A REVIEW OF DECISIONS RENDERED BY THE SUPREME COURT OF CANADA BETWEEN JANUARY 1, 2023 AND DECEMBER 31, 2023, 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, 2023, to December 31, 2023, 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 decisions relating to trial matters.

TRIALS

Crown Submissions:

In ***R. v. B.E.M.***, 2023 SCC 32, December 13, 2023, the accused was convicted of the offence of sexual assault in a trial held by a judge and jury. In his closing to the jury, Crown counsel made reference to a personal anecdote in an attempt to argue how memory works.

The accused's appeal from conviction was dismissed by a majority of the Court of Appeal (see 2022 ABCA 207).

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

The appeal was dismissed. In a brief oral judgment, per Kasier J., the Court held that Crown counsel should not have "recounted an anecdote about a personal childhood memory", but that the appeal should be dismissed:

> It is common ground that, in closing submissions to the jury, Crown counsel should not have recounted an anecdote about a personal childhood memory that had no connection to the evidence (see *Pisani v. The Queen*, [1971] S.C.R. 738, at p. 740). Personal anecdotes have no place in closing submissions and are fundamentally at odds with the role of counsel, and particularly the role of Crown counsel (see *Boucher v. The Queen*, [1955] S.C.R. 16). But the majority of the Court of Appeal was correct to conclude that this error did not result in an unfair trial or a miscarriage of justice in this case.
>
> Both the majority and the dissent relied on the relevant factors set out in *R. v. Stephan*, 2017 ABCA 380, 61 Alta. L.R. (6th) 26, rev'd on other grounds 2018 SCC 21, [2018] 1 S.C.R. 633, but disagreed on their application.
>
> At issue before the jury was both the veracity and accuracy of the complainant's own memory of the events relating to the sexual assaults she allegedly suffered as a child. The defence argued that these events never took place and challenged the complainant's recollections as uneven. Insofar as this

challenged the complainant's version of events as lacking both credibility and reliability, the improper comments of Crown counsel were potentially serious as they touched on a core issue at the trial.

That said, the context of the anecdote considerably limited its prejudicial effect. First, and unlike *Pisani*, the personal anecdote was not about an offence or about conduct comparable to the substance of the allegations at issue. Moreover, the anecdote was not a prominent feature of the Crown's closing address.

Furthermore, while defence counsel did object to other aspects of the Crown's closing submissions that are not relevant to the appeal, no objection was made to the Crown's personal anecdote. The failure of defence counsel to object to the anecdote is not of course dispositive, but it is a factor to be considered in measuring the impact on trial fairness on appeal (see *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401, at para. 107).

The trial judge did caution the jury not to consider what counsel said as evidence. And while the trial judge did not undertake specific remedial steps to alert the jury to the improper comments of the Crown, the judge's observation that jury members should use their "common sense understanding of how memories operate" (A.R., vol. I, at p. 63) is consonant with the idea that, although improper, the Crown's anecdote should be read in that light. Nothing would suggest that the charge did not achieve its purpose "to properly equip the jury in the circumstances of the trial to decide the case according to the law and the evidence" (*R. v. Abdullahi*, 2023 SCC 19, at para. 72).

In sum, we agree with the view that Crown counsel's improper anecdote did not render the appellant's trial unfair.

The appeal is dismissed.

Trials-Procedure-Role of Amicus Curiae:

In ***R. v. Kahsai***, 2023 SCC 20, July 28, 2023, the accused was charged with the offence of murder. He decided to represent himself. During the trial he was repeatedly excluded from the courtroom because of disruptive behavior. The trial judge decided to appoint an *amicus curiae*. The trial judge directed the *amicus* not to advocate on behalf of the defence.

At the end of the trial, the accused made a closing argument on his own behalf. The trial judge terminated the address before it was completed and did not ask the *amicus* to address the jury.

The accused was convicted. He appealed from conviction, arguing that the trial judge erred in failing to appoint *amicus* with an adversarial role at an earlier stage of the trial, resulting in a miscarriage of justice. The appeal was dismissed by a majority of the Alberta Court of Appeal. The accused appealed to the Supreme Court of Canada.

The Issue:

The Court indicated that "[a]t issue in this appeal is the proper scope of the role that *amicus curiae* — a 'friend of the court' — can play at criminal trial. When an unrepresented accused seems unable to advance a competent defence, does the guarantee of trial fairness permit or require the trial judge to appoint *amicus* with an adversarial mandate to advance the interests of the defence?" (at paragraph 1).

The appeal was dismissed. The Supreme Court concluded that a miscarriage of justice had not occurred (at paragraph 5):

> The law imposes a high standard for proving a miscarriage of justice. The inquiry must consider the circumstances of the trial as a whole. Here, the trial judge faced the difficult task of managing a jury trial that Mr. Kahsai seemed determined to derail. Once it became obvious that Mr. Kahsai would not cooperate with the court or advance any viable defence, the trial judge took several measures to preserve trial fairness and restore balance to the proceeding. This included the appointment of an *amicus*. Although the trial judge seems to have held the view that *amicus* could not play a more adversarial role, it is not clear that he would have granted a broader mandate in the circumstances, particularly given Mr. Kahsai's objections to the appointment of the *amicus*, and he was under no obligation to do so. Any irregularity does not result in a miscarriage of justice. I would dismiss the appeal.

Appointment of Amicus:

The Supreme Court held that "in exceptional circumstances, the trial judge retains wide discretion to appoint a*micus* with adversarial functions that can respond to the needs of a particular case. In tailoring the role for *amicus*, the judge must respect both the right of the accused to conduct their own defence and the right to a fair trial. These principles of fundamental justice, along with the nature of the role, help define the assistance that *amicus* can provide. While the role of *amicus* therefore has limits, the scope is broad enough to assist the judge where necessary to ensure a fair trial" (at paragraph 2).

The Court pointed out that "once counsel is appointed as *amicus*, they cannot maintain any solicitor-client relationship with the accused. An *amicus* does not take

instructions from the accused and cannot be dismissed by the accused. Thus, while *amicus* can advocate in ways that advance the interests of the defence, they do not 'represent' the accused" (at paragraph 41). However, the Supreme Court also noted that "[s]ome adversarial functions should generally be available for *amicus* because they do not conflict with the right to control one's own defence. For example, *amicus* can seek to advance the interests of the accused through examinations or submissions that do not conflict with the key strategic choices of the accused. Within those limits, *amicus* should always be entitled to test the strength of the Crown's case to put the Crown to its burden of proving guilt beyond a reasonable doubt" (at paragraph 46).

The Role of Amicus:

The Court noted that in its decision in *Ontario v. Criminal Lawyers' Association of Ontario* it "established that *amicus* can never essentially become defence counsel, identifying several dangers that might arise if *amicus* were appointed to act as counsel for the defence. However, *CLAO* did not canvass the many functions that *amicus* can legitimately perform without engaging the dangers identified by the Court. Nor did it limit amicus to assuming a strictly neutral role. The case law that has emerged shows that trial judges have since struggled to define the permissible scope of roles for *amicus*. This decision seeks to clarify the functions that amicus can perform to assist the court and the factors that trial judges should consider when tailoring the scope of an *amicus* appointment" (at paragraph 30).

The Supreme Court indicated that "in exceptional circumstances, the help of *amicus* may be needed to avoid actual unfairness or the appearance of unfairness. While *amicus* can never fully assume the role of defence counsel, they can discharge many adversarial functions typically performed by defence counsel where necessary to a fair trial. Although there are limits to the roles *amicus* can play — informed by the nature of their role as a friend of the court and the constitutional rights of the accused — the scope is broad enough to encompass adversarial functions where those are 'necessary to permit a particular proceeding to be successfully and justly adjudicated'" (at paragraph 33).

The Supreme Court pointed out that "the role of *amicus* is highly adaptable and can encompass duties that exist on a broad spectrum of functions…The precise role for *amicus* will depend on the particular needs identified by the trial judge. But the role of *amicus* is not without limits. In *CLAO*, this Court established that *amicus* would exceed the proper scope of their role once 'clothed with all the duties and responsibilities of defence counsel'" (at paragraph 38).

The Role of the Trial Judge:

The Supreme Court indicated that the trial judge "has a duty to help an unrepresented accused to ensure the proceeding respects their fundamental rights…While this duty can typically be fulfilled by explaining the trial process to the accused, some circumstances will require the judge to more actively intervene. For example, the duty may require the trial judge to suggest that the accused seek counsel; to identify the material issues; to frame questions to elicit relevant evidence for the defence; or to raise potential *Charter* breaches on the judge's own motion…At the same time, judges must always remain neutral, which limits the scope of their duty to help an unrepresented accused. For example, the judge cannot provide the accused with strategic advice or take over cross-examination for the defence…To balance these competing obligations, the judge must ensure the accused will benefit from a procedurally fair trial, while being mindful not to offer help that would be seen to undermine the impartiality of the court" (at paragraph 54).

A Summary:

The Supreme Court summarized the applicable principles in the following manner (at paragraphs 64 to 66):

> In sum, in the vast majority of cases, the responsibilities of the trial judge and the Crown will suffice to ensure trial fairness. Once it is determined that *amicus* is required, the trial judge retains wide discretion to appoint *amicus* with functions that are responsive to the needs of a case. This may include adversarial functions where necessary for trial fairness — for example, to restore balance to a proceeding when an accused chooses to self-represent and puts forward no meaningful defence. In tailoring the scope of the role for the *amicus*, the judge will consider the nature of the role of *amicus* as friend of the court and the circumstances of a case, including how the accused exercises their constitutional rights and what is needed to ensure a fair trial. While there are necessary limits to the adversarial functions that *amicus* can perform, the scope is broad enough to accommodate what is necessary for trial fairness in a particular case.
>
> In considering whether to appoint *amicus*, the judge should canvass the parties for their perspectives about the necessity and scope of an *amicus* appointment. The judge should consider whether an appointment that is limited in duration or scope would suffice. For example, assistance from *amicus* may only be necessary for cross-examination of certain Crown witnesses or for a particular motion in the proceeding. It would also be helpful to reduce the terms of appointment to writing in a formal order or endorsement, explicitly identifying

> the nature and scope of the role for the *amicus* and the specific functions that the court requires.
>
> Finally, the trial judge should consider whether the mandate assigned to an *amicus* will make a confidentiality order necessary for the *amicus* to effectively discharge their role. As the intervener the Criminal Trial Lawyers' Association submitted, full and frank conversation between the accused and an *amicus* may depend on a confidentiality order if the *amicus* is charged with advocating for the interests of the defence (see I.F., at p. 7). While solicitor-client privilege would not be available, a confidentiality order would create legal protections for communications between the *amicus* and the accused in discussing their case (see, e.g., *Imona-Russel*, at paras. 64 and 68, explaining how an undertaking by Crown counsel to treat all correspondence between the accused and *amicus* as privileged achieved the confidentiality necessary in that case).

Conclusion:

The Supreme Court suggested that it was "not clear that appointing *amicus* earlier or with a broader mandate would have provided much value for Mr. Kahsai, who forcefully resisted the appointment of *amicus* and sustained his objection to their participation throughout the trial. He refused to cooperate with trial *amicus*, was not interested in discussing strategy, and disclosed no potential defence. In this circumstance, it is hard to see how a different *amicus* appointment would have impacted the fairness or perceived fairness of his trial. While the appellant bears no burden to prove actual prejudice on this appeal, he needs to show that a well-informed and objective person would find an appearance of unfairness so serious that it would shake their confidence in the administration of justice — a high bar" (at paragraph 76).

The Supreme Court concluded that "a reasonable member of the public, considering the circumstances of the trial as a whole, would not find that a miscarriage of justice occurred. Instead, they would find the trial fairness concerns were sufficiently addressed by the trial judge and the assistance of *amicus*, such that a new trial is not required" (at paragraph 77).

