SUPREME COURT OF CANADA

CITATION: R. *v.* Hussein, 2026 SCC 2

APPEAL HEARD: January 23, 2025
JUDGMENT RENDERED: January 23, 2026
DOCKET: 41015

BETWEEN:

Awale Hussein
Appellant

and

His Majesty The King
Respondent

- and -

Director of Public Prosecutions,
Director of Criminal and Penal Prosecutions,
Trial Lawyers Association of British Columbia,
Independent Criminal Defence Advocacy Society,
Canadian Association of Black Lawyers and
Criminal Lawyers' Association (Ontario)
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: Wagner C.J. (Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)

(paras. 1 to 154)

CONCURRING REASONS: Jamal J. (Rowe J. concurring)
(paras. 155 to 192)

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Awale Hussein *Appellant*

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Admissibility — Credibility — Examination as to previous convictions — Accused charged with murder — Accused bringing Corbett application to exclude criminal record from evidence at trial — Trial judge dismissing application and accused convicted by jury — Whether trial judge erred in dismissing accused's Corbett application — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 12(1).

The victim was fatally stabbed after a night of drinking alcohol with friends in an apartment. No one witnessed the stabbing. Of the six people who were in the apartment before the stabbing, only the accused was not present when the police arrived. Forensic examination of the crime scene found the accused's blood in the living room, bathroom, and bedroom where the victim died. When the accused was arrested one week after the stabbing, he had an incised wound on his thumb. The central issues at trial were identity and *mens rea*.

During the trial before a judge and jury, the accused brought a *Corbett* application requesting that the trial judge exclude from evidence all or part of his criminal record, on which the Crown was permitted to question him by s. 12(1) of the *Canada Evidence Act* ("*CEA*"). The accused had been found guilty of seven offences as a youth, including two counts of uttering threats, three counts of robbery, and one count of failure to appear in court. He also had ten adult convictions: four for failing to comply with court orders, three for assault, one for uttering threats, one for possession of a weapon, and one for mischief. The trial judge dismissed the *Corbett* application,

concluding that the probative value of the criminal record outweighed its prejudicial effect. The accused was convicted of second degree murder. The Court of Appeal concluded that the trial judge's decision on the *Corbett* application was not unreasonable, nor did it contain any errors in principle, and it upheld the accused's conviction.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin and Moreau JJ.: In *Corbett*, the Court unanimously interpreted s. 12(1) of the *CEA* as establishing that prior convictions are relevant to the issue of credibility and are presumptively admissible. Nothing justifies a reinterpretation of s. 12(1), nor should a presumption of inadmissibility be imposed when the Crown seeks to cross-examine the accused on their criminal record in order so impeach their credibility. However, although the *Corbett* framework has stood the test of time, it warrants clarification to ensure that it is applied in a predictable and principled manner. In the instant case, under a clarified framework, the trial judge ought to have excluded the accused's youth offences and the prejudicial violent offences of assault, uttering threats, and possession of a weapon. However, this is one of the rare cases where the high standard to apply the curative proviso is satisfied. The evidence of the accused's guilt for murder was overwhelming, such that a conviction was inevitable.

An accused's criminal record is a form of character evidence when admitted under s. 12(1) of the *CEA*. Character evidence is often introduced to support

one or both of two inferences. The fact that a person has acted in a particular way in the past tends to support the primary inference that he or she has acted that way again. The secondary inference that can be drawn from character evidence relates to the likelihood that a particular witness is credible. Crown-led evidence of the accused's bad character, other than conduct that forms the subject matter of the charge, is presumptively inadmissible because it contributes to reasoning prejudice and moral prejudice, both of which undermine trial fairness. However, s. 12(1) of the *CEA* allows the questioning of the accused about whether they have been convicted of any offence, for the sole purpose of impeaching the credibility of the witness, which permits the Crown to establish the secondary inference.

In *Corbett*, the Court held that s. 12(1) of the *CEA* does not violate an accused's right to a fair trial guaranteed by s. 11(d) of the *Charter*. It also recognized that s. 12(1) does not displace a trial judge's common law discretion to exclude evidence when the prejudice it would cause to trial fairness outweighs its probative value. It set out the factors that should guide a trial judge's exercise of discretion in that context, the most important of which are: (1) the nature of the prior convictions; (2) the recency or remoteness of the prior convictions; and (3) the similarity between the prior convictions and the charge faced by the accused. The risk of presenting a distorted picture to the trier of fact is also a relevant factor when the accused makes a deliberate attack upon the credibility of a Crown witness and where the resolution of the case boils down to a credibility contest between the accused and that witness.

An accused's prior convictions should not be subject to a presumption of inadmissibility. Reading in a presumption of inadmissibility would ignore the language of s. 12 of the *CEA*, which is explicitly permissive, and would require the Court to depart from *stare decisis*. Section 12(1), however, in no way requires the reception of prior conviction evidence. Instead, s. 12(1) preserves space for the independent operation of the trial judge's general common law discretion to exclude Crown-led evidence if its prejudicial effect outweighs its probative value. Since the statute is silent on how the probative value and prejudicial effect of prior convictions should be assessed in any specific circumstance, the framework outlined in *Corbett* functions to provide the common law principles for how this assessment must be conducted.

Clarification of the *Corbett* framework is necessary to ensure that trial judges' admissibility assessments are conducted in an efficient, predictable, and constitutionally compliant manner. The common law discretion discussed in *Corbett* functions to uphold the presumption of innocence and trial fairness. Since prior convictions are a form of bad character evidence, the moral prejudice associated with their admission into evidence for impeachment purposes can be significant. The amelioration of moral prejudice is best achieved through evidentiary exclusions rather than limiting instructions. Trial judges should not hesitate to exercise their common law discretion to exclude convictions that do not have sufficient probative value on the issue of credibility.

The nature of the offence is the most important factor when the trial judge is assessing the probative value of prior convictions on the issue of the accused's credibility. For a conviction to have sufficient probative value to outweigh its prejudicial effect, it must permit the trier of fact to infer that the accused has a specific capacity or willingness to be dishonest. The convictions that are capable of supporting this inference will typically be those that involve traditional crimes of dishonesty as well as some administration of justice offences. An accused's failure to adhere to their promises and undertakings made to a court may be indicative of how constrained they will feel by their testimonial oath or affirmation. When prior convictions are admitted into evidence, the trier of fact will learn only the name of the crime, the date and place of the conviction, and the punishment imposed. Accordingly, the probative inference about the accused's dishonesty arises not from the actual facts of the crime, but rather from the inherent nature of the offence. These limitations require trial judges to carefully assess whether an offence will indicate to the trier of fact anything specific about the accused's capacity or willingness to be dishonest.

For the most part, crimes of violence have minimal probative value because they often do not support this specific credibility inference. Crimes of violence often stem from qualities of the accused or circumstances that tell the trier of fact little about the accused's honesty. An accused's general disregard for the law or other social values does not, on its own, demonstrate a specific capacity or willingness to be dishonest. Rather than identifying the heightened probative value of a criminal record in prior instances where the accused has knowingly deceived another, this line of reasoning

frames probative value as stemming from the general disposition of the accused. This inferential path may lead the trier of fact to inadvertently drift towards prohibited propensity reasoning. If a conviction cannot support the requisite credibility inference, or if it is unclear whether the conviction can do so, its probative value will generally be incapable of overcoming its significant prejudicial effect, and exclusion will be warranted.

Social context is a relevant, although not dispositive, factor where prior convictions stem in part from circumstances of disadvantage, including circumstances involving overt and systemic discrimination or poverty. Where a conviction stems at least in part from circumstances of disadvantage, the degree to which it advances the credibility inquiry will be reduced. This may be particularly true for certain crimes, like administration of justice offences, that often disproportionately involve marginalized individuals. In addition, the social context factor is relevant when a trial judge is assessing the prejudicial effect of an accused's criminal record. This prejudice can be elevated in circumstances where the accused is a member of a group that is subject to racist stereotypes that relate to credibility and criminal propensity. A direct causal link between an accused's past offending conduct and their social disadvantage is not necessary before this factor can be used to assess the probative value of their criminal record. Instead, the accused must show some connection between the discrimination or disadvantage and the circumstances that led to their prior conviction. Given the nature of the *Corbett* analysis and the need to avoid complex mid-trial evidentiary hearings, trial judges may rely on testimony or take judicial notice of social context.

The distortion factor becomes relevant only when, for reasons unrelated to the facts of the case, the defence has directly invited the trier of fact to draw an adverse credibility inference based on the alleged bad character of an important Crown witness. Trial judges should give this factor a weight that is proportionate to the risk of the trier of fact being misled. The magnitude of the risk will be based, among other things, on (i) whether there is other evidence available indicating the bad character of the accused; (ii) the materiality of the Crown witnesses' testimony; and (iii) the degree to which the defence has impugned the character of the Crown witnesses. Depending on the magnitude of the risk, trial judges should consider whether a distortion can be remedied by admitting part, rather than the entirety, of the accused's criminal record.

The remoteness factor is best understood as informing the probative value of a prior conviction. The strength of the inference that a prior conviction is indicative of the accused's specific capacity for dishonesty gradually diminishes over time. The degree of similarity between the prior convictions and the offence charged is often the most important factor when assessing the prejudicial effect of the convictions. If a high degree of similarity exists, there is a serious risk of moral prejudice, and only in exceptional circumstances will there be sufficient probative value to justify admission. Whether an offence was committed by the accused as a youth is a relevant factor in a *Corbett* analysis. Youth offences will generally have low probative value with respect to an adult accused's credibility. However, the strength of the Crown's case is irrelevant during a *Corbett* analysis. While the strength of the Crown's case may affect the weight

that the trier of fact places on the prohibited propensity inference when deciding whether a reasonable doubt exists, any reliance on such reasoning is impermissible.

While the above principles provide structure for an exercise of discretion that safeguards trial fairness for the accused, some flexibility in their application is inevitable. Trial judges, as evidentiary gatekeepers, are best positioned to assess probative value and prejudicial effect in light of the specific circumstances of the case. When these guiding principles are respected by trial judges, deference is owed on appeal.

In the instant case, the trial judge committed errors in principle and exercised his discretion unreasonably when weighing both the probative value and the prejudicial effect of the accused's criminal record. He understated the risk of improper propensity reasoning on the issue of *mens rea*: the accused's criminal record was still capable of leading the jury to believe that he was a violent man who was more likely to act violently even when foreseeing the risk of death. He overstated the dissimilarities between the homicide with which the accused was charged and his prior convictions. He improperly considered the strength of the Crown's case. He erred in characterizing the accused's violent offences as "equally legitimate" on the issue of his credibility because they demonstrated disregard for the law generally. This error was further aggravated by the trial judge's assessment of the probative value of the accused's youth offences. Finally, the trial judge overstated the risk of distortion by erroneously considering the defence's cross-examination of a police officer that incidentally

undermined a Crown witness' credibility based on the facts of the case. The trial judge ought to have excluded the accused's youth offences and the highly prejudicial violent offences of assault, uttering threats, and possession of a weapon.

Per Rowe and **Jamal** JJ.: There is agreement with the majority that the appeal should be dismissed. However, there was no reviewable error in the trial judge's decision to dismiss the accused's *Corbett* application. There is no basis to change the *Corbett* framework to prevent trial judges from considering either an accused's abiding contempt for the law, as revealed by their prior convictions, or the strength of the Crown's case.

Section 12(1) of the *CEA* reflects Parliament's legislative judgment that prior convictions are relevant to the trier of fact's evaluation of the credibility or testimonial trustworthiness of a witness. The *Corbett* framework recognizes a trial judge's discretion, on an application by the accused, to prevent the Crown from cross-examining the accused on their prior criminal convictions when the probative value of the convictions is outweighed by their prejudicial effect. In weighing the probative value and prejudicial effect of the prior convictions, the trial judge may consider several factors, including, but not limited to: (1) the nature of the convictions; (2) their remoteness or nearness to the matter under prosecution; (3) the similarity between the offences charged and the prior convictions; and (4) the risk of presenting a distorted picture to the jury. If the Crown is permitted to cross-examine the accused on their prior convictions, the trier of fact may only use the convictions to assess the

accused's credibility or testimonial trustworthiness. The Crown is generally limited to cross-examining the accused on the offence, the date and place of the conviction, and the punishment imposed.

A trial judge's exercise of discretion when weighing probative value and prejudicial effect under the *Corbett* framework is fact-specific and contextual, and sometimes different judges will reach different outcomes in different cases, even though they are applying the same legal principles. This is intrinsic to the exercise of judicial discretion and is a feature, not a flaw, of the *Corbett* framework.

Abiding contempt for the law remains a potentially relevant consideration under the *Corbett* framework. A trial judge in a given case may reason that a pattern of criminal conduct shows a repeated disregard or contempt for the law and is relevant to the credibility of the witness. A wide range of crimes is relevant to the capacity for truthfulness of potential witnesses, extending beyond criminal activity specifically implicating elements of dishonesty. As a matter of ordinary human experience and common sense, a person's demonstrated and repeated failure to respect community standards of behaviour is undoubtedly relevant to their testimonial trustworthiness. *Corbett* was fundamentally based on the Court's faith in juries to follow the instruction given by the trial judge and use the record only in assessing credibility and not for any other purpose. Such faith is justified and should be maintained. There is no basis to suggest that lower courts are confused about how to apply the discretionary *Corbett*

framework or that there has been a significant social or legal change to warrant the Court revisiting its precedent.

The strength of the Crown's case also remains a potentially relevant consideration under the *Corbett* framework, but this factor should be used with care. There is a greater risk of improper propensity reasoning when the Crown's case is weak, but a strong Crown case attenuates the concern of prohibited propensity reasoning. When the strength of the Crown's case has been considered as part of the *Corbett* analysis, a strong limiting instruction to the jury is important.

In the instant case, the trial judge's reasoning displays nothing amounting to a clear error in principle, a misapprehension of material facts, or an unreasonable exercise of discretion. Although another trial judge might have weighed the potential prejudice and probative value differently, that does not grant an appellate court licence to interfere.

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APPEAL from a judgment of the Ontario Court of Appeal (Paciocco, Sossin and Favreau JJ.A.), 2023 ONCA 253, 425 C.C.C. (3d) 528, [2023] O.J. No. 1661 (Lexis), 2023 CarswellOnt 5097 (WL), affirming the conviction of the accused for second degree murder. Appeal dismissed.

Matthew R. Gourlay, *Peter Sankoff* and *Brandon Chung*, for the appellant.

Kevin Rawluk and *Manasvin Goswami*, for the respondent.

Lisa Mathews and *Mark Covan*, for the intervener Director of Public Prosecutions.

Julie Nadeau and *Karine Therrien*, for the intervener Director of Criminal and Penal Prosecutions.

Tony C. Paisana and *Patrick H. Mueller*, for the intervener Trial Lawyers Association of British Columbia.

Rebecca A. McConchie, for the intervener Independent Criminal Defence Advocacy Society.

Theresa Donkor and *Chris Rudnicki*, for the intervener Canadian Association of Black Lawyers.

Julianna A. Greenspan and *Anna Zhang*, for the intervener Criminal Lawyers' Association (Ontario).

The judgment of Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The common law has long recognized that a criminal trial is not a forum to pass judgment on the general character of the accused. It upholds this principle by treating Crown-led evidence of an accused's bad character as presumptively inadmissible and by prohibiting the trier of fact from inferring guilt simply because the accused appears to be the "type" of person to commit the crime. These constraints are not merely evidentiary rules but constitutional imperatives, for they preserve the integrity of the presumption of innocence and the right to a fair trial guaranteed by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

[2] The provision at issue in this appeal, s. 12(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*"), sits in tension with the foregoing, as it presumptively allows the Crown to adduce evidence of the accused's prior convictions in order to impeach their credibility. In doing so, the provision departs from the common law's carefully calibrated rules governing character evidence. There is no requirement that the accused put their character in issue before the Crown can have their criminal record admitted into evidence. Nor does the provision explicitly address the significant risk that, even though prior convictions are technically admissible only for the purpose of assessing the accused's credibility, the trier of fact may nonetheless rely on the evidence to infer guilt using prohibited general propensity reasoning.

[3] Recognizing the dangerous potential of this provision, this Court, in *R. v. Corbett*, [1988] 1 S.C.R. 670, determined that s. 12(1) of the *CEA* is consistent with s. 11(d) of the *Charter* on the basis that trial judges retain their common law discretion to exclude evidence when the prejudice it would cause to trial fairness outweighs its probative value. To structure the exercise of discretion in this context, this Court developed a framework outlining four factors that trial judges should consider when weighing the probative value and prejudicial effect of an accused's prior convictions: (1) the nature of the prior convictions; (2) the recency or remoteness of the prior convictions; (3) the similarity between the prior convictions and the charge faced by the accused; and (4) the risk of presenting a distorted picture to the trier of fact (*Corbett*, at pp. 740-44, per La Forest J., dissenting).

