A REVIEW OF DECISIONS RENDERED BY THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR IN CRIMINAL CAUSES OR MATTERS (JANUARY 1, 2023 TO DECEMBER 31, 2023)

JUDGE WAYNE GORMAN
THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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Introduction:

The purpose of this paper is to review those decisions rendered by the Court of Appeal for Newfoundland and Labrador between the time-period of January 1, 2023, to December 31, 2023, which 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 its subject matters.

APPEALS

Appeals-Appointment of Counsel:

In ***R. v. L.H.***, 2023 NLCA 4, February 7, 2023, the accused was acquitted of the offence of sexual assault. The Crown appealed. The accused applied to have counsel appointed.

The application was denied. Justice O'Brien concluded that "based on the information and evidence provided on the application, Mr. H has not established that he does not have sufficient means to obtain legal counsel on the appeal. Accordingly, one of the two considerations outlined in section 684 of the *Code* (and one of the factors in *Ryan)* has not been satisfied…As such, having considered the factors in Ryan and the considerations in section 684 in the context of this application, and having concluded that the requirements for this Court to assign counsel have not been satisfied, Mr. H's application for government-funded legal counsel under section 684 is dismissed" (at paragraphs 27 and 28).

Appeals-Appointment of Counsel, Section 684(1), C*riminal Code*:

In ***R. v. Budgell***, 2023 NLCA 38, December 11, 2023, the accused was convicted of a number of offences, including sexual assault. He appealed from conviction and applied to the Court of Appeal for counsel to be appointed pursuant to section 684(1) of the *Criminal Code*.

The application was denied. Justice Goodridge concluded as follows (at paragraphs 9 and 10):

> I am satisfied that the Court will be able to properly decide the case without the appointment of counsel to assist Mr. Budgell in the conduct of the appeal. This was a straightforward factual case, and the outcome was based on the trial judge's assessment of credibility, as distinct from the application of complex legal principles. The issue raised, whether the trial judge erred in assessment of the evidence, is narrow in scope and not complex. The Court

> will not need the assistance of counsel to effectively deal with the issue. A fair and just result can be obtained when Mr. Budgell pursues his appeal without the assistance of counsel.
>
> Based on a review of the factors, I have concluded that the requirements for this Court to assign counsel have not been met. Accordingly, the application for appointment of counsel, with funding from the Attorney General, is denied.

Appeals-Ineffective Assistance of Counsel:

In ***R. v. White***, 2023 NLCA 28, September 20, 2023, the accused was convicted of the offence of aggravated assault. He appealed from conviction, arguing that he had received ineffective assistance of counsel.

The appeal was dismissed. The Court of Appeal held that the accused "has not established that his lawyer's acts or omissions fell outside the wide range of reasonable professional assistance. Nor has he established that he has been prejudiced by his lawyer's representation such that a miscarriage of justice occurred" (at paragraph 9).

Appeals-Judicial Interim Release:

In ***R. v. Snelgrove***, 2023 NLCA 21, July 28, 2023, the accused was convicted of the offence of sexual assault. His appeal to the Court of Appeal was dismissed. He applied for leave to appeal to the Supreme Court of Canada and applied to the Court of Appeal for judicial interim release.

Release was granted. Justice Knickle concluded as follows (at paragraphs 42 to 45):

> Even if Mr. Snelgrove establishes that there is sufficient merit to his application for leave to be afforded a hearing before the highest court, he will then need to convince the Court of the alleged error. Even if he is successful in establishing that his absence from the discussions was in error, he will still need to convince the Supreme Court of Canada that this Court was wrong to conclude that the *curative proviso* in section 686(1)(b)(iv) applied to rectify any error permitted by his absence from those discussions. In so concluding, this Court considered and found support in: *R. v. Esseghaier*, 2021 SCC 9, *Simon*, *Burnett*, *R. v. Cole*, 2012 ONCA 347, *R. v. T. (L.W.)*, 2008 SKCA 17, and *R. v. Iyamuremey*, 2017 ABCA 276.

Thus, while the grounds are by no means frivolous, success is also by no means assured at this point.

However, when I balance the merits of the interests in the enforceability of the conviction with the reviewability of the conviction, and the fact that there is a good plan in place to address the terms of release, and that there are no safety concerns, the balancing favours release. I also do not ignore that the process of challenging this Court's decision will take time, possibly longer than the sentence Mr. Snelgrove is serving. As stated, the enforceability concern is mitigated by the fact that there is no doubt that if unsuccessful, Mr. Snelgrove will be returned to custody.