THE CHARTER

Sections 8, 9 & 24(2):

In ***R. v. Zacharias***, 2023 SCC 30, December 1, 2023, a motor vehicle the accused driving was stopped by the police. The police placed the accused under "investigative detention". A sniffer dog was called in and it gave a positive indication for drugs in the vehicle. Relying on the sniffer dog search, the police arrested the accused. The police then searched the vehicle and seized over 100 pounds of marijuana.

The accused was charged with the offence of possession of a controlled substance for purpose of trafficking. The trial judge found that the police had breached sections 8 and 9 of the *Charter* in conducting the sniffer dog search and in their investigative detention of the accused. However, the trial judge ruled that the marijuana seized was admissible. The accused was convicted.

His appeal to the Alberta Court of Appeal (with a dissent) was dismissed. The majority of the Court of Appeal declined to consider alleged *Charter* breaches that had not been argued by the accused at trial. The accused appealed as of right to the Supreme Court of Canada.

The appeal was dismissed. Three judgments were filed. It was suggested that the appeal raised the following issues (at paragraphs 19 and 20):

> First, should this Court consider the new issues raised by the appellant for the first time at the Alberta Court of Appeal?
>
> Second, did the trial judge properly consider all of the relevant *Charter*-infringing state conduct? Answering this raises two further questions. First, did the police commit further breaches of the appellant's *Charter* rights by relying on the results of the unlawful sniffer dog search? And second, if so, how are these breaches to be factored into the s. 24(2) analysis?

Rowe and O'Bonsawin JJ:

These justices held that the arrest "that followed the sniffer search in this case" were violation of the *Charter*. They stated that the "state cannot rely on unlawfully obtained evidence to satisfy the reasonable and probable grounds requirement for arrest. Where the court finds a breach of the *Charter* has occurred, the breach must be considered in the s. 24(2) analysis". The justices concluded that though "the arrests and searches incident to arrest in this case constituted additional violations of the *Charter*, we would affirm the decision not to exclude the evidence under s. 24(2) of the *Charter*" (at paragraphs 2 and 3).

New Issues on Appeal:

Justices Rowe and O'Bonsawin concluded that these issues should be considered. They held that because the accused's "arguments rely on undisputed facts relating to his arrest; they can…be fairly considered on appeal" (at paragraph 25).

Arrests Made as a Consequence of a Charter Breach:

Justices Rowe and O'Bonsawin held that the "police cannot rely on unlawfully obtained evidence in order to conduct a warrantless arrest. Where the grounds for arrest are based on evidence that is subsequently found to have been unlawfully obtained, the court must excise this evidence from the factual matrix in order to determine whether the police had reasonable and probable grounds for arrest" (at paragraph 26).

An Unlawful Arrest as a "Consequential" Breach in the Section 24(2) Analysis:

The justices indicated that "[w]here an arrest is unlawful because it is premised on the results of a *Charter* breach, it is the initial *Charter* breach that renders what follows unlawful. In other words, there is a situation of linked or 'cascading' *Charter* breaches (see *Blanchard*, at para. 34). We use the term 'consequential' to refer to such breaches in the s. 24(2) analysis because the subsequent arrest is unlawful only as a consequence of the 'initial' breach or breaches that preceded it" (at paragraph 47).

Section 24(2) of the Charter:

Justices Rowe and O'Bonsawin held that the initial arrest and the search of the vehicle were conducted in contravention of section 8 the *Charter*. In addition, they held that the "placement of the appellant in the police vehicle (with handcuffs after the first arrest) and at the police detachment are further continuations of the s. 9 breaches occasioned by the arrests and investigative detention" (at paragraph 64).

However, the justices concluded that the evidence seized was admissible (at paragraphs 75 and 76):

> The first two *Grant* factors favour exclusion, albeit not strongly for the first and moderately for the second. We pause to note, briefly, that it was incorrect for the dissenting judge to state that either of the first *Grant* factors would favour *admission* (C.A. reasons, at para. 63). The first two branches never favour admission — at most, they can weakly favour exclusion (see *Le*, at para. 141).
>
> As mentioned, the third *Grant* factor tends strongly in favour of admission of the evidence. The pull of the first two factors in this case is insufficient to

> outweigh the third; thus, overall the circumstances favour admission. This conclusion is consistent with other decisions of this Court that involved a less serious *Charter* breach, a significant or moderately intrusive impact, and evidence that was real, reliable, and crucial to the Crown's case (see, e.g., *Grant* 2009, at para. 140; *Vu*, at para. 74). Thus, having balanced the factors, we would affirm the decision to admit the evidence and dismiss the appeal.

Côté J:

Justice Côté agreed that the appeal should be dismissed, but disagreed with the proposition "that the state 'cannot rely on unlawfully obtained evidence to satisfy the reasonable and probable grounds requirement for arrest'" (at paragraph 77).

Justice Côté also indicated that she was "in substantial agreement" with "Rowe O'Bonsawin JJ.'s s. 24(2) analysis" (at paragraph 80).

Martin and Kasirer JJ:

Justices Martin and Kasirer indicated that they agreed "with much of their [Rowe and O'Bonsawin JJ] reasons but, most respectfully, we disagree in the result. For the reasons that follow, we would allow the appeal, order the exclusion of the evidence, set aside the appellant's conviction and enter an acquittal" (at paragraph 106).

Multiple Breaches of the Charter:

The justices held that "all state conduct that violates the *Charter* must be weighed carefully in the balancing that s. 24(2) demands. Ignoring the fact that consequential breaches add to the cumulative, and potentially compounding, measure of the seriousness of state misconduct is, in our respectful view, an error of law under s. 24(2) of the *Charter* as interpreted by this Court in *Grant*" (at paragraph 109).

Section 24(2):

The justices held that "a correct application of the s. 24(2) framework mandated by Grant compels exclusion of the evidence in this case, given the seriousness of the state misconduct that would otherwise be discounted" (at paragraph 110).

The justices concluded that "[i]n this case, the first line of inquiry exerts a moderate to strong pull towards exclusion, while the second pulls strongly in the same direction. The third factor strongly favours admission. But it is not enough to

overwhelm the cumulative seriousness of the *Charter*-infringing conduct along with impacts on Mr. Zacharias, which together make a relatively strong case for the evidence's exclusion. For that reason, we conclude that the administration of justice would be brought into disrepute by its admission. Accordingly, s. 24(2) directs that the evidence shall be excluded" (at paragraph 160).

Sections 9 and 24(2)-The Stopping of Motor Vehicles:

In ***R. v. McColman***, 2023 SCC 8, March 23, 2023, the Supreme Court concluded that the stopping of the accused's motor vehicle on private property violated section 9 of the *Charter* because the police officer "did not have statutory authority under" section 48(1) of the *Highway Traffic Act*, R.S.O. 1990, "to follow the respondent onto the private driveway to conduct the random sobriety stop" (at paragraph 2). However, the Court concluded that the evidence obtained as a result of the stop should not be excluded pursuant to section 24(2) of the *Charter*.

The Supreme Court indicated that "the s. 24(2) analysis is an objective one, evaluated from the perspective of a reasonable person, and the burden to persuade a court that admission of the evidence would bring the administration of justice into disrepute rests on the party seeking exclusion…Section 24(2) is focused on maintaining the long-term integrity of, and public confidence in, the justice system. Accordingly, the exclusion of evidence under s. 24(2) is directed not at punishing police misconduct or compensating the accused, but rather at systemic and institutional concerns" (at paragraphs 53 and 54).

Because the "the trial judge did not conduct a *Grant* analysis, since he found that s. 48(1) of the *HTA* authorized the random sobriety stop and there was no s. 9 violation", the Supreme Court conducted the *Grant* analysis "afresh" (at paragraph 56).

Section 24(2):

The Supreme Court commenced its section 24(2) analysis by indicating that it is important to understand that "the first and second lines of inquiry are distinct. The first line of inquiry evaluates the state conduct itself, while the second line of inquiry goes further and assesses the impact of the state conduct on the accused's *Charter*-protected interests" (at paragraph 59).

In relation to the three lines of the *Grant* inquiry, the Supreme Court concluded as follows:

(1) The Seriousness of the Charter-Infringing Conduct:

> …the first line of inquiry pulls slightly in favour of exclusion. Although there was relevant case law to support the police officers' sobriety stop, given the legal uncertainty that existed at the time, the police officers should have acted with more prudence. When faced with legal uncertainty, "the police would do well to err on the side of caution"… on the whole, the first line of inquiry pulls slightly in favour of exclusion. The police acted without statutory authority in effecting the stop, and a body of case law confirmed their lack of authority to stop Mr. McColman. On the other hand, another body of case law supported their conduct. Given the legal uncertainty that existed at the time of the random sobriety stop, the breach was accordingly not so serious as to require this Court to disassociate itself from the police actions. In light of that same legal uncertainty, however, the police officers should have acted with more prudence. In our view, on balance, these two effects of the legal uncertainty pull in favour of exclusion, but only slightly (at paragraphs 60 and 65).

(2) The Impact of the Breach on the Charter-Protected Interests:

> …the second line of inquiry moderately favours exclusion of the evidence. The stop impacted Mr. McColman's liberty interests because the police questioned him in the course of an unlawful detention. Although the police had the power to randomly stop Mr. McColman to check his sobriety, they did not act within the legal limits of that power. In addition, the fact that the arbitrary detention occurred on private property is relevant because "[r]etreat to a private residence (even if not one's own residence) will sometimes be the only practical way for individuals to exercise their right to be left alone": Le, at para. 155. As a result of the unlawful stop, Mr. McColman was arrested and brought to the police station, where he was detained for several hours. The police obtained significant evidence against him, including the officer's observations of signs of impairment, Mr. McColman's statements about his alcohol consumption, and the results of two breathalyzer tests. Therefore, the unlawful police stop constituted a marked, although not egregious, intrusion on Mr. McColman's Charter-protected interests. (at paragraph 68).

(3) Society's Interest in the Adjudication of the Case on Its Merits:

> …the evidence collected by the police was reliable and crucial to the Crown's case…[I]mpaired driving is a serious offence…In light of the reliability and importance of the evidence as well as the seriousness of the alleged offence,

> the third line of inquiry pulls strongly in favour of inclusion. Admission of the evidence in this case would better serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system. (at paragraphs 71 to 73).

(4) Balancing the Grant Factors:

> When balancing the Grant factors, the cumulative weight of the first two lines of inquiry must be balanced against the third line of inquiry: *Lafrance*, at para. 90; *R. v. Beaver*, 2022 SCC 54, at para. 134. Here, the first line of inquiry slightly favours exclusion of the evidence and the second line of inquiry does so moderately. However, the third line of inquiry pulls strongly in favour of inclusion and, in our view, outweighs the cumulative weight of the first two lines of inquiry because of the crucial and reliable nature of the evidence as well as the important public policy concerns about the scourge of impaired driving. On the whole, considering all of the circumstances, the evidence should not be excluded under s. 24(2). (at paragraph 74).

Section 11(B):

In ***R. v. Hanan***, 2023 SCC 12, May 5, 2023, the accused was charged with a number of offences in December, 2015. The trial ended on November 28, 2019. The accused applied for a stay of proceedings to be entered, arguing that a breach of section 11(b) of the *Charter* had occurred. The application was dismissed. An appeal to the Ontario Court of Appeal was dismissed. The accused appealed to the Supreme Court of Canada.

The appeal was allowed and a stay of proceedings entered. The Supreme Court concluded that the "delay beyond the ceiling was due not to a lack of time for the system to ameliorate ingrained institutional delays, but to the Crown's refusal to agree to a trial by judge alone" (at paragraphs 6 to 9):

> First, the parties could not have reasonably relied upon the pre-*Jordan* state of the law after *Jordan* had been decided in July 2016. Nor did the parties actually rely upon the pre-*Jordan* state of the law, as they consciously scheduled a trial within the *Jordan* ceiling. Rather, as this Court held in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, the focus for delay that accrues after *Jordan* was decided "should instead be on the extent to which the parties and the courts had sufficient time to adapt" (para. 71). As noted by Nordheimer J.A. in dissent, "only a very small portion of the delay in this case preceded the decision in *Jordan* and most, if not all, of that delay has been laid at the feet of the defence" (2022 ONCA 229, 161 O.R. (3d) 161, at para. 143). Therefore, the trial judge erred in concluding that the delay in this

case was "justified based on the parties' reasonable reliance on the law as it previously existed" (para. 278).

