremacy, or whether the ordinary rules of horizontal stare decisis apply. As I shall endeavour to explain, *stare decisis* does apply and the trial judge was only bound to that limited extent on the question of the constitutionality of s. 33.1. The right approach can be stated plainly. Superior courts at first instance may not be bound if the prior decision is distinguishable on its facts or if the court had no practical way of knowing that the earlier decision existed. Otherwise, the decision is binding and the judge may only depart from it if one or more of the exceptions helpfully explained in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply" (at paragraph 6).

The Supreme Court concluded that "[t]rial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances" at paragraph 75):

> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> 2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
>
> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

The Supreme Court also indicated that "these criteria do not detract from the narrow circumstances outlined in *Bedford*, at paras. 42-45, describing when a lower court may depart from binding vertical precedent" (at paragraph 80).

Finally, the Court noted that horizontal *stare decisis* "applies to courts of coordinate jurisdiction within a province, and applies to a ruling on the constitutionality of legislation as it does to any other legal issue decided by a court, if the ruling is binding. While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well

as for the reasons supporting *stare decisis* generally (*Parkes*, at p. 158). A constitutional ruling by any court will, of course, bind lower courts through vertical *stare decisis*" (at paragraph 65).

SENTENCING

Imposing a Sentence Greater Than the One Requested by the Crown:

In ***R. v. Nahanee***, 2022 SCC 37, October 27, 2022, the Supreme Court of Canada considered when a sentencing judge can impose a sentence greater than the one requested by the Crown and the procedure that should be followed. The Court noted that the "public interest test adopted by this Court in *Anthony-Cook* does not, and should not, apply to contested sentencing hearings following a guilty plea, regardless of the amount of prior negotiation between the parties culminating in the plea. In such cases, however, if the sentencing judge is of a mind to impose a harsher sentence, in any respect, than what the Crown has proposed, they should notify the parties and give them an opportunity to make further submissions — failing which, they run the risk of having the harsher sentence overturned on appeal" (at paragraph 4).

Procedure-Notice Requirements:

The Court held that the sentencing judge must provide the parties with "adequate notice" of the intention to impose a greater sentence (at paragraphs 44 to 46):

> Sentencing judges should let the parties know as soon as possible if they are concerned that the Crown's proposed sentence is, or may be, too lenient and they are contemplating exceeding it.
>
> Adequate notice does not require the judge to set out in detail, or with exactitude, what it is that they find troublesome with the Crown's proposed sentence; they should, however, do so whenever possible. It is enough for a judge to advise the parties that, in their view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. Providing comprehensive reasons for this concern may, and often will, prove impossible since the judge's position at this point is unlikely to be fixed. As indicated, the purpose is simply to put the parties on notice that the judge is considering exceeding the Crown's proposed sentence. Notifying the parties can be as simple as saying: I am considering imposing a higher sentence than the Crown is seeking due to the seriousness of this offence (see, e.g., *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 37). While notice need not take

> a particular form, it must be more than simply asking questions or expressing vague concerns about the parties' sentencing proposals.
>
> There may be cases where the judge has no thought of imposing a harsher sentence than the Crown has proposed until the sentencing hearing is over and the judge has reserved their decision. When that occurs, the judge should notify the parties as soon as possible and invite further submissions, either orally or in writing. At this juncture, the judge may be able to provide greater detail as to the reasons for their concern.

Sentencing-Proceeds of Crime-Fines in Lieu of Forfeiture:

In ***R. v. Vallières***, 2022 SCC 10, March 31, 2022, the accused was convicted of the offences of fraud and theft of maple syrup. The maple syrup stolen was valued at eighteen million dollars. The accused received ten million dollars. The sentencing judge, pursuant to section 462.37(3) of the *Criminal Code*, imposed a fine of ten million dollars in lieu of an order for forfeiture of the property that was proceeds of crime. On appeal, the Quebec Court of Appeal reduced the fine to one million dollars. The Crown was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court allowed the appeal and reinstated the fine imposed by the trial judge.

The Supreme Court noted that a fine in lieu is "first and foremost, in the nature of a forfeiture order. It has consistently been held that the forfeiture inquiry is independent of the broader inquiry undertaken with respect to sentencing and the principles related thereto…It is therefore imperative that, when calculating the amount of a fine in lieu, courts put aside the general principles of sentencing that are incompatible with the nature of this order" (at paragraph 24).