For the above reasons, the application for judicial interim release is allowed and Mr. Snelgrove will be released on the terms as proposed by his counsel. Ms. Parsons will act as surety and will promise $10,000 to secure Mr. Snelgrove's release. There is no need to require a cash deposit in these circumstances.

Appeals-Judicial Interim Release:

In ***R. v. Leonard***, 2023 NLCA 39, December 11, 2023, the accused were convicted of offense contrary to the *Controlled Drugs and Substances Act*. They applied for judicial interim release pending appeal.

The applications were granted. Justice O'Brien concluded as follows (at paragraphs 31 and 32):

> With respect to the reviewability factor, I have already assessed the merits of appeal with respect to the first criterion for release. I will not repeat the analysis, but I concluded that the appeal of the section 11(b) decision has a foundation that well surpasses the "not frivolous" standard. This does not mean that the prospect of success on that ground of appeal is good. I do not have enough information before me now to determine that. The merits of the appeal will be determined by a panel of this Court after a full hearing. However, if the appellants are ultimately successful on this ground of appeal, and they establish a section 11(b) *Charter* breach, they may be entitled to a stay of proceedings. Appeals take time to prepare, hear, and decide. Even with the appeals proceeding expeditiously, if not released, the appellants would be expected to serve substantial portions of their sentences before their appeals are decided.

> Balancing the enforceability interest against the reviewability interest, I am satisfied that the public confidence in the administration of justice is better served by releasing the appellants. Although they have been convicted of serious crimes, they have a right to meaningful appellant review of their convictions. They have proposed good release plans, with substantial cash security, and they each have a strong recent history of compliance with court-imposed conditions and respect of court processes.

TRIALS

Trials-Presence of the Accused, Sections 650(1) and 650.01(1) of the Criminal Code-Questions From the Jury:

In ***R. v. Snelgrove***, 2023 NLCA 12, April 18, 2023, the accused was convicted of the offence of sexual assault. While on duty as a police officer, he had sexual contact with an intoxicated woman he had driven home. He appealed from conviction arguing that (at paragraphs 8 and 9):

> First, he argues that the Judge violated section 650(1) of the *Code* by conducting discussions respecting his jury charge and the jury questions in his chambers, when Mr. Snelgrove was not present. He maintains that a verdict which results from a trial that takes place in violation of section 650(1) must be set aside.
>
> Second, Mr. Snelgrove argues that the Judge erred in how he answered the questions the jury asked in the course of their deliberations. Mr. Snelgrove maintains that the Judge's answers to the jury's questions were insufficient and amounted to misdirection, requiring the verdict to be set aside.

The appeal was dismissed. The Court of Appeal concluded that the accused's right to be present at his trial was not violated and that the trial judge did not err in answering the jury's questions.

Sections 650(1) and 650.01(1) of the Criminal Code:

The Court of Appeal noted that there were "email communications and in-person discussions among his counsel, Crown counsel, and the Judge respecting the jury charge, and discussions between the Judge and counsel pertaining to questions the jury asked during its deliberations. Mr. Snelgrove was not involved in any of the email communications and he was not present when the Judge and counsel discussed the jury charge or the jury's questions and the Judge's answers" (at paragraph 14).

The Court of Appeal held that "the wording and interrelationship of sections 650(1), 650.01, and 650.1 authorized Mr. Snelgrove's counsel to communicate and discuss the jury charge and the jury's questions in Mr. Snelgrove's absence" (at paragraph 18).

The Court of Appeal indicated that as a result of the wording of section 650(1) of the *Criminal Code*, "an accused's presence at trial is not simply a right that may or may not be exercised, it is an imperative" (at paragraph 44). However, the Court of Appeal concluded that as a result of section 650.01(1) the *Criminal Code*, counsel designated by the accused could appear for the jury charge and jury questions discussions. The Court of Appeal stated that "when Mr. Snelgrove's counsel appeared on his behalf to communicate and discuss the jury charge and the jury's questions, Mr. Snelgrove was effectively present" (at paragraph 53).

The Questions from the Jury:

The appeal involved three questions submitted by the jury.

