

Insert 1 at 95§1

While high on methamphetamine, the Indigenous accused fired at least seven shots from a semi-automatic firearm from inside a residence. Three of the shots struck an unoccupied car. No one was hurt. The accused pleaded guilty to four weapons-related offences, including unauthorized possession of a loaded prohibited firearm contrary to s. 95(1) of the *Code*. He had a criminal record and was subject to two lifetime firearms prohibitions at the time of the offences. A *Gladue* report noted the presence of a number of systemic factors – intergenerational trauma, emotional and physical violence, a loss of connection with Indigenous heritage and culture, criminal involvement, early death of family members because of substance abuse and violence, family breakdown and dysfunctional behaviour, and witnessing violence. The sentencing judge sentenced the accused to a total of six years' imprisonment, including five years for the s. 95(1) offence. The accused's appeal was allowed. The sentencing judge erred in failing to give tangible effect to the serious systemic issues and background factors noted in the *Gladue* report. A fit sentence was five years' imprisonment, achieved by reducing the sentence for the s. 95(1) offence to four years.

R. v. Hiscock, 2020 BCCA 355, 2020 CarswellBC 3148, 68 C.R. (7th) 58 (B.C. C.A.) (Newbury, Saunders, Harris JJ.A.)

Insert 2 at 145§27

The 27-year-old accused pleaded guilty to dangerous driving, uttering threats to burn down his ex-girlfriend K's mother's home, and breach of an undertaking. After uttering the threat, the accused met K's mother on the road. He performed a U-turn and chased her car, driving very close to the car on the shoulder of the road. He was released on an undertaking that prohibited him from contact with K, and was later seen in the passenger seat of a car that K was driving. The accused had a criminal record. He was not remorseful, did not take responsibility for his actions, and believed that the police were out to get him. The accused was sentenced to 60 days' incarceration for uttering the threat, 60 days concurrent for dangerous driving, and 30 days consecutive for breach of an undertaking, followed by 12 months' probation. A 12-month driving prohibition was imposed.

R. v. Young, Tyson, 2020 CarswellNfld 266, 67 M.V.R. (7th) 198 (N.L. Prov. Ct.) (Porter Prov. J.)

Insert 3 at 231§8

The accused was charged with two counts of first-degree murder. The Crown's theory supporting the first-degree murder charges was that the victims were murdered by the accused while he was committing either sexual assault or unlawful confinement. The Crown was not permitted to adduce evidence of the accused's violent and bondage-related but mostly consensual sexual activities with former

romantic partners or evidence of his interest in images depicting sexual violence against women. That evidence was not sufficiently probative of whether the accused murdered the victims in the course of a sexual assault, whereas the prejudicial value of the evidence was considerable and risked focusing on whether the accused was of bad character, even though the trial was by judge alone. **R. v. Strong**, 2020 ONSC 7580, 2020 CarswellOnt 17753, 68 C.R. (7th) 359 (Ont. S.C.J.) (Di Luca J.)

Insert 4 at 232§9

After the accused taunted the victim and challenged him to a fight, the victim punched the accused in the mouth. The accused then went to his girlfriend's apartment, returned with a gun about a minute later, and shot the victim repeatedly at close range. The accused was convicted of second-degree murder. The partial defence of provocation was not available to the accused as the wrongful act or insult represented by the victim punching him in the face was not sufficient to deprive an ordinary person of the power of self-control.

R. v. Bird, 2020 ABQB 594, 2020 CarswellAlta 1850, 396 C.C.C. (3d) 490, 68 C.R. (7th) 432 (Alta. Q.B.) (Macleod J.)

Insert 5 at 232§15

The objective, "ordinary person", standard prescribed by s. 232 in respect of the partial defence of provocation did not violate the accused's rights under s. 7 of the *Charter* on the basis that he could not meet the objective standard because he suffered from Fetal Alcohol Spectrum Disorder. The objective standard exists to hold all persons to a uniform standard and to prevent the partial defence of provocation from being too readily available. Nor did the objective standard violate the accused's rights under s. 15 of the *Charter* by discriminating against him on the basis of mental disability.

R. v. Bird, 2020 ABQB 594, 2020 CarswellAlta 1850, 396 C.C.C. (3d) 490, 68 C.R. (7th) 432 (Alta. Q.B.) (Macleod J.)

Insert 6 at 255§2

The trial judge rejected a joint recommendation for nine months' incarceration followed by 18 months' probation for impaired driving and refusing to provide a breath sample, holding that the proposed sentence was "not in the norm" and that people would think he had come "unhinged on the bench". The accused was sentenced to 18 months' incarceration followed by 24 months' probation. His appeal was allowed. The Supreme Court of Canada in *R. v. Antony-Cook* stated that rejection of a joint submission denotes a submission "so unhinged from the circumstances of the offence and the offender" that it would lead reasonable and informed people to believe that the proper functioning of the justice system had broken down. The Court did not suggest that the test was whether people would think the sentencing judge himself had become unhinged. The issue before the trial judge was whether the joint submission could be said to be contrary to the public interest. The high threshold for rejection of a joint submission was not met, as the

joint submission was not unhinged from the circumstances of the offence and the offender and was consistent with sentencing caselaw in Nova Scotia and elsewhere. **R. v. Miller**, 2021 NSSC 38, 2021 CarswellNS 72, 67 M.V.R. (7th) 190 (N.S. S.C.) (Campbell J.)

Insert 7 at 255§6

The fact that Ontario has not proclaimed the curative discharge provision of s. 255 of the *Code* into force, so that the accused was subject to the mandatory minimum sentence for a first offence of a \$1,000 fine and a one-year driving prohibition, did not violate the accused's rights under s. 12 of the *Charter*. The accused's blood alcohol readings were well over twice the legal limit, her conduct placed the lives and safety of her two passengers and the general public at risk, and she was involved in a single-vehicle accident. There were mitigating factors – the accused was a youthful first offender, and her aboriginal background played a part in bringing her before the court. She met the requirements for a curative discharge, and that disposition would be appropriate if it were available. However, the mandatory minimum sentence was not grossly disproportionate in the accused's circumstances. The unavailability of a curative discharge also did not violate the accused's rights under s. 15 of the *Charter*, as curative discharges under s. 255 are unavailable to all offenders in Ontario, not just Indigenous offenders. The distinction was not drawn on the basis of an enumerated or analogous ground. **R. v. Sabbatis**, 2020 ONCJ 242, 2020 CarswellOnt 6554, 67 M.V.R. (7th) 122 (Ont. C.J.) (Henschel J.)

Insert 8 at 258§1

In assessing whether the presumption in s. 258(1)(a) applies, the trier of fact should examine the accused's intention at the time he began occupancy of the vehicle, and not at the time when he is found by the police occupying the driver's seat. **R. v. Thomas**, 2020 ONSC 5375, 2020 CarswellOnt 12824, 67 M.V.R. (7th) 249 (Ont. S.C.J.) (Somji J.)

Insert 9 at 258§29

The presumption of identity in s. 258(1)(c)(ii) is only engaged if the first breath sample was taken within two hours from the time that the accused last operated his motor vehicle, not the time when the investigating officer considered that there were reasonable grounds to believe the offence of driving over 80 had been committed within the previous three hours. The Crown was not permitted to rely on the presumption of identity where it led no evidence to establish when the accused last drove or had care or control of his vehicle. **R. v. MacDermott**, 2020 NSPC 33, 2020 CarswellNS 575, 67 M.V.R. (7th) 269 (N.S. Prov. Ct.) (Tax Prov. J.)

Insert 10 at 264.1§6

The 27-year-old accused pleaded guilty to dangerous driving, uttering threats to burn down his ex-girlfriend K's mother's home, and breach of an undertaking. After uttering the threat, the accused met K's mother on the road. He performed a U-turn and chased her car, driving very close to the car on the shoulder of the road. He was released on an undertaking which prohibited him from contact with K, and was later seen in the passenger seat of a car that K was driving. The accused had a criminal record. He was not remorseful, did not take responsibility for his actions, and believed that the police were out to get him. The accused was sentenced to 60 days' incarceration for uttering the threat, 60 days concurrent for dangerous driving, and 30 days consecutive for breach of an undertaking, followed by 12 months' probation. A 12-month driving prohibition was imposed.

R. v. Young, Tyson, 2020 CarswellNfld 266, 67 M.V.R. (7th) 198 (N.L. Prov. Ct.) (Porter Prov. J.)

Insert 11 at 271§12

The accused was convicted of sexual assault. During deliberations, the jury asked the trial judge whether the complainant's blood-alcohol levels were tested and, if so, why the results were not led in evidence. The trial judge told the jury not to speculate about why particular evidence had not been called. The accused's appeal was dismissed. The trial judge did not err in his response to the jury's question. It was essential that he instruct the jury not to speculate about why the blood-alcohol results were not led or what the results may have been. He properly reminded the jury that the absence of evidence could impact on whether the Crown had met its onus.

R. v. MacKenzie, 2020 ONCA 646, 2020 CarswellOnt 15067, 395 C.C.C. (3d) 421 (Ont. C.A.) (Doherty, van Rensburg, Trotter JJ.A.)

Insert 12 at 271§14

The accused was convicted on two counts of sexual assault. Each count related to a different complainant, and the Crown did not bring a similar fact evidence application. The accused appealed, arguing that the trial judge erred by not considering each count separately. The appeal was dismissed. While it would have been helpful if the trial judge had provided some indication that he was instructing himself that each count had to be treated separately, he was not required to do so. There is a presumption that judges know the law unless their reasons show they do not, and that presumption was not displaced in this case. The trial judge considered individually the accused's interactions with each complainant, and each complainant's conduct before and during the sexual activity in question. He reviewed separately, and in detail, the evidence that applied exclusively to count one and to count two, and gave no indication that he was using the evidence on one count to bolster or support the evidence or credibility of the other complainant or the other count.

Simoës v. R., 2020 NBCA 73, 2020 CarswellNB 541, 2020 CarswellNB 542, 395 C.C.C. (3d) 182 (N.B. C.A.) (French, LaVigne, LeBlond JJ.A.)

Insert 13 at 273§2

The Indigenous accused attacked and raped a woman at random, inflicting horrible injuries. He had a prior conviction for sexual assault and was assessed as posing a moderate to moderate-high risk of re-offending in a sexual manner. He pleaded guilty to aggravated sexual assault and was sentenced to 12 years' imprisonment. He appealed, arguing that the trial judge erred by saying that *Gladue* principles were "somewhat moot" in light of the seriousness of the offence. The appeal was dismissed. The gravity of the offence did not, and could not, render the circumstances relating to the accused's Indigenous heritage "moot". *Gladue* and its progeny prescribe a different method of analysis in determining a fit sentence for Indigenous offenders, which must be followed regardless of the severity of the offence. However, the trial judge did not err in his ultimate conclusion that 12 years was a fit sentence.

R. v. Brown, 2020 ONCA 657, 2020 CarswellOnt 15068, 395 C.C.C. (3d) 436 (Ont. C.A.) (Brown, Trotter, Paciocco JJ.A.)

Insert 14 at 273.2§1

The accused was convicted on two counts of sexual assault. Although he did not testify, he raised the defence of honest but mistaken belief in communicated consent, based on the notion that the relationship that existed between him and the complainants, as well as the complainants' past behaviour – namely, the sexual banter and flirtatious activities in which they had engaged – led him to believe they were consenting to the sexual activity in question. The trial judge found that there was no air of reality to the defence. The accused's appeal was dismissed. There was a total absence of evidence at trial that the accused had taken reasonable steps to ascertain consent. The fact that the complainants may have consented to flirtatious behaviour did not mean that they consented to the unwanted sexual touching that formed the basis of the charges. In the absence of evidence that the accused took reasonable steps to ascertain consent, there was no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent, since the accused was legally barred from raising that defence due to the operation of s. 273.2(b) of the *Code*.

Simoës v. R., 2020 NBCA 73, 2020 CarswellNB 541, 2020 CarswellNB 542, 395 C.C.C. (3d) 182 (N.B. C.A.) (French, LaVigne, LeBlond JJ.A.)