[4] This appeal marks the first time that this Court has been asked to revisit the *Corbett* framework. The appellant, Awale Hussein, asserts that courts have interpreted and applied *Corbett* inconsistently and therefore asks this Court to adjust the rules governing the admission of an accused's criminal record under s. 12(1) of the *CEA*, including by establishing that this evidence is subject to a presumption of inadmissibility and by confining its relevance to the issue of the accused's honesty. This Court is also called upon to clarify the principles governing the exercise of a trial judge's discretion to refuse cross-examination — specifically by identifying which convictions are probative of credibility, recognizing the role of social context as a factor, and delineating exactly when the distortion factor becomes relevant during a *Corbett* analysis.

[5] In my view, the *Corbett* framework has stood the test of time but warrants clarification and modification to ensure that it is applied in a predictable and principled manner. While I decline to read a presumption of inadmissibility into s. 12(1) of the *CEA*, this appeal provides this Court with an appropriate opportunity to specify with greater precision how the *Corbett* framework should be applied by trial judges.

[6] In this case, Mr. Hussein was convicted of second degree murder after a trial by judge and jury. The victim, Brian Boucher, was fatally stabbed after a night of drinking alcohol with friends in a basement apartment. No one witnessed the stabbing. The central issues at trial were identity and *mens rea*. During the trial, Mr. Hussein brought a *Corbett* application requesting that the trial judge exclude parts of his

criminal record. The trial judge dismissed the application. The Court of Appeal concluded that the trial judge's decision was not unreasonable, nor did it contain any errors in principle.

[7] I respectfully disagree. Although a ruling on a *Corbett* application warrants deference on appellate review, I am persuaded that the trial judge made errors in principle and exercised his discretion unreasonably. At a minimum, the trial judge ought to have excluded Mr. Hussein's youth offences and the highly prejudicial violent offences of assault, uttering threats, and possession of a weapon. With that being said, this is a case where the curative proviso can be appropriately applied. The evidence of Mr. Hussein's guilt for murder was overwhelming, such that a conviction was inevitable.

[8] I would therefore dismiss the appeal.

II. Background

[9] On February 1, 2017, Natasha Paquette entertained eight friends in her basement apartment in Ottawa. At the party, heavy drinking occurred. Six individuals were still in the apartment in the early morning hours: Mr. Boucher, Mr. Hussein, Austin McEwan, Papy Ndiya, Rayven Foster, and Ms. Paquette.

[10] Mr. Boucher was fatally stabbed around 5:00 a.m. in one of the bedrooms. He sustained 10 stab wounds, including to his forearms and hands. No one witnessed

the stabbing. Both Mr. Ndiya and Mr. McEwan testified that they discovered Mr. Boucher, but their accounts conflicted, as they each claimed to be alone when they found him.

[11] There was also conflicting testimony from witnesses about seeing someone leaving the basement near the time of the stabbing. Mr. Ndiya said that, while returning to the apartment after smoking a cigarette, he saw a man at the bottom of the stairs, who ran past him as he descended. Mr. Ndiya then rushed downstairs to find Mr. Boucher bleeding. Ms. Paquette's mother, who lived upstairs, testified that she came downstairs when she heard screaming and that, as she descended, she saw Mr. Hussein running up the stairs. She said that she did not see Mr. Ndiya at that time.

[12] Of the six people who remained at the party before the stabbing, only Mr. Hussein was not present when the police arrived. Having been told that the suspect had left the scene, the police questioned but did not search the occupants, including Mr. Ndiya and Mr. McEwan, who were covered in blood. Mr. Ndiya was permitted to wash his hands.

[13] A police examination of the crime scene disclosed important forensic evidence. Mr. Hussein's blood was found in the living room and bathroom. When he was later arrested, one week after the stabbing, he was found to have an incised wound on his thumb. Mr. Hussein's blood was found in the bedroom, including drops on the bedroom door adjacent to a puncture in the wall that was consistent with damage made by a knife. Mr. Hussein's DNA and Mr. Boucher's blood were found on a toque located

near where Mr. Boucher died. Another toque, also located in the room where Mr. Boucher was stabbed, contained Mr. Ndiya's DNA and Mr. Boucher's blood.

[14] Evidence of Mr. Hussein's after-the-fact conduct was also admitted at trial. For instance, there was circumstantial evidence that Mr. Hussein left the basement apartment shortly after the stabbing. There was also evidence that he subsequently lived at a friend's house for multiple days without a cellphone and then changed his appearance by shaving his head after learning that he was wanted for Mr. Boucher's murder.

III. Judicial History

A. *Voir Dire — Ontario Superior Court of Justice (Phillips J.)*

[15] During his trial, Mr. Hussein brought a *Corbett* application seeking an order to exclude his criminal record, which included 17 entries. He was found guilty of seven offences as a youth: two counts of uttering threats, one count of possession of a substance included in Sch. II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, three counts of robbery, and one count of failure to appear in court. He also had ten adult convictions: four for failing to comply with court orders, three for assault, one for uttering threats, one for possession of a weapon, and one for mischief.

[16] The trial judge dismissed Mr. Hussein's *Corbett* application after concluding that the probative value of the criminal record outweighed its prejudicial

effect. The trial judge held that the probative value of the record was "considerable" and "quite high" (A.R., vol. I, at pp. 3-4). In making this assessment, the trial judge noted that crimes of dishonesty and other examples of criminal misconduct are "[e]qually legitimate" on the issue of credibility (p. 2). These other types of crimes, he said, can "shed light on whether a witness has regard or disregard for the law generally" (*ibid.*). With respect to Mr. Hussein, the trial judge believed that the "sheer number of convictions, along with their persistent regularity", was indicative of his "disregard or disdain" for the law (p. 3).

[17] The trial judge then held that the prejudicial effect of the criminal record was "near absent" (p. 9). He reasoned that, because the Crown's case on the issue of identity was strong, there was a low risk that the jury would engage in prohibited reasoning on that issue. In addition, he believed that there was little risk of the jury relying on prohibited propensity reasoning to decide the issue of *mens rea*. He was also of the view that the prior convictions were "nowhere near to the nature" of the homicide in this case (p. 6).

[18] The trial judge further considered the fact that the defence had challenged the credibility of Mr. Ndiya, including by questioning him about his criminal record. The trial judge believed that, in light of this, it would create an "unfair distortion" for Mr. Hussein's criminal record to be kept away from the jury (p. 7).

[19] Finally, the trial judge rejected the request for Mr. Hussein's criminal record to be edited. Mr. Hussein had submitted that the trial judge should not permit

the Crown to cross-examine him either on his violent offences, because they were too prejudicial, or on the findings of guilt made against him as a youth, because they lacked probative value. He also asked that the robbery convictions be presented to the jury as convictions for theft. The trial judge reasoned that even the "rougher edges" of Mr. Hussein's criminal record "pale in comparison to the severity of the charge" and "have so little to do with the key issue in this trial, that being the foreseeability of death, that the prejudicial effect is near absent" (p. 8).

B. *Court of Appeal for Ontario, 2023 ONCA 253, 425 C.C.C. (3d) 528 (Paciocco, Sossin and Favreau JJ.A.)*

[20] The Court of Appeal dismissed Mr. Hussein's appeal. First, the Court of Appeal held that it was not an error in principle for the trial judge to consider the strength of the Crown's case as diminishing the prejudicial effect of Mr. Hussein's criminal record. Although the strength of the Crown's case is not one of the typical factors considered on a *Corbett* application, the Court of Appeal held that the trial judge's reasoning was consistent with jurisprudence observing that there is an elevated risk of improper propensity reasoning when the Crown's case is weak. The Court of Appeal acknowledged that jurors could still use impermissible reasoning even if the Crown's case was strong, but it ultimately deferred to the trial judge's assessment of the risk.

[21] Second, the Court of Appeal held that the trial judge understated the risk of prohibited propensity reasoning related to the issue of *mens rea* but that this did not

constitute an error in principle. The Court of Appeal accepted Mr. Hussein's argument that there remained a risk that jurors could draw the general prohibited inference that, because he was a violent man, he was more likely to act violently even when foreseeing the risk of death. Even so, the Court of Appeal was of the view that the trial judge's decision did not "materially turn" on his understated evaluation of the risk of prohibited propensity reasoning (para. 56).

[22] Third, the Court of Appeal held that the trial judge's overall balancing of prejudicial effect and probative value was not unreasonable. The Court of Appeal found that the trial judge did not discount the importance of the identity issue when assessing the criminal record's prejudicial effect. The court was likewise satisfied that the trial judge's acknowledgement in his sentencing reasons that Mr. Hussein's record indicated a "violent disposition" was not incompatible with the trial judge's conclusion on the *Corbett* application that there was a low risk of the jury convicting on that basis (paras. 60-61). The court was similarly satisfied that, even if the trial judge failed to assess how Mr. Hussein's intellectual disability affected the probative value and prejudicial effect of his criminal record, this factor would not have "materially altered" the trial judge's balancing (para. 64). Notably, the court held that "the relevance of Mr. Hussein's intellectual disability to the outcome of a *Corbett* application is not immediately obvious" (para. 63). The Court of Appeal also found that the trial judge did not overestimate the record's probative value by (i) failing to consider Mr. Hussein's diminished moral responsibility for offences he committed as a youth or (ii) overestimating the degree to which the jury would have been left with a distorted

understanding of Mr. Hussein's character following his attack on Mr. Ndiya's credibility.

[23] Fourth, the Court of Appeal held that it was reasonable for the trial judge to permit the Crown to use the entirety of Mr. Hussein's criminal record. It was appropriate for the trial judge to reason that the probative value of the record came from the fact that it indicated "ongoing, persistent, and regular disregard for the law" (para. 70). To establish the depth of this disregard, the trial judge reasonably concluded that the entire record needed to be presented as a cohesive whole.

IV. Issues

[24] The principal issue in this appeal is whether the trial judge erred by permitting the Crown to cross-examine Mr. Hussein on his entire criminal record for the purpose of impeaching his credibility. The essence of Mr. Hussein's argument is that the trial judge committed a series of errors in principle that led to a flawed assessment of the probative value and prejudicial effect of his criminal record.

[25] In making this argument, Mr. Hussein asks this Court to consider three changes to the *Corbett* framework: (i) establishing that an accused's prior convictions are subject to a presumption of inadmissibility; (ii) confining their relevance to the issue of honesty rather than credibility generally; and (iii) clarifying the factors governing the exercise of a trial judge's discretion to refuse cross-examination. In

response, the Crown argues that, in effect, Mr. Hussein's proposals seek to overturn *Corbett* and amend s. 12(1) of the *CEA*.

[26] To properly situate Mr. Hussein's proposals within this Court's jurisprudence, I will first outline the relevant evidentiary principles and summarize this Court's conclusions in *Corbett*. I will then go on to explain that, while I would reject Mr. Hussein's first proposal, I agree that the principles governing the exercise of a trial judge's discretion to refuse cross-examination of the accused on their prior convictions should be clarified. I conclude by determining that the trial judge in this case failed to comply with these principles, but I would nonetheless rely on the curative proviso to dismiss the appeal.

V. Analysis

A. *Governing Evidentiary Principles*

[27] An assessment of whether evidence is admissible involves a multi-step process (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶2.48). First, a trial judge must determine whether the proffered evidence is relevant. Relevance is not a high threshold and is established when the evidence has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 108, per Martin J., dissenting in part). There are no

degrees of relevance, nor does relevance require a "minimum probative value" (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). Evidence must also be material, meaning that it is relevant to a live issue at trial (*Calnen*, at para. 109). Generally speaking, relevant evidence is *prima facie* admissible (*R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 18; *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 20).

[28] Second, a trial judge must determine whether the evidence is subject to any exclusionary rule, which, as discussed below, includes the rule against bad character evidence. Third, when the evidence is led by the Crown, a trial judge must decide whether they should exercise their discretion to exclude the relevant evidence because its prejudicial effect outweighs its probative value. The standard for excluding relevant evidence is heightened when it is led by the defence (see *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 610-11). Probative value refers to "the degree or extent to which the evidence will prove the fact in issue for which it is tendered" (Lederman, Fuerst and Stewart, at ¶2.79). Evidence will have a prejudicial effect where "it is prone to being misused, its reliability cannot be adequately tested, or it may otherwise operate unfairly or produce problematic collateral costs" (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 52).

(1) General Principles of Character Evidence

[29] An accused's criminal record is a form of character evidence when admitted under s. 12(1) of the *CEA* (*R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.), at p. 461). An overview of the common law principles governing the use of

character evidence in criminal proceedings is therefore necessary in order to properly contextualize the rules governing the admission of an accused's criminal record.

[30] Character evidence is "any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour" (Paciocco, Paciocco and Stuesser, at p. 63). This evidence can take different forms. For example, character can be proven directly through statements about an individual's reputation in the community (see, e.g., *R. v. Close* (1982), 38 O.R. (2d) 453 (C.A.), at p. 460; *R. v. Profit*, [1993] 3 S.C.R. 637, at p. 637). In some situations, expert evidence can be relied upon to prove that the perpetrator of a crime or the accused has a distinctive disposition (*Mohan*, at p. 37; see also *McMillan v. The Queen*, [1977] 2 S.C.R. 824, at p. 827). Character can also be established circumstantially, such as through evidence of past actions (see *Morris v. The Queen*, [1979] 1 S.C.R. 405, at pp. 437-39; *R. v. Farrant*, [1983] 1 S.C.R. 124, at p. 145; *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.), at pp. 536-37).

[31] Character evidence is often introduced to support one or both of the following inferences. The primary inference that can be drawn from character evidence relates to the likelihood that an individual acted in a certain manner. It is a matter of common sense that "the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way again" (*Arp*, at para. 39). The secondary inference that can be drawn from character evidence relates to the likelihood that a particular witness is credible. As this Court explained in *Corbett*, one of the

factors that a trier of fact may consider when assessing the credibility of a witness is their "habits or mode of life" (p. 685; see also *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at pp. 831-32).

[32] Over time, the common law has developed various rules regulating how character evidence may be used in criminal proceedings. For example, the common law rule against oath-helping prohibits parties from introducing character evidence for the sole purpose of bolstering a witness's credibility unless an opposing party has attempted to undermine that credibility (see *R. v. Béland*, [1987] 2 S.C.R. 398, at pp. 405-8; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at pp. 729-30). However, the defence can call character witnesses to testify to the good character of the accused, regardless of whether the Crown has impeached the accused's character (*R. v. Clarke* (1998), 112 O.A.C. 233 (Ont. C.A.), at para. 21). If the accused adduces good character evidence, the trial judge must instruct the jury that it is relevant with respect to both the primary and the secondary inferences (*R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 135).

[33] When evidence of the accused's good character is introduced through lay witnesses, the witnesses must testify to the accused's reputation in the community rather than giving statements of personal opinion or evidence concerning past actions (*R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at p. 348). This restriction on the form in which good character evidence can be introduced does not extend to the accused, who is permitted to testify to prior acts of good conduct (*ibid.*; *Close*, at p. 460).

[34] For our purposes, the most pertinent common law rule on character evidence is the rule treating Crown-led evidence of the accused's bad character, other than conduct that forms the subject matter of the charge, as presumptively inadmissible. This rule encompasses any discreditable evidence, including conduct or information about the accused that a reasonable observer would likely find to be morally objectionable or indicative of a reprehensible character (Paciocco, Paciocco and Stuesser, at p. 68; see also Lederman, Fuerst and Stewart, at ¶11.2; *R. v. Robertson*, [1987] 1 S.C.R. 918, at pp. 941-42; *R. v. T.J.F.*, 2024 SCC 38, at paras. 75-77).

[35] The rationale for this rule is not based on relevance. As discussed, character evidence can be relevant to the question of whether the accused acted in a certain manner and to the question of whether the accused is credible. Instead, as this Court explained in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 31-40, the rationale for the exclusionary rule stems from recognition of the fact that bad character evidence often contributes to reasoning prejudice and moral prejudice.

[36] Both forms of prejudice undermine trial fairness (see *Handy*, at para. 148). Reasoning prejudice refers to the risk that bad character evidence will distract the trier of fact from deciding an issue in a reasoned way, perhaps by causing confusion or attracting disproportionate attention (Paciocco, Paciocco and Stuesser, at p. 70; *Handy*, at paras. 144-47). Moral prejudice refers to the risk that bad character evidence will be used by the trier of fact to draw the prohibited "general propensity" inference that the accused is the kind of bad person likely to commit the offence charged (Paciocco,

Paciocco and Stuesser, at pp. 70 and 74; *Handy*, at paras. 31 and 139). The common law has long recognized that this line of reasoning is unfair because it leads to convictions on the basis of "bad personhood", effectively relieving the Crown of having to prove every element of the offence beyond a reasonable doubt (see *Handy*, at paras. 31-33 and 72).