Question 1 – Recklessness and Wilful Blindness:

The jury's first question, and the trial judge's response, were as follows:

> *Can you provide guidance to help us understand what constitutes "reckless" and "wilfully blind" conduct with regard to his obligation to ensure [the complainant's] consent?*
>
> *Can you provide guidance to help us understand what constitutes reckless and wilfully blind conduct with regard to his [the accused's] obligation to ensure [the complainant's] consent.*

The trial judge answered this question in the following manner:

> *An honest belief cannot be grounded in recklessness or wilful blindness. If you find that Mr. Snelgrove knew that [the complainant] was so intoxicated that she could not consent, but engaged in sexual relations anyway, he would be reckless. If you find that Mr. Snelgrove engaged in sexual relations with [the complainant] without determining whether she was sober and consenting, he would be wilfully blind because he would be ignoring what might be obvious. Mr. Snelgrove could not have an honest belief —sorry, could not have an honest but mistaken belief in [the complainant's] consent if he was reckless or wilfully blind.*

The Court of Appeal noted that "[r]ecklessness or wilful blindness as to whether the complainant consented or whether she had the capacity to consent can satisfy the *mens rea* (the guilty intention) for sexual assault" (at paragraph 70). It indicated that "[w]ilful blindness exists where an accused's suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries" (at paragraph 76).

The Court of Appeal concluded the trial judge's "answer to this jury question gave a correct example of what would be wilful blindness, namely, failing to determine whether the complainant was sober and consenting. Making an assumption that the complainant was sober and consenting without determining whether, as a matter of fact, she was sober and consenting, is wilful blindness…It was correct, in this context, for the Judge to advise jurors that engaging in sexual activity without determining whether the complainant was sober and consenting would amount to wilful blindness" (at paragraphs 77 and 79).

Question 2 – Section 273.1(2)(c) – Inducement:

The Court of Appeal indicated that the "jury asked a four-part question relating back to the part of the jury charge dealing with 'inducement' to sexual activity, as contemplated under section 273.1(2)(c). That section states 'no consent is obtained if … the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority'" (at paragraph 83).

The trial judge's answers included the following:

> *So, first of all, with regard to induce, what would be needed to demonstrate inducement? You must decide, on the whole of the evidence, whether Mr. Snelgrove's actions on December the 21, 2014, were calculated to entice [the complainant] to engage in sexual relations with him. If you find beyond a reasonable doubt that his actions were so calculated you must find him guilty as charged. If you are unsure whether his actions were so calculated, then you must find him not guilty.*

The Court of Appeal concluded that it "was clear from the jury charge that 'inducement' could not be considered unless the jury was first satisfied that there had been an abuse of authority. In the circumstances, the Judge's response, considered in the context of the jury charge, and in the context of the full answer, was correct and complete. The jury was not misled" (at paragraph 91).

Question 3 – Replaying Evidence:

The Court of Appeal indicated that the jury asked the following question:

> *Can we get a transcript of [the complainant and Mr. Snelgrove's] courtroom statements – we want to confirm some details? (If not written can we get voice transcript).*

The trial judge responded by indicating that "[t]here is no written transcript of what [the complainant and Mr. Snelgrove] said in court. You can listen to their evidence, but if you listen to their evidence, you have to listen to all of their evidence. So, that means that we make at least a two hour commitment for each one, because they were on the stand for half a day".

The Court of Appeal indicated that it "is not an error for a judge, as occurred here, to decide against selecting excerpts of the evidence to respond to specific details. The practical challenges of locating and isolating excerpts for replay would involve the Judge and counsel replaying the evidence in advance before deciding on the relevant excerpts. Locating and isolating relevant excerpts would be time consuming and fraught with the risk of omitting relevant context" (at paragraph 114).

The Court of Appeal concluded that the trial judge "did not discourage rehearing the evidence and he discharged his obligation to assist the jury by offering (and repeating on three occasions in his initial answer) the option to have the evidence replayed. The Judge did not close the door to fulfilling the jury's request, and he reminded the jury by repeating on two more occasions the following day that the option to have the evidence replayed was still available" (at paragraph 119).