Second, as Nordheimer J.A. correctly observed, the Crown had "ample time" to adapt to *Jordan* (para. 148). The delay beyond the ceiling was due not to a lack of time for the system to ameliorate ingrained institutional delays, but to the Crown's refusal to agree to a trial by judge alone, despite being warned of the possible consequences of delay, and despite *Jordan* having been decided almost two and a half years earlier. Were it not for the Crown's decision, the trial would have occurred within the ceiling. This clearly demonstrates that there was enough time for the parties and system to adapt.

We conclude that no transitional exceptional circumstance applies in this case. The result is that the net delay of about 35 months is an unreasonable delay contrary to s. 11(b) of the *Charter*.

Like the majority and the dissent below, we reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. We agree with van Rensburg J.A. and Tulloch J.A., as he then was, at para. 56, that this approach is inconsistent with this Court's understanding of defence delay. Defence delay comprises "delays caused solely or directly by the defence's conduct" or "delays waived by the defence" (*Jordan*, at para. 66). Furthermore, "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable" (para. 64). All relevant circumstances should be considered to determine how delay should be apportioned among the participants (*R. v. Boulanger*, 2022 SCC 2, at para. 8). We share the view of the majority and dissenting judges in the Court of Appeal that, in the circumstances of this case, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence Delay (paras. 59 and 136).

Section 12, Application to Sections 244.2(1)(a) and 244(3)(a):

In ***R. v. Hills***, 2023 SCC 2 and ***R. v. Hilbach***, 2023 SCC 3, January 27, 2023, the Supreme Court of Canada considered its previous jurisprudence in relation to section 12 of the *Charter*, after fierce criticism of it by the Alberta Court of Appeal.

The Supreme Court concluded that there is "no reason to upset sound and settled law and adopt the new approaches advocated by some parties, interveners and judges of the Alberta Court of Appeal" (***Hills***, at paragraph 3).

R. v. Hills:

In ***Hills***, the accused pleaded guilty to the offence of discharging a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place, contrary to s. 244.2(1)(a) of the *Criminal Code*. At the time, this offence carried a mandatory minimum sentence of four years of imprisonment (see the former section 244.2(3)(b)).

The sentencing judge held that the mandatory minimum sentence violated section 12 of the *Charter* and imposed a period three and one-half years of incarceration. The Crown's appeal was allowed by the Alberta Court of Appeal. It set aside the declaration of invalidity and imposed the minimum sentence of four years' imprisonment. The accused appealed to the Supreme Court of Canada.

The Supreme Court of Canada:

The appeal was allowed. The sentencing judge's declaration of invalidity and sentence were affirmed.

The Supreme Court concluded, per Martin J., that that section 244.2(3)(b) "is grossly disproportionate. Here, the evidence showed that numerous air-powered rifles constituted 'firearms', including air-powered devices like paintball guns, even though they could not perforate the wall of a typical residence. It is also reasonably foreseeable that a young person could intentionally discharge such a 'firearm' into or at a place of residence. This provision therefore applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose a grave risk. Its effect at the low end of the spectrum is severe. The mandatory minimum cannot be justified by deterrence and denunciation alone, and the punishment shows a complete disregard for sentencing norms. The mandatory prison term would have significant deleterious effects on a youthful offender and it would shock the conscience of Canadians to learn that an offender can receive four years of imprisonment for firing a paintball gun at a home. As a result, s. 244.2(3)(b) imposes a mandatory minimum of four years' imprisonment for a much less grave type of activity such that it is grossly disproportionate and amounts to cruel and unusual punishment. The Crown did not argue that s. 244.2(3)(b) could be saved under s. 1 of the *Charter*. Accordingly, I would allow the appeal" (at paragraph 5).

The Section 12 Test for Mandatory Minimum Punishments:

The Supreme Court indicated that "[t]o assess whether a mandatory minimum violates s. 12 of the *Charter*, this Court has developed a two-stage inquiry that involves a contextual and comparative analysis (*Bissonnette*, at para. 62). A court must" (at paragraph 40):

> 1. Assess what constitutes a fit and proportionate sentence having regard to the objectives and principles of sentencing in the Criminal Code (*Bissonnette*, at para. 63; *Boudreault*, at para. 46; *Nur*, at para. 46).
>
> 2. Consider whether the impugned provision requires the imposition of a sentence that is grossly disproportionate, not merely excessive, to the fit and proportionate sentence (*Bissonnette*, at para. 63; *Nur*, at para. 46; *Smith*, at p. 1072). The constitutional bar is set high to respect Parliament's general authority to choose penal methods that do not amount to cruel and unusual punishment.

The Court noted that this "two-part assessment may proceed on the basis of either (a) the actual offender before the court, or (b) another offender in a reasonably foreseeable case or hypothetical scenario…Where the court concludes that the term of imprisonment prescribed by the mandatory minimum sentence provision is grossly disproportionate in either case, the provision infringes s. 12 and the court must turn to consider whether that infringement can be justified under s. 1 of the *Charter* if arguments or evidence to that effect are raised by the Crown (at paragraphs 41 and 42).

Reasonably Foreseeable Hypotheticals:

The Supreme Court held that a "reasonable hypothetical scenario needs to be constructed with care. While it may be tempting to allow the word 'hypothetical' to overwhelm, it is the reasonableness of the scenario that must be underscored" (at paragraph 76). The Court indicated that the "characteristics of a reasonable hypothetical include the following" (at paragraph 76):

> (i) The hypothetical must be reasonably foreseeable;
>
> (ii) Reported cases may be considered in the analysis;
>
> (iii) The hypothetical must be reasonable in view of the range of conduct in the offence in question;

(iv) Personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and

(v) Reasonable hypotheticals are best tested through the adversarial process.

Sentencing a Reasonably Foreseeable Offender:

The Supreme Court indicated that the "general sentencing principles apply when fixing a sentence for a reasonably foreseeable offender...Fixing a sentence for reasonably foreseeable offenders requires essentially the same approach that judges take in the daily task of sentencing offenders in courtrooms across this country. Any estimate must be circumscribed and tightly defined" (at paragraph 94).

When a Mandatory Minimum Sentence Will be Grossly Disproportionate:

The Supreme Court held that there are "three crucial components that must be assessed when considering the validity or vulnerability of mandatory minimum sentences: (1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives" (at paragraph 122).

The Court concluded that "[t]he first inquiry will often centre on the scope of the offence and whether it captures a broad set of disparate conduct. An inquiry into the effects of the punishment on the individual or reasonably foreseeable offender lies at the heart of the gross disproportionality analysis. Courts should inquire into the actual effects the punishment may have on the offender: both the time period and the material conditions under which the sentence will be served. The interplay between each of the three components should drive courts' gross disproportionality analysis" (at paragraph 147).

This Case:

In upholding the declaration of invalidity in relation to section 244.2(3)(b) of the *Criminal Code*, the Supreme Court concluded that section 244.2(3)(b) "is grossly disproportionate. It applies to an offence that captures a wide spectrum of conduct, ranging from acts that present little danger to the public to those that pose a grave risk. Its effect at the low end of the spectrum is as severe as the minimums in *Nur* and *Lloyd*. Denunciation and deterrence alone cannot support such a result. The punishment shows a complete disregard for sentencing norms and the mandatory prison term would have significant deleterious effects on a youthful offender. In light of these considerations, I agree with Mr. Hills that it would outrage Canadians to

learn that an offender can receive four years of imprisonment for firing a paintball gun at a home" (at paragraph 169).

R. v. Hilbach and Zwozdesky:

In ***Hilbach and Zwozdesky***, Mr. Hilbach pleaded guilty to the offence of robbery using a prohibited firearm contrary to section 344(1)(a)(i) of the *Criminal Code*. Section 344(1)(a)(i) prescribes a mandatory minimum sentence of five years of imprisonment for a first offence conviction of robbery committed with a restricted or prohibited firearm. Mr. Zwozdesky pleaded guilty to the offence of robbery with a firearm, contrary to section 344(1)(a.1) of the *Criminal Code*. At that time, section 344(1)(a.1) imposed a mandatory minimum sentence of four years of imprisonment for a conviction of robbery where an ordinary firearm was used.

Both accused argued that the mandatory prescribed minimum penalties violated section 12 of the *Charter*.

In ***Hilbach***, the sentencing judge concluded that the mandatory minimum sentence prescribed by section 344(a)(i) was grossly disproportionate and contravened section 12 of the *Charter*. He imposed a period of two years less a day of imprisonment.

In ***Zwozdesky***, the sentencing judge concluded that the mandatory minimum sentence prescribed by section 344(1)(a.i) was grossly disproportionate and contravened section 12 of the *Charter*. She imposed a period of three years of imprisonment.

The Alberta Court of Appeal dismissed the Crown's appeals, but added a year to Mr. Hilbach's sentence.

The Crown appealed to the Supreme Court of Canada.

The Supreme Court of Canada:

The appeals were allowed. The Supreme Court held that the mandatory minimum sentences set out in section 344(1)(a)(i) and the former section 344(1)(a.1) are constitutional and do not constitute cruel and unusual punishment.

Relying on its companion decision in ***Hill***, the Supreme Court indicated that "[d]etermining whether the mandatory minimum sentences for robbery are grossly disproportionate requires a two-stage inquiry. A court must first determine a fit and proportionate sentence for the offence having regard to the objectives and principles

of sentencing in the *Criminal Code*…The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate when compared to the fit and proportionate sentence…This two-part assessment may proceed on the basis of either (1) the actual offender before the court, as it will for Mr. Hilbach, or (2) another offender in a reasonably foreseeable case, as proposed by Mr. Zwozdesky…At both stages of the analysis, courts are called upon to be scrupulous…Analytical rigour at the first stage, and fixing as specific a sentence as possible, ensures that the comparative exercise at the second stage is not distorted. In some cases, the evaluation of gross disproportionality may be more apparent where the fit sentence fixed at the first stage is not carceral in nature — for example, where it would have involved probation rather than imprisonment as was the case in *Hills* (para. 156). But the same principled process of comparison applies when comparing terms of imprisonment to determine if and when the length of a carceral sentence becomes grossly disproportionate" (at paragraphs 34 and 35).