The Court indicated that the "imposition of a fine in lieu may be considered where forfeiture of the property that is proceeds of crime has become impracticable. In such a case, a court may, instead of ordering the forfeiture of the property, order the offender to pay a fine equal to the value of the property (s. 462.37(3) *Cr. C.*). Although the use of the word 'may' indicates that Parliament intended courts to have some discretion, I am of the view that this discretion does not allow them to limit the amount of a fine in lieu to the profit made from a criminal activity, even in cases where this would be consistent with the dual objective of deprivation of proceeds and deterrence…The fine is 'equal to the value of the property' that is proceeds of crime…Equivalency between the amount of the fine and the value of the property is inherent in the notion of substitution" (at paragraphs 26, 27, and 30).

The Court held that as a result, "[i]t follows that the amount of the fine does not vary based on an offender's degree of moral blameworthiness or the circumstances of the offence. Rather, the dual objective of the fine is to deprive an offender of the proceeds of their crime and to deter them from reoffending. But the objective of deterrence is not focused only on the actual offender: it also applies to potential accomplices and criminal organizations…Reducing a fine to the profit made by an offender from their criminal activities would clearly be contrary to this objective" (at paragraphs 33 and 34).

The Co-Accused:

The Court noted that in this case, "several co-accused had possession or control of the same property that constitutes proceeds of crime. More specifically, this case involves successive possession of the same property, namely the $10,000,000 that was in Mr. Vallières's possession and under his control, only part of which he ultimately kept following a redistribution to his accomplices" (at paragraph 38).

The Court held that "courts may divide the value of property among several co-accused in order to avoid a risk of double recovery. This risk arises where the Crown seeks to have a fine in lieu imposed on more than one offender in relation to the same proceeds of crime. At the stage of imposing a fine in lieu, one can speak only of a 'risk' of double recovery, for it may well be that this scenario will never materialize given the fact that some co-accused might be unable to pay their fine within the time allotted. However, this possibility does not prevent a court from apportioning the fine between co-accused if there is a risk of double recovery, if apportionment is requested by the offender and if the evidence allows this determination to be made…The onus is on the offender to make the request and to satisfy the court that it is appropriate to apportion the value of the property between co-accused, since apportionment is an exception to the general principle that the amount of the fine must correspond to the value of the property that was in the offender's possession or under their control" (at paragraphs 39 and 40).

Trials-Continuation of Proceedings-Section 669.2(3) of the *Criminal Code*:

In ***R. v. J.D.***, 2022 SCC 15, April 22, 2022, the accused was charged with a number of sexual offences against children. At his trial, one of the children (CD) testified. However, the trial could not be completed because the presiding judge became ill and could not continue. A new trial judge was assigned to continue the trial pursuant

to section 669.2 of the *Criminal Code*. Both parties agreed that the new judge could consider a transcript of CD's evidence.

The accused was convicted of a number of counts. On appeal, the Quebec Court of Appeal set aside the convictions entered in relation to the counts in which CD was the complainant (counts 1 and 2) and others in which CD's evidence was considered (counts 9 to 13). The Quebec Court of Appeal held that the new trial judge has a duty to determine whether the consent to the filing of the transcript was voluntary and informed, even though the accused is represented by counsel.

The Crown appealed to the Supreme Court of Canada.

The appeal was allowed and the convictions reinstated. The Supreme Court held that "[t]here is no reason to require an inquiry that is not provided for by law where the parties have consented to the filing, in a trial that was commenced again, of a transcript of testimony given at a first trial. Such an inquiry would completely alter the judge's role, minimize the judge's ability to assess the transcript of prior testimony and run counter to the presumption of the competence of counsel" (at paragraph 4).

The Supreme Court held that "where a trial is by judge alone and must be commenced again before a new judge, that judge may not require the parties, or one of them, to file evidence from the first trial. The trial must absolutely be commenced again" (at paragraph 24). However, "[a]t the outset of the second trial, both the prosecution and the defence are free to proceed as they see fit as regards the presentation of their evidence". The parties may "proceed by filing transcripts of prior testimony" (at paragraph 26).

The Supreme Court concluded that section 669.2(3) "does not bar a transcript of testimony given at a first trial from being filed as evidence on the merits in a second trial, nor does it require an inquiry by the judge in this regard. Nevertheless, s. 669.2 does not eliminate the judge's power not to allow a transcript to be filed if he or she finds that the prejudicial effect of filing it would undermine the fairness of the trial. A judge who finds that trial fairness is undermined must intervene" (at paragraph 35).

