Supplement to Roach, Berger, Cunliffe, and Kiyani *Criminal Law and Procedure 12th ed*

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Insert at p. 14 to replace the Reference re Firearms Act

Reference re Genetic Non-Discrimination Act
2020 SCC 17

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[1] Parliament criminalized compulsory genetic testing and the non-voluntary use or disclosure of genetic test results in the context of a wide range of activities — activities that structure much of our participation in society. This Court must decide whether Parliament could validly use its broad criminal law power to do so.

[2] In particular, we must decide whether s. 91(27) of the *Constitution Act, 1867* empowers Parliament to prohibit forcing an individual to take a genetic test or to disclose genetic test results, or to prohibit using an individual's genetic test results without consent, by way of ss. 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3. Answering that question turns on whether Parliament enacted the challenged prohibitions for a valid criminal law purpose. I find that it did.

[3] The Government of Quebec referred the constitutionality of ss. 1 to 7 of the *Act* to the Quebec Court of Appeal, which concluded that those provisions fell outside Parliament's authority to make criminal law. The appellant, the Canadian Coalition for Genetic Fairness, appeals to this Court as of right.

[4] I would allow the appeal and conclude that Parliament had the power to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act* under s. 91(27). As I explain below, the "matter" (or pith and substance) of the challenged provisions is to protect individuals' control over their detailed personal information disclosed by genetic tests, in the broad areas of contracting and the provision of goods and services, in order to address Canadians' fears that their genetic test results will be used against them and to prevent discrimination based on that information. This matter is properly classified within Parliament's s. 91(27) power over criminal law. The provisions are supported by a criminal law purpose because they respond to a threat of harm to several overlapping public interests traditionally protected by the criminal law. The prohibitions in the *Act* protect autonomy, privacy, equality and public health, and therefore represent a valid exercise of Parliament's criminal law power.

I. Genetic Non-Discrimination Act

[5] In December 2015, Senator James S. Cowan introduced Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, which would eventually become the *Genetic Non-Discrimination Act*, in the Senate. The Senate passed the bill by unanimous vote. The House of Commons passed it with 222 members of Parliament voting in favour and 60 against. Although the government opposed the bill, it did not require its backbenchers to vote against it. The bill came into force on royal assent as the *Genetic Non-Discrimination Act*: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5(2).

…

[7] Thus, individuals and corporations cannot force individuals to take genetic tests or disclose genetic test results and cannot use individuals' genetic test results without their written consent in the areas of contracting[1] and the provision of goods and services.

[8] Section 7 provides that doing anything prohibited by ss. 3, 4 or 5 is an offence punishable on summary conviction by a fine of up to $300,000 or imprisonment of up to 12 months, or both, and on indictment by a fine of up to $1 million or imprisonment of up to 5 years, or both.

[9] Section 6 provides that the prohibitions established by ss. 3 to 5 do not apply to a physician, pharmacist or other health care practitioner "in respect of an individual to whom they are providing health services" and also do not apply to "a person who is conducting medical, pharmaceutical or scientific research in respect of an individual who is participating in the research".

[10] Sections 8, 9 and 10 of the *Act* amended the *Canada Labour Code*, R.S.C. 1985, c. L-2, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.[2] None of those amendments is at issue in this appeal, but, as I explain below, they may help illuminate the purpose of ss. 1 to 7 of the *Act*.

II. Quebec Court of Appeal's Opinion, 2018 QCCA 2193, 2019 CLLC ¶230-020

[11] The Government of Quebec referred the following question to the Quebec Court of Appeal under the *Court of Appeal Reference Act*, CQLR, c. R-23, s. 1:

> Is the *Genetic Non-Discrimination Act* enacted by sections 1 to 7 of the *Act to prohibit and prevent genetic discrimination* (S.C. 2017, c. 3) *ultra vires* to the jurisdiction of the Parliament of Canada over criminal law under paragraph 91(27) of the *Constitution Act, 1867*? [para. 1]

[12] The Court of Appeal held that, in pith and substance, the *Act* aims to "encourage the use of genetic tests in order to improve the health of Canadians by supressing the fear of some that this information could eventually serve discriminatory purposes in the entering of agreements o[r] in the provision of goods and services, particularly insurance and employment contracts": para. 11. In the Court of Appeal's view, despite its title, nothing in the challenged provisions of the *Act* prohibits or even addresses genetic discrimination. The only mention of genetic discrimination is found in the amendments to the *Canadian Human Rights Act*.

[13] With that characterization in mind, the Court of Appeal concluded that the provisions do not pursue a valid criminal law purpose. In the Court of Appeal's view, the prohibitions created by ss. 3, 4 and 5 of the *Genetic Non-Discrimination Act* govern the type of information available for employment and insurance purposes, which is not a valid criminal law purpose. Moreover, the Court of Appeal reasoned that merely promoting health by encouraging more people to take genetic tests is not a criminal purpose because it does not attack a "real public health evil", in contrast to legislation that concerns tobacco and illegal drugs, both of which "intrinsically present a threat to public health": para. 24.

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[1] The provisions refer to entering into and continuing both contracts and agreements. Although the notion of an agreement is broader than that of a contract in a private law sense, I will refer simply to "contracting" and "entering into contracts" throughout these reasons.

[2] Section 11 of the *Genetic Non-Discrimination Act*, which coordinated the amendments to the *Canadian Human Rights Act* made by ss. 9 and 10(1) of the *Genetic Non-Discrimination Act* with those made by *An Act to amend the Canadian Human Rights Act and the Criminal Code*, S.C. 2017, c. 13, came into force in June 2017.

[14] Accordingly, the Court of Appeal answered the reference question in the affirmative, concluding that ss. 1 to 7 of the *Act* exceed Parliament's authority over criminal law.

III. Issue

[15] The only issue before this Court is whether Parliament had the power under s. 91(27) to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act*. The wisdom of Parliament's decision to criminalize the conduct the provisions prohibit is not in issue. Nor is it this Court's task to consider whether the policy objectives advanced by the provisions could be better achieved by other means, such as provincial legislation. …

…

[18] The respondents, the Attorneys General of Canada and of Quebec, both take the position that the *Act* is beyond Parliament's authority. The Attorney General of Canada argues that the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services with the aim of promoting health. The Attorney General of Quebec submits that, in pith and substance, the *Act* seeks to regulate the use of genetic information by insurance companies and employers under provincial jurisdiction. Accordingly, the Attorneys General submit that the challenged provisions in pith and substance relate primarily to matters properly classified as falling within the provinces' jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*.

[19] While the Court pays respectful attention to the submissions of attorneys general, they remain just that — submissions — even in the face of agreement between attorneys general. This Court's reference to agreement between federal and provincial attorneys general in the past has been in the context where they agree that the legislation at issue *is* constitutional: see, for example, *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 72-73. More fundamentally, agreement of the attorneys general that legislation is unconstitutional is not, in itself, persuasive. Parliament enacted the challenged provisions. The sole issue before us is whether it had the power to do so.

…

IV. Analysis

[20] The Constitution of Canada is fundamentally defined by its federal structure; the organizing principle of federalism infuses and breathes life into it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 32 to 49. This Court has held that the principle of federalism runs through the political and legal systems of Canada, and that the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* is the "primary textual expression" of the federalism principle in the Constitution: *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 905-9; *Secession Reference*, at para. 47.

[21] The division of powers assigns spheres of jurisdiction to a central Parliament and to the provincial legislatures, distributing the whole of legislative authority in Canada. Within their respective spheres, the legislative authority of the Parliament and the provincial legislatures is supreme (subject to the constraints established by the Constitution, including the *Canadian Charter of Rights and Freedoms* and s. 35 of the *Constitution Act, 1982*): *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 132; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 56-57. The principle of

federalism and the division of powers are aimed at reconciling diversity with unity: *Secession Reference*, at para. 43. They protect the autonomy of the provinces to pursue their own unique goals within their spheres of jurisdiction, while allowing the federal government to pursue common goals within its spheres.

…

[26] To determine whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15; *Reference re Securities Act*, at para. 63; *Reference re Pan-Canadian Securities Regulation*, at para. 86.

[27] Accordingly, I begin by characterizing the provisions of the *Genetic Non-Discrimination Act*, then proceed to determine whether they are properly classified as coming within Parliament's criminal law power.

A. *Characterization*

…

[30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16. Both Parliament's or the provincial legislature's purpose and the legal and practical effects of the law will assist the court in determining the law's essential character.

…

[33] I now turn to characterizing ss. 1 to 7 of the *Act*, considering first the provisions' purpose before turning to their effects.

(1) Purpose

[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.

…

[39] … [T]he *Act* aims to combat discrimination based on genetic test results. Health-related genetic tests reveal highly personal information — details that individuals might not wish to know or share and that could be used against them. The prohibitions target a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests. Parliament saw genetic test results relating to health as particularly vulnerable to abuse and discrimination. The intrinsic evidence suggests that the purpose of the provisions is to combat discrimination based on information disclosed by genetic tests by criminalizing compulsory genetic testing, compulsory disclosure of test results, and non-consensual use of test results in a broadly-defined context (the areas of contracting and the provision of goods and services). The extrinsic evidence points largely in the same direction.

[40] The main source of extrinsic evidence of purpose is the parliamentary debates on the bill that became the *Genetic Non-Discrimination Act*. ...

…

[45] … The mischief in parliamentarians' minds was the "gap" in the laws, which left individuals vulnerable to genetic discrimination and grounded the fear of genetic discrimination. Those concerns correspond to the title of the *Act* and the text of the prohibitions.

[46] In addition to enacting substantive provisions, the *Act* also amended the *Canada Labour Code* to protect employees from forced genetic testing or disclosure of test results, and from disciplinary action on the basis of genetic test results, and amended the *Canadian Human Rights Act* to add "genetic characteristics" as a prohibited ground of discrimination and to create a deeming provision relating to refusal to undergo genetic testing or disclose test results: see *Canada Labour Code*, ss. 247.98 and 247.99, as amended by s. 8 of the *Act*; *Canadian Human Rights Act*, s. 3(1) and (3), as amended by ss. 9 to 11 of the *Act*.

[47] Parliament's decision to make these amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* in conjunction with its enactment of the *Act*'s substantive provisions suggests that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools. It was not only targeting genetic discrimination directly through human rights and labour legislation, but was also targeting precursors to such discrimination, namely forced genetic testing and disclosure of the results of such testing. The fact that Parliament did not criminalize genetic discrimination does not belie Parliament's purpose of combatting genetic discrimination in this context. The relative breadth, directness or efficacy of the means Parliament chooses to address a problem is not the court's concern in its pith and substance inquiry.

…

[49] The title of the *Act* and the text of the prohibitions provide strong evidence that the prohibitions have the purpose of combatting genetic discrimination based on test results, and that the more precise mischief they are intended to address is the lack of legal protection for the results of genetic testing. The *Act* does what its title says it does: it prevents genetic discrimination by directly targeting that mischief. The parliamentary debates also provide strong evidence to support this. I find that the purpose of the challenged provisions is to combat genetic discrimination and the fear of genetic discrimination based on the results of genetic tests by prohibiting conduct that makes individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services.

[50] As I will explain, the effects of ss. 1 to 7 of the *Act* are consistent with their purpose.

(2) Effects

[51] Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects "flow[] directly from the provisions of the statute itself", whereas practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54, citing *Morgentaler* (1993), at pp. 482-83.

[52] Starting with legal effects, ss. 3 to 5 of the *Genetic Non-Discrimination Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions.

…

[54] The most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they choose to undergo. ...

[55] Choices about genetic testing are deeply personal in nature and the reasons for making them vary widely from one individual to another. Just as one individual may wish to be aware of every possible predisposition or risk that a genetic test might reveal, another may prefer not to know. And the individual who wants to know may not want others to know. The *Act* protects those choices.

[56] By protecting choices about who has access to such information, the legislation reduces the risk of genetic discrimination. And by removing the fear of some of the negative consequences that could flow from genetic testing, the *Act* may encourage individuals to undergo genetic testing. Additional testing may in turn produce health benefits, including by enabling earlier detection of health problems or predispositions, providing for more accurate and sometimes life-saving diagnoses and improving the health care system's ability to provide maximally beneficial care.[3]

[57] The legislation may also affect the insurance industry and, potentially, insurance premiums. By preventing insurers from using genetic test results without an individual's consent in making decisions about what policies to underwrite, the provisions at issue may result in increased insurance premiums. Since insurers will not be able to adjust individual premiums (or decline to insure an individual) based on genetic test results without written consent, they may be more likely to insure individuals who may be at risk of future health problems, or to insure those individuals at lower premiums than they would otherwise charge. Individuals who know they are at higher risk of future health problems may also be more likely to purchase insurance. This may in turn increase the amounts the insurer will be required to pay out. To make sure that they will be able to meet those potential increased future liabilities, insurers may need to raise premiums overall.

…

[60] The prohibitions in question are of general application, and do much more than prevent insurance companies from requiring individuals to disclose genetic test results when they contain relevant medical information. They give individuals control over their genetic testing results, allowing them to protect themselves against genetic discrimination. They respond to the mischief that is the lack of legal protection of genetic testing information in Canada across all sectors in which the specified activities take place — both private and public. They apply to a broad and growing array of circumstances. They may well apply, for instance, when a person is seeking to adopt a child, to use consumer genetic testing services, to access government services, to purchase any kind of good or service, or to obtain housing, insurance or employment.

…

[62] Though there is no doubt that parliamentarians were concerned about genetic discrimination in the insurance context, it does not follow that the prohibitions are essentially about insurance. A characterization narrowly focused on insurance reflects an impoverished view of the *Act* and fails to capture the broad purpose and effects of the legislation.

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[3] See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at p. 2 (Dr. Gail Graham).

(3) Conclusion

…

[65] I accordingly conclude that, in pith and substance, ss. 1 to 7 of the *Act* protect individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that individuals' genetic test results will be used against them and to prevent discrimination based on that information.

B. *Classification*

[66] … [T]he only question the Court must answer in this part of the division of powers analysis is whether the provisions at issue come within Parliament's s. 91(27) criminal law power.

(1) The Criminal Law Power

[67] Section 91(27) of the *Constitution Act, 1867* gives Parliament the exclusive authority to make laws in relation to "[t]he Criminal Law". Sections 1 to 7 of the *Genetic Non-Discrimination Act* will be valid criminal law if, in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose: *Firearms Reference*, at para. 27; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50 (*Margarine Reference*), aff'd [1951] A.C. 179 (P.C.).

[68] There is no dispute that the challenged provisions meet the first two requirements. They prohibit specific conduct and impose penalties for violating those prohibitions. The only issue is whether the matter of ss. 1 to 7 of the *Act* is supported by a criminal law purpose. [A] law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to another similar interest. I conclude that the prohibitions established by ss. 1 to 7 of the *Act* have a criminal law purpose, protecting several public interests traditionally safeguarded by the criminal law.

[69] Parliament's criminal law power is broad and plenary…. The criminal law must be able to respond to new and emerging matters, and the Court "has been careful not to freeze the definition [of the criminal law power] in time or confine it to a fixed domain of activity….

[70] But the use of the criminal law power to respond to those new and emerging matters must also be limited. This Court has rejected a purely formal approach that would have allowed Parliament to bring virtually any matter within s. 91(27), so long as it used prohibition and penalty as its vehicle….

[71] To that end, the Court in the *Margarine Reference* established the substantive criminal law purpose requirement. Rand J. famously stated that a criminal law prohibition must be "enacted with a view to a public purpose which can support it as being in relation to criminal law" and identified "[p]ublic peace, order, security, health, morality" as the typical but not exclusive "ends" served by the criminal law: p. 50. Rand J. also stated that criminal prohibitions are properly directed at "some evil or injurious or undesirable effect upon the public", and represent Parliament's attempt "to suppress the evil or to safeguard the interest threatened": p. 49….

[72] Rand J.'s statements in the *Margarine Reference* demonstrate that a law with a valid criminal law purpose has two features. First, it should be directed at some evil, injurious or undesirable effect on the public. Second, it should serve one or more of the "public purpose[s]" or "ends" Rand J. enumerated, or another similar purpose. Rand J.'s notion of public purpose refers to the public interests traditionally safeguarded by the criminal law, and other similar interests….

…

[74] [T]he *Margarine Reference*'s first criminal law purpose requirement (that the law target an evil, injurious or undesirable effect) is linked to the second (that the law protect a public interest that can properly ground criminal law). A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.

[75] [Karakatsanis J explained Court's role with respect to the harm principle, explored in further detail in chapter 2 of your casebook, and applied that principle to this legislation.]

…

[79] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court's jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law. The court does not determine whether Parliament's criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.

(2) Application

[80] As stated above, the only classification issue concerning ss. 1 to 7 of the *Act* is whether the provisions are supported by a criminal law purpose. In my view, the essential character of the prohibitions represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.

…

(a) *Autonomy, Privacy and Equality*

[82] This Court has consistently recognized that individuals have powerful interests in autonomy and privacy, and in dignity more generally, protected by various *Charter* guarantees: see, for example, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, per Wilson J. It has specifically recognized individuals' clear and pressing interest in safeguarding information about themselves — the ability to do so is "closely tied to the dignity and integrity of the individual, [and] is of paramount importance in modern society": *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 66; *R. v. Dyment*, [1988] 2 S.C.R 417, at p. 429.

[83] Parliament has often used its criminal law power to protect these vital interests, acting to protect human dignity by safeguarding autonomy and privacy. The prohibitions on voyeurism in s. 162(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and on wilfully intercepting private communications in s. 184, for example, both protect individuals' well-established interests in privacy and autonomy, while the prohibition on voyeurism also protects sexual integrity: *Jarvis*, at paras. 48 and 113. Safeguarding autonomy and privacy are established uses of the criminal law power.

[84] The conduct prohibited by ss. 1 to 7 of the *Act* poses a risk of harm to two facets of autonomy and personal privacy because individuals have an interest in deciding whether or not to access the detailed genetic information revealed by genetic testing and whether or not to share their test results with others.

[85] In particular, forced genetic testing (prohibited in s. 3 of the *Act*) poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects. People may not want to learn about their "genetic destiny", or risk the psychological harm that can result from obtaining unfavourable genetic test results: Office of the Privacy Commissioner of Canada, *The Potential Economic Impact of a Ban on the Use of Genetic Information for Life and Health Insurance*, by M. Hoy and M. Durnin (2012), at p. 11 (Hoy and Durnin). Forced disclosure of genetic test results (prohibited in s. 4) and the collection, use or disclosure of genetic test results without written consent (prohibited in s. 5) threaten autonomy and privacy by compromising an individual's control over access to their detailed genetic information. Such threats to autonomy and personal privacy are threats to human dignity.

[86] The prohibitions target this autonomy- and privacy-threatening conduct in the contexts of the provision of goods and services and the conclusion of contracts. The risk of harm to dignity-related interests in these contexts is neither narrow nor trivial: individuals meaningfully participate in society by way of goods, services and contracts. The prohibitions in the *Act* target a wide swath of conduct.

…

[90] Protecting fundamental moral precepts or social values is an established criminal law purpose: [citations omitted]. Parliamentarians considered discrimination on the basis of health-related genetic test results to be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. It is easy to see why. Such genetic discrimination threatens the fundamental social value of equality by stigmatizing and imposing adverse treatment on individuals because of their inherited, immutable genetic characteristics, and, in particular, the characteristics that may help to predict disease or disability. In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.

…

(b) *Public Health*

[93] Health is an "amorphous" field of jurisdiction, featuring overlap between valid exercises of the provinces' general power to regulate health and Parliament's criminal law power to respond to threats to health: see *RJR-MacDonald*, at para. 32; *PHS*, at para. 60. The criminal law authority that Parliament exercises in the area of health does not prevent the provinces from regulating extensively in relation to health: *Hydro-Québec*, at para. 131. Indeed, the two levels of government "frequently work together to meet common concerns": para. 131.

…

[96] Parliament is entitled to use its criminal law power to respond to a reasoned apprehension of harm, including a threat to public health.

[97] Genetic discrimination and the fear of genetic discrimination are not merely theoretical concerns. Testimony before Parliament demonstrated that fear of genetic discrimination leads patients to forego beneficial testing, results in wasted health care dollars and may deter patients from participating in

research that could advance medical understanding of their conditions.[4] Genetic discrimination is a barrier to accessing suitable, maximally effective health care, to preventing the onset of certain health conditions and to participating in research and other initiatives serving public health. Parliament accordingly apprehended individuals' vulnerability to and fear of genetic discrimination based on test results as a threat to public health.

…

(3) Conclusion

[103] Parliament took action in response to its concern that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address Canadian's fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament's criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

V. Costs

…

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J. —

I. Overview

[109] The decision to undergo or forego genetic testing is one of the most intimate personal health decisions that individuals now face. Some people decide that they would rather not know what their genetic makeup reveals. Others decide that they want to know so that they can take steps to protect their own health and the health of their families. Parliament recognized that individuals should have the autonomy to make this profoundly personal choice without having to fear how the information revealed by genetic testing will be used. However, there was ample evidence before Parliament that many did not feel free to make this choice. The parliamentary record demonstrated that people were choosing to "stay in the dark" about their genetic makeup — to the detriment of their health, the health of their families, and the greater public health system — due to their concerns that they would not be able to control the uses to which the information revealed by genetic testing would be put. Sections 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 ("*Act*"), represent Parliament's attempt to address this serious threat to health.

[110] In the result, I agree with my colleague Justice Karakatsanis that ss. 1 to 7 of the *Act* represent a valid exercise of Parliament's power over criminal law set out at s. 91(27) of the *Constitution Act, 1867*.

[4] See Standing Committee on Justice and Human Rights, *Evidence*, No. 37, at p. 2 (Dr. Gail Graham); see also p. 1 (Dr. Cindy Forbes). Dr. Ronald Cohn, of the Hospital for Sick Children in Toronto, testified that more than a third of families he approached to participate in a genetic study refused for fear of genetic discrimination, in spite of the opportunity the study would have provided to find an explanation for the children's severe medical conditions: Standing Committee on Justice and Human Rights, *Evidence*, No. 36, at p. 12.

However, and with respect, I arrive at this result in a different manner because I see the pith and substance of the impugned provisions differently from her, as well as from my colleague Justice Kasirer.

[111] In my view, the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. By giving people control over the decision to undergo genetic testing and over the collection, disclosure and use of the results of such testing, Parliament sought to mitigate their fears that their genetic test results could be used against them in a wide variety of contexts. Parliament had ample evidence before it that this fear was causing grave harm to the health of individuals and their families, and to the public healthcare system as a whole.

[112] The provisions in issue represent a valid exercise of Parliament's power over the criminal law because they contain prohibitions accompanied by penalties, and are backed by the criminal law purpose of suppressing a threat to health. In particular, they target the detrimental health effects occasioned by people foregoing genetic testing out of fear as to how the information revealed by such testing could be used.

…

II. Analysis

A. *Characterization*

[114] As indicated, I take the view that the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. This is borne out by the purpose and effects of these provisions.

[115] … I do not agree with Justice Karakatsanis that preventing discrimination forms part of the pith and substance of the challenged provisions. While I accept that ss. 1 to 7 of the *Act* reduce the opportunities for discrimination based on one's genetic test results, thereby mitigating individuals' fear of genetic discrimination, they do so by giving people control over the information revealed by genetic tests in furtherance of the purpose of protecting health. With respect, preventing or combating genetic discrimination is not the "'dominant purpose or true character'" of these provisions [citations omitted].

[116] Nor can I agree with Justice Kasirer that the pith and substance of the provisions is "to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians" (para. 154). As I see it, what is at stake here is not the *promotion* of beneficial health practices but the *protection* of individuals from a serious threat to health. Further, I have no doubt that the impugned provisions affect contracting and the provision of goods and services. However, with respect, I believe that the manner in which my colleague characterizes them "confuse[s] the law's purpose with 'the means chosen to achieve it'" (*Quebec v. Canada*, at para. 29, quoting *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25). Although the means chosen by Parliament engage aspects of contracting and the provision of goods and services, as I see it, "the regulation of contracts and the provision of goods and services" is, at best, peripheral to the dominant purpose or true character of the legislation. Indeed, as Justice Kasirer himself recognizes, "health dominates the discussion" (para. 221).

…

B. *Classification*

[137] As my colleagues have noted, the classification stage of this appeal turns on whether ss. 1 to 7 of the *Act* are backed by a criminal law purpose. ...

…

[139] Sections 1 to 7 of the *Act* are backed by a criminal law purpose because they are directed at suppressing a threat to health. People were choosing to put themselves at risk of preventable death and disease because they were concerned that they would not have control over the information revealed by genetic tests in a wide variety of contexts that govern how they interact with and in society. Parliament sought to mitigate these concerns by prohibiting conduct — namely, compulsory genetic testing, and compulsory disclosure and non-consensual collection, disclosure, and use of genetic test results — that undermined individuals' control over the information revealed by genetic testing. By giving people control over that information, Parliament sought to mitigate their fears that it would be used against them, thereby curbing the injurious effect on health.

[140] The threat to health that Parliament targeted by enacting ss. 1 to 7 of the *Act* was real — in every sense of the word. Parliament had ample evidence before it that people were refraining from undergoing genetic testing out of fear as to how their genetic test results could be used, thereby suffering significant harm or putting themselves at risk of significant and avoidable harm. The debates and committee testimony are saturated with examples of the life-saving, life-extending, and life-enhancing potential of genetic testing — all of which individuals felt they had to forego because they could not control the ways in which the results of such testing would be used in various contexts.

…

[142] The debates and committee testimony are also replete with discussions of genes that can indicate a predisposition to breast and/or ovarian cancer (the BRCA1 and BRCA2 genes), and the impact that testing for these genes has on women's health care choices.[5] …

…

[150] In sum, as I see it, by enacting ss. 1 to 7 of the *Act*, Parliament targeted conduct that was having an injurious effect on health. Canadians choosing to forego genetic testing and thereby dying preventable deaths and suffering other preventable health-related harms for no reason other than the fear that their genetic test results could be used against them is a threat to health that Parliament was constitutionally entitled to address, pursuant to s. 91(27) of the *Constitution Act, 1867*. Sections 1 to 7 of the *Act*, which prohibit conduct that undermines individuals' control over the information revealed by genetic testing in a wide variety of contexts that govern how people interact with and in society, accordingly represent a valid exercise of Parliament's power to enact laws in relation to the criminal law.

III. Conclusion

[151 For these reasons, I would dispose of the appeal in the manner proposed by Justice Karakatsanis (see para. 108).

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[5] See, e.g., *Debates of the Senate*, vol. 150, No. 8, at pp. 146-47 and 149-50; *House of Commons Debates*, vol. 148, No. 77, at pp. 4889-90 and 4892-94; *House of Commons Debates*, vol. 148, No. 97, at pp. 6126-27.

The reasons of Wagner C.J. and Brown, Rowe and Kasirer JJ. were delivered by

KASIRER J. —

I. Introduction

[152] I begin these reasons by noting that I find the explanations of the method for determining the constitutionality of ss. 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 ("*Act*"), offered by my colleagues Justice Moldaver and Justice Karakatsanis most helpful. With great respect, however, I do not share their view that the impugned provisions were enacted within the constitutional authority of the Parliament of Canada over the criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*.

[153] We disagree on the characterization — the pith and substance, in constitutional terms — of ss. 1 to 7 of the *Act* and, at the end of the day, how these provisions should be classified within the heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*.

[154] On my understanding, the pith and substance of ss. 1 to 7 is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. The *Act* has certain incidental purposes and effects, but when the dominant character of the impugned provisions is identified, they cannot be classified as a valid exercise of Parliament's constitutional power over criminal law. These provisions do not prohibit what is often styled, in language archaic but telling, an "evil" associated with the criminal law. Instead, ss. 1 to 7 fall within the provinces' constitutional authority over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. In the main, I find myself in broad agreement with the report of the Court of Appeal in the reference.

[155] Many of the spirited submissions made in support of the impugned legislation's constitutionality stressed what might be understood, in some circles, as noble public policy: to encourage government action that would combat genetic discrimination so that Canadians can, without fear, undergo genetic testing if they so desire. Whether or not this Court feels it is appropriate to recognize what the appellant referred to as the deeply personal character of the decision to undertake a genetic test is not the question before us. The task of the courts — perforce in a constitutional reference such as this one — is not to measure the suitability of public policy but to determine the validity of legislation pursuant to the division of powers under the Constitution. The urgings in favour of what counsel supporting the law see as sound policy would be best done before the appropriate legislative powers that be, acting within their right spheres of constitutional jurisdiction.

…

II. Analysis

…

A. *Characterization: What is the Pith and Substance of Sections 1 to 7 of the Act?*

…

[170] The wide range of characterization in this case suggests strongly to me that not all of the interpretative efforts at this stage have followed the cardinal rule that it is the *dominant* purpose and

effect of ss. 1 to 7 that should concern us. In fairness, part of the mischief comes from Parliament's choice for the *Act*'s short title (*Genetic Non-Discrimination Act*). This title may have put some readers of the impugned provisions on the wrong path by stressing what may have been an aspiration of parliamentarians — legitimate or not, be that as it may — that does not find expression in the statute's leading purpose or effects. Moreover, another part of the mischief appears to come from the wide-ranging and disparate character of the legislative debates, which offer a number of often conflicting accounts of the purposes and effects of the *Act*. This makes the identification of pith and substance difficult, especially given the absence of a statutory preamble or clearly-stated objective in the contested portion of the *Act* itself.

…

(1) The Purpose of the Impugned Provisions

...

[Justice Kasirer criticized the majority's use of intrinsic evidence of the pith and substance of the *Act,* noting that Parliament sometimes uses the long and short title of a statute for political ends and identifying that ss. 1 – 7 of the *Act* 'stop well short' of prohibiting, or even wholly preventing, discrimination on genetic grounds. Because the *Act* allows the possibility of misuse of genetic information, Kasirer J also concluded that Parliament's dominant purpose could not properly be said to be privacy and autonomy. Rather, in Kasirer J's view, the dominant purpose of the *Act* is to regulate the provision of goods and services by prohibiting certain preconditions to entering a contract. Similarly, Kasirer J concluded that the extrinsic evidence supports the view that Parliament did not intend to criminalize discrimination based on genetic characteristics, but only to regulate certain behaviours in the provision of goods and services.]

…

(a) *Conclusion*

[203] When considering the whole of the record, and giving appropriate weight to intrinsic and extrinsic evidence of purpose, it is plain that the main goal of ss. 1 to 7 is not to combat discrimination based on genetic characteristics. Genetic discrimination may have been on the mind of parliamentarians, but it is not prohibited in the impugned provisions. Nor is their objective to control the use of private information revealed by genetic testing, which is secondary to the true purpose of the provisions. Rather, the true aim of the provisions is to regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

(2) The Effects of the Impugned Provisions

…

[205] In my view, the dominant effects of the impugned provisions concern the regulation of insurance and the promotion of health rather than the protection of privacy and autonomy or the prevention of genetic discrimination.

…

(3) …

[221] I agree with the Court of Appeal that the aim of the impugned provisions is to remove the fear that information from genetic tests could serve discriminatory purposes in the provision of goods and services, in particular in insurance contracts, in order to encourage Canadians to avail themselves of those tests, should they so wish. This is done with a view to improve health by making people aware of their pre-existing medical conditions and hoping that they take precautionary steps. On my reading of her opinion, my colleague Justice Karakatsanis appears to agree that health dominates the discussion, given that health is at the heart of her analysis on the classification of the impugned provisions. Similarly, my colleague Justice Moldaver also considers health to be central to this case.

[222] In terms of whether the pith and substance is to combat discrimination based on the results of genetic tests, I must respectfully disagree with my colleague Justice Karakatsanis. While Parliament could have chosen to directly target discrimination in ss. 1 to 7 of the *Act*, those provisions instead tolerate discrimination on the basis of genetic characteristics so long as the genetic testing and disclosure of the results thereof were made lawfully or so long as tests are undertaken for non-health reasons. This is particularly obvious when ss. 1 to 7 are contrasted with the amendments to the *CLC* and to the *CHRA*. Genetic discrimination therefore cannot be at the centre of ss. 1 to 7's pith and substance.

[223] I must also respectfully disagree with Justice Moldaver that the pith and substance is focused on the control that individuals have over the information revealed by genetic tests. The protection of privacy and autonomy granted in the impugned provisions is only present as a necessary corollary of the promotion of health, since they apply only to a narrow health-based definition of genetic tests. As such, the control granted to individuals over the information revealed by genetic testing stands second — both in terms of purpose and effects — to Parliament's overarching objective of encouraging the well-being of Canadians. As a result, and recalling that genetic information revealed through other means is not protected, it also cannot form part of the pith and substance of the impugned provisions.

[224] Finally, the regulation of contracts and the provision of goods and services appropriately forms part of the pith and substance. The impugned prohibitions focus solely on situations concerning a "contract or agreement" or "providing goods or services": indeed, ss. 3(1) and (2), 4(1) and (2), and 5 all refer explicitly to these concepts. As such, the regulation of contracts and the provision of goods and services is an integral part of the legislation in that it is the heart of what the impugned provisions do.

[225] I would add that even if the regulation of contracts and of the provision of goods and services was merely the "means" used by Parliament, those means would be so intimately tied to the objective to improve health that they would rightly form part of the pith and substance (Moldaver J.'s reasons, at para. 116). While courts must of course be careful not to confuse the law's purpose with the means chosen to achieve it, this caution does not lead to the conclusion that any reference to "means" is problematic ...

…

[227] As a result of the foregoing, in my view, the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians.

B. *Classification: Does the Pith and Substance of the Impugned Provisions Fall Under the Section 91(27) Criminal Law Power?*

…

(1) Scope of the Criminal Law Power

...

(2) Criminal Law Purpose

…

[232] I disagree with the appellant that the word "evil" — the traditional measure of the criminal law in this context — is unhelpful in the classification analysis. Rather, the concept of "evil" is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose, contrary to my colleague's suggestion (see Karakatsanis J.'s reasons, at para. 76). In my view, discarding this concept from the core of the criminal law purpose inquiry would be a dramatic change of course from this Court's past jurisprudence. While the word "evil" may echo language drawn from another time, it has been used frequently in the modern law and it remains conceptually useful for courts to search for an evil before the criminal law purpose requirement is satisfied. Furthermore, to my ear, the French equivalent "*mal*" is perfectly current as a choice of word and I observe that other equivalent words such as "*fléau*" are also used for "evil" in the decided cases (see, e.g., *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 33).

[233] The words "some evil or injurious or undesirable effect upon the public against which the law is directed" point to a more precise idea than the protection of central moral precepts, in a broad sense: Parliament cannot act unless it seeks to suppress some threat. This threat itself must be well-defined and have ascertainable contours to constitute the valid subject-matter of criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*. It must also be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm. To suggest otherwise would be to render the substantive requirement so vague as to be impractical as a measure of what amounts to criminal law for constitutional purposes.

...

(3) Application

...

[254] In my view, Parliament did not target a threat within the purview of the criminal law through the impugned provisions. Quite simply, the prohibitions target certain practices related to contracts and the provision of goods and services, and more specifically, to insurance and employment. There is nothing on the record suggesting that the prohibited conduct is a threat to Canadians.

…

[257] Moreover, I respectfully disagree with the view that just because the impugned law "'target[s] conduct that Parliament reasonably apprehends as a threat to our central moral precepts'", this means that the impugned provisions are validly backed by a criminal law purpose (Karakatsanis J.'s reasons, at para. 73, citing with approval *AHRA Reference*, at para. 50, per McLachlin C.J.). It bears emphasizing that McLachlin C.J. went on to state that "[t]he role of the courts is to ensure that such a criminal law in pith

and substance relates to conduct that Parliament views as contrary to our central moral precepts" and upheld the legislation because "[i]t targets conduct that Parliament has found to be reprehensible" (para. 51; see also para. 30 (emphasis added)). Yet, as LeBel and Deschamps JJ. explained, while "the criminal law often expresses aspects of social morality or, in broader terms, the fundamental values of society . . . . care must be taken not to view every social, economic or scientific issue as a moral problem" (*AHRA Reference*, at para. 239). In other words, "Parliament's wisdom" cannot trump the requirement to identify a real evil, even from the standpoint of morality (paras. 76 and 250). To do otherwise has the potential to amplify the scope of s. 91(27) beyond any constitutional precedent (paras. 43 and 239).

…

[271] From the foregoing, I conclude that the contested provisions do not satisfy the substantive component of criminal law. While they do relate to a public purpose, Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. It matters little to the present task whether the impugned provisions constitute good policy: they are *ultra vires* Parliament's criminal law power.

[272] In my view, ss. 1 to 7 of the *Act* rather fall within provincial jurisdiction over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. As explained above, the impugned provisions substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces. There is no question that the provinces could enact the impugned provisions in their own jurisdiction, if they so desired (see *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.)).

...

III. Disposition

[274] In my respectful view, the reference question should be answered affirmatively. The *Genetic Non-Discrimination Act* enacted by ss. 1 to 7 of the *Act to prohibit and prevent genetic discrimination*, S.C. 2017, c. 3, is *ultra vires* to Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act, 1867*.

[275] For these reasons, I would dismiss the appeal without costs.

Insert at p. 130, after first full paragraph

In June 2022, Parliament added s. 319(2.1) to the hate speech provision. Section 319(2.1) specifically prohibits "communicating statements, other than in private conversation, [that] wilfully promotes antisemitism by condoning, denying or downplaying the Holocaust". Section 319(7) defines "Holocaust" as "the planned and deliberate state-sponsored persecution and annihilation of European Jewry by the Nazis and their collaborators from 1933 to 1945." To date, this new subsection has not been the subject of judicial consideration. What do you think motivated the addition of this provision and what might its vulnerabilities be?

Insert at p. 154, immediately before "C. Confessions and the Right to Silence"

One criticism of the decisions in *Sinclair* (above) and other cases is that they effectively undermine the right to counsel and the right to silence by indicating that police officers can compel suspects to undergo lengthy interrogations without an opportunity to reconsult with a lawyer. In the following case, the Supreme Court considered how police might undermine the right to counsel. As you read this case and subsequent cases on the right to silence, consider how this decision impacts a structure that gives police extensive decision-making authority over the circumstances, timing, and extent of interrogations.

R v Dussault
2022 SCC 16

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

[*The accused Dussault was arrested by police on charges of murder and arson. The police informed him of his rights, including his right to counsel. At the police station, Dussault called local defence lawyer Jean-François Benoît. Benoît informed him of his rights, including his right to remain silent. Benoît requested the investigation be suspended until he arrived at the station, which Detective Sergeant Pierre Chicoine agreed to. Dussault agreed to remain silent until Benoît arrived at the station to continue their conversation. Benoît arrived at the station and was not permitted to meet with Dussault. Benoît nonetheless waited for two hours at the police station, left a note stating that Dussault was only partially instructed on his rights and that he wanted to finish the consultation before interrogation began, and that he would be available again to meet Dussault in less than 90 minutes. Before the interrogation, Dussault asked why he had not spoken to his lawyer. He was told that Benoît was not at the station, and that he had already exercised his right to counsel. The interrogation then proceeded, during which Dussault made an incriminating statement. At trial, Dussault argued that his right to counsel under s. 10(b) of the Charter was breached, as his call with Benoît was not a complete consultation. The trial judge ruled against him and admitted the incriminating statement into evidence. The Court of Appeal found that his right to counsel was breached as his phone call did not constitute a complete consultation. They quashed the verdict and ordered a new trial. The Crown appealed to the Supreme Court, which considered whether Dussault's right to counsel was undermined by police conduct.*]

The judgment of the Court was delivered by

MOLDAVER J. —

…

IV. Analysis

…

A. The Legal Principles

(1) *Sinclair* and the Right to a Second Consultation

[30] Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right". Stated at its broadest, the purpose of the right to counsel "is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation": *Sinclair*, at para. 24.

[31] Section 10(b) places corresponding obligations on the state. Police must inform detainees of the right to counsel (the informational duty) and must provide detainees who invoke this right with a reasonable opportunity to exercise it (the implementational duty). Failure to comply with either duty results in a breach of s. 10(b): *Sinclair*, at para. 27, citing *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233.

[32] Police can typically discharge their implementational duty by facilitating "a single consultation at the time of detention or shortly thereafter": *Sinclair*, at para. 47. In this context, the consultation is meant to ensure that "the detainee's decision to cooperate with the investigation or decline to do so is free and informed": para. 26. A few minutes on the phone with a lawyer may suffice, even for very serious charges: see, e.g., *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429.

[33] On this point, it is worth reiterating what the *Sinclair* majority made clear: Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Although other jurisdictions recognize a right to have counsel present throughout a police interview, that is not the law in Canada. Canadian courts and legislatures have taken a different approach to reconciling the personal rights of detainees with the public interest in effective law enforcement: *Sinclair*, at paras. 37-39.

[34] Once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice. In *Sinclair*, McLachlin C.J. and Charron J., writing for the majority, explained that the law has thus far recognized three categories of "changed circumstances" that can renew a detainee's right to consult counsel: ". . . new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the first information provided was deficient" (para. 2). Of course, for any of these "changed circumstances" to give rise to a right to reconsult, they must be "objectively observable".

[35] As a specific example of the third category listed above, the majority explained, at para. 52, that the right to counsel may be renewed if police "undermine" the legal advice that the detainee has received:

> Similarly, if the police undermine the legal advice that the detainee has received, this may have the effect of distorting or nullifying it. This undercuts the purpose of s. 10(*b*). In order to counteract this effect, it has been found necessary to give the detainee a further right to consult counsel. See [*R. v.*] *Burlingham*[, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206].

(2) Undermining Legal Advice Includes Undermining Confidence in Counsel

[36] The majority in *Sinclair* did not expand on the type of police conduct that could "undermine the legal advice that the detainee has received" and thereby give rise to a renewed right to consult counsel. In this context, care must be taken in defining the term "undermine". It is clear, for instance, that if this term is defined too broadly, it would prevent police from attempting in any way to convince a detainee to act contrary to their lawyer's advice: see, e.g., *R. v. Edmondson*, 2005 SKCA 51, 257 Sask. R. 270, at para. 37. If this were so, police would effectively be required to cease questioning any detainee who said "my lawyer told me not to talk". That is not the law in Canada: *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405.

[37] The reference to *Burlingham* at the end of para. 52 in *Sinclair* sheds light on the type of police conduct that can "undermine" legal advice in the *Sinclair* sense of that term. It suggests that, in this

context, police can undermine legal advice by undermining confidence in the lawyer who provided that advice. In *Burlingham*, the accused was charged with one murder and suspected in a second. He was subjected to an intensive interrogation during which police repeatedly disparaged "defence counsel's loyalty, commitment, availability, as well as the amount of his legal fees": para. 4. A majority of the Court found that these "belittling" comments breached s. 10(b) because they were made with the purpose, or had the effect, of undermining the accused's confidence in counsel:

> . . . s. 10(*b*) specifically prohibits the police, as they did in this case, from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel. It makes no sense for s. 10(*b*) of the *Charter* to provide for the right to retain and instruct counsel if law enforcement authorities are able to undermine either an accused's confidence in his or her lawyer or the solicitor-client relationship. [para. 14]

[38] It is notable that *Burlingham* speaks of undermining confidence in counsel, whereas *Sinclair* speaks specifically of undermining legal advice. The implied premise of the *Sinclair* citation to *Burlingham* appears to be that undermining confidence in counsel and undermining legal advice, in this context, produce the same effect. I agree, they can.

[39] A detainee's confidence in counsel anchors the solicitor-client relationship and allows for the effective provision of legal advice: *R. v. McCallen* (1999), 1999 CanLII 3685 (ON CA), 43 O.R. (3d) 56 (C.A.). When the police undermine a detainee's confidence in counsel, the legal advice that counsel has already provided — even if it was perfectly correct at the time it was given — may become, as observed in *Sinclair*, "distort[ed] or nullif[ied]". *Sinclair* requires police to provide a new opportunity to consult with counsel in order to counteract these effects.

(3) "Undermining" Is Not Limited to Intentional Belittling of Defence Counsel

[40] The most notable cases in this area of the law are those, such as *Burlingham*, in which the police expressly call into question the competence or trustworthiness of defence counsel. *Burlingham* and certain cases following it have characterized this type of conduct as the "belittling" of defence counsel. In cases of this sort, it is difficult to view the police conduct as amounting to anything less than an intentional effort to undermine the legal advice provided to a detainee.

[41] The *Sinclair* analysis does not, however, distinguish between intentional and unintentional undermining of legal advice. The focus remains on the effects of the police conduct. Where the police conduct has the effect of undermining the legal advice given to a detainee, and where it is objectively observable that this has occurred, the right to a second consultation arises. There is no need to prove that the police conduct was intended to have this effect.

[42] This conclusion follows from a consideration of the basic principles that underlie the *Sinclair* framework. *Sinclair* mandates that police provide a second opportunity to consult counsel where "changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not": para. 48. To focus on whether the police *intended* to bring about a change in circumstance would be to shift the inquiry away from the necessity for reconsultation and toward the fault of the police. This would distort *Sinclair*. The duty to facilitate reconsultation is not imposed on police as a punishment for ill-intentioned conduct.

[43] The case law also demonstrates that police conduct can unintentionally undermine the legal advice provided to a detainee: see, e.g., *R. v. Daley*, 2015 ONSC 7145, at para. 42 (CanLII), per Fairburn J. (as she then was); *R. v. McGregor*, 2020 ONSC 4802, at para. 194 (CanLII); *R. v. Taylor*, 2016 BCSC 1956, at para. 54 (CanLII). It is for this reason that the Court of Appeal for Ontario was correct to warn that "police tread on dangerous ground when they comment on the legal advice tendered to detainees": *R. v. Mujku*, 2011 ONCA 64, 226 C.R.R. (2d) 234, at para. 36. The ground sometimes gives way, and the prohibited effect occurs, even where the intention to achieve it was absent.

[44] Nor is there any principled reason to think that police conduct must amount to the "belittling" of defence counsel in order to "undermine" legal advice in the *Sinclair* sense of that term. Recall that *Sinclair* described the "undermin[ing]" of legal advice as being conduct which "may have the effect of distorting or nullifying [that advice]": para. 52 (emphasis added). Conduct other than the express belittlement of defence counsel may have this effect: see, e.g., *R. v. Azonwanna*, 2020 ONSC 5416, 468 C.R.R. (2d) 258, at paras. 122 and 148-49, in which police undermined the legal advice that a detainee had received by providing a misleading and incorrect summary of his right to silence. There would be no point, however, in trying to catalogue the various types of police conduct that could have the effect of "undermin[ing]" legal advice in this context. The focus remains on the objectively observable *effects* of the police conduct, rather than on the conduct itself.

[45] Simply put, the purpose of s. 10(b) is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation. As noted earlier, the legal advice is intended to ensure that "the detainee's decision to cooperate with the investigation or decline to do so is free and informed". The legal advice received by a detainee can fulfill this function only if the detainee regards it as legally correct and trustworthy. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it. Police conduct of this sort is properly said to "undermine" the legal advice that the detainee has received. If there are objectively observable indicators that the legal advice provided to a detainee has been undermined, the right to a second consultation arises. By contrast, the right to reconsult will not be triggered by legitimate police tactics that persuade a detainee to cooperate without undermining the advice that they have received. As *Sinclair* makes clear, police tactics such as "revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him" do not trigger the right to a second consultation with counsel: para. 60.

B. Application

[46] I am satisfied that the police conduct in this case had the effect of leading Mr. Dussault to believe, first, that an in-person consultation with Mr. Benoît would occur and, second, that Mr. Benoît had failed to come to the police station for that consultation. The effect of this was to undermine the legal advice that Mr. Benoît had provided to Mr. Dussault during their telephone conversation. Importantly, there were objectively observable indicators of this. In my view, these indicators triggered the police duty to provide Mr. Dussault with a second opportunity to consult counsel. The police failed to discharge that duty and, in doing so, breached Mr. Dussault's right to counsel.