[37] In *Handy*, this Court repeatedly emphasized the "poisonous" nature of bad character evidence, observing that, when its admission is not tightly circumscribed by trial judges, there is a high likelihood that the trier of fact will, even with a limiting instruction, engage in impermissible propensity reasoning in order to convict the accused (see paras. 40, 58, 138 and 141). When such reasoning is used, the conviction will be wrongfully based on "prejudice rather than proof", thereby undermining the accused's right to be presumed innocent and to receive a fair trial (para. 139). It is the absence of the attendant risk of a wrongful conviction that explains why this exclusionary rule does not extend to ordinary witnesses (see *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 32; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 139).

[38] Despite the inherent prejudice that accompanies bad character evidence, the exclusionary rule is not absolute. In exceptional circumstances, the Crown may lead evidence of bad character to support a primary inference on an issue related to the guilt or innocence of the accused (*Handy*, at paras. 62-68). When the Crown seeks to introduce this evidence, the trial judge must be satisfied on a balance of probabilities that "in the context of the particular case the probative value of the evidence in relation

to a particular issue outweighs its potential prejudice and thereby justifies its reception" (para. 55). The test for the admission of bad character evidence is "strict" given that its probative value must be "so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury" (*R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at pp. 729 and 732). Accordingly, the evidence must go beyond showing the general disposition of the accused (*Handy*, at para. 71).

[39] Where the presumption of inadmissibility is successfully rebutted in the manner described above, the Crown is permitted to use bad character evidence to support a primary inference — that the accused likely did or did not act or think in a certain manner. However, there are other situations where the Crown may be permitted to adduce evidence of bad character for a more limited purpose. For example, if the defence puts the character of the accused in issue, the Crown is permitted to introduce evidence of bad character solely for the purposes of rebutting the accused's evidence of good character and, if the accused has testified to their good character, impugning the accused's credibility by suggesting that they lied during their testimony (*McNamara (No. 1)*, at p. 350). This rebuttal evidence of bad character cannot be used by the Crown to support a primary inference regarding the guilt or innocence of the accused, and the jury must be instructed on this distinction (*R. v. H. (E.D.)*, 2000 BCCA 523, 38 C.R. (5th) 74, at para. 19; see also *R. v. Chambers*, [1990] 2 S.C.R. 1293, at p. 1311).

[40] Generally speaking, an accused puts their character in issue when they proffer evidence to suggest that they are not the "type" of person to commit the offence in question (*McNamara (No. 1)*, at p. 346). This can occur in situations where the accused comments positively on their disposition or makes statements regarding the absence of past misconduct (see *Farrant*, at p. 145; *Morris*, at pp. 437-38). Even in these circumstances, trial judges retain their discretion to exclude the Crown's rebuttal evidence of bad character if its prejudicial effect outweighs its probative value (Lederman, Fuerst and Stewart, at ¶10.53).

[41] Similar principles apply when the Crown uses the accused's criminal record to rebut their evidence of good character. When the accused puts their character in issue, s. 666 of the *Criminal Code*, R.S.C. 1985, c. C-46, permits the Crown to adduce the accused's criminal record for the limited purposes of rebutting evidence of their good character and, if the accused has testified, impugning their credibility. Under this provision, the Crown may adduce the criminal record regardless of whether the accused testifies (Lederman, Fuerst and Stewart, at ¶10.67). The Crown is also permitted to adduce the facts underlying a particular conviction as part of its efforts to rebut the accused's evidence of good character (*R. v. L.K.W.* (1999), 126 O.A.C. 39, at para. 66).

(2) Section 12(1) of the *Canada Evidence Act*

[42] Section 12(1) of the *CEA* allows the questioning of any witness, including the accused, about whether they have been convicted of any offence. The sole purpose

of this cross-examination is to impeach the credibility of the witness. This statutory provision therefore permits the Crown to cross-examine the accused on their prior convictions to establish a secondary inference, regardless of whether the accused has put their character in issue (Lederman, Fuerst and Stewart, at ¶10.86). Section 12(1) of the *CEA* provides as follows:

> **12 (1)** A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.
>
> **(1.1)** If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

[43] The Crown's cross-examination in these circumstances "is not directly aimed at establishing the falsity of the witness's evidence; it is rather designed to lay down a factual basis — prior convictions — from which the inference may subsequently be drawn that the witness' credibility is suspect and that his evidence ought not to be believed" (*Morris*, at p. 432). The provision reflects a "legislative judgment that prior convictions do bear upon the credibility of a witness" (*Corbett*, at p. 685).

[44] In *Corbett*, this Court held that s. 12(1) of the *CEA* does not violate an accused's right to a fair trial guaranteed by s. 11(d) of the *Charter*. Mr. Corbett had argued that, while s. 12(1) purports to make prior convictions admissible solely to impugn credibility, the accused is unfairly prejudiced because the trier of fact will inevitably engage in impermissible propensity reasoning and use the convictions to

decide guilt or innocence (p. 688). This is so, he contended, even in circumstances where the jury is given a limiting instruction on the proper use of the prior convictions and is cautioned against propensity reasoning (p. 689). The Court rejected this constitutional argument after recognizing that s. 12(1) of the *CEA* does not displace a trial judge's common law discretion to exclude evidence when the prejudice it would cause to trial fairness outweighs its probative value (p. 697; see also p. 699, per Beetz J., and pp. 747-48, per La Forest J., dissenting).

[45] In recognizing that s. 12(1) of the *CEA* preserves a trial judge's discretion to exclude relevant evidence that would result in an unfair trial, a majority of this Court adopted La Forest J.'s articulation, in his dissenting reasons, of the factors that should guide a trial judge's exercise of discretion in this context (*Corbett*, at p. 698). La Forest J. stated that "[i]t is impossible to provide an exhaustive catalogue of the factors that are relevant in assessing the probative value or potential prejudice of such evidence" (p. 740), but he identified the following as among the most important factors: (1) the nature of the prior convictions; (2) the recency or remoteness of the prior convictions; and (3) the similarity between the prior convictions and the charge faced by the accused (pp. 740-42). On the first factor, La Forest J. cited *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), for the premise that crimes of dishonesty are more probative of credibility than crimes of violence, which generally have little direct bearing on an accused's honesty (pp. 740-41). On the second factor, La Forest J. stated that the remoteness of a prior conviction typically diminishes its probative value (p. 742). On the third factor, he held that convictions for offences that are more similar to the offence

for which the accused is being tried cause greater prejudice and that courts should therefore be "very chary" of admitting such evidence, noting the stringent requirements for rebutting the presumption of inadmissibility governing bad character evidence (pp. 741-42).

[46] La Forest J. also recognized that the risk of presenting a distorted picture to the trier of fact may be a relevant factor in some cases, noting that the factor comes into play especially in cases where the accused makes a "deliberate attack . . . upon the credibility of a Crown witness and where the resolution of the case boils down to a credibility contest between the accused and that witness" (p. 742). Ultimately, however, he cautioned that the distortion factor cannot "override the concern for a fair trial" (pp. 743-44).

[47] Both the majority and the dissent in *Corbett* emphasized the contextual and discretionary nature of judicial determinations of probative value and prejudicial effect. La Forest J. stated that "prejudicial potential and probative value are not abstract qualities. They exist in the context of a concrete case and are determined with reference to the circumstances of the case" (p. 744). Dickson C.J. similarly underscored "the discretion in the trial judge to exclude evidence of prior convictions in those unusual circumstances where a mechanical application of s. 12 would undermine the right to a fair trial" (p. 692).

[48] This Court split on the application of the relevant factors to Mr. Corbett's case. Mr. Corbett was on trial for a murder committed in 1982. During the trial, his

youth criminal record from 1954 was admitted into evidence. The crimes in that record included armed robbery, receiving stolen property, breaking and entering (two counts), theft (five counts), and escaping custody. His criminal conviction for non-capital murder in 1971 was also admitted into evidence (p. 681). Dickson C.J. held that the entire criminal record had been properly admitted, since excluding Mr. Corbett's murder conviction would have left the jury "with the entirely mistaken impression that while the Crown witnesses were hardened criminals, Corbett had an unblemished record" (p. 698). La Forest J. disagreed, holding that the murder conviction should have been excluded. In his view, the probative value of this type of offence was "trifling", and the similarity between the offences created a "manifestly profound" potential for prejudice (p. 746). While he accepted that Mr. Corbett had "assailed the credibility of Crown witnesses" and that credibility was a "vital issue" at trial, he was satisfied that the risk of distortion could have been remedied without reference to the murder conviction (p. 747). Specifically, he noted that the jury would have already known of Mr. Corbett's "unsavoury criminal character" from the other facts of the case and his other previous convictions (*ibid.*).

[49] In *Corbett*, this Court also identified various limitations placed on the Crown's ability to cross-examine the accused on their prior convictions: (1) the accused can be examined only as to the fact of the conviction and not as to the conduct that led to the conviction; (2) the accused cannot be cross-examined as to whether they testified during previous trials; (3) the accused cannot be cross-examined on discreditable conduct beyond prior convictions; (4) the Crown can adduce evidence of prior

convictions only if the accused takes the stand, even in circumstances where the defence has attacked the character of Crown witnesses; and (5) the accused can be cross-examined only on convictions, strictly construed, and not on findings of guilt for which the accused was discharged (p. 696). These limits on cross-examination are in addition to the requirement that the trial judge give a limiting instruction on general propensity reasoning by warning the jury that, while prior convictions are probative of credibility, they cannot be used to infer guilt (pp. 688-89; see also Lederman, Fuerst and Stewart, at ¶10.82).

[50] In *R. v. Underwood*, [1998] 1 S.C.R. 77, this Court held that an accused is entitled to a ruling on their *Corbett* application at the close of the Crown's case, before they decide whether to testify (para. 7). The extent to which an accused's criminal record is admissible encompasses part of the case to be met by the accused. Knowledge of the case to be met is a principle of fundamental justice protected by s. 7 of the *Charter* (para. 6).

B. *Corbett Must Be Clarified*

[51] I turn now to Mr. Hussein's proposed modifications to the *Corbett* framework. As I will explain, I do not agree that an accused's prior convictions should be subject to a presumption of inadmissibility. I will then clarify the manner in which trial judges must assess the probative value of prior convictions and the principles that govern the exercise of their discretion to limit or refuse cross-examination on those convictions.

(1) There Is No Presumption of Inadmissibility Under Section 12(1) of the *CEA*

[52] The first proposal put forward by Mr. Hussein is that, as with other forms of bad character evidence, a presumption of inadmissibility should apply when the Crown seeks to cross-examine the accused on their criminal record in order to impeach their credibility. In his view, placing a persuasive burden on the Crown to justify the criminal record's admission would be consistent with the common law's approach to other forms of prejudicial evidence and would reduce incoherence in the exercise by trial judges of their discretion to admit an accused's criminal record. In response, the Crown contends that reading in a presumption of inadmissibility would effectively require this Court to ignore the language of s. 12(1) of the *CEA* and overturn *Corbett*.

[53] I agree with the Crown. It is unclear how reading in a presumption of inadmissibility could be reconciled with the plain wording of the provision. The text is explicitly permissive: "A witness may be questioned as to whether the witness has been convicted of any offence . . . ." In *R. v. Potvin*, [1989] 1 S.C.R. 525, this Court treated s. 643(1) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 715), which used similarly permissive language, as rendering certain types of hearsay evidence presumptively admissible when specific requirements were met (see also *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 82). Where Parliament has sought to render certain types of evidence presumptively inadmissible, it has done so with clearer language. For example, s. 276(2) of the *Criminal Code* states that "evidence shall not be adduced by

or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge . . . unless . . . .”

[54] To be clear, even though s. 12(1) of the *CEA* makes this evidence relevant and thus presumptively admissible, “the statute . . . in no way requires its reception” (*Corbett*, at p. 733 (emphasis deleted)). Instead, it preserves space for the independent operation of the trial judge’s general common law discretion to exclude Crown-led evidence if its prejudicial effect outweighs its probative value (pp. 739-40). The statute is silent on how the probative value and prejudicial effect of prior convictions should be assessed in any specific circumstance. The framework outlined in *Corbett* functions to provide the common law principles for how this assessment must be conducted.

[55] Further, to impose a presumption of inadmissibility would require this Court to depart from *stare decisis*, yet Mr. Hussein offers no compelling reason to do so. In *Corbett*, this Court unanimously interpreted s. 12(1) of the *CEA* as establishing that prior convictions are relevant to the issue of credibility and, like relevant evidence generally, are presumptively admissible. For example, Dickson C.J. wrote that “[t]he effect of the section is merely to permit the Crown to adduce evidence of prior convictions as they relate to credibility” (p. 687). La Forest J. likewise noted that “the forerunners of s. 12, and indeed s. 12 itself, by rendering admissible into evidence all previous convictions for the purpose of affecting a witness’ credibility . . . necessarily embody a legislative judgment that such evidence is relevant to credibility” (p. 720).

[56] In his submissions, Mr. Hussein offers no clear explanation that would justify a reinterpretation of s. 12(1) of the *CEA*, nor has he brought a new constitutional challenge to invalidate the provision. This Court has previously expressed a heightened reluctance to depart from *stare decisis* on matters of statutory interpretation given that Parliament is free to amend the law (see *Binus v. The Queen*, [1967] S.C.R. 594, at p. 601). Moreover, to the extent that Mr. Hussein raises arguments about *Corbett* being unworkable, they are primarily directed at how courts have interpreted and applied *Corbett*'s guidance regarding the principles that govern the exercise of a trial judge's discretion to exclude an accused's criminal record. As I discuss below, these concerns are best addressed by clarifying those principles.

(2) Relevance of Prior Convictions Admitted Into Evidence Under Section 12(1) of the *CEA*

[57] The second proposal put forward by Mr. Hussein is that this Court should recognize that prior convictions admitted into evidence under s. 12(1) of the *CEA* are relevant not to "credibility generally" but rather to "honesty . . . specifically" (A.F., at para. 110 (emphasis deleted)). In his view, it must be clear to the trier of fact that it is improper to infer that the accused is more likely to lie simply because they have committed a past crime. There must be something about the prior conviction that supports the conclusion that the accused will lie. For its part, the Crown submits that this proposal is unnecessary because it largely reflects the current state of the law.

[58] I agree with the Crown that Mr. Hussein's second proposal is largely reflected in the law. When admitted under s. 12(1) of the *CEA*, the accused's criminal record is relevant solely to the issue of their credibility. In other words, the character evidence presented in these circumstances is being tendered only to support a secondary inference; it cannot be used to draw inferences on matters directly related to the accused's guilt or innocence. I also agree with Mr. Hussein that, properly understood, credibility has to do with a witness's honesty or testimonial trustworthiness (see *R. v. C. (M.)*, 2019 ONCA 502, 146 O.R. (3d) 493, at para. 176; *R. v. Ledesma*, 2021 ABCA 143, 403 C.C.C. (3d) 268, at para. 88; *R. v. King*, 2022 ONCA 665, 163 O.R. (3d) 179, at para. 176).

[59] A clarification is required, however, with respect to Mr. Hussein's submissions on the permissible and impermissible credibility inferences from prior convictions. I do not agree that, under the current law, it is *per se* improper for a trier of fact to reason that, in light of a witness's prior convictions, their general disposition renders them less honest. To hold otherwise would be to prohibit the line of reasoning that underpins Parliament's assessment of how prior convictions are relevant to credibility. As explained in *Corbett*, s. 12(1) of the *CEA* reflects a "legislative judgment" that *all* prior convictions are, "to some extent at least", relevant to the issue of credibility (p. 685). Again, relevance is a low bar and requires only that evidence have some tendency as a matter of common sense to further the proposition for which it is being tendered (*Calnen*, at para. 108).

[60] It is true that academic commentary has called into question whether all prior convictions are in fact relevant to credibility (see, e.g., M. Biddulph, "Myths, Stereotypes, and the Problem of Probative Value: Revisiting the Admissibility of Criminal Record Evidence" (2024), 57 *U.B.C. L. Rev.* 295, at pp. 323-26; P. J. Sankoff, *The Law of Witnesses and Evidence in Canada* (loose-leaf), at § 12:60). However, in the absence of a new constitutional challenge to s. 12(1) of the *CEA*, this is not the right case to question Parliament's assessment of relevance (see *Corbett*, at pp. 718-19).

[61] With that said, as I will discuss below, it remains true that this Court acknowledged in *Corbett* that not all prior convictions possess the same probative value on the issue of credibility (see pp. 740-41). In other words, not all prior convictions assist in proving the untrustworthiness of a witness to the same degree. To be substantially probative of credibility, a conviction must allow the trier of fact to infer that the witness has a *specific* capacity or willingness to be dishonest at the time of the trial. Many convictions are incapable of supporting this specific propensity inference.