Insert 15 at 276§1

The common law should not be expanded to impose substantive and procedural safeguards analogous to those in s. 276 of the *Code* in sexual services offences cases. To do so would constitute a significant change to the common law that would overstep the limits of the judicial role. It would also circumvent the legislative choices made by Parliament, which deliberately decided not to list sexual services offences in s. 276(1). Cases involving sexual services offences that do not implicate sexual offences do not involve the same risk of twin-myths reasoning as sexual offence cases.

R. v. Williams, 2020 ONSC 6347, 2020 CarswellOnt 15222, 396 C.C.C. (3d) 267, 68 C.R. (7th) 183 (Ont. S.C.J.) (Stribopoulos J.)

Insert 16 at 278.93§1

The accused was charged with sexually assaulting a fellow employee on one occasion when he was her supervisor. The complainant admitted at the preliminary inquiry that she had a continuing sexual relationship with the accused for several months after the alleged offence, but claimed that she did so only in hope that he would help her to get a promotion, and that she ended the relationship when the promotion did not happen. The accused applied for a hearing under s. 276 of the *Code* to determine whether he could adduce evidence at trial of the subsequent sexual activity. The application was allowed. The complainant's prior testimony put her own post-incident conduct in issue. The evidence sought to be adduced was potentially relevant to the issue of credibility and was not being advanced to support the "twin myths". It would be unfair to permit the complainant to allege facts in support of her own narrative about the sexual relationship that followed the alleged assault without permitting the accused to challenge the veracity of those very facts. The requirements of s. 278.93(2) of the *Code* were met.

R. v. C.R., 2020 ONSC 5275, 2020 CarswellOnt 13138, 68 C.R. (7th) 208 (Ont. S.C.J.) (Dunphy J.)

Insert 17 at 286.2§3

The common law should not be expanded to impose substantive and procedural safeguards analogous to those in s. 276 of the *Code* in sexual services offences cases. To do so would constitute a significant change to the common law that would overstep the limits of the judicial role. It would also circumvent the legislative choices made by Parliament, which deliberately decided not to list sexual services offences in s. 276(1). Cases involving sexual services offences that do not implicate sexual offences do not involve the same risk of twin-myths reasoning as sexual offence cases.

R. v. Williams, 2020 ONSC 6347, 2020 CarswellOnt 15222, 396 C.C.C. (3d) 267, 68 C.R. (7th) 183 (Ont. S.C.J.) (Stribopoulos J.)

Insert 18 at 286.3§4

The common law should not be expanded to impose substantive and procedural safeguards analogous to those in s. 276 of the *Code* in sexual services offences cases. To do so would constitute a significant change to the common law that would overstep the limits of the judicial role. It would also circumvent the legislative choices made by Parliament, which deliberately decided not to list sexual services offences in s. 276(1). Cases involving sexual services offences that do not implicate sexual offences do not involve the same risk of twin-myths reasoning as sexual offence cases.

R. v. Williams, 2020 ONSC 6347, 2020 CarswellOnt 15222, 396 C.C.C. (3d) 267, 68 C.R. (7th) 183 (Ont. S.C.J.) (Stribopoulos J.)

Insert 19 at 286.4§2

The common law should not be expanded to impose substantive and procedural safeguards analogous to those in s. 276 of the *Code* in sexual services offences cases. To do so would constitute a significant change to the common law that would overstep the limits of the judicial role. It would also circumvent the legislative choices made by Parliament, which deliberately decided not to list sexual services offences in s. 276(1). Cases involving sexual services offences that do not implicate sexual offences do not involve the same risk of twin-myths reasoning as sexual offence cases.

R. v. Williams, 2020 ONSC 6347, 2020 CarswellOnt 15222, 396 C.C.C. (3d) 267, 68 C.R. (7th) 183 (Ont. S.C.J.) (Stribopoulos J.)

Insert 20 – at 320.16

320.16§1 Reasonable excuse

If a driver has a reasonable excuse for failing to stop, s. 320.16 does not require him to subsequently go to a police station or call the police and report the accident. The requirement to provide one's name and address is dependent on stopping.

R. v. Well, 2020 ONCJ 294, 2020 CarswellOnt 8745, 67 M.V.R. (7th) 341 (Ont. C.J.) (Knazan J.)

Insert 21 at 320.19§2

The 27-year-old accused pleaded guilty to dangerous driving, uttering threats to burn down his ex-girlfriend K's mother's home, and breach of an undertaking. After uttering the threat, the accused met K's mother on the road. He performed a U-turn and chased her car, driving very close to the car on the shoulder of the road. He was released on an undertaking which prohibited him from contact with K, and was later seen in the passenger seat of a car that K was driving. The accused had a criminal record. He was not remorseful, did not take responsibility for his actions, and believed that the police were out to get him. The accused was sentenced to 60 days' incarceration for uttering the threat, 60 days concurrent for dangerous driving, and 30 days consecutive for breach of an undertaking, followed by 12 months' probation. A 12-month driving prohibition was imposed.

R. v. Young, Tyson, 2020 CarswellNfld 266, 67 M.V.R. (7th) 198 (N.L. Prov. Ct.) (Porter Prov. J.)

Insert 22 at 320.21§1

The accused, aged 46 at the time of the offence and 50 at the time of sentencing, pleaded guilty to dangerous driving causing death. He drove erratically and at a high rate of speed over a 10-kilometre stretch of highway, weaving in and out of traffic, tailgating and cutting off other vehicles, and racing one other vehicle, and finally lost control of his vehicle. The vehicle rolled over, fatally injuring the accused's wife. The accused had an extensive record of provincial highway traffic

convictions and had received multiple driving suspensions over the years. The accused was Indigenous, and there were a number of *Gladue* factors that diminished, but did not eliminate, his very high level of moral culpability or blameworthiness. He was sentenced to two years less a day in jail, followed by three years' probation. A five-year driving prohibition was imposed.

R. v. Morgan, 2020 BCSC 1397, 2020 CarswellBC 2318, 67 M.V.R. (7th) 64 (B.C. S.C.) (Giaschi J.)

Insert 23 at 348§4

The accused was convicted of breaking and entering his former residence with intent to commit an indictable offence. He had moved out of the matrimonial home at his wife's request and was living in his van until he could move into an apartment that he had rented. His wife came home one day to find that a pane of glass on her front door was broken. The accused's van was parked outside, and the accused emerged from the house. The accused's appeal was allowed. The trial judge's reasons for judgment were inadequate in that they omitted discussion of evidence that was capable of leading to an inference rebutting the presumption in s. 348(2). That evidence included the facts that the accused was still receiving mail at the house, that his van was parked in plain sight on the night of the alleged offence, that he had visited his wife after she told him to leave, that he had left clothing at the residence, that he had been in the house for some time on the evening in question, and that nothing was stolen. That evidence was capable of supporting an inference that the accused lacked the requisite intent to commit an indictable offence.

R. v. Bus, 2020 BCCA 278, 2020 CarswellBC 2495, 68 C.R. (7th) 116 (B.C. C.A.) (Saunders, Fenlon, DeWitt-Van Oosten JJ.A.)

Insert 24 at 348§9

348§9 Included offences

There was evidence at trial that the accused gained entry into his wife's residence by breaking a window on the front door. He was convicted of breaking and entering with intent to commit an indictable offence under s. 348(1) of the *Code*, but the conviction was set aside on appeal. The Court of Appeal declined to enter a conviction for mischief under s. 430(1)(a) of the *Code* as an included offence under breaking and entering with intent to commit an indictable offence. "Break" is defined in s. 321 of the *Code* as meaning "(a) to break any part, internal or external, or (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening". The offence charged did not particularize the offence in a way that excluded subsection (b) of the definition under s. 321. The offence charged could have been committed by opening the door without causing damage or destruction of property, a required element under s. 430(1)(a). Accordingly, the indictment did not charge the included offence of mischief under s. 430(1)(a).

R. v. Bus, 2020 BCCA 278, 2020 CarswellBC 2495, 68 C.R. (7th) 116 (B.C. C.A.) (Saunders, Fenlon, DeWitt-Van Oosten JJ.A.)

Insert 25 at 577§2

577§2 Direct indictments --- Relation to preliminary inquiry

The trial judge granted the accused's application for *certiorari* quashing the committal to stand trial on the basis that the accused should have been allowed to examine the lead investigating officer at the preliminary inquiry. He remitted the matter back to Provincial Court so that the examination could take place. He found, however, that sufficient evidence to go to trial existed and that his decision did not vacate the ultimate committal. The Crown then laid a direct indictment. The accused's application to quash the direct indictment was dismissed, and he was ultimately convicted. His appeal was dismissed. The trial judge erred in finding that his decision did not vacate the ultimate committal. *Certiorari* is an all or nothing remedy, and once it was granted, the committal order was necessarily quashed. That meant that the parties were back at the preliminary inquiry stage of the proceedings and that the preliminary inquiry had been commenced but not concluded. As a result, the Crown was permitted to bring a direct indictment. The accused failed to demonstrate that the laying of a direct indictment in the face of a *certiorari* decision quashing the committal order was an abuse of process.

R. v. Perdomo Lopez, 2020 ABCA 404, 2020 CarswellAlta 2130, 395 C.C.C. (3d) 131, 68 C.R. (7th) 318 (Alta. C.A.) (Veldhuis, Wakeling, Schutz JJ.A.)

Insert 26 at 606§3

The trial judge found that the accused's guilty plea was not fully informed because defence counsel failed to advise him that his ability to challenge the lawfulness of a search warrant would be forfeited upon entry of the plea. However, she found that the accused had failed to establish that it would be unfair to permit the guilty plea to stand. The accused's appeal from conviction was allowed. The trial judge erred by failing to consider whether the evidence adduced on the strike plea application established a reasonable possibility that the accused would not have pleaded guilty had he been aware that doing so would preclude a challenge to the search warrant. Had she done so, she would have concluded that the accused would not, in fact, have pleaded guilty on those circumstances. The guilty plea was set aside, the conviction was quashed, and a new trial was ordered.

R. v. Lam, 2020 BCCA 276, 2020 CarswellBC 2494, 395 C.C.C. (3d) 150 (B.C. C.A.) (Harris, Fitch, DeWitt-Van Oosten JJ.A.)

Insert 27 at 672§8

During jury deliberations, the Crown disclosed to the defence that two Crown witnesses had made claims for restitution under s. 737.1 of the *Code*. The trial judge dismissed the accused's application for a mistrial based on late disclosure. The accused's appeal from conviction was dismissed. There was no duty on the Crown to make an inquiry of Victim Services for any restitution claims that were submitted. The witnesses' restitution claims did not become subject to the first

party disclosure regime until they actually came into the hands of the prosecuting Crown at about the time that the Crown closed its case, at which point they were disclosed to the defence within 48 hours. The Crown's disclosure obligations were met. Even if there was some lateness in disclosure, the mistrial application was properly dismissed. The trial judge was in the best position to conclude that the witnesses' evidence was only of peripheral importance.

R. v. Robinson, 2020 ABCA 361, 2020 CarswellAlta 1842, 395 C.C.C. (3d) 202 (Alta. C.A.) (Slatter, Schutz, Greckol JJ.A.)

Insert 28 at 672§10.1

At the accused's trial on a charge of the attempted murder of his girlfriend, the Crown led evidence from an EMS attendant who travelled with the complainant on her way to hospital. The attendant testified as to statements made by the complainant and stated that the complainant nodded when the attendant asked her whether her boyfriend had attacked her. The accused's appeal from conviction was allowed. The complainant's statements to the EMS attendant, including her nod, were hearsay. They were not admissible under the principled approach to hearsay because they were not necessary. While the complainant could not remember having made the statements during the ambulance ride, she did remember the event itself and could and did testify as to the accused's identity as her attacker. The statements did not qualify as spontaneous statements because they were elicited through repeated questioning.

R. v. Borel, 2021 ONCA 16, 2021 CarswellOnt 167, 68 C.R. (7th) 256 (Ont. C.A.) (Lauwers, Miller, Nordheimer JJ.A.)

Insert 29 at 672§10.2

At the accused's trial on a charge of the attempted murder of his girlfriend, the Crown led evidence from an EMS attendant who travelled with the complainant on her way to hospital. The attendant testified as to statements made by the complainant and stated that the complainant nodded when the attendant asked her whether her boyfriend had attacked her. The accused's appeal from conviction was allowed. The complainant's statements to the EMS attendant, including her nod, were inadmissible under the rule against prior consistent statements, and no exception to that rule applied. The statements were not required to outline the narrative of events and they were not admissible to rebut an allegation of recent fabrication because no such allegation was made.