Offences-Sexual Assault-Consent-Fraud:

In ***R. v. Kirkpatrick***, 2022 SCC 33, July 29, 2022, the accused was charged with the offence of sexual assault. The Supreme Court indicated that "the complainant gave evidence that she had communicated to the appellant that her consent to sex was contingent on condom use. Despite the clear establishment of her physical

boundaries, the appellant disregarded her wishes and did not wear a condom. This was evidence of a lack of subjective consent by the complainant — an element of the *actus reus* of sexual assault" (at paragraph 3).

At the trial, the trial judge allowed the accused's motion for a directed verdict. The British Columbia Court of Appeal set aside the acquittal and ordered a new trial. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court indicated that "when consent to intercourse is conditioned on condom use, the only analytical framework consistent with the text, context and purpose of the prohibition against sexual assault is that there is no agreement to the physical act of intercourse without a condom. Sex with and without a condom are fundamentally and qualitatively distinct forms of physical touching. A complainant who consents to sex on the condition that their partner wear a condom does not consent to sex without a condom. This approach respects the provisions of the *Criminal Code*, this Court's consistent jurisprudence on consent and sexual assault and Parliament's intent to protect the sexual autonomy and human dignity of all persons in Canada. Since only yes means yes and no means no, it cannot be that 'no, not without a condom' means 'yes, without a condom'. If a complainant's partner ignores their stipulation, the sexual intercourse is non-consensual and their sexual autonomy and equal sexual agency have been violated" (at paragraph 2).

The Supreme Court indicated that the appeal raised two issues (at paragraphs 23 and 24):

> First, when a complainant makes their consent to sexual intercourse conditional on their partner wearing a condom, does failure to wear a condom result in "no voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1) of the *Criminal Code*, or should failure to wear a condom be analyzed under the fraud provision in s. 265(3)(c)?
>
> Second, what is required to establish fraud, and was there some evidence of dishonesty by the appellant capable of constituting fraud vitiating consent under s. 265(3)(c) of the *Criminal Code*?

Interpreting the "Sexual Activity in Question" in Section 273.1(1):

The Supreme Court indicated that "[t]he legal meaning given to the 'sexual activity in question' cannot be narrowly drawn or fixed for all cases. Like the consent of which it is part, it is tied to context and cannot be assessed in the abstract; it relates to particular behaviours and actions (*Hutchinson*, at para. 57; *Barton*, at para. 88). Much will depend on the facts and circumstances of the individual case. In a very

real way, it will be defined by the evidence and the complainant's allegations. What touching does the complainant say was unlawful? Which acts were beyond the boundaries of any consent given? The sexual activity in question will emerge from a comparison of what actually happened and what, if anything, was agreed to. This is bound to change in every case" (at paragraph 40).

The Court held that "condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom… All principles of statutory interpretation compel the conclusion that sex with a condom is a different physical activity than sex without a condom. It is the only meaning of the 'sexual activity in question' that reads s. 273.1 as a whole and harmoniously with this Court's jurisprudence on subjective and affirmative consent. In addition, it fulfills Parliament's objective of giving effect to the equality and dignity-affirming aims underlying the sexual assault prohibitions; responds to the context and harms of non-consensual condom refusal or removal; and respects the restraint principle in criminal law. While vitiation by fraud may still arise in other cases, it does not apply when condom use is a condition of consent" (at paragraphs 43 and 45).

Defences-Entrapment:

On November 24, 2022, the Supreme Court of Canada released four judgments in which it considered the defence or excuse of entrapment (***R. v. Ramelson***, 2022 SCC 44, ***R. v. Jaffer***, 2022 SCC 45, ***R. v. Haniffa***, 2022 SCC 46, and ***R. v. Dare***, 2022 SCC 47). The entrapment issue was considered in these appeals in the context of online police investigations in which the police provided individuals with an opportunity to commit sexual offences against children. All four of the appeals involved the accused communicating with undercover police officers through an online escort service. In each case, the undercover officers indicated that they were children. In each case, the accused, despite this information, agreed to meet the children at a hotel room. All four went to the designated room where they were arrested and charged with various offences.

At their trials, all four argued that a judicial stay of proceedings should be entered based upon them having been entrapped. These arguments were rejected by the trial judges in all of the cases except one (***Ramelson***). In the latter case, the Ontario Court of Appeal set aside the stay. All four individuals were granted leave to appeal by the Supreme Court of Canada.