[*The appeal was dismissed. The accused's conviction was set aside and a new trial was ordered*.]

Insert at p. 167, immediately before "III. Entrapment"

As the previous sections illustrate, one of the differences between the confessions rule and other protections that apply to suspect interrogations is that the confessions rule applies whether or not a person is detained. The next case considers when a person who is being interrogated ought to be considered a suspect, and whether all persons who are interrogated – suspects or not – should be informed of their rights to counsel and silence.

R v Tessier
2022 SCC 35

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

[*The accused Tessier was one of several people contacted by police for interviews after the deceased Berdahl was found dead in a ditch by a rural road. After receiving several phone calls from police, Tessier had a friend drive him to the RCMP detachment. Tessier was escorted into an interview room by Sergeant White and was not cautioned that he had the right to remain silent or that his statements could be used in evidence. Nor was he told of the right to retain and instruct counsel. After the interview, Tessier invited police to his home in Calgary to inspect and collect some of the belongings of Berdahl, who had been staying with Tessier. Tessier asked if he was free to go, and was driven home by the police. A surveillance team was then assigned to observe Tessier. Later that day, Tessier called the RCMP several times, then returned to look for White, who then began a second interview. Tessier then asked the police to come to his apartment in Calgary to examine a firearm he owned. When the police could not find the gun, they read Tessier his rights and cautioned him. Tessier was convicted of first-degree murder of Berdahl at trial, after statements made to Sergeant White were admitted into evidence. The Court of Appeal for Alberta ordered a new trial on the basis that the statements were involuntary and should have been excluded by operation of the confessions rule. The Crown appealed to the Supreme Court, which considered in part whether cautions should be required at all police interviews.*]

…

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe, Kasirer and Jamal JJ. was delivered by

KASIRER J, —

I. Overview

[1] When questioned at a police station in connection with a murder investigation, Russell Steven Tessier was not told that he had the right to remain silent. He was not cautioned that, if he did speak to the authorities, what he said could be taken down and used as evidence in court. While he did not confess, Mr. Tessier's answers to police questions included comments that the prosecution sought to introduce at trial to show that he committed the crime. At the time of the interviews, Mr. Tessier was not under arrest and he was not physically detained. The parties disagree whether he had become a suspect over the course of the interviews and whether he had been psychologically detained by reason of the police conduct at the station.

…

[3] The principal issue raised on appeal to the Court is whether the Crown met its heavy burden to show, beyond a reasonable doubt, that Mr. Tessier's statements were voluntary pursuant to the common law confessions rule. The Court of Appeal said the trial judge failed to address the key question in this case: whether, in the absence of a caution, Mr. Tessier had been denied a meaningful choice to speak to the police "*knowing* that *he was not required* to answer police questions, or that *anything* he did say would be taken down and *could be used in evidence*" (2020 ABCA 289, 12 Alta. L.R. (7th) 55, at para. 54 (emphasis in original)). The appeal bears upon two related doctrinal questions under the confessions rule: first, the requirements of the operating mind doctrine and, second, the impact of the absence of a caution on voluntariness prior to detention or arrest.

…

V. Analysis

…

A. Correctness of the Trial Judge's Reasons

…

(2) The Trial Judge Did Not Err in Law

[44] The Court of Appeal identified three errors of law committed by the trial judge. First, it said he overlooked the fairness rationale for the confessions rule (see paras. 6 and 47). Second, he adopted a flawed understanding of the operating mind doctrine which he confined to whether the individual had basic cognitive capacity. The trial judge is said to have ignored whether Mr. Tessier made a meaningful choice to speak based on an awareness of what was at stake (see paras. 50-52). And third, he erred in law when he decided that because Sgt. White did not subjectively perceive Mr. Tessier as a suspect, he was not required to give him a caution and that, as a result, the absence of a caution did not impact on voluntariness (see para. 55).

…

(b) *The Operating Mind Error*

[50] The Court of Appeal says at para. 50 of its reasons that the trial judge failed to apply the operating mind test set forth in *Whittle*. It is true that, at one point in his judgment, the trial judge appears to embrace a narrow understanding of the test, pared down to the question of whether an interviewee has a "limited degree of cognitive ability to understand what he is saying" (para. 41). But as the Court of Appeal itself recognized, the trial judge quoted more liberally from *Whittle* at para. 38, including the relevant dicta that an accused not only have the ability to understand what they are saying, but also the ability to comprehend that the statement may be used as evidence in criminal proceedings.

[51] It appears to me that the Court of Appeal's objection to the trial judge's reasons in this regard is its sense that *Whittle*, contrary to the trial judge's understanding of this point of law, "does not address what factors to consider in deciding whether someone made a meaningful choice" (para. 51). Yet as *Whittle* suggests at p. 932 of Sopinka J.'s reasons, the confessions rule, the right to silence and the right to counsel are together concerned with "preserving for the suspect the right to choose" and whether "the action of police authorities deprive[d] the suspect of making an effective choice by reason of coercion, trickery or misinformation or the lack of information". In *Whittle*, it was determined that the operating mind consideration of the voluntariness test requires proof that the accused was capable of making a

meaningful choice to speak to the police and that the choice was not improperly influenced by state action. The trial judge's determination of the law relating to the operating mind was, when the judgment is read as a whole, not mistaken in a material way.

[52] Respectfully, the cases do not support the Court of Appeal's wider interpretation of the operating mind doctrine. In the context of a detained or arrested suspect, the cases that employ the language of "choice" use it as a shorthand for voluntariness, to speak to the idea that a voluntary statement reflects an exercise of free choice which choice may be frustrated by the conduct of police (*Boudreau*, at pp. 269-71; *Whittle*, at pp. 932 and 939; *Hebert*, at p. 181; see also *Oickle*, at paras. 24-26; *Singh*, at paras. 35 and 53). The terms variously used in these cases, including "free", "active" and "meaningful" choice, are not predicated on any normative difference existing between them. All have been invoked in the jurisprudence to convey that the choice is voluntarily exercised when it is the product of an operating mind, as well as the absence of other factors as the context indicates, including police tricks, that would otherwise impugn voluntariness. As to the operating mind cases, they merely refer to the limited cognitive ability of a person to comprehend, in the case of *Horvath v. The Queen*, 1979 CanLII 16 (SCC), [1979] 2 S.C.R. 376, the police caution or, in the case of *Whittle*, what is being said and that it may be used as evidence in criminal proceedings (*Horvath*, at p. 425; *Whittle*, at p. 939; see also *Ward*; *R. v. Love*, 2020 ABQB 689, 21 Alta. L.R. (7th) 248, at para. 53). The default assumption in the cases is that, absent a cognitive impairment, an operating mind exists. But the burden always rests with the Crown to show, beyond a reasonable doubt, that the statement was voluntary in light of the broader contextual analysis proposed in *Oickle*. An operating mind is of course a necessary but not sufficient condition.

[53] The statements concerning a free choice in the decided cases have been carefully tempered. Sopinka J. in *Whittle* explained that an accused is not entitled to a good or wise choice (p. 939). In doing so, he "implicitly rejected" the suggestion, as authors S. Penney, V. Rondinelli and J. Stribopoulos note, "that voluntariness might require a more thorough understanding of the consequence of speech" (*Criminal Procedure in Canada* (3rd ed. 2022), at ¶4.20, citing *Clarkson v. The Queen*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383, at pp. 393-95; *R. v. MacDonald-Pelrine*, 2014 NSCA 6, 339 N.S.R. (2d) 277, at para. 38; see also H. Parent, *Traité de droit criminel*, t. IV, *Les garanties juridiques* (2nd ed. 2021), at pp. 61-62). Previously, McLachlin J. in *Hebert* — who, parenthetically, subscribed to the opinion of Sopinka J. in *Whittle* — was quick to note that proof of subjective knowledge could prove to be an "impossible task", and therefore should not form a part of what constitutes a choice to speak or remain silent (p. 177). In the particular context of a detainee tricked into confessing to an undercover police officer, she observed that a suspect's choice is informed by the right to counsel, a *Charter* right which only arises upon detention. In other words, it is the exercise of the right to counsel upon detention which informs the right to choose, rather than any state of legal or other knowledge held by a person the moment they interact with police. The cases seek to preserve the balance between the right to silence and the legitimate law enforcement objectives of the state, which is why the language of meaningful, free or active choice has emphasized the overall voluntariness of the statement, rather than a minimum level of subjective knowledge. Indeed, the Court of Appeal rightly recognized that the latter approach would be "unworkable" as a general requirement for all interviews with the police (para. 39).

[54] On my reading, however, the Court of Appeal introduced a level of subjective knowledge beyond what the cases require when it held that "an operating mind is not the only mental element required for a statement to be voluntary" and that a meaningful choice requires "knowing that [one is] not required to answer police questions, or that anything [said] would be taken down and could be used in evidence" (paras. 29 and 54). I agree with the Crown that the standard as described by the court would effectively require proof of actual knowledge that the accused did not have to say anything to the police and that

anything said could be taken down in evidence, which, as a practical matter, would oblige the Crown to prove that a police caution was given and properly understood.

[55] As the foregoing cases show, it is the *Charter* that introduces the necessity of a police caution at the moment of detention. There is good reason why the suspects in *Hebert*, *Whittle*, *Oickle*, and *Singh* were cautioned: they all were detained or arrested, such that the *Charter* mandated that certain information about the right to counsel, and by implication the right to silence, be communicated to them by the police. I would not expand the confessions rule where a person is not arrested or detained by adding an informational component to it that is absent from the settled jurisprudence.

[56] In my respectful view, proof of actual knowledge is not consonant with the law as it stands and would amount to an overextension of the operating mind doctrine that risks upsetting the balance between the individual and societal interests upon which the confessions rule is predicated. As the Court of Appeal itself noted (at para. 35), para. 36 of *Singh* stated that the question of voluntariness is an objective one, though the individual characteristics of the accused are relevant in applying the objective test. In essence, although the court acknowledged it would be unworkable for police to caution everyone at the outset of all interactions, it effectively introduced that standard by hinging the outcome of the voluntariness analysis on actual knowledge akin to the information contained in the police caution (*Love*, at paras. 38-53). This error is most plain in its conclusion that the trial judge had to assess whether Mr. Tessier *knew* that he was not required to answer police questions (C.A. reasons, at para. 54).

…

(c) *The Suspect Error*

…

[61] I accept the argument that the trial judge committed palpable errors in concluding that Mr. Tessier was not a suspect. There are two critical facts that, respectfully, the trial judge neglected to consider in his review of the circumstances and a third fact that, given these omissions, was misunderstood. First, at the start of the interview, when the police observed that Mr. Tessier did not arrive at the station in his own vehicle, another officer, Cst. Heidi Van Steelandt, was tasked with going to the place where he was staying in Didsbury to examine Mr. Tessier's Ford pickup. It was confirmed that the tires of that vehicle could match the traces observed at the scene of the homicide. This information was relayed to the detachment while Mr. Tessier was still at the station. The trial judge noted that the police knew there were tire tracks at the scene and what kind of truck Mr. Tessier drove (para. 50). But as Mr. Tessier argued before us, the trial judge made no mention that the police learned that the tire tracks matched the make of Mr. Tessier's truck. Second, following the interview, a surveillance team was put in place to observe Mr. Tessier. Despite Cst. Van Steelandt's testimony on this, the trial judge accepted Sgt. White's statement that Mr. Tessier was not a suspect without addressing these points. The trial judge's omission to consider the fact that the surveillance team had been put in place was also a palpable error in that it was a plain sign that suggests Mr. Tessier was suspected by police. In light of these two omissions, I am of the respectful view that the judge further underestimated the significance of the pointed questions posed by Sgt. White, including the direct suggestion that Mr. Tessier was culpably involved in the homicide, as a sign, viewed objectively, that Mr. Tessier was a suspect. These factual errors suggest strongly that the trial judge misapplied the objective test for determining whether Mr. Tessier was a suspect, or at least became a suspect, at the time of the interviews.

[62] These were palpable errors indicating that, as a matter of fact, Mr. Tessier was a suspect for the purposes of the confessions rule. But in my view, they did not prove to be overriding mistakes which

would warrant appellate intervention (see *Oickle*, at para. 71). The trial judge continued, as an alternative and in the event that he was mistaken, to assess the circumstances as though Mr. Tessier were a suspect, and concluded that the absence of the caution would not have been fatal in this context. Even where a person is a suspect, the cases are clear that there is no bright-line rule that a caution is required and that its absence renders a statement involuntary (*Prosko v. The King* (1922), 1922 CanLII 584 (SCC), 63 S.C.R. 226; *Boudreau*, at p. 267; *Oickle*, at paras. 47 and 71; *Singh*, at paras. 31-33; see also *R. v. Perry* (1993), 1993 CanLII 5399 (NB CA), 140 N.B.R. (2d) 133 (C.A.), at para. 13; *R. v. Peterson*, 2013 MBCA 104, 299 Man. R. (2d) 236, at para. 52; *Bottineau*, at para. 88; *R. v. Pearson*, 2017 ONCA 389, 348 C.C.C. (3d) 277, at para. 31; *R. v. Joseph*, 2020 ONCA 73, 385 C.C.C. (3d) 514, at paras. 51-56; *Bernard v. R.*, 2019 QCCA 1227, at para. 29 (CanLII)). The trial judge noted that the failure to caution a suspect may, in the particular circumstances of a case, "effectively and unfairly deny the suspect the choice to speak" (para. 45, citing *Morrison*, at para. 57). He then turned his mind to the relevant *Oickle* factors and concluded that Mr. Tessier had not been treated oppressively, was allowed to leave unaccompanied, and voluntarily cooperated throughout, disclosing information selectively (paras. 45 and 51-54). The Court of Appeal acknowledged that the trial judge did correctly point to evidence in support of his conclusion on voluntariness (para. 57). In other words, he asked whether Mr. Tessier had been unfairly denied his choice to speak in the event that he was a suspect, and concluded that, in the circumstances, he had not.

…

B. In the Pre-detention Phase of the Criminal Investigation, How Does the Absence of a Caution During Police Questioning of Mr. Tessier Affect the Voluntariness of His Statements?

…

(1) The Confessions Rule and Fairness

…

[69] This Court has repeatedly emphasized that the confessions rule, properly understood, strives for a balance between, on the one hand, the rights of the accused to remain silent and against self-incrimination and, on the other, the legitimate law enforcement objectives of the state relating to the investigation of crime (*Hebert*, at pp. 176-77 and 180; *Oickle*, at para. 33; *Singh*, at paras. 43 and 45). I would add that these interests, while they often appear in competition, share a common preoccupation in the repute of the administration of criminal justice which helps direct trial judges in finding the right point of equilibrium. Justice mandates a recognition that the rights of the accused are important but not without limit; it also insists that the police be given leeway in order to solve crimes but that their conduct not be unchecked. Indeed, achieving the right balance between these objectives involves seeking out this common ground and, in this sense, it has been usefully described as the "mission" of the confessions rule (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 425; see also Vauclair and Desjardins, at No. 38.23). In seeking this balance, the law imposes the heavy burden on the Crown to prove voluntariness beyond a reasonable doubt, which serves as substantial protection for the accused at all stages of a criminal investigation. Unlike the burden under the *Charter*, where the accused must establish a breach on a balance of probabilities, the confessions rule begins from a place of heightened protection for the accused because the rigorous task of showing voluntariness lies with the Crown.

[70] The rule is animated by both reliability and fairness concerns, and it operates differently depending on context. As Iacobucci J. explained in *Oickle*, while the doctrines of oppression and inducement are primarily concerned with reliability, other aspects of the confessions rule, such as the presence of threats or promises, the operating mind requirement, or police trickery, may all unfairly deny

the accused's right to silence (paras. 69-71; *Rothman v. The Queen*, 1981 CanLII 23 (SCC), [1981] 1 S.C.R. 640, at pp. 682-83 and 688, per Lamer J.; *Hebert*, at pp. 171-73; *Whittle*, at p. 932; *R. v. Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 S.C.R. 449, at paras. 21-22; *Singh*, at para. 34). A statement may be excluded as involuntary because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence, whatever the context indicates. It may be excluded if it was extracted by police conduct [translation] "[that] is not in keeping with the socio-moral values at the very foundation of the criminal justice system" (J. Fortin, *Preuve pénale* (1984), at No. 900).

[71] Even if reliability and fairness concerns are often tightly intertwined, the police caution is typically understood as speaking to fairness, as the case of *Morrison*, cited here by the trial judge, has emphasized. I agree with the Attorney General of New Brunswick that the lack of a police caution generally does very little to undermine the reliability of a statement. The mere fact that an individual was not cautioned does not in itself raise concerns that an unreliable confession or statement was provided. That said, in some situations a lack of a caution may exacerbate the pernicious influence of threats, inducements or oppression, which could contribute to undermining the reliability of a statement. In most cases, however, it speaks to fairness, in the sense that the absence of a caution may unfairly deprive someone of being able to make a free and meaningful choice to speak to police when, as a suspect, they are at a risk of legal jeopardy.

[72] But the caution does not resolve all of the concerns addressed by the confessions rule. The reason the absence of a caution is not determinative of voluntariness is because a caution is designed to rectify an informational imbalance when a detained or arrested individual is in a state of heightened vulnerability — which speaks to fairness — whereas voluntariness extends to a broader "complex of values" animated by both reliability and fairness (*Oickle*, at para. 70, citing J. H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev. 1970), vol. 3, § 826, at p. 351). While there is no doubt that fairness, driven by the common law right to silence and privilege against self-incrimination, plays an important role in the modern rule, the cases and the literature suggest it would be a mistake to allow it to dominate the analysis to the exclusion of other values (*Boudreau*, at pp. 269-70; *Oickle*, at para. 47; *Singh*, at para. 35; S. Penney, "Theories of Confession Admissibility: A Historical View" (1998), 25 *Am. J. Crim. L.* 309, at pp. 373-79; J. D. Grano, "Voluntariness, Free Will, and the Law of Confessions" (1979), 65 *Va. L. Rev.* 859, at p. 914). The confessions rule is also about protecting innocent defendants from false confessions and protecting suspects from abusive police tactics, which are distinct purposes reflected in their own ways in the threats or inducements, oppression and trickery factors. These concerns persist even where a caution has been properly delivered and understood. Contextual analysis is required to extend adequate protections to suspects beyond what the caution provides on its own, a point recognized in *Boudreau*.

[73] The rule in *Boudreau* has stood the test of time. In deciding that the absence of a caution is an important but not a decisive factor in the voluntariness inquiry, the Court confirmed that the confessions rule should remain flexible to account for the complex realities of police investigations. Rand J. appropriately observed that it would be a "serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules" (p. 270). This approach has successfully allowed for a continued balance between societal interests in the investigation of crime and individual rights for many years, even as the Court's understanding of the confessions rule has expanded to accommodate broader notions of fairness. *Boudreau* held that in *Gach v. The King*, 1943 CanLII 32 (SCC), [1943] S.C.R. 250, Taschereau J. was speaking in *obiter* when he stated that all confessions are inadmissible absent a proper caution. *Gach* was later criticized by Justice F. Kaufman of the Court of Appeal of Quebec, writing extrajudicially, who perceived it to misconstrue the law and "swe[ep] aside forty years of Canadian

jurisprudence and establis[h] a rigidity hitherto unknown" (*The Admissibility of Confessions* (3rd ed. 1979), at p. 144).

[74] To make the absence of a police caution determinative of voluntariness would risk inhibiting legitimate investigative techniques while ignoring the other protections provided by the rule. As one author put it, "[t]o strive for equality of knowledge . . . is to strive to eliminate confessions" (Grano, at p. 914). The confessions rule accepts in its design that statements resulting from police questioning are valuable, provided they are reliable and fairly obtained (*Hodgson*, at para. 21; *Singh*, at para. 29; see also Penney (1998), at p. 378; Trotter, at p. 293). Even where a caution is not given, the circumstances may nevertheless indicate that a person has freely chosen to speak and no fairness concerns arise. Requiring a police caution as a condition of voluntariness would defeat the purposes of the rule and the balance it strives to achieve by imposing an inflexible standard of subjectively held knowledge for all individuals, whatever their status or role in an investigation. While the cases rightly speak of a balance, it bears recalling that the scales already tip in favour of protecting the rights of the accused by the broad scope of the rule and the heavy burden resting with the Crown. Moreover, the common law has hesitated to substitute a caution or waiver requirement of the right to silence for suspects who are questioned for the fact-sensitive, contextual analysis in which the absence of a caution is an important, yet non-determinative, factor. If such a requirement was thought to be necessary, Parliament could introduce legislation to that effect (see S. Penney, "Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions" (2012), 57 *S.C.L.R.* (2d) 263, at pp. 263-64). In other contexts, for example the questioning of young persons, Parliament has done exactly that in recognition of their heightened vulnerability (see *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 146(2)).

[75] That said, there is no doubt that a caution can contribute to ensuring that an investigation is conducted fairly, especially where a suspect is detained and in a state more prone to making involuntary statements. In providing her guidance that a suspect should receive a caution, Charron J. in *Singh* was careful to note that a person's situation changes after the moment of detention, which is why the caution is seen as necessary in those circumstances. As Charron J. explained, state authorities control the detainee who is in a more vulnerable position and cannot walk away. The fact of detention alone may cause a person to feel compelled to make a statement (para. 32; see *Grant*, at paras. 22 and 39; *Hebert*, at pp. 179-80). The caution is required to attenuate the informational deficit in the face of heightened risk and vulnerability. Even if one acknowledges that many encounters with the police can be daunting, fairness considerations are unlikely to arise in the same way where the person is not suspected of being involved in the crime under investigation. Fairness concerns are manifest once an individual is targeted by the state. There is nothing inherently unfair, for instance, about police questioning a person standing on the street corner without providing a caution while gathering information regarding the potential witnessing of a crime.

[76] Yet in the specific context where a mere witness or an uninvolved individual is questioned, introducing a caution requirement as a condition of voluntariness could exact a cost on the administration of justice, notwithstanding the fact that no unfairness has arisen in obtaining the statement. Questioning at a police station is, to be sure, qualitatively different if the circumstances suggest that the interviewee brought or summoned for questioning is, on an objective basis, a suspect deserving of a caution. But to call for cautions in all circumstances would unnecessarily inhibit police work. Where a person faces no apparent legal jeopardy and the intentions of police are merely to gather information, an imposed caution could even chill investigations. Effective law enforcement is also highly dependent on the cooperation of members of the public (*Grant*, at para. 39). Where a contextual analysis reveals that no unfairness has arisen and no *Charter* protections were engaged, a bright-line rule to caution everyone could disturb the

balance struck by the confessions rule by excluding reliable and fairly-obtained statements. It is preferable to allow courts to take measure of the true circumstances of the police encounter flexibly. In the spirit of Charron J.'s suggestion in *Singh*, courts should pay particular attention to whether the absence of a caution has had a material impact on voluntariness in a manner which would warrant exclusion of the statement.

[77] As a suspect who was not detained, Mr. Tessier's circumstances lie between these extremes. Contrary to the Crown's suggestion, there are fairness reasons why the caution may take on greater importance once a person becomes a suspect. A person in Mr. Tessier's situation may also experience heightened vulnerability, but to a lesser degree than someone who, arrested and detained, is more fully under the control of the state. Speaking generally, a suspect who is not detained is free to leave. In some circumstances, notwithstanding the absence of a caution, a suspect may clearly know they do not have to answer questions or may be subject to no influences that would impugn voluntariness by way of threats or inducements, oppression, or police trickery. A suspect is not unfairly denied a free choice to speak in these circumstances. Conversely, even with an operating mind, conduct of the police may unfairly deny them that choice. All of this to say that the totality of the circumstances will be important in determining whether a statement made by a suspect who is not detained has been unfairly obtained.

(2) Consequences of the Absence of a Caution

[78] I agree with the Attorney General of New Brunswick that the weight to be given to the absence of a caution will fall on a spectrum. At one end, the significance attached to the failure to caution an uninvolved individual — such as the person on the street corner — will typically be negligible. The relative lack of vulnerability of an uninvolved individual or witness who is questioned by police means that a caution will typically be unnecessary to show that the statements were voluntary. To require that police caution every person to whom they address questions in a criminal investigation, even where those questions are asked at a police station, would be — as the Court of Appeal rightly noted here — an unworkable standard. It would unduly limit the broader societal interest in investigating crime by excluding reliable and fairly obtained statements in circumstances that do not warrant it.

[79] At the other end of the spectrum, the vulnerability and legal jeopardy faced by detainees cement the need for a police caution. Fairness commands that they know of their right to counsel and, by extension, of their right to remain silent so that they can make an "informed choice" whether or not to participate in the investigation (I borrow the expression "informed choice" from *Singh*, at para. 33). The balance courts seek to achieve in applying the confessions rule in this context tilts in favour of protecting the rights of the detained person and of limiting society's interest in the investigation of crime. The weight attached to the absence of a caution in these circumstances, while not determinative of the question of voluntariness owing to the contextual analysis required, will be at the highest end (see *Singh*, at para. 33).

[80] In circumstances in between, where police interview a suspect who is not detained and do not provide a caution, I agree with the longstanding view that the lack of caution is not fatal, but that it is an important factor in determining voluntariness (see generally Kaufman, at pp. 142-46). The importance attached to the absence of a caution will also be significant in recognition of the potential for vulnerability and exploitation of an informational deficit, unless it can be demonstrated in the circumstances, as I will explain in more detail below, that there is no doubt as to its voluntariness. This builds incrementally on Charron J.'s helpful reasons on this point in *Singh*. The heightened jeopardy and consequential vulnerability faced by a suspect, as opposed to an uninvolved individual, warrants special consideration in the final analysis to ensure adequate and principled protections under the confessions rule. Although

encounters between police and citizens sometimes mean the status of a person may change over the course of an interview, investigators are well accustomed to signs that raise their suspicions. This would be the proper moment to caution the interviewee to prevent the potential exclusion of the statement at trial.

…

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

…

(3) Legal Framework

[86] In the course of cross-examination of police witnesses or upon hearing the accused's own testimony, it may come to light that the accused was in a situation of heightened vulnerability and risk, either because they were detained or a suspect, and were not given a caution despite being suspected of a crime. That is sufficient to cast doubt on whether the interviewee spoke voluntarily as understood in *Whittle* and *Oickle*; that is, that the accused had the ability to understand what was being said and that it may be used in evidence, and that there was no other recognized consideration impugning voluntariness. The accused thus has met their evidentiary burden to make the absence of a caution a "live issue"; in keeping with its persuasive burden, the Crown must then satisfy the trial judge beyond a reasonable doubt that the statement was nevertheless voluntary.

[87] In these circumstances, it is appropriate for the trier of fact to undertake a contextual inquiry to determine whether an unfairness arose that vitiates voluntariness by denying the right to silence. This might arise where there is evidence of police trickery, for example circumstances in which the absence of a caution is the result of a willful failure to give a caution or a deliberate tactic to manipulate the suspect into thinking they have nothing at stake (see, e.g., *R. v. Crawford*, 1995 CanLII 138 (SCC), [1995] 1 S.C.R. 858, at para. 25; *R. v. Auclair* (2004), 2004 CanLII 24201 (QC CA), 183 C.C.C. (3d) 273 (Que. C.A.), at para. 41; *M. (D.)*, at para. 45;*Higham*, at para. 22). Impropriety on the part of the police, usually in the form of obscuring the jeopardy faced by the suspect to encourage cooperation, may unfairly deny a suspect their right to silence. Plainly, the statement should be excluded if the police deception shocks the community. But even if it does not rise to that level, deceiving the interviewee into thinking that, as a mere witness, they are in no jeopardy and that their statements will not be used in evidence against them could preclude admissibility at the end of the day. "[T]he ability to make a meaningful choice remains pertinent where trickery is involved", write Lederman, Fuerst and Stewart, "and exclusion is mandated where there is a reasonable doubt as to the confession's voluntariness in this regard" (¶8.126). I would note there is a distinction between misleading a person about the extent of their jeopardy and declining to inform a person that they are a suspect. Police need not provide details about the status of their investigation provided the salient information is communicated and there are no strategies of deception (*R. v. Campbell*, 2018 ONCA 837, 366 C.C.C. (3d) 346, at paras. 8-9).

…

(4) Summary

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

(5) Application to the Facts

[90] In light of the foregoing, and given the absence of a caution, were Mr. Tessier's statements to the police voluntary under the confessions rule? I agree with the trial judge's conclusion that the statements are admissible: Mr. Tessier did exercise a free or meaningful choice to speak to Sgt. White and he was not unfairly denied his right to silence. This is so even taking Mr. Tessier's argument at its highest by accepting that he was a suspect. I shall assume that Charron J.'s recommendation applies here: Sgt. White should have cautioned Mr. Tessier at the outset of the interview. Given that there was a reasonable basis to consider Mr. Tessier a suspect and in light of the pointed questioning he faced, which was adversarial in nature, the absence of the caution raises *prima facie* proof that, on its own, satisfies the evidentiary burden that the Crown must address in its legal burden of proving voluntariness. But I am satisfied that the record substantiates the Crown's argument, accepted by the trial judge, that Mr. Tessier had an operating mind and was not otherwise tricked in the circumstances. There are more decisive indications of voluntariness here, including circumstances that go above and beyond the basic requirements of an operating mind. The record contains strong signs, each of which points to the fact that Mr. Tessier was well aware of the consequences of speaking to Sgt. White. He knew that anything he said could be used as evidence, and knew that he had a choice between alternatives as to whether or not to cooperate with police. Additionally, while undoubtedly pointed at times, Sgt. White was forthright in the manner in which he confronted Mr. Tessier. The accused exercised a free choice to speak in the circumstances.

…

The following are the reasons delivered by

BROWN AND MARTIN JJ. —

I. Overview

…

[116] The majority rightly affirms that the *Oickle* factors are not a checklist (para. 68). Kasirer J. further recognizes that voluntariness protects the right of suspects to freely and effectively choose to speak to police (paras. 4, 9 and 71). As a result, the majority introduces a salutary change to the law: the absence of a warning in this circumstance is "*prima facie* evidence that [suspects] were unfairly denied their choice to speak to the police" (para. 9; see also paras. 83 and 89). We therefore understand the majority to adopt a presumption of inadmissibility when statements are elicited from suspects without a warning. The rationale underlying the majority's presumption is that the absence of a caution may unfairly deprive individuals of making a "free and meaningful choice to speak to police" when they are at "risk of legal jeopardy" (para. 71).

[117] While we agree with these statements, in our view, the majority falls short by failing to carry this same rationale to its logical conclusion: that is, in order to ensure that individuals are making a "free and meaningful choice to speak to police", police should provide a warning at the outset of *all* interviews — and not just interviews of *suspects*. In our view, any interview conducted without a warning is presumptively involuntary, *and* the presumption should be more difficult to rebut where the interviewee's risk of self-incrimination was objectively heightened.

[118] In our view, such a rule follows from our jurisprudence, which has progressed beyond a negative inquiry into police inducements, trickery, and oppression. Since at least this Court's decision in *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, confirmed more recently in *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, it has been clear that voluntariness exists *only* where the accused made *a meaningful choice* to speak with police. An individual's statement to police must therefore reflect a "genuine desire to confess" (H. Stewart, "The Confessions Rule and the *Charter*" (2009), 54 *McGill L.J.* 517, at p. 522). A meaningful choice is *an informedchoice*. Interviewees cannot make a meaningful choice without knowing that the choice is between speaking and not speaking with police, and of the consequences of choosing to speak. Voluntariness is premised on the assumption that the interviewee should have actual knowledge of the legally available options. So understood, that meaningful choice arises at the moment police begin to question an individual; its protection is not confined to detainees or suspects.

[119] We stress that it cannot merely be *assumed* that people interacting with the police know that they may remain silent and that whatever they say can be used in evidence. Indeed, the police officer in this case got the rule wrong himself when he (much later) told Mr. Tessier that only statements made after he was formally read his rights and *Charter* cautioned could be used against him.

[120] In sum, and unlike our colleagues, we would not limit the importance of a warning to circumstances where an accused is a suspect or detainee. A warning should be given at the outset of *all* interviews, and its importance increases with the objective risk of self-incrimination. Specifically, when the police initiate contact with a person to secure information about a crime they are investigating, a rebuttable presumption arises whereby any statement given in the absence of a warning is involuntary. The Crown may rebut the presumption by establishing, based on some other objective source of information, that interviewees otherwise knew they had a right to remain silent and that anything they said could be used in evidence. The presumption will be more difficult to rebut where the risk of self-incrimination is objectively heightened, for instance, when a person is invited to conduct a recorded interview at the police station, when the police take an adversarial approach during an interview, or when there is information that, *objectively* viewed, would raise a reasonable suspicion that the individual was involved in the crime. That is true whether or not the investigating officer *subjectively* views the individual being questioned as a witness, suspect, or detainee.

[121] A warning — one simple sentence — by the authorities at the outset of an interview — that the person is not obliged to say anything, but that anything said can be used in evidence, sets the necessary foundation for voluntariness and enhances the fairness of the process. Replacing the dubious assumption of universal knowledge with a simple and direct communication corrects any informational asymmetry to the benefit of all concerned.

[122] First, interviewees, having been informed of their choice, understand that they may lawfully remain silent.

[123] Secondly, police are given a clear, bright-line rule which does not rely on a cumbersome framework directing them to consider the perceived status of the interviewee at any particular point in time. Interviews are so dynamic and fluid that it has proven exceedingly difficult to pinpoint with any confidence when an interviewee becomes a potential suspect, a person of interest, a real suspect, or a detainee. Providing basic and necessary information from the outset, which is when the voluntariness requirement arises, allows authorities to proceed without fear that an interviewee's misunderstanding about whether to speak or not will result in their carefully conducted interviews yielding involuntary (and therefore inadmissible) statements.

[124] Finally, it follows that the Crown will benefit from such information having been given to the accused at the outset, since it can therefore more easily establish the meaningful choice at the heart of the voluntariness inquiry.

[125] Our approach promotes the confessions rule's animating concern with fairness and the administration of justice. It provides a strong incentive for police to warn individuals before questioning them, and helps alleviate the informational deficit and coercive element inherent in police interrogations. Contrary to the Crown's submissions and the majority's reasons, it will not unduly interfere with police investigations. Nor can we endorse an approach that effectively invites police to exploit the murky lines around psychological detention and rely on individuals' ignorance of their rights to extract statements where they are at risk of incriminating themselves.

[126] Applying our restated test, the question in this case becomes whether Mr. Tessier spoke to police voluntarily with awareness about what was at stake. In our view, he did not. When the police contacted him to secure information in relation to their homicide investigation, he was not initially informed that he was not required to speak to police and that what he said could be used as evidence. Further, both the officer's adversarial questioning and the information pointing to Mr. Tessier as a suspect increased his objective risk of self-incrimination. As the majority acknowledges (at para. 61), the trial judge committed palpable errors by ignoring key information that would have raised a reasonable suspicion that Mr. Tessier committed the crime. The Crown failed to rebut the presumption of involuntariness, and the statements should not have been admitted. We would therefore dismiss the appeal and confirm the judgment of the Court of Appeal setting aside the conviction and ordering a new trial.

[*The appeal was allowed and the conviction restored.*]

Insert at p. 174, immediately after McLachlin J dissent in Barnes

How does entrapment interact with the idea of reasonable suspicion as articulated in *R v Chehil*, 2013 SCC 49? In *Chehil*, the Court held that a reasonable suspicion is individualized (para 40) in the sense that police cannot merely rely on whether a person fits a drug courier "profile" to conduct a warrantless search, but must also point to specific objective facts about the individual before conducting the search (see Part IV.C, Chapter 3). How does this fit with the Court's interpretation of the concept in Barnes, where a "reasonable suspicion" was found over a place, the Granville Mall? See *R v Ahmad; Williams*, 2020 SCC 11 (dissenting reasons of Moldaver J).

Insert at p. 175, immediately before "IV. Search and Seizure"

While the standard for finding an abuse of process in terrorism cases seems quite high, is the standard as high when applied to other cases? In *R v Ahmad; Williams*, a majority of the Court held that Ahmad had not been entrapped, while Williams had been entrapped. In both cases, the officers involved received unsubstantiated tips that a phone number was associated with drug dealing. An officer called the number, briefly conversed with the people who answered the call, and then arranged to buy drugs. The distinction in the case appears to be that the undercover officer who called Ahmad waited for Ahmad to say "What do you need?" before asking for a specific amount of powder cocaine (which Ahmad agreed to provide). Williams also agreed to provide the requested amount of cocaine after being contacted by the undercover officer. However, a stay of proceedings was issued for the abuse of process (entrapment) that resulted from the officer stating "I need 80" (about 1 gram of cocaine) whilst introducing himself, and without waiting for Williams to agree to sell. Is this distinction sustainable? Does the officer conduct in either case rise to the level of an abuse of process?

Insert at 198, immediately before reference to Tanovich book

As suggested in *Brown*, evidence of racial bias is often circumstantial. Nonetheless, evidence shows severe racial disparities persist in the criminal justice system long after the report of the 1995 Commission on Systemic Racism in Ontario and the decision in *Brown*. The 1995 Commission reported that a disproportionately high number of Black male street dealers were detained due to intensive policing in low-income Black communities. The report also identified a racial disparity for those charged with drug offences. Compared to Black offenders, White offenders were twice as likely to be released and three times more likely to be granted bail.

While criminal laws around marijuana have changed in recent years, Black and Indigenous people in five major cities across Canada were arrested for cannabis possession at significantly higher rates than Whites, even though evidence shows Whites are most likely to use marijuana. See Akwasi Owusu-Bempah & Alex Luscombe, "Race, cannabis and the Canadian war on drugs: an examination of cannabis arrest data by race in five cities" (2021) 91 *International Journal of Drug Policy* May 2021:102937 [https://perma.cc/95J4-DCCX]. Similar evidence on cannabis possession exists with respect to Black men in Toronto. That data also shows that Black people in Toronto are charged with offences at a rate far higher than any other group, including Whites. Black people are also charged with "out-of-sight" driving offences – offences that are only discoverable *after* a vehicle has been stopped by police – at a rate 4.9 times higher than Whites and 6.9 times higher than members of other groups. See Scot Wortley and Maria Jung, *Racial Disparity in Arrests and Charges: An analysis of arrest and charge data from the Toronto Police Service* (Toronto*:* Ontario Human Rights Commission, 2020) [https://perma.cc/U879-T4ZV]. Studies in Ottawa and Toronto show that Black, Middle Eastern, and Indigenous individuals are notably overrepresented in use of force incidents with police. See Scot Wortley, Ayobami Laniyonu, and Erick Laming, *Use of force by the Toronto Police Service Final Report* (Toronto: Ontario Human Rights Commission, 2020) [https://perma.cc/DG5A-N464]; and, Lorne Foster and Les Jacobs, *External Review Race Data in Use of Force Reporting by the Ottawa Police Service* (Ottawa: report submitted to the Ottawa Police Services Board and Ottawa Police Service, 2020) [https://perma.cc/83G7-BXSZ].

Insert at 199, immediately before "C. Detention Powers"

In *Storrey*, Cory J made it clear that reasonable and probable grounds are required for a warrantless arrest (along with other requirements). In *R v Tim*, 2022 SCC 12, the accused was arrested during a traffic stop after the officer observed him trying to conceal a small bag with a single yellow pill. The officer correctly identified the pill, but mistakenly believed it to be regulated under the *Controlled Drugs and Substances Act.* The Court confirmed that

> [30] [c]ompelling considerations of principle and legal policy confirm that a lawful arrest cannot be based on a mistake of law — that is, when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not. Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be and would create disincentives for the police to know the law. Canadians rightly expect the police to follow the law, which requires the police to know the law. This Court has affirmed that "[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is" (*Grant*, at para. 133; *Le*, at para. 149). Côté J. helpfully encapsulated the relevant considerations of principle and legal policy in *Kosoian*, at para. 6:
>
> > In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce. Police officers are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by-laws they have to enforce.
>
> [31] It is thus unlawful for the police to arrest someone based on a mistake of law.

Insert at p. 206, immediately after excerpt from R v Grant

Grant is notable because it lays out two important legal tests. First is the test for determining when a detention crystallizes. Most of the remainder of this section builds from this test and focuses on police powers to detain and arrest individuals. Before reading those cases, consider the second significant legal point of *Grant*: the test to be applied when determining whether to exclude evidence after a breach of *Charter* rights – whether under ss 8, 9, 10 or some other part of the *Charter* – is identified. The following case considers whether police who realize they have breached a person's *Charter* rights are able to respond to those errors such that it can no longer be said that any evidence was "obtained in a manner" that breached the Charter.

R v Beaver
2022 SCC 54

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

[*After reporting the suspicious death of their roommate Bowers, the co-accused Beaver and Lambert were unlawfully detained on the basis of non-existent legal authority. As well, while both were cautioned about their right to silence and informed of their right to counsel, they were not told the reason for their detention: that they were suspects in Bowers' death. Lambert consulted with a lawyer, while Beaver did not. Vermette, a veteran detective, realized Beaver and Lambert had been illegally detained, but believed that he had sufficient grounds to arrest Beaver and Lambert. Vermette sent two other officers to arrest Beaver and Lambert. Both accused were told about the earlier Charter breach as well as the reason for their arrest. They were also re-cautioned of their right to silence and re-informed of their right to counsel. After 12 hours of questioning, Lambert confessed that he, Beaver, and the victim Bowers had fought the night before, that Bowers died during that fight, and that Lambert and Beaver (i) attempted to make the death look like an accident, (ii) developed a plan of what they would say to police, and (iii) called 911 to report Bowers' death as part of the plan. Beaver confessed after police showed him the video-taped recording of Lambert's confession. At trial, both co-accused applied to exclude their confessions as involuntary. The trial judge denied the application, and the co-accused were convicted of manslaughter. The Court of Appeal for Alberta dismissed the appeal from conviction. The co-accused then appealed to the Supreme Court of Canada, which considered whether the confessions were "obtained in a manner" that breached the Charter.*]

The judgment of Wagner C.J., and Moldaver, Rowe, Kasirer and Jamal JJ. was delivered by

JAMAL J. —

[*After asserting that Beaver and Lambert were not unlawfully arrested after Vermette reviewed the case, Jamal J considered the impact of the Charter breaches from the initial detention*.]

…

V. Analysis

…

C. Should the Appellants' Confessions Be Excluded Under Section 24(2) of the Charter?

…

(1) The Charter Rights Infringed

[90] The s. 24(2) analysis requires identifying the *Charter* rights infringed. The Crown conceded, and the trial judge found, that the police breached the appellants' ss. 9, 10(a), and 10(b) *Charter* rights from when they were unlawfully detained until they were arrested for murder about two hours later. The police breached s. 9 by unlawfully detaining the appellants at the scene and by transporting them to the police station while they were being "investigatively detained" under the non-existent *Medical Examiners Act*. There was no basis to place the appellants under investigative detention at common law because, at the time of their detention, there was no "clear nexus" between them and Bowers' death, and it had not been established that Bowers' death resulted from a recent criminal offence (ABQB *voir dire* reasons, at para. 149). Nor, at the time, was there statutory authority to arrest the appellants under the more onerous reasonable and probable grounds standard in s. 495(1)(a) of the *Criminal Code*. The police also breached s. 10(a) of the *Charter* by failing to give the appellants a legally valid reason for their detention and breached s. 10(b) because the appellants did not know the jeopardy they faced while they were unlawfully detained (paras. 183 and 188). Finally, the police breached Lambert's s. 10(b) rights by asking him questions in the police car after he had said that he wanted to speak to a lawyer (para. 185).

[91] I do not accept the appellants' suggestion that the trial judge found that the police breached their s. 8 *Charter* rights. The trial judge considered only Lambert's s. 8 *Charter* rights and found that both his arrest for murder and the search of his person incident to arrest were lawful (para. 210).

[92] I also reject the appellants' suggestion that the trial judge found that the police breached their rights to silence under s. 7 of the *Charter*. The trial judge noted that because the appellants' confessions were voluntary, the argument that their confessions were obtained in a manner that breached their s. 7 right to silence could not succeed: it is established that a voluntary confession cannot have been obtained in a manner that breached s. 7 of the *Charter* (paras. 127-30, citing *Singh*, at para. 8, and *R. v. Broyles*, [1991] 3 S.C.R. 595, at p. 609; see also D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 453). I see no error in these conclusions.

[93] As a result, I will consider whether the confessions should be excluded under s. 24(2) based solely on the ss. 9, 10(a), and 10(b) *Charter* violations. As I detail below, I have concluded that Lambert's confession was not "obtained in a manner" that breached the *Charter*, but that Beaver's confession was. The police severed any contextual connection between Lambert's confession and the earlier *Charter* breaches arising from his unlawful detention and rendered any temporal connection to those breaches remote or tenuous. In doing so, the police made a "fresh start" from the *Charter* breaches for Lambert. However, the police failed to do so for Beaver. This Court must therefore consider whether exclusion of Beaver's confession is required under s. 24(2). On a proper weighing of the relevant considerations, I conclude that it is not.

(2) The “Obtained in a Manner” Threshold Requirement

[94] There are two components to determining whether evidence must be excluded under s. 24(2). The first component -- the *threshold requirement* -- asks whether the evidence was "obtained in a manner" that infringed or denied a *Charter* right or freedom. If the threshold requirement is met, the second component -- the *evaluative component* -- asks whether, having regard to all the circumstances,

admitting the evidence would bring the administration of justice into disrepute (see *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 44, per Doherty J.A., who coined this terminology; see also *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1000; *Tim*, at para. 74; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357, at para. 57; *R. v. Lauriente*, 2010 BCCA 72, 283 B.C.A.C. 215, at para. 35; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at s. 19:22).

(a) *"Fresh Start" and the Threshold Requirement*

[95] Section 24(2) of the *Charter* is engaged only when the accused first establishes that evidence was "obtained in a manner" that breached the *Charter*. The threshold requirement "insists that there be a nexus" between the *Charter* breach and the evidence, absent which "s. 24(2) has no application" (*R. v. Manchulenko*, 2013 ONCA 543, 116 O.R. (3d) 721, at para. 71, per Watt J.A.). Determining whether evidence was "obtained in a manner" that infringed the *Charter* involves a case-specific factual inquiry into the existence and sufficiency of the connection between the *Charter* breach and the evidence obtained. There is "no hard and fast rule" (*Strachan*, at p. 1006; *Tim*, at para. 78).

[96] The general principles governing the application of the threshold requirement were helpfully summarized by Moldaver J. in *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38:

> Whether evidence was "obtained in a manner" that infringed an accused's rights under the *Charter* depends on the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).

See also *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561, at para. 72, per Laskin J.A.; *Tim*, at para. 78.

[97] A large body of appellate jurisprudence and academic commentary has recognized that evidence will not be "obtained in a manner" that breached the *Charter* when the police made a "fresh start" from an earlier *Charter* breach by severing any temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. In some cases, the police may make a "fresh start" by later complying with the *Charter*, although subsequent compliance does not result in a "fresh start" in every case. The inquiry must be sensitive to the facts of each case (see *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at paras. 3 and 21-22; *Plaha*, at paras. 47 and 53; *R. v. Lewis*, 2007 ONCA 349, 86 O.R. (3d) 46, at para. 31; *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259, at para. 69; *R. v. Woods*, 2008 ONCA 713, at paras. 10-11 (CanLII); *Manchulenko*, at paras. 68-70; *R. v. Hamilton*, 2017 ONCA 179, 347 C.C.C. (3d) 19, at para. 54; *McSweeney*, at para. 59; Paciocco, Paciocco and Stuesser, at p. 485; P. J. Sankoff, *The Law of Witnesses and Evidence in Canada*(loose-leaf), at s. 20:10; S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at 10.122-10.124; R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at ss. 2:36 and 5:68; D. Watt, *Watt's Manual of Criminal Evidence* (2021), at s.41.01; Ewaschuk, at s. 31:1565).