Application to Indigenous Offenders:

The Supreme Court held that section 718.2(e) "applies at three different parts of the [section 12] analysis" (at paragraphs 42 to 45):

> First, in conducting a s. 12 analysis, courts must consider *Gladue* when sentencing the individual offender. The failure to consider *Gladue* factors is an error that can lead to a finding that a sentence is unfit (*Ipeelee*, at paras. 86-87). Hence, where the offender is Indigenous, like Mr. Hilbach, a court will necessarily need to take into account *Gladue* principles in order to fix a sentence that is fit and proportionate at the first stage.
>
> Second, a court may consider scenarios involving Indigenous offenders in crafting reasonably foreseeable hypotheticals (*Hills*, at para. 86). Given the statistics concerning the imprisonment of Indigenous persons, it is reasonably foreseeable that a hypothetical offender could be Indigenous, and the consideration of a hypothetical offender's Indigeneity, in the context of a reasonable hypothetical scenario, aligns with the imperative statutory guidance provided by Parliament in s. 718.2(e). Indigenous people dealing with poverty, precarious housing, or disabilities and addictions appear with "staggering regularity in our provincial courts" and are therefore reasonably foreseeable (Boudreault, at para. 55).
>
> Lastly, Indigeneity is relevant at the second stage of the s. 12 inquiry. This Court has long affirmed that the assessment of whether a mandatory minimum

> sentence is grossly disproportionate depends, in part, on its reflection of valid penal purposes and recognized sentencing principles…*Gladue's* framework for applying s. 718.2(e) has been a core part of Canada's sentencing principles since 1999. The methodology called for under s. 718.2(e), as well as the norms it embodies, are well-established components of our sentencing jurisprudence, as much as parity and proportionality. Section 718.2(e) is necessarily relevant in a s. 12 framework that requires courts to assess the effects of mandatory minimum sentences in light of sentencing norms and objectives. Moreover, as *Boudreault* illustrates, the impact of a punishment on Parliament's objectives in s. 718.2(e) can support striking down a sentencing measure under s. 12. Accordingly, there is no reason to exclude consideration of s. 718.2(e) of the *Criminal Code* from either stage of the gross disproportionality framework.
>
> The types of considerations that may be raised under s. 718.2(e) in a s. 12 challenge to a mandatory minimum sentence include, for instance, whether a probationary sentence would have otherwise been a valid alternative to incarceration as a result of *Gladue* principles. Or, as in *Boudreault*, the effects of a sentencing measure may be particularly severe when circumstances affecting Indigenous offenders are considered (para. 94). This Court has identified, for instance, that Indigenous offenders may be more adversely affected by incarceration than non-Indigenous offenders (*Gladue*, at para. 68). Courts may identify these concerns as grounds that support the conclusion that a minimum sentence is grossly disproportionate, keeping in mind that a breach of s. 12 remains a high threshold to meet and a punishment is not grossly disproportionate due to the presence or absence of a single sentencing principle.

R. v. Hilbach:

The Supreme Court concluded that "a mandatory minimum of five years, while harsh and close to the line, is not grossly disproportionate in Mr. Hilbach's case. The minimum sentence at issue is not so wide that it encompasses conduct that poses relatively little risk of harm. Though Mr. Hilbach's personal circumstances attenuate his culpability somewhat, his actions constitute a grave offence with high moral blameworthiness. While the effects of imprisonment on Mr. Hilbach, an Indigenous offender, will be severe, five years' imprisonment in his case is not totally out of sync with sentencing norms. As a result, proportionality and parity are not compromised to the extent seen in *Nur*, *Lloyd* and *Hills*. Parliament's sentencing objectives and decision to prioritize denunciation and deterrence is justified for this

offence. Greater deference to Parliament's choice to enact a minimum sentence is therefore warranted" (at paragraph 51).

R. v. Zwozdesky:

The Supreme Court concluded that the proposed hypothetical scenarios advanced "introduce a degree of reduced gravity and culpability compared to Mr. Hilbach's case", but "they are insufficient to establish that s. 344(1)(a.1) is grossly disproportionate. Parliament could justifiably prioritize deterrence and denunciation in these circumstances as well and, as in Mr. Hilbach's case, they do not show four years' imprisonment for robbery with a firearm is totally out of sync with sentencing norms" (at paragraph 84).

Principles of Sentencing:

In addition to considering section 12 of the Charter in ***Hill***, the Supreme Court also made a number of comments concerning the principles of sentencing, including the sentencing principle of proportionality.

Proportionality:

The Supreme Court indicated that proportionality "is a 'central tenet' of Canada's sentencing regime, with roots that predate the recognition of it as the fundamental principle of sentencing in s. 718.1 of the *Criminal Code*…Indeed, 'whatever weight a judge may wish to accord to the objectives [for sentencing prescribed in ss. 718 to 718.2 of the *Criminal Code*], the resulting sentence must respect the fundamental principle of proportionality" (at paragraph 56).

The Supreme Court pointed out that the "purpose of proportionality is founded in 'fairness and justice'…It is to prevent unjust punishment for the "sake of the common good" (p. 547) and it serves as a limiting function to ensure that there is 'justice for the offender'…As the '*sine qua non* of a just sanction'…, the concept expresses that the amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender's moral blameworthiness" (at paragraph 57).

Gravity of the Offence:

The Supreme Court held that "[t]he 'gravity of the offence' refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime…The gravity

of the offence should be measured by taking into account the consequences of the offender's actions on victims and public safety, and the physical and psychological harms that flowed from the offence. In some cases where there is bias, prejudice or hatred, the motivation of the offender may also be relevant" (at paragraph 58).

The Offender's Moral Culpability:

The Supreme Court held that "[t]he offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity" (at paragraph 58).

In addition, the Supreme Court rejected the proposition that "the first stage is limited to consideration of a proportionate sentence solely for the offence" (at paragraph 60). Rather, it held that it incorporates "both the gravity of the offence and the moral blameworthiness of the offender"…Sentencing is a highly individualized and discretionary endeavor…Each sentence is to be custom tailored to match the particular offence, as well as the offender…There is no 'one size fits all' penalty… as sentencing is 'an inherently individualized' and 'profoundly subjective process'" (at paragraphs 61 and 62).

Denunciation and Deterrence:

The Supreme Court held that denunciation and deterrence, both general and specific, "are valid sentencing principles…Denunciatory sentences express a 'collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values' (*M. (C.A.),* at para. 81), and the need for denunciation is closely tied to the gravity of the offence (*Ipeelee*, at para. 37)…[G]eneral deterrence can support a stiffer sentence within a range of sentences" (at paragraph 139).

Charter-Section 12, Application to Sections 172.1(2)(a) and (b) of the Criminal Code:

Sentencing Child Luring:

In ***R. v. Marchand***, 2023 SCC 26, November 3, 2023, two accused were convicted of the offence of child luring (Marchand and H.V.). Marchand was tried by

indictment (section 172.1(2)(a), a mandatory minimum of one year of imprisonment) and H.V. by summary conviction (section 172.1(2)(b), a mandatory minimum of six months of imprisonment). Marchand was sentenced to a period of five months of imprisonment and H.V. was sentenced to a period of four months of imprisonment.

The Supreme Court of Canada described the two issues raised by the appeals in the following manner (at paragraphs 2 and 3):

> Two legal issues arise in these companion appeals. First, in Mr. Bertrand Marchand's matter, the Crown appellants have questioned the fitness of Mr. Bertrand Marchand's sentence for luring. This requires an examination of the sentencing principles for this separate and specific offence, based on a modern understanding of its gravity and associated harms.
>
> Second, both respondents in the companion appeals ask the Court to uphold the conclusions in the respective courts below that the mandatory minimum sentences outlined in s. 172.1(2)(a) and (b) are inconsistent with s. 12 of the *Canadian Charter of Rights and Freedoms* and therefore of no force or effect. Mr. Bertrand Marchand argues against the one-year mandatory minimum period of incarceration imposed when the Crown proceeds by indictment (s. 172.1(2)(a)), and H.V. impugns the six-month mandatory minimum period of incarceration imposed when the Crown proceeds summarily (s. 172.1(2)(b)). For their part, the Crown appellants ask that the Court affirm the constitutionality of the mandatory minimum sentences. While this Court has previously noted that the one-year obligatory penalty concerning s. 172.1(2)(a) is "constitutionally suspect" (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 146), this is the first time the Court squarely addresses the constitutional validity of both penalties.

The Supreme Court concluded as follows (at paragraphs 2, 4 and 5):

> In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, this Court articulated the various serious and potentially life-long consequences associated with sexual violence against children. I build on that analysis and explain the distinct harms of the child luring offence so that its full gravity animates the governing sentencing principles and informs their constitutional status. In Mr. Bertrand Marchand's case, after applying the correct sentencing principles, I increase his sentence from five months to one year imprisonment, and find that it should be served consecutively, and not concurrently, to the other offence for which he was sentenced. In H.V.'s matter, the fitness of H.V.'s sentence was not challenged before this Court.

> A thorough analysis reveals that these mandatory minimum sentences infringe the *Charter's* s. 12 protection against cruel and unusual punishment. The mandatory periods of incarceration apply to such an exceptionally wide scope of conduct that the result is grossly disproportionate punishments in reasonably foreseeable scenarios.
>
> Invalidating the mandatory minimums does not mean that child luring is a less serious offence. Based on the distinct and insidious psychological damage luring generates, in some cases the appropriate penalty for child luring will be imprisonment for a period equal to or longer than that set out in the unconstitutional mandatory minimum sentences. In these appeals, the reasonably foreseeable scenarios proffered produce fewer harms, and are presented in circumstances where the moral culpability of the offender is reduced. The broad reach and range of the offence means that a defined minimum period of imprisonment in all cases will sometimes produce results so excessive as to outrage standards of decency.

The Sentence Appeal:

The circumstances of the offences committed by Mr. Marchand were described by the Supreme Court in the following manner (at paragraphs 17 to 19):

> Maxime Bertrand Marchand met the victim in person in early August 2013, when he was 22 and she was, to his knowledge, 13 years old. In the weeks that followed, he sent her a friend request on Facebook, which she accepted. Over the next two years, they were in contact on social media and also met in person. Between August 1, 2013 and July 19, 2015, Mr. Bertrand Marchand had illegal sexual intercourse with the victim four separate times. As a result of these events, the Crown charged him with one count of sexual interference contrary to s. 151(a) of the *Criminal Code* for this time period.
>
> Mr. Bertrand Marchand was also charged with one count of luring a child contrary to s. 172.1(1)(b). Throughout their contact, Mr. Bertrand Marchand used Facebook messenger, and other means of telecommunications, to stay in touch with the victim and to arrange meetings. The time frame in the luring count was restricted to the period between February 25, 2015 and September 13, 2015. During this period, he turned 24 and she was 15.
>
> In the fall of 2014, as well as during the period covered in the indictment for the count of luring, the victim was living at a rehabilitation centre. Mr. Bertrand Marchand's online communications with the victim repeatedly raised the possibility of getting together in person and resulted in a meeting on July 19, 2015, which formed the basis for the fourth occurrence of sexual

> interference. On that day, the victim paid a weekend visit to her foster family, but afterwards did not return directly to the rehabilitation centre. Instead, she went with Mr. Bertrand Marchand to his home, and he had illegal sexual intercourse with her. After this, their social media exchanges became less frequent and eventually ceased completely. In September 2015, the victim provided her statement to the police and filed a complaint. The communications that preceded and followed this final act of sexual interference form the basis for the luring charge against Mr. Bertrand Marchand.

The Supreme Court increased the sentence imposed for the luring offence to one year of incarceration and concluded that "[a]pplying the totality principle, I find that a 22-month sentence is just in light of the circumstances of the case, Mr. Bertrand Marchand's personal circumstances and his moral blameworthiness" (at paragraph 101).

In increasing the sentence for the luring offence, the Court stated (at paragraphs 48 and 50):

> *Friesen's* analytical approach necessitates an understanding of the inherent wrongfulness and distinct harms of luring and Parliament's sentencing goals. Understanding the wrongfulness and harmfulness of the luring offence is integral to properly assessing the gravity of the offence and the degree of responsibility of the offender, as well as to avoiding stereotypical reasoning and the misidentification of aggravating and mitigating factors (para. 50).
>
> The sentencing judge committed errors in principle that impacted the assigned sentence of five months' imprisonment that she ordered be served concurrently to the sexual interference sentence. Specifically, she erred by (1) minimizing the harm caused to the victim by failing to recognize the grooming that did occur; (2) misconstruing the offender's actions; and (3) assigning a concurrent sentence for the luring offence. These errors in principle warranted appellate intervention that the majority of the Court of Appeal below failed to undertake. I would thus substitute the 5-month sentence imposed by the sentencing judge with the 12-month sentence sought by the Crown.

EVIDENCE/DEFENCES

Evidence-Prior Sexual Activity-Section 276 of the Criminal Code:

Defences-Honest But Mistaken Belief in Communicated Consent:

In ***R. v. Hay***, 2023 SCC 15, May 19, 2023, the accused was charged with the offence of sexual assault. He sought to present evidence of a prior consensual act of digital

anal penetration with the complainant. The trial judge admitted the evidence and the accused was acquitted.