(3) Principles Governing the Admission of Prior Convictions Into Evidence Under Section 12(1) of the *CEA*

[62] The final proposal put forward by Mr. Hussein is that this Court should refine the principles that govern the exercise of a trial judge's discretion to limit the Crown's cross-examination of the accused on their criminal record. In his view, this refinement is necessary given the inconsistent ways in which these principles have been applied by lower courts. Three adjustments are suggested. First, Mr. Hussein asks that

this Court reaffirm that many types of crimes, particularly crimes of violence, have tenuous probative value on the issue of credibility. Second, he asks that this Court recognize for the first time that social context can inform a trial judge's assessment of the probative value and prejudicial effect of an accused's criminal record. Third, he submits that further guidance is necessary on how the distortion factor should be applied.

[63] I agree that clarification of the *Corbett* framework is necessary to ensure that trial judges' admissibility assessments are conducted in an efficient, predictable, and constitutionally compliant manner. Predictability in this regard will inherently have its limits, given that some degree of inconsistency is inevitable with any fact-specific exercise of discretion. As Doherty J.A. wrote in *R. v. Talbot*, 2007 ONCA 81, 220 O.A.C. 167, different outcomes in the application of the *Corbett* framework are "simply reflective of a discretionary decision-making process" (para. 38). Even so, it should be recognized that the common law discretion discussed in *Corbett* functions to uphold the presumption of innocence and trial fairness. As Beetz J. emphasized in his concurring reasons, if s. 12(1) of the *CEA* ousted a trial judge's general discretion to exclude evidence whose probative value is outweighed by its prejudicial effect, the provision would not conform with ss. 7 and 11(d) of the *Charter* (*Corbett*, at p. 699). Since *Corbett*, this Court has made it clear that a trial judge's duty to properly exercise their common law discretion to exclude evidence that would result in an unfair trial for an accused is now a constitutional imperative in light of ss. 7 and 11(d) of the *Charter* (*R. v. Harrer*, [1995] 3 S.C.R. 562, at paras. 21-24). Because the admission of an

accused's criminal record carries a significant risk of prejudice, there is a heightened need for this general discretion to be exercised within clearly defined constraints to preserve the accused's *Charter* rights (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 875-76).

[64] In the following analysis, I outline a series of clarifications and adjustments to the *Corbett* framework to ensure that the significant prejudicial effect of an accused's criminal record is handled with proper care. This guidance fits within this Court's tradition of adjusting the rules of evidence in a manner that is "highly sensitive to the due process interests of the accused" (D. Paciocco, "Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence" (2008), 40 *S.C.L.R.* (2d) 309, at p. 311). As this Court stated in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, "[i]t is axiomatic that the common law must be developed in a manner consistent with the fundamental values enshrined in the *Charter*" (para. 121, citing *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603).

(a) *Observations on the Prejudicial Effect of Prior Convictions*

[65] Before I clarify the principles governing the exercise of a trial judge's discretion to refuse the Crown's cross-examination of the accused on their prior convictions, a few observations on the prejudicial nature of this evidence are in order.

[66] Differing views have been taken by provincial appellate courts when providing guidance on how often trial judges should exclude an accused's criminal record. Some courts have characterized the discretion recognized in *Corbett* as something to be exercised exceptionally (see, e.g., *R. v. Tremblay*, 2006 QCCA 75, 209 C.C.C. (3d) 212, at para. 22; *R. v. Thompson* (1992), 83 C.C.C. (3d) 273 (B.C.C.A.), at p. 277). Others have held that it is erroneous to treat the exercise of this discretion as exceptional (see, e.g., *R. v. Brand* (1995), 80 O.A.C. 396, at paras. 8-9; *R. v. Charland* (1996), 187 A.R. 161 (C.A.), at para. 20, aff'd on other grounds [1997] 3 S.C.R. 1006).

[67] Similarly, divergent views have been expressed on the degree to which limiting instructions to the jury effectively mitigate the prejudice caused by this evidence. In some circumstances, appellate courts have relied heavily on the presence of a limiting instruction to uphold a trial judge's refusal to exclude an accused's criminal record (see, e.g., *R. v. Halliday* (1992), 77 C.C.C. (3d) 481 (Man. C.A.), at p. 488; *R. v. Mantha* (2001), 155 C.C.C. (3d) 301 (Que. C.A.), at paras. 80-81). By contrast, courts in other cases have been much more skeptical of the efficacy of a limiting instruction (see, e.g., *R. v. T. (D.B.)* (1994), 89 C.C.C. (3d) 466 (Ont. C.A.), at p. 470).

[68] This divergence stems, in part, from the split decision in *Corbett*, in which Dickson C.J. and La Forest J. offered competing understandings of how effective limiting instructions are in mitigating the risk of moral prejudice. For example, Dickson C.J. observed that, while a risk of moral prejudice is present when cross-examination

is permitted, "it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose" (p. 692 (emphasis in original)). In his view, it is preferable to "give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information" (p. 691). By contrast, La Forest J. expressed greater doubt over the jury's ability to distinguish between impermissible and permissible uses of an accused's criminal record, noting that the law "ought [not] . . . simply to assert away this problem by reflexively invoking the virtues of the jury system" (p. 727). He continued by stating that "[w]e deceive ourselves if we expect the jury to reason in ways that we, as lawyers and judges, know from experience to be often unrealistic, if not impossible" (*ibid.*).

[69] In light of the foregoing, it is important for this Court to explain the nature of the prejudice that emerges when an accused's criminal record is admitted under s. 12(1) of the *CEA* for impeachment purposes. The role of limiting instructions in mitigating this prejudice must also be clarified to ensure alignment with contemporary understandings of the prejudice caused by bad character evidence generally.

[70] The prejudice caused by prior convictions admitted under s. 12(1) of the *CEA* is not identical to the prejudice caused by other forms of bad character evidence. Prior convictions are often reliable, since they are based on a judicial finding of proof beyond a reasonable doubt. This diminishes the risk of reasoning prejudice, because excessive time and attention are not taken up in proving the past discreditable conduct (see *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, at paras. 46 and 52). Moreover,

when admitted under s. 12(1) of the *CEA*, prior convictions can carry a lower risk of moral prejudice, since the Crown is prohibited from exploring the specific facts underlying the convictions (see *Stratton*, at pp. 466-67). To some extent, this can lessen the potential for the trier of fact to engage in impermissible propensity reasoning.

[71] Even so, it is unquestionable that, since prior convictions are a form of bad character evidence, the moral prejudice associated with their admission into evidence for impeachment purposes can be significant. Dickson C.J. and La Forest J. were in agreement on this point in *Corbett*. For example, Dickson C.J. cited Martin J.A.'s judgment in *R. v. Davison* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.), at pp. 441-42, where he stated that "[i]f an accused could in every case be cross-examined with a view to showing that he is a professional criminal under the guise of an attack upon his credibility as a witness it would be virtually impossible for him to receive a fair trial" (p. 691). La Forest J. similarly observed that "[t]he most obvious way in which this prejudice manifests itself arises from the fact that the operation of s. 12 significantly, and often invidiously, circumvents the complex of rules that precludes, in general, the introduction by the Crown of evidence of an accused's 'bad character'" (p. 725).

[72] Since the release of *Corbett*, this Court has continued to emphasize the risk that bad character evidence poses to trial fairness (see *B. (C.R.)*, at p. 732; *Arp*, at para. 40). Nowhere is this clearer than in the foundational case of *Handy*, where this Court clarified the framework for dealing with bad character evidence and determining its admissibility (see Paciocco, Paciocco and Stuesser, at p. 74; Lederman, Fuerst and

Stewart, at ¶11.6). As noted above, this Court was unequivocal in *Handy* about the "poisonous" quality of this evidence given its inherent ability to prompt the jury to engage in prohibited propensity reasoning and to facilitate wrongful convictions (see paras. 40, 58, 138-39 and 141). Notably, the Court cited a series of studies on the consequences of the jury's exposure to the accused's criminal record as support for its contention that the amelioration of moral prejudice is best achieved through evidentiary exclusions rather than limiting instructions (see para. 141, citing R. L. Wissler and M. J. Saks, "On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt" (1985), 9 *Law & Hum. Behav.* 37, at p. 43; S. Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study", [2000] *Crim. L.R.* 734, at p. 742; and K. L. Pickel, "Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help" (1995), 19 *Law & Hum. Behav.* 407).

[73] The contributions of *Handy* to the law of bad character evidence were immediate and substantial (see, e.g., *R. v. Blake*, 2004 SCC 69, [2004] 3 S.C.R. 503). Appellate courts continue to use the guidance provided in that case to recognize the unique dangers of this evidence and to express doubt as to the jury's ability to use this evidence in permissible ways. As Strathy C.J.O. stated in *R. v. C. (Z.W.)*, 2021 ONCA 116, 155 O.R. (3d) 129: "A jury obviously does not have the benefit of that training and experience to assist them in discriminating between permitted and prohibited logical thought processes when judging the conduct of an accused. The jury can all too

readily use the evidence for an improper purpose" (para. 94; see also *R. v. Amin*, 2024 ONCA 237, 171 O.R. (3d) 561, at para. 1).

[74] These contemporary perspectives on bad character evidence echo concerns about s. 12(1) of the *CEA* and the efficacy of limiting instructions that were raised in academic scholarship prior to *Corbett*. For instance, a paper by the Law Reform Commission of Canada observed that "[i]t is impossible for the jury to apply the trial judge's instructions and relate the accused's previous convictions elicited in cross-examination only to the credibility of his evidence and not to the probability of his guilt" (Law of Evidence Project, *Evidence*, Study Paper No. 3, *Credibility* (1972), at p. 8). Similarly, Professor Martin L. Friedland wrote that "[t]o say that the accused is a bad man and is not to be believed is hardly distinguishable from saying that he is a bad man and is guilty of the offence" ("Criminal Law — Evidence — Cross-Examination on Previous Convictions in Canada — Section 12 of the Canada Evidence Act" (1969), 47 *Can. Bar Rev.* 656, at p. 658). Professor Ed Ratushny expressed the same view: "It has long been recognized . . . that it is simply unrealistic to expect jurors to perform the mental gymnastics of separating bad character which affects credibility from bad character which shows disposition" (*Self-Incrimination in the Canadian Criminal Process* (1979), at p. 337).

[75] The prejudicial effect of using prior convictions to impeach an accused's credibility is also not limited to the significant moral prejudice caused, as there are other collateral consequences that create unfairness for the accused. La Forest J.

recognized in *Corbett* that s. 12(1) of the *CEA* can operate "so as to result in the unequal ability of accused persons to conduct their defence" (p. 728). It risks doing so by creating a strong deterrent against testifying at trial for accused persons who have a criminal record. As Professor Cecil A. Wright long ago explained, "even though [the accused] may have an honest defence he knows . . . that knowledge of a former conviction, if it be in any way related to the type of thing of which he is now accused, will make a verdict of guilty practically certain" ("Evidence — Credibility of Witness — Cross-Examination as to Previous Conviction" (1940), 18 *Can. Bar Rev.* 808, at p. 810). Justice G. Arthur Martin (writing extrajudicially) and Joseph W. Irving similarly observed that "almost every counsel who has done criminal work has kept an accused out of the witness box on occasion so that his or her criminal record would not be elicited" (*G. Arthur Martin: Essays on Aspects of Criminal Practice* (1997), at p. 201).

[76] This context confirms that the prejudicial effect of permitting the Crown to cross-examine the accused on their prior convictions for impeachment purposes can be significant. In light of the dangerous potential of this evidence, trial judges should not hesitate to exercise their common law discretion to exclude convictions that do not have sufficient probative value on the issue of credibility to overcome the prejudice associated with admitting them.

(b) *Nature of the Offence Factor*

[77] Having clarified how this evidence can operate prejudicially, I now turn to the question of how the first factor articulated in *Corbett* to guide a trial judge's exercise of discretion — the nature of the offence — should be applied.

[78] Mr. Hussein argues that this factor has been inconsistently interpreted, with some courts adopting an overly broad formulation of probative value to justify the admission into evidence of many types of criminal convictions, including for crimes of violence. He submits that, as a result, convictions that have minimal probative value on the issue of credibility but cause significant prejudice to trial fairness are being admitted. In response, the Crown argues that, while it is true that crimes of dishonesty are the most probative of credibility, courts have appropriately held that, in some circumstances, other crimes have substantial probative value.

[79] I agree with Mr. Hussein that there is a need to clarify how this factor should be applied. The nature of the offence is the most important factor when the trial judge is assessing the probative value of prior convictions on the issue of the accused's credibility. For a conviction to have sufficient probative value to outweigh its prejudicial effect, it must permit the trier of fact to infer that the accused has a *specific* capacity or willingness to be dishonest. The convictions that are capable of supporting this inference will typically be those that involve traditional crimes of dishonesty as well as some administration of justice offences. For the most part, crimes of violence have limited probative value because they do not support this specific credibility inference.

[80] As La Forest J. explained in *Corbett*, crimes of dishonesty are often highly probative of an accused's credibility (pp. 740-41). Some examples will be illustrative. The paradigmatic crime of dishonesty is perjury, since it speaks directly to the accused's willingness to lie under oath. Other examples of crimes of dishonesty include fraud and forgery, because they demonstrate that the accused has made misrepresentations of fact. Some property crimes, such as theft and robbery, have also been traditionally viewed as indicative of dishonesty, since the accused must have fraudulently converted the property of another to their own use.

[81] Some administration of justice offences can also speak to an accused's specific capacity or willingness to be dishonest (see *C. (M.)*, at para. 56). An accused's failure to adhere to their promises and undertakings made to a court may be indicative of how constrained they will feel by their testimonial oath or affirmation (see Sankoff, *The Law of Witnesses and Evidence in Canada*, at § 12:54). For example, the offences under s. 145 of the *Criminal Code* require the accused to have a subjective *mens rea* consisting of knowledge of the existence of a condition in a court order and failure to act in accordance with that condition (*R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3, at para. 109). Genuine forgetfulness can negate *mens rea* (paras. 112 and 114). However, as I discuss below, a consideration of social context may be particularly important when trial judges assess the probative value of administration of justice offences.

[82] Regardless of the crime in question, trial judges should be attentive to whether *the trier of fact* will see the crime, in the concrete circumstances of the

particular case, as reflective of the accused's dishonesty. It is best to remember that the Crown's desired probative inference "only exists if these crimes somehow 'stand out' as being more representative of dishonesty" (P. Sankoff, "*Corbett*, Crimes of Dishonesty and the Credibility Contest: Challenging the Accepted Wisdom on What Makes a Prior Conviction Probative" (2006), 10 *Can. Crim. L.R.* 215 ("Sankoff, 'Crimes of Dishonesty'"), at p. 222). Again, when prior convictions are admitted into evidence under s. 12(1) of the *CEA*, the trier of fact will learn only the name of the crime, the date and place of the conviction, and the punishment imposed (*R. v. Laurier* (1983), 1 O.A.C. 128, at paras. 9-10). The Crown cannot lead the details of the prior conviction (*Stratton*, at pp. 466-67). Accordingly, the probative inference about the accused's dishonesty arises "not from the actual facts of the crime, but rather from the inherent nature of the offence" (Sankoff, "Crimes of Dishonesty", at p. 218). These limitations require trial judges to carefully assess whether an offence will indicate to the trier of fact anything specific about the accused's capacity or willingness to be dishonest.

[83] In many circumstances, it will be clear that a crime has tenuous probative value on the issue of the accused's credibility. Many crimes of violence fall within this category. As La Forest J. explained in *Corbett*, crimes of violence often stem from qualities of the accused or circumstances that tell the trier of fact little about the accused's honesty (pp. 740-41). Building on this point, appellate courts have identified other crimes that are generally not reflective of an accused's dishonesty and thus have little bearing on credibility (see *R. v. Wilson* (2006), 210 C.C.C. (3d) 23 (Ont. C.A.), at

paras. 33-34; *R. v. Brown* (2002), 166 C.C.C. (3d) 570 (Ont. C.A.), at paras. 25-26; *Brand*, at paras. 8-9; *R. v. Buttino* (2000), 150 C.C.C. (3d) 286 (Que. C.A.), at paras. 45-46; *R. v. Thompson* (2000), 133 O.A.C. 126, at para. 32).

[84] Despite this guidance, some courts have held that, in certain circumstances, crimes of violence can have substantial probative value on the issue of the accused's credibility. In explaining how this is so, courts generally posit that an accused who has shown repeated contempt for the law or disregard for other important social values is unlikely to respect their obligation to tell the truth in court (see, e.g., *R. v. Saroya* (1994), 76 O.A.C. 25, at paras. 10-13; *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.), at para. 74; *R. v. Gibson*, 2001 BCCA 297, 153 C.C.C. (3d) 465, at paras. 29-37; *R. v. P. (N.A.)* (2002), 171 C.C.C. (3d) 70 (Ont. C.A.), at paras. 23-24; *LSJPA — 1037*, 2010 QCCA 1627, at paras. 156-58; *R. v. R.D.*, 2019 ONCA 951, 382 C.C.C. (3d) 304, at para. 20; *Ledesma*, at paras. 91-92).