The Circumstances Involved:

The general circumstances involved, which were common to each accused, were described by the Supreme Court of Canada in the following manner (at paragraphs 3, 12 and 15 of ***Ramelson***):

> Between 2014 and 2017, "Project Raphael", an online investigation of the York Regional Police (YRP), led to the arrests of 104 men for child luring and related offences. Ads posted by the police on the escort subdirectory of Backpage.com spurred text-message conversations, where an undercover officer, after agreeing to provide sexual services, revealed themselves to be a juvenile. All those who took up the invitation to visit the designated hotel room were arrested. Among them was the appellant in this case, Mr. Ramelson, as well as the three appellants in the related appeals (Mr. Jaffer (*R. v. Jaffer*, 2022 SCC 45), Mr. Haniffa (*R. v. Haniffa*, 2022 SCC 46), and Mr. Dare (*R. v. Dare*, 2022 SCC 47)). They argue they were entrapped.
>
> Project Raphael placed similar ads on Backpage, listing the age as 18 (the minimum the website would permit) and using words like "tight", "young", "new" or "fresh" in the ad's text, emulating common Backpage advertisements for the youngest sex workers (2019 ONSC 6894 (first ruling on entrapment), at para. 11 (CanLII); A.R., vol. II, at p. 135). When potential clients responded, the police, imitating an adolescent's idiom, arranged a sexual transaction. When the client agreed, the police revealed the sex worker was underage. When the client continued to engage, the police invited them to a hotel room.
>
> Although never recorded, the number of responses was "overwhelming". And the number of arrests was significant. In 2014-15, posing most often as a 16-year-old, the police made a total of 32 arrests in 8 days online. In 2016, with the age lowered to 15, the police made 53 arrests in 8 days. And in 2017, with the age further lowered to 14, the police made 19 arrests in 4 days. In total, Project Raphael led to the arrest of 104 people, all in only 20 days of operation.

The Elements of the Defence of Entrapment:

The Supreme Court described the elements of the entrapment defence as follows (***Ramelson***, at paragraphs 4 and 5):

> When the police lack reasonable suspicion that the individual is already engaged in criminal activity, the entrapment doctrine forbids them from offering opportunities to commit offences unless they do so in the course of a

"*bona fide* inquiry": that is, where they (1) reasonably suspect that crime is occurring in a sufficiently precise space; and (2) have a genuine purpose of investigating and repressing crime (*R. v. Ahmad*, 2020 SCC 11, at para. 20). That test applies to investigations in physical and virtual spaces alike. But as this Court noted in *Ahmad*, "state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space" (para. 37). There, the Court considered those differences in the context of surveillance that transpired in the investigative "space" of a phone number. This appeal, and the three related appeals, require us to do the same in the context of the Internet.

At its core, the entrapment doctrine recognizes that sometimes "the ends do not justify the means" (*R. v. Mack*, [1988] 2 S.C.R. 903, at p. 938). Given the Internet's potential reach, there is a strong public interest in ensuring that online police investigations do not unduly intrude on public life. In assessing whether an online space is sufficiently precise to ground the police's reasonable suspicion, then, the Internet's unique features must be considered. Being informational rather than geographical, online spaces flout the limitations of physical spaces; they may lead people to behave differently than they do in person; and their use can raise distinct rights concerns, notably over privacy. Unlike physical spaces, an online space's parameters may say little about whether the space of an investigation was sufficiently precise. Instead, the space must be viewed with particular attention to its functions and interactivity to ensure that the space has been "carefully delineate[d] and tightly circumscribe[d]" (*Ahmad*, at para. 39). The factors discussed by this Court in *Ahmad* — in particular, the number of activities and people affected, the interests of privacy and free expression, and the availability of less intrusive investigative techniques — may assist in that assessment. They may be key to ensuring that the purview of an online police investigation was no "broader than the evidence allow[ed]" (para. 41).

The Entrapment Doctrine:

The Supreme Court noted that "[w]hatever their utility in fighting crime, some police techniques are 'unacceptable in a free society with strong notions of fairness, decency, and privacy'…Entrapment is one of them. It is not a traditional defence, but a form of abuse of process whose only remedy is a stay of proceedings. It may occur in two ways" (***Ramelso***n, at paragraph 29):

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

However, the Supreme Court also indicated that the police are entitled to "considerable latitude" in their investigations, "such that a finding of entrapment should issue only in the 'clearest of cases'…The doctrine thus strives to balance competing imperatives: 'The rule of law, and the need to protect privacy interests and personal freedom from state overreach' on the one hand, and 'the state's legitimate interest in investigating and prosecuting crime' on the other" (at paragraphs 33 and 34).