On appeal, the Alberta Court of Appeal (2022 ABCA 246) set aside the acquittal, holding that the prior sexual activity evidence was inadmissible (at paragraphs 17 to 19):

> The trial judge erred in law in admitting this evidence. While she cautioned herself against twin-myth reasoning, the admitted evidence unfortunately followed the path of prohibited propensity reasoning. It served no other purpose than to support an inference that because the complainant had consented to digital anal penetration on August 24, she consented to this same sexual activity on September 13; or worse, that because she had twice consented to digital anal penetration, she must have consented to anal intercourse. There was no link between a prior incident of digital anal penetration and the sexual act for which Mr Hay was charged - anal intercourse.
>
> As the trial judge recognized, communicated consent must be given to every sexual act in a particular encounter. To make out the defence, Mr Hay must show "he believed that the complainant communicated consent to engage in the sexual activity in question": *Ewanchuk* at para 46 [emphasis in original]. The trial judge conflated anal digital penetration with anal intercourse, an error that permeated the trial decision. These are distinct sexual acts. "[A]greement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching": *R v Hutchinson*, 2014 SCC 19 at para 54.
>
> Taking Mr Hay's evidence at its highest, it fails to ground his argument that he believed the complainant communicated consent to engage in anal intercourse; notably absent was any evidence that Mr Hay believed the complainant had communicated consent to this specific act. At best, the evidence of previous sexual activity would have grounded his belief that the complainant might consent or was likely to consent to anal intercourse. This is not sufficient. The evidence did not meet the test for relevance and should not have been admitted or relied on by the trial judge in her subsequent decision.

The Defence of Honest but Mistaken Belief in Communicated Consent:

The Court of Appeal also concluded that "the defence of honest but mistaken belief in communicated consent had no air of reality because it was based largely on errors of law regarding consent and because there was no evidence that Mr Hay had taken

reasonable steps to ascertain consent to engage in anal intercourse. Quite the opposite; he admitted there was no discussion of anal intercourse" (at paragraph 43).

The accused appealed to the Supreme Court of Canada.

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

> Mr. Hay appeals from the unanimous decision of the Court of Appeal of Alberta setting aside an acquittal and substituting a conviction, pursuant to s. 686(4)(b)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, on one count of sexual assault.
>
> We are all of the view that the appeal should be dismissed, substantially for the reasons of the Court of Appeal. Mr. Hay's defence of honest but mistaken belief in communicated consent had no air of reality, and the evidence of prior sexual activity was inadmissible. In the circumstances, the Court of Appeal properly substituted a conviction. Therefore, the appeal is dismissed.

Evidence-Plain View Doctrine:

In ***R. v. McGregor***, 2023 SCC 4, February 17, 2023, the accused, a member of the Canadian Armed Forces, was posted to the Canadian Embassy in Washington and held diplomatic immunity. During an investigation by the Canadian Forces National Investigation Service (CFNIS), the Alexandria police assisted by obtaining a search warrant to search the accused's residence. The search warrant was executed by the American police and Canadian investigators.

During the search, the contents of some electronic devices were scanned. Evidence relating to unforeseen offences was discovered, including a sexual assault. The devices were seized and taken to Canada. The Canadian investigators obtained a Canadian warrant and conducted a further analysis of the devices seized.

At his Court Martial, the accused argued that the search and seizure of his electronic devices contravened section 8 of the *Charter*. The military judge held that the *Charter* did not apply extraterritorially. The accused was convicted of a number of offences, including sexual assault and disgraceful conduct. An appeal to the Court Martial Appeal Court was dismissed. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed.

The Supreme Court of Canada indicated that it's "decision in *Hape* is the governing authority on the territorial reach and limits of the *Charter* under s. 32(1). Under the *Hape* framework, the *Charter* generally cannot apply to Canadian authorities involved in an investigation conducted abroad. This general rule is qualified by two

exceptions: (1) consent by the foreign state to the application of Canadian law…and (2) Canadian participation in a process that violates Canada's international law obligations" (at paragraph 18).

However, the Supreme Court held that it was "unnecessary to deal with the issue of extraterritoriality to dispose of this appeal. This is so because the CFNIS did not violate the *Charter*. Working within the constraints of its authority in Virginia, the CFNIS sought the cooperation of local authorities to obtain and execute a warrant under Virginia law. The warrant which issued authorized the search, seizure, and analysis of Cpl. McGregor's electronic devices expressly. The evidence of sexual assault was discovered inadvertently by the investigators in the process of triaging the devices at the scene of the search; its incriminating nature was immediately apparent. Although the warrant did not contemplate such evidence, the digital files in issue fell squarely within the purview of the plain view doctrine. Furthermore, the CFNIS obtained Canadian warrants before conducting an in-depth analysis of these devices. It is difficult to see how the CFNIS investigators could have acted differently to attain their legitimate investigative objectives. I conclude that they did not infringe Cpl. McGregor's rights under s. 8 of the *Charter*" (at paragraph 4).

Section 8 of the Charter:

The Supreme Court noted that the "fact that a search of an electronic device is expressly authorized by warrant does not mean that any file contained therein may be analyzed — even where no search protocol has been imposed. Cromwell J. stressed in *Vu* that police officers are 'bound, in their search, to adhere to the rule that the manner of the search must be reasonable' (para. 61). Consequently, they cannot 'scour the devices indiscriminately' (para. 61) but must limit their search to the types of files that are 'reasonably necessary to achieve [the warrant's] objectives' (para. 22). Should 'the officers realiz[e] that there was in fact no reason to search a particular program or file on the device, the law of search and seizure would require them not to do so'" (at paragraph 29).

The Supreme Court indicated that though "the Virginia warrant did not encompass the investigation of sexual assault offences" the "discovery of unforeseen evidence does not invalidate the authorization to conduct a search for the purposes outlined in the original warrant…Here, the investigators discovered the impugned evidence when they were in the process of triaging Cpl. McGregor's electronic devices at the scene of the search, as was expressly authorized by warrant. The investigators set aside the incriminating devices for seizure and further analysis. Indeed, the CFNIS obtained Canadian warrants before further analyzing their contents. In my view, this investigative process was consistent with s. 8 of the *Charter*" (at paragraph 36).

The Plain View Doctrine:

The Supreme Court indicated that "two requirements must be satisfied for the plain view doctrine to apply: (1) the police officers must have a legitimate 'prior justification for the intrusion into the place where the 'plain view' seizure occurred'…; and (2) the incriminating evidence must be in plain view in that it is 'immediately obvious' and 'discovered inadvertently' by the police… it does apply in some form to electronic devices…In the case at bar, there can be no doubt that the doctrine applies" (at paragraph 37).

In the context of digital searches, the Court held that "the prior justification extends only to the types of files that are 'reasonably necessary' for the proper execution of such a search (*Vu*, at para. 22). In other words, there must be a reasonable nexus between the files examined and the purposes of the warrant for a search to satisfy the first requirement of the plain view doctrine" (at paragraph 38).

The Supreme Court concluded that "both requirements of the plain view doctrine are satisfied in the present case" (at paragraphs 41 and 42):

> First, the investigators had a legitimate justification for their inspection of the files containing evidence of sexual assault at the scene of the search. As mentioned above, the Virginia warrant meets the *Vu* requirement of specific, prior authorization applicable to digital searches. Moreover, the military judge found that "[t]he discovery of files relating to a potential sexual assault . . . occurred while looking for the types of files specifically sought and authorized" (*voir dire* decision, at para. 25 (CanLII)). The investigators "demonstrat[ed] care to limit the impact of the search through screening and conduct of a targeted search that involved a minimum of personal information" (para. 27). In these circumstances, the initial search leading to the discovery of the files in issue satisfies the requirement of prior justification.
>
> Second, the digital files disclosing evidence of sexual assault were in plain view, given their inadvertent discovery and immediately apparent unlawfulness. The investigators came upon these files in the triage process, which was designed to quickly identify evidence of interception and voyeurism. The military judge rejected "the submissions to the effect that the investigators continued to look into files they had no authority to look at under the terms of the warrant" (para. 25). He further noted that "any device that was assessed to contain potential child pornography and sexual assault files [was] set aside for seizure and further analysis back in Canada" (para. 25). Moreover, there was no need to closely examine the files to ascertain their

> incriminating nature — in contrast to the documents in *Law*, which were not facially unlawful. I thus conclude that the impugned evidence was in plain view and that its seizure during the triage process did not violate s. 8, either as part of a search carried out unreasonably or as an unreasonable seizure.

Conclusion:

The Court concluded that "CFNIS demonstrably observed the requirements of the *Charter*. The investigators discovered the incriminating evidence in the execution of a digital search expressly authorized by a valid warrant. The evidence of sexual assault, although not contemplated in the original warrant, fell squarely within the purview of the plain view doctrine. The CFNIS seized the evidence in accordance with that doctrine and subsequently obtained Canadian warrants before conducting an in-depth analysis of the files in issue. Even on Cpl. McGregor's view of the law, it is difficult to see how the CFNIS could have more fully complied with the *Charter*. In light of my conclusion that the investigative process was consistent with s. 8 of the *Charter*, it is unnecessary to address Cpl. McGregor's argument that the evidence should be excluded under s. 24(2)" (at paragraph 44).

In ***R. v. Lawlor***, 2023 SCC 34, December 15, 2023, the accused was convicted of murder. An appeal to the Ontario Court was dismissed, with a dissent (2022 ONCA 645). The accused appealed as of right to the Supreme Court of Canada.

The appeal was allowed and a new trial ordered (Kaiser J., dissenting). In a brief oral judgment, the Court stated:

> Only two grounds of appeal are before this Court. The first is whether the trial judge erred in his instructions to the jury regarding the use of evidence as to the accused's mental health and the requisite intent for first degree murder. The second relates to evidence of after-the-fact conduct.
>
> A majority of this Court would allow the appeal on the ground relating to the requisite intent for murder and for first degree murder, but not on the ground relating to after-the-fact conduct. As to the first ground, we are in substantial agreement with the reasons of Justice Nordheimer. As to the second ground, we are in substantial agreement with the reasons of the Ontario Court of Appeal majority. We would add the following comment.
>
> As has been stated on many occasions, and we repeat here, courts need to be mindful of evidence as to mental health where this is relevant to issues of criminal responsibility. This is especially so in instructing a jury, to assist them in the proper use of such evidence.

> Accordingly, the appeal is allowed, the conviction is set aside and a new trial is ordered.
>
> KASIRER J. — I would dismiss the appeal. I allow myself two observations.
>
> First, I agree with my colleagues that courts need to be mindful of mental health evidence in criminal matters, including in instructions to the jury. As the majority in the Court of Appeal wrote, there is no question that evidence of mental health problems may be relevant to issues of intent and planning and deliberation, including in an assessment of the adequacy of a jury charge (see paras. 41 and 44-48).
>
> Second, and with the utmost respect for other views, I conclude that the trial judge's charge properly equipped the jury, in light of all the circumstances, to decide the case according to the exacting standard set forth in *R. v. Abdullahi*, 2023 SCC 19. In sum, in respect of both the mental health and the after-the-fact evidence, I see no reviewable errors in the jury charge and, on these points, I would adopt the majority reasons of van Rensburg J.A. as my own, without reserve.

DEFENCES

Use of Force by a Peace Officer-Section 25 Criminal Code:

In ***R. v. Lindsay***, 2023 SCC 33, December 14, 2023, the accused, a peace officer, was convicted of the offence of aggravated assault. His appeal from conviction was dismissed by the Alberta Court of Appeal, dissenting. He appealed to the Supreme Court of Canada as of right.

