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Decisions of the Supreme Court of Canada in Criminal Matters:

January 1 to October 31, 2018

Wayne K. Gorman

In this edition's article, I will review decisions rendered by the Supreme Court of Canada concerning criminal law matters during the period of January 1 to October 31, 2018. As will be seen, the Supreme Court considered a multitude of criminal law issues, including the obligation of the Crown to disclose evidence to the accused, the offences of influence peddling and first-degree murder, and the impact of mistake of law in imposing sentence and informer privilege. Let us start with the Court's consideration of the law of evidence and informer privilege.¹

EVIDENCE

INFORMER PRIVILEGE AND SOLICITOR CLIENT COMMUNICATIONS:

In *R. v. Brassington*, four police officers with the Royal Canadian Mounted Police were charged with offences, including an attempt to obstruct the course of justice, relating to alleged misconduct during a police investigation.² The Supreme Court noted that when the officers "were charged, the RCMP and the Crown told them that they were prohibited from discussing 'the circumstances of their investigations in a manner that might reveal the identity of confidential informers to anyone, including their legal counsel.'"

Before their trial, they applied for a declaration that they could discuss with their defence counsel information they learned during the investigation that might reveal the identity of confidential informers. The application judge granted the application, declaring that the officers could discuss any information in their possession with counsel. She held that the "requirement of proving 'innocence at stake' did not apply" because the exception fit poorly in circumstances where "the accused already knows the privileged information and merely seeks to discuss it with counsel."

The Crown and the RCMP applied pursuant to section 37 of the Canada Evidence Act, for an order that disclosure be prohibited:

[A] Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.³

The application judge dismissed the application. The Crown appealed. The British Columbia Court of Appeal dismissed the appeal, holding that the order allowing disclosure was civil rather than criminal in nature and thus an appeal under section 37(1) was unavailable.

The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issue raised as being: "[W]hen police officers are charged with crimes relating to their conduct during an investigation, can they, at their own discretion, disclose to their defence lawyers information they learned during that investigation that might reveal the identity of a confidential informer?"

The Supreme Court allowed the Crown's appeal. It held that the declaratory order should be set aside. It granted an order pursuant to section 37(6) of the Canada Evidence Act prohibiting the officers from disclosing informer privileged information to their counsel, subject to a successful innocence-at-stake application. The Court indicated that "the 'privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. . . .' There are no other exceptions to informer privilege."

The Supreme Court concluded that the officers were not entitled to disclose the informer-privileged information to their lawyers: "Our jurisprudence prevents piercing informer privilege unless the accused can show that his or her innocence is at stake. . . . No evidence of 'innocence at stake' was presented. The police officers are therefore not entitled to disclose the information to their lawyers."

Footnotes

1. There are a number of ways in which a criminal case can reach the Supreme Court of Canada by way of appeal. They involve obtaining "leave to appeal" from the Supreme Court and appeals "as of right": (1) the Supreme Court can grant leave to appeal on a question of law (see sections 691(1)(b) and 691(2)(c) of the *Criminal Code*); (2) an accused person has a right to appeal to the Supreme Court if a conviction is affirmed or an acquittal set aside on any question of law upon which a judge of the Court of Appeal dissents (see sections 691(1)(b) and 691(2)(a) of the *Criminal Code*); (3) an accused person has a right to appeal to the Supreme Court on a question of law if their acquittal at trial is set aside and

the Court of Appeal enters a verdict of guilty (see section 691(2)(b) of the *Criminal Code*); (4) the Crown can appeal as of right when a conviction is set aside by a Court of Appeal if a judge of the Court of Appeal dissents on a question of law (see section 693(1)(a) of the *Criminal Code*); (5) the Crown can appeal if granted leave by the Supreme Court on a question of law when a conviction is set aside by the Court of Appeal (see section 693(1)(b) of the *Criminal Code*); and (6) through the *Supreme Court Act*, R.S.C. 1985.