The lead decision was rendered in ***Ramelson***. The remaining three appeals were decided based on the principles enunciated in ***Ramelson***.

R. v. Ramelson:

In this case, the charges against the accused were stayed by the trial judge. The Ontario Court of Appeal set aside the stay. The accused was granted leave to appeal to the Supreme Court of Canada,

The accused in this case "was among those arrested in 2017. On March 27, he messaged 'Michelle', aged 18, who was described as a 'Tight Brand NEW girl . . . who is sexy and YOUNG with a tight body', with a 'YOUNG FRIEND if your [sic] interested too'…The ad featured three faceless photographs of an undercover officer in her 30s, wearing a t-shirt from a local high school. After 27 minutes of somewhat sporadic conversation, and having agreed to a transaction, the undercover officer (UC) revealed their 'true' ages" (at paragraph 16):

> *[UC]: Just so you know we under 18. Some guys freak out and I don't want problems. We are small and it's obvious.*
>
> *[Ramelson]: I'm cool with it. I'll be gentle as long as you're sexy and willing*
>
> *[UC]: We are both willing. We're 14 but will both be turning 15 this year. That cool? We are buddies and very flexable [sic]??*
>
> *[Ramelson]: Should be lots of fun.*

Ramelson was arrested when he arrived at the hotel room. He was charged with three offences:

> Telecommunicating with a person he believed was under the age of 16 years for the purpose of facilitating the commission of an offence, contrary to section 152 of the *Criminal Code of Canada*;
>
> Communicating for the purpose of obtaining for consideration the sexual services of a person under the age of 18 years, contrary to contrary to section 286.1(2) of the *Criminal Code*; and
>
> Telecommunicating to make an arrangement with a person to commit an offence under s. 152 (invitation to sexual touching) contrary to s. 172.2(1)(b) of the *Criminal Code*.

The Appeal:

The Supreme Court indicated that the appeal raised "two broad issues" (at paragraph 26):

> • How does the *bona fide* inquiry prong of the entrapment doctrine apply in the context of online police investigations?

• Did the application judge err in concluding that Mr. Ramelson was entrapped?

(i) Did the police have reasonable suspicion that the s. 286.1(2) offence was occurring in a space defined with sufficient precision?

(ii) If so, were the police entitled to offer the opportunity to commit child luring offences under ss. 172.1 and 172.2 of the *Criminal Code*?

The Supreme Court indicated that the "central issue on appeal is whether Project Raphael was a *bona fide* inquiry. This has two criteria: the police must have had (1) reasonable suspicion over a sufficiently precise space; and (2) a genuine purpose of investigating and repressing crime…Satisfying those criteria entitles the police to present 'any person associated with the area with the opportunity to commit the particular offence' — even without individualized suspicion in the person investigated" (at paragraph 35).

The Court noted that "reasonable suspicion is not onerous; it requires only the reasonable possibility, not probability, that crime is occurring…Yet it still subjects police actions to 'exacting curial scrutiny', to ensure they were founded on objective evidence rather than on profiling, stereotyping or other improper grounds…As an objective standard, it 'protects everyone from random testing', whether they are tempted to commit crimes in the space or not" (at paragraph 53).

As regards how the doctrine of entrapment applies to online investigations, the Supreme Court indicated that "courts assessing whether an online police investigation was *bona fide* must pay close attention to the space's functions and interactivity — that is, to the permeability, interconnectedness, dynamism and other features that make the Internet a distinctive milieu for law enforcement. Even tailored online investigations may represent a broad and profound invasion into peoples' lives. Given the potential of online investigations to impact many more individuals than an equivalent investigation in a physical space, the nature of those impacts deserve scrutiny. How the police act on the Internet may matter as much or more as where they act" (at paragraph 35).

As a result, the Supreme Court indicated that online police investigations will "require the police to focus on more carefully delineated spaces and target their opportunities to particular subspaces or to particular ways in which users engage with the space. This is especially true in places frequented by vulnerable groups, such as racial, religious or sexual minorities, or in spaces whose use carries important

rights implications, where the need for precision is particularly critical" (at paragraph 64).