[85] There are three issues with this "contempt for the law" line of reasoning. First, an accused's general disregard for the law or other social values does not, on its own, demonstrate a specific capacity or willingness to be dishonest. Taken to its logical conclusion, this reasoning could allow courts to artificially conclude that *all* crimes are substantially probative of an accused's credibility. Many criminal offences could be framed as demonstrative of an accused's contempt for the law or other important values. This reasoning therefore provides no meaningful way for trial judges to distinguish between different types of crimes when assessing whether they are

probative of credibility. Without clearer guardrails, trial judges may erroneously hold that certain crimes are sufficiently probative of credibility despite being incapable of supporting the inference that an accused has a specific propensity to be dishonest.

[86] Second, the fact that an accused has a lengthy criminal record does not, on its own, demonstrate a specific capacity or willingness to be dishonest. As the Independent Criminal Defence Advocacy Society points out, individuals commit crimes for diverse and complex reasons that are unrelated to their specific capacity or willingness to lie, such as immaturity, ignorance about what the law allows, provocation, and defence of themselves or others that went too far.

[87] The third issue with this "contempt for the law" line of reasoning is its potential to cause profound prejudice to trial fairness because of its similarity to prohibited propensity reasoning. Rather than identifying the heightened probative value of a criminal record in prior instances where the accused has knowingly deceived another, it frames probative value as stemming from the general disposition or "bad personhood" of the accused. This inferential path may lead the trier of fact to inadvertently drift towards prohibited propensity reasoning. To meaningfully guard against moral prejudice and preserve the *Charter* rights of the accused, the assessment of whether a conviction has substantial probative value on the issue of credibility should be focused on whether it is capable of supporting an inference that the accused has a specific capacity for dishonesty.

[88] My colleague points to *Charland*, a decision of the Alberta Court of Appeal that cites this Court's decision in *Corbett*, as an example of endorsement of the "contempt for the law" line of reasoning. In *Charland*, the Court of Appeal accepted that convictions for crimes of violence, in the context of a lengthy criminal record, could support an inference that the convictions reflect a disregard for the law, making it more likely that the holder of the criminal record would lie.

[89] It appears that this "contempt for the law" line of reasoning has been embraced due to certain passages in Dickson C.J.'s opinion in *Corbett*. In his reasons, Dickson C.J. cited *State v. Duke*, 123 A.2d 745 (N.H. 1956), at p. 746, which expressed the idea that crimes other than those of dishonesty can be relevant to credibility when they demonstrate "repeated contempt for laws which [the accused] is legally and morally bound to obey" (p. 686). Respectfully, I do not believe that the citation of that case should be understood as a disagreement with La Forest J. and an endorsement of the notion that crimes that are not reflective of the accused's specific capacity for dishonesty have substantial probative value on the issue of credibility. The citation must be understood in the context of Dickson C.J.'s description of Parliament's rationale in enacting s. 12(1) of the *CEA*. Amongst a series of other quotes, *Duke* was referenced by Dickson C.J. to provide another explanation as to why Parliament decided that *all* prior convictions meet the low legal threshold of relevance on the issue of a witness's credibility. The quote did not speak to Dickson C.J.'s view as to which crimes are probative of the accused's credibility.

[90] Furthermore, since *Corbett* and *Charland* were decided, this Court has affirmed the dangers associated with bad character evidence. In *Handy*, this Court warned of the potentially "poisonous" nature of bad character evidence, given its inherent ability to prompt a trier of fact to infer guilt from general disposition or propensity. As noted above, this reasoning undermines the presumption of innocence enshrined in ss. 7 and 11(d) of the *Charter* by rooting a verdict in prejudice rather than proof (*Handy*, at para. 139). The "contempt for the law" line of reasoning comes dangerously close to this forbidden inference, inviting a trier of fact to disbelieve the accused's denial of having committed a charged offence because the accused has been found guilty in the past.

[91] To summarize, in deciding a *Corbett* application, trial judges should identify whether the nature of a prior conviction permits the trier of fact to infer that the accused has a specific capacity or willingness to be dishonest. The convictions that are capable of supporting this inference will typically be those that involve traditional crimes of dishonesty as well as some administration of justice offences. For the most part, crimes of violence cannot support this inference. If a conviction cannot support the requisite credibility inference, or if it is unclear whether the conviction can do so, its probative value will generally be incapable of overcoming its significant prejudicial effect, and exclusion will be warranted.

[92] In saying this, I would note that there is no bright-line rule that categorically bars the admission into evidence of convictions for crimes of violence

under s. 12(1) of the *CEA*. For example, robbery under s. 343 of the *Criminal Code* is both a crime of violence and a traditional crime of dishonesty. Likewise, the probative value of crimes of violence is not assessed on the basis of the "nature of the offence" factor alone. In some circumstances, there may be a sufficient risk of the trier of fact being misled about the relative character of the witnesses at trial and the accused, such that the distortion factor will operate to justify the admission of convictions for crimes of violence.

(c) *Social Context Factor*

[93] Mr. Hussein requests that this Court adopt the reasoning from *King*, in which Fairburn A.C.J.O. and George J.A. recognized that an accused person's Indigeneity is a relevant consideration on a *Corbett* application when the trial judge is assessing both the probative value and the prejudicial effect of a prior conviction. He submits, however, that this Court should extend the reasoning from *King* beyond Indigenous accused persons and recognize that an accused's social background will always be a relevant factor. The Crown accepts that a consideration of social context is an appropriate development of the existing *Corbett* framework, but submits that how far this extension goes "should be litigated in the context of individual cases" (R.F., at para. 90).

[94] I agree with the parties that the recognition of a new social context factor fits comfortably within the *Corbett* framework and that the relevance of this factor is not limited to Indigenous accused persons. Rather, this factor is relevant to all accused

persons whose prior convictions stem in part from circumstances of disadvantage, including circumstances involving overt and systemic discrimination or poverty. As stated in *King*, the "whole purpose" of a *Corbett* application is the preservation of a fair trial, and "[f]airness is best served when the accused's credibility can be properly and accurately scrutinized by the trier of fact" (paras. 173-74). To ensure that this occurs, trial judges should consider the unique social circumstances of accused persons when those circumstances inform the probative value and prejudicial effect of their prior convictions (see D. M. Tanovich, "Combatting Stereotyping and Facilitating Justice: Chief Justice McLachlin's Vision for the Law of Evidence", in V. Gruben, G. Mayeda and O. Rees, eds., *Controversies in the Common Law: Tracing the Contributions of Chief Justice Beverley McLachlin* (2022), 153, at p. 164).

[95] A prior conviction has substantial probative value on the issue of credibility when it permits the trier of fact to infer that the accused has a specific capacity or willingness to be dishonest at the time of the trial. Well-established *Corbett* factors like the nature and remoteness of the prior convictions assist trial judges in ascertaining when a prior conviction can support this inference. The social context factor adds to this inquiry because, as stated in *King*, "where a conviction stems at least in part from circumstances of disadvantage . . . the degree to which it advances the credibility inquiry will be reduced" (para. 189). This may be particularly true for certain crimes, like administration of justice offences, that often disproportionately involve marginalized individuals (see, e.g., *Zora*, at para. 79; M.-E. Sylvestre, N. Blomley and C. Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized*

People (2019), at p. 163). When an accused's unique background and the impacts of systemic factors are taken into account, it may become clear that a conviction is much less reflective of an accused's willingness to be dishonest than would otherwise appear (*King*, at para. 180). These distortions should be accounted for in order to reinforce the truth-seeking function of criminal trials.

[96] In addition, the social context factor is relevant when a trial judge is assessing the prejudicial effect of admitting an accused's criminal record into evidence for impeachment purposes. As discussed above, the admission of a prior conviction should normally be understood as already causing significant moral prejudice given its potential to lead the trier of fact to engage in prohibited general propensity reasoning. This prejudice can be elevated further in circumstances where the accused is a member of a group that is subject to racist "stereotypes that relate to credibility, worthiness and criminal propensity" (*King*, at para. 194, quoting *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58). This risk can continue even in the presence of procedural safeguards, such as limiting instructions and race-based challenges for cause (*King*, at para. 195).

[97] A direct causal link between an accused's past offending conduct and their social disadvantage is not necessary before this factor can be used to assess the probative value of their criminal record (*King*, at para. 182). As this Court recognized in the context of sentencing for Indigenous offenders, such a link is often extremely difficult to establish because "[t]he interconnections are simply too complex" (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 83). Instead, during the *Corbett*

voir dire, the accused must show some connection between the discrimination or disadvantage and the circumstances that led to their prior conviction (*King*, at para. 184). Given the nature of the *Corbett* analysis and the need to avoid complex mid-trial evidentiary hearings, trial judges may rely on testimony or take judicial notice of social context, rather than insisting that evidence be entered through professional reports as is often the case in the sentencing context (see *R. v. I.M.*, 2025 SCC 23, at para. 162). As Fairburn A.C.J.O. and George J.A. astutely observed, citing this Court's decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 27, the criminal law is calling out for "quality justice delivered with efficiency" (*King*, at para. 183).

[98] It follows from the preceding discussion that, during a *Corbett voir dire*, trial judges can take judicial notice of well-established forms of social disadvantage in order to facilitate trial fairness and promote efficiency. For example, in the case of Indigenous accused persons, trial judges can take notice of "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration" among Indigenous people (*Ipeelee*, at para. 60; see also *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 83; *King*, at para. 181). Likewise, in the case of Black accused persons, notice can be taken of how anti-Black racism contributes to higher rates of poverty and a strong police presence within Black communities in Canada (see *R. v. I.T.*, 2024 ONSC 6176, at para. 23; see also *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 40-43; *R. v. Anderson*, 2021 NSCA 62, 405 C.C.C. (3d) 1, at para. 111; *R. v. Le*, 2019 SCC

34, [2019] 2 S.C.R. 692, at paras. 82-97). Where judicial notice is taken, the accused must then prove that there is some connection between the systemic and background factors and their prior convictions (see *King*, at para. 184). Ultimately, the trial judge must be attentive to the unique circumstances of the accused and make a fact-specific, individualized assessment of whether these circumstances diminish the probative value of a prior conviction on the issue of the accused's credibility.

[99] Similarly, when determining the prejudice caused by the admission of prior convictions, trial judges may consider the risk that accused persons from certain disadvantaged groups will be subject to overt discrimination. For example, this Court has repeatedly recognized that Indigenous people are the target of racism inside and outside the criminal justice system and are subject to stereotypes "that relate to credibility, worthiness and criminal propensity" (*Williams*, at para. 58; see also *Gladue*, at para. 65; *Ipeelee*, at paras. 59-60; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 199). Black people and individuals with mental disabilities are also often subjected to biased views (see *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 342; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 1).

[100] To summarize, social context is a relevant, although not dispositive, factor in the *Corbett* framework. It requires trial judges to place an accused's criminal record within the context in which it has been accumulated in order to correct for possible systemic biases, stereotypes, and assumptions. Where a prior conviction stems in part

from circumstances of disadvantage, its probative value on the issue of credibility is diminished. While evidence of a direct causal link between the conviction and social disadvantage is unnecessary, the accused must show some connection between the two. The prejudicial effect of admitting prior convictions into evidence can also be elevated when the accused is a member of a disadvantaged group that is subject to discriminatory biases and stereotyping.

(d) *Distortion Factor*

[101] Mr. Hussein further submits that this Court should specify with greater clarity when the distortion factor becomes relevant in a *Corbett* analysis. In his view, the probative value of an accused's prior convictions increases only when the defence makes attacks on a Crown witness's character that go beyond simply asking about their criminal record. For its part, the Crown disagrees that an "all out attack" on a Crown witness's character is necessary to engage the distortion factor (R.F., at paras. 93-94). In its submission, the relevant question is whether the trier of fact has been left with a misleading picture of the character of Crown witnesses as compared to that of the accused.

[102] As I will explain, the distortion factor becomes relevant only when, for reasons unrelated to the facts of the case, the defence has directly invited the trier of fact to draw an adverse credibility inference based on the alleged bad character of an important Crown witness. The weight to be given to this factor must be proportionate

to the degree to which this character attack risks leaving the trier of fact with a distorted impression of the accused's character relative to the character of the Crown witness.

[103] In *Corbett*, La Forest J. recognized that the risk of presenting a distorted picture to the trier of fact may be a relevant factor when the trial judge is deciding whether to permit the Crown to cross-examine the accused on their criminal record (pp. 743-44). He suggested that this factor typically comes into play when "a deliberate attack has been made upon the credibility of a Crown witness and where the resolution of the case boils down to a credibility contest between the accused and that witness" (p. 742). As discussed above, the division between Dickson C.J. and La Forest J. on the outcome of the appeal stemmed in part from their disagreement over how much weight should be given to this factor.

[104] Since the release of *Corbett*, the distortion factor has been inconsistently applied due to uncertainty over when precisely it becomes relevant. In some circumstances, courts have justified reliance on the distortion factor when the accused's credibility is simply a critical issue in the trial or when the defence attacks the credibility of Crown witnesses with reference to facts that are present in the case, such as by suggesting that a witness has a motive to fabricate evidence (see, e.g., *R. v. Bilodeau*, 2003 CanLII 29650 (Que. C.A.), at paras. 6-7; *Thompson* (Ont. C.A.), at paras. 11, 21 and 28-29). In other instances, courts have circumscribed the use of the distortion factor more narrowly, limiting it to circumstances where the defence attacks the credibility of Crown witnesses on the basis of extrinsic evidence of bad character

(see, e.g., *R. v. Batte* (2000), 145 C.C.C. (3d) 498 (Ont. C.A.), at paras. 45-46; *Brown*, at para. 24).

[105] In my view, it is the latter approach that should govern when the distortion factor becomes relevant during a *Corbett* analysis. As Professor Peter Sankoff explains:

> The "credibility contest" rationale should not come into play unless the accused cross-examines the Crown witnesses in such a way so as to bring character into the equation. In other words, this factor will only be relevant where the defence suggests that owing to factors that are not *specifically* related to the facts of the case, the witness is the type of person who would lie, that person's evidence is both critical to the Crown's case and opposed to the version of events suggested by the defence, and as such, the jury will have a greater need for background evidence relating to the accused. [Emphasis in original.]
>
> ("*Corbett* Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006), 51 *Crim. L.Q.* 400 ("Sankoff, '*Corbett* Revisited'"), at p. 464)

[106] The distortion factor is included in the *Corbett* framework for a different reason than the other factors. The *Corbett* factors discussed above assist trial judges in identifying whether an accused's conviction has sufficient probative value with respect to their specific capacity or willingness to be dishonest at the time of the trial. By contrast, the distortion factor is meant to address the fact that, in some circumstances, admitting an accused's conviction is necessary to mitigate the risk that the trier of fact will be misled by the accused's attack on the credibility of a Crown witness. Framed otherwise, the purpose of the distortion factor is to ensure balance in the presentation of the facts the trier of fact is asked to judge.

[107] The exclusion of an accused's prior convictions misleads the trier of fact only when, for reasons unrelated to the facts of the case, the defence asks the trier of fact to draw an adverse credibility inference against an important Crown witness based on their alleged bad character. In these circumstances, the defence is suggesting that, because of their bad character, the Crown witness is the "type" of person to lie and is therefore likely to do so on the witness stand. This is the same general disposition inference that the Crown would ask the trier of fact to draw from the accused's convictions that would not be admitted without the operation of this factor (Sankoff, "*Corbett* Revisited", at p. 464).

[108] By extension, the exclusion of an accused's prior convictions does not mislead the trier of fact when the defence simply argues that, on the facts of the case, a Crown witness has been demonstrated to be a liar and therefore should be disbelieved (Sankoff, "Crimes of Dishonesty", at p. 232). In these circumstances, while the defence may be incidentally attacking the character of a Crown witness, it is not directly relying on character inferences to impugn the credibility of the witness, and thus there is no corresponding need for the trier of fact to have the opportunity to draw similar inferences about the accused.

[109] It follows from the foregoing that I disagree with Mr. Hussein that the defence must do more than attack a Crown witness's character by cross-examining them on their criminal record before the distortion factor will be triggered. If the Crown witness who is questioned on their criminal record is important to the Crown's case

and gives testimony that is opposed to the version of events suggested by the defence, there will be a risk of the trier of fact being misled about the facts it is asked to judge. The facts of *Corbett* provide a helpful example of who may constitute an important Crown witness and when this risk of distortion will appear. In that case, two Crown witnesses gave critical evidence implicating Mr. Corbett in the murder for which he was on trial, and the defence asked the jury to draw adverse credibility inferences against the witnesses by calling them "unmitigated liars" following cross-examination on their criminal backgrounds (p. 681).