The appeal was dismissed. The Supreme Court issued a brief oral judgment, per Jamal J.:

> We are all of the view that the appeal should be dismissed.
>
> We do not accept the appellant's submission that the trial judge misinterpreted the concession of defence counsel that if an assault occurred, it was an aggravated assault. The appellant did not raise this as a ground of appeal before the Court of Appeal. The appellant now claims that the trial judge interpreted this concession as meaning that he did not need to decide whether the Crown had proved the elements of aggravated assault. We disagree. Reading the judgment as a whole, the trial judge concluded that the appellant committed aggravated assault when he intentionally struck and threw the

person in his custody to the ground. As the majority of the Court of Appeal correctly noted, based on the trial judge's reasons, "the pathway to conviction is clear and based on the correct application of relevant legal principles" (para. 6). A trial judge is presumed to know the law and is entitled to focus on the live issues at trial. In our view, the trial judge's reasons are sufficient in law (see *R. v. G.F.*, 2021 SCC 20, at para. 74).

Nor do we accept the appellant's argument that the trial judge erred in concluding that s. 25(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, did not provide a defence for the appellant's use of force against the individual. Section 25(1) "essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances" (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 34). The matters raised by the dissenting judge in the Court of Appeal in essence impugn the trial judge's findings of fact. In our view, the trial judge was entitled to find on the evidence before him that the appellant had no reasonable grounds to strike the person initially, and that his use of force in striking him three more times in the head and then throwing him to the ground was unnecessary and excessive on a proper standard. The trial judge's findings of fact were amply supported by the record. We see no basis for this Court to intervene.

OFFENCES

Occupational Health and Safety Act-Meaning of the Word "Employer":

In ***R. v. Greater Sudbury (City)***, 2023 SCC 28, November 10, 2023, he City was charged with the offence of failing as an "employer" to "ensure that . . . the measures and procedures prescribed [in the Regulation] are carried out in the workplace", contrary to section 25(1)(c) of the *Occupational Health and Safety Act*, R.S.O. 1990.

The City had contracted with Interpaving Limited to act as constructor to repair a downtown water main. An Interpaving employee struck and killed a pedestrian when driving a road grader, in reverse, through an intersection, contrary to the accompanying regulation.

The City was acquitted. The trial judge held the City did not have direct control over the workers and the intersection and thus the City was not an "employer", and n the alternative, acted with all due diligence.

"Employer" is defined by section (1) of the *Act*, as follows:

> *…a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.*[1]

The City's acquittal, on the basis that it was not an employer, was upheld by the provincial offences appeal court. That Court did not address the trial judge's finding that the City acted with due diligence The Ontario Court of Appeal set aside the acquittal, found the City liable under section 25(1)(c) as an employer, and remitted the question of the City's due diligence to the provincial offences appeal court.

The City appealed to the Supreme Court of Canada.

The appeal was dismissed. Three sets of reasons were filed.

Wagner C.J. and Martin, Kasirer and Jamal JJ:

These justices held that the City was an "employer". They would remit the matter to the provincial offences appeal court to consider the issue of due diligence (at paragraphs 4 to 6):

> …while control over workers and the workplace may bear on a due diligence defence, nothing in the text, context or purpose of the Act requires the Ministry to establish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c).
>
> In s. 1(1), the Act defines "employer" broadly — without any reference to control — and charges all employers to uphold several statutory duties. There is simply no reason to embed a control requirement into the definition of an "employer" or graft a control requirement onto s. 25(1)(c) when the legislature deliberately chose not to do so. Indeed, diminishing an employer's duties by reading in a control requirement under either or both provisions would thwart the purpose of this remedial public welfare legislation. This Act is specifically designed to expand historically narrow safeguards and seeks to promote and maintain workplace health and safety by expressly imposing concurrent, overlapping, broad, strict, and non-delegable duties on multiple workplace participants in what is known as the "belt and braces" strategy. The

[1] Section 2(f) of the *Occupational Health and Safety Act*, RSNL 1990, defines "employer" in the following manner:

> *"employer" means a person who employs 1 or more workers.*

> interpretation advanced by the City not only defeats this intention, but would also create undesirable and unnecessary uncertainty and jeopardize efficient administration of the Act's strict liability offences. Instead, control is properly considered in deciding whether an employer who has breached the Act can nevertheless defend on the basis that it acted with due diligence. It is open to an accused to prove that its lack of control suggests that it took all reasonable steps in the circumstances.
>
> Accordingly, I agree with the Court of Appeal that the City was an employer and breached its duty under s. 25(1)(c). I would therefore dismiss the appeal and uphold the Court of Appeal's order remitting the question of due diligence to the provincial offences appeal court.

Due Diligence:

The Justices held that "[c]onsidering control at the due diligence stage respects the text, context and purpose of the Act and best upholds its purpose of promoting workplace safety… The fact-finder should assess, either in absolute or comparative terms, whether an employer had control over the worker and the workplace. Control is also an implicit consideration in assessing what alternatives were available to the accused" (at paragraphs 49 and 56).

Karakatsanis, Rowe and O'Bonsawin JJ.:

These Justices would have allowed the appeal They would "remit the matter to the Ontario Court of Justice to assess whether ss. 65 and 104(3) of the Regulation apply to the City as an employer, and thus whether the City breached its duty under s. 25(1)(c) of the Act" (at paragraph 162).

They concluded that "the definition of "employer" in s. 1(1) of the Act encompasses the City's relationship with its quality control inspectors. As an employer of the quality control inspectors, the scope of the City's duties under s. 25(1)(c) of the Act must be examined. Properly interpreted, s. 25(1)(c) holds employers liable for breaching the regulatory measures which apply to them. The present appeal involves measures contained within the Regulation. Having considered the text of the regulatory measures, the structure of the Regulation, its relationship to the division of roles within the Act, and the purposes of the scheme as a whole, we conclude that where certain measures in the Regulation do not specify to whom they apply, these measures apply to an employer when they relate to the work that the employer controlled and performed through their workers. As the courts below did not

properly analyze whether the breach was made out, we would remit the matter for reconsideration by the Ontario Court of Justice at the duties stage" (at paragraph 66).

These Justices concluded that the "fact that a party is an employer does not mean that they are an employer to all workers at a workplace or project, which may affect the scope of their responsibilities" (at paragraphs 88 and 89):

> The definition of "employer" in s. 1(1) covers two broad relationships. On the first branch, a person satisfies the definition of "employer" where they employ one or more workers. On the second branch, a person is an employer where they contract for the services of one or more workers.
>
> The Court of Appeal concluded that it did not need to examine the second branch of the definition (at para. 15), because it determined that the City was the employer of the quality control inspectors under the first branch. With respect, we believe that both branches of the definition warrant discussion. The fact that a party is an employer does not mean that they are an employer to *all workers* at a workplace or project, which may affect the scope of their responsibilities. Indeed, when we apply the Act to the present appeal based on our analytical approach, we agree with the Court of Appeal that the City is the employer of its *inspectors* under the first branch of the definition of "employer". However, the City is not the employer of the workers hired or contracted for by Interpaving under the second branch of the employer definition. The City's relationship with Interpaving reflects an owner-constructor relationship, not an employer-worker relationship.

Côté J.:

Justice Côté would have allowed the appeal and restored the acquittals. She agreed "with the trial judge, Lische J., that the City was not an "employer" on the construction project as defined and intended by the Act" (at paragraph 164).

Justice Côté held that the City was not the "employer" (at paragraphs 166 to 169):

> My analysis proceeds in three parts. First, I discuss why I substantially agree with Rowe and O'Bonsawin JJ.'s interpretation of the duties of employers under s. 25(1)(c) of the Act, which must be read in context and together with the applicable regulations. I further agree that the definition of "employer" in s. 1(1) of the Act does not capture the construction-specific relationship between a project owner and its general contractor (see Rowe and O'Bonsawin JJ., at paras. 99-104). With respect, Martin J. fails to consider the

structure of the Act and the carefully legislated distinction between construction projects and other workplaces.

Second, I consider the purpose of the Act and explain why the "belt and braces" approach to worker safety should not be interpreted in a manner that extends the reach of the Act "far beyond what was intended by the legislature" (*Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321, at para. 27; see also *R. v. Bondfield Construction Co.*, 2022 ONCA 302, at para. 59 (CanLII)). Even a "generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions" (*Blue Mountain*, at para. 26). While due diligence remains available as a defence, it should not affect the proper interpretation of the term "employer" or alter the nature of the statutory offence of a failure to comply with s. 25(1)(c) of the Act.

Third, and where I depart from Rowe and O'Bonsawin JJ., I explain why a municipal project owner is not an employer on the construction site merely because it employs quality control inspectors (see Ont. C.J. reasons, at paras. 84-90; Ont. S.C. reasons, at paras. 33-35). Rowe and O'Bonsawin JJ. find that "the applicability of the regulatory measures depends on whether [the City] controlled work being performed near public ways (s. 65) or controlled the operation of vehicles, machines and equipment (s. 104(3))" (para. 160). With respect, the trial court answered these questions. Over the course of a 5-day trial, the trial judge heard from 10 witnesses and considered 16 exhibits. In her careful and thorough analysis, she repeatedly rejected the Ministry's position that the City or its inspectors exercised control over any construction work at the project (see paras. 24-26, 64-67, 71, 81-82 and 86-89). In the alternative, the trial judge was satisfied that the City exercised due diligence, taking "every precaution reasonable in the circumstances to prevent the tragedy that occurred" (para. 91; see also paras. 92-103).

As a result, I would not remit the matter to the trial court. The City was not statutorily obligated to ensure compliance with ss. 65 and 104(3) of the Regulation, both of which applied only to the workplace parties involved in actual construction work at the Elgin Project.

Offences-Participation in a "Criminal Organization", Section 467.1 of the C*riminal Code:*

In ***R. v. Abdullahi***, 2023 SCC 19, July14, 2023, the accused was convicted by a jury of the offence of participation in the activities of a criminal organization for the

purpose of trafficking weapons, contrary to section 467.11 of the *Criminal Code*. The accused appealed from conviction, arguing that the trial judge erred in law in his instruction to the jury on the first required element of that offence — the existence of a "criminal organization" — by failing to explain that a criminal organization must have structure and continuity. A majority of the Ontario Court of Appeal dismissed the appeal. The accused appealed to the Supreme Court of Canada.

The appeal was allowed and a new trial ordered. The Supreme Court of Canada concluded that "the trial judge erred in law in his instructions to the jury by failing to explain that a criminal organization is one that by virtue of its structure and continuity poses an enhanced threat to society. This requirement distinguishes criminal organizations from other groups of offenders who act in concert; it also helps guard against improper reasoning, notably reliance on stereotypes, as a basis for identifying a criminal organization. Without an explanation of this requirement in the judge's instructions, the jury was not sufficiently instructed on the legal standard to apply to the evidence in concluding that a criminal organization existed" (at paragraph 5).

A Criminal Organization:

Section 467.1(1) of the *Criminal Code* defines a "criminal organization" as follows:

> *criminal organization means a group, however organized, that*
>
> > *(a) is composed of three or more persons in or outside Canada; and*
> >
> > *(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.*
>
> *It does not include a group of persons that forms randomly for the immediate commission of a single offence.*

The Supreme Court indicated that the "purpose of the *Criminal Code's* criminal organization regime is to identify and undermine groups that pose an enhanced threat to society due to the institutional advantages of structure and continuity (*Venneri*, at para. 40). Structured and continuous criminal entities offer advantages to their members by consolidating and retaining knowledge; sharing customers and resources; developing specializations; dividing labour; fostering trust and loyalty;

and developing reputations in the community, including for violence (para. 36). These same advantages enable criminal organizations to elude law enforcement more effectively" (at paragraph 78).

This Case:

The Supreme Court concluded that in this case, the trial judge's instructions "did not sufficiently equip the jury to determine whether a criminal organization existed. Rather, the judge merely recited the definition in s. 467.1(1) of the *Criminal Code*. This would not have equipped the jury with an understanding that a criminal organization must pose an enhanced threat to society by virtue of its structure and continuity" (at paragraph 89).