[98] The concept of a "fresh start" under s. 24(2) of the *Charter* was adopted from the common law "derived confessions rule", under which a court examines whether an otherwise voluntary confession is

sufficiently connected to a prior involuntary confession to be tainted (Penney, Rondinelli and Stribopoulos, at 4.50-4.52 and 10.122-10.123; Paciocco, Paciocco and Stuesser, at p. 426, fn. 179, and p. 485, fn. 72). Under this rule, courts evaluate whether a voluntary confession is admissible, despite the prior involuntary confession, by making a "factual determination based on factors designed to ascertain the degree of connection between the two statements", such as "the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances" (*R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, at p. 526; see also *R. v. R. (D.)*, [1994] 1 S.C.R. 881, at p. 882; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 28-30; *Manchulenko*, at paras. 67 and 69).

[99] In some cases, evidence will remain tainted by a *Charter* breach despite subsequent *Charter* compliance. For this reason, "[c]are should be taken in using the 'fresh start' label to resolve 'obtained in a manner' inquiries" (Paciocco, Paciocco and Stuesser, at p. 485). Whether evidence was "obtained in a manner" is not determined by whether the state eventually complied with its *Charter* obligations, but instead is based on whether there remains a sufficient causal, temporal, or contextual connection between the *Charter* breach and the impugned evidence. In this way, the "fresh start" analysis fits comfortably within this Court's holistic approach to whether evidence was "obtained in a manner" that breached the *Charter*.

(b) *Cases Illustrating the "Fresh Start" Concept*

[100] In *Wittwer*, Fish J. for this Court accepted that, in principle, the police can make a "fresh start" after a *Charter* violation, even though he found no "fresh start" on the facts. The accused had made two incriminating statements to the police that were inadmissible because they were made contrary to the accused's right to counsel under s. 10(b) of the *Charter*. Five months later, while the accused was in custody on another charge, a different officer informed him of his right to counsel and questioned him again, claiming that he did not know the content of the earlier statements. The accused provided no incriminating information until he was confronted with one of his earlier incriminating statements, at which point he made a third incriminating statement. Fish J. ruled that by referring to the earlier incriminating statement, the police "intentionally and explicitly bridged" the gap between the inadmissible statement and the third statement, thus preserving the temporal, causal, and contextual connections between them (para. 22). He explained that "[w]hat began as a *permissible* fresh start thus ended as an *impermissible* interrogation inseparably linked to its tainted past" (para. 3 (emphasis in original)). The third statement was thus "obtained in a manner" that breached the *Charter* and was then excluded under s. 24(2).

[101] By contrast, in *Simon* the Ontario Court of Appeal found that the police did make a "fresh start". In that case, the police had placed the accused under surveillance while investigating sexual assaults and arrested him for being in possession of a stolen van. They advised him of his right to counsel under s. 10(b) of the *Charter* in connection with the stolen van, but they did not advise him of his s. 10(b) right in connection with the sexual assaults before they questioned him about them. During questioning, the accused gave his written consent to provide the police with a saliva sample for DNA analysis for the sexual assault investigation. When giving this consent, the accused acknowledged that he did not have to provide the sample, that it could be used against him in criminal proceedings, and that he had the right to discuss with a lawyer whether to provide it. The DNA analysis of the saliva sample ultimately incriminated the accused in the sexual assaults. In ruling that the saliva sample was admissible, Doherty J.A. acknowledged that the police breached s. 10(b) of the *Charter* by failing to advise the accused of his right to counsel in

relation to the sexual assault investigation, but ruled that the police made a "fresh start" by severing this earlier *Charter* breach from their later conduct. In Doherty J.A.'s view, by obtaining the accused's written consent for the saliva sample, "the officers administered a focussed and powerful antidote to their earlier s. 10(b) breach" (para. 70), and drove "a wedge between the giving of the sample and the earlier breach of s. 10(b)" (para. 74). Doherty J.A. concluded that because the police had "effectively disconnected the decision to give the sample from any potential effect of the prior s. 10(b) breach" (para. 74), the saliva sample was not "obtained in a manner" that breached the *Charter*.

[102] These principles apply to any form of evidence that the police obtain following a *Charter* violation; they are not limited either to successive statements or to s. 10(b) *Charter* violations. Although many "fresh start" cases have involved successive statements to persons in authority (see, for example, *Plaha*; *Lewis*; *Woods*; *Hamilton*; *McSweeney*), I agree with the observation of Watt J.A. in *Manchulenko*, at para. 70, that "[n]o principled reason exists to confine the 'fresh start' jurisprudence" to such cases and that "[t]he rationale that underpins the 'fresh start' principle is the same irrespective of the specific form the evidence proposed for admission takes".

(c) *Potential Indicators of a "Fresh Start"*

[103] When undertaking the case-specific factual inquiry into whether the police effected a "fresh start", some potentially illustrative indicators include:

* Whether the police informed the accused of the *Charter* breach and dispelled its effect with appropriate language (*R. (D.)*, at p. 882). What constitutes appropriate language will vary with the circumstances of the case. In some cases, it may be sufficient to say, "we're going to start over"; in other cases, more detailed or specific language may be needed to remove the taint from the earlier *Charter* breach;

* Whether the police cautioned the accused after the *Charter* breach but before the impugned evidence was obtained (*Plaha*, at para. 53; *Hamilton*, at paras. 58-59; *Woods*, at para. 9). Ideally, this would involve both a primary caution ("You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence" (*Singh*, at para. 31; *Manninen*, at p. 1237)), and a secondary caution ("Your decision to speak to the police should not be influenced by anything you have already said to the police or the police have already said to you" (*Manninen*, at p. 1238));

* Whether the accused had the chance to consult counsel after the *Charter* breach but before the impugned evidence was obtained (*Manchulenko*, at para. 69; *Woods*, at paras. 5 and 9; *R. v. Dawkins*, 2018 ONSC 6394, at para. 62 (CanLII));

* Whether the accused gave informed consent to the taking of the impugned evidence after the *Charter* breach (*Simon*, at para. 74);

* Whether and how different police officers interacted with the accused after the *Charter* breach but before the impugned evidence was obtained (see *Lewis*, at para. 32; *Woods*, at para. 9; *McSweeney*, at para. 62; *I. (L.R.) and T. (E.)*, at p. 526; *Dawkins*, at para. 62); and

* Whether the accused was released from detention after the *Charter* breach but before the impugned evidence was obtained.

(3) Application

(a) *The Trial Judge's "Fresh Start" Analysis Contained Errors of Law*

[104] Although the trial judge reviewed the case law on "fresh start" principles, I have concluded that he erred in law by failing to apply the correct legal test and by applying an incorrect legal principle (*R. v. Chung*, 2020 SCC 8, at paras. 13 and 18).

[105] First, the trial judge failed to apply the correct legal test by focussing solely on the conduct of the police that was *Charter*-compliant, without expressly analyzing whether or how that conduct severed the temporal, causal, or contextual connection between the earlier *Charter* breaches and the appellants' confessions or rendered those connections remote or tenuous. The trial judge appeared to proceed on the basis that the appellants' arrest for murder was sufficient to constitute a "fresh start". He framed the issue as "whether [the appellants'] arrests following Det. Vermette's direction [to arrest the appellants for murder] resulted in a 'fresh start' such that the *Charter* breaches are 'cured'" (para. 206). He concluded that the arrests resulted in a "fresh start" and compliance with the *Charter*, without considering the connection between the earlier *Charter* violations and the confessions (para. 209).

[106] Second, and relatedly, the trial judge applied the wrong legal principle by repeatedly referring to the police as having "cured" the earlier *Charter* breaches (paras. 191, 206, 215, 239 and 253). It is unhelpful and inaccurate to describe the police as having "cured" the earlier *Charter* breaches. It is unhelpful because it obscures the real issue: whether there is a sufficient connection between the *Charter* breaches and the impugned evidence, and not simply whether there was subsequent *Charter* compliance. It is inaccurate because subsequent *Charter*-compliant conduct by the police does not "cure" earlier *Charter* breaches; the *Charter* breaches still occurred and merit proper consideration under the threshold requirement. Instead, *Charter*-compliant conduct may dissociate the *Charter* breaches from the impugned evidence by severing any connection between them or by rendering any connection remote or tenuous. Only then is the evidence not "obtained in a manner" that breached the *Charter*.

[107] Because the trial judge erred in law in his analysis of the threshold requirement, no deference is owed to his conclusion that the evidence was not "obtained in a manner" that breached the *Charter* (*Mack*, at para. 39; *R. v. Keror*, 2017 ABCA 273, 57 Alta. L.R. (6th) 268, at para. 35). That issue must be analyzed afresh.

(b) *Lambert's Confession Was Not "Obtained in a Manner" That Breached the Charter*

[108] In my view, the police took several steps that collectively severed any contextual connection between the breach of Lambert's *Charter* rights arising from his unlawful detention and his confession. These steps also rendered any temporal connection with the *Charter* breaches remote. Finally, there was also no causal relationship between the *Charter* breaches and Lambert's confession. Lambert's confession was thus not "obtained in a manner" that breached the *Charter*.

[109] Specifically, Det. Demarino severed any contextual connection with Lambert's earlier unlawful detention under the supposed *Medical Examiners Act*. He did so by telling Lambert that they were going to "start from the very beginning", by advising him that this is a "very, very serious matter", and by informing him four times that he was under arrest for murder. By taking these steps, Det. Demarino

addressed the previous failure to advise Lambert of the extent of his jeopardy when he had been unlawfully detained. Det. Demarino then facilitated Lambert's second consultation with counsel, confirmed that he understood the advice he had been given, repeated to him that they "have to start everything all over again", and provided him with a primary caution three times and a secondary caution once. Collectively, these steps created a new context for the interaction with the police and "dispelled" the effect of the *Charter* breaches on Lambert's confession (*R. (D.)*, at p. 882).

[110] In addition, any temporal connection between the *Charter* breaches arising from Lambert's unlawful detention and his confession after he had been arrested for murder was at best tenuous. Lambert's confession was provided about 12 hours after the *Charter* breaches, which the Court of Appeal found left "arguably no temporal connection" (para. 26). In *Plaha*, at para. 49, Doherty J.A. cautioned that evaluating whether a temporal connection persists "requires more than simply counting the minutes or hours" between the breach and the subsequent statement. As he explained, "[e]vents that occur during the time interval can colour the significance of the passage of time" (para. 49; see also *Manchulenko*, at para. 73). Here, the intervening steps taken by Det. Demarino and Lambert's decision to confess even after he was fully aware of his rights rendered any temporal link between the *Charter* breaches and the confession extremely tenuous (*R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 45). Such "remote or tenuous connections are no connections at all" (*R. v. Keshavarz*, 2022 ONCA 312, 413 C.C.C. (3d) 263, at para. 53, per Fairburn A.C.J.O.).

[111] There was also no causal connection between the *Charter* breaches arising from Lambert's unlawful detention and his confession after he was arrested for murder. Lambert provided no incriminating information because of the *Charter* breaches and he continued to protest his innocence. Lambert confessed only after he consulted counsel, after he understood his rights, and after he appreciated that he had been arrested for murder.

[112] By taking the steps described above, the police ensured that Lambert's confession was not "obtained in a manner" that breached the *Charter*. It is therefore unnecessary to consider the evaluative component of s. 24(2) for Lambert. Since Lambert's confession was admissible, I would dismiss his appeal and confirm his conviction for manslaughter.

(c) *Beaver's Confession Was "Obtained in a Manner" That Breached the Charter*

[113] The same cannot be said of Beaver's confession. Although, like Lambert, Beaver was at first unlawfully detained and then arrested for murder, unlike Lambert, Beaver declined the several opportunities he was given to consult counsel. As a result, in Beaver's case it cannot be said that an intervening consultation with counsel severed any connection between the *Charter* breaches arising from his unlawful detention and his eventual confession (see *Manchulenko*, at para. 69).

[114] Most importantly, however, Det. Hossack referred back to Cst. Husband's earlier caution during Beaver's unlawful detention, when Beaver had been told that he was being "investigatively detained" for "whatever's going on" in the townhouse where Bowers had been found dead. By telling Beaver that "it's no different than what uh, Constable Husband read to [him]", Det. Hossack invoked a caution given when Beaver was unlawfully detained under non-existent legislation and when he had not been advised of the jeopardy he faced for any offence, let alone for murder. By recalling this caution, Det. Hossack failed to dissociate her interaction with Beaver from the earlier *Charter* breaches and actively maintained a contextual connection between Beaver's initial unlawful detention and his confession. Thus, even after

Beaver had been lawfully arrested and made aware of the jeopardy he faced, his confession was contextually linked to the earlier *Charter* breaches.

[115] Beaver's confession was thus "obtained in a manner" that breached the *Charter*. It is therefore necessary to consider whether it should be excluded under s. 24(2) of the *Charter*.

[*After applying the Grant framework for exclusion under s 24(2), Jamal J determined that Beaver's confession should not be excluded.*]

…

The reasons of Karakatsanis, Côté, Brown and Martin JJ. were delivered by

MARTIN J. —

…

III. Analysis

[164] My analysis will address three issues. First, were the appellants' arrests unlawful? Second, was the evidence provided in their statements "obtained in a manner" that infringed their *Charter* rights? Finally, would admission of the evidence bring the administration of justice into disrepute?

[165] I have no hesitation in answering each of these questions in the affirmative.

…

A. The Appellants' Arrests Were Unlawful

…

[168] The need to establish reasonable grounds before effecting an arrest is not a mere procedural requirement -- it is a constitutional imperative. An arrest is a key investigative step on which much hinges, both for the police and for the arrestee. It triggers intrusive police powers relating to detention, interrogation, search, and the use of force. An arrest empowers police to search the individual and their immediate surroundings without requiring them to obtain a warrant or show independent reasonable and probable grounds. Police can detain arrested individuals without any review for up to 24 hours -- potentially longer if a justice is unavailable (*Criminal Code*, s. 503(1)). During this prolonged detention, the police may subject the arrestee to hours on end of questioning involving forms of manipulation, including lying to the arrestee in order to extract information. This is why, in the foundational decision of *Storrey*, Cory J. described the reasonable grounds requirement as a vital protection necessary to safeguard citizens' liberty and without which "even the most democratic society could all too easily fall prey to the abuses and excesses of a police state" (p. 249). The powers an arrest affords to the police is only justifiable on the basis of demonstrating reasonable grounds to believe an offence has been committed. Absent this information, the intrusion on liberty interests tolerated in the name of the investigation of crime cannot be justified. The reasonable grounds standard is a key constitutional safeguard and it must not be watered down because of mere investigative expediency or to salvage an investigation in the face of *Charter*-infringing conduct.

[169] It is worth setting out at some length Det. Vermette's testimony describing the basis on which he asserted that there were reasonable grounds to direct the appellants' arrests. He explained his grounds for arrest in this way:

> ... when I get called out, it's called out on a suspicious death. The -- the -- there is -- it is clear that there's a conversation between Staff Sergeant Chisholm and the medical examiner. That is important to me. I know the process that we go through and how the medical examiner or the Medical Examiner's Office triage those type of calls. So that call coming in as suspicious is important to me.
>
> I know that someone is deceased at the scene, and I start getting relationships based on that. I can tell you that Brian Lambert is the caller. He identifies himself as the roommate. And without getting into too much detail, I believed that Jim Beaver is the other roommate that is present as well... .

...

> ... we talk about a prior altercation with roommates. So what I am looking at here, if I look at the totality, I look at the environment, I look at the violence, I look at the anger, I look at some of the vernacular that was used, I can see that both roommates were there at the time of this 911 call. I look -- I start looking at opportunity. Is there possible opportunity that Mr. Beaver or Mr. Lambert could have committed this offence? Why do I say "this offence"? I believe it to be suspicious in nature. There's red flags all over the document.
>
> Now, when I look at the PIMS report and then I look at that as corroborating some of the information that I saw, I start looking at motive. I start looking at motivation. And, again, in culmination with all of the information that I am getting -- and to review, phone call from Staff Sergeant Chisholm, email from Staff Sergeant Chisholm, review of the I/Net Event Information, review of the I/Net Event Chronology, review of the PIMS report, the belief that investigatively that the victim is going to be Sutton Bowers, I believe there are subjective and objective grounds to arrest both Mr. Lambert and Mr. Beaver for murder.
>
> (A.R., vol. I, at pp. 226-27)

[170] The grounds relied on by Det. Vermette to direct the appellants' arrests do not come close to providing the particularized evidence required to ground a reasonable belief based on credible and compelling information that the reasonable grounds standard demands. I explain this conclusion in the following manner. I begin by briefly commenting on the relevance of the absence of notes taken by Det. Vermette to the assessment of reasonable grounds. Then, I explain why the above information fails to meet the objective reasonable grounds standard. First, all of the information, in its totality, is not sufficient to meet the particularized probability required to form reasonable grounds. Second, the timeline of events in Det. Vermette's testimony undermines the reasonableness of his stated belief that there was reason to believe the appellants killed Mr. Bowers at the time of their arrest. Third, the individual pillars of evidence relied on for the asserted grounds do not support the officer's reasoning.

(1) <u>There Were No Notes to Review on the Claimed Grounds for Arrest</u>

[171] Det. Vermette did not take notes detailing the actual and individual information he claimed to rely on to support his decision-making at the time of the arrest. There is therefore no contemporaneous

record of the particular grounds asserted to justify why the arrest power was believed to be a legally available option for each accused at the relevant point in time.

…

(2) The Totality of the Information Relied on Is Insufficient to Meet the Reasonable Grounds Standard

[176] The grounds forming the basis on which Det. Vermette directed the appellants' arrests in their totality do not rise to the level of a credibly based probability required to meet the reasonable grounds standard. Det. Vermette's testimony continuously restated the same information in various verbal formulations. The reasons proffered were embellished, long-winded, abstract and repetitive. They exaggerated the extent and utility of the information relied upon and obscured the lack of particularized evidence grounding the stated belief. When the inflated explanations are stripped back, the reasoning is essentially that the police were called on the scene to investigate a suspicious death and the individuals who found the body had an acrimonious relationship with the deceased, in which the deceased appeared to be the aggressor. I cannot accept that the police, whenever they are called upon to investigate a traumatic death, are entitled to arrest the individuals who reported the body for murder simply because they had a tumultuous history with the deceased.

…

[179] Further, the grounds asserted by Det. Vermette and accepted by the lower courts fail to engage with the exculpatory evidence pointing away from Mr. Bowers' death being a homicide, and from the appellants being involved. In assessing whether the reasonable grounds standard is met, the police must take into account the totality of the circumstances. This means that they are not entitled to disregard exculpatory, neutral, or equivocal information unless they have good reason to believe it is unreliable (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 26, 29 and 33). Here, there were serious questions relating to both the offence and the individuals.

[180] With respect to the offence, information at the scene suggested that Mr. Bowers may have died in an intoxicated fall. This is reflected in the trial judge's finding that, at the time of the appellants' detention, it was unclear whether the death was the result of a criminal offence. No further information suggesting the death was the result of a homicide was uncovered between the initial detention and the appellants' arrests. Det. Vermette's assertion that the death was "suspicious" because there were "red flags all over the document" is not the type of credible, compelling, particularized information that police can rely upon to support a reasonable belief that an offence has been committed for the purpose of justifying an arrest for murder.

[181] With respect to the individuals, the appellants' connection to the death was tenuous. There was no information about the time of death suggesting that it had occurred when the appellants would have had the "opportunity" to commit the offence. It will be true in every case that a particular individual or individuals report finding the body. This fact alone does not provide evidence of an "opportunity" to commit the offence. The information known to police at the time of the arrests was that the deceased was last seen alive with an unknown man.

[182] Further, in all of the history in the police file, the deceased was the aggressor in the altercations. He was the only one with a history of violence. Neither of the accused had a criminal record. The

information in the PIMS report relied on to support the "motive" suggested that Mr. Lambert didn't think much of the assault and did not want to involve the police, have charges laid or provide a statement. Any indication that the assault provided Mr. Lambert with a motive to kill was minimal.

[183] Moreover, there was nothing at all to suggest Mr. Beaver was involved in any of the prior incidents other than the argument the evening before the 9-1-1 call, which was already known to officers at the scene. It is untenable to conclude, as the trial judge did, that the information in the PIMS report could make up the difference between the absence of reasonable suspicion to detain the appellants at the scene, and the presence of reasonable grounds to arrest them at police headquarters.

(3) The Timing of the Arrests Suggests the Decision Was Made for Expediency

[184] The timing of Det. Vermette's direction to arrest the appellants also calls into question the reasonableness of the decision. On Det. Vermette's own evidence, he made the decision to arrest the appellants within two minutes of learning that the appellants had been illegally detained and transported to the station. Up to this point, he had been under the mistaken impression that officers at the scene had already arrested the appellants for murder. Det. Vermette testified that he made the decision to arrest quickly in order to "rectify" the situation (A.R., vol. I, at p. 225).

[185] The circumstances of the appellants' unlawful detention and transport should have been a cause for concern not only because of the *Charter* breaches that resulted, but to prompt questioning into why the other officers did not believe they had grounds to arrest the appellants under their authority in s. 495 of the *Criminal Code*. Det. Vermette's failure to make any such inquiries in this case is indicative of the arrests being a means to salvage the investigation, rather than the result of asking himself whether he in fact had lawful grounds to keep the appellants in custody, even if not done in bad faith.

(4) The Evidence Relied on for the Asserted Grounds Did Not Support a Reasonable Belief

[186] Finally, the individual pillars of evidence relied on for the asserted grounds do not support the officer's reasoning, either standing alone or in combination.

[187] I have already explained why the information relied on to support the appellants' "motive" and "opportunity" is not compelling. In addition, much was made in Det. Vermette's testimony of the fact that the medical examiner had called the homicide unit to investigate the death, which in his view meant that the death was suspicious. The word "suspicious" was Det. Vermette's own -- the police reports described the death as a "sudden death", not a suspicious one.

[188] For an investigator to rely on the "suspicious" nature of a death in support of reasonable grounds, this label must hold up to scrutiny on the basis of particularized, objectively verifiable information. The police, not the medical examiner, are legally trained on what the constitutional standard of reasonable grounds entails. The possibility of foul play will be true any time the homicide unit is called in to investigate a death. It is not the fact of the medical investigator calling for further investigation, but the basis on which she made that decision, that could reasonably support the belief that an offence had been committed. The medical examiner can explain to the police the information on which they believe foul play may or may not have been involved, and the police can and should use that information to inform their view of whether or not there are reasonable grounds. This appears to have happened in a phone call between the medical examiner and Det. Vermette at 12:35 p.m. in which she provided the details of her scene assessment. However, this occurred approximately 20 minutes *after* he had directed Dets. Hossack and

Demarino to arrest the appellants for murder. At the time of the arrests, there was no information about why the medical examiner had engaged the homicide unit and what facts or factors grounded her assessment. It could be that the medical examiner calls out the police to every "sudden death", or it could be that there were particular facts about the scene that supported a belief that the death was not the result of an accident. We simply do not know.

…

B. The Evidence Was "Obtained in a Manner" That Infringed the Appellants' Charter Rights

…

[191] In determining whether evidence was "obtained in a manner" that breaches the *Charter*, I agree with my colleague that courts should examine the entire relationship between the evidence and the breach to determine the strength of the connection and assess whether the breach and the evidence are part of the same transaction or course of conduct. The connection may be temporal, contextual, causal, or a combination of the three (*Strachan*; *Goldhart*; *Wittwer*). A strict causal connection is not required (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 649; *Strachan*, at pp. 1005-6). Instead, a global assessment is necessary "to determine whether a *Charter* violation occurred in the course of obtaining the evidence" (*Strachan*, at p. 1005). Indeed, a *Charter* breach following the discovery of evidence may still meet the "obtained in a manner" requirement of s. 24(2) (*R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561). The "obtained in a manner" analysis necessitates the full contextual analysis each time it is performed, regardless of whether subsequent *Charter*-compliant actions exist.

[192] The trial judge and Court of Appeal departed from this holistic assessment. They defined a "fresh start" as an attempt by police to "cure" an earlier breach so that any subsequently discovered evidence would not be "obtained in a manner" that infringed a person's *Charter* rights (C.A. reasons, at para. 12; see also I.F., Canadian Civil Liberties Association ("CCLA Factum"), at para. 13). Instead of examining the connection between the breach and the evidence holistically, the "fresh start" principle focuses on whether the police, after the breach, corrected their behaviour. This definition of "fresh start" reduces the broad "obtained in a manner" analysis and asks only two questions: (1) whether there was subsequent *Charter*-compliant state conduct following the breach but before the discovery of the evidence; and (2) whether that subsequent *Charter*-compliant conduct severed the relationship between the breach and the discovery of the evidence (CCLA Factum, at para. 13).

[193] The arrests, even if they were lawful, do not constitute a "fresh start" that shields subsequent actions by the police from *Charter* scrutiny.

[194] I do not think this vague notion of a "fresh start" is already part of our law and I am convinced it should not be so recognized. The idea of a "fresh start" is unnecessary because the established holistic approach is more than adequate to the task and this new flourish creates many deep pitfalls with no countervailing purpose.

[195] I disagree with my colleague's contention that this Court has accepted that, in principle, the police can make a "fresh start" after a *Charter* violation (para. 100). I would not read *Wittwer* as endorsing the "fresh start" concept as one that can shield evidence from the application of s. 24(2) of the *Charter*. No such conclusion was ever made in that case.

[196] *Wittwer* concerned the admissibility of an incriminating statement that the police obtained from the accused in a manner that violated his right to counsel. Another officer made a new attempt to get a statement from the accused without referring to the information gathered from the unconstitutionally obtained statement, but eventually referred to it after the officer determined there was no other way to convince the accused to talk. Fish J. concluded that the evidence was obtained in a manner that violated the *Charter* because "[w]hat began as a permissible fresh start thus ended as an impermissible interrogation inseparably linked to its tainted past" (para. 3 (emphasis added; emphasis in original deleted)).

[197] Some have sought to elevate this ambiguous wording as endorsing the view that "fresh starts" may be permissible in appropriate cases, even if the one in *Wittwer* was found not to be (see *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259; *R. v. Manchulenko*, 2013 ONCA 543, 116 O.R. (3d) 721; *R. v. Hamilton*, 2017 ONCA 179, 347 C.C.C. (3d) 19; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357). In my view, the above statement does not establish the notion of a "fresh start" as an accepted doctrine or binding principle of our law. The Court in *Wittwer* found that there was no break between the manner in which the *Charter* was breached in these two offending interrogations. Fish J. used a colloquial description of what police were trying to do by their conduct and by doing so he did not create a new doctrine which operates outside of the holistic analysis done under s. 24. The "fresh start" described related to the police's conduct, and not the admissibility of the second statement under s. 24. Indeed, on the contrary, Fish J. determined that the taking of the second statement was tainted by reference to the "inadmissible statement" taken some five months prior (para. 22).

[198] The concept of a "permissible fresh start" detracts from the broad and generous approach that this Court has adopted for the "obtained in a manner" requirement of s. 24 of the *Charter*. Regardless of the presence of *Charter*-compliant conduct following a breach, the test must remain the same in every case: the evidence is "obtained in a manner" that infringes a *Charter* right if upon review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three, and the connection must be more than tenuous (*R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45, citing *Goldhart*, at paras. 32-49). I see no reason why this test should not govern in all cases even if, or maybe especially when, police have recognized a breach and have taken steps to stop it.

[199] This is precisely the approach adopted by Fish J. in *Wittwer* (at para. 21) and is the only legal test endorsed by this Court. Although arguably, Fish J. refers to a "fresh start", he then unequivocally applies the generous and broad approach to the "obtained in a manner" requirement developed in *Strachan* and *Goldhart* to conduct his analysis. The text of s. 24(2) is not worded so narrowly as to preclude evidence from consideration even when the police take steps to cease an ongoing *Charter* violation. Substituting a "fresh start" analysis for a complete and contextual "obtained in a manner" analysis creates an inflexible test that makes *Charter* remedies less accessible to those whose rights were violated. No single rule should disrupt the courts' remedial inquiry (CCLA Factum, at para. 22).

[200] As with all remedial provisions, s. 24 of the *Charter* must be given a large and liberal interpretation consistent with its purpose. Taking a broad and generous approach to the "obtained in a manner" threshold requirement is important, as it is the gateway to the focus of s. 24(2): whether the admission would bring the administration of justice into disrepute (*Pino*, at para. 56). An overly narrow interpretation of s. 24(2) would prevent courts from even considering the seriousness of the *Charter*-infringing conduct, an unwelcome result which would automatically immunize prior *Charter* breaches. There is simply no

need or utility in speaking about a "fresh start" because the current s. 24 jurisprudence contemplates that there may be circumstances in which the requisite connection is not established and the evidence was outside its "obtained in a manner" requirement. In my view, it is an unhelpful label that creates and supports an improper path of reasoning, serving to divide a holistic analysis into two parts. The trial decision in this case demonstrates the dangers that accompany the "fresh start" doctrine. In finding that there was a "fresh start" such that the *Charter* breaches were "cured", the trial judge characterized the police conduct following the arrest as a second transaction, unrelated to the prior events (paras. 207-11). This allowed him to ignore the unlawful conduct that preceded the arrests while relying only on the *Charter*- compliant conduct following the arrests to justify a lack of connection between the *Charter* violations and the statements.

[201] Respectfully, the approach my colleague has taken to the "fresh start" doctrine leads to a replication of the trial judge's error. Though he rejects the trial judge's conclusion that police can "cure" an earlier *Charter* breach with *Charter*-compliant conduct (para. 106, citing ABQB reasons, at paras. 191, 206, 215, 239 and 253), he similarly enumerates police conduct that would allow just that; indicators that the police have rectified their breaches with new, *Charter*-compliant conduct (factors enumerated at para. 103). There is no "focussed and powerful antidote" that can erase conduct violating the *Charter* (para. 101, citing *Simon*, at para. 70); this conduct must always form part of the "obtained in a manner" analysis.

[202] By shifting the focus to the eventual *Charter*-compliant conduct, the "fresh start" doctrine distracts from the remedial nature of s. 24(2) and allows police to insulate their conduct from review, regardless of the severity of that conduct. This approach clashes with the principle under the *Grant* inquiry that *Charter*- compliant conduct by *some* police officers does not negate or reduce the severity of the *Charter*-infringing conduct of *other* police officers (*R. v. Reilly*, 2020 BCCA 369, 397 C.C.C. (3d) 219, at paras. 93-102, aff'd 2021 SCC 38; see also CCLA Factum, at para. 20).

[203] After reviewing the entire course of events, I conclude that the evidence was "obtained in a manner" that infringed the appellants' *Charter* rights. Because the trial judge erred in (1) concluding that there were reasonable grounds to arrest the appellants and in (2) relying on the concept of a "fresh start" to sever the connection between the initial *Charter* breaches and subsequent statements provided, his conclusion that the evidence was not "obtained in a manner" within the meaning of s. 24(2) of the *Charter* is not owed deference. Here, there is a strong temporal, contextual, and causal connection between the breaches of the appellants' *Charter* rights and the collection of their statements. The appellants were under the continuous control and supervision of the police from the time of their unlawful detention and transportation from the scene, to the time Det. Vermette unlawfully directed their arrests, to the time they ultimately admitted their involvement some 12 hours later. The police facilitating a second consultation with counsel for Mr. Lambert and advising him that they are "start[ing] everything all over again" does nothing to relinquish the firm grasp they continued to hold on him (A.R., vol. II, at p. 30). Although a causal connection is not required, the fact that the police would not have obtained the evidence but for the detention, transport, and arrests that were conducted in a manner that violated their *Charter* rights supports the conclusion that the *Charter* breaches and the evidence the appellants provided in their statements were "inextricably linked" (*R. v. Black*, [1989] 2 S.C.R. 138, at p. 163).

[*The accused's appeals from conviction were denied.*]

Insert at 225, immediately after discussion of strip search statistics

The general power to conduct warrantless searches incident to lawful arrests is well-established, but has given rise to numerous Charter challenges based the distinct privacy implications of warrantless searches in different scenarios. The following considers one such scenario: when a person is arrested in their home.

R v Stairs
2022 SCC 11

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

[*Police arrived at the accused's residence following a report of domestic violence. They noted that the accused was a violent, high-risk offender. The officers knocked several times but no one answered. Concerned for the woman's safety, they entered the residence and announced their presence. A woman with fresh injuries to her face walked up from the basement. She was not cooperative and provided little information. The officers then saw Stairs run across the basement entrance and lock himself in the basement laundry room. He was soon after arrested there. After the arrest, an officer conducted a visual clearing search of the laundry room and adjoining living room. The officer observed a clear container and plastic bag in clear view on the floor that contained methamphetamine. At trial, Stairs submitted that the drug evidence should be excluded as his right against unreasonable search and seizure was violated. The trial judge found no breach of s. 8, stating the officers had conducted a reasonable search with the valid objective of ensuring safety. Stairs received multiple convictions, including possession of illegal drugs with the intent to traffic. Stairs appealed the drug offence conviction. The majority of the Court of Appeal upheld the conviction, ruling that the search and seizure did not breach s. 8 of the Charter. Stairs appealed to the Supreme Court which considered the permissible scope of a search incident to a lawful arrest in a person's home.*]

The judgment of Wagner C.J. and Moldaver, Rowe, Kasirer and Jamal JJ. was delivered by

MOLDAVER AND JAMAL JJ. —

I. Overview

…

[5] Mr. Stairs now appeals as of right to this Court regarding his conviction for the drug offence. He argues that the common law standard for search incident to arrest must be modified for searches conducted in a home given the very high privacy interests that apply to a person's home. He asserts that where the police search for safety purposes, as alleged in his case, they can only do so if they have reasonable grounds to believe, or at least suspect, that there is an imminent threat to public or police safety. Mr. Stairs claims that this standard was not met and that the search of the basement living room by the police was therefore unconstitutional. Further, he says, the methamphetamine seized by the police should have been excluded from the evidence and an acquittal must be entered with respect to the charge of possession of a controlled substance for the purpose of trafficking.

[6] The baseline common law standard for search incident to arrest requires that the individual searched has been lawfully arrested, that the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest, and that the search is conducted reasonably

(*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 21 and 27). In the past, this Court has tailored this standard in several contexts to comply with s. 8 of the *Charter*. The search incident to arrest power has been eliminated for the seizure of bodily samples (*R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607), and the standard has been modified in other situations presenting a heightened privacy interest in the subject matter of the search, such as strip searches, penile swabs, and cell phone searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *Fearon*).

[7] While we agree with Mr. Stairs that the common law standard should be modified — and made stricter — to reflect an accused's heightened privacy interest in their home, we do not accept the test he proposes. Given the facts of this case, his submissions were directed solely to safety searches and did not extend to investigative purposes, such as evidence preservation and evidence discovery.

[8] Balancing the demands of effective law enforcement and a person's right to privacy in their home, we conclude that the common law standard for a search of a home incident to arrest must be modified, depending on whether the area searched is within or outside the physical control of the arrested person. Where the area searched is within the arrested person's physical control, the common law standard continues to apply. However, where the area is outside their physical control, but it is still sufficiently proximate to the arrest, a search of a home incident to arrest for safety purposes will be valid only if:

- the police have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and

- the search is conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

…

V. Analysis

…

B. Stage Two: Determining Whether the Common Law Standard Must Be Modified

…

(3) Modifications to the Common Law Standard

[56] To pass constitutional muster, the common law standard for search incident to arrest must be modified in two ways that make the standard stricter where the police search areas of the home outside the arrested person's physical control:

- the police must have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and

- the search must be conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

…

(a) *Reasonable Suspicion Required for Areas Outside the Arrested Person's Physical Control*

(i) Defining the Surrounding Area of the Arrest

…

[60] The task of determining whether a particular area is part of the surrounding area of the arrest and which subcategory it falls under lies with the trial judge. Consistent with this Court's jurisprudence, whether an area is sufficiently proximate to the arrest is a contextual and case-specific inquiry. The key question is whether there is a "link between the location and purpose of the search and the grounds for the arrest" (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 49). The inquiry is highly contextual; the determination must be made using a purposive approach to ensure that the police can adequately respond to the wide variety of factual situations that may arise. Depending on the circumstances, the surrounding area may be wider or narrower. As one learned author notes: "A search incident to arrest can extend to the surrounding area, and so might include searching the building or vehicle in which the accused is arrested" (S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 124).

[61] When the police make an arrest, under the existing common law standard, they may conduct a pat-down search and examine the area within the physical control of the person arrested. But when the police go outside the zone of physical control, the standard must be raised to recognize that the police have entered a home without a warrant. In these circumstances, it is not enough to satisfy the existing common law standard, which requires some reasonable basis for the search. Rather, the police must meet a higher standard: they must have reason to suspect that the search will address a valid safety purpose. We will say more about the reasonable suspicion standard in the section below.

…

(ii) The Nature of Reasonable Suspicion

…

[67] Reasonable suspicion is a higher standard than the common law standard for search incident to arrest. As this Court noted in *Caslake*, the search incident to arrest power arises from the fact of the lawful arrest (para. 13). All that is required is "some reasonable basis" for doing what the police did based on the arrest (para. 20). The common law standard is less stringent than the reasonable suspicion standard because it permits searches based on generalized concerns arising from the arrest, while the reasonable suspicion standard does not.

[68] By contrast, to establish reasonable suspicion, the police require a constellation of objectively discernible facts assessed against the totality of the circumstances giving rise to the suspicion of the risk. This assessment must be "fact-based, flexible, and grounded in common sense and practical, everyday experience" (*Chehil*, at para. 29). In addition, the police must have reason to suspect that the search will address the risk. However, reasonable suspicion is a lower standard than reasonable and probable grounds because it is based on a *possibility* rather than a *probability* (*Chehil*, at para. 32).

[69] Whether the circumstances of a particular case give rise to reasonable suspicion must be assessed based on the totality of the circumstances (*Chehil*, at para. 26). Relevant considerations include (a) the

need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that the contemplated risk actually exists (*R. v. Golub* (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743 (C.A.), at p. 758).

…

(iii) The Rationale for Reasonable Suspicion

…

[72] In *Golub*, the police *entered* the home to conduct a search incident to arrest, whereas here the police were already lawfully in the home under exigent circumstances when they conducted the search incident to arrest. Despite this difference, in our view, the principles which led the court in *Golub* to require a standard of reasonable suspicion apply equally here. Simply because the police have entered the home for a valid reason does not give them *carte blanche* to wander through the home at large where the circumstances do not call for it. As we have explained, the more extensive the warrantless search, the greater the potential for violating privacy. Thus, when the police search a home incident to arrest in areas outside the physical control of the arrested person at the time of arrest, they require reasonable suspicion.

…

[74] When assessing police conduct, the reviewing judge must be alive to the volatility and uncertainty that police officers face — the police must expect the unexpected. This reality is inherent in the police's exercise of their common law powers, as well as their statutory duties, including "the preservation of the peace, the prevention of crime, and the protection of life and property" (*R. v. Godoy*, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311, at para. 15 (emphasis deleted), citing *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at pp. 11-12; *Police Services Act*, R.S.O. 1990, c. P.15, s. 42). Given their mandate, "police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing" (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 16). A reasonable suspicion standard ensures that the police may carry out these duties, while also balancing the enhanced privacy in a person's home.

(iv) No Requirement for Reasonable Belief in Imminent Harm

[75] In adopting a reasonable suspicion standard, we reject Mr. Stairs' proposed standard of reasonable belief in imminent harm, which was endorsed by the dissenting judge at the Court of Appeal. Both Mr. Stairs and the dissenting judge relied on *MacDonald*. However, *MacDonald* is distinguishable.

[76] In that case, the police attended Mr. MacDonald's condominium in response to a noise complaint. When he partially opened the door to his unit, it appeared that he may have been holding a weapon behind his leg. After he refused to reveal what was behind his leg, the police pushed the door open further. Importantly, Mr. MacDonald was not under arrest. He therefore retained a strong expectation of privacy in his home and the police required heightened grounds to justify entry — i.e., a reasonable belief in imminent harm. In the present case, by contrast, the police had already entered the home under exigent circumstances and lawfully effected the arrest. Mr. Stairs' expectation of privacy was thus significantly diminished (*Fearon*, at para. 56, referencing *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 413). To be clear, "[t]he authority for the search does not arise as a result of a reduced expectation of

privacy of the arrested individual"; however, it is a factor in assessing the standard for a search incident to arrest (*Caslake*, at para. 17). It follows, in our view, that *MacDonald* is distinguishable.

[77] There are also independent reasons for rejecting a standard of reasonable belief in imminent harm for a home search incident to arrest. First, because a search incident to arrest typically occurs at the early stages of an investigation, the police will often be unable to show reasonable and probable grounds. Setting the bar too high will prevent the police from acting promptly, taking *immediate* steps to address risks to their safety and the safety of others, including innocent bystanders. Second, an imminence requirement would practically proscribe the search incident to arrest power, as it would simply restate the exigency exception. If there were exigent circumstances, the police could act solely on that basis. There would be no need for the power to search incident to arrest.

(b) *Nature and Extent of the Search*

[78] The police must carefully tailor their searches incident to arrest in a home to ensure that they respect the heightened privacy interests implicated. The search incident to arrest power does not permit the police to engage in windfall searches. The police are highly constrained when they go beyond the area within the physical control of the arrested person.

[79] The search incident to arrest power only permits police to search the surrounding area of the arrest (*Cloutier*, at pp. 180-81; Coughlan, at p. 124). This Court's guidance on how to determine what constitutes the surrounding area of the arrest remains constant. As indicated, the key consideration is the link between the location and purpose of the search and the grounds for the arrest (*Nolet*, at para. 49).

[80] In addition, the nature of the search must be tailored to its specific purpose, the circumstances of the arrest, and the nature of the offence. As a general rule, the police cannot use the search incident to arrest power to justify searching every nook and cranny of the house. A search incident to arrest remains an exception to the general rule that a warrant is required to justify intrusion into the home. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion.

[81] Further, it would be good practice for the police to take detailed notes after searching a home incident to arrest. They should keep track of the places searched, the extent of the search, the time of the search, its purpose, and its duration. In some instances, insufficient notes may lead a trial judge to make adverse findings impacting the reasonableness of the search.

…

VI. Application

…

A. Reasonable Suspicion

[84] The living room search met the standard for reasonable suspicion, both in terms of its subjective and objective components.

(1) Subjective Component

[85] It was open to the trial judge to conclude that the police subjectively believed there was a safety risk that would be addressed by conducting a clearing search of the living room. This was a valid law enforcement purpose. The officer who conducted the clearing search (Officer Vandervelde) testified that the search was performed to ensure that "no one else was there", such as someone potentially posing a risk or needing assistance, and that there were "no other hazards", such as weapons or firearms sitting out in the open (see pre-trial application reasons, at para. 282).

(2) Objective Component

[86] It was equally open to the trial judge to find that it was objectively reasonable for the police to clear the area for hazards and other occupants. When assessing reasonableness, it is essential to properly contextualize the arrest and the surrounding circumstances. Here, the following factors figure prominently in the reason-to-suspect analysis: (a) the dynamic before and during the arrest; and (b) the nature of the offence for which Mr. Stairs was arrested.

(a) *The Dynamic of the Arrest*

[87] The situation was volatile and rapidly changing. The police were responding to a civilian 9-1-1 call. The caller reported that the male driver was swerving on the road while repeatedly striking the female passenger in a "flurry of strikes". He continued hitting her, even though she was huddling to protect herself.

[88] Shortly thereafter, the police located the reported car parked in the driveway of an unknown home. Despite loudly and repeatedly announcing themselves, no one answered the door. They entered the home because they feared that the assault was ongoing. When the woman emerged from the living room in the basement, she had fresh injuries to her face, supporting the police officers' belief that she had been assaulted. Moreover, Mr. Stairs disobeyed repeated commands. He behaved erratically, running across the basement from the living room and barricading himself in the laundry room.

[89] From door knock to arrest, about four minutes elapsed. The situation was tense and the police had their weapons drawn. Throughout this interaction, the police also knew that Mr. Stairs had a history of violence, including domestic violence, that he was an escape risk, and that he had been identified as a high-risk offender.

(b) *The Nature of the Offence*

[90] The arrest was for domestic assault. As this Court recognized in *Godoy*, at para. 21, privacy in the home must be balanced with the safety of other members of the household:

> One of the hallmarks of [domestic violence] is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response.

[91] For victims of domestic violence, the home is often not a safe haven. Instead, it is a place that shields and enables their abuse. While privacy interests in the home are important, s. 8 of the *Charter* "was not intended to protect blindly privacy interests claimed in the context of criminal

activities which are played out within one's home" (*Silveira*, at para. 119, per L'Heureux-Dubé J., concurring). In domestic violence cases, the police are not only concerned with the privacy and autonomy of the person arrested; they must also be alert to the safety of all members of the household, including both known and potential victims.

[92] Historically, victims of domestic violence did not receive the help they needed. Domestic conflicts were considered "private" matters that did not warrant state intervention. More recently, "the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence" (*Godoy*, at para. 21). And yet, despite these advances, domestic violence persists. It remains one of the most prevalent crimes in Canada, accounting for more than a quarter of all violent crimes. In 2019, there were about 400,000 victims of violent crime reported to the police. Of these, 26 percent — over 100,000 people — were victimized by a family member (Statistics Canada, *Family violence in Canada: A statistical profile, 2019* (March 2021), at p. 4).

[93] Moreover, cases involving domestic violence are often emotionally charged and volatile (*Jensen v. Stemmer*, 2007 MBCA 42, 214 Man. R. (2d) 64, at para. 98; L. Ruff, "Does Training Matter? Exploring Police Officer Response to Domestic Dispute Calls Before and After Training on Intimate Partner Violence" (2012), 85 *Police J*. 285). Domestic dispute calls can be dangerous and even life-threatening for responding officers and persons at the scene (*R. v. Dodd* (1999), 1999 CanLII 18930 (NL CA), 180 Nfld. & P.E.I.R. 145 (N.L.C.A.), at para. 38). Given the prevalence of domestic violence and its attendant risks, responding police officers must have the ability to assess and control the situation. In this case, that included confirming whether other individuals or hazards were in the surrounding area of the arrest.

[94] The police often respond to domestic violence calls with limited information. For example, they may not know if other family members, including children, are involved. This is further exacerbated when victims at the scene of the arrest are uncooperative, a common phenomenon in the domestic violence context. For example, in *R. v. Lowes*, 2016 ONCA 519, the police responded to a 9-1-1 call in which a neighbour reported hearing a man threaten to kill a woman. The woman insisted to the police that no one else was in the apartment. The Court of Appeal found that the police would have been "derelict in their duty" had they accepted the woman's response at face value (para. 12 (CanLII)).

[95] A similar situation played out here. Despite fresh and visible injuries, the victim claimed that she and Mr. Stairs were just play fighting. This was not credible, given the nature of her injuries and since a civilian had witnessed an assault so violent that he reported his observations to 9-1-1. Moreover, Officer Brown testified that based on his conversation with the victim, he believed that she "didn't want to co-operate" (A.R., vol. II, at p. 49). Importantly, the police could not depend on her for reliable information about the presence of other people, other hazards, or the cause of her injuries, and there was no one else they could turn to for such information. It was thus objectively reasonable for the police to engage in a cursory search of the surrounding area of the arrest, including the basement living room.

…

B. Nature and Extent of the Search

[98] The search was conducted reasonably. It took place right after the arrest and the police merely conducted a visual scan of the living room area to ensure that no one else was present and that there were no weapons or hazards.

[99] The spatial scope of the search was appropriate. The trial judge's finding of fact that the living room was part of the surrounding area of the arrest reveals no error. The police appropriately limited the scope of their search. Had they searched the upper floors of the home or other rooms, the search would have been unreasonable. But they did not do so. They only cleared the basement living room area immediately adjacent to where Mr. Stairs had been arrested — the very area from which he and the victim had emerged just moments earlier.