THE CHARTER

Charter-Sections 8 and 24(2)-Warrantless Search of Motor Vehicle Incident to Arrest:

In ***R. v. Genge***, 2023 NLCA 35, November 23, 2023, after a motor vehicle accident in which a person was killed, the police seized the vehicle. The police searched the vehicle without a search warrant and seized the vehicle's Airbag Control Module (ACM). It was subsequently examined (with a search warrant) by a company hired by the police and data was extracted. A production order was then obtained to have the data produced to the police.

The accused was charged with the offence of dangerous operation of a motor vehicle causing death. At his trial, the trial judge held that the warrantless search violated section 8 of the *Charter*. He also held that when the evidence obtained in violation of the *Charter* was excised from the production order, the remaining evidence was insufficient for the order to have been issued. He excluded the evidence obtained from the examination of the ACM. The accused was acquitted.

The Crown appealed from the acquittal. The Court of Appeal indicated that "[t]his appeal addresses whether police had the necessary authority when they searched the interior of a vehicle after an accident, to locate, detach, and seize the vehicle's Airbag Control Module" (at paragraph 1). The Court of Appeal indicated that the appeal raised the following questions (at paragraph 18):

> *Did the trial judge err in failing to apply the correct legal test in assessing the reasonableness of a claimed privacy interest under section 8 of the Charter;*
> *Did the trial judge err in his analysis of the sub-facial challenge to the General Production Order;*
>
> *Did the trial judge err in assessment of discoverability during the analysis under section 24(2) of the Charter;*
>
> *Did the trial judge err in excluding the ACM and its data as the section 24(2) remedy; and*
>
> *Assuming the t*rial judge erred, did this have a material bearing on the acquittal?

The appeal was dismissed. The Court of Appeal concluded that the search violated section 8 and the evidence was properly excluded.

Did the trial judge err in failing to apply the correct legal test in assessing the reasonableness of a claimed privacy interest under section 8 of the Charter:

The Court of Appeal indicated that though "a vehicle owner — or a driver with the owner's permission — enjoys a reasonable expectation of privacy, albeit a reduced one as compared to home, in his or her vehicle", this reduced expectation of privacy "does not allow investigative searches as part of a criminal investigation where, as here, there are no reasonable grounds to believe that the vehicle had been used in the commission of an offence or would afford evidence in respect of an offence" (at paragraphs 25 and 26).

The Court of Appeal concluded that the accused had a reasonable expectation of privacy in relation to his vehicle and therefore in relation to the ACM (at paragraph 32):

> Mr. Genge had a reasonable expectation of privacy in the vehicle. Police entering the vehicle for criminal investigative purposes had to meet the reasonableness requirements demanded by section 8 of the *Charter*. That constitutional protection is not dependent on Mr. Genge establishing a separate privacy interest in the ACM, or in any other evidence discovered and seized during the vehicle search, including the data. To allow police to bypass the territorial privacy interest in the vehicle to access potentially incriminating computer data on the ACM, by logical extension, would allow police to bypass the territorial privacy interest in one's home for the same purpose.

Did the trial judge err in his analysis of the sub-facial challenge to the General Production Order:

The Court of Appeal concluded that once the "inadmissible facts are excised, there is no information about where the ACM came from and its association with Mr. Genge or his vehicle. Accordingly, the facts remaining in the ITO did not contain sufficient information to ground the issuance of the General Production Order" (at paragraph 40).

Did the trial judge err in assessment of discoverability during the analysis under section 24(2) of the Charter:

The Court of Appeal noted that "[d]iscoverability refers to whether unconstitutionally obtained evidence could have been obtained by lawful means had the police chosen to adopt them. Discoverability is sometimes a factor in conducting the analysis under section 24(2) to decide whether exclusion of evidence is the appropriate remedy for the *Charter* violation" (at paragraph 43).

The Court of Appeal concluded that "there was no error in [the trial judge's] assessment of discoverability during the section 24(2) *Charter* analysis" (see paragraphs 3 to 48).

Did the trial judge err in excluding the ACM and its data as the section 24(2) remedy:

The Court of Appeal that it "was the task of the trial judge to weigh the various considerations and factors, and there is no overarching rule that governs how the balance is to be struck. As stated in *Grant*, at paragraph 86, 'Where the trial judge

has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination'. In this case the trial judge did consider and weigh the proper factors and his ultimate determination to exclude the ACM and its data is entitled to deference" (at paragraph 54).