Offences-Party Liability:

In ***R. v. Johnson***, 2023 SCC 24, October 13, 2023, the accused was convicted of murder. His appeal to the Ontario Court of Appeal (2022 ONCA 534) was dismissed (Nordheimer J.A., dissenting). The accused appealed as of right to the Supreme Court of Canada.

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

> We are all of the view that the majority in the Court of Appeal was correct to conclude that party liability was properly left to the jury by the trial judge. The evidence on the record provided party liability with an air of reality.
>
> We agree, however, with Nordheimer J.A., dissenting, that the trial judge erred in law in his instructions on party liability. In one part of the charge, the judge gave instructions that resembled co-principal liability, but said he was instructing on aiding. In other parts of the charge, the jury was given partially correct instructions on aiding. We share Nordheimer J.A.'s view that the jury was never clearly told that the appellant would have needed to know that the principal intended to kill the victims in a planned and deliberate manner in order to be liable for first degree murder as an aider.
>
> That said, we would apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, because these errors were harmless. There is no reasonable possibility that the jury would have reached a different verdict had these errors not been made (see *R. v. Abdullahi*, 2023 SCC 19, at para. 33; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25). The evidence that supported party liability was the same as the evidence for co-

> principal liability. Moreover, the appellant's defence was not undermined by the jury charge.
>
> Accordingly, we would dismiss the appeal.

Offences Refusing to Comply with an Approved Screening Device Demand-Meaning of "Forthwith":

In ***R. v. Breault***, 2023 SCC 9, April 13, 2023, the accused was convicted of refusing to comply with an approved screening device demand. The conviction was overturned by the Quebec Court of Appeal, which concluded that because the officer did not have a screening device with him, the demand was not valid. The Crown appealed to the Supreme Court of Canada. The appeal was dismissed and the acquittal upheld.

The Supreme Court described the issue raised as being the following (at paragraphs 1, 4 and 20):

> This appeal concerns the interpretation of the immediacy requirement in what was, at the relevant time, s. 254(2)(b) (now s. 320.27(1)(b)) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"). According to this provision, if a peace officer has reasonable grounds to suspect that a driver has alcohol in their body, the peace officer may, by demand, require the driver "to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made" through an approved screening device ("ASD").
>
> The central issue in this case relates to the time within which a peace officer must enable a driver who is stopped for this purpose to provide the breath sample required for a proper analysis to be made by means of an ASD. Specifically, this Court must determine whether the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* requires that the officer have immediate access to an ASD at the time the demand is made.
>
> The resolution of this case lies in the answer to the following question: Does the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* require that the officer have immediate access to an ASD at the time the demand is made?

The Supreme Court concluded that subject to "unusual circumstances", for an approved screening device demand to be valid, the officer must have the device with them.

The Supreme Court held that "as a general rule, the word 'forthwith' must be given an interpretation that reflects its ordinary meaning. This interpretation is consistent with the text, context and purpose of s. 254(2)(b) Cr. C. It is also in keeping with the decisions of this Court, from *R. v. Thomsen*, [1988] 1 S.C.R. 640, to *Woods*, in which the word 'forthwith' has been interpreted in a manner consistent with its ordinary meaning, except in unusual circumstances" (at paragraph 24).

The Supreme Court indicated that the word "forthwith" means "'immediately' or 'without delay'" (at paragraph 29). The Court also indicated that "the guidance provided by this judgment on the interpretation of the immediacy requirement in s. 254(2)(b) *Cr. C.* applies to the interpretation of the word 'immediately' in s. 320.27(1)(b) *Cr. C.*".

The Court held that "the relevant time period for the explicit immediacy requirement is the period between the making of the demand and the moment when the breath sample can be provided…'Forthwith' is not synonymous with 'time reasonably necessary'; this word must be given an interpretation consistent with its ordinary meaning, except in the unusual circumstances referred to by Fish J. at para. 43 of *Woods*" (at paragraph 51).

Unusual Circumstances:

The Supreme Court held that "[f]irst, the burden of establishing the existence of unusual circumstances rests on the Crown" (at paragraphs 55). It provided the following guidance (at paragraphs 56 to 60):

> Second, as in *Bernshaw*, the unusual circumstances must be identified in light of the text of the provision (*Piazza*, at para. 81 (CanLII)). This preserves the provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith".
>
> Like the provision at issue in *Bernshaw*, s. 254(2)(b) *Cr. C.* specifies that the sample collected must enable a "proper analysis" to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result.
>
> That being said, courts might recognize unusual circumstances other than those directly related to the use of the ASD or the reliability of the result that will be generated. For example, insofar as the primary purpose of the impaired driving detection procedure is to ensure everyone's safety, circumstances involving urgency in ensuring the safety of the public or of peace officers might be recognized.

> Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency. A flexible interpretation of the immediacy requirement cannot be justified by the magnitude of the public funding required to supply police forces with ASDs or by the time needed to train officers to use them. There is nothing unusual about such utilitarian considerations. Allocating a limited budget is the daily reality of any government (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153).
>
> Fourth, the absence of an ASD at the scene at the time the demand is made is not in itself an unusual circumstance.

Conclusion:

The Supreme Court conclude that the Crown "has not shown that there was any unusual circumstance that would account for the absence of an ASD at the scene and thereby justify a flexible interpretation of the immediacy requirement. In fact, the appellant is unable to explain why [the officers] did not have an ASD in their possession. The demand made by [the officer] was therefore invalid. Accordingly, the respondent's refusal did not attract criminal liability, and the acquittal entered by the Quebec Court of Appeal must be upheld" (at paragraph 68).

Offences-Voyeurism-Section 162(1)(a), Criminal Code:

In ***R. v. Downes***, 2023 SCC 6, March 10, 2023, the accused was convicted of the offence of voyeurism, contrary to section 162(1)(a) of the *Criminal Code*. He had surreptitiously taken photographs of boys aged between 12 and 14 years old in their underwear in hockey arena dressing rooms. On appeal, a majority of the British Columbia Court of Appeal set aside the convictions, holding that section 162(1)(a) was intended to apply to persons who expect to observe or record nudity or sexual activity.

The Crown appealed to the Supreme Court of Canada. The Supreme Court indicated that the "question in this appeal is whether the "place" referred to in s. 162(1)(a) is qualified by an implicit temporal component; specifically, must the person be in a place in which a person can reasonably be expected to be nude at the specific time when the person is surreptitiously observed or recorded?" (at paragraph 1).

The appeal was allowed and the convictions restored. The Supreme Court concluded that section 162(1)(a) "has no implicit temporal component" (at paragraph 5):

> In my view, properly interpreted based on its text, context, and purpose, s. 162(1)(a) has no implicit temporal component. The text of s. 162(1)(a) lacks

> language suggesting that Parliament intended the "place" to be evaluated at the specific time when the observation or recording was made. Further, as this Court observed in *Jarvis*, Parliament's purposes in enacting the voyeurism offence were to protect individuals' privacy and sexual integrity. Those purposes are promoted by interpreting s. 162(1)(a) without an implicit temporal component, and would be detracted from by reading in such a component. In effect, s. 162(1)(a) designates places such as bedrooms, bathrooms, and dressing rooms as "safe places" where people should be free from intrusions onto their privacy and sexual integrity, whether or not a person in the place could reasonably be expected to be nude or engaged in sexual activity at the specific time the person is surreptitiously observed or recorded. Finally, I would decline to address the constitutional issue because this is not an appropriate case for this Court to exceptionally exercise its discretion to decide such an issue for the first time on appeal. I would therefore allow the appeal and restore the convictions.

PROCEDURE

Applications-Summary Dismissal:

In ***R. v. Haevischer***, 2023 SCC 11, April 28, 2023, the accused was charged with the offence of murder. He applied for a stay of proceedings to be entered, arguing that an abuse of process had occurred. His application was summarily dismissed by the trial judge and he was convicted. The British Columbia Court of Appeal upheld the finding of guilt, but remitted the matter to the trial judge to consider the abuse of process argument on its merits. The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issue raised as being the following (at paragraph 1):

> In this appeal the Court addresses the standard to be applied in criminal cases when judges are asked to summarily dismiss an application without hearing it on its merits. Specifically, when is it appropriate to summarily dismiss an application for a stay of proceedings for abuse of process?

The appeal was dismissed. The Supreme Court held that "an application in a criminal proceeding, including for a stay of proceedings for abuse of process, should only be summarily dismissed if the application is 'manifestly frivolous'" (at paragraph 3). It concluded that the trial judge erred in summarily dismissing the application.

The Manifestly Frivolous Test:

The Supreme Court indicated that "the 'frivolous' part of the standard weeds out those applications that will necessarily fail. This Court has previously stated that the

'not frivolous' test is widely recognized as being a very low bar'…Having reviewed the case law on the 'not frivolous' threshold, inevitability or necessity of failure is the key characteristic of a 'frivolous' application" (at paragraphs 67). The Court indicated that it added "the word 'manifestly' to capture the idea that the frivolous nature of the application should be obvious. 'Manifestly' is defined as 'as is manifest; evidently, unmistakably, openly", and "manifest" is defined as "[c]learly revealed to the eye, mind, or judgement; open to view or comprehension; obvious'" (at paragraph 69).

Applying the Standard:

The Supreme Court indicated that on a "summary dismissal motion, the judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest…While there is no need to weigh the evidence or decide any facts on the summary dismissal motion, the applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous" (at paragraph 83).

Conclusion:

The Supreme Court concluded that the trial judge "erred in law by applying an incorrect threshold for summary dismissal" and in "deciding the ultimate merits of the applications". The Court held that "[i]n finding that she would not grant a stay, the judge focused on the merits and on the ultimate outcome rather than on whether the applications were manifestly frivolous. In doing so, she applied too lax a threshold for summary dismissal and conflated the analysis required for the summary dismissal hearing with the analysis she was required to undertake on the *voir dire* itself" (at paragraphs 115 and 120).

Procedure-Publication Bans:

In ***Canadian Broadcasting corp. v. Manitoba***, 2023 SCC 27, November 9, 2023, during a proceeding before the Manitoba Court of Appeal, "an accused sought to introduce as new evidence an affidavit sworn by his lawyer concerning the death of a witness involved in those proceedings". The Court of Appeal issued a publication ban in relation to the affidavit.

After the appeal was completed, the Court of Appeal ordered that the publication ban was to remain in effect The Canadian Broadcasting Corporation (the "CBC") filed a motion to set aside the publication ban. The Court of Appeal held that it did

not have jurisdiction to hear the motion to set aside the publication because it was *functus officio* (2019 MBCA 122). The CBC sought and obtained leave to appeal both judgments to this Court.

The appeals were dismissed. The Supreme Court of Canada concluded that the Court of Appeal "did not commit a reversible error in issuing the publication ban and ordering that it remain in effect" (at paragraph 7).

The Supreme Court, quoting from an earlier decision, indicated that a person asking a court to exercise discretion in a way that limits the open court presumption must establish that: "(1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects" (at paragraph 8).

The Supreme Court concluded that the "benefits" of the "publication ban significantly outweigh its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings" (at paragraph 12):

> Finally, as to the third branch, we agree with the Court of Appeal in the Judgment on Remand that the benefits of the 2018 publication ban significantly outweigh its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings. The benefit of the publication ban is to protect the dignity of the witness's spouse as already explained, whereas the publication ban has a minimal negative effect on the right of free expression and the open court principle (paras. 92-93). The affidavit did not relate to the wrongful conviction or the legitimacy of the accused's appeal before the Court of Appeal in 2018. As the Court of Appeal observed in the Judgment on Remand, the affidavit was "capable of proving nothing" (para. 91). Here, the affidavit was not admitted as evidence in the wrongful conviction proceedings and, therefore, did not play a role in determining that a wrongful conviction had occurred.