[100] Moreover, the police searched what appeared to be a common living room space. There was nothing about that space to suggest that a higher than normal expectation of privacy in the context of a home was warranted, such as one might reasonably expect in a bedroom. While it was revealed at trial that Mr. Stairs used the basement living room area as his main living space, at the time of the search there was no indication that it was being used as a bedroom. Nor was the basement a separate apartment unit from the rest of the house.

[101] Finally, the police engaged in the most cursory of searches. They did a brief visual scan to see if anyone else or obvious weapons or hazards were in the area. They did not move any items or open doors or cupboards, which would not have been permissible in this case. Given their objective, the search was the least invasive possible.

…

The reasons of Karakatsanis, Brown and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

…

[107] Like my colleagues, I conclude that the common law sets too low a bar for searches incident to arrest inside a home. Privacy demands more. When officers seek to search a home for safety purposes — as they did here — the appropriate standard is reasonable suspicion of an imminent threat to police or public safety.

…

III. Analysis

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A. The Power to Search Incident to Arrest

…

(2) Common Law Power to Search Incident to Arrest

…

[117] Notwithstanding the power's limitations, the Court has remained cautious to prevent its overreach. The search incident to arrest power is an "extraordinary" one, not only because it permits warrantless searches, but because it may do so "in circumstances in which the grounds to obtain a warrant do not exist" (*Fearon*, at para. 16). In some cases, the Court has modified or tailored the common law framework to account for particularly compelling individual interests, restricting seizures of hair, buccal swabs, and teeth impressions (*R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607); strip searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679); cell phone searches (*Fearon*); and penile swabs (*Saeed*). The issue in this case is whether the strong privacy interests in a home also call for modifications to the exercise of this common law power.

(3) Searches in a Home

[118] To answer that question, s. 8 requires that the privacy interests in a home and law enforcement interests be balanced.

(a) *Privacy Interests*

[119] For centuries, the law has recognized that every person's home is their sanctuary (*Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, at p. 743). Long a central restraint on state intrusions, the legal status of privacy in one's home "significantly increased in importance with the advent of the *Charter*" (*Feeney*, at para. 43). Today, there is no doubt that individuals have strong privacy interests in a home (*Silveira*, at para. 140; *Feeney*, at para. 43; *R. v. Godoy*, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311, at para. 19; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22; *MacDonald*, at para. 26; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 46; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 24). And this is true not only of arrested persons, but of other occupants, including in areas or items under shared control (*Reeves*, at para. 37). However brief or circumscribed, police searches in homes threaten those compelling and comprehensive privacy interests and the interests that underlie them — dignity, integrity and autonomy (*R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, at p. 293) — all of which are vital to human flourishing.

[120] My colleagues recognize that the privacy interests in a home are high (para. 49). But unlike them, I find it unhelpful to compare privacy in a home to a strip search or obtaining bodily samples (para. 51). Privacy interests come in different forms — whether personal, territorial, or informational (*Tessling*, at para. 20) — which are not easily equated. The focus in tailoring the common law framework is to reconcile the specific privacy interests at issue with the specific law enforcement interests that counterbalance them. Whether a search of a home could be more or less invasive than body, cellphone or car searches is, in this respect, tangential; the key questions are when and how the undoubtedly strong privacy interests in a home ought to yield to varying policing objectives.

[121] Put simply, a home is the setting of individuals' innermost lives: at once a shield from the outside world and a biographical record, its sanctity is indispensable. Without it, personal privacy, dignity, integrity and autonomy would suffer. The high weight placed on a person's security in their home, then, stands as a "bulwark" of protection, which "affords the individual a measure of privacy and tranquillity against the overwhelming power of the state" (*Silveira*, at para. 41, per La Forest J., dissenting, but not on this point).

(b) *Law Enforcement Objectives*

[122] While privacy interests in a home are significant, so too are the interests in protecting police and public safety. Police must be able to address the hazards that may arise in unfamiliar, and potentially hostile, environments, not least when investigating volatile offences like domestic violence. The cost of inadequate measures to protect safety "can be very high indeed", and it would be unreasonable to "ask the police to place themselves in potentially dangerous situations" without equipping them to take reasonable defensive steps (*R. v. Golub* (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743 (C.A.), at p. 757). Depending on the circumstances of the arrest, police may also need to assist others on the scene, including children.

[123] To be sure, the law enforcement interests engaged by home searches in the domestic violence context may cut both ways. Police searches may revictimize victims or uncover evidence of unrelated offences, which may discourage individuals from reporting. That is a particular concern in domestic violence, one of whose "hallmarks" is its private nature (*Godoy*, at para. 21). Again, this case is illustrative: shortly after arresting Mr. Stairs, police arrested the victim herself for drug possession. Victims of domestic violence are often reluctant to seek police assistance and reluctant to cooperate when police arrive. Overly broad search powers can only compound that reluctance.

…

(4) The Reasonable Suspicion Standard

…

[128] While reasonable suspicion is a relatively low threshold imposed by the courts to meet s. 8 of the *Charter*, it still requires the officers to articulate some basis to suspect safety may be at risk. As in other searches incident to arrest, they must have both subjective *and* objective grounds for the search (*Caslake*, at para. 21). And those grounds must correspond — officers "cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched" (*Caslake*, at para. 27). The court's task is to examine the evidence of the *actual* reasons for the search — and not whether reasonable suspicion could have justified the search.

[129] In *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, the Court outlined several principles to guide the reasonable suspicion standard's application. As my colleagues note, reasonable suspicion:

- is "based on objectively discernible facts, which can then be subjected to independent judicial scrutiny [that] is exacting, and must account for the totality of the circumstances" (*Chehil*, at para. 26);
- is a higher standard than "mere suspicion" but lower than reasonable and probable grounds — it engages "reasonable possibility, rather than probability" (paras. 26-27, citing *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 75); and
- is "fact-based, flexible, and grounded in common sense and practical, everyday experience" (para. 29).

[130] My colleagues also explain that reasonable suspicion does not permit searches "based on generalized concerns arising from the arrest" (para. 67). Indeed, in *Chehil* the Court was clear that an

"exacting" review of the basis for a search must be tied to the specific facts in question. Citing the need for "a sufficiently particularized constellation of factors", the Court explained that a "constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a 'generalized' suspicion" (para. 30). And while recognizing the importance of officer training and experience in the assessment, it cautioned against allowing those factors to overwhelm the inquiry:

> An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field . . . . A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. [Emphasis added; citation omitted; para. 47.]

…

(5) The Scope of Safety Searches Inside a Home

…

[135] I would not adopt, as my colleagues do, the American distinction between "areas inside and outside the arrested person's physical control" (paras. 62-64). In our jurisprudence a search incident to arrest has always been framed as the authority to search the person arrested and their immediate surroundings. In defining where the modified framework applies inside a home, I would distinguish between the arrestee's person and their immediate surroundings. This is because a search of an arrestee's person (the ubiquitous "frisk" search) does not implicate their privacy interests *in the home* — they have the same personal privacy interests at home as in public. Areas beyond their person, however, engage broader territorial and informational interests which, in a home, are significant. The distinction based on a zone inside the arrested person's control was not argued, its adoption is unnecessary, and it complicates the search incident to arrest framework.

[136] In rare situations where safety concerns arise independently from the arrest, other doctrines may also apply. The common law police duty to protect life and safety, for instance, may justify police in carrying out a warrantless safety search in circumstances of "objectively verifiable necessity" (*MacDonald*, at paras. 40-41). But those searches, too, cannot be "unbridled" (para. 41). They too must be conducted in a manner that reflects their purpose, namely to do what is "reasonably *necessary*" to allay the apprehended threat (para. 47 (emphasis in original)).

[137] Clearly, not all safety concerns are alike. As with determining whether the reasonable suspicion standard has been satisfied, the scope of a search will depend on a particularized assessment of the facts before the police. But given that searches incident to arrest inside a home require an imminent safety risk, their scope will, in my view, often be limited. This is consistent with the power's exceptional status under s. 8. Though "an invaluable tool in the hands of the police", searches incident to arrest "inevitably intrude on an individual's privacy interests" (*Saeed*, at para. 1). They should intrude no more than necessary. In a home more than anywhere else, it ought to remain a "focussed power" (*Fearon*, at para. 16).

B. Application

[138] Applied to this case, I conclude that the search and the seizures fell outside the scope of the common law police powers and were therefore unconstitutional.

…

[144] As I have explained, courts assessing the reasonableness of a police search must determine whether the officer's own grounds for the search were reasonable. Only those subjective grounds may be considered; courts "cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched" (*Caslake*, at para. 27).

[145] The subjective basis for the officers' search must be found in the evidence of the officer conducting the search. Officer Vandervelde testified as follows when asked what happened after Mr. Stairs' arrest:

> . . . so once he was in handcuffs and I felt it was safe, I proceeded through the basement, make sure there's no other obvious threats, any other people in that basement.
>
> Never really know exactly what you're looking for when you're entering a house in a situation like this, so whether there's firearms sitting out, like I said, other people that could be in the basement. [Emphasis added.]
>
> (A.R., vol. II, at pp. 212-13)

[146] He later expanded on this answer:

> Q. . . . So in terms of clearing the basement, as opposed to getting a search warrant what is the importance or significance of having to go through that clearing process?
>
> A. Mostly just to ensure my safety and other officers' safety that are on the scene.
>
> Q. What sort of risks are presented if you don't clear an area?
>
> A. Other persons could be hiding in the basement; potential unsafely stored firearms or weapons, *et cetera*, you never really know what kind of hazards could be down there. [Underlining added.]
>
> (A.R., vol. II, at p. 229)

[147] As I have explained, to satisfy the reasonable suspicion standard, the evidence must be "sufficiently particularized"; the search cannot rest on generalities, hunches, intuition or educated guesses (*Chehil*, at paras. 30 and 47). But here the officer, at best, expressed a generalized concern about weapons or people that might be found "in a situation like this". He admitted he "felt it was safe" and you "[n]ever really know exactly what you're looking for". His evidence gave no basis to suggest he suspected that other assailants, victims, or weapons were present. As a rationale, "you never really know" could apply any time the police make an arrest in a home. It is not a constitutionally acceptable reason to search in a private home; subjectively, the reasonable suspicion standard was not met.

[148] Nor was this subjective justification objectively reasonable. I note the following:

- Although the search of Mr. Stairs' licence plate generated cautions for violence and family violence, there was no mention of weapons in the police dispatch, and nothing to suggest Mr. Stairs possessed any (pre-trial application reasons, at paras. 36, 76, 101 and 157).

- Officers Brown and Vandervelde visually scanned the basement when they entered. Although they could not see the entire area, that scan satisfied them that they could turn their backs and focus on drawing Mr. Stairs out from the laundry room (paras. 58, 128 and 281).

- Officer Brown found no weapons on Mr. Stairs (at para. 60) and had "no observations from the scene that anyone was in danger" (para. 50).

- Officer Vandervelde only conducted the search "once [Mr. Stairs] was in handcuffs and [he] felt safe", at a time when the victim was upstairs and in the company of Officer Martin (para. 89).

- Although the officers knew that Mr. Stairs' father lived at the home, they never saw any signs of people aside from Mr. Stairs and the victim, and never asked either of them whether anyone else was present (paras. 55, 71, 81-84, 119 and 166-67).

[149] There were, in sum, no particularized facts to justify a safety search, only generalized uncertainty about the presence of weapons or other people. But with Mr. Stairs in handcuffs, the victim upstairs with Officer Martin, and no sign of weapons or other people, there was, quite simply, no apparent safety threat. That is not objectively reasonable suspicion.

[*The appeal was dismissed. The evidence was included and the conviction was upheld.*]

Insert at p. 259, after the case extract

On *S(RD)* see Constance Backhouse *Reckoning with Racism: Police, Judges and the RDS Case* (Vancouver: University of British Columbia Press, 2022) which notes that RDS was the only person who testified for the defence and recounted: "it was my word against that of a white police officer. I thought it was going to be a slam dunk for the white police officer." Ibid at p. 15. She also records that Justice Sparks issued supplementary reasons (not considered on the appeals on the basis that Justice Sparks was without jurisdiction after acquitting RDS) where she explained that Constable Steinburg had been cross examined by RDS's lawyer about whether he characterization of RDS as "non-white" was "a pejorative categorization of African-Canadians. Generally, the court observed that this witness appeared nervous when he commenced giving evidence. It was not unnoticed by the Court that this may have been due to the racial configuration in the court which consisted of the accused, the defence counsel, the court reporter and the judge all being of African-Canadian ancestry." Ibid at 79.

Insert at p. 275, before the new section

Bill C-40 was introduced in Parliament in February 2023 and would create a Miscarriage of Justice Review Commission of between five and nine persons. It follows some but not all of the recommendations of Justice Harry LaForme and Juanita Westmoreland-Traore in A Miscarriages of Justice Commission (2021) at https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html For analysis of the Bill see Kent Roach "The Proposed Miscarriage of Justice Commission" (2023) 71 CLQ 1.

Insert at p. 286, immediately above heading D. Prosecutorial Independence

Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act received assent on November 17, 2022. It repeals certain mandatory minimum penalties, allows for a greater use of conditional sentences, and establishes diversion measures for simple drug possession offences. It aims to address the disproportionate impacts on Indigenous and Black offenders, as well as those struggling with substance use and addiction.[6] These amendments establish strong statutory guidance favouring diversion measures and seek to guide the exercise of police and prosecutorial discretion for simple drug possession offences.

[6] An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, SC 2022, c 15 https://canlii.ca/t/55p5g

Insert at p. 291, top of page

In *R v Bouvette* 2023 BCCA 152, the British Columbia Court of Appeal reversed a conviction based on Ms. Bouvette's guilty plea to manslaughter of a 19 month old child in her care. Defence counsel entered the guilty plea and there was no plea comprehension inquiry. The Court of Appeal admitted evidence not disclosed to Ms. Bouvette that raised concerns about the expert forensic pathology evidence in the case that suggested that the deceased child had been physically abused. The Court of Appeal observed:

…

[101] In her fresh evidence affidavit, the appellant deposes she would not have pleaded guilty to the offence of criminal negligence causing death had she been aware of the undisclosed material and its potential impact on the strength of Dr. Matshes' opinion evidence:

> 17. In March 2013, [defence counsel] told me about a plea offer from Crown, which involved me pleading guilty to criminal negligence causing death and the charge of murder against me being stayed.
>
> 18. I did not believe I was responsible for Iyanna's death. However, [defence counsel] told me I should take the plea offer. He said the likely outcome at trial would be a conviction for second degree murder because of Dr. Matshes' expert opinion. I understood Dr. Matshes' would be giving evidence that I had caused Iyanna's death.
>
> 19. I felt like I had no choice but to plead guilty. I wanted to get out of jail and I was facing 25 years.
>
> …
>
> 43. If I had been advised of the non-disclosed materials… and how they would have negatively impacted on the strength of Dr. Matshes' expert opinion, I would not have accepted the plea bargain.
>
> 44. If I had been advised that Dr. Matshes' opinions [were] the subject of considerable expert criticism, including his opinion in Iyanna's case, I would not have accepted the plea bargain.

…

[110] In the circumstances, the appellant faced a terrible dilemma, similar to the one that faced the appellant in *R. v. Kumar*, 2011 ONCA 120 at para. 34. She could proceed to trial and risk being convicted of second degree murder, or plead guilty to a reduced charge. Against this background, the Crown held out a powerful inducement: a guilty plea to a lesser charge and the certainty of a much-reduced sentence. Indeed, the Crown sought the imposition of a two-year custodial term on the appellant's plea of guilty to criminal negligence causing death. It is not difficult to imagine why, unarmed with critical information that could assist her, this marginalized, overwhelmed and intellectually challenged appellant would enter a guilty plea to a lesser offence.

[111] In our view, this evidence, assessed against the significance of the undisclosed information, establishes a reasonable possibility that the appellant would not have pleaded guilty to criminal negligence causing death had the Crown and police complied with their disclosure obligations.

[112] In our view, the conviction entered following the appellant's guilty plea is the product of a miscarriage of justice. It must be set aside.

[*The Court of Appeal held that a stay of proceedings rather than acquittal was appropriate because while Ms Bouvette had served her sentence and lost custody of her children it was still possible that she could still be convicted of criminal negligence even if she had only briefly left the child unattended in a tub where she drowned.*]

Before Bouvette's case, the Canadian Registry of Wrongful Conviction recorded 15 false guilty pleas, most involving the flawed forensic pathology evidence of Charles Smith. See https://www.wrongfulconvictions.ca/issues/false-guilty-pleas; Kent Roach "Canada's False Guilty Pleas" (2023) 4(1) Wrongful Conviction L.Rev. 16; Kent Roach *Wrongfully Convicted: Guilty Pleas, Imagined Crime and What Canada Must Do To Safeguard Justice* (Toronto: Simon and Schuster, 2023).

Insert at 310, immediately after discussion of 2019 amendments

R v Zora
2020 SCC 14

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

[*The appellant had been convicted of breaching his bail conditions by twice failing to appear at the door of his residence when police officers came to check if he was home. In determining that the offence under s 145(3) of the Criminal Code was a subjective mens rea offence – contrary to the decisions of the trial and appellate courts – the Court expanded upon the Antic principles and the legislative framework governing bail.*]

The judgment of the Court was delivered by

MARTIN J. –

…

[6] All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions. Requiring subjective *mens rea* to affix criminal liability under s. 145(3) reflects the principles of restraint and review and mirrors the individualized approach mandated for the imposition of bail conditions.

…

[24] The jurisprudence mandates that judicial officials respect the ladder principle, meaning that they must consider release with fewer and less onerous conditions before release on more onerous ones….Without a restrained approach to bail conditions, a less onerous form of bail, such as an undertaking with conditions, can become just as or more onerous than other steps up the bail ladder or, in some cases, even more restrictive than conditional sentence and probation orders issued after conviction (*R. v. McCormack*, 2014 ONSC 7123, at para. 23 (CanLII); *R. v. Burdon*, 2010 ABCA 171, 487 A.R. 220, at para. 8).

[25] Only conditions that are specifically tailored to the individual circumstances of the accused can meet these criteria. Bail conditions are thus intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person. They are to be imposed with restraint not only because they limit the liberty of someone who is presumed innocent of the underlying offence, but because the effect of s. 145(3) is often to criminalize behaviour that would otherwise be lawful. In effect, each imposed bail condition creates a new source of potential criminal liability personal to that individual accused.

[26] Many intervenors drew attention to the widespread problems which continue to exist, even after this Court's decision in *Antic*, with the ongoing imposition of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail. Any such practice offends the principle of restraint which has always been at the core of the law governing the setting of bail conditions. Restraint has a constitutional dimension, a legislative footing, and is not only recognized in case law, but was also recently expressly reinforced by the amendments that came into force on December 18, 2019. Section 493.1 now explicitly sets out a "principle of restraint" for any interim release decisions, requiring a peace officer or judicial official to "give primary consideration" to imposing release on the "least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with." Section 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are Indigenous or who belong to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release.

[27] Parliament also acted to address concerns regarding the over-criminalization of bail breaches, which is in part explained by the initial imposition of numerous and onerous bail conditions. Besides changes to bail revocation under s. 524 , Parliament has enacted a new procedure for managing failure to comply charges under s. 145(3), called a "judicial referral hearing" (s. 523.1). If an accused has failed to comply with their conditions of release, and has not caused harm to a victim, property damage, or economic loss, the Crown can opt to direct the accused to a judicial referral hearing. If satisfied that the accused failed to comply with their court order or failed to attend court, a judicial official must review the accused's conditions of bail while taking special note of the accused's particular circumstances. The judicial official can then decide to take no action, release the accused on new conditions, or detain the accused. If the accused was charged with a failure to comply offence, the judicial official must dismiss the charge after making their decision (s. 523.1; *R. v. Rowan*, 2018 ABPC 208, at paras. 39-40 (CanLII)).

…

(3) Setting Bail Conditions and Their Breach Under Section 145(3)

[73] There is a strong, indeed inexorable, connection between the setting of bail conditions and the operation of s. 145(3), including its *mens rea* element. In this section, I address the argument that because bail conditions are tailored to the individual, Parliament intended an objective *mens rea* for breaches under s. 145(3). In my view, this argument lacks a sound conceptual basis and fails to take into account the manner in which bail conditions continue to be imposed despite the principles articulated in the *Charter* , the *Code* , and by this Court in *Antic*. I conclude that the opposite is true: the requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused are considered both when bail is set and if bail is breached.

[74] The respondent and the intervener Attorney General of British Columbia ("AGBC") submit that the *mens rea* for s. 145(3) can be satisfied on proof of an objective fault standard. They argue that bail conditions, set at the beginning of the bail process, are carefully tailored to the accused and would lead to only minimal criminal liability for the accused. The AGBC links the various phases of the bail system, but claims that the "[l]egitimate concern about marginalized people whose breach of bail pose an attenuated risk is effectively tackled at the front-end of the process" (I.F. (AGBC), at para. 3). In other words, concerns about the treatment of marginalized individuals are factored into the conditions themselves, which obviates the need for a subjective fault standard if those conditions are breached.

[75] I do not accept this line of reasoning. This proposition is premised on a false dichotomy which assumes that a focus on the individual accused may occur only at one stage or the other. Conceptually, there is no reason why the rights and interests of the accused should be bargained away in an either/or formulation. Nothing prevents an individualized focus both at the time when the conditions are imposed and at the time of breach. The ethos of *Antic* favours a consistent and complementary approach under which the relevant rights in the *Charter* and the salient protections in the *Code* animate all aspects of the bail system: from imposition to breach. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the impositions of any bail conditions.

[76] I would also reject the position put forward by the AGBC because of the prevalence of bail conditions that fail to reflect the requirements for bail under the *Charter*, the *Code*, and this Court's principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions. Many intervenors described how, despite the fact that the default form of release should be an undertaking without conditions under s. 515(1), studies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice (citations omitted)….

[77] Several factors contribute to the imposition of numerous and onerous bail conditions. Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions (citations omitted). In [*R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221], Di Luca J. emphasized that this culture continues despite the directions of *Antic.* He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail" (para. 29).

[78] The expeditious nature of bail hearings also generates a culture of consent, which aggravates the lack of restraint in imposing excessive bail conditions. This is the practical reality of bail courts, which must work efficiently to minimize the time accused persons spend unnecessarily in pre-trial detention. As this Court has previously recognized, the timing and speed of bail hearings impacts accused persons by making it difficult to find counsel, resulting in many accused who are self-represented or reliant on duty counsel who are often given little time to prepare (*St-Cloud*, at para. 109). This process encourages accused persons to agree to onerous terms of release rather than run the risk of detention both before and after a contested bail hearing (citations omitted). Where joint submissions are made, some observers have gone so far as to suggest that the Crown is rarely asked to justify the proposed conditions of release, which is "arguably a key contributing factor to the higher number of conditions imposed in consent release cases than would be expected based on the law" (C. Yule and R. Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019), 61 *Can. J. Crimin. & Crim. Just*. 45, at pp. 57-60).

[79] A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-5; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 *C.L.Q.* 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (citations omitted). The oft-cited CCLA Report provides the following trenchant summary:

> Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime. [p. 1]

[80] …Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is function perfectly, when it clearly is not.

…

A. *General Principles Governing Bail Conditions*

…

[88] Bail conditions are to be tailored to the individual risks posed by the accused. There should not be a list of conditions inserted by rote. The only bail condition that should be routinely added is the condition to attend court (*Birtchnell*, at para. 6), as well as those conditions that must be considered for certain offences under s. 515(4.1) to (4.3). There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behavior modification is viewed as desirable. Bail conditions may be easy to list, but hard to live.

[89] In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

- <u>If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions</u>? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?

- <u>Is this condition necessary?</u> If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?

- <u>Is this condition reasonable?</u> Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?

- <u>Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)?</u> Is it narrowly focussed on addressing that specific risk posed by the accused's release?

- <u>What is the cumulative effect of all the conditions?</u> Taken together, are they the fewest and least onerous conditions required in the circumstances?

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail

court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

[90] When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail?

B. *Specific Conditions*

[91] I now address some specific non-enumerated conditions commonly included in release orders. Many of these types of conditions were in Mr. Zora's release order. As stated above, the criminalization of non-compliance with conditions under s. 145(3) means the principles of restraint and review call for increased scrutiny to determine if a particular type of condition is necessary, reasonable, least onerous, and sufficiently linked to a risk listed in s. 515(10). The discussion of specific conditions below demonstrates how these common types of conditions must be scrutinized.

[92] First, judicial officials should be wary of conditions that may be directed to symptoms of mental illness. This includes alcohol and drug abstinence conditions for an accused with an alcohol or drug addiction. If an accused cannot possibly abide by such a condition, then it will not be reasonable (*Penunsi*, at para. 80; *Omeasoo*, at para. 37-38). In addition, rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition — a condition will only be appropriate if it is necessary to address the accused's specific risks. Subjecting individuals who are presumed innocent to abstention conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstention may present substantial risk to the health and well-being of that person" and even "give rise to potentially lethal withdrawal effects" (*R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, at paras. 14-15; see also John Howard Society of Ontario, at pp. 12-13). If an abstinence condition is necessary, the condition must be fine-tuned to target the actual risk to public safety, for example, by prohibiting the accused from drinking alcohol outside of their home if their alleged offences occurred when they were drunk outside of their house (*Omeasoo*, at para. 42). Those seeking and imposing bail conditions should also be aware that an accused's substance use disorder, or any other mental illness, may yet be undiagnosed. And, where necessary, liberal use should be made of the bail review and variation provisions under ss. 520, 521 and 523 to accommodate these circumstances. Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve.

[93] Second, other behavioural conditions that are intended to rehabilitate or help an accused person will not be appropriate unless the conditions are necessary to address the risks posed by the accused. As described by Cheryl Webster in her report for the Department of Justice, "conditions such as 'attend school' or 'attend counselling/treatment' may serve broader social welfare objectives but are [usually] unrelated to the actual offence alleged to have been committed" (Webster Report, at p. 7). There may be

exceptions, such as in *S.K.*, where the judge found that an "attend school" condition was sufficiently linked to the accused's risks. However, even if a condition seems sufficiently linked to an accused's risks, the question is also whether the condition is proportional: imposing such conditions means that the accused could be convicted of a criminal offence for skipping a day of school.

[94] Third, the condition to "keep the peace and be of good behaviour" is a required condition in probation orders, conditional sentence orders, and peace bonds, but is not a required condition for bail (*S.K.*, at para. 39). It should be rigorously reviewed when proposed as a condition of bail. This generic condition is usually understood as prohibiting the accused from breaching the peace or violating any federal, provincial, or municipal statute (citations omitted). Because a breach of a bail condition is a criminal offence, this condition "adds a new layer of sanction, not just to criminal behavior, but to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality" and "is not in harmony with the presumption of innocence" that usually applies when an accused is on bail (citations omitted). Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary, least onerous, and sufficiently linked to an accused's flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice (see *S.K.*, at para. 39).

[95] Fourth, broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth. In *J.A.D.*, the Court of Queen's Bench for Saskatchewan found that such a condition was void for vagueness and an improper delegation of the judicial function (para. 11). These types of conditions prevent the accused from understanding what they must do to avoid violating their condition, as the rules of the house can change based on the whims of the person who sets them (*K. (R.)*, at paras. 19-22). Imposing a condition that delegates the creation of bail rules to a surety or anyone else bypasses the judicial official's obligation to uphold the principles of restraint and review and assess whether the rules of the house truly address any of the risks posed by the accused.

[96] Fifth, certain conditions may cause perverse consequences or unintended negative impacts on the safety of the accused or the public. These unintended effects underscore the need for careful and rigorous review of each bail condition. For example, a condition that prevents an accused person from using a cellphone may prevent them from calling for help in the event of an emergency or inhibit their ability to work or care for dependents (*Prychitko*, at paras. 19-25; Trotter, at pp. 6-44 to 6-45). Other conditions may hinder the administration of justice by punishing accused persons who are otherwise the victims of crime. In *Omeasoo*, police responded to a complaint of domestic assault where Ms. Omeasoo was the victim. However, she was arrested and charged for failure to comply because she had consumed alcohol contrary to her bail condition (para. 6). She was therefore charged for the offence of being intoxicated while being the victim of an assault. While one hopes that prosecutorial discretion would help prevent these types of unintended consequences, such conditions may become a disincentive to reporting serious crime and significantly increase the vulnerability of certain people.

[97] Further examples of conditions with perverse consequences include "red zone" conditions which prevent an accused from entering a certain geographical area and "no drug paraphernalia" conditions. These conditions may have especially significant impacts on marginalized accused persons. "Red zone" conditions can isolate people from essential services and their support systems (Sylvestre, Blomley and Bellot). Paraphernalia prohibitions can encourage the sharing of needles if accused persons are not able to carry their own clean needles (Pivot Report, at pp. 89-95). In fact, a guideline for bail conditions for accused persons with substance use disorders released in 2019 by the

Public Prosecution Service of Canada has acknowledged that these types of conditions "should generally not be imposed" (*Public Prosecution Service of Canada Deskbook*, Part. III, c. 19, "Bail Conditions to Address Opioid Overdoses" (updated April 1, 2019) (online)). Overall, the impacts of these conditions emphasize that any proposed bail condition needs to be carefully considered and limited to addressing flight risk, public safety, or confidence in the administration of justice, otherwise the condition may have negative unintended consequences on the accused and the public.

[98] Finally, I note that some bail conditions may impact additional *Charter* rights of the accused, beyond their right to be presumed innocent, liberty rights (s. 7), and right to reasonable bail (s. 11 (*e*)). Principles of restraint and review require that judicial officials rigorously examine these conditions and determine whether they do infringe the *Charter*. For example, some accused are subject to bail conditions that require them to submit to searches of their person, vehicle, phone, or residence on demand without a warrant (citations omitted). As noted by this Court in *Shoker*, in the context of probation conditions, a judge does not have jurisdiction to impose a condition that subjects an accused to a lower standard for a search than would otherwise be required, unless Parliament creates a *Charter*-compliant statutory scheme for the search or the accused consents to the search (citations omitted). These types of conditions are effectively enforcement mechanisms that "facilitate the gathering of evidence", "do not simply monitor the [accused's] behaviour", and are not linked to an accused's risk under s. 515(10) (*Shoker*, at para. 22). As such conditions are not supported by the enumerated conditions for bail in s. 515, nor is there a scheme set by Parliament for the searches, they are constitutionally suspect.

[99] Other conditions can also affect an accused's freedom of expression or freedom of association (see, e.g., *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389, at paras. 41-47 (QL); see *Manseau*, at p. 10; *Clarke*). Such conditions that restrict additional *Charter* rights must be rigorously assessed to determine whether such a restriction is justified and proportional to the risk posed by the accused. It must always be remembered that by making such a condition on bail, the judicial official is criminalizing the accused's exercise of their *Charter* rights at a time when they are presumed innocent prior to trial.

C. *Responsibilities*

[100] All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice (Trotter, at p. 1-59; *Antic*, at para. 67(j); see also s. 493.1 of the *Code* as of December 18, 2019). The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent. The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

[101] All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail (see Berger and Stribopolous, at pp. 323-24). This is because the "automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence" (*R. v. A.D.M.*, 2017 NSPC 77, at para. 29 (CanLII), citing *Antic*). The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Other than in reverse onus situations, the Crown should understand, and if asked, be able to explain why proposed bail conditions are necessary, reasonable, least onerous, and sufficiently linked to the risks in

s. 515(10). This prosecutorial responsibility of restraint when considering bail conditions is reflected in both Crown counsel policy documents put before us by interveners (Ontario, Ministry of the Attorney General, *Ontario Prosecution Directive*, "Judicial Interim Release (Bail)" (November 2017) (online); and British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, "Bail — Adult" (April 2019) (online)). Defence counsel also should be alive to bail conditions that are not minimal, necessary, reasonable, least onerous, and sufficiently linked to an accused's risk for both contested and consent release, especially when a client may simply be prepared to agree to excessive and overbroad conditions to gain release. That said, it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested hearing, which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered.

[102] Ultimately, the obligation to ensure that accused persons are released on appropriate bail orders lies with the judicial official. As with the setting of cash deposits in *Antic*, if a judicial official does not understand how a condition is appropriate, "a justice or a judge setting bail is under a positive obligation" to make inquiries into whether the suspect bail condition is necessary, reasonable, least onerous, and sufficiently linked to the accused's risks (paras. 56 and 67(i)). Before transforming bail conditions into personal sources of potential criminal liability, judicial officials are asked to use their discretion with care and review the proposed conditions to make sure they are focussed, narrow, and tightly-framed to address the accused's risks.

[103] Judicial officials have adequate tools to ensure that bail orders are generally appropriate while conserving judicial resources. They can and should question conditions that seem unusual or excessive. They should also be alert for any pattern that might suggest that conditions are being imposed routinely or unduly.

[104] These obligations carry over to consent releases, where special considerations apply. There are many compelling reasons a person in custody would "accept" suggested restrictions to secure release, even if such restrictions were overbroad. In addition to the universal human impulse towards freedom, individuals are concerned with the effects continued detention would have on their families, their income, their employment, their ability to keep their home, and their ability to access medication and necessary services, as described above. When presented with a promise of release on what may appear to be "take it or leave it conditions" many accused simply acquiesce to avoid continued detention and/or a contested bail hearing. This is why alcohol-addicted persons would agree to a bail term which prohibits them from drinking alcohol, knowing full well that they have previously been unable to overcome their addiction. These factors, and others, exert pressure and have contributed to a culture of consent in which accused persons, who often represent themselves at bail hearings, frequently agree to be bound by conditions which are unnecessary, unreasonable, and even potentially unconstitutional.

[105] The ladder principle and the rigorous assessment of bail conditions will be more strictly applicable when bail is contested, but joint proposals must still be premised on the criteria for bail conditions established by the guarantees in the *Charter*, the provisions of the *Code*, and this Court's jurisprudence (*Antic*, at para. 44). Judicial officials "should not routinely second-guess joint proposals" given that consent release remains an efficient method of release in busy bail courts (*Antic*, at para. 68). However, everyone should also be aware that judicial officials have the discretion to reject overbroad proposals, and judicial officials must keep top of mind the identified concerns with consent releases. In *R. v. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757, Hill J. noted that, even post-*Antic*, counsel sometimes do not appear aware of this judicial discretion:

> Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a "consent" bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong. [para. 24 (QL)]

[106] I agree. Although bail courts are busy places, where consent releases can encourage efficiency, little efficiency is achieved if an accused person is released on conditions by which they cannot realistically abide, which will inevitably lead to greater use of court time and resources through applications for bail review, bail revocation, or breach charges. Judicial officials must therefore act with caution, with their eyes wide open to the consequences of imposing bail conditions, when reviewing and approving consent release orders.

[*The Court then explained the proper interpretation of the mens rea for s 145(3). The appeal was granted, and a new trial was ordered on the basis that the trial judge improperly applied an objective mens rea rather than a subjective mens rea standard.*]

Insert at p. 310, after* Zora *extract, above

Bill C-48 was introduced in Parliament in May 2023 in response to provincial demands for tougher bail laws. It has the following preamble reflecting some of the values at stake:

> **Preamble**
>
> Whereas Canada's criminal justice system contributes to a safe, peaceful and prosperous society and the bail system plays a critical role in achieving this objective;
>
> Whereas the criminal justice system, including the bail system, is a shared responsibility between the federal, provincial and territorial governments;
>
> Whereas repeated acts of violence, serious offences committed with firearms or other weapons and random acts of violence all have a harmful impact on victims and communities and undermine public safety and confidence in the criminal justice system;
>
> Whereas a proper functioning bail system is necessary to maintain confidence in the criminal justice system, including in the administration of justice;
>
> Whereas a proper functioning bail system respects and upholds the rights guaranteed by the *Canadian Charter of Rights and Freedoms*, including the presumption of innocence, the right to liberty and the right not to be denied reasonable bail without just cause;
>
> Whereas detention is justified when it is necessary according to the grounds for detention set out in the *Criminal Code*, including for the protection of public safety and to maintain confidence in the administration of justice;
>
> Whereas bail decisions are informed by other important considerations, such as the need to consider the particular circumstances of accused persons, including those from populations that face disadvantages at the bail stage and are overrepresented in the criminal justice system;
>
> And whereas confidence in the administration of justice is eroded in cases when accused persons are released on bail while their detention is justified, including because of risks to public safety, or when accused persons are unnecessarily detained;
>
> Now, therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Among other reforms such as adding to the number of reverse onuses placed on the accused with respect to bail, Bill C-48 would add the following to the Criminal Code:

Subsection 515(13) of the Act is replaced by the following:

Victim's and community's safety and security

(13) A justice who makes an order under this section shall include in the record of the proceedings a statement that Insertion start the justice considered the safety and security of every victim of the offence Insertion start and the safety and security of the community when making the order.

What effect, if any, do you think the above amendment would make to bail practice?

Insert at p. 419, immediately before "III. Subjective Standards of Fault"

In 2020, the Supreme Court revisited the question of statutory interpretation and the presumption of subjective fault. As you read the following extract, consider whether the Court applies a "fully contextual" approach to statutory interpretation in the manner proposed by Cromwell J. Should the social and practical context of bail – the way in which conditions are imposed and reviewed, and impact marginalized groups – affect the interpretation of the mens rea of the offence? Of other offences?

R v Zora
2020 SCC 14

[*The appellant was charged with three counts of possession for the purposes of trafficking contrary to s 19 of the Controlled Drugs and Substances Act. He was released on his own recognizance with 12 bail conditions. One condition was house arrest, and another was the obligation to present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his house arrest condition. Over the Thanksgiving weekend, the appellant twice failed to present himself at the door when police visited. He did not know he had missed the police visits until two weeks later, when told he was being charged with two counts of breaching his curfew condition and two counts of breaching his condition to answer the door. Each of these four counts was charged under s 145(3) of the Criminal Code. The trial judge acquitted on the first two counts but convicted on the latter two. The summary convictions appeals judge, and four of the five members of the Court of Appeal for British Columbia panel that heard the subsequent appeal agreed that s 145(3) was an objective fault offence. The majority at the Court of Appeal held that objective fault is permissible in part because it permits a defence of lawful excuse (e.g. mistake of fact or some other defence). The Appellant's failure to present at the door demonstrated a marked departure from what a reasonable person would have done in the circumstances. A reasonably prudent person would have foreseen or appreciated the risk of not hearing or knowing the police were attending, or could have done something to prevent the breach. The appellant further appealed to the Supreme Court, which revisited the issue. As you will see, the Court's ruling depends in part on understanding the legislative framework governing bail, and you may find it helpful to review that part of Chapter 4*.]

…

The judgment of the Court was delivered by

MARTIN J. –

…

C. *The Text of Section 145(3) Is Neutral and Does Not Create a Duty-Based Offence*

[36] The text of s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either subjective or objective *mens rea*. When Mr. Zora was charged in 2015, the failure to comply offence read:

> 145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

[37] I start by noting that the inclusion of the statutory defence of a "lawful excuse" in s. 145(3) plays no role in the interpretation of the *mens rea* of the offence. Lawful excuse provides an additional defence that would not otherwise be available to the accused (citations omitted). It should not be confused with *mens rea* (M. Manning and P. Sankoff, *Manning*, *Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 805; Trotter, at p. 12-16). The availability of the defence does not change the burden on the Crown to prove all elements of the offence, including *mens rea*, beyond a reasonable doubt (citations omitted). Therefore, it is not material to the issue of whether the *mens rea* element of the offence is subjective or objective.

[38] In evaluating whether there is an expression of legislative intent that displaces the presumption of subjective fault, courts look both to the words included in the provision as well as the words that were not (*A.D.H.*, at para. 42). It is true that s. 145(3) does not contain express words indicating a subjective intent, like "wilful" or "knowing". However, this absence cannot, on its own, displace the presumption. In fact, it is precisely when the words and context are neutral that the presumption of subjective *mens rea* operates with full effect.

[39] The majority of the Court of Appeal emphasized that the words "undertaking", "recognizance", "[b]ound to comply", and "[f]ails" indicate that the accused has a binding legal obligation to meet an objectively determined standard of conduct (para. 53). They looked to the five categories of objective *mens rea* offences outlined by this Court in *A.D.H.*, at paras. 57-63: dangerous conduct offences; careless conduct offences; predicate offences; criminal negligence offences; and duty-based offences. The majority, at para. 54, found that this language meant that s. 145(3) fell within the last category, namely duty-based offences. Duty-based offences, such as failing to provide the necessaries of life under s. 215, are offences based on a failure to perform specific "legal duties arising out of defined relationships" (*A.D.H.*, at para. 67, citing *Naglik*, at p. 141).

[40] The Crown also argues that the legislative history of s. 145(3) supports this interpretation, since when it was enacted, the then Minister of Justice referred to the "responsibility" or "duty" of a person on bail to attend court and comply with conditions to ensure that the bail system can rely on voluntary appearance rather than pre-trial custody (citations omitted).

[41] With respect, I disagree that either the text of s. 145(3) or the Minister's comments establish a clear intention to create a duty-based offence which calls for the uniform normative standard associated with objective *mens rea*. First, the text of s. 145(3) does not contain any of the language typically used by Parliament when it intends to create an offence involving objective fault (see *A.D.H.*, at para. 73). Unlike the duties in ss. 215, 216, 217 and 217.1 of the *Code*, s. 145(3) does not expressly include the word "duty", a word which may suggest objective fault (*A.D.H.*, at para. 71; *Naglik*, at p. 141). I agree with Fenlon J.A. that "the omission is a significant one" (C.A. Reasons, at para. 80) when we are looking for a clear intention of Parliament to rebut the presumption of subjective fault. I also accept that the word "fails" in this context is neutral:

> "Fails" can connote neglect, but as my colleague notes, also means acting contrary to the agreed legal duty or obligation and being unable to meet set standards or expectations: *The Oxford English Dictionary*, 11th ed, *sub verbo* "fail". That definition is equally compatible with intentional conduct or inadvertence.

(C.A. Reasons, at para. 78)

Similarly, the word "omet" in the French version of s. 145(3) can refer to neglecting, but also refraining, from acting in accordance with a duty (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015)), at pp. 446-47, "*omission*"). Neither the words "fails" or "*omet*" demonstrate a clear intention of Parliament to establish objective fault.

[42] Second, there is a danger in putting too much weight on the word choice of one Minister, especially when his statement does not clearly evince an intention of Parliament to create an objective *mens rea* offence. For example, contemporaneous commentary described that the aim of these offences were to "ensure an accused [did] not disregard the new system with impunity", which seems to suggest a subjective *mens rea* (J. Scollin, Q.C., *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 19). There is no clear indication from the legislative history that Parliament intended to create an objective *mens rea* offence.

[43] The Minister saying that a provision that establishes a criminal offence imposes a responsibility or duty in a general sense does not make it the type of duty-based offence at issue in *Naglik*. The wording in s. 145(3) speaks only of being bound to comply and failing to do so. This wording does not displace the presumption of subjective intent. All criminal prohibitions impose obligations to act or not in particular ways and inflict sanctions when people fail to comply. If accepted, the Crown's argument and the Court of Appeal's conclusion would make all compliance obligations into "duties" and all crimes into duty-based offences. However, the duty-based offences discussed in *A.D.H.* are a far more limited category and are directed at legal duties very different from the obligation of an accused to comply with the conditions of a judicial order.

[44] Section 145(3) simply does not share the defining characteristics of those duty-based offences requiring objective fault that were at issue in *Naglik* and discussed in *A.D.H*. The points of distinction include the different nature of the relationships to which these legal duties attach, the varying levels of risk to the public when duties are not met, whether the duty must be defined according to a uniform, societal standard of conduct, and whether applying such a uniform standard is possible and appropriate in the circumstances.

[45] Legal duties, like those in ss. 215 to 217.1 , tend to impose a positive obligation to act in certain identifiable relationships, address a duty of a more powerful party towards a weaker party, and involve a direct risk to life or health if a uniform community standard of behaviour is not met (*A.D.H.*, at para. 67). An obligation to not breach a bail condition is not comparable to the power imbalance and risks to public health and safety addressed by the duties imposed by ss. 215 to 217.1 : providing the necessaries of life to certain defined persons (s. 215), undertaking medical procedures that may endanger the life of another person (s. 216), or undertaking to do an act or direct work where there is a danger to life or risk of bodily harm (ss. 217 and 217.1).

[46] Further, the duty-based offence in *Naglik* and other types of objective *mens rea* offences involve legal standards that would be "meaningless if every individual defined its content for [themselves] according to [their] subjective beliefs and priorities" (p. 141). The majority of the Court of Appeal thought that bail conditions impose just such "a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct" (para. 57). With respect, I disagree. Although societal interests can be at play when bail conditions are set, there is no uniform standard of care for abiding by bail conditions, as there is for driving a car, storing a firearm, or providing the necessaries of life to a dependant. Parliament legislated a bail system based upon an individualized process, which only permits

conditions which address risks specific to the accused to ensure their attendance in court, protect public safety, or maintain confidence in the administration of justice. The bail order is expected to list personalized and precise standards of behavior. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3).

[47] In addition, the lack of a uniform standard from which to assess the breach of these conditions means that it is also not obvious what degree of breach would attract criminal liability if an objective standard applied to s. 145(3). Only a marked departure from the conduct of a reasonable person would draw criminal liability under an objective standard of *mens rea*. However, unlike an activity like driving where there is a spectrum of conduct ranging from prudent to careless to criminal based on the foreseeable risks of the conduct to a reasonable person, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions may restrict normal activities like travelling and communicating with other people and are specifically tailored to address the *individual* risks posed by each accused. Bail conditions and the risks they address vary dramatically among individuals on release, so that it is not intelligible to refer to the concepts of a "marked" or "mere" departure from the standard of a reasonable person. In the absence of a bail condition, the regulated conduct would usually not be a departure from any uniform societal standard of behaviour. Without this ability to distinguish a marked departure from a mere departure, there is a risk that the objective fault standard slips into absolute liability for s. 145(3).

[48] Similarly, the offence in s. 145(3) is not comparable to other objective fault offences listed in *A.D.H.* Although a risk assessment is involved in the setting of bail conditions, this individualized risk will rarely be the same as the broad societal risks posed by objective fault offences like dangerous driving or careless firearms storage. As stated by the Standing Senate Committee on Legal and Constitutional Affairs, failure to comply offences, like many offences against the administration of justice, differ from other criminal offences because they rarely involve harm to a victim, they usually do not involve behaviour that would otherwise be considered criminal without a court order, and they are secondary offences that only arise after someone has been charged with an underlying offence (*Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (June 2017) (online), at p. 139 ("Senate Committee Report")). A departure from many bail conditions would not automatically lead to a threat to public health and safety.

[49] Finally, reasonable bail is a right under s. 11 (*e*) of the *Charter* and cannot be compared to a regulated activity that is voluntarily entered into like driving or firearm ownership where an objective fault standard for related offences is further justified (*Hundal*, at p. 884). An accused person who is presumed innocent has a right to regain their liberty following their arrest subject to the least onerous measures to address their individual risk of not attending their court date, risk to public protection and safety, and risk to the administration of justice. The fact that accused persons consent to bail conditions in order to be released does not mean that they have chosen to enter into a regulated activity comparable to driving or owning firearms.

D. *Subjective Mens Rea Is Required for Breaches of Probation*

[50] This Court's jurisprudence requiring subjective *mens rea* for the breach of probation offence further supports a subjective *mens rea* for the failure to comply offence. The offences of breach of probation (s. 733.1) and failure to comply with bail conditions (s. 145(3)) are similar offences, which both arise from an accused's breach of conditions set out in a court order. In *R. v. Docherty*, [1989] 2 S.C.R. 941,

the Court determined that a subjective *mens rea* was required for the breach of probation offence. That offence used the words "wilfully" and "refuses", which reinforced the presumption of subjective fault, and are not in s. 145(3). However, even after the word "wilfully" was removed from the current breach of probation offence, most courts continue to interpret the offence to require subjective *mens rea*, based on this Court's reasoning in *Docherty* and the fact that the removal of the word "wilfully" does not on its own indicate an intent to create an objective *mens rea* offence (citations omitted).