Assuming the trial judge erred, did this have a material bearing on the acquittal:

The Court of Appeal stated that "[i]n light of the above findings that there were no errors, it is unnecessary to address this final issue" (at paragraph 56).

Charter-Sections 10(b) and 24(2):

In ***R. v. Villeneuve***, 2023 NLCA 14, May 23, 2023, the accused was charged with a number of offences arising out of a motor vehicle collision. Evidence obtained after the accused was taken to the hospital was excluded by the trial judge and the accused was acquitted. The Crown appealed.

The appeal was allowed. The Court of Appeal concluded that the accused was not detained prior to a blood sample being demanded (at paragraphs 102 and 103):

> As stated in *Therens*, the essence of detention is the interference with liberty or loss of choice of the individual because of the conduct of the police. In these circumstances, there was no interference by the police with Mr. Villeneuve's liberty or loss of choice until the blood demand was given at 5:30, the first exercise of control by the officer over Mr. Villeneuve. The reasonable person in Mr. Villeneuve's shoes would not have believed that they had no choice but to comply with the officer's demands, because until 5:30 there was no conduct that would cause such a belief. The trial judge erred in concluding otherwise.
>
> Although the trial judge erred as to when Mr. Villeneuve was detained, there is no dispute that Mr. Villeneuve was detained when the blood demand was given at 5:30, and that his *Charter* rights under section 10(b) were violated. Given this, the trial judge had to determine what evidence, if any, ought to be excluded as a result of that violation, as per section 24(2) of the *Charter*.

Section 24(2) of the Charter:

The Court of Appeal held that "[t]he blood drawn for medical purposes by the medical personnel was not evidence obtained in a manner that violated Mr.

Villeneuve's *Charter* rights…I would make a similar finding regarding the medical records excluded by the trial judge. This was information that existed independently of the conduct of the police and was available through a properly issued judicial authorization. There was no temporal, causal or contextual nexus between this evidence and the manner in which Mr. Villeneuve's *Charter* rights were breached. There is no reason that this evidence should be excluded under section 24(2) because of the unrelated section 10(b) violation" (at paragraphs 110 and 117).

EVIDENCE

Evidence-Considering the Accused's Statement-Admissibility of Accused's statement to a counsellor:

Offences-Child Luring:

In ***R. v. Trimm***, 2023 NLCA 13, May 2, 2023, the accused was convicted of the offences of distribution of child pornography and child luring, contrary to sections 163.1(3) and 172.1(1)(b) of the *Criminal Code*. He appealed from conviction, arguing that:

> a. The trial judge erred in law by admitting the conversation between him and his counsellor;
>
> b. The trial judge erred in law by failing to consider his statement to police, which was tendered by the Crown; and
>
> c. The trial judge erred in law in her interpretation of the elements of the offence of child luring.

The appeal was dismissed. The Court of Appeal concluded as follows (at paragraph 10):

> a. The trial judge did not err in admitting Mr. Trimm's statement to his counsellor. Because the counsellor told Mr. Trimm in advance that she would break confidentiality if there was a risk of harm to a child, the trial judge did not err in finding that Mr. Trimm's statement did not originate in confidence.
>
> b. The trial judge's reasons demonstrate that she considered Mr. Trimm's exculpatory statement and that it did not leave her with reasonable doubt. Her reasons are sufficient to allow this Court to meaningfully review her decision and they explain why she found Mr. Trimm guilty of distributing child pornography.

c. The trial judge did not err in her interpretation or application of the elements of the offence of child luring. Although she did not specifically identify any of the secondary offences listed in s. 172.1(1)(b) of the Code, she described conduct consistent with the secondary offences of sexual assault (s. 271) and sexual interference (s. 151) sufficiently to ensure her reasons explain why she convicted Mr. Trimm.

OFFENCES

Cruelty to Animals:

In ***R. v. Picco***, 2023 NLCA 33, October 30, 2023, the accused was charged with the offences of wilfully causing unnecessary suffering and wilfully neglecting to provide suitable and adequate food, water, shelter and care, in relation to four beagles under his care, contrary to sections 445.1(1)(a) and 446(1)(b) of the *Criminal Code*.

He was acquitted of both charges at his trial. The trial judge concluded that the Crown had failed to prove the *mens rea* elements in relation to either offence. An appeal to the summary conviction appeal court was dismissed. The Crown sought leave to appeal to the Court of Appeal.