[110] To be clear, the fact that the defence strategy has made the distortion factor relevant on a *Corbett* application does not provide *carte blanche* for the admission into evidence of the accused's entire criminal record. The distortion factor cannot override the concern for a fair trial; rather, "cross-examination should only be permitted on the foregoing basis where to do so would render the trial more, and not less, fair" (*Corbett*, at pp. 743-44, citing *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965)). Trial judges should remain attentive to the fact that the prejudicial effect of the accused's convictions remains the same when the distortion factor is triggered. It should also be noted that this factor often leads to the admission of convictions that should otherwise be excluded because, in light of the other *Corbett* factors, they are not themselves sufficiently probative of the accused's credibility to outweigh their prejudicial effect. As a result, in order to preserve trial fairness, trial judges should give this factor a weight that is proportionate to the risk of the trier of fact being misled. The magnitude of the risk will be based, among other things, on (i) whether there is other evidence

available indicating the bad character of the accused; (ii) the materiality of the Crown witnesses' testimony; and (iii) the degree to which the defence has impugned the character of the Crown witnesses. Depending on the magnitude of the risk, trial judges should consider whether a distortion can be remedied by admitting part, rather than the entirety, of the accused's criminal record.

(e) *Additional Considerations*

[111] Three additional points of guidance are warranted with respect to the *Corbett* framework in light of the facts of this case.

[112] First, the other two well-established *Corbett* factors that have been largely unaddressed in these reasons — the remoteness and the similarity of the prior convictions — remain important components of this framework. The remoteness factor is best understood as informing the probative value of a prior conviction. The strength of the inference that a prior conviction is indicative of the accused's specific capacity for dishonesty will, generally speaking, gradually diminish over time (Sankoff, "*Corbett* Revisited", at p. 458). As noted in *Handy*, the "[l]apse of time opens up a greater possibility of character reform" (para. 122). Moreover, the degree of similarity between the prior convictions and the offence charged is often the most important factor when assessing the prejudicial effect of the convictions. If a high degree of similarity exists, there is a serious risk of moral prejudice, and only in exceptional circumstances will there be sufficient probative value to justify admission (see *Corbett*, at p. 741).

[113] Second, one of the arguments put forward by Mr. Hussein is that the trial judge erred in failing to exclude his youth offences due to their limited probative value. In light of this argument, I would take the opportunity to confirm that whether an offence was committed by the accused as a youth is a relevant factor in a *Corbett* analysis. In a decision predating both the *Charter* and *Corbett*, this Court held that the word "conviction" in s. 12(1) of the *CEA* included findings of delinquency under the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 (*Morris*, at p. 429). However, no meaningful discussion on the probative value of youth offences with respect to an adult accused's credibility was undertaken in that case. Indeed, the question of whether trial judges had the discretion to refuse cross-examination of the accused on their criminal record was still unanswered at the time (see p. 434).

[114] In my view, a contemporary understanding of youth criminal justice necessitates the conclusion that youth offences will generally have lower probative value with respect to an adult accused's credibility. Young persons benefit from a presumption of diminished moral blameworthiness — a principle of fundamental justice (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 95). This presumption recognizes that the developmental age of young people creates real and measurable differences between them and adults in terms of maturity, independence, and judgment, and by extension, that youth crime is often a product of the fact that these character traits are not fully developed (*I.M.*, at para. 108; *D.B.*, at paras. 41 and 62-64). It is because of these unique qualities that young people must be held differently accountable in the criminal justice system.

[115] When the rationale behind the presumption of diminished moral blameworthiness is made plain, the tension between this presumption and the logic of s. 12(1) of the *CEA* becomes apparent. The latter presupposes stability of character and the idea that "the moral character of the person who committed the prior offence is truly the moral character of the person who is on trial" (N. J. Langille, "Forgetting Youth: The Use of Prior Youth Records to Impugn Credibility" (2014), 72 *U.T. Fac. L. Rev.* 10, at p. 29). By contrast, the presumption emphasizes that young people must be understood as lacking a fixed character and assumes that their actions are not predictive of their future character (*ibid.*; see N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 101). Routinely using youth records to impeach the credibility of an adult accused would undermine this foundational premise.

[116] Third, considerable attention was given by the Court of Appeal to the question of whether it was appropriate for the trial judge to consider the strength of the Crown's case as a relevant factor during a *Corbett* analysis. Because this question remains relevant to deciding whether the trial judge erred in his exercise of discretion, it is appropriate to resolve it. In my view, the strength of the Crown's case is irrelevant during a *Corbett* analysis. The presence of a strong Crown case should not be understood as materially reducing the likelihood that the trier of fact will engage in prohibited propensity reasoning. While the strength of the Crown's case may affect the weight that the trier of fact places on the prohibited inference when deciding whether a reasonable doubt exists, this Court has consistently held that *any* reliance on such reasoning is impermissible (see *Handy*, at para. 72).

(4) Summary of Principles

[117] The principles governing the exercise of a trial judge's discretion to refuse the Crown's cross-examination of the accused on their prior convictions pursuant to s. 12(1) of the *CEA* can be summarized in the following manner.

[118] When the accused brings a *Corbett* application to have part of their criminal record excluded, they must persuade the trial judge on a balance of probabilities that the prejudice it would cause to trial fairness outweighs its probative value on the issue of credibility. The admission into evidence of an accused's prior conviction generally carries a significant risk of moral prejudice. Accordingly, to discharge their persuasive burden, the accused must demonstrate that a prior conviction lacks sufficient probative value to outweigh the significant prejudice typically inherent in this evidence.

[119] Sufficient probative value will exist only when the prior conviction permits the trier of fact to infer that the accused has a *specific* capacity or willingness to be dishonest at the time of the trial. This will largely depend on the nature of the offence. Traditional crimes of dishonesty and some administration of justice offences are often capable of supporting this credibility inference. By contrast, many crimes of violence are not. If a conviction cannot support the requisite credibility inference, or if it is unclear whether the conviction can do so, its probative value will generally be incapable of overcoming its prejudicial effect, and exclusion will be warranted.

[120] Other factors are relevant to an assessment of probative value. A remote prior conviction will be less probative of the accused's capacity for dishonesty at the time of the trial compared to a recent conviction. Additionally, when a prior conviction stems in part from circumstances of disadvantage, its probative value on the issue of credibility will be diminished. Youth offences will generally have low probative value with respect to an adult accused's credibility.

[121] The probative value of prior convictions can also increase when there is a risk of the trier of fact being misled about the facts it is asked to judge. The risk of distortion appears when, for reasons unrelated to the facts of the case, the defence asks the trier of fact to draw an adverse credibility inference against an important Crown witness based on their alleged bad character. In these circumstances, the defence is suggesting that, because of their bad character, the Crown witness is the "type" of person to lie and is therefore likely to do so on the witness stand. Trial judges should give this factor a weight that is proportionate to the risk of distortion, recognizing that the theory underlying this factor's inclusion in the *Corbett* framework is distinct from that underlying the other *Corbett* factors.

[122] The prejudice caused by a prior conviction can also be impacted by various factors. For example, if a high degree of similarity exists between a prior conviction and the offence charged, there will, generally speaking, be a profound risk of moral prejudice and the prior conviction will be admitted into evidence only exceptionally. Certain types of serious crimes, including some violent offences, can also elevate the

risk of prohibited propensity reasoning. Moreover, the prejudice caused by a prior conviction can be elevated when the accused is a member of a disadvantaged group that is subject to discriminatory biases and stereotyping. The strength of the Crown's case does not mitigate the prejudice associated with the admission of a prior conviction.

[123] Finally, it bears repeating that, while these principles provide structure for an exercise of discretion that safeguards trial fairness for the accused, some flexibility in their application is inevitable. This is a contextual inquiry. Trial judges, as evidentiary gatekeepers, are best positioned to assess probative value and prejudicial effect in light of the specific circumstances of the case. When these guiding principles are respected by trial judges, deference is owed on appeal.

C. *Application*

[124] The standard of appellate review for rulings on *Corbett* applications is consistent with the standard applicable to all forms of discretionary decision-making. Deference is warranted unless there is an error in principle, a material misapprehension of the evidence, or an unreasonable exercise of discretion (see *R. v. J.W.*, 2025 SCC 16, at para. 50, citing *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, [2022] 3 S.C.R. 515, at para. 41; see also *Charland* (SCC), at paras. 1-2). An appellate court should not "simply substitute its own view of how [the] discretion ought to have been exercised" in the absence of a clear error (*Corbett*, at p 746).

[125] Mr. Hussein essentially argues that the trial judge's ruling on the *Corbett* application included a series of errors in principle and, when assessed as a whole, was unreasonable. In his submission, the entire criminal record or, at a minimum, his violent and youth offences, should have been excluded.

[126] With regard to the trial judge's assessment of probative value, Mr. Hussein identifies three errors. First, the trial judge erred in treating the violent crimes as probative of his credibility in the same manner as offences involving dishonesty. Second, the trial judge erred in failing to consider how his youth offences had diminished probative value. Third, the trial judge erred in placing too much weight on the distortion factor given that the defence attacked the character of only one Crown witness through the introduction of his criminal record.

[127] With regard to the trial judge's assessment of prejudicial effect, Mr. Hussein makes three main submissions. First, the trial judge erred in failing to consider how his mental disability and race bore on the prejudicial effect of the criminal record. Second, the trial judge drew unreasonable conclusions regarding the degree of similarity between the Crown's theory of the murder and Mr. Hussein's prior convictions. Third, the trial judge erred in failing to appreciate how prohibited propensity reasoning could still have infected the jury's determination on the issue of *mens rea*.

[128] Mr. Hussein's criminal record consists of 17 entries. He was found guilty of seven offences as a youth: two counts of uttering threats, one count of possession of

a substance included in Sch. II of the *Controlled Drugs and Substances Act*, three counts of robbery, and one count of failure to appear in court. At the time of the trial, he also had ten adult convictions: four for failing to comply with court orders, three for assault, one for uttering threats, one for possession of a weapon, and one for mischief.

[129] As I will explain, I believe that the trial judge committed errors in principle and exercised his discretion unreasonably when weighing both the probative value and the prejudicial effect of Mr. Hussein's criminal record. At a minimum, the trial judge ought to have excluded Mr. Hussein's youth offences and the highly prejudicial violent offences of assault, uttering threats, and possession of a weapon. In coming to this conclusion, I am mindful of the fact that the trial judge and the Court of Appeal did not have the benefit of these reasons when they held otherwise.

[130] In my view, the trial judge's determination that the prejudicial effect of the criminal record was "near absent" was unreasonable and contained errors.

[131] As the Court of Appeal acknowledged, the trial judge understated the risk of improper propensity reasoning on the issue of *mens rea*. The trial judge stated that "[t]he criminal record . . . does not bear on that question" because "[f]oreseeability of death is not made more likely if Mr. Hussein is thought by the jury to be a violent man on the basis of that criminal record" (A.R., vol. I, at p. 6). The Court of Appeal correctly acknowledged that Mr. Hussein's criminal record was still capable of leading the jury to believe that he was a violent man who was more likely to act violently even when foreseeing the risk of death. With respect, I disagree with the Court of Appeal's view

that this error did not have a material bearing on the trial judge's ruling given that he identified this point as one of two factors when assessing prejudicial effect and repeated it later in his reasons.

[132] The trial judge also overstated the dissimilarities between the homicide with which Mr. Hussein was charged and his prior convictions. The trial judge's characterization of the homicide and the prior convictions as being "nowhere near" each other is difficult to reconcile with his reasons for dismissing the similar fact evidence application, in which he stated that the evidence of prior offences was "quite discreditable" because it would show Mr. Hussein "to be quite a hot-head, prone to losing his cool, taking up available weapons" (A.R., vol. II, at pp. 185-86). While I recognize that the scope of the information disclosed to the jury following a successful similar fact evidence application would have been broader, the trial judge's reasons on the application are indicative of the high degree of similarity between the prior convictions and the facts at issue in the trial. Given the manner in which the homicide occurred (a spontaneous knife attack), it was unreasonable to suggest that Mr. Hussein's prior convictions for assault, uttering threats, and possession of a weapon would not carry an elevated risk of moral prejudice.

[133] In addition, the trial judge improperly considered the strength of the Crown's case, and the Court of Appeal erred in concluding otherwise. As I have discussed, this is not a relevant factor during a *Corbett* analysis. While the strength of the Crown's case may affect the weight that the jury may give to the prohibited

propensity inference when determining guilt or innocence, I do not agree that it reduces the likelihood that the jury will in fact engage in such reasoning. Any reliance on such reasoning is improper.

[134] The trial judge's determination that the probative value of Mr. Hussein's criminal record was "quite high" was likewise tainted by errors in principle and unreasonable assessments.

[135] The trial judge erred in characterizing Mr. Hussein's violent offences as "[e]qually legitimate" on the issue of his credibility because they demonstrated "disregard for the law generally" (A.R., vol. I, at p. 2). The trial judge recognized that the entries in his criminal record "do not all speak to offences involving overt elements of deceit" but held that they remained probative because "the sheer number of convictions, along with their persistent regularity, show[ed] an ongoing approach to the law that could be described as disregard or disdain" (p. 3). As discussed, violent offences generally have tenuous probative value on the issue of credibility because they are incapable of supporting the inference that the accused has a specific capacity or willingness to be dishonest. The "contempt for the law" line of reasoning used by the trial judge cannot serve as a basis for concluding that violent offences have substantial probative value on the issue of the accused's credibility. Given their tenuous probative value and elevated prejudicial effect, the trial judge ought to have excluded these violent offences.

[136] This error was further aggravated by the trial judge's assessment of the probative value of Mr. Hussein's youth offences. As discussed, following *Corbett*, this Court has recognized that youth crime typically stems from "heightened vulnerability, less maturity and a reduced capacity for moral judgment", entitling young persons to a presumption of diminished moral blameworthiness (*D.B.*, at para. 41). As a result, rather than viewing Mr. Hussein's youth offences as part of a "cohesive whole" that spoke to his fixed character traits, the trial judge and the Court of Appeal ought to have appreciated that these offences were a product of his youthful developmental age at the time they were committed. The low probative value of these offences was outweighed by the risk of prejudice, and they therefore should have been excluded.

[137] As well, I agree with Mr. Hussein that the trial judge placed undue weight on the distortion factor. It is true that the defence attacked the character of an important Crown witness, Mr. Ndiya, by cross-examining him on his criminal record (A.R., vol. IV, at pp. 1169-70). This created a potential for the jury to be misled when assessing the character of Mr. Hussein relative to that of Mr. Ndiya. However, contrary to the Court of Appeal, I am of the view that the trial judge overstated the risk of distortion by erroneously considering the defence's cross-examination of a police officer that incidentally undermined Mr. Ndiya's credibility. This type of questioning did not rely on extrinsic evidence of Mr. Ndiya's bad character in order to invite the jury to infer that Mr. Ndiya was the "kind of person" to lie on the stand. The defence was simply impeaching his credibility based on the facts of the case. As a result, viewed in its totality, the defence's attack on the Crown witness's character was limited,

diminishing the need to rectify any distortion in the minds of the jury. The distortion factor should not have been given significant weight and could not justify the admission into evidence of Mr. Hussein's entire criminal record.

[138] In conclusion, the trial judge's decision to admit Mr. Hussein's entire criminal record was based on erroneous assessments of probative value and prejudicial effect. Under a clarified framework, it becomes apparent that the trial judge ought to have excluded Mr. Hussein's youth offences and the prejudicial violent offences of assault, uttering threats, and possession of a weapon.

D. *Curative Proviso*

[139] The Crown argues that, even if the trial judge erred in his ruling on Mr. Hussein's *Corbett* application, the curative proviso should apply. More specifically, the Crown contends that both branches of the curative proviso are engaged because any error the trial judge made was harmless and because the evidence against Mr. Hussein was overwhelming.

[140] In my view, the trial judge's errors cannot be characterized as harmless or minor. They were serious and would justify a new trial. However, I agree that the evidence of Mr. Hussein's guilt for murder was overwhelming.

(1) Legal Principles

[141] Under s. 686(1)(b)(iii) of the *Criminal Code*, a conviction can be upheld provided that an error at trial has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of proving that the curative proviso is applicable and that despite the legal error, a conviction ought to be sustained (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34).

[142] The Crown discharges its burden where it demonstrates that an error falls into one of two categories. For the first category, errors must have been so minor or harmless that they could not have impacted the verdict (*R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 81). The second category comprises errors that are serious and would ordinarily warrant a new trial but for the fact that the evidence against the accused is so overwhelming that a conviction was inevitable (*ibid.*). In this case, we are concerned with the second category.