R. v. Borel, 2021 ONCA 16, 2021 CarswellOnt 167, 68 C.R. (7th) 256 (Ont. C.A.) (Lauwers, Miller, Nordheimer JJ.A.)

Insert 30 at 672.11§1

The accused was convicted of second-degree murder at his second trial. He claimed that he heard voices that ordered him to kill the victim. His first trial ended in a mistrial. He was found fit to stand trial prior to both trials. He was self-represented at his second trial, and *amicus* was appointed. When the Crown closed its case, *amicus* asked the trial judge to order a fitness assessment under s. 672.11 of the

Code since the accused had taken no meaningful steps in his own defence and was passive. The trial judge saw no basis to find that the extent to which the accused had participated or not participated in the proceedings raised a concern respecting fitness and denied the request. The accused's appeal from conviction was dismissed. *Amicus* did not submit that he was unable to communicate with the accused, and the record suggested that he was able to do so. The trial judge was provided with four assessments completed in the prior two years, all of which found the accused to be fit. The totality of evidence before the trial judge did not establish reasonable grounds to believe that an assessment was necessary to determine whether the accused was fit.

R. v. Ledesma, 2020 ABCA 410, 2020 CarswellAlta 2183, 395 C.C.C. (3d) 259 (Alta. C.A.) (Paperny, Hughes, Feehan JJ.A.)

Insert 31 at 672.51

672.51§1 Counsel

T, who suffered from schizophrenia and who had been found not criminally responsible on charges that included attempted murder, was subject to a disposition detaining him on a general forensic unit with privileges that included indirect supervision on hospital grounds and in the community. He disclosed to his clinical team that he was experiencing delusions and auditory hallucinations. At his annual review, the Review Board rejected his request for an absolute discharge and instead ordered his continued detention. T's appeal was dismissed. The record clearly supported the Board's conclusion that T represented a significant risk to public safety. He had lost insight into his mental illness and need for medication, and the Board correctly found that the Hospital had to be able to regulate his medication and treatment and to choose his residence and the details of community access, which was only possible under a detention order.

Tran (Re), 2020 ONCA 722, 2020 CarswellOnt 16554, 395 C.C.C. (3d) 547, 68 C.R. (7th) 337 (Ont. C.A.) (Pepall, Hourigan, Roberts JJ.A.)

Insert 32 at 672.56§2

T, who suffered from schizophrenia and who had been found not criminally responsible on charges that included attempted murder, was subject to a disposition detaining him on a general forensic unit with privileges that included indirect supervision on hospital grounds and in the community. When he disclosed that he was experiencing delusions and auditory hallucinations, his indirectly supervised passes (which permitted him to go out onto hospital grounds and into the community on his own) were put on hold, and his escorted passes to the community were withheld for one month. He did not lose his privilege of going onto hospital grounds accompanied but declined to use it. The Review Board did not err in finding that the increase in the restrictions on T's liberty was not significant, so that notice under s. 672.56(2) of the *Code* and a hearing under s. 672.81(2.1) were not required. The changes made were the kind of day-to-day adjustments that should normally be left to T's clinical team.

Tran (Re), 2020 ONCA 722, 2020 CarswellOnt 16554, 395 C.C.C. (3d) 547, 68 C.R. (7th) 337 (Ont. C.A.) (Pepall, Hourigan, Roberts JJ.A.)

Insert 33 at 683§4

The accused was convicted of assault causing bodily harm. He and the complainant were involved in a physical altercation in the washroom of a pub. Both men claimed that they acted in self-defence after the other instigated the fight. The trial judge rejected the accused's evidence. On the accused's appeal, the complainant's criminal record, including the underlying facts of a 2003 conviction for assault, was admissible as fresh evidence related to the integrity of the trial process. The Crown's failure to disclose the complainant's prior record limited a line of inquiry related to the complainant's credibility and insulated him from scrutiny to some extent, but did not deprive the defence from garnering additional evidence that would ultimately have affected the trial judge's material findings. While the fact of the complainant's criminal record was relevant to his credibility generally, given the content of the record, there was no reasonable possibility that cross-examination on that record would have had an impact on the decision to convict. The non-disclosure did not deprive the accused of realistic opportunities to explore possible uses of the record for purposes of investigation and gathering evidence.

R. v. Frigon, 2020 BCCA 315, 2020 CarswellBC 2879, 395 C.C.C. (3d) 222 (B.C. C.A.) (Groberman, Goepel, Fisher JJ.A.)

Insert 34 at 683§7

The accused was convicted of breaking and entering. His identity as one of the persons responsible for a home invasion was the sole controverted issue at trial. His appeal was dismissed. Before a formal order dismissing the appeal was entered, the accused applied to re-open his appeal, intending to adduce fresh evidence that he did not take part in the home invasion. The Crown's application to quash the application to re-open for lack of jurisdiction was dismissed. A court continues to be seized of a case and is not *functus officio* until the formal order has been drawn up and entered. Accordingly, a court of appeal has a limited power to permit re-opening of an appeal before the formal order is entered if it is in the interests of justice to do so. The source of the authority to reopen is the inherent jurisdiction of the court – even a statutory court like a court of appeal – to control its own process and to prevent an injustice. In this case, the Crown failed to establish that the application to re-open had no reasonable prospect of success.

R. v. Smithen-Davis, 2020 ONCA 759, 2020 CarswellOnt 17595, 68 C.R. (7th) 75 (Ont. C.A.) (Simmons, Watt, Miller JJ.A.)

Insert 35 at 686§6

At the accused's trial on a charge of attempted murder, the Crown played the accused's three-hour police interview for the jury and asked the homicide detective who had conducted it to identify what he found unusual about it. The detective responded that three things were unusual: the accused's general demeanour and body language were inconsistent with someone charged with attempted murder; the accused's version of events changed throughout the interview; and the accused's denials about involvement in the crime were relatively weak. The

detective testified that, in his experience, an innocent detainee would be likely to make stronger denials. The accused's appeal from conviction was allowed. The Crown ought not to have elicited the evidence of the detective's opinions. That testimony amounted to evidence from a highly experienced police officer that the accused acted like someone who was guilty. The evidence was inadmissible and highly prejudicial.

R. v. Borel, 2021 ONCA 16, 2021 CarswellOnt 167, 68 C.R. (7th) 256 (Ont. C.A.) (Lauwers, Miller, Nordheimer JJ.A.)

Insert 36 at 686§13

The accused was convicted of sexual assault. The complainant testified that the accused had non-consensual intercourse with her while she was extremely intoxicated and blacking out. DNA evidence indicated that the accused's semen was found in the complainant. In a police statement, the accused denied having sexual intercourse with the complainant, but testified at trial that he had consensual sexual intercourse with her and that she was not overly intoxicated. The accused appealed, arguing ineffective assistance of counsel. The appeal was dismissed. Trial counsel's decision not to cross-examine the Crown's DNA expert was not prejudicial. Not only did the accused's admittedly untruthful statement to the police seriously undermine his credibility, the independent evidence supporting the complainant's credibility and reliability was overwhelming. Trial counsel's failure to cross-examine the Crown's toxicologist on the physical capabilities of an individual experiencing blackouts also caused no prejudice to the defence. The distinction between "blacking out" (i.e., losing memory) and "passing out" (i.e., losing consciousness) was already present in the expert's evidence.

R. v. Trejo, 2020 BCCA 302, 2020 CarswellBC 2760, 395 C.C.C. (3d) 58 (B.C. C.A.) (Newbury, MacKenzie, Willcock JJ.A.)

Insert 37 at 686§23

The accused was convicted of breaking and entering. His identity as one of the persons responsible for a home invasion was the sole controverted issue at trial. His appeal was dismissed. Before a formal order dismissing the appeal was entered, the accused changed counsel and applied to re-open his appeal, intending to adduce fresh evidence that he did not take part in the home invasion. The Crown's application to quash the application to re-open for lack of jurisdiction was dismissed. A court continues to be seized of a case and is not *functus officio* until the formal order has been drawn up and entered. Accordingly, a court of appeal has a limited power to permit re-opening of an appeal before the formal order is entered if it is in the interests of justice to do so. The source of the authority to reopen is the inherent jurisdiction of the court – even a statutory court like a court of appeal – to control its own process and to prevent an injustice. In this case, the Crown failed to establish that the application to re-open had no reasonable prospect of success.

R. v. Smithen-Davis, 2020 ONCA 759, 2020 CarswellOnt 17595, 68 C.R. (7th) 75 (Ont. C.A.) (Simmons, Watt, Miller JJ.A.)

Insert 38 at 718§3

The trial judge rejected a joint recommendation for nine months' incarceration followed by 18 months' probation for impaired driving and refusing to provide a breath sample, holding that the proposed sentence was "not in the norm" and that people would think he had come "unhinged on the bench". The accused was sentenced to 18 months' incarceration followed by 24 months' probation. His appeal was allowed. The Supreme Court of Canada in *R. v. Antony-Cook* stated rejection of a joint submission denotes a submission "so unhinged from the circumstances of the offence and the offender" that it would lead reasonable and informed people to believe that the proper functioning of the justice system had broken down. The Court did not suggest that the test was whether people would think the sentencing judge himself had become unhinged. The issue before the trial judge was whether the joint submission could be said to be contrary to the public interest. The high threshold for rejection of a joint submission was not met, as the joint submission was not unhinged from the circumstances of the offence and the offender and was consistent with sentencing caselaw in Nova Scotia and elsewhere.

R. v. Miller, 2021 NSSC 38, 2021 CarswellNS 72, 67 M.V.R. (7th) 190 (N.S. S.C.) (Campbell J.)

Insert 39 at 718.2§1

While high on methamphetamine, the Indigenous accused fired at least seven shots from a semi-automatic firearm from inside a residence. Three of the shots struck an unoccupied car. No one was hurt. The accused pleaded guilty to four weapons-related offences, including unauthorized possession of a loaded prohibited firearm contrary to s. 95(1) of the *Code*. He had a criminal record and was subject to two lifetime firearms prohibitions at the time of the offences. A *Gladue* report noted the presence of a number of systemic factors – intergenerational trauma, emotional and physical violence, a loss of connection with Indigenous heritage and culture, criminal involvement, early death of family members because of substance abuse and violence, family breakdown and dysfunctional behaviour, and witnessing violence. The sentencing judge sentenced the accused to a total of six years' imprisonment, including five years for the s. 95(1) offence. The accused's appeal was allowed. The sentencing judge erred in principle in failing to give tangible effect to the serious systemic issues and background factors noted in the *Gladue* report. A fit sentence was five years' imprisonment, achieved by reducing the sentence for the s. 95(1) offence to four years.

R. v. Hiscock, 2020 BCCA 355, 2020 CarswellBC 3148, 68 C.R. (7th) 58 (B.C. C.A.) (Newbury, Saunders, Harris JJ.A.)

The Indigenous accused attacked and raped a woman at random, inflicting horrible injuries. He had a prior conviction for sexual assault and was assessed as posing a moderate to moderate-high risk of re-offending in a sexual manner. He pleaded guilty to aggravated sexual assault and was sentenced to 12 years' imprisonment.

He appealed, arguing that the trial judge erred by saying that *Gladue* principles were “somewhat moot” in light of the seriousness of the offence. The appeal was dismissed. The gravity of the offence did not, and could not, render the circumstances relating to the accused’s Indigenous heritage “moot”. *Gladue* and its progeny prescribe a different method of analysis in determining a fit sentence for Indigenous offenders, which must be followed regardless of the severity of the offence. However, the trial judge did not err in his ultimate conclusion that 12 years was a fit sentence.

R. v. Brown, 2020 ONCA 657, 2020 CarswellOnt 15068, 395 C.C.C. (3d) 436 (Ont. C.A.) (Brown, Trotter, Paciocco JJ.A.)

Insert 40 at 745.51§2

Section 745.51 violates s. 12 of the *Charter*. The provision is excessive, and the effect of consecutive parole ineligibility periods is grossly disproportionate because it renders inapplicable certain fundamental components of Canadian criminal law, notably the objectives of rehabilitation and proportionality. Section 745.51 also violates s. 7 of the *Charter*. The scope of the provision exceeds its objective because it applies to all multiple murderers, regardless of the specific circumstances of the case. The provision is overbroad. Section 745.51 is not saved under s. 1 of the *Charter* and is of no force or effect.