[51] Beyond the text of s. 733.1, the Court in *Docherty* found that subjective *mens rea* was supported by the presumption of subjective fault, the possibility of imprisonment if an accused was convicted, and the purpose of the provision to deter people from breaching their probation orders (pp. 950-52). These factors similarly favour a subjective *mens rea* for s. 145(3). And the point of differentiation, that a probation order governs the behaviour of someone who has already been convicted of a crime while bail conditions primarily restrict the civil liberties of those who are presumed innocent of the underlying offence, further supports a subjective fault element for s. 145(3) (see, e.g., M. Manikis and J. De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019), 60 *C. de D.* 873, at pp. 879-80).

[*The Court then noted that a subjective fault requirement was consistent with the penalties and consequences that resulted from conviction under s 145(3); the role of s 145(3) in the legislative framework governing bail conditions; and the restrained and individualized approach to bail*. *The serious consequences noted by the Court include: up to two years imprisonment for the breach (even if acquitted of the underlying charge); the imposition of further conditions as part of the sentence; extending the criminal record of the person (with the associated stigma and difficulties that can result for employment, housing and family obligations). Charges under s 145(3) place a reverse onus on the individual in any future bail hearings, and convictions under s 145 may affect bail hearings for future offences unrelated to the current charges. The Court noted that the Department of Justice's own study showed that accused with a prior history of s 145 convictions were more likely to be denied bail than accused with no history, and accused with a history of convictions for violent or sexual offences. This, the Court said, can lead to "a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention. According to the Court, these serious consequences presuppose that the person knowingly (rather than unwittingly) breaches their bail conditions.]*

…

[63] In my view, despite high rates of criminal charges for failure to comply, Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. The scheme of the *Code* illustrates that such concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached, which may result in release on the same conditions with altered behaviour expected of the accused, changed conditions, or detention. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk.

…

[68] If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. Bail revocation was the process designed for determining

whether a person's risk factors are such that their failure to abide by bail conditions means they ought to be detained rather than released on different conditions. Revocation can therefore address negligent and careless breaches of bail conditions without creating additional criminal liability. While revocation carries the threat of detention and should be sought only when the negative impacts that can arise from detention are justified, it can address risks arising from breaches of bail conditions without adding offences against the administration of justice to the criminal record of the accused.

[69] …Section 145(3) adds criminal liability on top of the possibility of an accused losing their ability to be out on bail prior to trial. Therefore criminal charges are intended as a means of last resort to punish harmful behaviors when other risk management tools have not served their purposes.

[*The Court then noted that the requirement of subjective mens rea is supported by the understanding that bail is an individualized decision and must be tailored to the individual characteristics of the accused. The Attorney General of British Columbia argued that individualization was only necessary at the time of determining bail conditions, but the Court argued that individualization was required both when conditions are imposed and when breached. The Court said a number of features of the bail system supports the conclusion that subjective mens rea is required. These features include: "the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges" [para 76]; the imposition of excessive bail conditions due to "a culture of risk aversion" [para 77]; the pace at which bail hearings proceed, which leads to less contestation of excessive conditions; and, the disproportionate impact of bail conditions on members of marginalized groups.*]

…

[80] The presence of too many unnecessary conditions and the prevalence of breach charges resulting from the imposition of excessive and onerous conditions is part of the relevant legislative context in interpreting s. 145(3) (Sullivan, at pp. 648-49). It is the same context to which Parliament has recently responded by amending the bail scheme. Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is functioning perfectly, when it clearly is not. There is no basis in theory or practice to accept that an individualized imposition of bail conditions at the front end shows a clear intent to displace the presumed subjective fault standard.

[*The Court addressed how s 145(3) allowed for the consideration of general bail principles, problems with commonly imposed bail conditions, and the responsibilities of all participants in the bail system to uphold principles of restraint and review. The Court then considered the specific components of the subjective mens rea for Section 145(3).*]

…

[109] Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and

2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were

wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

[110] These elements accord with the *mens rea* required in jurisdictions recognizing a subjective *mens rea* for failure to comply offences by requiring that the Crown show beyond a reasonable doubt that the accused knowingly or recklessly breached the condition (*Legere*, at para. 100; *Custance*, at para. 10).

…

[112] I prefer the alternative approach. An accused must know or be wilfully blind to their conditions in order to be convicted, although the accused does not need to know the legal consequences or the scope of the condition: (citations omitted) A number of failure to appear cases also require that the accused know of their court date such that an accused's genuine forgetfulness can negate *mens rea* (citations omitted). I accept the position of the Court of Appeal for Ontario in *Smith*, which held that the fact that the accused misheard the terms of his recognizance and failed to review those terms meant that he did not knowingly breach his condition, nor was he wilfully blind. The accused must know the conditions of their release in order to possess the *mens rea* for the failure to comply offence.

[113] Wilful blindness is a substitute for the accused's knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 21 and 24). For a court to find that an accused was wilfully blind in the context of a failure to comply offence, the accused has to know there was a need for inquiry, and deliberately decline to make the inquiries necessary to confirm their exact bail condition (*Smith*, at para. 5; *Withworth*, at para. 13).

[114] Requiring that an accused person has knowledge of, or is wilfully blind to, their conditions of bail does not mean that the accused must have knowledge of the law, which would be contrary to the rule that ignorance of the law is no excuse (s. 19 of the *Code*). While subjective *mens rea* for s. 145(3) means that an accused person who has an honest but mistaken belief about the conditions of their bail order cannot be found liable, this does not mean that an accused must know and understand their legal obligations to fulfill those conditions. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*, whereas a mistake regarding the legal scope or effect of a condition is a mistake of law and would not be an excuse for non-compliance with the condition (see *Withworth*, at paras. 16-19, per Trotter J.). In *Custance*, for example, the accused knew he had to stay at a certain apartment, but when he could not get into that apartment he chose to sleep in his car as he thought this would meet his condition. The accused was aware of his bail condition, but made a mistake as to what the law required to meet that condition. This was a mistake of law that did not negate *mens rea.*

[115] The conclusion that an accused must have knowledge of their conditions of bail, or be wilfully blind to their conditions, in order to have the requisite *mens rea* under s. 145(3), also accords with Wilson J.'s reasoning in *Docherty*, which emphasized the importance of knowledge in finding that an accused breached a condition. In that case, she found that proof of breach of a probation order requires evidence that an accused knew they were bound by the probation order, knew there was a term that would be breached by their proposed conduct, and went ahead and engaged in the conduct anyway (pp. 957-58). The reasoning is still helpful even though the condition breached in *Docherty* required that the accused knew he was committing a criminal offence, which meant the accused had to know of the legal

consequences of his actions (pp. 960-61). In contrast, s. 145(3) does not require that the accused must have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. The purpose of s. 145(3), like the breach of probation offence, is to punish and deter failures to comply with bail conditions. As previously mentioned, knowledge and deterrence are linked: an accused will only be deterred from breaching their conditions if they know they are doing something wrong, meaning they must know that they are bound by a particular bail condition (*Docherty*, at pp. 951-52).

[116] The second component of the *mens rea* for s. 145(3) can be met by showing that the accused acted knowingly or recklessly in breaching their condition. Knowledge in this second component means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act (or refrain from acting) to comply with their conditions at the time of breach (e.g., in Mr. Zora's case, knowing that the police were at his door).

[117] This second component can also be met by showing that the accused was reckless. Where, as here, a higher requirement of "wilfulness" or "intent" is not indicated by the text or nature of an offence, recklessness is generally included in subjective *mens rea* (see *Sault Ste. Marie*, at pp. 1309-10; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), at p. 71). Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk (*Josephie*, at para. 30; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584). Knowledge of risk is key to recklessness. Therefore, the accused must still know of their bail conditions in order to be aware of any risk of non-compliance. The accused must also be aware of the risk that the factual circumstances requiring them to act (or refrain from acting) to comply with their bail conditions could arise and continue with their course of conduct despite the risk. Recklessness is not, and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

[118] Given that s. 145(3) can operate to criminalize otherwise lawful day-to-day behaviour, I would conclude that knowledge of *any* risk of non-compliance is not sufficient to establish that an accused was reckless. Instead, the accused must be aware that their continued conduct creates a *substantial and unjustified risk* of non-compliance with their bail conditions. This Court has previously adopted this standard of risk in describing recklessness for certain offences (see *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at paras. 27-29; *Leary v. The Queen*, [1978] 1 S.C.R. 29, at p. 35 (per Dickson J. dissenting, but not on this point)). The risk cannot be far-fetched, trivial, or *de minimis*. The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with which the risk could be avoided, are all relevant considerations (Manning and Sankoff, at p. 229). Although the trial judge will assess whether a risk is unjustified based on the above considerations, because recklessness is a subjective standard, the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.

[119] Requiring this standard of risk for recklessness is warranted because the offence may criminalize everyday activities and have unforeseen consequences on people's everyday lives. For example, in the context of a condition requiring an accused to answer the door to police during their curfew, an accused would not be reckless if they took the minimal and justified risk of taking a short shower during their curfew whereas they could be reckless if they disconnected their doorbell or wore earplugs around their house. As with this Court's decision in *Hamilton*, at paras. 32-33, these reasons should not be interpreted as changing the general principles of recklessness as a fault element set out in *Sansregret*, as my description of recklessness is specific to the offence under s. 145(3).

[120] Finally, I do not accept that a subjective fault requirement would make it too difficult for the Crown to prove an accused's knowing or reckless failure to comply with bail conditions. If the Crown chooses to lay a criminal charge under s. 145(3), when the possibility of a bail variation and bail revocation also exist, it will do so only when it has a reasonable prospect of conviction based on a full appreciation of all constituent elements of the offence. Many crimes have a subjective fault standard and there are recognized ways to marshal sufficient evidence to convince a judge beyond a reasonable doubt that the accused acted knowingly or recklessly. Courts may infer subjective fault for failure to comply charges, whether or not the accused decides to testify. After considering all the evidence, the trier of fact may be able to conclude beyond a reasonable doubt that the accused had the state of mind required for conviction based on the common sense inference that individuals "intend the natural and probable consequences of their actions" (*R. v. Seymour*, [1996] 2 S.C.R. 252, at paras. 19 and 23; *Docherty*, at p. 958; *Loutitt*, at para. 18). As noted by the intervener Attorney General of Ontario a subjective fault requirement has not prevented convictions on s. 145(3) charges in Ontario.

[121] The Crown's concern that accused persons may simply say they forgot about their bail conditions to escape criminal liability for breaching their bail is addressed because judges "will no doubt act sensibly in assessing the authenticity of claims of forgotten court dates and overlooked bail conditions. Effect need not be given to forgetfulness merely because it has been asserted" (*Withworth*, at para. 14).

[*The appeal was granted and a new trial was ordered*].

Insert at p. 491, before the new section

R v Mooney
2023 ABCA 144

[*The accused, an on-duty police officer, was convicted of careless driving under Alberta's Traffic Safety when he backed his car into a pedestrian causing serious injuries but then acquitted by a summary conviction appeal judge who stressed that while the officer's conduct may have been negligent his conduct in not seeing the pedestrian when he checked his rear view mirror "was 'not of such a nature that it can be considered a breach of duty to the public deserving of punishment and the consequences of a finding of criminality' or that he should suffer criminal consequences'. The Crown appealed this conviction.*]

The Court of Appeal:

[15] [The above quoted statements from the summary conviction appeal judge] do not reflect the law on careless driving.

…

[19] This appeal involves a regulatory offence. These offences, also known as public welfare offences, emphasize protecting the public rather than punishing inherently wrongful conduct. "Courts have fashioned distinct rules to make it easier for the state to investigate and prosecute regulatory offences": Kent Roach, *Criminal Law*, 8th ed (Toronto: Irwin Law Inc, 2022), 252.

[20] Traditionally regulatory offences were interpreted either to require absolute liability, for which conviction follows from the mere commission of the *actus reus*, and full subjective fault. Eventually a "half-way house" approach developed, strict liability: ***R v Sault Ste Marie (City)***, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299, 1312-1313, 1325-1326, 40 CCC (2d) 353.

…

[21] "An absolute liability offence requires the Crown to prove the commission of the prohibited act beyond a reasonable doubt, but does not require proof of any additional fault element": Roach, 254…

…

[24] Strict liability offences do not involve the requirement to prove *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness. A public welfare offence would fall in this category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence: ***Sault Ste Marie***, 1325-1326….

…

[27] When establishing due diligence or reasonable care, the accused's conduct is assessed using the reasonable person standard. The circumstances as perceived by the accused are not determinative; rather, the focus is on whether the accused took reasonable steps. "A defence of 'human error' or honest but not necessarily reasonable mistake will not suffice": Roach, 264.

[28] The proper application of the law is set out in ***R v Jacobsen***, 1964 CanLII 677 (BC CA), [1965] 1 CCC 99, 108, 48 WWR 272 (BCCA): the conduct required for proof of careless driving does not require "a breach

of duty to the public . . . deserving of punishment." This is succinctly stated in ***R v Morrison***, 2002 YKCA 15, para 11, 172 BCAC 232:

> A strict liability offence does not require proof of an additional element of blameworthiness or higher degree of culpability as the appellant argues. All that is required is proof that the person charged with the strict liability offence did the prohibited act and thereby breached the standard of conduct required by the section of the enactment that creates the offence.

It is then that the defence of reasonable care or due diligence becomes available by proof on a balance of probabilities.

[29] To the extent that ***R v Beauchamp***, 1952 CanLII 60 (ON CA), [1953] OR 422, 432-433, 106 CCC 6 (CA), or **R v Grosvenor** (1993), 1993 CanLII 16333 (AB KB), 146 AR 63, para 3, 13-16, 50 MVR (2d) 95 (QB), purport to require *mens rea*, "an additional fault element", "a breach of duty to the public ... deserving of punishment", or a "quasi-criminal element", those decisions have been overtaken in evolution of the law. See in that regard ***R v Brown*** (1986), 1986 CanLII 1874 (AB KB), 71 AR 137, paras 9-14 (QB) (post-***Beauchamp***) and ***R v Emery***, 2015 ABQB 679, para 54, 90 MVR (6th) 44 (post-***Grosvenor***).

…

[31] The summary conviction appeal judge erred by relying on ***Beauchamp*** to find conduct that was a breach of duty to the public deserving of punishment was a necessary element of the offence and by failing to recognize that inadvertent negligence (breach of a standard of care) may be sufficient to establish the offence of driving "without due care and attention".

[*Appeal allowed, new trial ordered.*]

Insert at p. 514, before the new section

R v Lin
2022 ONCA 289

[1] Following a trial by judge and jury, the appellants, Ting Lin and Shuhao Shi, were convicted of: (i) Count 1 - unlawful possession of a Class A precursor, gamma butyrolactone ("GBL"), for the purpose of producing a controlled substance, gamma hydroxybutyrate ("GHB"), contrary to s. 6.1of the *Precursor Control Regulations*, SOR/2002-359, and s. 46 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended ("*CDSA*"); and (ii) Counts 2, 3, and 4 - unlawfully possessing ketamine for the purpose of trafficking contrary to s. 5(2) of the *CDSA*.

[2] They were each sentenced to terms of imprisonment of six years, calculated as follows: Count 2 – 6 years; Count 1 – 2.5 years concurrent; Count 3 – 6 years concurrent; and Count 4 – 6 months concurrent.

[3] The appellants appeal their convictions and seek leave to appeal their sentences.

…

[9] At the hearing of the appeal, the appellants submitted that the trial judge made two reversible errors. First, he erred by failing to put to the jury the defence that the appellants honestly but mistakenly believed an authorization existed that permitted them to engage in their activities with the two substances, ketamine and GBL. Second, and relatedly, the trial judge failed to include a proper instruction in his jury charge on the meaning of mistake of fact and to connect the principles of mistake of fact to the evidence.

…

[20] We do not accept the appellants' submission that an element of the offences charged required the Crown to prove beyond a reasonable doubt that the appellants did not operate under a mistaken belief that the drugs found in the storage locker were acquired through a proper authorization. We agree with the Crown that the appellants' position would require the Crown to prove, in effect, that an accused "knew the law". That would run counter to the established jurisprudence, s. 19 of the *Criminal Code*, R.S.C., 1985, c. C-46, which provides that "[i]gnorance of the law by a person who commits an offence is not an excuse for committing that offence", and s. 48(2) of the *CDSA*, which provides:

> 48(2). In any prosecution under this Act, the prosecutor is not required, except by way of rebuttal, to prove that a certificate, licence, permit or other qualification does not operate in favour of the accused, whether or not the qualification is set out in the information or indictment.

[21] In *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, the Supreme Court of Canada considered the elements of the offence under s. 95(1) of the *Criminal Code* of possession of specified firearms without being the holder of an authorization (or licence) and registration certificate for the firearm. The Supreme Court held that the *mens rea* for the Crown to prove under s. 95(1) does not include knowledge that possession of the firearm in the place in question is unauthorized. The Court explained, at paras. 55 and 56:

> [K]nowledge that one possesses a loaded restricted firearm, together with an intention to possess the loaded firearm in that place, is enough. An individual who knowingly possesses a loaded restricted firearm in a particular place with an intention to do so will be liable to punishment for the offence provided for in s. 95(1) unless he or she holds an authorization or a licence under which the firearm may be possessed in that place. Thus, a proper authorization or licence serves to negate the *actus reus* of the offence, thereby allowing someone who legitimately possesses a restricted firearm in a given place to avoid liability.
>
> With respect, the Court of Appeal erred in law by improperly reading a defence of ignorance of the law into s. 95(1). In the majority's view, the Crown had to prove that Mr. MacDonald knew or was wilfully blind to the fact that his possession was unauthorized. Such a burden would compel the Crown to prove that an accused knew the conditions of his or her authorization or licence. This amounts to requiring the Crown to prove that the accused knew the law. [Emphasis added]

[22] More recently, in *R. v. Fan*, 2021 ONCA 674, 75 C.R. (7th) 1, a case involving offences under the *CDSA*, this court observed, at para. 47, that s. 19 of the *Criminal Code* "applies to the existence and language of offence-creating provisions, as well as authorizations required for regulated activities, such as the possession of firearms and drugs." Writing for the court, Trotter J.A. stated, at para. 50:

> To require the Crown to prove that the appellants understood the legal framework in which they operated confuses *actus reus* and *mens rea* requirements. In this context, a proper authorization or licence negates the *actus reus* of activity that would otherwise be illegal. Conceived as a *mens rea* component, it would require the Crown to prove that an accused person knew the conditions of their licence or authorization. As Lamer C.J. held in *R. v. Forster*, 1992 CanLII 118 (SCC), [1992] 1 S.C.R. 339, at p. 346: "[K]nowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence." See also *R. v. Docherty*, 1989 CanLII 45 (SCC), [1989] 2 S.C.R. 941, at pp. 960-61.

[23] In the present case, the appellants' submission that for each offence the Crown was required to prove that the appellants knew they were dealing with substances, the possession of which was unauthorized, is tantamount to requiring the Crown to prove the appellants knew the law. That position was clearly rejected by the Supreme Court in *MacDonald* and this court in *Fan*, runs counter to s. 19 of the *Criminal Code*, and is contrary to s. 48(2) of the *CDSA*, which is a specific application of s. 19 in the forensic setting of a prosecution.[1] Accordingly, we see no basis for the appellants' legal submission.

Insert at p. 550,* immediately after extract from *R v Nixon

R v Cowan
2021 SCC 45

The judgment of Wagner C.J. and Moldaver, Côté, Martin and Kasirer JJ. was delivered by

Moldaver J. —

I. Overview

[1] Two individuals robbed a Subway restaurant in Regina, Saskatchewan, on July 7, 2016. One wore a mask and brandished a knife, while the other stood watch at the front door. The robbers made off with $400 and a coin dispenser.

[2] A police investigation led to the arrest of the accused, Jason William Cowan. He was subsequently charged with armed robbery, contrary to ss. 343(d) and 344 of the Criminal Code, R.S.C. 1985, c. C-46.

[3] Mr. Cowan was tried by a judge alone. At trial, the Crown advanced two theories of liability: first, that Mr. Cowan was the masked robber and was therefore guilty as a principal offender; second, and in the alternative, that Mr. Cowan was guilty as a party to the armed robbery in that he either abetted the commission of the offence under s. 21(1)(c) of the Criminal Code, or counselled its commission under s. 22(1).

[4] The trial judge rejected both theories of liability and acquitted Mr. Cowan. In his view, the circumstantial evidence fell short of proving that Mr. Cowan was one of the principal offenders. As for party liability, he found that Mr. Cowan could only be convicted as a party if the Crown established that two of Mr. Cowan's friends — Matthew Tone and a man known as "Littleman" — had committed the robbery. Once again, he found that the evidence relied upon by the Crown fell short in this regard.

[5] The Crown appealed from Mr. Cowan's acquittal. A majority of the Court of Appeal for Saskatchewan allowed the appeal. …

[6] This case involves an appeal by both Mr. Cowan and the Crown. On his appeal, Mr. Cowan relies upon the view of the dissenting judge at the Court of Appeal that the trial judge did not err in his analysis of party liability and that there was no basis in fact or law for the majority to interfere with the verdict of acquittal. …

[7] For the reasons that follow, I would dismiss Mr. Cowan's appeal and allow the Crown's appeal. I am in agreement with the majority of the Court of Appeal that the trial judge committed an error of law in his analysis of party liability, which had a material bearing on the acquittal. The appropriate remedy is therefore to set aside the acquittal and order a new trial. However, in my respectful view, the new trial must be a full retrial. While appellate courts have broad powers under s. 686(8) of the *Criminal*

Code to "make any order, in addition, that justice requires", this does not include the power to limit the scope of a new trial to a particular theory of liability on a single criminal charge.

II. Facts

[8] The events giving rise to these appeals occurred between approximately 9:00 and 9:30 p.m. on July 7, 2016. The sole employee working at the Subway restaurant at the time of the robbery was in the back area of the restaurant when he heard the front door open. He came out and saw that two individuals had entered — one was standing watch by the front door, while the other was approaching the counter with his face masked and a knife in his hand. The masked robber proceeded to jump over the counter and instruct the employee to place the money from the cash register, totalling $400, into a Subway sandwich bag. He then noticed a coin dispenser and demanded that the employee give it to him. The employee complied. The robbers left, taking the cash and coin dispenser with them.

[9] While the robbers could not be identified by the employee, the masked robber could be seen in the restaurant's security camera footage wearing distinctive running shoes.

[10] A few days later, the police received an anonymous tip implicating Mr. Cowan in the robbery and placed him under surveillance. As part of the surveillance operation, the police took photographs of Mr. Cowan showing him wearing a pair of running shoes that closely resembled those worn by the masked robber.

[11] Some weeks later, on August 11, 2016, the police arrested Mr. Cowan, in relation to the robbery, at a residence on McDonald Street located a few blocks away from the Subway restaurant. He was taken to the police station, where he provided a recorded statement denying having any involvement in the robbery and claiming he had an alibi. He explained that he was at the McDonald Street residence on the day of the robbery, but that he had left around 5:00 p.m. to go to the house of a friend named Jenna-Lee Tiszauer. He then went on to admit that while he was not directly involved in the robbery, on that same day, a group of individuals at the McDonald Street residence were talking about "how they needed money" and that he told them "how to do a robbery what to say how to do it how long to be in there" (trial reasons, 2018 SKQB 75, at paras. 24-25 (CanLII)). Initially, he said this conversation occurred with Mr. Tone and an individual named Dustin Fiddler. Later, he added that Littleman and an individual named Bradley Robinson were also present.

[12] When shown photographs of the robbery from the Subway restaurant security camera footage, Mr. Cowan identified Littleman as the robber standing watch at the door and Mr. Robinson as the masked robber. Later, he told the police that Mr. Fiddler and Mr. Tone had driven Littleman and Mr. Robinson to the restaurant and had waited in Mr. Fiddler's vehicle during the robbery.

[13] Mr. Cowan was subsequently charged with "steal[ing] Canadian currency and a coin dispenser from Subway while armed with an offensive weapon, contrary to section 343(d) . . . of the *Criminal Code*" (armed robbery) (A.R., vol. I, at p. 2).[1] At trial, the Crown advanced two alternative theories of liability to establish Mr. Cowan's guilt — either he was the masked robber and therefore a principal offender, or he was a party in that he abetted or counselled the commission of the offence.

…

[15] As for its alternative theory — that Mr. Cowan was a party to the robbery because he abetted or counselled the commission of the robbery — the Crown primarily relied on Mr. Cowan's statement in which he admitted to having told Mr. Fiddler, Mr. Tone, Mr. Robinson, and Littleman "how to do [the] robbery and what to say exactly" (A.R., vol. II, at p. 47).

…

[28] In my respectful view, the trial judge erred in law in assessing Mr. Cowan's liability as a party for having abetted or counselled the commission of the offence. Specifically, as I will explain, by reasoning that the Crown was required to prove that Mr. Tone and Littleman were the principals in the commission of the armed robbery as a prerequisite to establishing Mr. Cowan's guilt as a party, the trial judge misdirected himself on the law and, as a result, failed to correctly assess the relevant evidence.

…

[37] … [I]t is clear that to establish Mr. Cowan's guilt as a party on the basis of abetting or counselling, the Crown was not required to prove the identity of Mr. Tone and Littleman as the principal offenders or the precise role played by them in the commission of the offence. The Crown was only required to prove that any one of the individuals encouraged by Mr. Cowan went on to participate in the offence either as a principal offender — in which case Mr. Cowan would be guilty as both an abettor and a counsellor — or as a party — in which case Mr. Cowan would be guilty as a counsellor.

…

[44] In any event, even if the evidence and submissions had, in fact, focused on Mr. Tone and Littleman, this did not insulate the trial judge from legal error. As I have explained, Mr. Cowan could still have been found guilty of being a party to the offence even if the precise identity or part played by each individual who participated in the commission of the offence was uncertain, so long as Mr. Cowan had committed the necessary act with the requisite intent (*Isaac*, at p. 81, citing *Sparrow*, at p. 458; *Pickton*, at para. 58; *Thatcher*, at pp. 687-89). There was therefore no need for the trial judge to focus on the identity of a given principal, whether or not the Crown identified specific individuals as principals to the offence. Rather, all that was required was for him to find that Mr. Cowan had encouraged at least one of the individuals who participated in the commission of the offence, be it as a principal (abetting or counselling) or a party (counselling). Respectfully, the trial judge erred in failing to recognize this.

…

[54] Where an appellate court exercises its powers under s. 686(2), (4), (6) or (7), it may also "make any order, in addition, that justice requires" under s. 686(8). This power, however, is not limitless. As this Court recently explained in R.V., for an appellate court to issue an additional order under its s. 686(8) residual power, three conditions must be met (para. 74, citing R. v. Thomas, 1998 CanLII 774 (SCC), [1998] 3 S.C.R. 535). First, the court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering power in that it cannot

be “at direct variance with the court’s underlying judgment” (Thomas, at para. 17; see also R. v. Warsing, 1998 CanLII 775 (SCC), [1998] 3 S.C.R. 579, at paras. 72-74). Third and finally, the order must be one that “justice requires”.

[55] Here, I am of the view that the second and third conditions for exercising s. 686(8) were not met, as the ancillary order limiting the scope of the new trial was at variance with the underlying judgment and was not an order that justice required.

[56] According to the Court of Appeal, the scope of the new trial had to be limited to the question of whether Mr. Cowan was guilty of armed robbery as a party on the basis of abetting or counselling, since the legal error only pertained to the trial judge’s analysis of party liability and the Crown’s grounds of appeal relating to principal liability were rejected. With respect, this was an error. The new trial must be on all available modes of committing the offence.

[57] As I have explained, ss. 21 and 22 do not create multiple offences; rather, they merely provide alternative paths to the same destination by setting out different ways in which an accused may participate in and be found guilty of an offence. Yet, in separating the Crown’s theories of liability in its ancillary order, the Court of Appeal bifurcated the offence of armed robbery into two separate offences: robbery as a principal and robbery as a party, be it as an abettor or counsellor. Thus, the effect of the ancillary order restricting the scope of the new trial was to uphold Mr. Cowan’s acquittal on the single charge of armed robbery in part. This is at odds with the underlying judgment allowing the Crown appeal and setting aside the verdict rendered on that charge as a whole. Put simply, the ancillary order gave rise to a partial acquittal on a single criminal charge — a two-headed hydra-like creation unknown to Canada’s criminal law.

…

[63] The ancillary order was also not one that justice required. In Canadian criminal law, the concept of the “interests of justice” has come to be understood as encompassing the interests of the accused, the interests of the Crown, broad-based societal concerns, and the integrity of the criminal process (R. v. Beaulac, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768; R. v. M. (P.S.) (1992), 1992 CanLII 2785 (ON CA), 77 C.C.C. (3d) 402 (Ont. C.A.), at paras. 32-36; R. v. Owen, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 52; R. v. Last, 2009 SCC 45, [2009] 3 S.C.R. 146, at para. 16; R. v. Bernardo (1997), 1997 CanLII 2240 (ON CA), 105 O.A.C. 244, at paras. 16 and 20). Here, in my view, the ancillary order threatens the integrity of the criminal process by distorting the truth-seeking function of the courts.

[64] As one of the purposes of the criminal process is to foster a search for truth, justice cannot require that a trier of fact be restricted in their ability to determine how, if at all, an accused participated in a given offence. Rather, a trier of fact must be able to consider any and all theories of liability that have an air of reality based on the evidence adduced at the new trial (Huard, at para. 60). To prospectively deny a trier of fact the ability to consider a viable theory of liability would be to undermine their ability to carry out their core function: to determine whether the Crown has proven that the accused committed the offence(s) charged. This approach is consistent with the Court’s reasoning in MacKay,

where Charron J. held that the "scope of the appropriate instruction on the definition of assault at the new trial [could] only be determined on the basis of the evidence adduced at th[at] new trial" (para. 4).

[65] As a practical matter, upholding the Court of Appeal's ancillary order would mean that if, at the new trial, the defence adduced evidence showing that Mr. Cowan did not abet or counsel anyone because he was, in fact, the principal offender, and the trier of fact believed that evidence or it raised a reasonable doubt, the trier of fact would have no option but to acquit Mr. Cowan of the charge of armed robbery. Such a result would make a mockery of the justice system and cannot be what justice requires.

Justice Rowe and Justice Brown would have set aside the Saskatchewan Court of Appeal's decision and restored the acquittal, substantially for the reasons given by the dissenting judge, Jackson J.A., in the Court of Appeal. Justice Rowe (with whom Brown J agreed) also addressed the majority's reasoning on the scope of the retrial, as follows:

[93] … I am of the view that the Court of Appeal did not err in limiting the issues on the new trial. This result promoted fairness to Mr. Cowan, the efficient use of the court's resources and the integrity of the criminal justice process. There is no reason to return the matter for trial on the issue of whether Mr. Cowan committed the offence as a principal.

Insert at p. 659, before next section

In *R. v. GF,* 2021 SCC 20, the Supreme Court of Canada restored the convictions of two accused for sexually assaulting a complainant who was 16 years old at the time of the offence. The trial judge accepted the complainant's testimony that she was extremely intoxicated when the sexual activity occurred. Justice Karakatsanis held for a majority of the court that "[t]his appeal provides the Court with an opportunity to clarify the relationship between consent and the capacity to give consent. In my view, capacity and consent are inextricably joined. Subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent." She explained at paragraph 24 of her reasons that:

> where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent. As I shall explain, this is distinct from circumstances where a person may provide subjective consent that is not legally effective, due to, for example, duress or fraud. Thus, when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity.

In reaching this conclusion, Karakatsanis J drew a distinction between capacity to consent (the absence of which means that no subjective consent can be given) and circumstances which vitiate consent, for example the factors listed in s. 265(3) of the *Criminal Code* (the presence of which mean that subjective consent which may otherwise appear to exist will have no force, on policy grounds).

She set out the constituent elements of capacity to consent as follows:

> [57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:
>
> 1. the physical act;
>
> 2. that the act is sexual in nature;
>
> 3. the specific identity of the complainant's partner or partners; and
>
> 4. that they have the choice to refuse to participate in the sexual activity.
>
> [58] The complainant will only be capable of providing subjective consent if they are capable of understanding all four factors. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent and the absence of consent is established at the actus reus stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate.

Justice Karakatsanis also provided guidance on the nature of incapacity to consent and its relationship with withholding consent. Her reasoning in this passage renders inapplicable some of the sexual assault myths and stereotypes about complainants that have often been used to challenge the credibility of complainants who voluntarily consume intoxicants:

> [61] The respondents argued here, as they argued below, that the trial judge's error went beyond blending his consent and capacity assessments — they argue that he could not find

both that the complainant was incapable of consenting and that she did not agree to the sexual activity. They argue that these findings are "mutually exclusive" and a complainant who is incapable of consenting is not capable of withholding agreement to sexual activity. I do not agree for two reasons.

[62] First, I am not convinced that these findings are mutually exclusive at the theoretical level. In my view, the capacity to consent requires a higher level of understanding than the capacity to withhold consent. As discussed, the capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate all the conditions of subjective consent. If a complainant is incapable of understanding any one of those conditions, then they are incapable of consenting. Conversely, the capacity to withhold consent inherently requires a lesser degree of understanding because that capacity is established by a complainant's capacity to understand any of the necessary factors. For example, if a complainant is incapable of understanding the sexual nature of proposed touching but knows they do not want to be touched, then they are capable of withholding consent despite being incapable of consenting.

[63] Second, the continuous nature of consent provides a further reason why the respondents' argument must fail at a practical level. Consent must be specifically directed to each sexual act: *J.A.,* at para. 34; Criminal Code, s. 273.1(2)(e). There is no reason why the entire course of sexual activity must be blanketed with a single finding of consent, non-consent, or incapacity. This case provides an example. On the trial judge's findings, the sexual activity began when the complainant was passed out — evidence of incapacity. As it continued, the complainant struggled and told the respondents to stop — evidence that she expressly refused to engage in the sexual activity. When those struggles and demands were ignored by the respondents, the complainant, in her confused and intoxicated state, acquiesced, believing she had no choice in the matter — again, evidence of incapacity.

[64] Accordingly, it was open to the trial judge to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question. In the context of this case, the trial judge did not err in addressing these issues together in his reasons. Both findings went to a lack of subjective consent, thus establishing the final element of the actus reus. They did not need to be reconciled with each other, nor approached in any particular order.

[65] As a final note, I reject the respondents' argument that the complainant's claim of incapacity was belied by her thorough recollection of the sexual activity. Whether the complainant has a memory of events or not does not answer the incapacity question one way or another. The ultimate question of capacity must remain rooted in the subjective nature of consent. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.

In *R. v. Kirkpatrick,* the Supreme Court of Canada further considered the *actus reus* dimensions of consent, in particular the meaning of the legislative phrase "the sexual activity in question" and the circumstances in which the provisions of s. 265(3)(c) regarding consent obtained by fraud are enlivened.

R v Kirkpatrick
2022 SCC 33

The judgment of Moldaver, Karakatsanis, Martin, Kasirer and Jamal JJ. was delivered by

Martin J. —

I. Introduction

[1] This appeal raises an important legal question about consent and condom use in the context of an allegation of sexual assault. What analytical framework applies when the complainant agrees to vaginal sexual intercourse only if the accused wears a condom, and he instead chooses not to wear one? All parties and members of this Court agree that his negation of her express limits on how she can be touched engages the criminal law. The question is: should condom use form part of the "sexual activity in question" to which a person may provide voluntary agreement under s. 273.1(1) of the Criminal Code, R.S.C. 1985, c. C-46? Or alternatively, is condom use always irrelevant to the presence or absence of consent under s. 273.1(1), meaning that there is consent but it may be vitiated if it rises to the level of fraud under s. 265(3)(c) of the Criminal Code?

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

[3] Here, the complainant gave evidence that she had communicated to the appellant that her consent to sex was contingent on condom use. Despite the clear establishment of her physical boundaries, the appellant disregarded her wishes and did not wear a condom. This was evidence of a lack of subjective consent by the complainant — an element of the *actus reus* of sexual assault. As a result, the trial judge erred in granting the appellant's no evidence motion. Accordingly, I would dismiss the appeal and uphold the order of the Court of Appeal for British Columbia setting aside the acquittal and remitting the matter to the Provincial Court of British Columbia for a new trial.

…

[39] The starting point and primary provision for determining whether there is consent to sexual activity for sexual assault offences is s. 273.1. This particular section was enacted more recently than s. 265(3) and was singularly designed for and uniquely directed to sexual assault offences. This statutory definition of consent plays a central role in Parliament's assault-based prohibitions against sexual violence. The key term "sexual activity in question" in s. 273.1(1) exists within a composite phrase that requires "voluntary agreement . . . to engage in the sexual activity in question". We are to seek Parliament's intent as demonstrated by the text, context, and purpose of the sexual assault provisions and interpret it consistently with this Court's considerable jurisprudence on consent and "harmonious[ly]" with all parts of s. 273.1 and the overall legislative scheme (J.A., at para. 33).

[40] The legal meaning given to the "sexual activity in question" cannot be narrowly drawn or fixed for all cases. Like the consent of which it is part, it is tied to context and cannot be assessed in the abstract; it relates to particular behaviours and actions (Hutchinson, at para. 57; Barton, at para. 88). Much will depend on the facts and circumstances of the individual case. In a very real way, it will be defined by the evidence and the complainant's allegations. What touching does the complainant say was unlawful? Which acts were beyond the boundaries of any consent given? The sexual activity in question will emerge from a comparison of what actually happened and what, if anything, was agreed to. This is bound to change in every case.

[41] Here, the complainant makes no complaint about the first act of vaginal intercourse in which the appellant used the required condom. She nevertheless claims that she never consented to what he did subsequently, which was to have vaginal intercourse without a condom. The specific sexual assault alleged, and the sexual activity in question, was therefore vaginal sexual intercourse without a condom.

[42] In determining whether her agreement to sexual intercourse with a condom means she also agreed to sexual intercourse without a condom, we start with the proposition from Hutchinson that the "sexual activity in question" that the complainant must agree to is the "specific physical sex act" (para. 54 (emphasis deleted)). The focus should therefore be on the specific sex act(s), defined by reference to the physical acts involved. The Court in Hutchinson also provided examples of different physical acts, like "kissing, petting, oral sex, intercourse, or the use of sex toys" (para. 54). These were mere illustrations and operate only in comparison to each other in the sense that kissing is a different physical activity than petting; petting is not the same thing as oral sex; and intercourse is distinguished from the use of sex toys. These are not closed or mandatory legal categories of broad sexual activity, regardless of the particular evidence and allegations at issue.

[43] Applying Hutchinson's focus on the "specific physical sex act", condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom. To state the obvious, the physical difference is that intercourse without a condom involves direct skin-to-skin contact, while intercourse with a condom involves indirect contact. Indeed, this difference, of a changed physical experience, is put forward by some men to explain why they prefer not to wear a condom (K. Czechowski et al., "That's not what was originally agreed to": Perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample, in PLoS ONE, 14(7), July 10, 2019 (online), at p. 2).

[44] The law recognizes that consent to penetration in one area of the body does not constitute consent to penetration in a different area because these are distinct physical acts (Hutchinson, at para. 54). Similarly, consent to a form of touching may depend on what is being used to touch the body because the law appreciates there is a physical difference between being touched by a digit, penis, sex toy or other object. It is also clear, for example, that the law sees different specific physical sex acts when a person who has obtained consent to touch a woman's chest over her clothing instead reaches underneath her clothing to make direct skin to skin contact with her bare breast. In the same way, being touched by a condom-covered penis is not the same specific physical act as being touched by a bare penis. Logically and legally, direct and unmediated sexual touching is a different physical act than indirect and mediated contact. Indeed, given the centrality of the distinction, whether a condom is required is basic to the physical act.

[45] All principles of statutory interpretation compel the conclusion that sex with a condom is a different physical activity than sex without a condom. It is the only meaning of the "sexual activity in

question" that reads s. 273.1 as a whole and harmoniously with this Court's jurisprudence on subjective and affirmative consent. In addition, it fulfills Parliament's objective of giving effect to the equality and dignity-affirming aims underlying the sexual assault prohibitions; responds to the context and harms of non-consensual condom refusal or removal; and respects the restraint principle in criminal law. While vitiation by fraud may still arise in other cases, it does not apply when condom use is a condition of consent.

…

[56] Recognizing that condom use may be part of the sexual activity in question best respects Parliament's equality-seeking and dignity-promoting purposes and its desire to reflect the realities, rights and concerns of complainants. This approach is most respectful of Parliament's aims as evidenced by the legislative history, the preamble to the 1992 amendments in which consent was first defined, the social context in which s. 273.1 was introduced, and the present problems associated with condom refusal and removal [lengthy list of citations omitted].

…

[58] Non-consensual condom refusal or removal involves a range of conduct employed to avoid using a condom with a partner who wants to use one. This includes the refusal to use a condom in the first place, whether the accused informs the complainant of their refusal or not. It also covers cases of "stealthing", where the accused pretends to have put on a condom or secretly removes it. There are many forms of "condom use resistance" and they may involve using physical force, manipulation, threats and deception to obtain unprotected sex (R.F., at para. 79; see also paras. 80-85; Barbra Schlifer Factum, at paras. 6-11; I.F., West Coast Legal Education and Action Fund Association, at para. 7).

[59] Recent empirical studies indicate the rates of non-consensual condom refusal or removal may be very high (Latimer et al., at p. 11; Czechowski et al., at pp. 16 and 20-21). The Intervener Barbra Schlifer Commemorative Clinic notes that Canadian universities have begun to consider non-consensual condom refusal or removal in their sexual violence prevention policies (I.F., at para. 10, citing University of Ottawa, Policy 67b Prevention of Sexual Violence, December 9, 2019; St. Francis Xavier University, Sexual Violence Response Policy, February 1, 2020, at p. 4; Dalhousie University, Sexualized Violence Policy, June 25, 2019, at p. 5).

[60] Non-consensual condom refusal or removal is experienced as and recognized as a form of sexual violence which generates various forms of harm. There are clear physical risks, but the psychological consequences are also very real. Women who have experienced non-consensual condom refusal or removal have been found to develop negative self-perception about their sexual agency and sometimes themselves (Boadle, Gierer and Buzwell, at p. 1708). Victims of non-consensual condom refusal or removal describe it as a "disempowering, demeaning violation of a sexual agreement", a violation of consent, a betrayal of trust, a denial of autonomy, and an act of sexual violence (Brodsky, at pp. 184 and 186; Czechowski et al., at pp. 11-13; S. Lévesque and C. Rousseau, "Young Women's Acknowledgment of Reproductive Coercion: A Qualitative Analysis" (2021), 36 J. of Interpers. Violence NP8200 (online), at p. NP8210). The complainant's testimony — which we must take to be true at this preliminary stage — is clearly consistent with that research. She described the appellant's conduct as "like, freaking rape, like, because — like, I said I only have sex with condoms" (A.R., vol. II, at p. 63).

[61] As with other forms of sexual coercion, the risk of experiencing non-consensual condom refusal or removal is not distributed equally throughout the population. The power dynamic it rests on is exacerbated among vulnerable women, including women living in poverty, racialized women, migrant

women, and among people with diverse gender identities and sex workers (Barbra Schlifer Factum, at para. 9, citing K. T. Grace and J. C. Anderson, "Reproductive Coercion: A Systematic Review" (2018), 19 Trauma, Violence, & Abuse 371, at pp. 383-85). Younger women, who may agree to sexual activity only if protection is used in dating contexts or casual sexual relationships with partners they do not know well (as the facts of this case demonstrate), are also targets of non-consensual condom refusal or removal (Boadle, Gierer and Buzwell, at pp. 1706-7; see, e.g., R. v. Lupi, 2019 ONSC 3713; R. v. Rivera, 2019 ONSC 3918; R. v. Kraft, 2021 ONSC 1970). The phenomenon is also particularly associated with intimate partner violence (Barbra Schlifer Factum, at para. 9, citing Grace and Anderson, at p. 385).

[62] Sexual assault remains a highly gendered crime (Goldfinch, at paras. 37-38; Barton, at para. 1). Sexual violence disproportionately impacts women and gender diverse people, including trans and cisgender women and girls and other trans, non-binary, and Two Spirit people. This is even more true for racialized members of those communities (I.F., Women's Legal Education and Action Fund Inc., at para. 18). I agree with the Attorney General of Alberta that a narrow interpretation of the sexual activity in question will have a disproportionate impact on vulnerable groups, contribute to sexual inequality and deny Canadians equality under the law (I.F., at para. 23). Where a complainant's wishes are ignored by their partner, with or without deception, failing to recognize condom use as part of the sexual activity in question for the purposes of their consent would deny recognition of their sexual agency, equality and right to control over their reproductive and physical health and well-being (Barbra Schlifer Factum, at para. 17, citing E. C. Neilson et al., "Psychological Effects of Abuse, Partner Pressure, and Alcohol: The Roles of in-the-Moment Condom Negotiation Efficacy and Condom-Decision Abdication on Women's Intentions to Engage in Condomless Sex" (2019), 36 J. of Interpers. Violence NP9416).

[63] Condom refusal or removal disproportionately affects women, but it can be experienced by any person and the sexual assault laws are designed to provide equal protection to all. The offence of sexual assault protects the inviolability of each and every individual, and is inextricable from notions of power and control. In addition to sex inequality, there can also be inequality in sex. Requiring a condom is an act of agency, but negotiating its use often takes place in circumstances of inequality. Who has the authority to insist and ultimately decide how their bodies will be touched is at the heart of human dignity and equal sexual agency. Disregarding a complainant's insistence on a condom is both proof and practice of an unequal relationship. It allows one partner to appropriate to themself the ability to overrule the other partner's conditions of consent. It is a clear exercise of dominance which shows a disregard for the other person's ability to dictate the boundaries of their participation. Overruling the complainant's insistence on the use of a condom is unlawful; an accused is not permitted to privilege his desire over her express limits and use her as a means to his sexual ends.

[64] The recognition that condom use when required is part of the sexual activity in question provides the requisite protection for everyone against illegal conduct which produces complex harms. Having control over how one's body is touched must include the right to choose whether one's body is penetrated by a bare penis or a condom-covered penis and to limit one's consent accordingly. It is no different than having the right to choose whether one's body is touched over or under clothing, penetrated by a digit or a sex toy, or where and how penetration may occur. Preventing a complainant from limiting consent to circumstances where a condom is used erodes the right to refuse or limit consent to specific sexual acts, leaving "the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy" (C.A. reasons, at para. 3).

In *Kirkpatrick*, Martin J. for the majority distinguishes *R. v. Hutchinson,* 2014 SCC 19, which is summarized at pp. 658 – 9 of your casebook, on the basis that *Hutchinson* "is a classic case of deception in which the accused deliberately made holes in the condom hoping that pregnancy would result. It simply held that

cases involving condom sabotage and deceit should be analyzed under the fraud provision rather than as part of the sexual activity in question in s. 273.1."

By contrast, Coté, Brown and Rowe JJ, with whom Wagner CJ agreed, would have found that *Hutchinson* applied to the facts in *Kirkpatrick*. The minority agreed with Martin J in the result and emphasized that they "also broadly and emphatically agree with our colleague's summary … of Canadian sexual assault law. No means *only* no; and *only* yes means yes. Consent to sexual activity requires nothing less than positive affirmation. In this way, our law strives to safeguard bodily integrity and sexual autonomy for all." However, the minority criticized the distinction drawn by Martin J between *Kirkpatrick* and *Hutchinson* as "incoherent and illogical". Finding that *Hutchinson* would have governed the proper approach in *Kirkpatrick,* the minority judgment raised concerns about how Martin J's approach to the interpretation of "the sexual act in question" as extending to the question of condom use "opens the door to over-criminalization, the burden of which is likely to fall disproportionately on the same marginalized communities she claims to defend."[7] The minority judgment also makes an interesting argument about the nature of statutory interpretation within a changing social context.