2. *R. v. Brassington*, 2018 SCC 37 (Can.).

3. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 37(1).

Finally, the Court held that

requiring the police officers to exercise caution with respect to what information they disclose to their lawyers does not amount to a *per se* interference with their constitutional rights. Police officers bear particular responsibilities by virtue of the positions of power and trust they occupy, including obligations to keep informer-privileged information in the strictest confidence. Neither the right to solicitor-client privilege nor the right to make full answer and defence relieves police officers of those obligations.

PRIOR CONSISTENT STATEMENTS:

In *R. v. Cain*, the accused was convicted of the offence of sexual assault. A majority of the Nova Scotia Court of Appeal (Justice Scanlon dissenting) dismissed his appeal.⁴

An appeal was taken to the Supreme Court of Canada as of right. The Supreme Court considered the appeal based upon the issue of whether the trial judge used a prior consistent statement of the complainant to confirm the truth of her testimony at the trial.

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

The trial judge found that the inconsistencies involved only insignificant peripheral matters, and so he rejected Mr. Cain's contention that any inconsistencies rendered the complainant not credible or her evidence unreliable. The trial judge did not rely on consistencies between the statements and testimony to bolster the truth of the complainant's testimony. This was an appropriate use of a prior consistent statement and did not constitute an error of law.

OFFENCES

SEXUAL-ASSAULT CONSENT:

In *R. v. Gagnon*, Warrant Officer J. Gagnon was charged with the offence of sexual assault, an offence punishable under section 130 of the *National Defence Act*.⁵ He was acquitted by a court-martial panel. The Crown appealed to the Court Martial Appeal Court of Canada, arguing that the Military Trial Judge erred in placing the defence of honest belief in consent before the panel. The appeal was allowed and a new trial was ordered. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed. In a brief oral judgment, the Supreme Court stated: "[T]here was no evidence from which a trier of fact could find that the appellant had taken reasonable steps to ascertain that the complainant was consenting. . . . It follows that the defence of honest but mistaken belief should not have been put to the panel."

PROCEDURE

CROWN DISCLOSURE:

In *R. v. Gubbins and Vallentgoed*, two accused were each charged with the offence of operating a motor vehicle with a blood-alcohol level exceeding .08, contrary to section 253(1)(b) of the *Criminal Code*. In each case, the essential evidence against them was the results of the analysis of their breath conducted on breathalyzer machines.⁶

Before their trials, both of the accused requested that the Crown disclose to them the maintenance records for the breathalyzer machines used to analyze their breath samples. The Crown refused to provide the requested disclosure.

Mr. Vallentgoed's application was dismissed and he was subsequently convicted at trial. Mr. Gubbins was granted a stay of proceedings on the basis of the Crown's failure to disclose the records.

The Alberta Court of Appeal considered both matters on appeal. A majority of the Court of Appeal affirmed Mr. Vallentgoed's conviction. It set aside the stay entered in relation to Mr. Gubbins and remitted his matter for a new trial.

THE APPEAL:

Appeals were taken to the Supreme Court of Canada by both accused. The Supreme Court described the issues raised by the appeals in the following manner:

These appeals deal with the scope of the Crown's disclosure obligations with respect to maintenance records of breathalyzer instruments. . . . Are the maintenance records part of first party disclosure, subject to inclusion in the Crown's standard disclosure package? Or, are these records third party records, which require the defence to demonstrate their likely relevance before an order for disclosure can be made?

THE SUPREME COURT OF CANADA:

The Supreme Court of Canada dismissed both appeals. It held that these "records are subject to third party (rather than first party) disclosure. On the evidence in both cases, the defence failed to show that the maintenance records meet the requisite threshold for third party disclosure."

The Supreme Court noted that it has held that "the Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. This is referred to as first party disclosure." However, the "Crown" for the purposes of disclosure "does not refer to all Crown entities, but only to the prosecuting Crown All other Crown entities, including police, are third parties for the purposes of disclosure." For third-party disclosure to occur, an accused person must "show that the record is 'likely relevant.'"