Bissonnette c. R., 2020 QCCA 1585, 2020 CarswellQue 13124, 2020 CarswellQue 12129, 68 C.R. (7th) 1 (C.A. Que.) (Doyon, Gagnon, Bélanger JJ.C.A.)

Insert 41 at CEA 12§1

At his sexual assault trial, the accused was cross-examined about his prior convictions for obstruction of justice and conspiracy to commit murder. On appeal from conviction, the accused argued that Crown counsel went beyond the permissible scope of cross-examination under s. 12(1) of the CEA by cross-examining him about the details of those convictions. The appeal was dismissed. The Crown’s cross-examination on the criminal record was initially limited to questions that sought to reveal, beyond the superficial *Criminal Code* section number, that the accused had been convicted of bribing a witness, rather than some other conduct that would constitute obstructing justice, and that he had conspired to harm that witness, as opposed to conspiring to murder a stranger. The Crown’s questions became more probing only when the accused denied conspiring to harm a witness. Those further inquiries were neither unfair nor prejudicial. Where an accused is evasive and misleading regarding their own criminal record, the Crown is permitted through questioning to provide a clearer picture of the accused’s credibility for the trier of fact.

R. v. Strathdee, 2020 ABCA 306, 2020 CarswellAlta 1559, 393 C.C.C. (3d) 278 (Alta. C.A.) (Fraser C.J.A., Crighton, Wakeling JJ.A.)

Insert 42 at CEA 29

CEA 29§1 Banking records

Videos and still photos from bank surveillance cameras were properly admitted under s. 29 of the CEA at the accused's fraud trial notwithstanding that the bank employee who swore the affidavit identifying the evidence did not have personal knowledge of how the images and videos were selected and extracted. The ordinary and common sense reading of the word "knowledge" in s. 29(2) does not mean personal knowledge of every aspect of the record, including its precise retrieval. **R. v. Brar**, 2020 ABCA 398, 2020 CarswellAlta 2084, 394 C.C.C. (3d) 402 (Alta. C.A.) (O'Ferrall, Schutz, Strekaf JJ.A.)

Insert 43 at CDSA 4§8

CDSA 4§8 Evidence of possession

The police stopped a vehicle driven by the accused and found 208.3 grams of cocaine behind the stereo console. The accused, who was the sole occupant, was not the registered owner of the vehicle, but several documents found in the vehicle connected it to the accused. The accused was convicted of possession of cocaine for the purpose of trafficking. The trial judge addressed the accused's argument that someone else could have surreptitiously hidden the cocaine behind the stereo console without his knowledge. He concluded that the quantity and value of the seized drugs made it inconceivable that the drugs would be casually entrusted to someone who did not know what was in the vehicle. He also found the use of a third-party vehicle consistent with evidence that third-party vehicles are used to transport drugs. The accused's appeal was dismissed. The circumstantial evidence established a constellation of factors that together supported the inference that the accused knew about the presence of drugs in the vehicle. Only alternative inferences that are reasonable are sufficient to raise a reasonable doubt. The trial judge properly concluded that the accused's theory did not cross the line from speculation to "plausible theory" or "reasonable possibility".

R. v. Lola, 2020 SKCA 103, 2020 CarswellSask 405, 392 C.C.C. (3d) 284 (Sask. C.A.) (Leurer, Ottenbreit, Ryan-Froslic JJ.A.)

Insert 44 at CDSA 5§32

The accused was convicted of possession of 51 grams of fentanyl for the purpose of trafficking after the police intercepted a package from China containing the drugs, which the accused had ordered. The accused had a youth record that included serious offences, and a less serious adult record. His appeal from a sentence of 10 years' imprisonment was dismissed. The sentencing range for importing or trafficking fentanyl, an extraordinarily dangerous drug, should exceed that for cocaine and heroin. Cases submitted by the accused were distinguishable on the basis that they involved first offenders, persons who entered guilty pleas, low-level operators, youthful offenders with excellent rehabilitative prospects, or offenders who had co-operated with the police and agreed to testify at great personal risk. While the purity of the fentanyl may be considered as aggravating in some cases, the fact that its purity was unknown in this case was not a significant factor. Sentences will not depend finely on the purity or potency of a particular drug,

particularly where the drug, like fentanyl, is highly toxic even in very small doses. The 10-year sentence was not unfit.

R. v. Petrowski, 2020 MBCA 78, 2020 CarswellMan 317, 393 C.C.C. (3d) 102 (Man. C.A.) (Cameron, Spivak, Burnett JJ.A.)

Insert 45 at CDSA 6§9

The accused, a 32-year-old with a criminal record, pleaded guilty to importing 49 grams of fentanyl from China. He was not the primary actor; he was an addict, and his involvement consisted of allowing his residence to be used for the importation of fentanyl for his supplier in exchange for free fentanyl. While he was on bail, a second package from China was successfully delivered to his address and signed for. The accused's appeal from a sentence of eight years' imprisonment was dismissed. Sentences for importing or trafficking in fentanyl should reflect the dangerousness of that drug. Despite his awareness of how dangerous fentanyl is, the accused stored it at his home, where his partner and two young children resided, demonstrating a lack of concern for the risk to others. He had refused to take advantage of the opportunities he had to rehabilitate himself and had used his addiction to deflect blame from himself. The sentence was not unfit.

R. v. Slotta, 2020 MBCA 79, 2020 CarswellMan 319, 393 C.C.C. (3d) 122 (Man. C.A.) (Cameron, Spivak, Burnett JJ.A.)

Insert 46 at CHA 7§5.1

The accused was convicted of sexual interference after having sexual intercourse with a 13-year-old girl when he was 25 or 26. At trial, he unsuccessfully challenged the constitutionality of s. 150.1 of the *Code*, arguing that the denial of a defence of consent where the close-in-age exception does not apply is overly broad and violates s. 7 of the *Charter* as it criminalizes sexual relationships with minors in the absence of exploitation or an abuse of power. The accused's appeal from conviction was dismissed. The accused's constitutional argument wrongly presumed that children under the age of 16 have the capacity to consent to sexual activity with adults and failed to recognize the inherently exploitive nature of sexual activity between adults and children and its real and apprehended harm. Sexual activity between accused persons who do not meet the criteria for a close-in-age exception and complainants under the age of 16 is, by its very nature, exploitive, even in cases where the complainant is alleged to have willingly participated in the activity. Section 150.1 does not violate s. 7 of the *Charter*.

R. v. Alfred, 2020 BCCA 256, 2020 CarswellBC 2267, 393 C.C.C. (3d) 356 (B.C. C.A.) (Abrioux, DeWitt-Van Oosten, Willcock JJ.A.)

Section 745.51, which permits a sentencing judge to impose consecutive parole ineligibility periods for murder, violates s. 7 of the *Charter*. The scope of the provision exceeds its objective because it applies to all multiple murderers, regardless of the specific circumstances of this case. The provision is overbroad. Section 745.51 is not saved under s. 1 of the *Charter* and is of no force or effect.

Bissonnette c. R., 2020 QCCA 1585, 2020 CarswellQue 13124, 2020 CarswellQue 12129, 68 C.R. (7th) 1 (C.A. Que.) (Doyon, Gagnon, Bélanger JJ.C.A.)

Section 117 of the *Immigration and Refugee Protection Act*, which prohibits assisting foreign nationals to enter Canada illegally, is overbroad in relation to the legislative purpose of prohibiting human smuggling that is for profit, that is related to criminal or terrorist organizations, or that endangers asylum-seekers, to the extent that it catches three categories of conduct: (1) humanitarian aid to undocumented entrants; (2) mutual aid amongst asylum-seekers; and (3) assistance to family members. Section 117 unjustifiably violates s. 7 of the *Charter*. The appropriate remedy is to read down s. 117 by excluding those three categories. **R. v. Boule**, 2020 BCSC 1846, 2020 CarswellBC 3052, 68 C.R. (7th) 382 (B.C. S.C.) (Iyer J.)

Insert 47 at CHA 7§7

Before his trial on a charge of first degree murder, the accused applied for an order for disclosure of a Crimestoppers tip relating to the victim's death, arguing that, without that disclosure, he would be unable to raise an alternate suspect defence. The application judge held that, based on the evidentiary record, there was a likelihood of the accused being able to adduce evidence against third parties, and that it would therefore be inaccurate to say that he was unable to raise a reasonable doubt about his guilt without the privileged information. The accused's appeal from his subsequent conviction was dismissed. The application judge correctly found that the "innocence at stake" exception to informer privilege did not apply as the accused had other evidence that could raise a reasonable doubt. While the Crimestoppers tip may have contained exculpatory details regarding the accused's role in the murder, informer privilege can only be pierced where the information is the accused's sole means of raising a reasonable doubt.

R. v. Hayes, 2020 ONCA 284, 2020 CarswellOnt 6133, 391 C.C.C. (3d) 453 (Ont. C.A.) (Feldman, Jamal, Tulloch JJ.A.)

The accused was convicted of drug and weapons offences. He subsequently discovered that F, a police officer who had taken part in surveillance of the accused leading to the obtaining of a search warrant and the accused's arrest, was now believed to associate with individuals involved in criminal activities. He brought an application for disclosure of documents relating to F in anticipation of filing an application to adduce new evidence on his appeal from conviction. The disclosure application was dismissed. The criminal corruption charges against F did not call into question either the search warrant or the accused's arrest. F was a sub-affiant in the Information to Obtain the search warrant. If F's observations of the accused were excised from the ITO, what remained was sufficient to support the issuance of the warrant. Similarly, the arresting officer had reasonable and probable grounds to arrest the accused apart from F's surveillance observations. There was no reasonable possibility that the information or material sought might assist the accused in the pursuit of his appeal.

R. v. Orr, 2020 BCCA 319, 2020 CarswellBC 2877, 395 C.C.C. (3d) 406 (B.C. C.A.) (Saunders, Dickson, Fitch JJ.A.)

During jury deliberations, the Crown disclosed to the defence that two Crown witnesses had made claims for restitution under s. 737.1 of the *Code*. The trial judge dismissed the accused's application for a mistrial based on late disclosure. The accused's appeal from conviction was dismissed. There was no duty on the Crown to make an inquiry of Victim Services for any restitution claims that were submitted. The witnesses' restitution claims did not become subject to the first party disclosure regime until they actually came into the hands of the prosecuting Crown at about the time that the Crown closed its case, at which point they were disclosed to the defence within about 48 hours. The Crown's disclosure obligations were met.

R. v. Robinson, 2020 ABCA 361, 2020 CarswellAlta 1842, 395 C.C.C. (3d) 202 (Alta. C.A.) (Slatter, Schutz, Greckol JJ.A.)

The accused was convicted of assault causing bodily harm. He and the complainant were involved in a physical altercation in the washroom of a pub. Both men claimed that they acted in self-defence after the other instigated the fight. The trial judge rejected the accused's evidence. On the accused's appeal, the complainant's criminal record, including the underlying facts of his 2003 conviction for assault, was admissible as fresh evidence related to the integrity of the trial process. The Crown's failure to disclose the complainant's prior record limited a line of inquiry related to the complainant's credibility and insulated him from scrutiny to some extent, but did not deprive the defence from garnering additional evidence that would ultimately have affected the trial judge's material findings. While the fact of the complainant's criminal record was relevant to his credibility generally, given the content of the record, there was no reasonable possibility that cross-examination on that record would have had an impact on the decision to convict. The non-disclosure did not deprive the accused of realistic opportunities to explore possible uses of the record for purposes of investigation and gathering evidence.