Procedure-Jury Trials-Publication Bans:

In ***La Presse inc. v. Quebec***, 2023 SCC 22, the Supreme Court of Canada considered what it described as the conflict between "the open court principle and the right to a fair trial" (at paragraph 4).

The two appeals involved a consideration of the constitutionality of the mandatory prohibition on the media publicizing information not heard by a jury until the jury

retires to consider its verdict (such as evidence excluded by the trial judge or constitutional challenges).

The Court held that there "is no irreconcilable conflict between the open court principle and trial fairness. They both serve to instill public confidence in the justice system. The public can understand the work of the courts, and thus come to trust the judicial process and its outcomes, only if informed of 'what a judge decides' and 'why the particular decision is made'…Needless to say, the media play a crucial role in making this possible". However, the "protection of fair trial interests, such as the right to an independent, impartial, and representative jury, is also essential to public confidence in the administration of justice…Parliament has chosen to impose a temporary publication ban for the purposes of shielding the jury from information it has never been permitted to consider and promoting efficient trials" (at paragraphs 7 and 8).

The Background:

The appeal involved two criminal matters: *The King v. Silva* and *The King v. Coban*.

The King v. Silva:

In *Silva*, the accused was charged with four counts of murder and one count of attempted murder. Before the empanelment of the jury, the accused applied for a judicial "stay of proceedings" to be entered based upon alleged police misconduct. The trial judge dismissed the application and issued an order pursuant to section 648(1) of the *Criminal Code*, prohibiting the publication and broadcasting of his decision. The Supreme Court noted that "[i]t is anomalous that these 'orders' were made given that, when s. 648(1) applies, it applies automatically, by operation of statute" (at paragraph 10).

The Media (La Presse inc) applied to have the publication ban set aside. It argued that section 648(1) only applies only after the jury is empanelled. The trial judge dismissed this application.

The accused was subsequently found guilty on one count and the section 648(1) publication ban was lifted.

The King v. Coban:

In *Coban*, the accused was charged with several offences relating to child pornography and child luring. The Supreme Court noted that the matter "drew national and international attention" (at paragraph 14).

Prior to the empanelment of the jury, the trial judge issued a mandatory order, pursuant to section 486.4(3) of the *Criminal Code*, prohibiting the publication of information that could identify the complainants.

The Canadian Broadcasting Corporation and other media outlets applied for a "declaration" that the section 648(1) only applies after the jury is empanelled. The trial judge dismissed the application.

Publication Bans:

The *Criminal Code of Canada*, R.S.C. 1985, requires in jury trials for an automatic "publication ban", prohibiting the publication of information about portions of the criminal trial at which the jury is not present. This ban is found in s. 648(1) of the *Criminal Code* and states as follows:

> *After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.*

The *Criminal Code* also allows the trial judge conducting the trial to make evidentiary rulings before the jury is empaneled. This power is found in section 645(5). It sates as follows:

> *In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.*

In these appeals, numerous matters were dealt with in each case before the respective juries were empaneled. The Supreme Court indicated that the "question before this Court is whether and, if so, how this automatic publication ban applies before the jury is empanelled, given the jurisdiction conferred by s. 645(5) of the *Criminal Code* upon trial judges…to deal with certain matters before the empanelment of the jury" (at paragraph 2).

The Issue:

The Supreme Court noted that Canadian trial courts "are divided on the interpretation of s. 648(1)…Some courts have held that s. 648(1) applies only after the jury is empaneled…Others have held that s. 648(1) also applies before the jury is empaneled" (at paragraph 19).

The Court indicated that this "judicial divide presents two issues" (at paragraph 20):

(a) Does s. 648(1) apply before the jury is empanelled?

(b) If s. 648(1) applies before the jury is empanelled, what hearings and what information are captured by a publication ban under this section?

The Supreme Court of Canada held that the publication prohibition in section 648(1) of the *Criminal Code* "applies before the jury is empanelled to matters dealt with pursuant to s. 645(5). This conclusion follows from an understanding of the text of s. 648(1) when considered in its full context and in light of Parliament's purpose. This interpretation does not expand the coverage of the publication ban: only matters that were captured by the ban prior to the enactment of s. 645(5) continue to be captured by it today. This interpretation has not 'evolved' or 'changed' in a way that departs from any previous meaning held by s. 648(1). The context of modern trials simply reveals s. 648(1)'s full temporal scope" (at paragraph 9).

The Court concluded that section 648(1) of the *Criminal Code* seeks to "enhance trial fairness" by making publications bans automatic (at paragraphs 42 and 43):

> By enacting s. 648(1) in 1972, Parliament intended to enhance trial fairness through the protection of two interconnected interests. First, there is the fundamental interest of the accused in being tried by jurors who are not exposed to, and biased by, the rulings rendered on matters dealt with in their absence. I find this to be immediately apparent from the wording of the provision — which bans the publication of information regarding portions of the trial at which the jury is not present — and readily inferable from Hansard. Second, trial fairness under s. 648(1) is also concerned with the interest of both the accused and society in the efficiency of our system of trial by jury. This is revealed by Parliament's choice to introduce an automatic publication ban that applies simply by operation of statute and thus does not require the intervention of a court.
>
> These two interests are best served when *the trial proceeds only on information properly available to the jury.*

The Supreme Court's Analysis:

The Court commenced its analysis by noting that it "is well established that, under the modern approach to statutory interpretation, 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'". However, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms" (at paragraphs 22 and 23).

The Court indicated that prior to the enactment of section 648(1), the common law in Canada "precluded a trial judge from making evidentiary rulings until after a jury was empanelled", but that "in a modern trial, the bulk of so-called 'pre-trial' applications are dealt with by the trial judge or case management judge before the jury is empanelled" (at paragraphs 32 and 36).

The Court concluded that "one of Parliament's objectives was to shield the jury from information about any portion of the trial from which it was absent, so that its verdict is based only on the evidence found admissible in court…This objective is relevant with respect to both the existent jury and the prospective jury, that is, the jury yet to be empanelled…as a result of the introduction of s. 645(5), the matters that should 'remain a secret' for the jury are now dealt with both before and after its empanelment" (at paragraphs 49 and 50).

The Court concluded that "[a]ll indicators of legislative meaning — text, context, and purpose — admit of only one interpretation of s. 648(1): that it applies not only after the jury is empanelled but also before the jury is empanelled with respect to matters dealt with pursuant to s. 645(5)". Thus, section 648(1) "applies before the jury is empanelled only when a judge is exercising jurisdiction traceable to s. 645(5) to deal with a matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn" (at paragraph 58 and 76). What do these last words mean?

A matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn:

The Supreme Court noted that section 648(2) of the *Criminal Code* "makes it a summary conviction offence to violate the s. 648(1) publication ban". Thus, "interpreting s. 648(1) as applying before the jury is empanelled, but only to some matters, could give rise to uncertainty over what matters are covered by the publication ban" (at paragraphs 64 and 65).

The Court indicated that it t would "be prudent for judges holding a hearing pursuant to s. 645(5) to announce that they are exercising their jurisdiction under that section and to note that s. 648(1) automatically prohibits the publication of any information regarding that portion of the trial" (at paragraph 66).

However, the Supreme Court declined "to provide a comprehensive list of matters that would be captured or excluded by s. 648(1)", though it noted that there are "kinds of hearings that have never been required to take place 'at trial'" and that "these would not be covered by the prohibition found in s. 648(1)" (at paragraph 67).

Conclusion:

The Court concluded its decision by stating that since it has "interpreted s. 648(1) as applying before the jury is empanelled to matters dealt with pursuant to s. 645(5)" both appeals are dismissed (at paragraphs 79 and 80):

> *In Mr. Silva's case, David J. understood s. 648(1) as applying to matters dealt with before the jury is empanelled. He did not specify, however, whether it would cover information about all matters or only those dealt with pursuant to s. 645(5). Regardless, the order dismissing the application to lift the publication bans should be upheld. One of the matters dealt with by David J. concerned the admissibility of evidence (a Garofoli application). The other was a motion for a stay of proceedings for abuse of process. This clearly concerned the indictment and had to be dealt with by the trial judge (or case management judge exercising the powers of a trial judge) so that it would be reviewable on appeal from the conviction. Therefore, it is only by virtue of s. 645(5) that these matters could be dealt with prior to the empanelment of the jury, and it follows that they were covered by s. 648(1). I would dismiss the appeal in this case.*
>
> *The reasoning in Mr. Coban's case was that s. 648(1) applies to "all pre-trial applications" (para. 2). This is not consistent with the proper interpretation of s. 648(1). However, the order was simply as follows: ". . . the Application to clarify or declare that the publication ban herein pursuant to section 648 of the Criminal Code of Canada applies only to proceedings after the jury is empanelled, is dismissed" (A.R., CBC et al., at pp. 7-8). The media had applied for a declaration that s. 648(1) applies only after the jury has been empanelled. The judge dismissed that application. That was the extent of the order. While the judge did not adopt the interpretation I have presented, the dismissal is consistent with the proper interpretation of s. 648(1). I would therefore dismiss the appeal in this case as well.*

SENTENCING

Driving Prohibitions-Mandatory Minimum Punishments:

In ***R. v. Basque***, 2023 SCC 18, June 30, 2023, the accused was convicted of the offence of impaired driving, the sentence for which included a one year mandatory minimum driving prohibition (section 259(1)(a) at the time). The accused had been released on a release order prohibiting her from operating a motor vehicle. The sentencing judge imposed a one year driving prohibition, but backdated it to reflect the time period in which the release order was in effect.

An appeal was taken to the Supreme Court of Canada. The Court described the issue as being the following:

> Could the sentencing judge credit Ms. Basque for the driving prohibition period already served, notwithstanding the combined effect of that one-year mandatory minimum prohibition and the direction — codified in s. 719(1) *Cr. C.* — that except where otherwise provided, a sentence commences when it is imposed?

The sentence imposed was affirmed.

The Supreme Court held that "granting credit based on the common law discretion recognized in *Lacasse* is perfectly consistent with the application of the minimum prohibition in s. 259(1)(a) *Cr. C*. and with the rule requiring that a sentence commence when it is imposed in s. 719(1) *Cr. C.* It was therefore open to the sentencing judge to take into account the period of 21 months already served by Ms. Basque, as this would not undermine Parliament's intent" (at paragraph 5).

The Court indicated that "[p]roperly interpreted, s. 259(1)(a) requires the court to impose a total punishment of one year to be served by the offender, not to hand down a sentence imposing a one-year prohibition that must necessarily be served prospectively. As Rosenberg J.A. noted in *McDonald*, Parliament's intention is respected whether the punishment is served before or after the offender is sentenced, because the effect on the offender is the same in either case. Interpreted in this way, s. 259(1)(a) did not prohibit the sentencing judge from "reducing" the sentence by granting credit for the pre-sentence driving prohibition period, as long as the total punishment remained consistent with the minimum prescribed by Parliament" (at paragraph 8).

The Court described the correct procedure to be followed in the following manner (at paragraph 12):

> In light of the foregoing, and given that Ms. Basque has already been prohibited from driving for 21 months, the imposition of an additional one-year prohibition period would amount to a kind of double punishment, contrary to the most fundamental requirements of justice and fairness. Conscious of this fact, the sentencing judge ordered a one-year driving prohibition but found that Ms. Basque had already satisfied this condition. However, he backdated Ms. Basque's sentence to achieve this result. With respect, this was an error. He could quite properly have imposed the one-year mandatory minimum punishment required by s. 259(1)(a) *Cr. C.*, stated that a

> sentence commences when it is imposed under s. 719(1) *Cr. C.*, and then granted credit for the pre-sentence driving prohibition period by exercising his common law discretion, which has not been displaced by the *Criminal Code*.

Conclusion:

As can be seen, this was a busy year for the Supreme Court of Canada in relation to criminal appeals. The Court rendered a number of significant judgments. 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 significant criminal law issues.