The Decision:

The Supreme Court indicated that it agreed "with the Court of Appeal for Ontario that the application judge erred by failing to consider factors beyond the number of people affected by the police investigation. On the correct analysis, the police had reasonable suspicion over a sufficiently precise space and the offences the police offered were rationally connected and proportionate to the offence they reasonably suspected was occurring. Mr. Ramelson was therefore not entrapped" (at paragraph 6).

The Supreme Court held that the evidence established that police had reasonable suspicion to believe that the offence of communicating for the purpose of obtaining the sexual services of a person under the age of 18 years was "occurring in the space" they placed their advertizements. The Court concluded that "[i]f the [police] were to address offences related to juvenile sex work, ads in the York Region escort subdirectory of Backpage for the youngest sex workers were places to do so" (at paragraph 76).

The Supreme Court also concluded that the trial judge "failed to properly consider the entire context — in particular, the seriousness of the crimes and the difficulty investigating them via alternative techniques. Like the Court of Appeal, a review of the full context leads me to conclude that the online space in which Project Raphael offered opportunities was defined with sufficient precision to ground the police's reasonable suspicion. I begin with the virtual space's definition, which must be carefully delineated, including, as I have explained, with a view to the space's functions and interactivity" (at paragraph 78).

Finally, the Supreme Court pointed out that it was "when the police mentioned the sex worker's age — that they provided him with the opportunity to commit the offences under ss. 286.1(2), 172.1 and 172.2…By agreeing to proceed with the transaction, all the elements of the offences were satisfied…[s]ting operations have become 'an important tool — if not the most important tool — available to the police in detecting offenders who target children and preventing them from doing actual harm to children'…Given the 'considerable latitude' police are owed in their investigations…, sting operations like Project Raphael should not be foreclosed lightly" (at paragraphs 84 and 92).

R. v. Jaffer:

In this case, the accused's application for a stay of proceedings to be entered was denied by the trial judge and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18 contrary to section 172.1(1)(a) of the *Criminal Co*de, and communicating to obtain for consideration the sexual services of a person under 18 contrary section 286.1(2)). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

The Circumstances Involved:

While "browsing the escort subdirectory of Backpage.com, Mr. Jaffer messaged 'Kathy', aged 18, who was described as a 'Tight Brand New girl' who is 'sexy and young with a tight body'…The posting listed a phone number and an email address titled 'kathyblunt16@gmail.com'. Communicating by text with Mr. Jaffer, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (at paragraph 2):

> *[UC]: . . . how old r u*
>
> *[Jaffer]: 22*
>
> *[UC]: . . . well im not quite 18 yet r u ok with that*
>
> *[Jaffer]: Yeah I'm ok . . . but how much younger are u? 17?*
>
> *[UC]: im turning 16 on sunday but I look 18*
>
> *[Jaffer]: Um . . . ok but how do I know you're not a cop?*
>
> *[Jaffer]: I really don't want to get in trouble ya know*
>
> *[UC]: and i definitely don't want trouble*
>
> *[Jaffer]: Ok can I ask why you're escorting if it's ok with u? Usually people your age don't know about this industry*
>
> *[Jaffer]: Just curios*
>
> *[UC]: my friend got me into it . . . i just need the money i dont do this all the time its my second time honestly i need the money.*

> *[Jaffer]: I see . . . I like that you're honest. I can trust u then. So I'll come then but please please let's keep this between ourselves.*

The Supreme Court's Decision:

The appeal was dismissed and the convictions affirmed. The Supreme Court indicated that the accused adopted "the arguments raised in the companion appeals as they concern opportunity-based entrapment, adding that the police lacked reasonable suspicion over him personally. I have addressed these points in my reasons in *Ramelson*, where I concluded that Project Raphael was a bona fide inquiry. For the reasons given in that case, I would not accede to these grounds of appeal" (at paragraph 7).

However, Mr. Jaffer also raised an additional argument. He argued that the trial judge erred "in failing to take his personal circumstances into account when assessing whether he was induced. Mr. Jaffer acknowledges that the police could not have known that he was living with undiagnosed Asperger's Syndrome, but submits that such personal circumstances are relevant and ought to be considered in the analysis of inducement-based entrapment. Mr. Jaffer explains that the common symptoms of his condition — in particular, a difficulty socializing and rigid rule compliance — put him at a heightened risk for being induced. In addition, that condition, and an earlier interaction he had with police, where he had agreed to provide information about a particular sex worker and her pimp, lent credence to his explanation that he had planned to meet 'Kathy' only to gather information and alert the authorities" (at paragraph 8).