R. v. Frigon, 2020 BCCA 315, 2020 CarswellBC 2879, 395 C.C.C. (3d) 222 (B.C. C.A.) (Groberman, Goepel, Fisher JJ.A.)

Insert 48 at CHA 7§9

Section 672.851 of the *Code* does not violate s. 7 of the *Charter*. There is not a sufficient causal connection between the limitation that the Review Board cannot make a recommendation at the initial disposition hearing for a court inquiry into whether a stay of proceedings should be granted and prejudice to the liberty or security of an accused person. Even if such a connection existed, s. 672.851 is not arbitrary. The purpose of the limitation is to ensure that public safety is adequately considered by the Board and to enhance public confidence in the administration of justice. There is an obvious connection between that purpose and the effect of the limitation. Both public safety and public confidence in the administration of justice will be enhanced by the knowledge that the Board has made a recommendation only after a second look at the accused.

R. v. Lynn, 2020 ONSC 4581, 2020 CarswellOnt 10655, 66 C.R. (7th) 448 (Ont. S.C.J.) (Dambrot J.)

It was an error of law for the trial judge to impugn the credibility of the accused on the basis that he tailored his evidence to the Crown disclosure or to testimony heard in court. The trial judge erred in law by turning the accused's constitutional right to be present, to know the case he had to meet, and to make full answer and defence into an evidentiary trap by finding that the accused had structured his evidence to respond to the allegations against him. The trial judge was entitled to consider the inconsistencies in the accused's level of recollection before and during his trial testimony, but she was not entitled to attribute those inconsistencies to the accused's presence at his trial or to disclosure. While a trial judge is entitled to treat with concern an accused's evidence that appears rehearsed, scripted, or implausible, it will be an error of law for a trial judge to find that the accused's evidence should be rejected because it appeared tailored or structured to meet the case against him.

R. v. G.V., 2020 ONCA 291, 2020 CarswellOnt 6875, 392 C.C.C. (3d) 14 (Ont. C.A.) (Feldman, Jamal, Tulloch JJ.A.)

The trial judge erred in law by rejecting the accused's evidence on the basis that he seemed to have tailored his testimony to the evidence he knew would be forthcoming and to the Crown disclosure. The trial judge erred by using the accused's presence at his trial and his receipt of Crown disclosure against him. The inference that an accused has tailored his evidence to the disclosure, however logical, cannot be drawn without turning constitutional rights into a trap for accused persons. The error was significant and went to the heart of trial fairness and the accused's constitutional right to make full answer and defence.

R. v. M.D., 2020 ONCA 290, 2020 CarswellOnt 6876, 392 C.C.C. (3d) 29, 64 C.R. (7th) 382 (Ont. C.A.) (Harvison Young, Feldman, Jamal JJ.A.)

Insert 49 at CHA 7§11

The *Code* does not permit a direct indictment to be filed once a trial is underway. The filing of a direct indictment against the accused once their trial in provincial court had started was without lawful authority, amounted to an abuse of process, and violated their rights under s. 7 of the *Charter*. The direct indictment was quashed, and the matter was remitted to the provincial court for the continuation of the trial.

R. v. Grewal, 2020 SKQB 164, 2020 CarswellSask 297, 391 C.C.C. (3d) 404 (Sask. Q.B.) (Danyliuk J.)

The accused was pulled over by a police officer who claimed to be setting up a RIDE program checkpoint and was ultimately charged with driving over 80. The arresting officer gave contradictory and misleading evidence at trial about the nature of the RIDE program in question, first claiming that it was a stationary program and then claiming that it was a mobile program, and also contradicted himself on the issue of when he activated his emergency lights. The officer was prepared to steadfastly maintain confidence in areas of his evidence until it became inconvenient or impossible for him to do so. There was also a concern that the officer's lack of honesty and candour extended beyond the courtroom and into other aspects of his job, as he misled the breathalyser technician about whether the accused had

spoken to a lawyer. The accused's application to exclude breathalyser evidence under s. 24(2) of the *Charter* was allowed and the accused was acquitted. The officer's conduct amounted to an abuse of process and compromised the accused's right to a fair trial, violating his rights under ss. 7 and 11(d) of the *Charter*.

R. v. McKee, 2020 ONCJ 341, 2020 CarswellOnt 10617, 67 M.V.R. (7th) 307 (Ont. C.J.) (Donald J.)

Insert 50 at CHA 8§1.1

While the search of a computer or cell phone is not akin to the seizure of bodily samples or a strip search, it may nevertheless be a significant intrusion on personal privacy. To be reasonable, such a search must have a threshold requirement. To the extent that s. 99(1)(a) of the *Customs Act* permits the unlimited search of personal electronic devices at the border without any threshold requirement at all, it violates s. 8 of the *Charter*. The infringement cannot be justified under s. 1 of the *Charter* as the impugned provision does not minimally impair the right to be secure against unreasonable search or seizure. To the extent that s. 99(1)(a) imposes no limits on the searches of electronic devices at the border, it is of no force or effect.

R. v. Canfield, 2020 ABCA 383, 2020 CarswellAlta 2004, 395 C.C.C. (3d) 483 (Alta. C.A.) (Schutz, Strekaf, Khullar JJ.A.)

The accused's rights under s. 8 of the *Charter* were violated when, without her knowledge, she was monitored and recorded using the toilet in a police cell. While a person subject to lawful arrest and in police custody has a reduced expectation of privacy, a person in the accused's circumstances is presumed to be innocent and is entitled to constitutional protection from police activity that interferes with her bodily integrity and personal dignity. The violation was serious; no efforts were made to give the accused *any* privacy while she used the toilet, or to have her monitored by a female officer. She was fully observed by a male Commissionaire. The violation was intrusive and demeaning and had a significant impact on the accused's *Charter*-protected interests. The accused's application to exclude a Certificate of Qualified Technician under s. 24(2) of the *Charter* was allowed.

R. v. Marty, 2020 ABPC 167, 2020 CarswellAlta 1692, 67 M.V.R. (7th) 25 (Alta. Prov. Ct.) (DePoe Prov. J.)

The accused was videotaped having a bowel movement in a police cell toilet. While he was told about the videotaping and provided with a privacy blanket during the booking procedure, the trial judge found that the police did not ensure that he understood. Concluding that the accused's rights under s. 8 of the *Charter* were violated, the trial judge excluded breath test evidence and acquitted the accused of driving over 80. The Crown's appeal was dismissed. The trial judge did not err in finding that the police had a duty to ensure that the accused understood about videotaping and the use of the privacy blanket, and that their failure to do so resulted in a violation of the accused's s. 8 rights. The breath samples were obtained in a manner that violated the *Charter* as there was a significant contextual and temporal connection between the violation and the obtaining of the breath samples. The violation was serious and had a significant impact on the accused's *Charter*-protected interests. While the breathalyser evidence was reliable and the

breath tests were minimally intrusive, on balance, admission of the evidence would bring the administration of justice into disrepute.

R. v. Walker, 2020 ONSC 2139, 2020 CarswellOnt 4763, 65 M.V.R. (7th) 290 (Ont. S.C.J.) (Coroza J.)

The accused was convicted of second-degree murder. The deceased's blood was found when the police executed a search warrant at commercial premises previously leased by the accused. The trial judge did not err in finding that the accused lacked standing to challenge the search warrant as he had abandoned the premises before the search and therefore did not have a reasonable expectation of privacy in the premises.

R. v. Herntier, 2020 MBCA 95, 2020 CarswellMan 343, 394 C.C.C. (3d) 28 (Man. C.A.) (Cameron, Beard, Monnin JJ.A.)

Insert 51 at CHA 8§2

While investigating a string of residential break-ins, the police obtained a search warrant for the accused's residence based on, among other things, surveillance video of one of the break-ins that appeared to show the accused and the fact that the accused's fingerprint was found in a stolen truck. DNA found in that truck matched DNA found at the other crime scenes. When they executed the warrant, the police seized evidence of burglaries, including stolen jewellery and balaclavas. They then obtained a DNA warrant, pursuant to which they took a DNA sample from the accused and matched it to the DNA found at the crime scenes. The trial judge excluded the DNA evidence on the basis that there was an insufficient basis for the issuance of the DNA warrant and that the accused's rights under s. 8 of the *Charter* were therefore violated. The accused was acquitted. The Crown's appeal was allowed. There were reasonable and probable grounds to believe that the accused was a party to the offences in question. The DNA warrant was properly issued.

R. v. Mackey, 2020 ONCA 466, 2020 CarswellOnt 9960, 392 C.C.C. (3d) 230 (Ont. C.A.) (Thorburn, Roberts, Tulloch JJ.A.)

After receiving a tip from a previously reliable confidential informant about a person producing MDMA, the police conducted surveillance of the accused and saw him placing three 20k bags of caustic soda and five bags of kitty litter in his vehicle. One of the officers smelled sassafras and noted four CCTV cameras at one of the properties under surveillance. That information was set out in Informations to Obtain search warrants for three locations associated with the accused. The trial judge found that the ITOs did not set out a sufficient basis for the issuance of the warrants, quashed the warrants, and found that the searches violated the accused's rights under s. 8 of the *Charter*. In doing so, he exceeded the bounds of permissible review of the warrants. He erred by asking whether the surveillance observations could have had innocent explanations, rather than asking whether they could properly be given some weight by the issuing judge. With respect to the officer's olfactory observations, he erred in admitting defence evidence from a chemist about the smell produced by MDMA production, as that witness had no relevant expertise. In any event, expert evidence will rarely be helpful in the limited inquiry that should be conducted on a sub-facial challenge to a warrant.

R. v. Slemko, 2020 BCCA 207, 2020 CarswellBC 1785, 392 C.C.C. (3d) 246 (B.C. C.A.) (Butler, Saunders, Willcock JJ.A.)

After obtaining a telewarrant to search the accused's house for drugs, nine police officers, at least one with his gun drawn, entered the residence by breaking down the door without knocking first. The trial judge correctly ruled that the search did not violate the accused's rights under s. 8 of the *Charter*. The decision not to comply with the "knock and announce" requirement was justified both for safety reasons and in order to prevent the destruction of evidence. Given the size and layout of the house's two levels (with the potential for multiple washrooms) and the nature of the drugs (oxycodone pills that could easily be flushed), there was a real likelihood that the accused would be able to destroy the evidence quickly. Although the officers had no information that there were firearms in the house, the allegations involved serious drug charges, and the typical combination of drugs and guns was well-known to the police. To some degree, the police must be entitled to rely upon their collective experience when approaching situations that may endanger their lives.

R. v. Pileggi, 2021 ONCA 4, 2021 CarswellOnt 36, 68 C.R. (7th) 223 (Ont. C.A.) (Doherty, van Rensburg, Trotter JJ.A.)

Insert 52 at CHA 8§3

After seeing a male driver striking his female passenger, a witness called 911, described the car, and provided its licence plate number. Shortly after being dispatched, police officers located a similar car in a nearby driveway. No one came to the door when they knocked repeatedly. Concerned for the female passenger, the officers entered the residence, found a woman with fresh facial injuries, and arrested the accused. They then performed a safety sweep, in the course of which one officer saw what appeared to be methamphetamine in plain view. The trial judge did not err in finding that the officers had reasonable grounds to arrest the accused and that the search was conducted for valid safety reasons and did not violate the accused's rights under s. 8 of the *Charter*. The police were lawfully in the house under the ancillary powers doctrine. The situation was potentially dangerous as they had no way of knowing if anyone else was in the house. In the circumstances, it was not unreasonable for them to conduct a quick visual scan. **R. v. Stairs**, 2020 ONCA 678, 2020 CarswellOnt 15663, 67 C.R. (7th) 10 (Ont. C.A.) (Fairburn A.C.J.O., Harvison Young, Nordheimer JJ.A.)

The accused was a passenger in a vehicle involved in a single car accident on a remote stretch of highway in frigid weather. Police officers agreed to give the occupants of the inoperable vehicle a lift home but told them they would need to be searched for safety purposes first. The officers found a pill bottle on the accused, arrested him for possession of narcotics, found more pills in his backpack, and re-arrested him for possession for the purpose of trafficking. The accused's application to exclude the evidence of the pills was allowed. The accused's rights under s. 8 of the *Charter* were violated. The search was not authorized by law as a safety search as the officers did not have reasonable grounds to believe that their safety was at risk. The search was also not authorized as a consent search as the accused did not consent to a search for anything other than weapons. The unlawful search was a significant breach of the accused's s. 8 *Charter* rights. The evidence of 660 Percocet pills was highly reliable and essential to the Crown's case. On balance, admission of the evidence would bring the administration of justice into disrepute. **R. v. Williams**, 2020 ONSC 4880, 2020 CarswellOnt 13704, 67 C.R. (7th) 39 (Ont. S.C.J.) (Newton J.)