[7] While Martin J. provides extensive citations in her judgment, the minority does not cite any research or other sources in support of this assertion.

Insert at p. 679, end of page

In brief reasons in *R v AE,* 2022 SCC 4, the Supreme Court of Canada applied the principles set out in this chapter to a case in which two accused continued sexual activity after the complainant had clearly said "no". In particular, the Court confirmed that the defence of honest but mistaken belief in consent can have no application in these circumstances.

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R v Brown
2022 SCC 18

The judgment of the Court was delivered by

Kasirer J. —

I. Overview

[1] Following a party at which he had consumed alcohol and "magic mushrooms", Matthew Winston Brown violently attacked Janet Hamnett, a person he did not know and who had done nothing to invite the assault. At the time, Mr. Brown was in what the trial judge described as a "substance intoxication delirium" that was so extreme as to be "akin to automatism" (2020 ABQB 166, 9 Alta. L.R. (7th) 375, at para. 87). While capable of physical movement, he was in a delusional state and had no willed control over his actions. Mr. Brown's extreme intoxication akin to automatism was brought about by his voluntary ingestion of the magic mushrooms which contained a drug called psilocybin. Mr. Brown was acquitted at trial. The Alberta Court of Appeal set aside that verdict and convicted him of the general intent offence of aggravated assault.

[2] At common law, automatism is "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action" (*R. v. Stone*, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, at para. 156). It is sometimes said that the effect of automatism is to provoke physical involuntariness whereby there is no connection between mind and body (see *Rabey v. The Queen*, 1980 CanLII 44 (SCC), [1980] 2 S.C.R. 513, at p. 518). Examples often given include the involuntary physical movement of an individual who has suffered a heart attack or seizure. Conduct that is involuntary in this sense cannot be criminal (see *R. v. Luedecke*, 2008 ONCA 716, 93 O.R. (3d) 89, at paras. 53-56, relying in particular on *Rabey*, at p. 519, per Ritchie J., and at p. 545, per Dickson J., as he then was, dissenting but not on this point).

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

[4] These are not drunkenness cases. The accused in each of these appeals consumed drugs which, they argued, taken alone or in combination with alcohol, provoked psychotic, delusional and involuntary conduct, which are reactions not generally associated with drunkenness. As I note below, there is good reason to believe Parliament understood that alcohol alone is unlikely to bring about the delusional state akin to automatism it sought to regulate in enacting s. 33.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. As Lauwers J.A. wrote in *R. v. Sullivan*, 2020 ONCA 333, 151 O.R. (3d) 353, "it is not clear that extreme alcohol intoxication causes non-mental disorder automatism as a matter of basic science" (para. 288). In any event, these reasons say nothing about criminal liability for violent conduct produced by alcohol alone

short of the psychotic state akin to automatism experienced by Mr. Brown and spoken to by the trial judge. I specifically leave intact the common law rule that drunkenness, absent clear scientific evidence of automatism, is not a defence to general intent crimes, including crimes of violence such as sexual assault.

[5] It thus bears emphasizing that Mr. Brown was not simply drunk or high. To be plain: it is the law in Canada that intoxication short of automatism is not a defence to the kind of violent crime at issue here. The outcome of the constitutional questions in these appeals has no impact on the rule that intoxication short of automatism is not a defence to violent crimes of general intent in this country.

[6] Parliament added s. 33.1 largely in response to *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63. In that case, the Court confirmed the common law rule that intoxication is not a defence to crimes of general intent. The majority in *Daviault* recognized, however, that the *Charter* mandated an exception to the common law rule: where intoxication is so extreme that an accused falls into a condition akin to automatism, a conviction for the offence charged would violate ss. 7 and 11(d) of the *Charter*. It would be unfair, reasoned the Court, to hold an individual responsible for crimes committed while in a state of automatism, as they are incapable of voluntarily committing a guilty act or of having a guilty mind.

[7] Crown counsel in this appeal and the *Sullivan* and *Chan* appeals recall that the *Daviault* exception was met with public incomprehension and disapproval. In dissent, Sopinka J. anticipated this grievance when he wrote that those who voluntarily render themselves intoxicated and then violently cause bodily harm to others are "far from blameless" (p. 128). In order to address the constitutional failings identified by the majority of the Court in a manner that would properly reflect the blameworthiness of the extremely self-intoxicated accused identified by the dissent, Parliament enacted s. 33.1. The new provision purported to remove the defence of automatism for the extremely self-intoxicated accused and put in place a constitutionally-compliant measure of criminal fault for the underlying violent offence. The Crown and the intervening attorneys general urge us to interpret s. 33.1 as validly imposing liability for violent crimes based on a standard of criminal negligence that would answer the violations of the *Charter* pointed to in *Daviault*.

[8] But the impugned provision of the *Criminal Code* does not establish a proper measure of criminal fault by reason of intoxication. Instead, s. 33.1 imposes liability for the violent offence if an accused interferes with the bodily integrity of another "while" in a state of self-induced intoxication rendering them incapable of consciously controlling their behaviour. Section 33.1 treats extreme voluntary intoxication, foreseeable or otherwise, as a condition of liability for the underlying violent offence and not as a measure of fault based on criminal negligence.

[9] Accordingly, the accused risks conviction for the relevant general intent offence — in Mr. Brown's case, for aggravated assault — based on conduct that occurred while they are incapable of committing the guilty act (the *actus reus*) or of having the guilty mind (*mens rea*) required to justify conviction and punishment. They are not being held to account for their conduct undertaken as free agents, including the choice to ingest an intoxicant undertaken when neither the risk of automatism nor the risk of harm was necessarily foreseeable. Instead, the accused is called to answer for the general intent crime that they cannot voluntarily or wilfully commit, an offence for which the whole weight of the criminal law and ss. 7 and 11(d) say they may be morally innocent. To deprive a person of their liberty for that involuntary conduct committed in a state akin to automatism — conduct that cannot be criminal — violates the principles of fundamental justice in a system of criminal justice based on personal responsibility for one's actions. On its face, not only does the text of s. 33.1 fail to provide a constitutionally compliant fault for

the underlying offence set out in its third paragraph, it creates what amounts to a crime of absolute liability.

[10] I hasten to say that there may well have been other paths for Parliament to achieve its legitimate aims connected to combatting extreme intoxicated violence. The sense that an accused who acts violently in a state of extreme self-induced intoxication is morally blameworthy is by no means beyond the proper reach of the criminal law. Protecting the victims of violent crime — particularly in light of the equality and dignity interests of women and children who are vulnerable to intoxicated sexual and domestic violence — is a pressing and substantial social purpose. And as I shall endeavour to show, it was not impermissible for Parliament to enact legislation seeking to hold an extremely intoxicated person accountable for a violent crime when they chose to create the risk of harm by ingesting intoxicants.

[11] The alternatives to the constitutionally fragile s. 33.1 strike different balances between individual rights and societal interests and, no doubt, each has advantages and shortcomings as a matter of social policy. Some of these options would be manifestly fairer to the accused while achieving some, if not all, of Parliament's objectives. I am mindful that it is not the role of the courts to set social policy, much less draft legislation for Parliament, as courts are not institutionally designed for these tasks. But it is relevant to the analysis that follows that, as noted by the majority in *Daviault* itself (p. 100) and by the majority of the Court of Appeal in *Sullivan*(para. 132), it would likely be open to Parliament to establish a stand-alone offence of criminal intoxication. Others, including the *voir dire* judge in this very case (2019 ABQB 770, at para. 80 (CanLII)), have suggested liability for the underlying offence would be possible if the legal standard of criminal negligence required proof that both of the risks of a loss of control and of the harm that follows were reasonably foreseeable. In either of these ways, Parliament would be enacting a law rooted in a "moral instinct" that says a person who chooses to become extremely intoxicated may fairly be held responsible for creating a situation where they threaten the physical integrity of others (I borrow the phrase "moral instinct" from Professors M. Plaxton and C. Mathen, "What's Right With Section 33.1" (2021), 25 *Can. Crim. L.R.* 255, at p. 257).

[12] Parliament did not enact a new offence of dangerous intoxication, nor did it adopt a new mode of liability for existing violent offences based on a proper standard of criminal negligence. With the utmost respect, I am bound to conclude the path Parliament chose in enacting s. 33.1 was not, from the point of view of ss. 7and 11(d) of the *Charter*, constitutionally compliant. I am unable to agree with what the Minister of Justice asserted on the third reading of s. 33.1 in Parliament: ". . . the approach taken in Bill C-72 is fundamentally fair, both to the victims of violence and to those accused of crime" (*House of Commons Debates* ("Hansard"), vol. 133, No. 224, 1st Sess., 35th Parl., June 22, 1995, at p. 14470).

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

[14] In the case of Mr. Brown, and on the strength of the findings of fact at trial, the conclusion may be plainly stated. Mr. Brown might well be reproached for choosing to drink alcohol and ingest magic mushrooms prior to the harm suffered by Ms. Hamnett, but that blame cannot ground criminal liability for the aggravated assault that occurred while he was in a state of delirium akin to automatism. On a

constitutional standard, he did not commit the guilty act of aggravated assault voluntarily and he was incapable of forming even the minimally-required degree of *mens rea* required for conviction of that offence. In my respectful view, to punish him in these circumstances, however exceptional they might be, would be intolerable in a free and democratic society. The law imposes the solemn and onerous duty on this Court to declare s. 33.1 unconstitutional (see *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 497). For the reasons that follow, I would set aside the judgment of the Court of Appeal, declare s. 33.1 to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and restore Mr. Brown's acquittal rendered at trial.

[*The Court discussed the proper approach to Charter interpretation in this case*]

…

[67] As a preliminary matter, the Court must first decide whether the rights of victims of intoxicated violence, in particular the rights of women and children under ss. 7 and 15 of the *Charter* and alluded to in the preamble to Bill C-72, should inform the analysis of a possible breach of the accused's rights under s. 7, or whether it is appropriate to consider these interests specifically at the justification stage under s. 1.

[68] The intervener Women's Legal Education and Action Fund Inc. (LEAF) invites this Court to balance the rights of the accused against the rights of women and children in the s. 7 analysis. It says that, in *Daviault*, there was no consideration of competing rights at that stage, unlike the clear engagement with equality, security and dignity interests in Bill C-72. These rights are not simply other social interests that should be "relegated" to the s. 1 justification. Where courts fail to undertake balancing under s. 7 — as the majority of the Court of Appeal did not do in *Sullivan*, for example — the effect is that, wittingly or unwittingly, they favour individual rights over those of vulnerable groups who disproportionately bear the risk of intoxicated violence. Others, including the Crown and the Canadian Civil Liberties Association, depart from this view and submit that the interests of women and children are properly considered under s. 1 following *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

[69] LEAF invokes *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mills*, [1999] 3 S.C.R. 668, in which this Court balanced competing *Charter* rights under the breach analysis. These cases involved situations where state action directly implicated multiple sets of *Charter* rights. In both, the procedural rights of the accused brought the *Charter* rights of another party into conflict and created the risk that both sets of rights would be undermined.

[70] In my view, the *Dagenais* and *Mills* mode of analysis does not apply and does not support the argument that balancing between the rights and interests of alleged perpetrators and victims of crime should take place under s. 7 in this circumstance. *Dagenais* and *Mills* apply when the *Charter* rights of two or more parties are in conflict and both are directly implicated by state action, which is not the case here. Section 33.1 affects the substantive rights of the accused subject to prosecution by the state. The equality and dignity interests of women and children are certainly engaged as potential victims of crime — but in this context, by virtue of the accused's actions, not of some state action against them. This is qualitatively different from the balancing undertaken for example in *Mills*, where it was state action — through the application of an evidentiary rule for the production of records to the accused relating to the complainant — that directly affected both the accused and the complainant. Section 33.1 operates to constrain the ability of an accused to rely on the defence of automatism but nothing in the provision limits, by the state's action, the rights of victims including the ss. 7, 15 and 28 *Charter* rights of women and children.

These interests are appropriately understood as justification for the infringement by the state. As the preamble of Bill C-72 makes plain, the equality, dignity and security interests of vulnerable groups informed the overarching social policy goals of Parliament; they are best considered under s. 1.

…

[78] The Crown is mistaken when it draws an analogy between impaired driving offences and s. 33.1. The gravamen of the offence faced by Mr. Brown does not include intoxication, unlike criminal offences for impaired driving. Counsel for Mr. Sullivan made the point plainly: "The gravamen of assault is not intoxication. Without intoxication, every element of an assault [must] be proven; without intoxication, driving is benign" (*Sullivan* and *Chan* appeals, R.F., at para. 44; see also *Sullivan*, at para. 65, per Paciocco J.A.).

[79] The requirements of s. 33.1 — that the accused be intoxicated at the material time and the intoxication be self-induced — are not, together or separately, a measure of fault. They are, as *Bouchard-Lebrun* makes clear, conditions of liability as the use of the word "while" in s. 33.1(2) confirms.

…

[82] I disagree with the view advanced by the Attorney General of Saskatchewan and others that the adjective "self-induced" must be read so that s. 33.1 carries with it a proper criminal negligence standard. The cases say that intoxication is "self-induced" where the accused voluntarily ingests a substance that they know or ought to know is an intoxicant, in circumstances where the risk of becoming intoxicated is or should be within their contemplation (see, e.g., *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99 ("*Chaulk (2007)*"), at para. 47). The term "self-induced intoxication" says nothing about whether the accused foresaw, or ought to have foreseen, the risk of extreme intoxication.

[83] Moreover, no plausible reading of the text suggests that self-induced intoxication brings with it a reasonable foreseeability of bodily harm, as the *voir dire* judge rightly wrote in this case, at paras. 36-37. In addition, I agree with Paciocco J.A. in *Sullivan* that the problem is not overcome by designating the violent act as the marked departure. This is so because, as he wrote, "moral fault cannot come from a consequence alone" (para. 94). Drawing on this Court's judgment in *Creighton*, at p. 58, he explained that the mental fault inherent in penal negligence "lies in [the] failure to direct the mind to a risk which the reasonable person would have appreciated" (para. 94). If the marked departure from the norm was simply the violent act, the law countenances a form of absolute liability…

…

[85] Contrary to the Crown's position, the "marked departure" standard of fault in s. 33.1(2) clearly attaches then to the violent offence, not the act of self-induced intoxication. Neither can the definition of "self-induced" supply the *mens rea* for criminal negligence, as it says nothing about risk, either by way of foreseeability of extreme intoxication or the possibility of violence.

[86] The whole of the text confirms this. Section 33.1(1) distinguishes self-induced intoxication from the prohibited offence, meaning the two cannot be the same. It provides that no defence is available where "the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence". This is telling and clearly indicates that what Parliament sought was to impose liability for the charged offence, namely the assaultive behaviour, and not the act of self-induced intoxication itself…

[*The Court then discussed various violations of s.7 of the Charter*]

…

[93] Section 33.1 … imposes criminal liability where a person's intoxication carries no objective foreseeability of harm. Just as it draws no distinction based on the seriousness of the effects of intoxication, neither does s. 33.1 draw any distinction based on the risk of harm, which may vary depending on the intoxicant in question. It is certainly true that some inherently risky forms of self-intoxication — such as mixing alcohol with dangerous street drugs — may carry reasonably foreseeable harm. The difficulty is that s. 33.1applies even where the intoxicant in question is typically known for its relaxing or therapeutic properties: [translation] ". . . the provision seems capable of applying to people who have done little or nothing for which they can be reproached" (H. Parent, "La constitutionnalité de l'article 33.1 du Code criminel: analyse et commentaires" (2022), 26 *Can. Crim. L. Rev.* 175, at p. 190). Forms of self-intoxication that carry reasonably foreseeable harm are more blameworthy than those that do not because the individual has proceeded in spite of the known risks. Yet s. 33.1 captures both indifferently on the premise that all extreme self-intoxication is blameworthy.

…

[95] Instead, s. 33.1 deems a person to have departed markedly from the standard of care expected in Canadian society whenever a violent act occurs while the person is in a state of extreme voluntary intoxication akin to automatism. This is so even where a loss of control or awareness of one's behaviour and a risk of harm was unforeseeable and even where the accused's conduct did not in fact depart markedly from the standard of a reasonable person. In doing so, s. 33.1 runs afoul of the principle of fundamental justice that penal liability requires proof of fault reflecting the offence and punishment faced by the accused (*Motor Vehicle Reference*, at pp. 513-15; *Vaillancourt*, at pp. 653-54). Since s. 33.1 allows a court to convict an accused without proof of the constitutionally required *mens rea*, s. 33.1 violates s. 7 (*Daviault*, at p. 90). By allowing courts to convict individuals of a crime without proof of *mens rea*, s. 33.1 turns those offences, which carry the possibility of imprisonment, into what amounts to absolute liability offences, contrary to s. 7 of the *Charter* (*Motor Vehicle Reference*, at p. 515).

(b) *Voluntariness as Required by Section 7*

[96] Section 33.1 also directs that an accused person is criminally responsible for their involuntary conduct. Because involuntariness negates the *actus reus* of the offence, involuntary conduct is not criminal, and Canadian law recognizes that the requirement of voluntariness for the conviction of a crime is a principle of fundamental justice (*Luedecke*, at para. 53; *Daviault*, at pp. 91-92). Mr. Brown was convicted by the Court of Appeal of aggravated assault, for actions that he did not commit voluntarily. This breaches s. 7.

…

[98] It may be that the voluntariness problem could be avoided if Parliament legislated an offence of dangerous intoxication or intoxication causing harm that incorporates voluntary intoxication as an essential element — in this hypothetical offence, the gravamen of the offence is the voluntary intoxication, not the involuntary conduct that follows. I recall that, in part, this was the invitation made by the majority of this Court in *Daviault* (p. 100); a suggested avenue of legislative action that had also been noted nearly twenty years before the enactment of Bill C-72 by Dickson J., as he then was, in *Leary* ("a crime of being drunk and dangerous") (pp. 46-47). I recall too that Paciocco J.A. signaled this option in *Sullivan*, as one that would not infringe the *Charter* rights that s. 33.1 disregards: "It would

criminalize", he wrote, "the very act from which the Crown purports to derive the relevant moral fault, namely, the decision to become intoxicated in those cases where that intoxication proves, by the subsequent conduct of the accused, to have been dangerous" (para. 134). This, however, is not what Parliament enacted in that s. 33.1 exposes the accused to jeopardy for the underlying offence, not for extreme intoxication which is not, in itself, an unlawful act.

[*The Court then found a violation of s.11(d) of the Charter*]

…

[103] As noted, s. 33.1 unequivocally removes a defence that the accused lacked the general intent or voluntariness to commit the offence. Accordingly, the fault and voluntariness of intoxication are substituted by s. 33.1 for the fault and voluntariness of the violent offence. The provision has been described as "a legislated form of guilt-by-proxy" whereby the moral blameworthiness that one might associate with extreme self-induced intoxication is substituted for the *mens rea* of the violent offences of general intent which make up the charge pursuant to s. 33.1(3) (Lawrence, at p. 391; see also F. E. Chapman, "*Sullivan*. Specific and General Intent be Damned: Volition Missing and *Mens Rea* Incomplete" (2020), 63 C.R. (7th) 164, at pp. 167-71). To avoid the improper substitution problem, the trier of fact must be sure that the fault attaching to the intoxication is such that the person can fairly be held accountable for their violent conduct.

…

[106] As a final point, Mr. Brown asserts that s. 33.1 infringes s. 7 of the *Charter* because the violent offence occurs later in time than the intention to become intoxicated. Mr. Brown says this is contrary to rule of contemporaneity, which holds that the *actus reus* and *mens rea* must coincide. The Crown responds that symmetry is not required between the *mens rea* and the consequences of the prohibited act.

[107] Symmetry differs from contemporaneity. Symmetry refers to knowledge or foreseeability of the precise consequences of the *actus reus*. For example, in *Creighton*, McLachlin J., as she then was, held that the accused need not foresee death, the consequence, specifically — it was enough to foresee bodily harm that is neither trivial nor transitory (pp. 44-45). Contemporaneity holds that the guilty mind must concur with the prohibited act, although this principle is applied flexibly (*R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 156). Contemporaneity has not yet been recognized as a principle of fundamental justice, and I respectfully decline to do so here. The *mens rea*, voluntariness, and improper substitution breaches remain the most accurate and relevant way of describing the way in which s. 33.1 imposes absolute liability, contrary to the principles of fundamental justice.

[108] I thus agree with the conclusion of the *voir dire* judge and with Khullar J.A., who relied on the reasons of the majority of the Court of Appeal in *Sullivan*, that s. 33.1violates ss. 7 and 11(d) of the *Charter*.

[109] I turn to a consideration of whether s. 33.1 can be saved under s. 1.

…

- (1) Pressing and Substantial Purpose

[115] The parliamentary record, the preamble and, of course, s. 33.1 itself, all point to the two broad reasons why s. 33.1 was enacted in the period following *Daviault*: the protection of the victims of

extremely intoxicated violence and a sense that the law should hold offenders accountable for the bodily harm they cause to others when, by choice, they become extremely intoxicated. With some variations, these were the purposes recognized by the *voir dire* judge and all the judges on appeal in this case.

[*The Court found both objectives to be valid concluding:*]

…

[126] This distinct and particularized accountability goal can serve as an objective for the purpose of the *Oakes* test in the unusual circumstances of this case. Here, the objective concerns the choice to create a risk, and this choice is not the conduct Parliament aims to criminalize. In other words, the objective is separate from the gravamen of the offence (i.e., the assault), which ensures that the ends and the means remain distinct. Stated in this manner, accountability in this context is pressing and substantial and fits appropriately within the *Oakes* analysis. This is not just a preference for other values over rights that have been constitutionally entrenched; right or wrong, it is a policy choice, by Parliament, that accountability for creating a risk of violence and bodily harm by way of extreme voluntary intoxication take precedence in a free and democratic society (see Coughlan, at p. 2). It is not circular to frame the accountability objective in this way; the finding that a right has been violated, as I have found here with respect to ss. 7 and 11(d), is a preliminary conclusion. An "infringement" in this context is a limit that is not justified (*K.R.J.*, at paras. 91-92 and 115-16). The infringement question is only answered once the *prima facie* breaches have been considered in light of the broader public interest considerations mandated by *Oakes*.

[*The Court held that while s.33.1 was rationally connected to both the protective and accountability objectives that there were less rights invasive alternatives.*]

…

[136] I have no hesitation imagining less impairing options. Many scholars have advanced options that would trench less on the rights of the accused (see, e.g., D. Stuart, "Parliament Should Declare a New Responsibility for Drunkenness Based on Criminal Negligence" (1995), 33 C.R. (4th) 289; T. Quigley, "A Time for Parliament to Enact an Offence of Dangerous Incapacitation" (1995), 33 C.R. (4th) 283; M. Tremblay, "*Charte canadienne* et intoxication volontaire: l'article 33.1 du *Code criminel* et ses solutions de rechange" (2020), 79 *R. du B.* 67, at p. 98; G. Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012), 57 *S.C.L.R.* (2d) 111). Paciocco J.A. concluded that a stand-alone offence of criminal intoxication would achieve similar objectives as s. 33.1 and would arguably improve on the protective purpose by making deterrence more focused on the intoxication itself (paras. 132-34). It is certainly true, as the Minister said in Parliament, that the lesser stigma and lesser penalties associated with a new offence would punish intoxicated perpetrators less severely for their wrongs than would a conviction for the underlying offence. But it is an alternative to the consequence of allowing the extremely intoxicated offender to escape punishment altogether.

[137] Apart from the stand-alone offence, others have proposed alternative paths to liability for the underlying violent offence based on a criminal negligence standard more carefully crafted than that advanced by s. 33.1. One example is that proposed by the *voir dire* judge. He accepted Parliament's goal of holding people accountable for a violent act when they have departed from a minimum standard of care by voluntarily consuming intoxicants (para. 79). However, he observed that this standard could be achieved in a less impairing way if s. 33.1 incorporated a true objective fault standard that clearly attaches to the act of self-induced intoxication, which would allow the trier of fact to consider whether a loss of control and bodily harm were both reasonably foreseeable at the time of intoxication (para. 80). He

concluded that this would "truly be a link between the *mens rea* of becoming intoxicated and the *mens rea* for the underlying offence" (*ibid.*). This would align with the principle in *DeSousa* and *Creighton* that specific consequences need not always be foreseen provided there is an objectively foreseeable risk of bodily harm.

[138] In terms of the minimal impairment analysis, the stand-alone offence fails to meet Parliament's full objective and thus was not a viable alternative. It would have labelled Mr. Brown's offence as one of negligent or dangerous intoxication, rather than stigmatize him for the aggravated assault. The stand-alone offence might also have led to lesser sentences, and, as noted above, the option was criticized as proposing a "drunkenness discount". Indeed, Parliament rejected the stand-alone offence because it would fail to recognize the true harm committed by an offender and would send the message that an offender should not be held accountable for the harm that is inherent in the underlying offence (see, e.g., Department of Justice, *Self-Induced Intoxication as Criminal Fault: Information Note* (1995), at p. 5). This would be a particular failure in respect of Parliament's goal to hold perpetrators to account in as full a manner as possible for the choice to become extremely intoxicated and the violence committed while in that state (see P. Healy, "Intoxication in the Codification of Canadian Criminal Law" (1994), 73 *Can. Bar Rev.* 515, at pp. 541-42; E. Sheehy, "The intoxication defense in Canada: why women should care" (1996), 23 *Contemp. Drug Probs.* 595, at p. 618). In the circumstances, it is difficult to conclude that the stand-alone offence would have achieved the objectives in a "real and substantial manner".

[139] The alternative proposed by the *voir dire* judge could however allow an accused to be convicted for the underlying violent act and not simply negligent or dangerous intoxication. Incorporating a true marked departure standard into s. 33.1 would allow it to achieve the minimum objective fault standard required by the Constitution (in the case of offences that are not constitutionally required to contain subjective fault, per *R. v. Martineau*, [1990] 2 S.C.R. 633). Indeed, Khullar J.A. recognized that this alternative would be "less problematic".

…

[142] While I conclude that s. 33.1 is not minimally impairing of an accused's ss. 7 and 11(d) rights, I recognize that Parliament is entitled to a degree of deference in measuring the reasonable character of policy alternatives. But even if those who defend the law as minimally impairing were right, I am unequivocally of the view that s. 33.1 must fail on the last branch of the proportionality test which reveals the most profound failings of the provision. Mindful that the proportionality analysis is holistic and depends on a close connection between the final two stages of *Oakes* (*Hutterian Brethren*, at para. 191, per LeBel J.), I turn now to an explanation of why s. 33.1 must also fail on an assessment of the relative benefits and negative effects of the law under the *Oakes* test.

…

[164] As this Court held in *Bedford*, at the final stage of the s. 1 analysis, the negative impact of the law is weighed against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are weighed both qualitatively and quantitatively. As with the previous stages of the justification analysis, the state continues to bear the burden of showing that the breaches are justified having regard to Parliament's goals. The Crown is well placed to call the social science and expert evidence required to justify the law's impact in societal terms (*Bedford*, at para. 126). At the end of the day, the courts determine whether the *Charter* infringements resulting from state action are too high a price to pay for the benefit of the law.

[165] In my respectful view, the Crown has not discharged its burden of showing that the benefits suggested by the evidence are fairly realized by s. 33.1. The Crown warns of widespread sexual and intimate partner violence, with the implication that such gendered violence will go undeterred in the absence of s. 33.1. I accept that such violence exists in the severe magnitude described by the Crown. But even the current common law precludes an accused from relying on voluntary intoxication as a complete answer to crime in a broad sweep of instances of intoxicated violence. It is not the case that in the absence of what amounts to a rule of absolute liability in s. 33.1 such violence will go unpunished or undeterred. Rather, in relation to the evidence presented by the Crown, in the absence of s. 33.1, the benefits tied to accountability and protection will continue to be met, to a not unmeaningful extent, through the application of common law rules which prevent the defence of intoxication including to general intent crimes of violence. This would be truer still if a more fairly crafted rule than s. 33.1 was enacted by Parliament.

[166] The limits imposed on the most fundamental *Charter* rights in our system of criminal justice outweigh societal benefits that are already in part realized, and which Parliament can advance through other means. The weight to be accorded to the principles of fundamental justice and the presumption of innocence cannot be ignored here. In *Oakes*, Dickson C.J. explained that different rights and freedoms carry different weight: "Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society" (pp. 139-40). Some rights, such as the protections in ss. 7 and 11(d), will not be easily outweighed by collective interests under s. 1. That is the case here, as s. 33.1 trenches on fundamental principles at the very core of our criminal law system, including the presumption of innocence upon which the fairness of the system itself depends. Section 33.1 creates a liability regime that disregards principles meant to protect the innocent, and communicates the message that securing a conviction is more important than respecting basic principles of justice. Balancing the salutary and deleterious effects of the law, I respectfully conclude that the impact on the principles of fundamental justice is disproportionate to its overarching public benefits. For these reasons, the limits s. 33.1 places on ss. 7 and 11(d) of the *Charter* cannot be justified in a free and democratic society.

The above decision was rendered in May 2022. By June 2022, Parliament had amended s.33 of the Criminal Code as follows:

Self-induced Extreme Intoxication

Offences of violence by negligence

> **33.1 (1)** A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
>
> - **(a)** all the other elements of the offence are present; and
> - **(b)** before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.
>
> **Marked departure — foreseeability of risk and other circumstances**

(2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

Offences
(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

Definition of extreme intoxication
(4) In this section, **extreme intoxication** means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour.

For a discussion of *Brown* and the subsequent amendments see Kent Roach *Criminal Law* 8th ed (Toronto: Irwin Law, 2022) at 311-318 and Kerri Froc and Elizabeth Sheehy "Last Among Equals: Women's Equality, R. v. Brown and the Extreme Intoxication Defence" (2022) 73 U.N.B.L.J. 268

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The next case raises similar issues about self-defence, self-help and the relevance of a degree of self-defence that may be judged to be excessive in the circumstances.

R v Khill
2021 SCC 37

[*The accused was awoken by his female partner to a loud knocking outside their home and saw that the dashboard lights of his pickup truck were on. He retrieved and loaded his shotgun, left his home and approach his truck shouting "Hey hands up!" He shot twice, fatally killing an unarmed intruder with a folding knife in his pocket. The accused called 9-11 telling the dispatcher he shot the unarmed person in self-defence. He was charged with second degree murder with the included offence of manslaughter but acquitted by a jury after judicial instructions that made no reference to the jury examining the accused's role in the incident under s.34(2)(c) of the Code. The Crown's appeal was allowed by the Ontario Court of Appeal on the basis that such an instruction was necessary. The accused appealed.*]

The judgment of Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. was delivered by

Martin J. —

I. Introduction

[1] The law of self-defence plays an important part in the criminal law and in society. At the core of the defence is the sanctity of human life and physical inviolability of the person. Preserving life and limb operates to explain both why the law allows individuals to resist external threats and why the law imposes limits on the responsive action taken against others in its name. Life is precious. Any legal basis for taking it must be defined with care and circumspection (*R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 82).

[2] The contours of our law of self-defence are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour. To the extent self-defence morally justifies or excuses an accused's otherwise criminal conduct and renders it non-culpable, it cannot rest exclusively on the accused's perception of the need to act. Put another way, killing or injuring another cannot be lawful simply because the accused believed it was necessary. Self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances. A fact finder is obliged to consider a wide range of factors to determine what a reasonable person would have done in a comparable situation.

[3] In March 2013, Parliament's redesigned *Criminal Code* provisions on self-defence came into force. These changes not only expanded the offences and situations to which self-defence could apply, but also afforded an unprecedented degree of flexibility to the trier of fact. This flexibility is most obviously expressed by the requirement to assess the reasonableness of the accused's response by reference to a non-exhaustive list of factors, one of which is "the person's role in the incident". The interpretation and breadth of this new phrase is at the heart of this appeal.

[4] Is this factor, as argued by Mr. Khill, restricted to cases of unlawful conduct, morally blameworthy behaviour or provocation as previously defined in the repealed provisions? Or does it include any relevant conduct by the accused throughout the incident that colours the reasonableness of the ultimate act that is the subject matter of the charge? I conclude that it is the latter. While the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances, the jury must take into account the extent to which the accused played a role in bringing about the conflict to answer that question. It needs to consider whether the accused's conduct throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

[5] In the present case, this jury was not instructed to consider the effect of Mr. Khill's role in this incident on the reasonableness of his response and I am satisfied this was an error of law that had a material bearing on the jury's verdict.

…

[11] While no definitive timeline emerged from the evidence, Mr. Khill's counsel submitted to this Court that the time between Mr. Khill first hearing the noises in his bedroom and the death of Mr. Styres was a matter of minutes at most, and certainly less than ten minutes.

[12] At trial, Mr. Khill testified that he feared that whoever had entered the truck may well attempt to enter the garage or house next. Mr. Khill claimed that he perceived the threat from the noise outside as so imminent that it was unnecessary to take the time to call 911. At the same time, he acknowledged in cross-examination that he was aware no one had attempted to enter the home or garage before he chose to go outside and confront whoever was in his truck. Mr. Khill claimed that his intent was to find out who was outside, confront them and, "if they choose to surrender, then [he] would disarm and detain them" (A.R., vol. V, at p. 306). The defence also adduced evidence about Mr. Khill's and Ms. Benko's concerns that someone may have previously tested the electronic keypad to their home.

[13] Mr. Khill's training as a part-time reservist in the Canadian Armed Forces featured prominently at trial. His experience consisted of intermittent employment from 2007 to 2011 with a local artillery unit, ending some five years before the incident. The only training qualifications in evidence consisted of the two most basic army courses, being the Basic Military Qualification and Soldier Qualification courses, one of which he completed on a part-time basis as a co-op student in high school. He explained his decision to leave the home with a gun was a learned response from his training to "gain control and neutralize the threat" (A.R., vol. V, at p. 302). Mr. Khill acknowledged that when he received his training years before, a clear line was drawn between battlefield conditions and civilian life. There was also evidence that he had received training that even in war-like situations, the military has strict rules concerning the use of deadly force.

[14] Mr. Khill admitted he spent no time thinking and his response did not include "any of the civilian aspects" suggested by the Crown, such as calling 911, turning on the porch light or verbally confronting Mr. Styres from a safe distance (A.R., vol. V, at p. 356; see also pp. 300, 352 and 355). While acknowledging that staying inside the safety of his home with Ms. Benko would have been a reasonable option, Mr. Khill claimed that going outside, advancing alone into the darkness with a loaded gun against an unknown number of assailants, possibly armed as heavily as he was, seemed reasonable to him. Mr. Khill also explained his mistaken perception that Mr. Styres had a gun was based on his military training about what hand movements are consistent with the raising of a firearm. Despite failing to

confirm whether Mr. Styres in fact possessed a weapon, Mr. Khill nevertheless fired two successive volleys into Mr. Styres at short range, killing him.

[*Martin J. discusses the 2013 reforms to self defence*]

…

[39] Parliament looked to the previous sections and corresponding jurisprudence to find a coherent way forward. It worked with, but not necessarily within, the existing elements of the prior law. Parliament then dismantled the structure of the old provisions and constructed something original. In doing so it took many of the building blocks from the prior law, left some as rubble, brought in some new materials and reshaped others to fit the new form. There is now only one door to the new edifice for all cases of defence of the person. Even if one accepts that the new unified framework in s. 34 was built upon the foundation of the old provisions and case law, it changed the law of self-defence in significant ways by broadening the scope and application of self-defence and employing a multifactorial reasonableness assessment.

[40] First, the new self-defence provisions are "broader in compass" (Paciocco (2014), at pp. 275-76). For instance, under former s. 34(1) and (2), the accused had to show they faced or reasonably perceived an unlawful "assault". Under the new law, what is relevant is reasonably apprehended "force" of any kind, including force that is the product of negligence. The accused's response under the new law is also no longer limited to a defensive use of force. It can apply to other classes of offences, including acts that tread upon the rights of innocent third parties, such as theft, breaking and entering or dangerous driving. Replacing "assault" with "force" also clarifies that imminence is not a strict requirement, consistent with jurisprudence interpreting the old provisions since *Lavallee* (imminence remains a factor under s. 34(2)(b)). The accused need not believe that the victim had the *present* ability to effect a threat of physical force, as is required in order to establish an assault under s. 265(1)(b) of the *Criminal Code*. Finally, s. 34 is equally applicable whether the intention is to protect oneself or another, and is no longer circumscribed to persons "under [the accused's] protection", as was previously required by former s. 37.

[41] Second, Parliament chose a novel methodology when it removed the tangle of preliminary and qualifying conditions under the previous provisions and established a unified framework with a general reasonableness standard. The conditions formerly imposed by each of the self-defence provisions were screening devices used to determine whether the defence was left with the jury in the first place, and then to determine whether the defence had been established. Some of these concepts are now incorporated into s. 34(2) as relevant factors in the reasonableness inquiry. As such, the legal effect of the erstwhile preliminary and qualifying conditions in former ss. 34 to 37 has been transformed.

[42] The importance of this reform cannot be overstated. As Justice Paciocco writes, "the evaluative component of the defence is more fluid, and factors that would not have been contemplated under the repealed provisions are now available to the decision-maker" (Paciocco (2014), at p. 295). It is now for the trier of fact to weigh these factors and determine the ultimate success of the defence. The discretion conferred on triers of fact means they are now free to grant the defence in the absence of what was previously a condition for its success. For example, while the previous s. 34(1) required as a preliminary condition that the force used be "no more than is necessary", under the new framework, the nature and proportionality of the accused's response to the use or threat of force is but one factor (s. 34(2)(g)) that informs the overall reasonableness of the accused's actions in the circumstances.

[43] Likewise, provocation or the absence of provocation is no longer a preliminary requirement that funnels the accused through one door or another, but rather simply a factor to be considered. The trier of fact is therefore "freer . . . to treat provocation as an ongoing consideration that can influence the final

determination of reasonableness rather than a mere threshold consideration that expires in influence once it is determined which self-defence provision is to be applied" (Paciocco (2014), at p. 290).

[44] The upshot of Parliament's choice is that the defence is now more open and flexible and additional claims of self-defence will be placed before triers of fact. Even in situations where the extent of the accused's initial involvement is contested or the violent encounter developed over a series of discrete confrontations, the unified framework under s. 34 means judges need only provide juries with a single set of instructions.

[45] Replacing preliminary and qualifying conditions with reasonableness factors also means these factors must be considered in all self-defence cases in which they are relevant on the facts. By contrast, under ss. 34 to 37 of the prior regime, some requirements were only engaged in certain situations, depending on which of those provisions governed. For example, while the former s. 37 required that the force used be no more than necessary, there was no similar requirement under the former s. 34(2) (*Hebert*, at para. 16). Now, however, the proportionality of an accused's actions in response to a threat is always a discrete factor to be considered under s. 34(2)(g). It may be a deciding factor, even where the accused was an otherwise innocent victim of circumstance (*R. v. Parr*, 2019 ONCJ 842; *R. v. Robertson*, 2020 SKCA 8, 386 C.C.C. (3d) 107, at paras. 41-43).

[46] In practice, the new provisions are simultaneously more generous to the accused and more restrictive: the provisions narrow the scope of self-defence in some factual circumstances and broaden it in others (*R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22, at paras. 47-48; Paciocco (2014), at p. 296). The transposition of mandatory conditions into mere factors suggests more flexibility in accessing the defence, but this added flexibility is counter-balanced by the requirement to consider certain factors — including proportionality and the availability of other means to respond to the use or threat of force — in every case in which they are relevant, regardless of the genesis of the confrontation or the features of the dispute.

[47] The question also arises whether the amendments have altered the scope or nature of self-defence by shifting its moral foundation from justification to excuse. On a justificatory account of self-defence, killing in self-defence is not considered wrongful because it upholds the right to life and autonomy of the person acting. It is grounded on the necessity of self-preservation (*R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109, at para. 68). In contrast, an excuse negates the blameworthiness of the accused. It mainly works by denying the voluntary character of an act that is nevertheless wrongful. A number of theorists have questioned whether self-defence is a justification, especially outside the classic case of defence against an unlawful use of force. They are divided in cases where the accused uses force against a reasonably perceived threat that does not exist in fact, against an attack that they have provoked, and when the defending act is not proportional or necessary (A. Brudner, "Constitutionalizing self-defence" (2011), 61 *U.T.L.J.* 867, at pp. 891-95; C. Fehr, "Self-Defence and the Constitution" (2017), 43 *Queen's L.J.* 85, at p. 109; K. Ferzan, "Justification and Excuse", in J. Deigh and D. Dolinko, eds., *The Oxford Handbook of the Philosophy of the Criminal Law* (2011), 239, at p. 253; K. Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012), 16 *Can. Crim. L. Rev.* 275, at p. 276-77). In such cases, the defending act is not considered rightful or tolerable by many authors, but guilt can be avoided when the circumstances call into question the voluntariness of the act, which brings it closer to an excuse and the law of necessity.

[48] The 2013 amendments further obscure the moral foundation of self-defence. The new provisions retain the underlying principle that the accused's actions are a response to an external threat to their bodily integrity. However, unlike the old law, the self-defence provisions no longer use the language of

justification. Section 34 simply states that the accused "is not guilty of an offence" where the requirements of the defence are met. Further, the elimination of an "unlawfu[l] assaul[t]" (per the previous s. 34(1)) or an "apprehension of death or grievous bodily harm" (per the previous s. 34(2)) as discrete triggering features arguably removes any residual boundary between the "morally justifiable" and "morally excusable" categories of the defence. Some argue that the new s. 34 may accommodate a continuum of moral conduct, including acts that are merely "morally permissible" where the threat and response meet a reasoned equilibrium (Fehr, at p. 102). This suggests the defence is neither purely a justification nor an excuse, instead occupying a middle ground of "permissibility" between rightfulness and blamelessness. As will become apparent, the line between justification and excuse has been blurred by the amendments, and this must be taken into consideration in interpreting the new provisions. Because the defence is now available in circumstances that may not fit neatly within the traditional justification-based framework, the need to consider all of the accused's conduct over the course of the incident that is relevant to the reasonableness of the act of purported self-defence takes on greater importance.

[49] To summarize, while a driving purpose of the amendments was to simplify the law of self-defence in Canada, Parliament also effected a significant shift. It is widely recognized by appellate courts across the country and academics that these amendments resulted in substantive changes to the law of self-defence… (The words "person's role in the incident" in s. 34(2)(c) must be interpreted in light of the expansive and substantive changes to the law and not read simply with reference to the old provisions.

…

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

[52] This element of self-defence considers the accused's state of mind and the perception of events that led them to act. As stated previously, the new provisions include both defence of self and defence of another. Unless the accused subjectively believed that force or a threat thereof was being used against their person or that of another, the defence is unavailable.

[53] Importantly, the accused's actual belief must be held "on reasonable grounds". Good reason supports the overlay of an objective component when assessing an accused's belief under s. 34(1)(a) and in the law of self-defence more generally. As self-defence operates to shield otherwise criminal acts from punitive consequence, the defence cannot depend exclusively on an individual accused's perception of the need to act. The reference to reasonableness incorporates community norms and values in weighing the moral blameworthiness of the accused's actions (*Cinous*, at para. 121). It "is a quality control measure used to maintain a standard of conduct that is acceptable not to the subject, but to society at large" (Paciocco (2014), at p. 278).

[54] The test to judge the reasonableness of the accused's belief under the self-defence provisions has traditionally been understood to be a blended or modified objective standard. Reasonableness was not measured "from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances" (*R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674, at para. 18). Instead, it was contextualized to some extent: the accused's beliefs were assessed from the perspective of an ordinary person who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused's belief or actions (*Lavallee*, at p. 883).

[55] For example, an accused's prior violent encounters with the victim were taken into account to assess whether the accused believed on reasonable grounds that they faced an imminent threat of death or grievous bodily harm (*Pétel*, at p. 13-14; *Lavallee*, at pp. 874 and 889… An accused's mental disabilities

were also considered in the reasonableness assessment (*Nelson*, at pp. 370-72; *R. v. Kagan, 2004 NSCA 77, 224 N.S.R. (2d) 118, at paras. 37-45).*

[56] However, not all personal characteristics or experiences are relevant to the modified objective inquiry. The personal circumstances of the accused that influence their beliefs — be they noble, anti-social or criminal — should not undermine the *Criminal Code*'s most basic purpose of promoting public order (*Cinous*, at para. 128, per Binnie J., concurring). Reasonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of criminal subcultures (*Reilly v. The Queen*, 1984 CanLII 83 (SCC), [1984] 2 S.C.R. 396, at p. 405; *Cinous*, at para. 129-30, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*" (*R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 34). Personal prejudices or irrational fears towards an ethnic group or identifiable culture could never acceptably inform an objectively reasonable perception of a threat. This limitation ensures that racist beliefs which are antithetical to equality cannot ground a belief held on reasonable grounds. Doherty J.A. succinctly illustrated this principle in his reasons in this appeal, at para. 49:

> For example, an accused's "honest" belief that all young black men are armed and dangerous could not be taken into account in determining the reasonableness of that accused's belief that the young black man he shot was armed and about to shoot him. To colour the reasonableness inquiry with racist views would undermine the very purpose of that inquiry. The justificatory rationale for the defence is inimical to a defence predicated on a belief that is inconsistent with essential community values and norms.

[57] The question is not therefore what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive (*Pilon*, *at para. 74).* The law also continues to accept that an honest but mistaken belief can nevertheless be reasonable and does not automatically bar a claim to self-defence (*Lavallee*, at p. 874; *Pétel*, at p. 13; *R. v. Billing*, 2019 BCCA 237, 379 C.C.C. (3d) 285, at para. 9; *R. v. Robinson*, 2019 ABQB 889, at para. 23 (CanLII); *R. v. Cunha*, 2016 ONCA 491, 337 C.C.C. (3d) 7, at para. 8).

[58] Reasonableness is ultimately a matter of judgment and "[t]o brand a belief as unreasonable in the context of a self-defence claim is to declare the accused's act criminally blameworthy" (C.A. reasons, at para. 46; see also *Cinous*, at para. 210, per Arbour J. in dissent but not on this point; *Pilon*, at para. 75; *Phillips, at para. 98*; G. P. Fletcher, "The Right and the Reasonable", in R. L. Christopher, ed., *Fletcher's Essays on Criminal Law* (2013), 150, at p. 157).

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

[59] The second element of self-defence considers the accused's personal purpose in committing the act that constitutes the offence. Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; Paciocco (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.

[60] The motive provision also distinguishes self-defence from other situations that may involve the excusable or authorized application of force by an accused, such as preventing the commission of an

offence (s. 27), defence of property (s. 35) or citizen's arrest (s. 494). Clarity as to the accused's purpose is critical, as the spectrum of what qualifies as a reasonable response may be limited by the accused's purpose at any given point in time. The range of reasonable responses will be different depending on whether the accused's purpose is to defend property, effect an arrest, or defend themselves or another from the use of force.

[61] An accused's purpose for acting may evolve as an incident progresses or escalates. Parliament's decision to modify the law of defence of person, defence of property and citizen's arrest under a single bill recognized this overlap, as each is "directly relevant to the broader question of how citizens can lawfully respond when faced with urgent and unlawful threats to their property, to themselves and to others" (*House of Commons Debates*, vol. 146, No. 58, 1st Sess., 41st Parl., December 1, 2011, at p. 3833 (Robert Goguen)). Initial steps taken to defend one's property may transition into a situation of self-defence. Likewise, separate defences may rightly apply to distinct offences or phases of an incident (*Cormier*, at para. 67). At the same time, great care is needed to properly articulate the threat or use of force that existed at a particular point in time so that the assessment of the accused's action can be properly aligned to their stated purpose. Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about. As recognized by the then-Parliamentary Secretary for the Minister of Justice at second reading, "all of these laws, any one of which may be pertinent to a given case, must be clear, flexible and provide the right balance between self-help and the resort to the police. That is why all these measures are joined together in Bill C-26" (*House of Commons Debates*, vol. 146, No. 58, at p. 3833 (Robert Goguen)).