The Supreme Court held that to determine if a record is subject to first- or third-party disclosure, the following factors should be considered:

4. *R. v. Cain*, [2018] 421 D.L.R. 239 (Can.).

5. *R. v. Gagnon*, 2018 SCC 41 (Can.).

6. *R. v. Gubbins and Vallentgoed*, 2018 SCC 44 (Can.).

(1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown?

The Supreme Court concluded that the maintenance records are not part of first-party disclosure because they “are not in the possession or control of the prosecuting Crown. They do not form part of the ‘fruits of the investigation’; and the evidence in this case is that the maintenance records are not ‘obviously relevant’ to the cases of the accused”

APPLICATION TO THIS CASE:

The Supreme Court held that neither accused had proven that the maintenance records were “likely relevant” as to whether “an instrument was malfunctioning or operated improperly [and i]n the absence of any such evidence, the expert evidence of the Crown is persuasive that the maintenance records are not relevant. By its nature, this is a technical and scientific question, not a matter of doctrine.”

CERTIORARI:

In *R. v. Awashish*, a companion case to *Gubbins*, the accused was also charged with operating a motor vehicle with a blood-alcohol level exceeding .08, contrary to section 253(1)(b) of the *Criminal Code*.⁷ Before her trial, she applied for an order requiring the Crown to “inquire” into the existence of maintenance records for the breathalyzer machine used to analyze her breath. The application was granted by a provincial-court judge.

The Crown successfully obtained an order of *certiorari* to quash the order. The accused appealed to the Quebec Court of Appeal. The Court of Appeal allowed the appeal, holding that *certiorari* was not available because the trial judge’s decision was made within the exercise of her jurisdiction as the trial judge. The Crown appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court indicated that resort to *certiorari* is “tightly limited by the *Criminal Code* and the common law so as to ensure that it is not used to do an ‘end-run’ around the rule against interlocutory appeals.” The Court held that

certiorari in criminal proceedings is available to parties only for a jurisdictional error by a provincial court judge. . . . For third parties, *certiorari* is available to review jurisdictional errors as well as errors on the face of the record relating to a decision of a final and conclusive character vis-à-vis the third party

The Supreme Court held that the order of *certiorari* should not have been issued because the decision of the trial judge did not involve a jurisdictional error. However, the Supreme Court concluded that “Ms. Awashish did not establish a basis for the records’ existence or relevance. The Crown was therefore

under no obligation to inquire into the matter.” The trial judge “erred in holding otherwise. However, given that she made no jurisdictional error, *certiorari* cannot be used to correct that error.”

INTERLOCUTORY INJUNCTIONS OF PUBLICATION BANS:

In *R. v. Canadian Broadcasting Corporation*, the accused was charged with the first-degree murder of a person under the age of eighteen.⁸ At the trial, a publication ban was issued prohibiting the publication, broadcast, or transmission in any way of any information that could identify the victim, pursuant to section 486.4(2.2) of the *Criminal Code*.

Before the issuance of the publication ban, the Canadian Broadcasting Corporation (CBC) had posted information on its website, which revealed the identity of the victim. After the publication ban was issued, the CBC refused to remove the information.

The Crown sought the issuing of a mandatory interlocutory injunction directing the removal of the victim’s identifying information from the website.

The application judge dismissed the application, concluding that the Crown had not established the requirements for an interlocutory injunction. The Crown appealed. A majority of the Alberta Court of Appeal allowed the appeal and granted the injunction.

The CBC appealed to the Supreme Court of Canada. The appeal was allowed and the injunction was set aside. The Supreme Court indicated that an application for a mandatory interlocutory injunction must satisfy three elements:

At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried” The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction. . . .

The Supreme Court also indicated that this constituted a “general framework” and that there are cases “which require ‘an extensive review of the merits’ at the first stage of the analysis.”