The police had information linking the occupants of a residence to suspected drug trafficking. An undercover officer knocked on the door and told the person who answered that everyone had been arrested and that the boss said to get rid of the stock. After observing the accused arriving at the residence and leaving with three garbage bags, officers stopped his car, found drugs, and obtained a search warrant for the residence. The trial judge dismissed the accused's application to exclude evidence based on a violation of his rights under s. 8 of the *Charter*, holding that no search took place as the undercover officer never entered the residence. The accused's conviction appeal was dismissed. State agents may attend at the door of a home with the intention of questioning the occupant in order to advance a legitimate investigation. In this case, the police had a reasonable suspicion that drug trafficking was taking place in the residence. By knocking on the door, the undercover officer respected the implied waiver of the occupant's right to privacy,

and never acted as an intruder on the occupant's private property. The investigative method used by the police could not be equated to a search of the residence.

Tremblay c. R., 2020 QCCA 1131, 2020 CarswellQue 9223, 67 C.R. (7th) 72 (C.A. Que.) (Healy, Moore JJ.C.A., Savard J.C.Q.)

Insert 53 at CHA 8§3.2

The accused was arrested when the police executed a search warrant in the course of an intensive investigation into drug trafficking in Lethbridge, Alberta. At the time of his arrest, his pants were partly down, and he was seen reaching around the back of his pants, leading the police to believe that he was concealing something. The police had information that the traffickers in question did not trust the people around them and kept their drugs on their person at all times. The accused was strip searched at the police station and baggies of cocaine were found. The trial judge correctly found that the strip search did not violate the accused's rights under s. 8 of the *Charter* as the police had reasonable and probable grounds to believe that the accused was concealing drugs on his person. The reasonable and probable grounds standard did not require the police to have direct information that the accused had a history of hiding drugs on his person before a strip search was justified.

R. v. Ali, 2020 ABCA 344, 2020 CarswellAlta 1746, 394 C.C.C. (3d) 358 (Alta. C.A.) (Veldhuis, Slatter, Paperny JJ.A.)

Insert 54 at CHA 9§2

After seeing a male driver striking his female passenger, a witness called 911, described the car, and provided its licence plate number. About eight minutes after being dispatched, police officers located a similar car in a nearby driveway. No one came to the door when they knocked repeatedly. Concerned for the female passenger, the officers entered the residence, found a woman with fresh facial injuries, and arrested the accused after he ran into a laundry room in the basement. The trial judge did not err in finding that the officers had reasonable grounds to arrest the accused. There is no requirement that an arrest be based on direct, as opposed to circumstantial, evidence. There was very strong circumstantial evidence that the two people in the house were the ones seen by the 911 caller. The police were lawfully in the house under the ancillary powers doctrine. They were not required to get a *Feeney* warrant to make the arrest in the residence.

R. v. Stairs, 2020 ONCA 678, 2020 CarswellOnt 15663, 67 C.R. (7th) 10 (Ont. C.A.) (Fairburn A.C.J.O., Harvison Young, Nordheimer JJ.A.)

Three and a half hours after a vehicle was reported stolen, the police found it and observed the accused entering the passenger seat and M entering the driver's seat. M and the accused drove around for about half an hour, then parked in a back alley, exited the vehicle, briefly split up, then converged at a nearby intersection a few minutes later. The accused was arrested for possession of a stolen vehicle. The trial judge correctly found that the arresting officer had reasonable and probable grounds to arrest the accused, and that the accused's rights under s. 9 of the

Charter were not violated. The officer was entitled to infer from the fact that the accused and M jointly abandoned the vehicle before separating and then converging again that they were engaged in a coordinated action that indicated a joint venture and that they shared legal possession of the stolen vehicle

R. v. Harms, 2020 BCCA 242, 2020 CarswellBC 2094, 393 C.C.C. (3d) 133 (B.C. C.A.) (Dickson, Hunter, Newbury JJ.A.)

The police received information from three previously reliable confidential informants that the two accused were selling drugs together, that they had driven out west in a rental vehicle to bring back drugs, and that one accused had sold her house to purchase the drugs. Based on that information, the police arrested the accused, searched their vehicle, and found cocaine and methamphetamine. The trial judge correctly found that the arrest was lawful and did not violate s. 9 of the *Charter*. Taken as a whole, the information relied upon to arrest was compelling. The information from all three sources, while not exact or uniform in detail, was largely consistent. Two of the informants were aware that the vehicle used by the accused broke down out west. That information was not widely known and supported the belief that the informants were closely acquainted with the accused. The information provided by each informant was corroborated not only by the other informants but by other investigative evidence, including evidence of the house sale. Police corroboration of neutral information provided by the informants concerning the residences and living arrangements of the accused enhanced the reliability of the sources generally.

R. v. Protz, 2020 SKCA 115, 2020 CarswellSask 479, 393 C.C.C. (3d) 438 (Sask. C.A.) (Caldwell, Leurer, Ottenbreit JJ.A.)

While in fresh pursuit of a robbery suspect, police encountered the accused, who was not involved in the robbery but who happened to be moving a stash of illegal weapons. His appearance, clothing, and distinctive footwear had similarities to the suspect's. When he panicked and seemed about to run off, he was arrested. A loaded sawed-off shotgun and other weapons were found in his backpack. The trial judge erred in finding that the arrest and the search incident to arrest violated the accused's rights under ss. 9 and 8 of the *Charter* and that the violations warranted the remedy of a sentence reduction. In addition to the similarities in appearance between the accused and the robbery suspect and the accused's suspicious behaviour, dog-track evidence put the accused in the pool of potential suspects. The cumulative effect of the circumstances, viewed contextually, commonsensically, and in light of the arresting officer's experience and training, established that the arresting officer objectively had reasonable grounds to arrest the accused.

R. v. Coutu, 2020 MBCA 106, 2020 CarswellMan 383, 394 C.C.C. (3d) 345 (Man. C.A.) (Mainella, leMaistre JJ.A., Chartier C.J.M.)

Insert 55 at CHA 9§2.1

After providing breath samples, the accused was placed in a cell for about ten minutes while a Promise to Appear was being completed. Assuming that the accused was arbitrarily detained contrary to s. 9 of the *Charter* when he was held in the cell, the violation was minor and brief and did not warrant a stay of proceedings

under s. 24(1) of the *Charter* or the exclusion of evidence under s. 24(2). A just and appropriate remedy would be a sentence reduction if the accused was convicted.

R. v. Raswan, 2020 ONCJ 182, 2020 CarswellOnt 4973, 65 M.V.R. (7th) 312 (Ont. C.J.) (Duncan J.)

An unnecessary delay of just under two minutes between the investigating officer's formation of grounds to make an approved screening device demand and the making of a formal demand was not so unreasonable as to constitute an arbitrary detention under s. 9 of the *Charter*. If there was a violation of s. 9, it would amount, at most, to a technical breach that would not justify the exclusion of breathalyser evidence under s. 24(2) of the *Charter*.

R. v. Lucas, 2020 YKTC 27, 2020 CarswellYukon 76, 66 M.V.R. (7th) 56 (Y.T. Terr. Ct.) (Ruddy Terr. Ct. J.)

The police detained the accused for investigation solely on the basis of a tip that a black male was in a group of black males in a particular large apartment building and had a firearm. A loaded firearm was discovered when the accused was searched. At his trial on firearms charges, the accused applied to exclude the evidence of the firearm. The application was allowed. The tip was not detailed. The police did not have a reasonable suspicion that the accused was involved in criminal activity as there was nothing to connect the tip to the accused other than the fact that he was one of a group of black men in the building. The detention violated the accused's rights under s. 9 of the *Charter*. The violation was serious and had a significant impact on the accused's *Charter*-protected interests. It was necessary for the court to dissociate itself from the conduct of the police in stopping black males solely on the basis that they were black males at a particular location.

R. v. Sahal, 2020 ONSC 6924, 2020 CarswellOnt 17751, 68 C.R. (7th) 136 (Ont. S.C.J.) (Copeland J.)

Insert 56 at CHA 10§3

The accused was told when he was arrested that he could call any lawyer he wished. When asked if he wanted to call a lawyer at that point, he said that he did not know any. Upon arrival at the police station, he repeated that he did not have a lawyer. The arresting officer asked him if he wanted to speak to duty counsel. He agreed to do so and did not express any dissatisfaction with duty counsel's advice. The trial judge found that the accused's rights under s. 10(b) of the *Charter* were not violated and convicted him of driving over 80. The accused's appeal was dismissed. If a detainee is told at the time of arrest that he can call any lawyer he wishes and does not ask to speak to a specific lawyer or is unable to reach a specific lawyer, there is no s. 10(b) violation if he is then only told that free advice from duty counsel is immediately available. The police have no obligation to inform him that he also has the right to try to contact another private lawyer.

R. v. Raswan, 2020 ONCJ 182, 2020 CarswellOnt 4973, 65 M.V.R. (7th) 312 (Ont. C.J.) (Duncan J.)

Insert 57 at CHA 10§6

In the early hours of the morning, the police made numerous unsuccessful attempts to reach the accused's counsel of choice at his office number and at an "emergency" number. The accused stated twice that she did not want to speak to duty counsel, but ultimately agreed to do so and did not express any dissatisfaction with the advice she received. Held, the accused's rights under s. 10(b) of the *Charter* were not violated. Where the police take it upon themselves to contact counsel of choice, they do not have an "enhanced" obligation. Their obligation is simply to take reasonable steps to provide the detainee with a reasonable opportunity to consult counsel of choice. That obligation does not include doing "everything that the detainee would have done". In this case, the police were not required to search for another phone number for counsel of choice.

R. v. Wijesuriya (2020), 2020 ONSC 253, 2020 CarswellOnt 2510, 64 M.V.R. (7th) 130 (Ont. S.C.J.) (Ricchetti J.)

Insert 58 at CHA 11§2

The total delay in a drug trafficking and money laundering prosecution was five years, two months and 11 days. In a pre-*Jordan* ruling, the trial judge dismissed the accused's application for a stay of proceedings for unreasonable delay. The accused's conviction appeal was dismissed. The institutional delay was at most 16 months and 12 days, which fell under the 18-month *Morin* guidelines. The trial judge correctly concluded that the accused did not suffer any specific prejudice. Any inferred prejudice would not outweigh other relevant considerations. The accused did not seriously raise Crown missteps that rendered the delay otherwise unreasonable, and this was a complex prosecution on serious charges.

R. v. Rose, 2020 ONCA 306, 2020 CarswellOnt 7112, 392 C.C.C. (3d) 70 (Ont. C.A.) (Strathy C.J.O., Harvison Young, Jamal JJ.A.)

The total delay in the accused's drug trafficking prosecution was 21 months and 25 days. The trial judge calculated defence delay as 80 days. The net delay of 19 months and five days was presumptively unreasonable, but the trial judge found that exceptional circumstances existed which rebutted the presumption, as the delay was principally caused by the parties' good faith but mistaken estimate of the number of days required for the trial. Once the period of three months and 28 days resulting from that mistaken estimate was deducted, the delay fell below the presumptive ceiling. The accused's application for a stay of proceedings for unreasonable delay was dismissed. His appeal from conviction was dismissed. The trial judge did not err in finding that the underestimate of the required trial time constituted an exceptional circumstance. She was entitled to reject the defence submission that the need for an adjournment resulted not from a good faith mistake but from late Crown disclosure.

R. v. McNeill-Crawford, 2020 ONCA 504, 2020 CarswellOnt 11601, 392 C.C.C. (3d) 127 (Ont. C.A.) (Hourigan, Roberts, Pepall JJ.A.)

The *Jordan* clock starts to run when the information is sworn, and is not reset by the Crown's filing of a direct indictment.

R. v. Pennington, 2020 SKQB 198, 2020 CarswellSask 398, 392 C.C.C. (3d) 150, 67 C.R. (7th) 211 (Sask. Q.B.) (Tochor J.)

The presumptive ceiling for proceedings under Part I of the *Provincial Offences Act* is 18 months.