Leave was granted, the appeal was allowed and the Court of Appeal remitted the matter to the Provincial Court for trial.

The Issues:

The Court of Appeal indicated that the following issues were raised (at paragraph 9):

-Did the appeal judge err in concluding that whether the animals were suffering under section 445.1(1)(a) was a question of fact?

-Did the appeal judge err in affirming the trial judge's reasonable doubt that the animals were suffering under section 445.1(1)(a)?

-Did the appeal judge err in finding that the *mens rea* for the offence under section 445.1(1)(a) was subjective?

-Did the appeal judge err in affirming the trial judge's interpretation of "evidence to the contrary" for the purpose of rebutting the presumption under section 445.1(3)?

> -Did the appeal judge err in affirming the trial judge's reasonable doubt as to whether or not Mr. Picco's conduct was reckless in relation to either offence?

Suffering:

Section 445.1(1)(a) of the *Criminal Code* states:

> *Every one commits an offence who (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird.*

The Court of Appeal indicated that "whether an animal has suffered for the purposes of establishing the *actus reus* of the offence is related to whether or not the suffering was necessary. Once it is established that there has been suffering that is unnecessary, it does not matter to what degree" (at paragraph 25).

The Court of Appeal concluded that the trial judge "incorrectly concluded that the Crown had not proven the *actus reus* of the offence under section 445.1(1)(a) beyond a reasonable doubt. Based on the facts as found by the trial judge, because of the state of their emaciation and being near death at the time they were seized by Beagle Paws, the dogs were suffering as per section 445.1(1)(a), and as understood in *Menard*. The trial judge was owed no deference on this question and the appeal judge erred in affirming the trial judge's erroneous conclusion" (at paragraph 29).

The Mens Rea Element:

The Court of Appeal held that "the *mens rea* for [the] offence is subjective" (at paragraph 31).

Did the appeal judge err in affirming the trial judge's interpretation of "evidence to the contrary" for the purpose of rebutting the presumption under section 445.1(3)?

The Court of Appeal noted that as a result of section 445.1(3), "in the absence of evidence to the contrary, proof of a failure in reasonable care will be proof that the accused acted wilfully; that is with the necessary subjective *mens rea*…evidence to the contrary is any evidence that tends to raise a reasonable doubt about that presumption*"* (at paragraphs 48 and 52).

Did the appeal judge err in affirming the trial judge's reasonable doubt as to whether or not Mr. Picco's conduct was reckless in relation to either offence?

Section 446(1)(b) of the *Criminal Code* states:

> *Every one commits an offence who.*
>
> > *... (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.*

The Court of Appeal held that that "failing to provide any one of the four listed needs would constitute a failure in a person's duty to adequately and suitably provide for the animal" (at paragraph 72).

The Court of Appeal concluded that the "failure that must be proven under section 446(1)(b) is in providing food, water, shelter or care that is suitable and adequate. Conduct that constitutes a marked departure is not a measure of whether the *actus reus* of the offence has been established. While such conduct could be relevant to whether the accused possessed the necessary *mens rea*, as discussed, the offence already requires a higher *mens rea*: that an offender is, at a minimum, reckless towards the failure to provide suitable and adequate food, water, shelter and care. It is irrelevant if the conduct is also a marked departure from the conduct of the reasonable person" (at paragraph 79).

The Trial Judge's Assessment of the Mens Rea of the Section 446(1)(b) Offence:

The Court of Appeal indicated that the "starting point under section 429 was whether the evidence established that Mr. Picco failed to fulfil his duty to provide for the animals by ensuring they had suitable and adequate food, water, shelter and care. The trial judge then had to be satisfied at a minimum, that Mr. Picco knew of this duty, but knowingly chose to pursue a course of conduct of which he was aware created the substantial risk that he would fail to adequately and suitably provide for the animals" (at paragraph 86).

The Court of Appeal concluded that "the trial judge erred in her approach to determining that Mr. Picco did not possess the necessary *mens rea* for the offence under section 446(1)(b). The trial judge failed to properly analyze the evidence that had a bearing on whether Mr. Picco was reckless. The trial judge's acceptance of Mr. Picco's testimony also cannot be reconciled with her conclusion that the *actus reus* for the offence had been proven. Given the errors, the appeal judge erred in

affirming the trial judge's analysis of the evidence and her incorrect conclusion that there was a reasonable doubt that Mr. Picco was reckless" (at paragraph 97).