[143] The notion that a conviction may stand in the face of a serious error is not a departure from principle, but a reflection of it. As Justice Sopinka noted in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, "depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction" (p. 916). The justification for upholding a conviction is compelling. Where another conviction is inevitable, ordering a new trial would "result in a waste of time or resources" (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 90).

[144] Nevertheless, appellate courts must approach this analysis with great care because the standard to apply the curative proviso in this manner is high. This Court

has previously characterized the threshold as being "substantially higher . . . than the requirement that the Crown prove its case 'beyond a reasonable doubt' at trial" (*Trochym*, at para. 82). This standard is justified given the inherent difficulty of assessing the strength of the Crown's case retroactively, without the benefit of observing the trial as it unfolded (*Van*, at para. 36, citing *Trochym*, at para. 82).

[145] As I set out below, this is one of the rare cases where the high standard to apply the curative proviso is satisfied. The evidence of Mr. Hussein's guilt for murder was overwhelming, such that a conviction was inevitable.

(2) Application

[146] The Crown's case was irrefutable on the issue of identity. Mr. Hussein's blood was found in several locations at the scene, including on a Band-Aid box and near the medicine cabinet in the bathroom, on the living room wall, on the couch in the bedroom, on the bedroom floor, and on the inside of the door of the bedroom where the deceased was stabbed (A.R., vol. II, at p. 342; A.R. vol. IV, at p. 947; A.R., vol. V, at pp. 1594, 1599 and 1601-2). On that door, Mr. Hussein's blood was identified right next to a narrow puncture in the wall that was roughly the same length as the deceased's stab wounds (A.R., vol. I, at p. 5; A.R., vol. IV, at p. 923). This puncture was consistent with knife damage. When Mr. Hussein was arrested one week after the stabbing, he had a healing incised wound on his thumb that could be expected to have bled when it was inflicted — an injury an expert at trial testified could have resulted from knife slippage during a stabbing (A.R., vol. V, at p. 1736). The healing of his wound

suggested that it was sustained around the time of the killing (*ibid.*). Mr. Hussein's blood spots on the bedroom wall next to the knife damage were consistent with blood being expelled from a hand wound when the knife punctured the door. A bloodstained toque containing the DNA of both the deceased and Mr. Hussein was found "dropped almost on top of the spot" where the deceased died (A.R., vol. VI, at p. 1789; A.R., vol. V, p. 1598). Only the deceased's and Mr. Hussein's DNA profiles were found in the blood tested from the scene (A.R., vol. V, at p. 1604).

[147] Mr. Hussein's after-the-fact conduct provides further evidence of his guilt. Shortly after the stabbing, Mr. Hussein quickly exited the basement apartment. One witness testified that she encountered Mr. Hussein coming up the basement stairs after she heard screams (A.R., vol. IV, p. 1287). Of the six people who were at the party before the stabbing, only Mr. Hussein was not present when the police arrived. Security footage from a nearby car dealership captured a person matching Mr. Hussein's description leaving the area. Mr. Hussein went to a friend's residence after the killing occurred. This friend observed a bloodstain on Mr. Hussein's pant leg when Mr. Hussein arrived roughly 30 minutes after the killing, suggesting that Mr. Hussein had been proximate to a bloodletting event (A.R., vol. V, p. 1490). The friend also testified that Mr. Hussein stated upon his arrival that "someone got murdered" (A.R., vol. I, at p. 44), providing circumstantial evidence of Mr. Hussein's involvement in the homicide. After leaving the scene and then his friend's residence, Mr. Hussein briefly returned to his own residence. Mr. Hussein then arranged for a taxi under a false name, went to stay with a friend for several days without a cellphone, and, after learning he

was wanted in connection with the deceased's killing, altered his appearance by shaving his head (A.R., vol. VI, at p. 1932).

[148] Taken together, this evidence leaves no doubt that Mr. Hussein was the individual who killed the deceased.

[149] The Crown's case was similarly compelling on the issue of Mr. Hussein's *mens rea* for murder. The deceased was stabbed 10 times. All of the knife wounds were aimed at the deceased's head and neck. The fatal wound, inflicted with enough force to reach a depth of at least five centimetres, sliced his carotid artery in two (A.R., vol. V, at pp. 1710, 1721). Further, the deceased sustained multiple stab and incised wounds to his armpit, arms, and hands, including two jagged wounds likely caused when he attempted to deflect injuries away from his head and neck by grabbing the knife (pp. 1731, 1735 and 1745). From this evidence, the jury could draw inferences about the duration of the struggle. As the trial judge wrote, the attack was reflective of Mr. Hussein's "persistence and resolve in accomplishing his objective" (A.R., vol. I, at p. 83). The trial judge also instructed the jury that it could reflect on how obvious the fatal outcome would have been to Mr. Hussein in performing these acts.

[150] While Mr. Hussein and several witnesses testified about Mr. Hussein's state of intoxication, this Court has made it clear that a "particularly advanced degree of intoxication" must be established in order to demonstrate that an accused was incapable of forming an intent to kill (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523,

at para. 42; see also *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 52). Evidence of Mr. Hussein's intoxication was not capable of meeting this high threshold.

[151] The trial judge instructed the jury to consider evidence of Mr. Hussein's intoxication in light of Mr. Hussein's testimony that he had no memory of the material time but clearly recalled not stabbing the deceased and not leaving the party with a knife (A.R., vol. VI, at p. 1897). He claimed that his amnesia began early in the evening, well before he started drinking.

[152] Furthermore, the trial judge instructed the jury that evidence of Mr. Hussein's after-the-fact conduct could inform its assessment of the functioning of his mind. The trial judge provided concrete examples of relevant actions. For instance, blood pattern evidence suggested that, after cutting himself, Mr. Hussein went to the bathroom to find a Band-Aid and tend to his own injury. There was evidence that Mr. Hussein retrieved his jacket before leaving. The security footage depicted the person matching Mr. Hussein's description intermittently walking and running without stumbling, while altering his pace to stay a distance behind another pedestrian (A.R., vol. VI, at pp. 1924, 1927-28 and 1930).

[153] Ultimately, the web of circumstantial evidence in this case constitutes overwhelming evidence of Mr. Hussein's guilt for murder. Accordingly, I find that the Crown has met its persuasive burden of establishing that there is no reasonable possibility that the verdict would have been different in the absence of the trial judge's errors (*Khan*, at paras. 23 and 26).

VI. Conclusion

[154] I would therefore dismiss the appeal.

The reasons of Rowe and Jamal JJ. were delivered by

JAMAL J. —

I. Introduction

[155] I agree with the majority of this Court that Mr. Hussein's conviction for second degree murder should be affirmed. I reach this conclusion by applying, without modification, the settled legal framework established by Chief Justice Dickson almost 40 years ago in *R. v. Corbett*, [1988] 1 S.C.R. 670, for when a trial judge may prevent or restrict the Crown from cross-examining the accused on their prior criminal convictions. The *Corbett* framework recognizes that trial judges exercise discretion by weighing the probative value and prejudicial effect arising from the accused's criminal record. *Corbett* has stood the test of time and has been applied hundreds of times by trial and appellate courts across Canada. With respect for the contrary view, I see no basis to change the *Corbett* framework to prevent trial judges from considering either an accused's abiding contempt for the law, as revealed by their prior convictions, or the strength of the Crown's case. Both remain potentially relevant considerations.

[156] Applying the settled legal principles laid out in *Corbett* and subsequent jurisprudence, I agree with the unanimous Court of Appeal for Ontario that there was no reviewable error in the trial judge's decision to dismiss Mr. Hussein's *Corbett* application. I would therefore dismiss the appeal.

II. Factual Background

[157] A jury convicted Mr. Hussein of second degree murder for stabbing Brian Boucher to death. The murder took place on February 1, 2017, after a night of heavy drinking at the apartment of Natasha Paquette. Mr. Boucher was stabbed 10 times. The fatal stab was to Mr. Boucher's neck, where he was stabbed with enough force to reach a depth of at least five centimetres, slicing his carotid artery in two.

[158] The Crown's case against Mr. Hussein was overwhelming. The forensic evidence pointed strongly to Mr. Hussein as the killer. Mr. Hussein's blood was found in multiple locations in Ms. Paquette's apartment, including the bedroom where Mr. Boucher was killed, the living room, and in the bathroom on a Band-Aid package and near a medicine cabinet. When Mr. Hussein was arrested a week after the stabbing, he had a healing wound on his thumb. In the bedroom where Mr. Boucher was killed, Mr. Hussein's blood was found on the back of the door immediately next to a puncture in the wall, consistent with damage made by a knife and blood being expelled from a hand wound when the knife punctured the wall. Mr. Hussein's DNA and Mr. Boucher's blood were found on a toque dropped on almost the exact spot where Mr. Boucher died.

[159] Mr. Hussein's post-offence conduct was also inculpatory. Of the six people who had been at the apartment just before the stabbing, only Mr. Hussein was gone when the police arrived. He had fled soon after the stabbing. Security video from a nearby car dealership showed someone matching Mr. Hussein's description running or walking quickly away from the area shortly after the stabbing. After the killing, Mr. Hussein went to the home of a friend, who had noticed blood on Mr. Hussein's pants. Mr. Hussein told his friend that someone had been murdered at Ms. Paquette's apartment. That afternoon, after returning home, Mr. Hussein called a taxi under a fake name and went to stay with a friend for several days without a cellphone. When Mr. Hussein learned that he was wanted in connection with Mr. Boucher's killing, he shaved his head to change his appearance.

[160] At Mr. Hussein's trial for second degree murder, he brought a *Corbett* application to prevent or restrict the Crown from cross-examining him on his prior criminal record should he choose to testify. Mr. Hussein, who was 23 years old at the time of the killing, had four youth entries in his record, beginning when he was 17 years old, including two for uttering threats, possession of a Sch. II substance, and failure to appear in court. Mr. Hussein also had 12 convictions as an adult, including four convictions for failing to comply with court orders, three convictions for assault, two convictions for robbery, and convictions for uttering threats, possession of a weapon, and mischief. The trial judge denied the *Corbett* application. When Mr. Hussein chose to testify in his own defence, the Crown cross-examined him on his criminal record as permitted by s. 12(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

III. The *Corbett* Framework

[161] Section 12(1) of the *Canada Evidence Act* provides that a witness who testifies may be cross-examined on their prior convictions: "A witness may be questioned as to whether the witness has been convicted of any offence . . . ." This provision applies to all witnesses, including an accused.

[162] As Dickson C.J. observed in *Corbett*, s. 12(1) of the *Canada Evidence Act* reflects Parliament's legislative judgment that prior convictions are relevant to the trier of fact's evaluation of the credibility or testimonial trustworthiness of a witness (pp. 685-86). Dickson C.J. explained the rationale for this provision by quoting approvingly the words of Martin J.A. in *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.), at p. 461:

> Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness . . . .

Thus, "[t]he fact that a witness has been convicted of a crime is relevant to his trustworthiness as a witness" (*Corbett*, at p. 686, quoting *R. v. Brown* (1978), 38 C.C.C. (2d) 339 (Ont. C.A.), at p. 342, per Martin J.A.).

[163] The essential features of the *Corbett* framework are well known. *Corbett* recognizes a trial judge's discretion, on an application by the accused, to prevent the

Crown from cross-examining the accused on their prior criminal convictions when the probative value of the convictions is outweighed by their prejudicial effect. In such a case, the accused's prior convictions are excluded from evidence. In weighing the probative value and prejudicial effect of the prior convictions, the trial judge may consider several factors, including, but not limited to: (1) the nature of the convictions; (2) their remoteness or nearness to the matter under prosecution; (3) the similarity between the offences charged and the prior convictions; and (4) the risk of presenting a distorted picture to the jury (*Corbett*, at pp. 697-98, per Dickson C.J., and at pp. 740-44, per La Forest J., dissenting; see also *R. v. Underwood*, [1998] 1 S.C.R. 77, at para. 9; *R. v. King*, 2022 ONCA 665, 163 O.R. (3d) 179, at paras. 143-45; *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, at para. 82; *R. v. C. (M.)*, 2019 ONCA 502, 146 O.R. (3d) 493, at para. 59; *R. v. Charland* (1996), 187 A.R. 161 (C.A.), at para. 21, aff'd [1997] 3 S.C.R. 1006; *R. v. Linklater*, 2021 MBCA 65, at para. 73; *R. v. Simpson*, 2004 ABCA 146, 348 A.R. 178, at para. 15; *LeBlanc v. R.*, 2019 NBCA 65, 378 C.C.C. (3d) 405, at para. 72; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶¶10.94-10.95; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2025* (32nd ed. 2025), at para. 40.43).

[164] It is also settled that if the Crown is permitted to cross-examine the accused on their prior convictions, the trier of fact may only use the convictions to assess the accused's credibility or testimonial trustworthiness. They may not engage in prohibited propensity reasoning by inferring from the convictions that the accused is more likely

to have committed the offence for which they are on trial (*Corbett*, at pp. 688-89 and 694, per Dickson C.J., and at p. 722, per La Forest J.; see also *King*, at para. 141; Lederman, Fuerst and Stewart, at ¶10.89; Vauclair, Desjardins and Lachance, at para. 40.38; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 9:31). Case law has also recognized other limitations, including notably that the Crown is permitted to cross-examine an accused (unlike other witnesses) only on the convictions themselves and not the conduct or facts that led to those convictions. The Crown is generally limited to cross-examining the accused on the offence, the date and place of the conviction, and the punishment imposed (*Corbett*, at pp. 696-97, per Dickson C.J.; *King*, at para. 142; *R. v. K. (A.J.)*, 2022 ONCA 487, 162 O.R. (3d) 721, at para. 50; *C. (M.)*, at para. 55; Lederman, Fuerst and Stewart, at ¶10.88; Hill, Tanovich and Strezos, at § 9:30; D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 616).

[165] A trial judge's exercise of discretion when weighing probative value and prejudicial effect under the *Corbett* framework is fact-specific and contextual. As La Forest J. explained in *Corbett*, "prejudicial potential and probative value are not abstract qualities. They exist in the context of a concrete case and are determined with reference to the circumstances of the case" (p. 744; see also p. 747). The *Corbett* framework recognizes that trial judges are best placed to assess the admissibility of an accused person's prior convictions in each case. As this Court has noted, "[t]rial judges routinely weigh the probative value and prejudicial effect of evidence" (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 110).

[166] Because *Corbett* decisions are discretionary and fact- and context-specific, sometimes different judges will reach different outcomes in different cases, even though they are applying the same legal principles (Lederman, Fuerst and Stewart, at ¶10.101). This is intrinsic to the exercise of judicial discretion. It is a feature, not a flaw, of the *Corbett* framework. As noted by Professor R. J. Delisle:

> Recognizing a discretion in the trial judge, recognizes room for choice, room for judgment. It is inherent in the nature of the exercise. We should not fear it nor should we insist on certainty in all our rules of evidence. The so-called "rules" of evidence were designed largely by trial judges seeking justice in their individual cases and were not meant to be a calculus rigidly applied. The best that we can do is to catalogue factors which are important to the sound exercise of discretion. Nor should discretion be feared as some form of palm-tree justice which is unreviewable. Protection against a trial judge's abuse of discretion should always be available by appeal.
>
> ("Evidence — Judicial Discretion and Rules of Evidence — Canada Evidence Act, s. 12: *Corbett* v. *The Queen*" (1988), 67 *Can. Bar Rev.* 706, at pp. 709-10)

IV. Discussion

A. *Abiding Contempt for the Law Remains a Potentially Relevant Consideration Under the Corbett Framework*

[167] While crimes of dishonesty will often be more probative of credibility than crimes of violence, the latter will sometimes be relevant to the testimonial trustworthiness of a witness and may be admitted into evidence. It is a settled feature of the *Corbett* framework that a trial judge in a given case may reason that a pattern of

criminal conduct shows a repeated disregard or contempt for the law and is relevant to the credibility of the witness. I see no basis to depart from this aspect of *Corbett*.

[168] In *Corbett* itself, both Dickson C.J. and La Forest J. recognized abiding or repeated contempt for the law as a relevant factor in the analysis. Dickson C.J. cited approvingly a passage from *State v. Duke*, 123 A.2d 745 (N.H. 1956), at p. 746, which stated that crimes other than those of dishonesty have the potential to demonstrate a "[l]ack of trustworthiness" on the part of the witness and can thus be relevant to credibility when they demonstrate "repeated contempt for laws which [the accused] is legally and morally bound to obey" (p. 686).