R. v. Nguyen, 2020 ONCA 609, 2020 CarswellOnt 14024, 64 M.V.R. (7th) 1 (Ont. C.A.) (Watt, Gillese JJ.A., Strathy C.J.O.)

Delay caused by the Crown's unsuccessful application for *certiorari* to quash an order for disclosure of a drug recognition expert's rolling logs was properly characterized as an exceptional circumstance. The Crown's position, though unsuccessful, was not frivolous or pursued in a dilatory manner.

R. v. Mansour, 2020 ONCA 586, 2020 CarswellOnt 13340, 393 C.C.C. (3d) 347 (Ont. C.A.) (Thorburn, Feldman, van Rensburg JJ.A.)

The trial judge found that a 77-month delay violated the accused's rights under s. 11(b) of the *Charter* but declined to grant a stay of proceedings. The accused's appeal was allowed. The trial judge erred in assuming that he had the discretion to decline a stay of proceedings for a s. 11(b) violation on the basis that it was not an appropriate and just remedy. The only available remedy for a finding of unreasonable delay under s. 11(b) is a stay of proceedings. The trial judge also erred when he considered the lack of prejudice to the accused as a factor in determining whether to grant a stay of proceedings. Prejudice is relevant in determining whether there has been a violation of s. 11(b) but is not relevant in determining an appropriate remedy under s. 24(1).

Ste-Marie v. R., 2020 QCCA 1118, 2020 CarswellQue 8863, 2020 CarswellQue 8864, 394 C.C.C. (3d) 18 (C.A. Que.) (Hamilton, Healy, Lévesque JJ.C.A.)

A trial judge's decision on a s. 11(b) application as to how to categorize periods of delay is entitled to a high degree of deference. The trial judge was entitled to find that delay relating to late requests for disclosure at the accused's sexual assault trial was attributable to the Crown, rather than the defence. Moreover, the fact that defence counsel was not available for the first date offered by the Court while the Crown was available did not mean that the delay was defence-caused, as counsel was available two weeks later. The *Jordan* approach to trial delay claims is intended to reduce complicated micro-accounting.

R. v. Ellis, 2020 NSCA 78, 2020 CarswellNS 785, 68 C.R. (7th) 296 (N.S. C.A.) (Beveridge, Bryson, Derrick JJ.A.)

Whether or not a case is complex, in the context of a s. 11(b) analysis, requires a qualitative rather than a quantitative assessment. In determining that the case was complex, the trial judge considered the voluminous disclosure, the number of experts expected to be called at trial, the extensive pre-trial litigation, and the jurisdictional interface between the Provincial Court and the Court of Queen's Bench arising from the accused's failed motion for particulars, his committal for trial after

a preliminary inquiry, and his application for *certiorari* to quash that committal. The trial judge made no error in his reasoning.

R. v. Perdomo Lopez, 2020 ABCA 404, 2020 CarswellAlta 2130, 395 C.C.C. (3d) 131, 68 C.R. (7th) 318 (Alta. C.A.) (Veldhuis, Wakeling, Schutz JJ.A.)

The accused appealed his conviction for fraud on the basis that the trial judge erred in dismissing his application for a stay of proceedings for unreasonable delay. The appeal was dismissed. The net delay was 945 days, or 32 days above the presumptive ceiling. The trial judge erred in finding that the delay was justified based on the complexity of the case. The method by which the accused's commercial fraud was perpetrated was unsophisticated. While the Crown initially intended to call 26 witnesses, many of those witnesses were being called solely to establish the provenance of documents and records, and the testimony of the Crown's only expert witness would have been, at best, moderately complex. The legal and factual issues were neither novel nor complex. Defence counsel requested only two weeks to review disclosure. Despite the trial judge's error, the application was properly dismissed, as the transitional exceptional circumstance applied. The offence was serious, and the accused, who was not arrested, held in pre-trial custody, or subject to any conditions, was not prejudiced by the delay. The Crown took reasonable steps, post-*Jordan*, to mitigate delay. Prior to the release of *Jordan*, the Crown would have had good reason to believe that the delay would not be found to be unreasonable.

R. v. Roberts, 2020 BCCA 307, 2020 CarswellBC 2730, 395 C.C.C. (3d) 86 (B.C. C.A.) (Frankel, MacKenzie, Fisher JJ.A.)

Insert 59 at CHA 11§5

The accused was pulled over by a police officer who claimed to be setting up a RIDE program checkpoint and was ultimately charged with driving over 80. The arresting officer gave contradictory and misleading evidence at trial about the nature of the RIDE program in question, first claiming that it was a stationary program and then claiming that it was a mobile program, and also contradicted himself on the issue of when he activated his emergency lights. The officer was prepared to steadfastly maintain confidence in areas of his evidence until it became inconvenient or impossible for him to do so. There was also a concern that the officer's lack of honesty and candour extended beyond the courtroom and into other aspects of his job, as he misled the breathalyser technician about whether the accused had spoken to a lawyer. The accused's application to exclude the breathalyser evidence under s. 24(2) of the *Charter* was allowed and the accused was acquitted. The officer's conduct amounted to an abuse of process and compromised the accused's right to a fair trial, violating his rights under ss. 7 and 11(d) of the *Charter*.

R. v. McKee, 2020 ONCJ 341, 2020 CarswellOnt 10617, 67 M.V.R. (7th) 307 (Ont. C.J.) (Donald J.)

Insert 60 at CHA 12§1

Corporations are not entitled to the protection of s. 12 of the *Charter*. The ordinary meaning of the word “cruel” does not permit its application to inanimate objects or legal entities such as corporations, so the words “cruel and unusual treatment or punishment” in s. 12 refer to *human* pain and suffering, both physical and mental. **Québec (Procureure générale) c. 9147-0732 Québec inc.**, 2020 CSC 32, 2020 SCC 32, 2020 CarswellQue 10838, 2020 CarswellQue 10837, 395 C.C.C. (3d) 1, 67 C.R. (7th) 225 (S.C.C.) (Abella, Brown, Côté, Karakatsanis, Kasirer, Martin, Moldaver, Rowe JJ., Wagner C.J.C.)

The accused, a 19-year-old Inuit first offender, pleaded guilty to intentionally discharging a firearm into a place knowing that, or being reckless as to whether, another person was present, contrary to s. 244.2(1)(a) of the *Criminal Code*. While intoxicated, he got into an altercation with A and then fired a single shot into A’s residence, narrowly missing A’s uncle. A had a history of bullying the accused. The sentencing judge found that the appropriate sentence was two years less a day in jail, and that the mandatory minimum four-year sentence was grossly disproportionate and unjustifiably violated the accused’s rights under s. 12 of the *Charter*. The Crown’s appeal was allowed. Anyone who commits an offence under s. 244.2(1)(a) is guilty of significant morally blameworthy conduct. The sentencing judge underemphasized the accused’s moral blameworthiness and overemphasized his intoxication, the bullying to which he was subjected by A, and *Gladue* factors. Neither the accused’s intoxication, the fact that he fired only one shot, his experience of being bullied, nor the *Gladue* factors reduced his moral blameworthiness. The four-year sentence was not grossly disproportionate in the accused’s circumstances or in the reasonable hypothetical circumstances suggested by the accused. The sentence was varied to four years’ imprisonment. **R. v. Ookowt**, 2020 NUCA 5, 2020 CarswellNun 31, 392 C.C.C. (3d) 200 (Nun. C.A.) (Schutz, Shaner, Greckol JJ.A.)

Section 745.51, which permits a sentencing judge to impose consecutive parole ineligibility periods for murder, violates s. 12 of the *Charter*. The provision is excessive, and the effect of consecutive parole ineligibility periods is grossly disproportionate because it renders inapplicable certain fundamental components of Canadian criminal law, notably the objectives of rehabilitation and proportionality. Section 745.51 is not saved under s. 1 of the *Charter* and is of no force or effect. **Bissonnette c. R.**, 2020 QCCA 1585, 2020 CarswellQue 13124, 2020 CarswellQue 12129, 68 C.R. (7th) 1 (C.A. Que.) (Doyon, Gagnon, Bélanger JJ.C.A.)

The fact that Ontario has not proclaimed the curative discharge provision of s. 255 of the *Code* into force, so that the Indigenous accused was subject to the mandatory minimum sentence for a first offence of a \$1,000 fine and a one-year driving prohibition, did not violate the accused’s rights under s. 12 of the *Charter*. The accused’s blood alcohol readings were well over twice the legal limit, her conduct placed the lives and safety of her two passengers and the general public at risk, and she was involved in a single-vehicle accident. There were mitigating factors – the accused was a youthful first offender, and her aboriginal background

played a part in bringing her before the court. She met the requirements for a curative discharge, and that disposition would be appropriate if it were available. However, the mandatory minimum sentence was not grossly disproportionate in the accused's circumstances.

R. v. Sabattis, 2020 ONCJ 242, 2020 CarswellOnt 6554, 67 M.V.R. (7th) 122 (Ont. C.J.) (Henschel J.)

Insert 61 at CHA 15§1

Because of the remoteness of their First Nation, a fly-in community hundreds of kilometres from the nearest jail, it was financially and logistically impossible for the Indigenous applicants to serve intermittent sentences. They argued that the practical impossibility of obtaining an intermittent sentence unjustifiably violated their rights under s. 15 of the *Charter*. Their application was allowed. Being deprived of the opportunity to serve a jail sentence intermittently because of the applicants' status as on-reserve members of a First Nation amounted to a deprivation of a legal benefit and created a distinction in law between the applicants and other members of the general public. The distinction was discriminatory because it failed to respond to the actual capacities and needs of on-reserve citizens, and instead imposed burdens or denied a benefit in a manner that reinforced, perpetuated, or exacerbated their disadvantage. Justification under s. 1 of the *Charter* failed at the minimal impairment stage because the fact that the drinking and driving offences of which the applicants were convicted attracted mandatory minimum sentences deprived the court of any other sentencing options. The deleterious effects of the violation were egregious and were not outweighed by the salutary effect of a uniform sentencing regime.

R. v. Turtle, 2020 ONCJ 429, 2020 CarswellOnt 14248, 66 C.R. (7th) 382 (Ont. C.J.) (Gibson J.)

To the extent that it does not permit persons who were found not criminally responsible of sexual offences on account of mental disorder and subsequently discharged by a review board or court to be removed from the sex offender registry or to be exempted from the reporting requirement while permitting persons who have been *convicted* of sexual offences and who subsequently receive a pardon or criminal record suspension to be removed or exempted, *Christopher's Law (Sex Offender Registry)* discriminates against NCR offenders on the basis of mental disability contrary to s. 15 of the *Charter*. The scheme is not saved under s. 1 of the *Charter* as it does not minimally impair equality rights. The appropriate remedy is to declare *Christopher's Law* to be of no force or effect as it applies to NCR offenders who have been granted an absolute discharge and to suspend the declaration of invalidity for 12 months.

Ontario (Attorney General) v. G, 2020 CSC 38, 2020 SCC 38, 2020 CarswellOnt 17020, 2020 CarswellOnt 17021, 395 C.C.C. (3d) 277, 67 C.R. (7th) 340 (S.C.C.) (Abella, Brown, Côté, Karakatsanis, Kasirer, Martin, Moldaver, Rowe JJ., Wagner C.J.C.)

The fact that Ontario has not proclaimed the curative discharge provision of s. 255 of the *Code* into force, so that the Indigenous accused was subject to the

mandatory minimum sentence for a first offence of a \$1,000 fine and a one-year driving prohibition, did not violate the accused's rights under s. 15 of the *Charter*. Curative discharges under s. 255 are unavailable to all offenders in Ontario, not just Indigenous offenders. The distinction was not drawn on the basis of an enumerated or analogous ground.

R. v. Sabattis, 2020 ONCJ 242, 2020 CarswellOnt 6554, 67 M.V.R. (7th) 122 (Ont. C.J.) (Henschel J.)

Insert 62 at CHA 24§5

Suspensions of declarations of constitutional invalidity should be rare, and should be granted only when an identifiable public interest, itself grounded in the Constitution, would be endangered by an immediate declaration of invalidity and where, on balance, those harms outweigh the harms of delay. The length of the suspension must be justified by the government seeking it and should be no longer than necessary. An individual exemption can be granted as a remedy under s. 24(1) of the *Charter* during the period of suspension. This is not limited to cases where the remedy would be entirely frustrated were it not granted during the suspension. The claimant who brings a successful constitutional challenge has served the public interest. Exemptions should not be granted, however, where doing so would undermine the rationale for the suspension.