The Supreme Court indicated that the entrapment excuse allows a trial judge to consider judge whether the police "appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction". However, the Court declined to deal with this issue, holding that there was no evidence "that the police 'employed means which go further than providing an opportunity' to commit the offences" (at paragraphs 9 and 10):

> The inducement branch of the entrapment doctrine provides that even if the police have reasonable suspicion over an individual or act under a bona fide inquiry, they cannot "emplo[y] means which go further than providing an opportunity" to commit a crime (*R. v. Mack*, [1988] 2 S.C.R. 903, at p. 966). That assessment may include looking at "whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime" or whether the police "appear to have

> exploited a particular vulnerability of a person such as a mental handicap or a substance addiction", among other factors (p. 966). But the assessment is objective and focuses on the police's conduct, not on that conduct's effect "on the accused's state of mind" (p. 965).
>
> In my view, the issue of whether that framework ought to be revised is better left for another case. Whatever the merit of Mr. Jaffer's legal arguments — a point I do not decide here — the jury, in full knowledge of Mr. Jaffer's circumstances, rejected his evidence that he had intended to visit the hotel room solely to gather information. In convicting him, the jury did not have a reasonable doubt about the purpose for which he arranged the meeting. Echoing that conclusion, the application judge found that Mr. Jaffer had been intent on a sexual transaction, even after learning the sex worker's age. No error in those findings has been demonstrated. Nor has Mr. Jaffer pointed to any indication that the police "employed means which go further than providing an opportunity" to commit the offences (*Mack*, at p. 966). Even if Mr. Jaffer's subjective circumstances were considered under the legal framework for inducement, then, they could not affect the result. I would not accede to this ground of appeal.

R. v. Haniffa:

In this case, the accused's application for a stay of proceedings to be entered was denied by the trial judge and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18 years, for the purpose of committing an offence, contrary to section 172.1(1)(a) of the *Criminal Code*; telecommunicating with a person he believed to be under the age of 16 years for the purpose of committing an offence under section 152 (invitation to sexual touching), contrary to s. 172.1(1)(b); and communicating to obtain sexual services for consideration from a person under 18 years, contrary to s. 286.1(2). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

The Circumstances Involved:

While "browsing the escort subdirectory of Backpage.com, Mr. Haniffa responded to an ad purportedly placed by 'Jamie'. The ad indicated she was 18 years old (the minimum age allowed by the website), and described her as 'YOUNG Shy FRESH and NEW', 'super new to this and pretty shy' and as having a friend who is 'young

like me'. Communicating with Mr. Haniffa by text, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (at paragraph 3):

> *[Haniffa]: U busy?*
>
> *[UC]: im free tn after school*
>
> *[Haniffa]: What time is school done?*
>
> *[UC]: 330*
>
> *[UC]: r u ok if im not quite 18 yet?*
>
> *[Haniffa]: Is this like a cop thing or something?*
>
> *[Haniffa]: Can u call u?*
>
> *[UC]: .no silly*
>
> *[Haniffa]: How old r u?*
>
> *[UC]: im 15 to be hones but I look older hun*
>
> *[Haniffa]: Mm*
>
> *[Haniffa]: Ok so where will u be working?*
>
> *[UC]: why the mm babe*
>
> *[Haniffa]: As in mm ok.*

The Supreme Court's Decision:

The accused in this case raised the same arguments presented in ***Ramelson***. For the reasons provided in that decision, the appeal was dismissed (at paragraph 7):

> In this appeal, Mr. Haniffa adopts the questions in issue as set out in the appellant's factum in *Ramelson*, and acknowledges that 'the facts of the present case are sufficiently similar, so that the same conclusions must follow.

However, the accused in this appeal raised an additional ground of appeal. He argued that the evidence of the primary investigator (Inspector Truong), upon whom the

Crown relied to establish a *bona fide* investigation, "was insufficient to ground reasonable suspicion: it was based too heavily on his personal experiences, failed to show the targeted offences were prevalent, and failed to explain how a user would actually locate a juvenile sex worker through the website, given its parameters. And given the potential breadth of investigations into spaces, the police should be limited, in the context of *bona fide* inquiries, to offering the same offences they suspect are occurring; they should not be entitled to offer those that are only rationally connected and proportionate" (at paragraph 7).