The Trial Judge's Assessment of the Mens Rea of the Section 445.1(1)(a) Offence:

The Court of Appeal concluded that the trial judge "was obliged to explain why she had a reasonable doubt on the section 445.1(1)(a) offence, or how her reasonable doubt on the 446(1)(b) offence applied to section 445.1(1)(a). This, she did not do and, failing to so do, committed error. Further, I agree with the Crown that her reasons as to why there was a reasonable doubt with respect to the section 445.1(1)(a) offence insofar as the *mens rea* is concerned, was inadequate and insufficient for meaningful review by an appeal court. There is no way to assess whether the trial judge actually differentiated the *mens rea* between the two offences. The inadequate reasons constituted further legal error...The appeal judge erred in concluding that the trial judge committed no legal error acquitting the accused of the section 445.1(1)(a) offence" (at paragraphs 104 and 105).

Conclusion:

The Court of Appeal summarized its conclusions in the following manner (at paragraphs 106 to 109):

> For the above reasons, I am satisfied that the trial judge made several legal errors in acquitting Mr. Picco of both offences. The trial judge erred in applying the wrong legal principles to the determination of the *actus reus* and *mens rea* of both offences.
>
> In respect of the section 445.1(1)(a) offence, the trial judge erred in concluding that the animals were not suffering by applying an incorrect analysis and failing to give proper legal effect to the facts she accepted. On the facts as found by the trial judge, there was no other conclusion than that the dogs were suffering. The appeal judge erred by refusing to interfere with the trial judge's conclusion that the dogs were not suffering and concluding that this was a question of fact. As a legal conclusion, whether the dogs were suffering was a question of law.
>
> The trial judge also erred in her determination that there was a reasonable doubt that Mr. Picco possessed the necessary *mens rea* for the offence under section 445.1(1)(a). The trial judge's reasons were deficient as to how there was a reasonable doubt. Reasonable doubt on the section 446(1)(b) offence did not explain why there was a reasonable doubt on the section 445.1(1)(a)

> offence. These were different offences and required separate analysis. The appeal judge erred in concluding that the trial judge committed no error in acquitting Mr. Picco of this offence.
>
> With respect to the section 446(1)(b) offence, the trial judge erred in her application of the principles governing whether the accused was reckless. The trial judge failed to properly apply the test for recklessness to the evidence she accepted. Further, the trial judge's acceptance of both the accused's testimony and that the *actus reus* of the offence had been established, also cannot be reconciled and are contradictory findings. The appeal judge erred in affirming the trial judge's analysis.

Offences-Uttering a Threat:

In ***R. v. Churchill***, 2023 NLCA 26, September 1, 2023, the accused was convicted of the offence of uttering a threat, contrary to section 264.1 of the *Criminal Code*. The conviction was overturned by the summary conviction appeal court (Noel J.). The Crown appeal to the Court of Appeal. The evidence at the trial established that the accused, while detained in the back seat of a police car, uttered the following words to a police officer (Constable Dunphy):

> *I'm going to put my f—ing boot in your head.*

The appeal was allowed and the conviction restored. The Court of Appeal pointed out that "[o]n a charge of uttering a threat to cause bodily harm, the Crown must prove two essential elements: (1) that the accused uttered the threatening words (*actus reus*), and (2) that the words were intended to intimidate or be taken seriously (*mens rea*)" [at paragraph 3]. The Court of Appeal concluded that the trial judge properly applied this test (at paragraphs 25 to 27):

> In his reasons, the trial judge did discuss the broader context surrounding the threat, noting that Cst. Dunphy was a police officer and that Mr. Churchill was still detained in the rear seat of the police car when the threat was made. The SCAC judge erred to the extent that he implied that the trial judge overlooked these points: "The fact that Cst. Dunphy was a police officer, detaining Churchill in the manner he was, is a relevant factor that must be considered …" (SCAC Decision, at paragraph 82). It is clear from the trial judge's reasons that he considered these factors and was aware that Mr. Churchill had no ability to carry out his threat while detained in the back of the police car. Other details of context that SCAC judge referenced – such as

Cst. Dunphy being in uniform and carrying the use-of-force equipment – can be reasonably inferred from the broader context. There is no error in the failure of the trial judge to get into this level of detail as part of the *mens rea* analysis.