Ontario (Attorney General) v. G, 2020 CSC 38, 2020 SCC 38, 2020 CarswellOnt 17020, 2020 CarswellOnt 17021, 395 C.C.C. (3d) 277, 67 C.R. (7th) 340 (S.C.C.) (Abella, Brown, Côté, Karakatsanis, Kasirer, Martin, Moldaver, Rowe JJ., Wagner C.J.C.)

Insert 63 at CHA 24§5.2

The accused was not brought before a justice for some 35 hours after his arrest. The Crown conceded that the failure to bring him before a justice within the requisite 24 hours violated his rights under ss. 7, 9, and 11(e) of the *Charter*. Due to the growing pains of a new bail system, which was being introduced into Alberta at the time, the number of violations of s. 503(1)(a) of the *Code* had increased. The trial judge granted the accused a stay of proceedings, largely due to the systemic problems. The Court of Appeal allowed the Crown's appeal, holding that the remedy granted was unrelated to the systemic problems and was excessive, that alternative remedies such as a sentence reduction upon conviction were available, and that there was no evidence of negligence in the design of the new bail system or a deliberate failure to provide adequate resources. The accused's appeal from the reversal of the stay was allowed. In light of the trial judge's findings that the breach was systemic and ongoing and that it was not being satisfactorily addressed, there was no basis for the Court of Appeal to interfere with her exercise of discretion.

R. v. Reilly, 2020 CSC 27, 2020 SCC 27, 2020 CarswellAlta 1862, 2020 CarswellAlta 1863, 66 C.R. (7th) 231 (S.C.C.) (Abella, Brown, Côté, Karakatsanis, Kasirer, Martin, Moldaver, Rowe JJ., Wagner C.J.C.)

Insert 64 at CHA 24§7

The accused was videotaped having a bowel movement in a police cell toilet. While he was told about the videotaping and provided with a privacy blanket during the booking procedure, the trial judge found that the police did not ensure that he understood. Concluding that the accused's rights under s. 8 of the *Charter* were violated, the trial judge excluded breath test evidence and acquitted the accused of driving over 80. The Crown's appeal was dismissed. The trial judge did not err in finding that the police had a duty to ensure that the accused understood about videotaping and the use of the privacy blanket, and that their failure to do so resulted in a violation of the accused's s. 8 rights. The breath samples were obtained in a manner that violated the *Charter* as there was a significant contextual and temporal connection between the violation and the obtaining of the breath samples. The violation was serious and had a significant impact on the accused's *Charter*-protected interests. While the breathalyser evidence was reliable and the breath tests were minimally intrusive, on balance, admission of the evidence would bring the administration of justice into disrepute.

R. v. Walker, 2020 ONSC 2139, 2020 CarswellOnt 4763, 65 M.V.R. (7th) 290 (Ont. S.C.J.) (Coroza J.)

The police violated the rights of the accused under ss. 9 and 10 of the *Charter* by purporting to detain them under a non-existent statute and asking one of the accused some questions after he invoked his right to counsel. Upon arrival at the police station, the accused were arrested for murder and informed of their right to counsel. They were then interviewed for hours and ultimately confessed. The trial judge declined to exclude the confessions on the basis that they were not "obtained in a manner" that violated the *Charter*. The accused were convicted. Their appeal was dismissed. It was open to the trial judge to find that the police actions at the station constituted a "fresh start" that cured the earlier problems with the initial detentions.

R. v. Beaver, 2020 ABCA 203, 2020 CarswellAlta 933, 393 C.C.C. (3d) 175 (Alta. C.A.) (O'Ferrall, Feehan, Wakeling JJ.A.)

Insert 65 at CHA 24§8

The police received a report that the accused had sexually touched his eight-year-old daughter L. Some years earlier, the accused had admitting to using child pornography. The police obtained and executed a search warrant for the accused's computers in the course of the sexual touching investigation and found child pornography, unrelated to L, on the computers. At the accused's trial on child pornography charges, the trial judge found that the affiant of the Information to Obtain the search warrant did not articulate her rationale for believing that the computers would contain evidence with respect to the sexual touching offence and that the search of the computers violated the accused's rights under s. 8 of the *Charter*, but declined to exclude the child pornography evidence under s. 24(2) of the *Charter*. The accused's appeal from conviction was dismissed. It was open to the trial judge to find that the s. 8 violation was not serious. There were sufficient reasonable grounds for the warrant to have issued, but the affiant failed to properly

articulate those grounds. The trial judge found that the affiant was perhaps negligent but did not act in bad faith. The trial judge did not make the mistake of equating negligence with good faith.

R. v. P.W., 2020 ONCA 301, 2020 CarswellOnt 6937, 392 C.C.C. (3d) 1 (Ont. C.A.) (Miller, Fairburn, Thorburn JJ.A.)

The accused was videotaped having a bowel movement in a police cell toilet. While he was told about the videotaping and provided with a privacy blanket during the booking procedure, the trial judge found that the police did not ensure that he understood. Concluding that the accused's rights under s. 8 of the *Charter* were violated, the trial judge excluded breath test evidence and acquitted the accused of driving over 80. The Crown's appeal was dismissed. The trial judge did not err in finding that the police had a duty to ensure that the accused understood about videotaping and the use of the privacy blanket, and that their failure to do so resulted in a violation of the accused's s. 8 rights. The breath samples were obtained in a manner that violated the *Charter* as there was a significant contextual and temporal connection between the violation and the obtaining of the breath samples. The violation was serious and had a significant impact on the accused's *Charter*-protected interests. While the breathalyser evidence was reliable and the breath tests were minimally intrusive, on balance, admission of the evidence would bring the administration of justice into disrepute.

R. v. Walker, 2020 ONSC 2139, 2020 CarswellOnt 4763, 65 M.V.R. (7th) 290 (Ont. S.C.J.) (Coroza J.)

The police detained the accused for investigation solely on the basis of a tip that a black male was in a group of black males in a particular apartment building and had a firearm. A loaded firearm was found when the accused was searched. At his trial on firearms charges, the accused applied to exclude the firearm and an inculpatory statement that he made after asserting his wish to speak to counsel and before he was given an opportunity to do so. The application was allowed. There was nothing to connect the tip to the accused other than the fact that he was one of a group of black men in that building, which did not satisfy the reasonable suspicion standard. The detention violated the accused's rights under s. 9 of the *Charter*. The subsequent search was not incident to a lawful investigative detention and therefore violated the accused's rights under s. 8 of the *Charter*. The elicitation of evidence from the accused after he had asserted his right to counsel violated s. 10(b) of the *Charter*. The violations (especially the s. 9 violation) were serious and had a significant impact on the accused's *Charter*-protected interests. It was necessary for the court to dissociate itself from the conduct of the police in stopping black males solely on the basis that they were black males at a particular location.

R. v. Sahal, 2020 ONSC 6924, 2020 CarswellOnt 17751, 68 C.R. (7th) 136 (Ont. S.C.J.) (Copeland J.)

The accused was detained while police officers executed a search warrant at his residence. The police informed the accused of his right to counsel seven minutes later, after performing a safety search. The police violated the accused's s. 10(b) rights by failing to hold off in questioning him before facilitating his right to counsel, asking him if he would like to tell them where anything was, and by failing to

arrange contact with his counsel of choice. Those violations did not require the exclusion of evidence under s. 24(2) of the *Charter*. While the violations were serious, they were not systemic. The impact on the accused's *Charter*-protected interests was not significant as no evidence was found as a result of the violations. The long-term reputé of the criminal justice system favoured admission of the evidence.

R. v. Pileggi, 2021 ONCA 4, 2021 CarswellOnt 36, 68 C.R. (7th) 223 (Ont. C.A.) (Doherty, van Rensburg, Trotter JJ.A.)

A police officer went to the accused's door to investigate a report of an intoxicated driver, noted signs of impairment, and made an approved screening device demand. The accused went back into the house, accompanied by the officer, to hand her child over to her nanny. The accused was ultimately charged with failure to comply with an ASD demand. The trial judge found that the officer violated the accused's rights under s. 8 of the *Charter* by approaching her residence for the purpose of gathering evidence in a criminal investigation, excluded the evidence of the demand and the refusal under s. 24(2) of the *Charter*, and acquitted the accused. The Crown's appeal from a decision of the Summary Conviction Appeal Court upholding the conviction was allowed. In her s. 24(2) analysis, the trial judge erred by finding that the officer's entry into the house and the handcuffing of the accused after her arrest aggravated the seriousness of the s. 8 violation. No evidence was sought or obtained as a result of the entry, and the handcuffing was entirely disconnected from the *Charter*-infringing conduct. The violation did not have a significant impact on the accused's *Charter*-protected interests as she had a low expectation of privacy in her signs of impairment, which had recently been on display in public. Admission of the evidence would not bring the administration of justice into disrepute.

R. v. Babich, 2020 SKCA 139, 2020 CarswellSask 648, 68 C.R. (7th) 275 (Sask. C.A.) (Richards C.J.S., Whitmore, Kalmakoff JJ.A.)

The accused's rights under s. 8 of the *Charter* were violated when, without her knowledge, she was monitored and recorded using the toilet in a police cell. The violation was serious; no efforts were made to give the accused *any* privacy while she used the toilet, or to have her monitored by a female officer. She was fully observed by a male Commissionaire. The violation was intrusive and demeaning and had a significant impact on the accused's *Charter*-protected interests. The accused's application to exclude a Certificate of Qualified Technician under s. 24(2) of the *Charter* was allowed.

R. v. Marty, 2020 ABPC 167, 2020 CarswellAlta 1692, 67 M.V.R. (7th) 25 (Alta. Prov. Ct.) (DePoe Prov. J.)

Insert 66 at CHA 24§10.1

The accused corporations were charged with unlawful dredging. They applied to exclude evidence on the basis of alleged violations of their rights under ss. 8 and 11(d) of the *Charter*, arguing that investigators interviewed corporate directors without advising them that they could refuse to cooperate and denied their attempts to terminate the interview, and that they unlawfully seized documents and

other evidence. The Crown sought the summary dismissal of the application on the basis that it had no reasonable prospect of success. Held, a *voir dire* addressing the ss. 8 and 11(d) arguments was directed. The accused claimed an informational privacy interest under s. 8 in the statements made by the interviewees. It was difficult to see how that claim would succeed, but the accused were only required to meet a low standard to proceed to a *voir dire*, and that standard was met. While the accused were trying to use a novel approach to s. 11(d) to get around the fact that, as corporations, they could not rely on ss. 7, 9, 10(a) or 10(b) *Charter* rights, a preliminary ruling denying a *voir dire* should not be used to stifle novel but unsettled and important legal issues.

R. v. Fraser River Pile and Dredge (GP) Inc., 2020 BCPC 169, 2020 CarswellBC 2167, 392 C.C.C. (3d) 421 (B.C. Prov. Ct.) (Patterson Prov. J.)

Insert 67 at CHA 52§5

Suspensions of declarations of constitutional invalidity should be rare, and should be granted only when an identifiable public interest, itself grounded in the Constitution, would be endangered by an immediate declaration of invalidity and where, on balance, those harms outweigh the harms of delay. The length of the suspension must be justified by the government seeking it and should be no longer than necessary. An individual exemption can be granted as a remedy under s. 24(1) of the *Charter* during the period of suspension. This is not limited to cases where the remedy would be entirely frustrated were it not granted during the suspension. The claimant who brings a successful constitutional challenge has served the public interest. Exemptions should not be granted, however, where doing so would undermine the rationale for the suspension.

Ontario (Attorney General) v. G, 2020 CSC 38, 2020 SCC 38, 2020 CarswellOnt 17020, 2020 CarswellOnt 17021, 395 C.C.C. (3d) 277, 67 C.R. (7th) 340 (S.C.C.) (Abella, Brown, Côté, Karakatsanis, Kasirer, Martin, Moldaver, Rowe JJ., Wagner C.J.C.)