[169] La Forest J. agreed on this point twice in his reasons. First, La Forest J. affirmed that the policy under s. 12 of the *Canada Evidence Act* and similar legislation in other jurisdictions is that "a wide range of crimes is relevant to the capacity for truthfulness of potential witnesses, extending beyond criminal activity specifically implicating elements of dishonesty or creditworthiness" (p. 718). La Forest J. cited the Advisory Committee on the United States' Federal Rules of Evidence that a "demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony" (p. 718, citing *Federal Rules of Evidence Manual* (4th ed. 1986), at p. 557). Second, La Forest J. cited approvingly the observation of Martin J.A. in *Brown*, at p. 342, that "[t]he probative value of prior convictions with respect to the personal trustworthiness of the witness also varies according to the number of prior convictions and their proximity or

remoteness to the time when the witness gives evidence" (pp. 720-21 (emphasis added)).

[170] Since *Corbett* was decided, innumerable courts across Canada — including this Court and appellate courts in Alberta, British Columbia, Ontario, and Quebec — have followed the approach of Dickson C.J. and La Forest J., reasoning that a criminal record showing an abiding contempt for the law, including a record of violent crimes, can be probative of testimonial trustworthiness (see *Charland* (C.A.), at paras. 35-36, aff'd *Charland* (SCC), at para. 5; *R. v. Ledesma*, 2021 ABCA 143, 403 C.C.C. (3d) 268, at paras. 91-92; *R. v. A.B.*, 2016 ABQB 733, at paras. 22 and 24-25; *R. v. Gibson*, 2001 BCCA 297, 153 C.C.C. (3d) 465, at para. 30; *R. v. Fengstad* (1998), 117 B.C.A.C. 95, at para. 27; *R. v. Roy* (1997), 91 B.C.A.C. 311, at para. 12; *R. v. Wareing*, 2024 BCSC 2502, at para. 54; *R. v. L. (D.B.G.)* (1998), 17 C.R. (5th) 62 (B.C.S.C.), at para. 17; *King*, at para. 140; *R. v. Marshall*, 2025 ONCA 638, at para. 54; *R. v. Guthrie*, 2014 ONSC 3269, at paras. 7 and 13; *R. v. C.M.*, 2010 ONSC 5303, at paras. 20 and 26; *R. v. Hong*, 2015 ONSC 4865, at para. 81; *R. v. I.T.*, 2024 ONSC 6176, at para. 47; *R. v. Chretien*, 2009 CanLII 9381 (Ont. S.C.J.), at para. 34; *Pallagi v. R.*, 2024 QCCA 1694, at paras. 18-20; *R. v. Tremblay*, 2006 QCCA 75, 209 C.C.C. (3d) 212, at para. 18; *R. v. Charette*, 2010 QCCA 2211, 283 C.C.C. (3d) 24, at para. 28; *LSJPA — 1037 (Re)*, 2010 QCCA 1627, 274 C.C.C. (3d) 90, at paras. 156-58; *R. v. Gargan*, 2012 NWTSC 42, at p. 4).

[171] As reflected in these and many other decisions, violent offences, particularly as part of a long criminal record, can bear on testimonial trustworthiness. In the frequently cited decision of *Charland*, for example, a majority of the Alberta Court of Appeal upheld the decision of a trial judge to allow the Crown to cross-examine the accused on his entire criminal record — including prior sexual assault convictions — for the limited purpose of assessing his credibility at his trial for sexual assault and related offences. The Alberta Court of Appeal accepted that "[g]enerally, previous convictions for violent offences such as sexual assault do not directly reflect on honesty and truthfulness and, depending on the circumstances of the case, have limited probative value in assessing credibility" (p. 313). But, the court added, "particularly in the context of a lengthy criminal record, such prior convictions have probative value that is greater than trifling because a jury could reasonably conclude that the convictions reflect a disregard for the laws and rules of society, making it more likely that the person who harbours such attitudes would lie" (p. 313). On further appeal, this Court unanimously stated that it "agree[d] with the conclusions of the majority of the Alberta Court of Appeal" (para. 5).

[172] Over the past 20 years, this Court's decision in *Charland* has been repeatedly followed by courts across Canada as affirming the relevance of abiding contempt for the law under the *Corbett* framework (see *Pallagi*, at paras. 18 and 20; *R. v. Barnabé-Paradis*, 2022 QCCS 3995, at para. 50; *R. v. H.W.*, 2021 ONSC 5477, at para. 22; *Ledesma*, at paras. 88-89; *R. v. Mauricin*, 2020 QCCS 362, at paras. 8 and 24; *R. v. Brown*, 2019 ONSC 1472, at para. 15; *Martin v. R.*, 2016 QCCS 6022, at para. 26;

R. v. A.S., 2016 ONSC 6965, at para. 51; *R. v. Gabriel*, 2014 QCCS 2128, at para. 31; *R. v. Grizzle*, 2013 ONSC 6521, at para. 14, aff'd 2016 ONCA 190; *R. v. Newman*, 2013 BCSC 1240, at paras. 20-21; *R. v. Land*, 2012 ONSC 6038, at para. 16; *R. v. Alexander*, 2012 ONSC 3596, at para. 10; *R. v. Fullerton*, 2011 ONSC 1601, at para. 7; *C.M.*, at para. 20; *Chretien*, at para. 38; *R. v. Desjarlais*, 2006 BCSC 342, at para. 27; *R. v. Turpin*, 2005 BCSC 547, at para. 14; *R. v. Michell*, 2002 BCSC 278, at para. 22). As a matter of ordinary human experience and common sense, a person's demonstrated and repeated failure to respect community standards of behaviour is undoubtedly relevant to their testimonial trustworthiness.

[173] Further, although a conviction for an offence falling within the traditional category of "crimes of dishonesty" may have the clearest relationship with credibility, it is also evident that dishonesty is "an integral part of so many different crimes" (P. Sankoff, "*Corbett*, Crimes of Dishonesty and the Credibility Contest: Challenging the Accepted Wisdom on What Makes a Prior Conviction Probative" (2006), 10 *Can. Crim. L.R.* 215, at p. 221, citing the U.K. Law Commission Consultation Paper No. 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), at pp. 112-13). In other words, the line between crimes of dishonesty and other crimes is not always clear.

[174] Rejecting contempt for the law as a relevant factor under the *Corbett* framework is at odds with Dickson C.J.'s warning in *Corbett* that "it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper

purpose" (p. 692 (emphasis deleted)). *Corbett* was fundamentally based on this Court's trust in juries to "follow the instruction given by the trial judge and use the record only in assessing credibility and not for any other purpose" (*R. v. Poitras* (2002), 57 O.R. (3d) 538 (C.A.), at para. 31). Dickson C.J. emphasized that "[w]e should maintain our strong faith in juries" (p. 693). In my view, such faith is justified and should be maintained.

[175] In addition, rejecting contempt for the law as a relevant consideration under the *Corbett* framework would lead to perverse results. The result would be that "convicted hired assassins, convicted drug dealers and convicted pimps would be treated as more credible witnesses than a person who has concealed a small amount of assets on an application for welfare or a person who has failed to file a small amount of income on his tax return" (Sankoff, at pp. 224-25, quoting Federal/Provincial Task Force on Uniform Rules of Evidence, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), at p. 351).

[176] Ultimately, then, the presumptive relevance and admissibility of past criminal convictions continue to apply even to violent crimes. The nature of the offence is only one factor to consider. I acknowledge that as the number of convictions increases, so too does the risk of potential prejudice. Courts must be especially attentive to this risk and not reflexively conclude that a long list of convictions is necessarily admissible based on the contempt for the law line of reasoning. The trial judge must always undertake a contextual analysis in discharging their discretionary power. To

repeat La Forest J.'s observation in *Corbett*, probative value and prejudicial potential "are not abstract qualities" and must be "determined with reference to the circumstances of the case" (p. 744).

[177] I therefore see no basis to overturn the settled and longstanding precedent of this Court that contempt for the law is a relevant factor under the *Corbett* framework. I accept that this Court may depart from its own precedent where there is a compelling reason to do so, including if the precedent failed to have regard to a binding authority or statute, it has proven unworkable, or its rationale has been eroded by significant social or legal change (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98, citing *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *R. v. Kirkpatrick*, 2022 SCC 33, [2022] 2 S.C.R. 480, at para. 202). But no such circumstance exists here. There is no basis to suggest that lower courts are confused about how to apply the discretionary *Corbett* framework or that there has been a significant social or legal change to warrant this Court revisiting its precedent.

[178] Any claim that the *Corbett* framework is unworkable because different judges reach different outcomes in different cases is at odds with the nature of the judicial discretion under the *Corbett* framework. In *R. v. Talbot*, 2007 ONCA 81, 220 O.A.C. 167, at para. 38, Doherty J.A. rejected an argument that the *Corbett* framework needed to be refashioned because the jurisprudence was in a "chaotic state". In my respectful view, Doherty J.A.'s observations remain true today:

> [The] assertion that the "*Corbett*" application jurisprudence is in a chaotic state, misunderstands the nature of judicial discretion. Fact-specific decisions are essential to the proper exercise of judicial discretion. Each judge must decide the weight to be assigned to the various factors relevant to the exercise of his or her discretion. It should come as no surprise that very similar situations yield different results. One judge will assign more or less weight to one or another factor than would another judge. What counsel for the Crown sees as jurisprudential chaos is simply reflective of a discretionary decision-making process. [Footnote omitted; para. 38.]

B. *The Strength of the Crown's Case Also Remains a Potentially Relevant Consideration Under the Corbett Framework*

[179] The strength of the Crown's case should also remain a relevant consideration under a *Corbett* analysis. At the same time, I agree with the Court of Appeal that this factor should be "used with care" (2023 ONCA 253, 425 C.C.C. (3d) 528, at para. 49).

[180] As the Court of Appeal observed, there is a greater risk of improper propensity reasoning when the Crown's case is weak, because there is an increased risk that the trier of fact would use the accused's past conviction to "jump the gap in the evidence" (para. 49, citing *R. v. Hall*, 2018 ONCA 185, 139 O.R. (3d) 561, at para. 65; *R. v. Atkins*, 2017 ONCA 650, 137 O.R. (3d) 1, at para. 225). The logical corollary of this is that a strong Crown case attenuates the concern of prohibited propensity reasoning (C.A. reasons, at para. 49; see also *Guthrie*, at para. 10; *R. v. Thompson* (2000), 133 O.A.C. 126, at para. 32; *R. v. Mason* (1996), 180 A.R. 282 (Q.B.), at para. 38).

[181] At the same time, a strong Crown case does not eliminate the likelihood that the trier of fact would engage in prohibited propensity reasoning. For this reason, when the strength of the Crown's case has been considered as part of the *Corbett* analysis, courts have underscored the importance of the trial judge giving a "strong limiting instruction" to the jury (see *Thompson*, at para. 32). That strikes me as entirely appropriate.

C. *The Trial Judge Made No Reviewable Error in Weighing the Probative Value and Prejudicial Effect of Mr. Hussein's Criminal Record*

[182] In my respectful view, the trial judge made no reviewable error in weighing the probative value and prejudicial effect of Mr. Hussein's criminal record, and thus in permitting the Crown to cross-examine him on it.

[183] Appellate intervention regarding a *Corbett* application is only appropriate where there is an "error in principle, a misapprehension of material facts, or an exercise of the discretion which, in the totality of the circumstances, must be regarded as unreasonable" (*R. v. Clarke*, 2014 ONCA 777, 319 C.C.C. (3d) 127, at para. 5, quoting *R. v. Mayers*, 2014 ONCA 474, at para. 3; see also *R. v. J.W.*, 2025 SCC 16, at para. 50, citing *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, [2022] 3 S.C.R. 515, at para. 41; *Ledesma*, at para. 34). As La Forest J. stated in *Corbett*, "an appellate court should never, in the absence of clear error, simply substitute its own view of how [the] discretion ought to have been exercised for that of the trial judge" (p. 746).

[184] The trial judge's reasoning displays nothing amounting to a clear error in principle, a misapprehension of material facts, or an unreasonable exercise of discretion. That reasonable people may disagree with the trial judge's assessment of how Mr. Hussein's criminal record bears on his credibility or testimonial trustworthiness "merely attests to the fact that unanimity in matters of common sense and human experience is unattainable" (*Corbett*, at p. 720, per La Forest J., dissenting).

[185] I see no basis to conclude that the trial judge erred in assessing the probative value of Mr. Hussein's criminal record by characterizing his violent offences as "[e]qually legitimate" on the issue of his credibility because they demonstrated "disregard for the law generally" (A.R., vol. I, at p. 2). The trial judge recognized that the entries in Mr. Hussein's criminal record "do not all speak to offences involving overt elements of deceit", but he held that they remained probative of his testimonial trustworthiness because "the sheer number of convictions, along with their persistent regularity, show[ed] an ongoing approach to the law that could be described as disregard or disdain" (p. 3). In my respectful view, it was open to the trial judge to reach this conclusion in this case.

[186] Nor, in my respectful view, did the trial judge err in his assessment of the probative value of Mr. Hussein's youth offences. This Court has recognized that young people have "heightened vulnerability, less maturity and a reduced capacity for moral judgment", entitling them to a presumption of diminished moral blameworthiness or culpability (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 41). Here, though, I

am not persuaded that the trial judge erred in concluding that Mr. Hussein's youth convictions were not "remote" and formed part of a "cohesive whole" with his offences as an adult (A.R., vol. I, at p. 3). The Court of Appeal correctly stated that Mr. Hussein's youth convictions "were remote in neither time nor behaviour" (para. 66). His youth convictions dated from when he was aged 17, but he was only 23 at the time of Mr. Boucher's death. As the Court of Appeal noted, Mr. Hussein was "still a youthful offender during his trial" (para. 66). His youth record also showed an "ongoing" "pattern of persistent and regular disregard for the law" (para. 66). In other cases involving *Corbett* applications, youth offences have similarly been found not to be too remote and to have sufficient probative value to be admissible (see *R. v. Madrusan*, 2005 BCCA 609, 203 C.C.C. (3d) 513, at para. 32; *R. v. Oppong*, 2017 ONSC 3379, at paras. 5, 12 and 17; *R. v. Pépin*, 2021 QCCS 4116, at paras. 23, 39-41 and 63; *I.T.*, at para. 47; *R. v. C.S.*, 2013 ONSC 5797, at para. 16; *R. v. Smith*, 2007 CanLII 24101 (Ont. S.C.J.), at pp. 11-12).

[187] In assessing prejudicial effect, the trial judge made no reviewable error in concluding that Mr. Hussein's record would not bear on the jury's analysis of whether he intended to commit murder. On the one hand, I agree with the Court of Appeal that "[t]he trial judge overstated things . . . when he said that '[f]oreseeability of death is not made more likely if Mr. Hussein is thought by the jury to be a violent man on the basis of [his] criminal record'" (para. 54 (text in brackets in original)). At the same time, like the Court of Appeal, "I accept the more limited proposition that since by its nature foreseeability of death is a subjective state of mind that arises in the specific

circumstances of a particular case, jurors would be unlikely to draw a specific inference, based on Mr. Hussein's prior criminal convictions, that he would have foreseen the risk" (para. 55).

[188] The Court of Appeal stated that "the trial judge understated the risk of improper propensity reasoning relating to the foreseeability issue", but noted that "the risk of prejudice the trial judge failed to note is not pronounced enough to have altered the calculus of his decision" (para. 56). In other words, although the trial judge may have attributed an incorrect weight to a relevant consideration, applying the proper weight would not have changed the decision to allow the Crown to cross-examine Mr. Hussein on his criminal record. I agree. There is thus no basis for appellate intervention.

[189] I also see no error in the trial judge having considered the strength of the Crown's case to reason that the risk of improper propensity reasoning was reduced. This can be a relevant factor in a *Corbett* analysis. Importantly, the trial judge gave the jury a clear and strong limiting instruction (see A.R., vol. I, at pp. 32-34). He repeatedly warned the jury that they were not to "use the fact or nature of the prior convictions to decide . . . that Mr. Hussein is the sort of person who would commit the offence charged or is a person of bad character and thus likely to have committed the offence charged" (p. 34).

[190] Finally, the trial judge did not err in finding there was a risk of distortion if the Crown were prohibited from cross-examining Mr. Hussein on his criminal record, given the nature of the defence's cross-examination of a witness, Papy Ndiya, on his

criminal record. As the Court of Appeal reasoned, "[i]t is not for us to second-guess the trial judge's evaluation of the significance of that cross-examination. He was present when it occurred. We were not. I would defer to the trial judge's assessment of where a fair balance lay" (para. 67).

[191] Although another trial judge might have weighed the potential prejudice and probative value differently, that does not grant an appellate court licence to interfere (*Grizzle* (C.A.), at para. 19). I would affirm that "[t]rial judges are afforded a wide berth of discretion in making their *Corbett* determinations" (*King*, at para. 201, citing *Charland* (SCC)), and I would defer to the trial judge's exercise of discretion in this case.

V. Conclusion

[192] I would dismiss the appeal.

Appeal dismissed.

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