The Supreme Court held that an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant’s case at the first stage “is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case”:

A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise “put the situation back to what it should be”. . . .

7. *R. v. Awashish*, 2018 SCC 45 (Can.).

8. *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 (Can.).

The Supreme Court concluded that “the chambers judge applied the correct legal test in deciding the Crown’s application, and his decision that the Crown’s case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.”

WHEN A WITNESS REFUSES TO ANSWER:

In *R. v. Noremore*, the accused was charged with the offence of attempted murder.⁹ At his trial, a witness refused to answer a question asked by defence counsel. The trial judge reminded the witness of the potential consequences of failing to answer, but the witness continued to refuse to answer, and the trial judge did not cite the witness for contempt.

The accused was convicted and appealed. A majority of the Court of Appeal of Newfoundland and Labrador overturned the conviction, concluding that the trial judge’s failure to cite the witness for contempt caused the trial to be unfair.

The Crown appealed, as of right, to the Supreme Court of Canada, which allowed the appeal and restored the conviction. In an oral judgment the Supreme Court held that “the trial judge did not err in the way in which he addressed a witness’s refusal to answer a question put to him by defence counsel”:

The question the witness refused to answer was put to him by defence counsel in an attempt to raise doubts about who wrote two notes found in Mr. Normore’s residence. The trial judge relied on these notes, along with other evidence, to find that Mr. Normore had committed the offences in question. However, in all of the circumstances of this case, including that Mr. Normore subsequently admitted to writing the most incriminating statement in these notes, we are of the view that the trial judge’s failure to take further steps to compel the witness to answer the question put to him could not have had an effect on the verdict.

TRIAL JUDGE’S REASONS—SUFFICIENCY:

In *R. v. Black*, the accused was convicted of the offence of importing cocaine into Canada.¹⁰ He appealed from conviction, arguing that the trial judge’s reasons were insufficient. A majority of the Ontario Court of Appeal (Pardu J.A., dissenting) dismissed the appeal. The accused appealed, as of right, to the Supreme Court of Canada.

In a brief judgment, the Supreme Court of Canada allowed the appeal, stating:

Unlike my colleagues, I am not prepared to infer that the trial judge engaged in the necessary reasoning from the conclusory statements [T]he majority concludes, based on the context of the evidence and the arguments made at trial, that the trial judge implicitly held that the appellant in this case knowingly imported cocaine. . . .

I am not convinced that in this case the trial judge’s reasoning was apparent enough in the context of the record for it to be discernable to this court without this court having to

We agree with Justice Pardu that the trial judge’s reasons, even when read as a whole and in the context of the trial record, fail to reveal the basis on which the trial judge concluded that the Crown had proven the mental element of the offence beyond a reasonable doubt. The reasons fail to fulfil the function of permitting effective appellate review.

The appeal is therefore allowed, and a new trial is ordered.¹¹

TRIAL JUDGE’S REASONS—STEREOTYPICAL THINKING:

In *R. v. A.R.J.D.*, the accused was charged with three counts of sexual assault.¹² He was acquitted. The Crown’s appeal to the Alberta Court of Appeal was successful, and a new trial was ordered.

The accused appealed to the Supreme Court of Canada. The Supreme Court considered the appeal on the issue of whether the trial judge’s reasons illustrated the use of stereotypical thinking in rejecting the complainant’s evidence.

The appeal was dismissed. In a brief oral judgment, the Supreme Court of Canada issued the following judgment:

In considering the lack of evidence of the complainant’s avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant’s credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.¹³

THE WITHDRAWAL OF A GUILTY PLEA:

In *R. v. Wong*, the accused pleaded guilty to the offence of trafficking in cocaine and was sentenced to nine months of imprisonment.¹⁴ Because of the accused’s status as a “permanent resident of Canada,” the sentence had the consequence of a loss of his permanent-resident status and a removal order from Canada being issued without any right of appeal being allowed.