The remaining two contextual details referenced by the SCAC judge relate to how the uttered words were perceived by Cst. Dunphy.

The perception by the alleged victim can be relevant and can assist in determining the *mens rea* (*McRae*, at para. 20, and *O'Brien*, at para. 13). However, the perception of the alleged victim is not an essential consideration and the SCAC judge erred in stating, "An essential consideration is Churchill's state of mind from the perspective of how the words were perceived by the officer" (SCAC Decision, at paragraph 64). The error was compounded by the SCAC judge suggesting that Cst. Dunphy did not perceive the words as threatening: "There was no evidence in this case that Cst. Dunphy felt intimidated" (SCAC Decision, at paragraph 73). The tenor of Cst. Dunphy's evidence was the opposite. He testified that Mr. Churchill was "very belligerent, verbally abusive toward me" and "I was concerned because of his aggression" (Trial Transcript, at page 5). These extracts from Cst. Dunphy's evidence would indicate that Cst. Dunphy perceived a threat and viewed it as a serious threat.

SENTENCING

Possession for the Purposes of Trafficking and Concurrent versus Consecutive Sentences:

In ***R. v. Summers***, 2023 NLCA 8, March 28, 2023, the accused pleaded guilty to the offences of possession of a controlled substance (including fentanyl) for the purpose of trafficking (three counts) and break and entry into a pharmacy. He was sentenced to a period five years of imprisonment for the *Controlled Drugs and Substances Act* offences and three years of imprisonment, to be served concurrently, for the break and entry offences, resulting in a total sentence of five years of imprisonment. At the time, Mr. Summers was serving a period of imprisonment for other offences. The sentencing judge ordered that that new period of imprisonment was to be served on a consecutive basis to the sentence being served.

The accused appealed from the latter sentence. He argued that the latter sentence should have been ordered to be served concurrently to the sentence imposed earlier.

The appeal was allowed. The Court of Appeal increased the sentence imposed for the *CDSA* offences to seven years of imprisonment, concluding as follows (at paragraph 52):

> In this case, Mr. Summers was breaking into pharmacies to steal whatever drugs were available. The Tricon pharmacy theft included ten fentanyl patches as well as morphine, codeine, oxycodone and hydromorphone with an estimated street value of approximately $105,000. Taking into account the range of sentence of eight to fifteen years as discussed in Parranto together with Mr. Summers' past criminal conduct, the type and quantity of drugs found in his possession, the degree of planning and deliberation involved in commission of the offences, his leadership role, and the nature of the offence which amounted to a commercial enterprise, a fit and proper sentence would be seven years imprisonment. That sentence is marginally lower than the lower end of the range for trafficking in large amounts of fentanyl, but reflects the gravity of the offence together with Mr. Summers' moral blameworthiness.

Concurrent or Consecutive to the Earlier Sentence Imposed?

The Court of Appeal ordered that the seven years of imprisonment be it be served on a concurrent basis to the sentence that was imposed earlier.

The Court of Appeal concluded that the sentencing judge "erred in his application of the principle of proportionality, and in particular, in his failure to adequately explain how he took into account not only how much time remained to be served by Mr. Summers for previous convictions, but also, how, if at all, other relevant factors were assessed and taken into consideration" (at paragraph 3).

The Court of Appeal indicated that "while the judge referred to the unexpired portion of the sentence Mr. Summers was serving at the time, he did not specify the length of time he would be taking into account in assessing whether a five-year sentence served consecutively would be unduly long or harsh" (at paragraph 35).

The Court of Appeal held that "[f]or purposes of determining an appropriate sentence where there are multiple convictions and the *Hutchings* principles are applied, the length of sentence to be considered in the analysis is the sentence imposed without regard to a deduction for time served on remand…The failure by the judge to specify the length of sentence he was considering amounted to error because, in the absence of that information and reference to other relevant factors, this Court does not have a sufficient basis on which to determine the appropriateness

of the judge's decision to order the five year sentence to be served consecutively to the sentence Mr. Summers was already serving" (at paragraphs 38 and 40).

Conclusion:

In conclusion, 2023 was a relatively slow year for the Court of Appeal for Newfoundland and Labrador as regards criminal appeals. The Court, for instance, only issued one decisions in relation to sentencing. However, it did render a number of judgments considering the element of various offences.