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

[62] The final inquiry under s. 34(1)(c) examines the accused's response to the use or threat of force and requires that "the act committed [be] reasonable in the circumstances". The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon. The law of self-defence might otherwise "encourage hot-headedness and unnecessary resorts to violent self-help" (Roach, at pp. 277-78). That the moral character of self-defence is thus now inextricably linked to the reasonableness of the accused's act is especially important as certain conditions that were essential to self-defence under the old regime — such as the nature of the force or threat of force raising a reasonable apprehension of death or grievous bodily harm — have been turned into mere factors under s. 34(2).

[63] The transition to "reasonableness" under s. 34(1)(c) illustrates the new scheme's orientation towards broad and flexible language. While later judicial interpretations of the old law treated the words "no more force than is necessary" as akin to "reasonableness" (*R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at paras. 25 and 37; *R. v. Szczerbaniwicz*, 2010 SCC 15, [2010] 1 S.C.R. 455, at paras. 20-21), the new provision explicitly adopts this standard and applies it in all cases. As such, the ordinary meaning of the provision is more apparent to the everyday citizen and not dependent on an appreciation of judicial interpretation or terms of art (Technical Guide, at p. 21). This reflects Parliament's intent to make the law of self-defence more comprehensible and accessible to the Canadian public (*House of Commons Debates*, vol. 146, No. 109, 1st Sess., 41st Parl., April 24, 2012, at pp. 7063-64 (Robert Goguen)).

[64] Through s. 34(2), Parliament has also expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the

provision dictates, the starting point is that reasonableness will be measured according to "the relevant circumstances of the person, the other parties and the act". This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused — including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1)).

[65] Nevertheless, the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time. For example, even if Mr. Khill's military training qualifies as a relevant personal characteristic, it does not convert the reasonableness determination into a personal standard built only for him, much less a lower standard than would otherwise be expected of a reasonable person in his shoes. The law of self-defence cannot offer different rules of engagement for what happens at the homes of those with military experience or allow "training" to replace discernment and judgment. Section 34(1)(c) asks whether the "act committed is reasonable in the circumstances". It does not ask whether Mr. Khill's military training makes his act reasonable nor whether it was reasonable for this accused to have committed the act. The question is: what would a reasonable person with similar military training do in those civilian circumstances?

[66] As observed by Doherty J.A. at para. 58 of his reasons, the "relevant circumstances of the accused" in s. 34(2) can also include any mistaken beliefs reasonably held by the accused. If the court determines that the accused believed wrongly, but on reasonable grounds, that force was being used or threatened against them under s. 34(1)(a), that finding is relevant to the reasonableness inquiry under s. 34(1)(c). However, while s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's *actions*, not their mental state.

[67] Courts must therefore avoid treating the assessment of the reasonableness of the *act* under s. 34(1)(c) as equivalent to reasonable *belief* under s. 34(1)(a). Beyond honest but reasonable mistakes, judges must remind juries that the objective assessment of s. 34(1)(c) should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences. As simply put by the then-Parliamentary Secretary to the Minister of Justice at second reading, "If a person seeks to be excused for the commission of what would otherwise be a criminal offence, the law expects the person to behave reasonably, including in the person's assessment of threats to himself or herself, or others" (*House of Commons Debates*, vol. 146, No. 58, at p. 3834 (emphasis added) (Robert Goguen)).

[68] Parliament provides further structure and guidance because the fact finder "shall" consider all factors set out in paragraphs (a) to (h) of s. 34(2) that are relevant in the circumstances of the case. The original bill introduced in the House of Commons provided only that the court "may" consider the enumerated factors, but that was changed to make "it clear that it is obligatory, rather than permissible, for the court to consider all relevant circumstances" (*House of Commons Debates*, vol. 146, No. 109, at p. 7065 (Robert Goguen)). The factors listed are not exhaustive, and this allows the law to develop.

[69] The "act committed" is the act that constitutes the criminal charge — in this case, the shooting. Given s. 34(1)(c), the question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. There is thus no requirement for the Crown to show that a "person's role in the incident" was itself unreasonable before it may be considered as a factor under s. 34(1)(c). As long as "the person's role in the incident" is probative as to

whether the act underlying the charge was reasonable or unreasonable it may be placed before the trier of fact. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise. No single factor is necessarily determinative of the outcome.

[70] As previously explained, Parliament's choice of a global assessment of the reasonableness of the accused's otherwise unlawful actions represents the most significant modification to the law of self-defence. While new to the law of self-defence, this is not the first time Parliament has asked judges and juries to assess the reasonableness of an accused's conduct or used a multifactorial legal test. The clear and common methodology which applies in such instances also operates under s. 34(2). The parties can be expected to make submissions about the legal interpretation of the factors, which apply, the evidence that may support or refute them and the weight to be assigned to each applicable factor. Indeed, whether a certain factor needs to be considered at all or the weight to be given to it will often be contested in final argument and/or when counsel makes submissions concerning what should be left to the jury.

[71] The parties agree with this overall framework but divide over the meaning and scope of one of the listed factors. It is to that issue that I now turn.

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

[72] The correct interpretation of "the person's role in the incident" lies at the heart of this appeal. Mr. Khill argues that it is a very limited concept: it only captures conduct that also qualifies as unlawful, provocative or morally blameworthy. In substance, Justice Moldaver accepts this submission but also proposes a new test. In his opinion, this factor would only apply when the accused has engaged in conduct that is sufficiently wrongful, including conduct that is "excessive."

[73] Imposing either the appellant's or my colleague's additional unwritten conditions onto s. 34(2)(c) creates an unnecessary and unduly restrictive threshold before a person's "role in the incident" can be considered by the trier of fact. In drafting the provision, Parliament could have, but did not, use the words "the person's wrongful role in the incident". By requiring conduct to be wrongful before it can be considered by the trier of fact, Justice Moldaver essentially imports a reasonableness assessment onto the factor of the accused's conduct throughout the incident (under s. 34(2)(c)), instead of focusing the reasonableness inquiry on a global assessment of the accused's act (under s. 34(1)(c)), as Parliament directed.

[74] In my view, based on accepted principles of statutory interpretation, Parliament deliberately chose broad and neutral words to capture a wide range of conduct, both temporally and behaviourally. Parliament's intent is clear that "the person's role in the incident" refers to the person's conduct — such as actions, omissions and exercises of judgment — during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances. It calls for a review of the accused's role, if any, in bringing about the conflict. The analytical purpose of considering this conduct is to assess whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

[75] Properly interpreted, this factor includes, but is not limited to, conduct that could have been classified as unlawful, provocative or morally blameworthy under the prior provisions or labelled "excessive" under my colleague's framework. I acknowledge that claims of self-defence may often involve wrongful conduct that could be described in those terms. Those examples of conduct clearly concern the reasonableness, even the moral culpability, of the accused's conduct, and are certainly included in

Parliament's new widely-worded phrase. But there is simply no indication that Parliament intended to constrain a "person's role in the incident" so narrowly. Instead, a "person's role in the incident" was intended to be much broader to ensure the trier of fact considers how all relevant conduct of the accused in the incident contributed to the final confrontation.

…

[78] In the 2013 amendments, Parliament made a deliberate choice to use little of the statutory language from the previous regime. It carried forward certain concepts from the old provisions and the jurisprudence developed under them, like "proportionality", "imminen[ce]" and "relationship between the parties." However, it also expressly introduced original phrases, which tend to be stated in more open-ended, general and generic terms. For example, the phrase "other means available to respond" under s. 34(2)(b) captures a broader range of alternatives than "quitted or retreated" found in the previous s. 35 (Technical Guide, at p. 24).

[79] The phrase "the person's role in the incident" in s. 34(2)(c) is another such innovation. It has no equivalent in the previous statute or case law and lacks a generally accepted meaning in the criminal law. The plain language meaning of a person's "role in the incident" is wide-ranging and neutral. It captures both a broad temporal scope and a wide spectrum of behaviour, whether that behaviour is wrongful, unreasonable or praiseworthy.

…

[81] In the context of these provisions, the "incident" incorporates a broader temporal frame of reference than the specific threat the accused claims motivated them to commit the act in question. That "incident" is broader than "act" is evident in how "incident" is used in s. 34(2)(c), (d), (e), (f) and (f.1) as distinct from "act" in s. 34(1)(b) and (c). And, if "incident" was interpreted to mean the actual "act" of self-defence, s. 34(2)(c) would be redundant of s. 34(2)(g), which examines the nature and proportionality of the accused's response to the use or threat of force.

[82] As such, in choosing the broad phrase "the person's role in the incident", Parliament signaled that the trier of fact should consider the accused's conduct from the beginning to the end of the "incident" giving rise to the "act", as long as that conduct is relevant to the ultimate assessment of whether the accused's act was reasonable. This expansive temporal scope distinguishes the "person's role in the incident" under s. 34(2)(c) from other factors listed under s. 34(2), some of which are temporally bounded by the force or threat of force that motivated the accused to act on one end and their subsequent response on the other. For example, s. 34(2)(b) considers what alternatives the accused could have pursued instead of the act underlying the offence, such as retreat or less harmful measures, relative to the imminence of the threat. The question of proportionality under s. 34(2)(g) similarly juxtaposes the force threatened and the reaction of the accused. Both of these factors ask the trier of fact to weigh the accused's response once the perceived threat has materialized. In this way, s. 34(2)(c) was intended to serve a distinctive, balancing and residual function as it captures the full scope of actions the accused could have taken *before* the presentation of the threat that motivated the claim of self-defence, including reasonable avenues the accused could have taken to avoid bringing about the violent incident.

[83] This broad temporal frame allows the trier of fact to consider the full context of the accused's actions in a holistic manner. Parliament made a choice not to repeat the freeze-frame analysis encouraged by such concepts as provocation and unlawful assault. Rather than a forensic apportionment of blows, words or gestures delivered immediately preceding the violent confrontation, the "incident" extends to an ongoing event that takes place over minutes, hours or days. Consistent with the new approach to

self-defence under s. 34, judges and juries are no longer expected to engage in a step by step analysis of events, artificially compartmentalizing the actions and intentions of each party at discrete stages, in order to apply the appropriate framework to the facts (see, e.g., *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339, at paras. 17-20). For example, where both parties are engaged in aggressive and confrontational behaviour, s. 34(2)(c) does not demand a zero-sum finding of instigation, provocation, cause or consent (paras. 21-22). Parliament has now selected a single overarching standard to weigh the moral blameworthiness of the accused's act in context: reasonableness. This reflects the complexity of human interaction and allows triers of fact to appropriately contextualize the actions of all parties involved, rather than artificially fragmenting the facts.

[84] Just as "role in the incident" may cover an expansive time frame, it also has the potential to sweep up a wide range of conduct during that time frame. The dictionary definition of "role" refers to "a function or part performed especially in a particular operation or process" (Merriam-Webster's Collegiate Dictionary (11th ed. 2003), at p. 1079). The notion of an accused's "role" reflects a contribution towards something, without necessarily suggesting full responsibility or fault. Parliament has selected a phrase at a high level of abstraction, creating a single capacious category to cover the widest possible range of circumstances. As indicated by the wording, the question under s. 34(2)(c) is what kind of role the accused played in the sequence of events leading to the subject matter of the charge. The phrase "role in the incident" includes acts and omissions, decisions taken and rejected and alternative courses of action which may not have been considered. It captures the full range of human conduct: from the Good Samaritan and the innocent victim of an unprovoked assault, to the initial and persistent aggressor, and everything in between (see, e.g., *R. v. Lessard*, 2018 QCCM 249). Thus "role in the incident" encompasses not only provocative or unlawful conduct, but also hotheadedness, the reckless escalation of risk, and a failure to reasonably reassess the situation as it unfolds. As the Crown submits, this does not mean that the reasonableness assessment is "unbounded" or overly subjective. The inquiry is broad, not vague.

[85] The analytical purpose of considering the person's "role in the incident" is its relevance to the reasonableness assessment where there is something about what the accused did or did not do which led to a situation where they felt the need to resort to an otherwise unlawful act to defend themselves. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis. Where self-defence is asserted, courts have always been interested in who did what. The fact that the victim was the cause of the violence often weighed heavily against them. As this Court explained in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, at para. 50:

> In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide (bearing in mind, of course, that the victim's threats may themselves have been provoked by the conduct of the accused). In this sense, he or she is the author of his or her own deserts, a factor which arguably warrants special consideration in the law. [Emphasis deleted.]

The phrase "role in the incident" captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. In this way, the trier of fact called upon to evaluate this factor will determine how that person's role impacts the "equities of the situation" (Paciocco (2014), at p. 290).

…

[88] There are clear and convincing policy rationales for ensuring the accused's role in bringing about the conflict is before the trier of fact in determining whether the accused's conduct should be sheltered from criminal liability. I agree with Justice Paciocco that the rationale underpinning the former law is still compelling:

> . . . accused persons should not be able to instigate an assault so that they can claim self-defence. . . . [T]hose who provoke an assault are causally responsible in a real sense for the violence that ensues even if they did not intend to provoke an attack and . . . this should diminish their right of response.
>
> (Paciocco (2014), at p. 290)

But while those rationales are most obvious and pressing where the accused played a role as a provocateur or initial aggressor, they also underlie the need to consider other conduct that falls short of provocation and contributes to the development of the crisis.

[89] Self-defence is not meant to be an insurance policy or self-help mechanism to proactively take the law — and the lives of other citizens — into one's hands. As the Nova Scotia Court of Appeal suggested in *Borden* at para. 101, by including the person's "role in the incident" in s. 34(2)©, "a protection is hopefully present to prevent self-defence from becoming too ready a refuge for people who instigate violent encounters, but then seek to escape criminal liability when the encounter does not go as they hoped and they resort to use of a weapon." The law should encourage peaceful resolution of disputes. It should not condone the unnecessary escalation of conflicts.

…

- (2) "Role in the Incident" Includes But Is Not Limited to Provocative, Unlawful and Morally Blameworthy Conduct

[91] There are many reasons for which I do not accept Mr. Khill's argument that the phrase "role in the incident" applies only to certain categories of conduct, such as "unlawful, provocative or morally blameworthy conduct on the part of the accused" (A.F., at para. 19). For similar reasons, I am not persuaded that creating a new precondition that the conduct must first be sufficiently wrongful before it can be considered by the trier of fact is either in line with or necessary to give effect to Parliament's stated intention.

[92] First, narrowing the scope of "role in the incident" to specific categories of conduct would be inconsistent with the broad and neutral wording chosen by Parliament. Provocation had a well-established meaning in self-defence and had been a component of the law since the provisions were first codified in 1892. It was an express statutory term in the previous legislation, defined in former s. 36 to include "provocation by blows, words or gestures". If Parliament wanted to limit consideration of a person's "role in the incident" to actions which qualified as "provocation", it could have continued to rely on provocation as a statutory precondition or even listed it as an enumerated factor under s. 34(2). It did neither. Instead, it chose to remove this word entirely from all parts of the new provisions. To constrain "role in the incident" by reference to a repealed statutory term like provocation is to rewrite the statute.

…

[96] Nor should a person's "role in the incident" be limited to only unlawful or blameworthy conduct. Legality is also an unhelpful tool in assessing reasonableness. Whether an act is lawful or not shines little light on whether it was reasonable. Lawful conduct may be unreasonable and vice versa. Further, had

Parliament wished to limit "role in the incident" to these kinds of conduct, it could have done so expressly as it did with the partial defence of provocation under s. 232 of the *Criminal Code*. The previous text of s. 232 defined provocation in terms of a "wrongful act or insult", which was a question of fact regarding the victim's conduct that bore a clear moral tenor. Amendments in 2015 replaced "wrongful act or insult" with "[c]onduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment" (*Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29, s. 7). Were illegality or moral blameworthiness a necessary threshold for conduct to be considered under s. 34(2)(c), it stands to reason Parliament would have made its intention known explicitly. Instead, it selected a commonly understood term which is consistent with the shift to a flexible consideration of reasonableness under s. 34(1)(c), complements the other factors in s. 34(2), and ensures that the moral character of the accused's otherwise unlawful act is appropriately contextualized.

[97] Second, the incongruity between the *mens rea* attached to the former preliminary conditions to accessing the defence and the *mens rea* attached to Parliament's new reasonableness standard provides a further reason why it chose not to carry these concepts forward as such into s. 34(2). Provocation and assault each have a subjective intention component (Paciocco (2008), at pp. 54-56; *Nelson*, at pp. 370-72). This does not fit easily, or at all, into the new overarching standard of reasonableness, which is meant to be judged holistically and objectively. Inserting these intention-based concepts to weed out what can be considered in the reasonableness analysis would only operate to keep the full range of the accused's actions from the trier of fact.

[98] Third, the new unified framework was designed to obviate the need for complex jury instructions. Mr. Khill's interpretation would require judges to instruct the jury to consider the accused's "role in the incident" only if it is morally blameworthy or meets the legal criteria of concepts like provocation or unlawful assault. This invites a degree of complexity at odds with Parliament's stated purpose. It is reminiscent of the unnecessary complexity typifying the old regime, with its thicket of preliminary and qualifying conditions. This Court should not reintroduce repealed filters through which the accused's conduct must pass — such as a requirement that their conduct be provocative, morally blameworthy or unlawful — before being left with the jury. Taking "role in the incident" at face value — that is, as a broad and value-neutral expression — is most consistent with Parliament's aim of pruning away unnecessary complication. Parliament did not intend the judge to conduct a preliminary assessment of the overall wrongfulness of the accused's conduct leading up to the confrontation before leaving it with the jury under this factor.

[99] Fourth, there is no need for judges to impose new preconditions as the phrase chosen by Parliament includes previous concepts, like provocation or unlawfulness, but is clearly not limited to or circumscribed by them….

[100] I agree with Doherty J.A. that the inquiry under s. 34(2)(c) not only subsumes provocative conduct, but also extends to the other ways the accused might contribute to the crisis through conduct that colours the reasonableness of the ultimate act underlying the charge (C.A. reasons, at paras. 75-76). The move from the language of provocation to the broader language of "role in the incident" means the trier of fact is "freer . . . to consider the causal role the accused played in the assault he sought to defend against, whether he intended to provoke the assault or even foresaw that it was likely to happen" (Paciocco (2014), at p. 290).

[101] Fifth, "role in the incident" is also not limited to conduct that would weigh against the reasonableness of the accused's act. Contrary to my colleague's suggestion, the question of whether "pro-social" conduct could rightly be captured by s. 34(2)(c) is before us in this appeal and was explicitly

addressed by Mr. Khill. At trial, Mr. Khill's defence directly appealed to the reasonableness of his proactive actions both as a means of protecting his partner and consistent with his military training. Where the accused plays a praiseworthy role in the incident, this may be a compelling factor supporting the conclusion that their ultimate act was reasonable. The accused's role in the incident may be morally blameless, such as the accused who has been subjected to a pattern of abuse by the other party to the incident. Where relationships are defined by ongoing cycles of violence, anger and abuse, the nature of the accused's role may be significantly coloured by the rituals and dynamics between the parties (*R. v. Ameralik*, 2021 NUCJ 3, 69 C.R. (7th) 161; *R. v. Rabut*, 2015 ABPC 114; *R. v. Knott*, 2014 MBQB 72, 304 Man. R. (2d) 226). In addition, where an accused had no prior interaction with the victim and was subject to an unprovoked assault, the very absence of the accused's role in the confrontation may militate strongly in favour of the accused…

[102] As a result, I do not accept that the accused's "role in the incident" is necessarily or inherently a "pro-conviction factor" which should be read narrowly. The words Parliament chose are not only wide, they are deliberately neutral. On a plain language reading, "the person's role in the incident" neither evokes strong emotion nor carries the normative stigma of conduct which is unlawful, provocative or morally blameworthy. As written, it is not more suggestive of guilt than any of the other factors listed under s. 34(2), such as "whether there were other means available to respond" (s. 34(2)(b)), the "size, age, gender and physical capabilities" (s. 34(2)(e)) or "the nature and proportionality of the person's response" (s. 34(2)(g)). Section 34(2)(c) is neutral and its application will depend entirely on the conduct of the accused and whether their behaviour throughout the incident sheds light on the nature and extent of their responsibility for the final confrontation that culminated in the act giving rise to the charge.

[103] Sixth, a broad and comprehensive approach to an accused's "role in the incident" is a familiar exercise for courts. Under the previous law, courts canvassed all of the accused's actions to determine whether they reasonably believed no other alternative existed but to resort to deadly force and whether the defence as a whole bore an air of reality. This reasonableness inquiry was not limited to provocative conduct or the strict timeframe of the attack, but could encompass the larger incident as a whole (*R. v. Ball*, 2013 ABQB 409, at para. 128 (CanLII); see also *Szczerbaniwicz*, at para. 20). The conduct of the accused during the incident — including the accused's precipitation of the conflict or failure to take other steps — could colour the reasonableness assessment and thus foreclose the ultimate success of the defence (*Cinous*, at para. 123; *R. v. Boyd* (1999), 1999 CanLII 2870 (ON CA), 118 O.A.C. 85, at para. 13; *Dubois v. R.*, 2010 QCCA 835, at paras. 22-23 (CanLII)).

[104] Indeed, this broad understanding of "role in the incident" is even more important in light of the potential for the new self-defence provisions to apply more generously to the accused than the old provisions. Under the present law, for instance, an accused no longer must wait until they reasonably apprehend death or grievous bodily harm before resorting to deadly force. The nature of the threat of force is merely one factor to be weighed among others under s. 34(2). As noted above, the new s. 34 also extends to a broader range of offences, including those potentially impacting innocent third parties (*House of Commons Debates*, vol. 146, No. 109, at p. 7066 (Robert Goguen)). These changes highlight the need to widen the lens to ensure the trier of fact is able to consider how the accused found themselves in a situation where they felt compelled to use force or commit some other offence.

[105] Seventh, the muddying of the water on whether self-defence should be viewed as a purely justificatory defence or something closer to an excuse also militates in favour of a broad interpretation of "role in the incident". The structure of s. 34 leaves room for a trier of fact to conclude that self-defence is not disproved even though the accused escalated the incident that led to the death of the victim, was mistaken as to the existence of the use of force and used disproportionate force. In such cases, which lie

far from the core of justification, the widest possible review of the accused's conduct and contribution to the ultimate confrontation is required. An accused who played a pro-social role throughout the incident would increase their chances of justifying or excusing their act in the eyes of society. By contrast, society is more likely to view the accused's ultimate act as wrongful or inexcusable where their conduct was rash, reckless, negligent or unreasonable. This is particularly critical in the instance of the putative defender who acts on mistaken belief, and whose actions cannot be said to be morally "right". In assessing the overall lawfulness of the act, the trier of fact must weigh the risks they took, and steps that could have been taken to properly ascertain the threat, against objective community standards of reasonableness (Fehr, at pp. 113-14; Muñoz Conde, at p. 592).

…

[107] My reading of "role in the incident" is consistent with the expanded scope and shifting foundation of the new self-defence provisions. In contrast, a new test of sufficiently wrongful conduct, which includes conduct that is "excessive", relies exclusively on the justification principle and may not therefore accurately reflect the moral underpinnings of the new self-defence provisions (see above, at paras. 47-48).

- (3) The Proposed Wrongfulness Test Should Be Rejected

[108] My colleague and I agree that "role in the incident" goes beyond provocation and unlawful aggression. However, overlaying a standard of wrongfulness or imposing a novel application of "excessiveness" onto the clear words "role in the incident" is unwarranted. The threshold of wrongfulness is not derived from the text, context or scheme of the provisions. It imposes an additional reasonableness assessment onto the "role in the incident" factor, rather than focusing the assessment on the overall reasonableness of the accused's act. Further, while provocation had a settled meaning in the jurisprudence, the category of "excessive" conduct, insofar as it applies to the consideration of the accused's behaviour in the sequence of events leading up to the purportedly defensive act, is a novel addition to the law of self-defence and is not grounded in either the Parliamentary record or scholarship in this area. Although the term "excessive" finds its roots in the former s. 37(2), the phrase "excessive" as it was used in the prior regime was concerned with the proportionality of the accused's ultimate act of force (*R. v. Grandin,* 2001 BCCA 340, 95 B.C.L.R. (3d) 78, at paras. 39 and 45; *Billing*, at para. 18). Under the present regime developed by Parliament, the proportionality of the accused's response is already one of the considerations that forms part of the overall reasonableness assessment by virtue of s. 34(2)(g). Invoked in this novel way, the use of the term "excessive" as a means of assessing an accused's conduct in the events leading up to the act is a metric without measure and will invite litigation by adjective rather than providing meaningful assistance to trial judges and jurors.

[109] The imposition of a wrongfulness threshold reinstates an unnecessary hoop or filter, which will introduce complexity and operate like the repealed preliminary and qualifying conditions. This generates further problems when an accused's role may be contested and relied on by both the Crown and defence to reach different conclusions. In this case, Mr. Khill suggests that his prior conduct was good or pro-social, while the Crown argues that this same conduct undermined the reasonableness of his ultimate act and could have led the jury to convict. To suggest that the Crown's reliance on s. 34(2)(c) must reach a certain threshold of wrongfulness before being put to the jury equally begs the question of whether the accused may be subject to similar threshold inquiries. If separate thresholds apply to the defence and the Crown, this will only exacerbate confusion and may even create unfairness where both sides seek to rely on prior conduct to show that the accused's act was either unreasonable or reasonable.

…

[112] It is common ground that Parliament has placed considerable discretion in the hands of decision makers, whether judges or juries, by its shift to a three-pronged inquiry for all self-defence claims in which the reasonableness of the accused's act plays a crucial role. Parliament structured this discretion by setting out the nine factors in s. 34(2) and saw no problem with allowing decision makers to assign weight to them under its multifactorial legal test. A "person's role in the incident" remains but one factor in the overall assessment of the reasonableness of the accused's act. And while this factor was meant to be broad temporally and behaviourally, it nevertheless contains threshold requirements and is therefore not without limits. The conduct must relate to the incident and be relevant to whether the ultimate responsive act was reasonable in the circumstances. The relevance inquiry is guided by both the temporal and behavioural aspects of "the person's role in the incident" — namely, the conduct in question must be both temporally relevant and behaviourally relevant to the incident. This is a conjunctive test. Evidence will be relevant where it has a tendency, as a matter of logic, common sense, and human experience, to make the act underlying the charge more or less reasonable in the circumstances (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 140 (per Binnie J., dissenting, but not on this point)). Thus, the type of conduct that would not meet the "relevance" threshold is conduct during the incident that has no bearing on whether or not the act was reasonable. As previously mentioned: this factor is broad, not vague.

…

[115] Parliament has chosen to trust juries with the task of assessing the reasonableness of the accused's act having regard to the non-exhaustive list of factors in s. 34(2), including the accused's "role in the incident". Juries are regularly asked to apply the reasonableness standard to a number of offences and defences by asking what a reasonable person would have done in like circumstances. Dangerous conduct offences, careless conduct offences, offences based on criminal negligence, and duty-based offences all require the jury to engage in a reasonableness assessment to determine if the Crown has made out the objective fault requirement (*R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at paras. 55-63). Likewise, the s. 25 defence for persons acting under authority and the s. 35 defence of property provisions require juries to undertake a reasonableness assessment in their determination of whether the defence is available.

[116] This Court's jurisprudence expresses "faith in the institution of the jury and our firmly held belief that juries perform their duties according to the law and the instructions they are given" (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 177). As Dickson C.J. explained in *R. v. Corbett*, 1988 CanLII 80 (SCC), [1988] 1 S.C.R. 670, at pp. 692-93 that:

> The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. . . .
>
> It is of course, entirely possible to construct an argument disputing the theory of trial by jury. . . . But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them.

[117] Nor does my interpretation of "the person's role in the incident" imperil appellate review. This is amply demonstrated by the fulsome reviews conducted by the Court of Appeal for Ontario and in these reasons. If Parliament's choice of a reasonableness requirement and a multifactorial analysis for self-

defence may make appellate review more difficult in certain cases, that consequence is not a result of how I approach s. 34(2)(c); it is a by-product of the overall scheme it enacted — a regime it chose despite this possible externality. It must have concluded that any such risk was so small it did not call for any different legislative approach. The concern for appellate oversight is all but moot in judge alone trials owing to the judicial duty to give reasons (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869). Appellate courts remain fully able to review the reasons for judgment in respect of self-defence given that judges are required to explain how the decision was reached and how s. 34 was applied, including why certain factors were considered, what evidence supported those factors and how they were weighed and balanced to reach a conclusion about the ultimate reasonableness of the accused's act.

[118] Parliament would also have appreciated that it is different for jury trials. As juries render a verdict without reasons, and their deliberations are secret, there is never a way for the public, the sentencing judge or the appellate courts to determine exactly why a jury reached its collective conclusion. In a case of self-defence, for example, depending on the verdict, an appellate court would often not know whether the jurors ever reached the third inquiry to consider the reasonableness of the act in s. 34(1)(c); or which factors they used or what weight they assigned to each. This is, however, a known function of how all jury trials operate across Canada. Any limited ability of appellate courts to review a jury verdict is not a new issue unique to claims of self-defence under the present legislation.

[119] Even appreciating this general limitation, appellate courts retain a supervisory role to assess the reasonableness of the verdict and they are equipped to ensure that the trial judge provided adequate instructions to the jury. For example, under s. 34(1)(c), I agree that the appellate courts maintain the ability to review that:

- the trial judge has correctly interpreted the factors, including "the person's role in the incident" under s. 34(2)(c);
- the trial judge has correctly determined that there is evidence of the accused's prior conduct capable of amounting to a "role in the incident" within the s. 34(2)(c) — meaning evidence of the accused's conduct in the course of the incident that is relevant to the reasonableness of the act in the circumstances;
- the jury has been directed to the evidence of the accused's particular conduct in the course of the entire incident relevant to the reasonableness of the act committed that it may consider under s. 34(2)(c); and
- the jury has been instructed that in considering the accused's "role in the incident" and any of the other relevant s. 34(2) factors to which it has been directed, the weight it chooses to give to any particular factor in assessing the ultimate reasonableness of the accused's responsive act is for it to decide.

These standard protections operate to guide both trial judges and juries and ensure the jury's deliberations are appropriately circumscribed, while also respecting the Parliamentary design of a multifactorial regime.

[120] Finally, my colleague has taken my reading of the law to suggest an accused could be convicted of murder or other serious crimes of violence based exclusively on negligent or careless conduct leading up to a violent confrontation (Moldaver J.'s reasons, at para. 209). I disagree. First, a jury cannot properly convict an accused based solely on their prior conduct, even if it was unreasonable or "wrongful". Instead, the Crown must prove beyond a reasonable doubt that an accused's act in response to force or a threat

thereof was unreasonable, with reference to all of the relevant factors listed under s. 34(2). Accordingly, trial judges are expected to instruct the jury that self-defence is not available only if the accused's ultimate *act* was unreasonable.

[121] Secondly, and more fundamentally, a life sentence for murder does not automatically flow from the Crown defeating an accused's claim of self-defence. As the trial judge explained at length, if self-defence is not made out, the jury then had to consider whether Mr. Khill acted with the requisite level of intent for murder rather than manslaughter. Where the trier of fact is satisfied the accused acted with intent to kill or was reckless to that probability, then the burden for murder will have been met. It will not, however, be met based on merely negligent or careless behaviour — and a failure to instruct the jury otherwise would be a clear error open to appellate review. Instead, the jury must consider the cumulative effect of all the relevant evidence to decide if the requisite level of fault has been established beyond a reasonable doubt (*R. v. Flores*, 2011 ONCA 155, 274 O.A.C. 314, at paras 73-75; *R. v. Levy*, 2016 NSCA 45, 374 N.S.R. (2d) 251, at para. 148).

[122] Justice Moldaver is correct to be mindful of the potential life sentence the accused may face. But human life is at stake on both sides of the equation and we should be cautious as to how readily we legally sanction the actions of those who take the lives of others.

- (4) Summary

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

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

VII. Application

[125] The trial judge provided extensive and detailed instructions to the jury, particularly with respect to the three essential elements of self-defence that the Crown had to disprove beyond a reasonable doubt. In explaining the first element of the defence — namely, that Mr. Khill had a reasonable belief that Mr. Styres was using or threatening force against him and Ms. Benko — the trial judge spent 26 pages thoroughly reviewing the evidence presented at trial. The trial judge next described the second element of self-defence, which is whether Mr. Khill committed the act for a defensive purpose. At this stage, he included a similar but much shorter review of the evidence. Finally, the trial judge explained the third

element of self-defence: whether the act was reasonable in the circumstances. The trial judge told the jury he would not review the evidence in respect of the various reasonableness factors. Instead, he emphasized the need to consider all of the evidence and all of the circumstances with reference to the factors listed under s. 34(2):

> Your answer to this question requires you to consider all the evidence and will depend on your view of that evidence. Consider all of the circumstances including, but not limited to, the nature of the force or threatened force by Jonathan Styres – not only what you find to be the actual peril facing Mr. Khill, but also what his honest perception of the peril was provided that if [his] perception of the peril was mistaken, his mistake was reasonable.
>
> Consider the extent to which the use of force or threatened use of force by Jonathan Styres was imminent and if Mr. Khill's perception of the imminence of the force or threat was mistaken, was his mistake reasonable?
>
> Were there other means available to Peter Khill to respond to the actual or potential use of force by Jonathan Styres? . . . Consider whether Jonathan Styres used or threatened to use a weapon, the size, age, gender and physical capabilities of each of Peter Khill and Jonathan Styres, the nature and proportionality of Peter Khill's response to Jonathan Styres' use or threat of force. Use your common sense, life experience and knowledge of human nature in your assessment of the evidence to answer this question.
>
> (A.R., vol. I, at pp. 88-89)

Absent from this instruction was any reference to Mr. Khill's role in the incident under s. 34(2)(c). The jury therefore received no instructions on how this factor should have informed their assessment of reasonableness and there was no linking of the evidence to this specific factor.

[126] The key question is whether this omission was a reversible error….

[127] The factors listed in s. 34(2) are not elements of the defence and, while s. 34(2) states that the listed factors "shall" be considered, it is not an automatic error of law if one such factor is not brought to the attention of the jury. As I have explained, the judge, whether instructing a jury or adjudicating, will decide which factors in s. 34(2) are relevant, applicable, and/or worthy of consideration based on the evidence actually adduced in the particular trial. For this reason, it is unnecessary to reference a factor where there is no factual basis to inform it. For example, where there is no prior relationship between the parties, as in this case, referring to the factors under paragraphs (f) or (f.1) of s. 34(2) would only serve to confuse or misdirect the jury. Thus, the omission of a factor under s. 34(2) may not, in every instance, represent an error.

[128] Mr. Khill argues any reference to s. 34(2)(c) was unnecessary and so its oversight was harmless. Even if the omission was an error, he argues the trial judge's extensive review of events prior to the shooting and his direction for the jury to consider the totality of the circumstances was functionally equivalent to referring to his role in the incident. He points to the Crown's failure to object to the charge as evidence the omission was insignificant and actually served the Crown's tactical interest. The Crown asserts that s. 34(2)(c) is a mandatory factor and the jury was obliged to consider whether Mr. Khill, even if acting legally, played a role in instigating or escalating the confrontation. Without specific direction, the jury was not equipped to appreciate the relevance of the accused's actions to the reasonableness of his response in the circumstances.

[129] In my view, Mr. Khill's role in the incident leading up to the shooting was potentially a significant factor in the assessment of the reasonableness of the shooting and one that satisfied legal and factual thresholds of "the person's role in the incident". The trial judge's failure to explain the significance of this factor and to instruct the jury on the need to consider Mr. Khill's conduct throughout the incident left the jury unequipped to grapple with what may have been a crucial question in the evaluation of the reasonableness of Mr. Khill's shooting of Mr. Styres.

[130] The instruction on s. 34(2)(c) should have directed the jury to consider the effect of the risks assumed and actions taken by Mr. Khill: from the moment he heard the loud banging outside and observed his truck's illuminated dashboard lights from the bedroom window to the moment he shot and killed Mr. Styres in the driveway. The importance of s. 34(2)(c) is obvious where an accused's actions leading up to a violent confrontation effectively eliminate all other means to respond with anything less than deadly force. Where a person confronts a trespasser, thief or source of loud noises in a way that leaves little alternative for either party to kill or be killed, the accused's role in the incident will be significant.

[131] Mr. Khill acknowledges that he had a significant role in the incident. As concisely stated in his factum, "[Mr. Khill] was the only one doing anything in that narrative" (A.F., at para. 63). It was Mr. Khill who approached Mr. Styres with a loaded firearm. And it was Mr. Khill who, upon addressing Mr. Styres, pulled the trigger…. On these admitted facts he had a central role in creating a highly risky scenario.

[132] Accordingly, the threshold was met and there was a clear evidentiary basis for a jury to draw inferences from Mr. Khill's role in the incident that might lead to the conclusion that the act of shooting Mr. Styres was unreasonable. Without a clear direction to consider Mr. Khill's role in the incident from beginning to end, the jury would not have known that it was a factor to be considered in assessing the reasonableness of the shooting itself. Since no such direction was given, the jury may not have understood the connection between Mr. Khill's role in the incident leading up to the shooting and the reasonableness of the shooting itself. The exclusion of s. 34(2)(c) from the instructions was therefore a clear oversight which amounts to an error of law.

[133] Because of this error, the jury was left without instructions to consider the wide spectrum of conduct and the broad temporal frame captured by the words "role in the incident". As I have explained, Mr. Khill's conduct need not meet the criteria for concepts such as provocation or unlawfulness to be left with the jury — rather, the jury was to consider any facts that might shed light on his role in bringing about the confrontation. The instructions did not convey the need to factor in the extent to which Mr. Khill's actions initiated, contributed to or caused the ultimate encounter, and the extent to which his role in the incident coloured the reasonableness of his ultimate act.

[134] Moreover, the charge failed to communicate that the jury had to consider all of Mr. Khill's actions, omissions and exercises of judgment throughout the entirety of the "incident". That word signals Parliament's intent to broaden the temporal scope of the inquiry to include the time period before the threat or use of force that motivates the accused to act. The charge may have left the misleading impression that the reasonableness inquiry should focus on the mere instant between the time Mr. Khill perceived an uplifted gun and the time that he shot Mr. Styres. Clarity as to the temporal scope of the inquiry was particularly important in light of defence counsel's closing argument. The defence repeatedly told the jury that self-defence was not at issue when Mr. Khill decided to leave his home to confront the intruder. Instead, the jury was urged to focus its attention on the split second before Mr. Khill shot Mr. Styres:

> So let's return to the issue, the specific point in time where self-defence must be considered and it is in those very brief seconds between the shouted command, "hey, hands up" and the shots being fired. That's the point in time where you'll have to consider the issue of self-defence precisely and it's a lot to have to think about in such a short period of time with so much happening, but yet happening so quickly.
>
> (A.R., vol. VII, at p. 7; see also p. 41)

[135] Rather than correcting or counteracting defence counsel's repeated emphasis on this final "split second" of the incident, the trial judge reinforced it in his instructions on s. 34(2) by omitting any reference to the accused's "role in the incident" and giving express instructions on the imminence of the threat of force — that is, the perceived uplifted gun in the moment before Mr. Khill shot Mr. Styres — and potential alternative means to respond to it. As testimony from both Mr. Khill and Ms. Benko suggested, the time between Mr. Khill's shouts and the subsequent gunshots was near-instantaneous. The opportunity to call 911, shout from the doorway or fire a warning shot — alternatives raised by the Crown in cross-examination — had long passed at this juncture. Had the jury been instructed to consider Mr. Khill's "role in the incident", their minds would necessarily have had to resolve how the accused's initial response to a loud noise outside his home suddenly placed him in a situation where he claims he felt compelled to kill Mr. Styres. In contrast to s. 34(2)(b)'s emphasis on the imminence of force, the "incident" referred to under s. 34(2)(c) is intended to place greater weight on the viable alternatives open to Mr. Khill before leaving his home, proceeding through the darkness and then relying on deadly force.

[136] There was ample evidence in this appeal to support a finding Mr. Khill played a role in bringing about the very emergency he relied upon to claim self-defence. This larger context was potentially a key factor in assessing the reasonableness of his act in the moment of crisis. The trial judge ought to have reminded the jury to consider how Mr. Khill's conduct and assumption of risk associated with this confrontation impacted the reasonableness of his subsequent actions. They needed to understand their obligation to incorporate the wider time frame into the reasonableness assessment, not simply with respect to Mr. Khill's belief he and Ms. Benko were being threatened with force under the first element of self-defence, but also with respect to the shooting itself based on Mr. Khill's actions in approaching Mr. Styres with a loaded firearm and announcing his presence at the very last moment. In assessing the reasonableness of the shooting, the jury needed to question how the incident happened: how the parties and pieces were put into motion and how a person breaking into a truck parked outside a home ended up being shot dead within a matter of minutes.

[137] Examined as a whole, the trial judge's instructions were not functionally equivalent to an explicit direction on Mr. Khill's role in the incident. The charge directed the jury to consider the five following factors: s. 34(2)(a) ("the nature of the force or threatened force by Jonathan Styres"); s. 34(2)(b) ("the extent to which the use of force or threatened use of force by Jonathan Styres was imminent and . . . [w]ere there other means available to Peter Khill to respond"); s. 34(2)(d) ("whether Jonathan Styres used or threatened to use a weapon"); s. 34(2)(e) ("the size age, gender and physical capabilities of each of Peter Khill and Jonathan Styres"); and s. 34(2)(g) ("the nature and proportionality of Peter Khill's response to Jonathan Styres' use or threat of force").

[138] None of these factors expressly or functionally directed the jury to consider the significance of Mr. Khill's role in bringing about the deadly confrontation. First, the "nature of the force or threat" considered Mr. Khill's perception of the threat presented by Mr. Styres immediately after Mr. Khill shouted "hands up", not the unknown knocking outside his house and his response to it. Second, the "extent to which the use of force was imminent and whether there were other means available to respond

to the potential use of force" considered the imminence of an attack by Mr. Styres and other options available to Mr. Khill, but not the effect of Mr. Khill's actions in escalating the incident or eliminating non-lethal alternatives. Third, the question of "whether any party to the incident used or threatened to use a weapon" focused exclusively on Mr. Khill's perception that Mr. Styres was armed but not the significance of Mr. Khill introducing a firearm into the incident and its effect on his perception of Mr. Styres. Fourth, the "size, age, gender and physical capabilities of the parties to the incident" considered the relevant physical characteristics of the parties, but again did not consider Mr. Khill's conduct. Fifth and finally, the "nature and proportionality of the person's response to the use or threat of force" considered the proportionality between Mr. Khill's response and the perceived threat presented by Mr. Styres; it did not consider more broadly whether Mr. Khill's conduct precipitated the need to rely on force at all.

[139] Nor do I accept Mr. Khill's position that the trial judge's reference to the totality of the circumstances and general review of the evidence was functionally equivalent to a direction under s. 34(2)(c). Recognizing that trial judges are not required to recite the legislative text of each factor under s. 34(2) verbatim, it is still necessary to equip the jury with the instructions they require to discharge their obligations. It is significant that almost all of the evidence was reviewed immediately following the instruction on the first element of self-defence under s. 34(1)(a). In contrast, the trial judge provided only limited reference to the evidence after directing the jury on the element of a defensive purpose under s. 34(1)(b), and none at all in explaining how they should assess the reasonableness of Mr. Khill's response in the circumstances under s. 34(1)(c).

…

[141] The error is significant and might reasonably have had a material bearing on the acquittal when considered in the concrete reality of the case. In the end, even if the jury considered Mr. Khill to have played a major role in instigating the fatal confrontation between him and Mr. Styres, this fact alone would not necessarily render his actions unreasonable or preclude him from successfully making a claim of self-defence. A "person's role in the incident", like any factor listed under s. 34(2), merely informs the overall assessment of reasonableness of a person's response in the circumstances. Ultimately, once the threshold was met, Parliament decided that it was for the jury to determine the implications of these facts for the reasonableness of Mr. Khill's response in the circumstances. However, the jury needed to know they were obliged to consider his role in the incident.

[142] On the available record, if properly instructed, the jury could well have arrived at a different conclusion based on Mr. Khill's role in the incident and its effect on the reasonableness of his act in the circumstances. From one perspective, the jury may well have found that Mr. Khill's conduct increased the risk of a fatal confrontation with Mr. Styres outside the home. They may also have measured Mr. Khill's decision to advance into the darkness against other alternatives he could have taken, including calling 911, shouting from the window or turning on the lights. Those courses of conduct may have prevented his mistaken belief that Mr. Styres was armed and about to shoot, and thus avoided the need to use deadly force altogether. If the jury determined that Mr. Khill had provoked the threat, was the initial aggressor or had behaved recklessly or unreasonably, his role in the incident could have significantly coloured his responsibility and moral culpability for the death of Mr. Styres. Far from a reasonable response, the jury may have instead considered Mr. Khill to be the author of his own misfortune — with Mr. Styres paying the price for this failure of judgment.

[143] The jury could have also taken a different view. It was open for the jury to conclude that Mr. Khill had a genuine concern for his safety and that of Ms. Benko. Further still, the jury may have accepted that a reasonable person in the circumstances would have perceived the risk of waiting for an armed intruder

to enter his home to be greater than confronting that person or persons outside. The jury may have also accepted that the available alternatives open to Mr. Khill may have only been partially successful or may have actually compromised his ability to regain control of the situation if the intruder was armed and aggressive. Under the open-ended and flexible assessment of reasonableness under s. 34(1)(c), once the threshold was met and the trial judge instructed on the legal test and the evidence that related to Mr. Khill's "role in the incident", it was entirely for the jury to determine how much or little weight to place on Mr. Khill's role when assessing the reasonableness of his decision to shoot Mr. Styres. But it was essential that his role in the incident be considered.

…

[145] In summary, Mr. Khill's role in the incident should have been expressly drawn to the attention of the jury. The absence of any explanation concerning the legal significance of Mr. Khill's role in the incident was a serious error. Once the initial threshold is met, a "person's role in the incident" is a mandatory factor and it was clearly relevant in these circumstances. Without this instruction the jury was unaware of the wider temporal and behavioural scope of a "person's role in the incident" and may have improperly narrowed its attention to the time of the shooting. These instructions were deficient and not functionally equivalent to what was required under s. 34(2)(c). This non-direction had a material bearing on the acquittal that justifies setting aside Mr. Khill's acquittal and ordering a new trial. I can say with a reasonable degree of certainty that, but for the omission, the verdict may not necessarily have been the same (*R. v. Morin*, [1998] 2 S.C.R. 345, at p. 374).

VIII. Disposition

[146] For the above reasons, a new trial is necessary to ensure the jury is appropriately instructed with respect to the principles of self-defence and the significance of Mr. Khill's role in the incident as a mandatory factor under s. 34(2).

[147] I would accordingly dismiss the appeal.

The reasons of Moldaver, Brown and Rowe JJ. were delivered by

Moldaver J. —

[*Cote J. agreed with Justice Moldaver's approach but unlike him would have allowed the appeal and affirmed the acquittal at trial*.]

[152] For the reasons that follow, I would dismiss Mr. Khill's appeal. With respect, however, I am unable to fully endorse the Court of Appeal's interpretation of s. 34(2)(c). In particular, I believe added guidance should be given to triers of fact charged with deciding whether an accused's prior conduct amounts to a "role in the incident". Relatedly, the court's interpretation renders consideration of an accused's prior conduct a matter of discretion for triers of fact that is effectively appeal-proof. These problems call for a more circumscribed approach to discern the types of prior conduct that an accused's "role in the incident" is meant to encompass, and how triers of fact are to assess such conduct in working through the "reasonableness analysis" mandated by s. 34(1)(c).