The Supreme Court indicated that "[f]or the reasons given in *Ramelson*, I would not accede to these arguments. As I explained there, the police had reasonable suspicion over a sufficiently precise space and the *Mack* standard of 'rationally connected and proportionate' applies and was satisfied. Project Raphael was thus a *bona fide* inquiry. I conclude that Mr. Haniffa was not entrapped" (at paragraph 8).

R. v. Dare:

Finally, in this case, the accused's application for a stay of proceedings to be entered as a result of being entrapped was denied and he was convicted of the offences of telecommunicating with a person he believed to be under the age of 18 years, for the purpose of committing an offence, contrary to section 172.1(1)(a) of the *Criminal Code*; telecommunicating with a person he believed to be under the age of 16 years for the purpose of committing an offence under section 152 (invitation to sexual touching), contrary to section 172.1(1)(b); and communicating to obtain sexual services for consideration from a person under 18 years, contrary to section 286.1(2). His appeal from conviction was dismissed by the Ontario Court of Appeal. He was granted leave to appeal to the Supreme Court of Canada.

The Circumstances Involved:

While "browsing the escort subdirectory of Backpage.com, Mr. Dare responded to an ad purportedly placed by 'Kathy'. The ad indicated she was 18 years old (the minimum age allowed by the website), described her as a 'Tight Brand New girl who is sexy and young with a tight body', and stated that she had a 'YOUNG FRIEND'. Communicating with Mr. Dare by text, the undercover officer (UC) eventually revealed to him that 'she' was 15 years old" (at paragraph 3):

> *[UC]: You cool with young?*
>
> *[Dare]: Yes*

[Dare]: Am also young

[UC]: Ok cool. I'm 15 but look bit older.

[UC]: How old are you if don't mind me asking?

[Dare]: Ok am 22.

The Supreme Court's Decision:

In dismissing the appeal, the Supreme Court noted that Mr. Dare adopted "the appellant submissions made in *Ramelson* and *Haniffa*, stating that 'the facts in the present case are sufficiently similar, so that the same conclusions ought to follow'". The Supreme Court held that for the reasons given in *Ramelson*, where it was held "that Project Raphael was a bona fide inquiry, I would not accede to Mr. Dare's grounds of appeal. He was not entrapped. I would therefore dismiss the appeal" (at paragraph 7).

Conclusion:

The Supreme Court summarized its conclusion by indicating that "[a]t the *actus reus* stage of sexual assault, placing a condition of condom use on consent defines the sexual activity voluntarily agreed to under s. 273.1. The 'sexual activity' to which the complainant must consent may include the use of condoms… Where condom use is a condition of the complainant's consent to the sexual activity in question, it will form part of the 'sexual activity in question' and the consent analysis under s. 273.1. If the *actus reus* is established, the focus will shift to the *mens rea*. If the accused is mistaken and has not been reckless or willfully blind to the complainant's consent, and has taken reasonable steps to ascertain this consent, they may be able to put forward a defence at the *mens rea* stage of the analysis" (at paragraphs 99 and 102).

The Court concluded that "[t]he complainant's evidence in this case was clear: she would not consent to having sex with the appellant without a condom, but the appellant nevertheless chose to engage in sexual intercourse without one. Therefore, there was some evidence that the complainant did not subjectively consent to the sexual activity in question. The trial judge erred in concluding otherwise… Given my conclusion on the first issue, it is not necessary to consider the second issue of whether there was evidence capable of meeting the requirements to establish fraud under s. 265(3)(c)" [at paragraphs 106 and 107].

Conclusion:

As can be seen, this was a busy year for the Supreme Court of Canada in relation to criminal appeals. In addition, the Court rendered a number of significant judgments including ones that considered when the police must provide a second consultation with counsel to detained or arrested persons (***Lafrance***); the introduction of a complainant's private records (***J.J.***); and a number of decisions which considered section 24(2) of the *Charter* (***Ali***, ***Tim***, ***Beaver***, ***Lafrance***, and ***Tessier***).

Amongst these, it will be interesting to see how the Supreme Court's decision in ***Beaver*** is interpreted, as it could be argued that it has strengthened the importance of the third ***Grant*** element in relation to serious offences.

Finally, as it has in the last number of years, this year the Supreme Court of Canada rendered brief oral judgments in a number of appeals that deal with pressing and serious legal issues.