[153] Prior conduct of an accused can conceivably play a variety of roles in a self-defence trial. In this case, the Crown seeks to challenge Mr. Khill's entitlement to self-defence on the basis that his conduct leading up to the fatal shooting was unjustified and thereby rendered his use of lethal force unreasonable

in the circumstances. Mr. Khill does not counter that his conduct leading up to the final confrontation was prosocial — like taking on the role of Good Samaritan — such that it could render his use of lethal force reasonable. Rather, he simply maintains that his decision to confront Mr. Styres instead of pursuing other alternatives did not amount to the kind of prior conduct encompassed by s. 34(2)(c) that "can defeat a self-defence claim". My analysis is focused exclusively on this context. I leave for another day how s. 34(2) of the *Criminal Code* could apply in cases where an accused seeks to argue that their positive or prosocial prior conduct should be considered as a factor favouring the reasonableness of their use of force under s. 34(1)(c). Those issues, which are not without their own complexities, simply do not arise on the facts before us.

[154] For reasons that will become apparent, I am respectfully of the view that where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence, in order to come within s. 34(2)(c), the prior conduct must reach a threshold of wrongfulness capable of negatively impacting the justification for the use of force which undergirds the accused's claim of self-defence. Examples of conduct that meet the threshold of wrongfulness include provocation and unlawful aggression. I would also include prior conduct that is excessive in the circumstances as the accused reasonably perceived them to be.

[155] In this case, I am satisfied that a properly instructed jury could find that Mr. Khill's prior conduct, leading up to his use of lethal force, was excessive, such that it could constitute a "role in the incident". Accordingly, the trial judge was required to instruct the jury to determine, under s. 34(2)(c), whether Mr. Khill had a "role in the incident" and, if so, how that role may have affected the reasonableness of Mr. Khill's use of lethal force. The failure to provide an instruction of this kind necessitates a new trial.

…

[178] …I am of the opinion that in cases such as this one, *where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence*, s. 34(2)(c) must be construed narrowly: under s. 34(2)(c), an accused has a "role in the incident" only when their conduct is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds their claim of self-defence. Examples of prior conduct that meet the threshold of wrongfulness include: (a) provocation; (b) unlawful aggression; and (c) conduct that is excessive in the circumstances as the accused reasonably perceived them to be.

[179] A trial judge sitting with a jury has the responsibility of deciding whether there is an evidentiary foundation upon which a jury could find that the accused's prior conduct was sufficiently wrongful so as to amount to a "role in the incident".[1] If this foundation exists, then the trial judge must instruct the jury to:

> i. determine whether the prior conduct was sufficiently wrongful to amount to a "role in the incident" under s. 34(2)(c); and
>
> ii. if so, weigh the accused's "role in the incident" along with the other factors in s. 34(2) in determining whether, under s. 34(1)(c), the act that constitutes the alleged offence — purportedly committed in self-defence — was reasonable in the circumstances. …

…

[201] My colleague [Martin J.] takes issue with the use of the term "excessive" in the context of s. 34(2)(c). She observes that, historically, it only applied to the amount of force used in the ultimate act,

and that this use of the term has been preserved under s. 34(2)(g) of the present legislation. She steadfastly maintains that it has no place in the interpretation of s. 34(2)(c), where the Crown seeks to use an accused's prior conduct to remove the justification that would otherwise have supported a claim of self-defence. With respect, this misses the point. Whether the term "excessive" references the ultimate act or the prior conduct, it goes to conduct that is sufficiently wrongful to negate the justification for the use of force that undergirds the accused's claim of self-defence. And that is precisely how I am using the term in the present context.

…

[204] More generally, where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence, interpreting s. 34(2)(c) as limited to sufficiently wrongful conduct capable of negatively affecting justification better fits with two important policy considerations that underlie the self-defence analysis.

[205] First, the practical reality is that "those in peril, or even in situations of perceived peril, do not have time for full reflection and that errors in interpretation and judgment will be made" (Paciocco, at p. 36). Given this reality, the self-defence analysis has always recognized that "a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action" (*R. v. Baxter* (1975), 1975 CanLII 1510 (ON CA), 27 C.C.C. (2d) 96 (Ont. C.A.), at p. 111; *R. v. Hebert*, 1996 CanLII 202 (SCC), [1996] 2 S.C.R. 272, at para. 18). Prior conduct potentially falling within s. 34(2)(c) should be assessed in a similar fashion. It should not, in my view, be interpreted in a manner that allows triers of fact to second-guess the accused's every move leading up to the final confrontation. Section 34(2)(c) should apply only where conduct is sufficiently wrongful to overcome the room for error that self-defence necessarily affords to an accused.

[206] Second, I am mindful that self-defence arises regularly in life or death situations involving lethal force. In such circumstances, the chances of a manslaughter verdict tend to be more illusory than real, since in most cases the accused will have expressly intended to neutralize the threat posed by the assailant. As such, the self-defence claim will often be the sole determinant of whether the accused goes free or faces a life sentence (*Criminal Code*, s. 235(1)). In these circumstances, the accused may be left with the Hobbesian choice of deciding whether to use lethal force and thereby risk life imprisonment because others would perhaps have acted differently in the lead-up to the final confrontation, or to hold off and run the risk of being killed or suffering grievous bodily harm. Given the severity of these outcomes, I would not rush to infer that in enacting s. 34(2)(c), Parliament intended with the revised legislation to give triers of fact unguided and unappealable discretion in evaluating the relevance of an accused's prior conduct. Had Parliament intended such a drastic revision to the law of self-defence, I would have expected something more explicit than a simple instruction requiring the triers of fact to consider the accused's "role in the incident".

[207] Justice Martin takes a different view of s. 34(2)(c). As indicated, she construes this provision as requiring triers of fact to examine the totality of the accused's actions, from the beginning of the incident to its end. Included in this is conduct that is both temporally and behaviourally connected to the final incident. Only conduct that "has no bearing on whether or not the act was reasonable" will be excluded from consideration (para. 112). In her view, the provision gives triers of fact wide latitude to decide what aspect or aspects of that prior conduct are capable of undermining the reasonableness of the accused's use of force, including conduct that she variously describes as "rash", "negligent," "unreasonable," "hotheaded", "risky" or "otherwise [falling] below community standards" (paras. 84, 94 and 105). She

would put the accused's prior conduct in the "minutes, hours or days" leading up to the final confrontation under a microscope, parsing their every move (para. 83).

[208] Under her interpretation of s. 34(2)(c), triers of fact are invited to look at the accused's entire course of conduct in the lead up to the final confrontation with a view to determining whether any part of it *created, caused, or contributed* to the incident or crisis (para. 124). Was there something the accused could have done, but failed to do, which may have prevented the final confrontation? Was there something the accused did that could have been done differently, or avoided altogether, which may have prevented the final confrontation? On my colleague's approach, these and similar questions would inevitably end up being left to the jury for its consideration — and this creates at least two problems.

[209] First, any instruction the trial judge might give the jury to circumscribe the nature, scope, or breadth of the prior conduct would be all but meaningless. In circumstances giving rise to extreme fear, panic, and anger — where emotions are running high and the adrenalin is flowing — there will always be things that, upon detached reflection, a calm and rational person might have done differently. But we do not convict people of murder or other serious crimes of violence for prior conduct in the lead up to the final confrontation that would, upon detached reflection, be considered careless, negligent, impulsive, or simply an error in judgment.

[210] Under the previous legislation, prior conduct amounting to carelessness, negligence, impulsivity, or a lack of judgment was simply not relevant because it was insufficiently wrongful. Conversely, provocation and unlawful aggression were included because they were wrongful and thus capable of undermining the justification that undergirds a claim of self-defence. My colleague's interpretation of s. 34(2)(c) misconstrues the role that prior conduct is meant to play in the analysis of a self-defence claim. Unlike those factors enumerated in s. 34(2) that go *directly* to the nature of the threat or the proportionality of the accused's defensive response (see, e.g., s. 34(2)(a), (b), (d), (g) and (h)), I find it difficult to explain how conduct such as carelessness, negligence, acting precipitously on impulse, or a lack of judgment exhibited by the accused before the threat giving rise to the act has materialized could somehow be used to deprive the accused of the right to defend against this threat. Given the justificatory nature of self-defence, if the prior conduct does not meet a threshold of wrongfulness, I fail to see its relevance to the accused's entitlement to a defensive response.

[211] Second, on my colleague's approach, no meaningful standard can be set which would provide the jury with the guidance it needs to circumscribe the nature, scope, or breadth of the prior conduct that would warrant depriving the accused of their entitlement to the defence of self-defence. As indicated, my colleague takes the position that any conduct that is temporally and behaviourally relevant to the incident in question is included in the person's role in the incident under s. 34(2)(c). The only type of prior conduct not included is conduct that had no bearing on whether the final act was reasonable.

[212] With respect, if this test is meant to provide a guardrail to guide the jury in its deliberations, then it is a guardrail that, for all intents and purposes, is meaningless. And that, more than anything else, is what separates my approach from my colleague's. On my approach, the jury is given meaningful guardrails, which ensure that if an accused is to be deprived from relying on the defence of self-defence based on prior conduct leading up to the final confrontation, the prior conduct must be sufficiently wrongful to warrant such a drastic result.

[213] With respect, I remain unconvinced that the new s. 34(2)(c) calls for a different interpretation, one that fails to focus on wrongfulness. And yet, that is precisely the interpretation that my colleague proposes. She invites a freewheeling inquiry into an accused's every move leading up to the final

confrontation — an approach that effectively dispenses with the justificatory nature of self-defence despite legislative intent to preserve the core principles of self-defence. The drastic consequence of her reasons is that accused persons who find themselves staring down the barrel of a gun could be left with no right to defend themselves, simply because, at some point along the way, they behaved carelessly or negligently or exhibited a lack of judgment. In sum, my colleague proposes an amorphous interpretation of s. 34(2)(c) that is all but limitless. For these reasons alone, her interpretation should be rejected.

…

[215] My colleague's interpretation of s. 34(2)(c) would allow the jury to reject a self-defence claim, effectively guaranteeing a life sentence for an accused charged with murder, on the basis of an amorphous examination of whether their conduct in the lead up to the confrontation "sheds light on the nature and extent of the accused's responsibility" for the final act (para. 123). Let there be no doubt about it: on this approach, where an accused intentionally causes death in circumstances where they honestly and reasonably believe that their life is in peril, they could lose a valid self-defence claim because their conduct during the final confrontation was found to be unreasonable due to carelessness, negligence, impulsivity, or even a lack of judgment in the lead-up to it. Despite my colleague's protestations to the contrary, conduct of this sort — not just in the final defensive act but in the minutes, hours or days leading up to it — can make the difference between an acquittal and a murder conviction resulting in a life sentence. Surely this cannot be right. It raises the spectre of convicting accused persons who do not come anywhere close to the high degree of moral blameworthiness required to sustain a conviction for murder. As such, my colleague's approach runs the very real risk of contravening fundamental principles of criminal and constitutional law and for that reason alone, it should be rejected (see generally A. Brudner, "Constitutionalizing Self-Defence" (2011), 61 *U.T.L.J.* 867, at pp. 896-97).

[216] I recognize that my colleague is concerned about adhering to Parliament's goal of, among other things, simplifying jury instructions in self-defence cases, but that concern does not support an interpretation of s. 34(2)(c) that gives the jury complete authority to decide what prior conduct falls within s. 34(2)(c). With respect, there is no simplicity in leaving the jury to sift through the "minutes, hours or days" leading up to the final confrontation in search of conduct that could range anywhere from negligence to impulsivity, from risky behaviour to a mere lack of judgment. But even if the interpretation I have advanced leads to somewhat greater complexity, it is a far cry from the tangled web of the prior self-defence provisions that Parliament sought to remove. Regardless, it is a crucial measure that enhances the jury's ability to carry out its task, and is justified by the need for certainty in obtaining a criminal conviction and the significant stakes in a self-defence case. My colleague's approach effectively sets these rule of law interests aside: it removes any meaningful role for the trial judge to guide the jury's inquiry under s. 34(2)(c) and leaves appellate courts with virtually nothing to review in protecting the accused from an improper conviction. In its attempt to simplify the self-defence provisions, surely Parliament did not seek an upheaval of such basic rule of law principles.

[217] Finally, I wish to be clear that the interpretation of s. 34(2)(c) that I advance is not motivated by a belief that jurors might disregard the instructions that bind them. I have tremendous faith in our jury system; I have no doubt that jurors take their job seriously, and I am fully confident that they can be trusted to follow the legal instructions they receive from the trial judge. I simply interpret s. 34(2)(c) more narrowly than my colleague, at least where the Crown seeks to use the provision to prevent an accused from claiming self-defence. That interpretation has nothing to do with mistrusting the jury. Rather, it has everything to do with providing a yardstick against which the jury can measure the accused person's prior conduct — one that, consistent with my analysis of the intrinsic and extrinsic evidence of the revised provisions' meaning, focuses the jury's attention on the wrongfulness of an accused's prior conduct and

the principle of justification. To that end, the guardrails included in my interpretation of s. 34(2)(c) seek to facilitate, and therefore promote, the crucial function that jurors perform.

[218] In sum, I am of the view that, in the context of this case, where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence, the prior conduct can only amount to a "role in the incident" within the meaning of s. 34(2)(c) when it is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds the accused's claim of self-defence. This includes conduct that amounts to provocation or unlawful aggression, as well as conduct that is excessive in the circumstances as the accused reasonably perceived them to be. As described in para. 179 above, if there is an evidentiary foundation for the jury to find that the prior conduct is sufficiently wrongful, the trial judge must instruct the jury to determine whether the conduct in question meets the threshold of wrongfulness required to amount to a "role in the incident". If so, the jury must then weigh this factor along with the other relevant factors identified in s. 34(2) to determine the ultimate question, namely whether the Crown has met its burden of proving beyond a reasonable doubt that the force used by the accused was unreasonable in the circumstances.

(3) Application

[219] Applying this test, I am satisfied that a properly instructed jury acting reasonably could have found that Mr. Khill had a "role in the incident". Specifically, there was an evidentiary basis upon which the jury could find that Mr. Khill's prior conduct was excessive in the circumstances as he reasonably perceived them to be.

[220] When Mr. Khill first awoke, he could hear loud noises. Looking outside, he could tell that someone had broken into his truck, although he could not determine how many people were present. He also knew that the truck contained a garage opener, by which one or more intruders could gain access to the garage and possibly the house. He knew that break-ins were common in the area and that his fiancée had experienced a break-in attempt at their home the week before. He also believed that, given the rural location of the house, the police might not be able to arrive quickly. Under these circumstances, and given his military training, Mr. Khill's decision to take his shotgun and proceed through the house to assess the level of threat facing him and his fiancée has not been seriously challenged by the Crown.

[221] The Crown does, however, challenge Mr. Khill's conduct as events progressed and he gained more information about the nature and extent of the threat. After searching the house and confirming that no one was inside, he checked the garage and found that it too was free of intruders. At that point, it is at least arguable that he had no reason to think that he and his fiancée faced any immediate threat, especially once it appeared that Mr. Styres was the lone intruder on the property. Appreciating the isolated nature of the threat, Mr. Khill could have called the police at this juncture. He might also have alerted Mr. Styres to his presence from beyond the range at which lethal force would have been necessary. Instead, Mr. Khill chose to sneak up on Mr. Styres while armed with a lethal weapon.

[222] In my view, Mr. Khill's conduct provided an evidentiary foundation for the jury to consider whether he had a role in the incident under s. 34(2)(c). Given Mr. Khill's evolving understanding of the isolated threat, his decision to sneak up on Mr. Styres, and the alternative responses that may not only have been available but also have better corresponded with his understanding, the jury could reasonably have found that Mr. Khill's conduct leading up to the final confrontation was not simply careless, negligent, impulsive, or an error in judgment, but excessive such that it could negatively impact the justification for his use of force. That conclusion is, however, by no means a certainty. It was also open to the jury to find that his conduct fell below the excessive standard, in view of his military training and his perception that the situation was one of great danger for himself and his fiancée. Nevertheless, because

there was an evidentiary foundation for the jury to consider Mr. Khill's prior conduct, the trial judge was obliged to instruct the jury to decide if that conduct, in fact, reached the threshold for including it in s. 34(2)(c) and, if it did, to consider that factor in the s. 34(1)(c) reasonableness analysis.

…

[234] For the reasons given, I would dismiss the appeal.

[*Mr. Khill was re-tried on both second degree murder and manslaughter charge with the jury specifically instructed to consider his conduct throughout the incident that resulted in Mr. Styres death. After 13 hours of deliberation, the jury acquitted Mr. Khill of second degree murder and convicted him of manslaughter. "Peter Khill guilty of manslaughter, not guilty of murder" CBC News 16 Dec 2022 at https://www.cbc.ca/news/canada/hamilton/peter-khill-trial-murder-jon-styres-guilty-verdict-1.6689316*

Could this manslaughter verdict be a de-facto recognition that manslaughter is appropriate in cases of excessive self-defence? Should self-defence be an "all or nothing" defence or is there some wisdom in the approach taken by the jury at least in cases involving murder and manslaughter charges? Mr. Khill was sentenced to eight years imprisonment, four more years than the mandatory minimum penalty for manslaughter committed with a firearm.]

Update to statute at p. 976

Please note that, in 2021, Parliament added the following aggravating circumstances to the list found in s. 718.2(a):

> (iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,…
>
> (vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services

Insert at p. 984, after the paragraph on appellate deference

The Supreme Court of Canada most recently and forcefully affirmed this stance on deference to sentencing judges and the non-binding nature of appellate guidance in *R v Parranto*, 2021 SCC 46. The Court underscored "that sentencing is an individualized process, and parity is secondary to proportionality" (para 38). "Therefore," Brown and Martin JJ reasoned, "departures from the starting point or sentences above or below the range are to be expected. Even significant departures are not to be treated as a *prima facie* indication of an error or demonstrable unfitness. Fitness is assessed with reference to the principles and objectives of sentencing in the *Code*, not with reference to how far the sentence departs from quantitative appellate guidance" (*ibid*).

Insert at p. 1017, before the start of section IV of the chapter

The Court's most recent thinking on s. 12 of the Charter can be found in the following case, which itself extended beyond conventional mandatory minimum sentences to consider the practice authorized by s. 745.51 of the *Criminal Code*: the imposition of consecutive 25-year parole ineligibility periods in cases involving multiple first-degree murder convictions. When used, this provision would mean that someone convicted of 2 or 3 counts of first-degree murder could be sentenced to life imprisonment with no eligibility for parole in 50 or 75 years, respectively, rather than the usual rule that, irrespective of the number of convictions, the period of parole ineligibility is 25 years. The concern with these extremely long or "stacked" periods of parole ineligibility is that they amount to the removal of the possibility of parole; otherwise put, this provision created situations in which the offender was consigned to spend the rest of their natural life in prison. In the following case, which arose out of the horrific mass murder at the Great Mosque of Québec in 2017, the Supreme Court of Canada ruled unanimously that s. 745.51 offended s. 12 of the Charter and was unconstitutional. You will find that the decision includes an account of the Court's interpretation of s. 12 of the Charter, as well as a helpful overview of the core principles of sentencing, with which this chapter began.

Though the decision of the Court was unanimous, the outcome was highly controversial, regarded by some as reflecting an "activist" Court straying too far into the realm of policy. What is your view of this judgment and what does it tell you more generally about the law and institutional politics of sentencing (and, perhaps, criminal justice more broadly) in Canada?

R v Bissonnette
2022 SCC 23

THE CHIEF JUSTICE—

I. Introduction

[1] The crimes committed by the respondent in the Great Mosque of Québec on the fateful day of January 29, 2017 were of unspeakable horror and left deep and agonizing scars in the heart of the Muslim community and of Canadian society as a whole. We cannot help but feel sympathy for the victims and their loved ones for their irreparable losses and their indescribable pain.

[2] It is in the context of those crimes that this Court must rule on the constitutional limits on the state's power to punish offenders. The appeal requires us to weigh fundamental values of our society enshrined in the *Canadian Charter of Rights and Freedoms* and to reaffirm our commitment to upholding the rights it guarantees to every individual, including the vilest of criminals.

[3] More specifically, the question before the Court is whether s. 745.51 of the *Criminal Code*, *R.S.C. 1985, c. C-46* ("*Cr. C.*"), which was introduced in 2011 by the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, S.C. 2011, c. 5, s. 5, is contrary to ss. 7 and 12 of the *Charter*. The impugned provision authorizes the imposition of consecutive parole ineligibility periods in cases involving multiple murders. In the context of first degree murders, the application of this provision allows a court to impose

a sentence of imprisonment without eligibility for parole for a period of 50, 75, 100 or even 150 years. In practice, the exercise of the court's discretion will inevitably result in imprisonment for life without a realistic possibility of parole for every offender concerned who has been convicted of multiple first degree murders. Such a criminal sentence is one whose severity is without precedent in this country's history since the abolition of the death penalty and corporal punishment in the 1970s.

[4] For the reasons that follow, I conclude that s. 745.51 *Cr. C.* is contrary to s. 12 of the *Charter* and is not saved under s. 1. In light of this conclusion, it will not be necessary to consider the alleged infringement of s. 7 of the *Charter*.

[5] Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual punishment or treatment. In essence, its purpose is to protect human dignity and ensure respect for the inherent worth of each individual. This Court recently affirmed, albeit in a different context, that human dignity transcends the interests of the individual and concerns society at large (*Sherman Estate v. Donovan*, *2021 SCC 25*, at para. 33). In this sense, the significance of this appeal extends well beyond its particular facts.

[6] Section 12 of the *Charter* prohibits the state from imposing a punishment that is grossly disproportionate in relation to the situation of a particular offender and from having recourse to punishments that, by their very nature, are intrinsically incompatible with human dignity.

[7] The provision challenged in this case allows the imposition of a sentence that falls into this latter category of punishments that are cruel and unusual by nature. All offenders subjected to stacked 25-year ineligibility periods under s. 745.51 *Cr. C.* are doomed to be incarcerated for the rest of their lives without a realistic possibility of being granted parole. The impugned provision, taken to its extreme, authorizes a court to order an offender to serve an ineligibility period that exceeds the life expectancy of any human being, a sentence so absurd that it would bring the administration of justice into disrepute.

[8] A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity. Such a sentence is degrading insofar as it negates, in advance and irreversibly, the penological objective of rehabilitation. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. This conclusion that a sentence of imprisonment for life without a realistic possibility of parole is incompatible with human dignity is not only reinforced by the effects that such a sentence may have on all offenders on whom it is imposed, but also finds support in international and comparative law.

[9] To ensure respect for the inherent dignity of every individual, s. 12 of the *Charter* requires that Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance. In practical terms, this means that every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of an ineligibility period of 50 years, which is the minimum ineligibility period resulting from the exercise of judicial discretion under the impugned provision in cases involving first degree murders.

…

IV. Analysis

C. *Sentencing Objectives in Canadian Law*

[45] Before I begin the s. 12 analysis, an overview of the objectives of sentencing will be essential to the

adjudication of the case before the Court. In Canadian law, the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more objectives, including denunciation, deterrence and rehabilitation, which it will be helpful to discuss (s. 718 *Cr. C.*).

[46] First of all, the penological objective of denunciation requires that a sentence express society's condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values (*R. v. M. (C.A.)*, *[1996] 1 S.C.R. 500*, at para. 81). This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity (C. C. Ruby, *Sentencing* (10th ed. 2020), at s.1.22).

[47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted (*R. v. B.W.P.*, *2006 SCC 27*, *[2006] 1 S.C.R. 941*, at para. 2). When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be weighed by a court, but the effectiveness of which has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders (Ruby, at s.1.31; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at pp. 136-38).

[48] Lastly, the objective of rehabilitation is designed to reform offenders with a view to their reintegration into society so that they can become law-abiding citizens. This penological objective presupposes that offenders are capable of gaining control over their lives and improving themselves, which ultimately leads to a better protection of society. M. Manning and P. Sankoff note that rehabilitation "is probably the most economical in the long run and the most humanitarian objective of punishment" (*Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at 1.155). Along the same lines, I would reiterate my comment in *R. v. Lacasse*, *2015 SCC 64*, *[2015] 3 S.C.R. 1089*, that "[r]ehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world" (para. 4).

[49] The relative importance of each of the sentencing objectives varies with the nature of the crime and the characteristics of the offender (*R. v. Lyons*, *[1987] 2 S.C.R. 309*, at p. 329). There is no mathematical formula for determining what constitutes a just and appropriate sentence. That is why this Court has described sentencing as a "delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community" (*M. (C.A.)*, at para. 91).

[50] But sentencing must in all circumstances be guided by the cardinal principle of proportionality. The sentence must be severe enough to denounce the offence but must not exceed "what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence" (*R. v. Nasogaluak*, *2010 SCC 6*, *[2010] 1 S.C.R. 206*, at para. 42; see also *R. v. Ipeelee*, *2012 SCC 13*, *[2012] 1 S.C.R. 433*, at para. 37). Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle

assures the public that the offender deserves the punishment received (*Re B.C. Motor Vehicle Act*, *[1985] 2 S.C.R. 486*, at p. 533, per Wilson J., concurring).

[51] It follows that "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending" (*Nur*, at para. 45). In a similar vein, Vauclair J.A. aptly stated that [TRANSLATION] "striving for exemplarity to the detriment of evidence of the merit of rehabilitation objectives is incompatible with the principle of individualization" (*Lacelle Belec v. R.*, *2019 QCCA 711*, at para. 30 (CanLII), citing *R. v. Paré*, *2011 QCCA 2047*, at para. 48 (CanLII), per Doyon J.A.). Proportionality has a restraining function, and in this sense serves to guarantee that a sentence is individualized, just and appropriate.

[52] The principle of proportionality is so fundamental that it has a constitutional dimension under s. 12 of the *Charter*, which forbids the imposition of a sentence that is so grossly disproportionate as to be incompatible with human dignity (*Nasogaluak*, at para. 41; *Ipeelee*, at para. 36). However, proportionality as a sentencing principle has no constitutional status as such, since it is not recognized to be a principle of fundamental justice under s. 7 of the *Charter* (*R. v. Malmo-Levine*, *2003 SCC 74*, *[2003] 3 S.C.R. 571*, at para. 160; *R. v. Safarzadeh-Markhali*, *2016 SCC 14*, *[2016] 1 S.C.R. 180*, at para. 71).

[53] Nor do the other sentencing principles and objectives have their own constitutional status. It follows that "Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*" (*Safarzadeh-Markhali*, at para. 71).

D. *The Right Under Section 12 of the Charter Not to Be Subjected to Cruel and Unusual Punishment*

[54] Section 12 of the *Charter*, which appears under the heading "Legal Rights", provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." Although these reasons apply to both punishment and treatment, I will, for the sake of brevity, refer solely to punishment.

[55] It will therefore be appropriate, first, to determine whether the parole ineligibility period constitutes punishment and, second, to clarify the two prongs of the protection afforded by this constitutional guarantee.

(1) The Parole Ineligibility Period Constitutes Punishment

[56] Section 12 of the *Charter* grants individuals a right not to be subjected to cruel and unusual punishment. A precondition for applying this section is therefore that the impugned action constitute punishment. Such is the case here.

[57] State action is considered to be punishment for the purposes of s. 12 if it "(1) ... is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) ... is imposed in furtherance of the purpose and principles of sentencing, or (3) ... has a significant impact on an offender's liberty or security interests" (*R. v. Boudreault*, *2018 SCC 58*, *[2018] 3 S.C.R. 599*, at para. 39, quoting *R. v. K.R.J.*, *2016 SCC 31*, *[2016] 1 S.C.R. 906*, at para. 41).

[58] The length of parole ineligibility is part of an offender's punishment (*Shropshire*, at para. 23; see also *Zinck*, at para. 31). It is a consequence of conviction and has a significant impact on the offender's interests in liberty and security of the person. What is more, the parole ineligibility period furthers the objectives of denunciation and deterrence that underlie a sentence (*Shropshire*, at paras. 21-23; *M. (C.A.)*, at para.

64; *R. v. Simmonds*, *2018 BCCA 205*, *362 C.C.C. (3d) 215*, at para. 10). It follows that the imposition of consecutive parole ineligibility periods authorized by s. 745.51 *Cr. C.* constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

(2) The Two Prongs of the Right Not to Be Subjected to Cruel and Unusual Punishment

[59] For a proper understanding of the two prongs of the protection afforded by s. 12 of the *Charter*, it is necessary to refocus the analysis on the purpose of this provision. This Court recently stated that the purpose of s. 12 is "to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals" (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, *2020 SCC 32*, at para. 51; the Court was unanimous on this point). Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*Blencoe v. British Columbia (Human Rights Commission)*, *2000 SCC 44*, *[2000] 2 S.C.R. 307*, at para. 77). Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect (*Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, *2021 SCC 43*, at para. 56; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, *[1996] 3 S.C.R. 211*, at para. 105). This respect is owed to every individual, irrespective of their actions (see C. Brunelle, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale", [2006] *R. du B.* (numéro thématique) 143, at pp. 150-51).

[60] Against this backdrop, the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity (*R. v. Smith*, *[1987] 1 S.C.R. 1045*, at pp. 1072-74; L. Kerr and B. L. Berger, "Methods and Severity: The Two Tracks of Section 12" *(2020), 94 S.C.L.R. (2d) 235*, at pp. 235-36). This distinction is often blurred, and it would be helpful in the context of this appeal to clarify certain points in this regard.

[61] The first form of cruel and unusual punishment involves punishment whose effect is grossly disproportionate to what would have been appropriate (*Smith*, at p. 1072). A punishment oversteps constitutional limits when it is grossly disproportionate, and not merely excessive (*Smith*, at p. 1072). A grossly disproportionate sentence is cruel and unusual in that it shows the state's complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them.

[62] Determining whether a punishment is grossly disproportionate requires a contextual and comparative analysis: a punishment is found to be so in the specific circumstances of a particular case, in relation to the punishment that would have been just and appropriate having regard to the offender's personal characteristics and the circumstances surrounding the commission of the offence. However, the nature of the punishment inflicted is not problematic from a constitutional perspective. For example, it is accepted that the state may have recourse to fixed-term imprisonment or to the imposition of a fine as punishment. Such punishment is therefore not in itself cruel and unusual, but can become so if its effects make it grossly disproportionate.

[63] The case law on grossly disproportionate punishment has been developed in the context of mandatory sentences imposed without regard for the offender's particular circumstances (e.g., mandatory minimum prison sentences in *R. v. Lloyd*, *2016 SCC 13*, *[2016] 1 S.C.R. 130*; *Nur*; *R. v. Ferguson*,

2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Smith*; a mandatory victim surcharge in *Boudreault*; a mandatory weapons prohibition order in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895). In *Nur*, this Court noted that, to determine whether a minimum sentence is grossly disproportionate, a court must first consider "what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*" (para. 46). The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate to one that would be just and appropriate for the offender or for another offender in a reasonable hypothetical case; if the provision does so, it infringes s. 12 of the *Charter* (*Nur*, at para. 46). The *Nur* framework does not apply to discretionary sentences. Where there is no mandatory minimum sentence, the imposition of a sentence that is acceptable by its nature but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence rather than a declaration of unconstitutionality (*Malmo-Levine*, at paras. 167-68).

[64] The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will "always be grossly disproportionate" because they are intrinsically incompatible with human dignity (*Smith*, at p. 1073). These punishments are in themselves contrary to human dignity because of their "degrading and dehumanizing" nature, as this Court put it in *9147-0732 Québec inc.* (para. 51; the Court was unanimous on this point). A degrading or dehumanizing punishment, by its very nature, outrages "our standards of decency" (*Luxton*, at p. 724).

[65] Since a society's standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 22; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). As Cory J. pointed out more than 30 years ago while dissenting on another point in *Kindler v. Canada (Minister of Justice)*, *[1991] 2 S.C.R. 779*, "[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity" (p. 818). Punishments that we regard as incompatible with human dignity today were common and accepted in the past. Professor A. N. Doob rightly states that "[t]he reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values" (Department of Justice Canada, *A Values and Evidence Approach to Sentencing Purposes and Principles* (2017), at p. 4).

[66] Among the punishments and treatments that have so far been held to be intrinsically incompatible with human dignity are "the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed ... the lobotomisation of certain dangerous offenders or the castration of sexual offenders" (*Smith*, at p. 1074). Torture also falls into this category, for it has as its end "the denial of a person's humanity" (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 51).

[67] A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. A punishment that is cruel and unusual by nature is "so inherently repugnant that it could never be an appropriate punishment, however egregious the offence" (*Suresh*, at para. 51). To determine whether a punishment is intrinsically incompatible with dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have

on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment.

[68] The court's analysis must remain focused on the nature of the punishment rather than on considerations of proportionality between the punishment and the offender's moral culpability. A punishment that is cruel and unusual by nature will by definition "always be grossly disproportionate" (*Smith*, at p. 1073). Such a punishment must quite simply be excluded from the arsenal of sanctions available to the state, which means that the state cannot circumvent s. 12 by providing for specific exemptions for the imposition of the punishment or by making its imposition subject to judicial discretion. In other words, the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

[69] In sum, a punishment may infringe s. 12 for two distinct reasons, either because it is grossly disproportionate in a given case or because it is intrinsically incompatible with human dignity. Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be unnecessary -- and I would even say pointless -- to consider whether it is grossly disproportionate in a given case, because a punishment that is cruel and unusual by nature will "always be grossly disproportionate" (*Smith*, at p. 1073; see also Kerr and Berger, at p. 238).

[70] In their analysis under s. 12 of the *Charter*, the courts must show deference to Parliament's policy decisions with respect to sentencing (*Lloyd*, at para. 45). The limit set by the Constitution for a sentence to be found grossly disproportionate is intended to be demanding and will be attained only rarely (*Boudreault*, at para. 45; *Lloyd*, at para. 24; *Steele v. Mountain Institution*, *[1990] 2 S.C.R. 1385*, at p. 1417; *Lyons*, at p. 345). Likewise, the courts must be cautious and deferential when a sentence is contested on the basis that it falls into the narrow category of punishment that is cruel and unusual by nature. Nevertheless, "the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function" (*Lloyd*, at para. 45, quoting *R. v. Guiller* *(1985), 48 C.R. (3d) 226* (Ont. Dist. Ct.), at p. 238). That is the analysis we must now undertake.

E. *Does Section 745.51 Cr. C. Infringe Section 12 of the Charter?*

…

[73] For the reasons that follow, I conclude that, by allowing consecutive 25-year parole ineligibility periods to be imposed in cases involving first degree murders, s. 745.51 *Cr. C.* authorizes the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods consecutively. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. The conclusion that a sentence of imprisonment without a realistic possibility of parole is incompatible with human dignity is supported by an analysis of the effects that such a sentence may have on all offenders on whom it is imposed, as well as by a review of international and comparative law. Finally, the judicial discretion cannot save the impugned provision, and the royal prerogative of mercy does not offer a realistic possibility of release for an individual serving a sentence of imprisonment for which there is no other review mechanism.

…

(2) Imprisonment for Life Without a Realistic Possibility of Parole Constitutes Punishment That Is Cruel and Unusual by Nature

[81] An examination of the nature of a sentence of imprisonment for life without a realistic possibility of parole leads to the conclusion that it is incompatible with human dignity, a value that underlies the protection conferred by s. 12 of the *Charter*. This punishment is degrading in nature in that it presupposes at the time of its imposition, in a definitive and irreversible way, that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. This alone justifies the conclusion that this punishment is cruel and unusual by nature. It will nonetheless be helpful to review in addition the effects that this sentence may have on all offenders on whom it is imposed.

(a) *Examination of the Nature of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

[82] A sentence of imprisonment for life without a realistic possibility of parole is different in nature from a sentence of incarceration for which a review mechanism exists, in that the former deprives the offender of any prospect of reforming and re-entering society (see *Lyons*, at pp. 340-41; I. Grant, C. Choi and D. Parkes, "*The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing*" *(2020), 52 Ottawa L. Rev. 133*, at p. 172, citing A. Liebling, "Moral performance, inhuman and degrading treatment and prison pain" (2011), 13 *Punishm. & Soc.* 530, at p. 536). A variety of expressions, all of which allude to the fact that the offender will inevitably die behind bars, have been used to describe the nature of a sentence of life in prison without the possibility of parole (e.g., "living death sentence", "death by incarceration", "virtual death sentence", "prolonged death penalty", "delayed death penalty", "death sentence without an execution date" and "the other death penalty"; see J. S. Henry, "Death-in-Prison Sentences: Overutilized and Underscrutinized", in C. J. Ogletree, Jr. and A. Sarat, eds., *Life without Parole: America's New Death Penalty?* (2012), 66, at p. 66). Once behind prison walls, the offender is doomed to remain there until death regardless of any efforts at rehabilitation, despite the devastating effects that this causes.

[83] The objective of rehabilitation is intimately linked to human dignity in that it reflects the conviction that all individuals carry within themselves the capacity to reform and re-enter society. As J. Desrosiers and C. Bernard aptly write, criminal law is based, and must be based, [TRANSLATION] "on a conception of the human being as an agent who is free and autonomous and, as a result, capable of change" ("L'emprisonnement à perpétuité sans possibilité de libération conditionnelle: une peine inconstitutionnelle?" (2021), 25 *Can. Crim. L.R.* 275, at p. 303).

[84] It is difficult if not impossible to predict an offender's capacity for reform over a period of 50 years or more, let alone to predict whether the offender will actually be able to reform during their many years of incarceration. By depriving offenders in advance of any possibility of reintegration into society, the impugned provision shakes the very foundations of Canadian criminal law. It thereby negates the objective of rehabilitation from the time of sentencing, which has the effect of denying offenders any autonomy and imposing on them a degrading punishment that is incompatible with human dignity.

[85] To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. Offenders who are by chance able to rehabilitate themselves must have access to a sentence review mechanism after having served a period of incarceration that is sufficiently long to denounce the gravity of their offence. This last point is important, as Parliament has latitude to establish sentences whose severity expresses society's condemnation of the

offence committed, and while such sentences may in some circumstances have the effect of dooming offenders to die behind bars, they are not necessarily contrary to s. 12 of the *Charter*.

…

[87] In the case at bar… the impugned provision authorizes the imposition of consecutive parole ineligibility periods of 25 years each, for each first degree murder, which has the result of depriving every offender who must serve such periods of the possibility of reforming and re-entering society. J. S. Henry rightly states that "[death-in-prison] sentences are severe and degrading because, like capital sentences, they fail to recognize the intrinsic worth of the incarcerated person. The absence of all redemptive possibility denies human dignity" (p. 76). As Martin J. observed in *Boudreault*, in which the Court struck down the victim surcharge provision, "[t]he inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system" (para. 79). Although the context of that case was different from the present one, the principle it lays down that every offender should have the opportunity to reform and be reintegrated into society is of general application. The foundations of our criminal justice system, as discussed in *Boudreault*, require respect for the inherent worth of every individual, including the vilest of criminals.

[8]8 Contrary to what the appellants argue, the intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual. Where the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the punishment.

[89] The objectives of denunciation and deterrence are already attained by imposing the harshest mandatory minimum sentence provided for in the *Criminal Code*: imprisonment for life (s. 235 *Cr. C.*). The idea that parole puts an end to an offender's sentence is a myth. Conditional release only alters the conditions under which a sentence is served; the sentence itself remains in effect for its entire term, that is, until the offender's death (*M. (C.A.)*, at para. 57). An offender who is granted parole "still carries the societal stigma of being a convicted offender who is serving a criminal sentence" (*M. (C.A.)*, at para. 62). Moreover, an offender who is granted parole on the basis that they no longer pose a danger to society remains "under the strict control of the parole system, and the offender's liberty remains significantly curtailed" (*M (C.A.)*, at para. 62). The threat of reincarceration -- should a condition be breached -- hangs over the offender at all times (*Conditional Release Act*, s. 135). Contrary to popular belief, "[a] person on parole is not a free man" (*R. v. Wilmott*, *[1967] 1 C.C.C. 171* (Ont. C.A.), at p. 181).

[90] The 25-year parole ineligibility period must also be placed in perspective in order to clearly illustrate its severity. It must be borne in mind that this 25-year period, although constitutional, is far from lenient. In a report published in 1987, the Canadian Sentencing Commission noted that "[t]here has been extensive criticism of the 25 year term of custody without the possibility of parole. Many see it as inhumane: inmates have no opportunity to mitigate their sentences" (p. 262). Furthermore, inmates on whom this term is imposed have no incentive to conform to prison rules (p. 262).
…

[92] This overview highlights the severity of Canada's mandatory minimum sentence for first degree murder. There can be no doubt that the preponderant objectives of this sentence are denunciation and deterrence and that the place of rehabilitation is secondary. The only effect of s. 745.51 *Cr. C.* is to

completely negate the last of these objectives, which is incompatible with human dignity for the reasons set out above.

[93] The appellants stress the importance of denouncing multiple murders more strongly by imposing a sentence that reflects the value of each human life that was lost. Such a sentence is based on a retributivist approach that could, on its own, justify a sentence of unlimited severity, and even a sentence establishing a true correspondence between the crime and the punishment. However, as Desrosiers and Bernard put it, [TRANSLATION] "in a legal system based on respect for rights and freedoms, the 'eye for an eye' principle does not apply" (p. 292). The courts must establish a limit on the state's power to sanction offenders, in keeping with the *Charter*.

[94] Furthermore, the objectives of denunciation and deterrence are not better served by the imposition of excessive sentences. Beyond a certain threshold, these objectives lose all of their functional value, especially when the sentence far exceeds human life expectancy. The imposition of excessive sentences that fulfil no function, like the 150-year parole ineligibility period initially sought by the Crown in this case, does nothing more than bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system. And this is leaving aside the fact that the imposition of extremely severe sentences tends to normalize such sentences and to have an inflationary effect on sentencing generally (Grant, Choi and Parkes, at p. 138, citing M. Hamilton, "Extreme Prison Sentences: Legal and Normative Consequences" (2016), 38 *Cardozo L. Rev.* 59, at pp. 106-11).

[95] As the Court of Appeal aptly stated, the imposition of a parole ineligibility period that exceeds human life expectancy [TRANSLATION] "is absurd... . A court must not make an order that can never be carried out" (para. 93). Although such a punishment could well be popular, it is contrary to the fundamental values of Canadian society. The thirst for vengeance that can drive us when a heinous crime is committed by one of our fellow citizens cannot justify imposing a sentence that, no matter how harsh it is, can never erase the horror of what the person has done.

(b) *Effects of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

…

[97] The psychological consequences flowing from a sentence of imprisonment for life without a realistic possibility of parole are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration. In any event, "[w]hile there may not be universal agreement that [death-in-prison] sentences are *worse* than death, it is clear that [such] sentences are uniquely severe and degrading in their own right" (Henry, at p. 75 (emphasis in original)). For offenders who are sentenced to imprisonment for life without a realistic possibility of parole, the feeling of leading a monotonous, futile existence in isolation from their loved ones and from the outside world is very hard to tolerate. Some of them prefer to put an end to their lives rather than die slowly and endure suffering that seems endless to them (R. Johnson and S. McGunigall-Smith, "Life Without Parole, America's Other Death Penalty" (2008), 88 *Prison J.* 328, at pp. 332-36; see also R. Kleinstuber and J. Coldsmith, "Is life without parole an effective way to reduce violent crime? An empirical assessment" (2020), 19 *Criminol. & Pub. Pol'y* 617, at p. 620). Effects like these support the conclusion that a sentence of imprisonment for life without a realistic possibility of parole is degrading in nature and thus intrinsically incompatible with human dignity. It is an inherently cruel and unusual punishment that infringes s. 12 of the *Charter*.

[Chief Justice Wagner then considered support in international and comparative law for the proposition

that a sentence of imprisonment for life without the possibility of parole is incompatible with human dignity. He then found that neither the sentencing judge's discretion to impose the consecutive periods of parole ineligibility, nor the possibility of the exercise of the royal prerogative of mercy, could save the provision. He concluded the judgment of the Court as follows:]

Conclusion

[139] In summary, by stipulating that a court may impose consecutive 25-year parole ineligibility periods, the impugned provision authorizes the infliction of a degrading punishment that is incompatible with human dignity. Under this provision, a court has the power to sentence an offender to imprisonment for life without a realistic possibility of parole for 50, 75 or even 150 years. In other words, in the context of multiple first degree murders, all offenders to whom this provision applies are doomed to spend the rest of their lives behind bars, and the sentences of some offenders may even exceed human life expectancy.

[140] Not only do such punishments bring the administration of justice into disrepute, but they are cruel and unusual by nature and thus contrary to s. 12 of the *Charter*. They are intrinsically incompatible with human dignity because of their degrading nature, as they deny offenders any moral autonomy by depriving them, in advance and definitively, of any possibility of reintegration into society. Sentences of imprisonment for life without a realistic possibility of parole may also have devastating effects on offenders, who are left with no incentive to rehabilitate themselves and whose incarceration will end only upon their death.

[141] Parliament may not prescribe a sentence that negates the objective of rehabilitation in advance, and irreversibly, for all offenders. This penological objective is intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society. For the objective of rehabilitation to be meaningful, every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of the minimum ineligibility period of 50 years stipulated in the impugned provision for cases involving first degree murders. What is at stake is our commitment, as a society, to respect human dignity and the inherent worth of every individual, however appalling the individual's crimes may be.

[142] Let me be very clear. The conclusion that imposing consecutive 25-year parole ineligibility periods is unconstitutional must not be seen as devaluing the life of each innocent victim. Everyone would agree that multiple murders are inherently despicable acts and are the most serious of crimes, with consequences that last forever. This appeal is not about the value of each human life, but rather about the limits on the state's power to punish offenders, which, in a society founded on the rule of law, must be exercised in a manner consistent with the Constitution.

[143] In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid immediately. This declaration strikes down the provision retroactively to its enactment in 2011. The applicable law is therefore the law that existed prior to that date. This means that the respondent must receive a sentence of imprisonment for life without eligibility for parole for a total period of 25 years.

[144] The respondent committed horrendous crimes that damaged the very fabric of our society. Fueled by hatred, he took the lives of six innocent victims and caused serious, even permanent, physical and psychological injuries to the survivors of the killings. He left not only families devastated but a whole community -- the Muslim community in Québec and throughout Canada -- in a state of anguish and pain, with many of its members still fearful for their safety today. And he left Canadians at large feeling deeply

saddened and outraged in the wake of his heinous crimes that undermined the very foundations on which our society rests.

[145] Sadly, this case is but one example of the crimes committed by multiple murderers that shock our collective conscience. Other examples include murders committed by sexual predators who place no value on the lives of their victims and who leave entire communities in a state of fear and terror until they are apprehended. So, too, is the case of terrorists who seek to destroy Canada's political order without regard to the devastation and loss of life that may result from their crimes.

[146] The horror of the crimes, however, does not negate the basic proposition that all human beings carry within them a capacity for rehabilitation and that, accordingly, punishments which fail to account for this human quality will offend the principles that underlie s. 12 of the *Charter*.

[147] All multiple murderers receive a minimum sentence of life in prison. In the current state of the law, they are eligible for parole after 25 years in the case of first degree murders. Eligibility for parole is not a right to parole. Experience has shown that the Board generally proceeds with care and caution before making a decision as important as releasing multiple murderers back into society. The protection of the public is the paramount consideration in the Board's decision-making process, but the Board also takes into account other factors such as the gravity of the offence and its impact on victims. It, perhaps, provides a measure of solace to know that compelling evidence of rehabilitation will be demanded before the perpetrators of such crimes will be released on parole.

[148] For all these reasons, the appeal is dismissed.