The accused appealed from conviction, seeking to withdraw his guilty plea. He filed an affidavit indicating that before entering his plea of guilty, he had been unaware of the possible immigration consequences of his conviction and sentence.

The British Columbia Court of Appeal dismissed the appeal.

9. *R. v. Noremore*, 2018 SCC 42 (Can.).

10. *R. v. Black*, 2018 SCC 10, [2018] 419 D.L.R. 1 (Can.).

11. In her dissent in the Ontario Court of Appeal, Pardu J.A. stated:

reassess the case itself and substitute its own analysis. There may be an implicit route available from the trial judge’s explicit factual findings . . . to a finding of the appellant’s guilt, but “it is not appropriate for this court to attempt to discern that route and explain it”: *R. v. Capano*, 2014 ONCA 599, 313 C.C.C. (3d) 135, at para. 74.

R. v. Black, 2017 ONCA 599 (Can. Ont. C.A.)

12. *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 422 D.L.R. 469 (Can.).

13. In *R. v. Baksza*, 2018 ABCA 873, [2018] A.J. No. 873 (Can. Alta. C.A.), the Alberta Court of Appeal considered *A.R.J.D.*, and indicated that it illustrated “the dangers associated with judging while wearing stereotypical blinders.”

14. *R. v. Wong*, 2018 SCC 25 (Can.).

The accused was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court described the issue raised by the appeal in the following manner:

This case concerns the proper approach for considering whether a guilty plea can be withdrawn on the basis that the accused was unaware of a collateral consequence stemming from that plea, such that holding him or her to the plea amounts to a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*

The appeal was dismissed. The Supreme Court indicated that an accused person “need not show a viable defence to the charge to withdraw a plea on procedural grounds.” The Court held that in order to withdraw a guilty plea the accused must demonstrate “prejudice”:

In our view, an accused seeking to withdraw a guilty plea must demonstrate prejudice by filing an affidavit establishing a reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. . . .

A guilty plea on different conditions will suffice to establish prejudice where a court finds that the accused would have insisted on those conditions to enter a guilty plea and where those conditions would have alleviated, in whole or in part, the adverse effects of the legally relevant consequence. . . .

The Supreme Court also held that to be granted leave to withdraw a guilty plea an accused person must “articulate a meaningfully different course of action to justify vacating a plea, and satisfy a court that there is a reasonable possibility he or she would have taken that course.”

CONCLUSION—WONG:

The Supreme Court concluded that the appeal should be dismissed because though the accused

filed an affidavit before the Court of Appeal, he did not depose to what he would have done differently in the plea process had he been informed of the immigration consequences of his guilty plea

OFFENCES

INFLUENCE PEDDLING:

Section 121(1)(d) of the *Criminal Code* creates the offence of “influence peddling,” which is defined as:

having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for

cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office

In *R. v. Carson*, the accused was charged with the offence “influence peddling,” contrary to section 121(1)(d) of the *Criminal Code*.¹⁵

The accused had used government contacts to help a company, H2O Professionals Inc. (H2O), sell water treatment systems to First Nation’s Communities. In exchange, H2O promised to pay a commission to the accused’s girlfriend. After the agreement was made, the accused spoke to government officials at Indian and Northern Affairs Canada to promote the purchase of H2O’s products.

The trial judge entered an acquittal, having concluded that it was the communities rather than the government that decided whether to purchase the water systems. The Ontario Court of Appeal allowed a Crown appeal and substituted a conviction.

The accused appealed to the Supreme Court of Canada. The Supreme Court indicated that “[t]he sole issue in this appeal is whether the assistance he promised to provide was in connection with ‘any matter of business relating to the government.’” The Court found that the accused “admitted to having influence with the government. He also admitted that he demanded a benefit for another person as consideration for assisting H2O by calling upon his government contacts to promote the sale of its water treatment systems to First Nations.”

The appeal was dismissed and the conviction affirmed. The Supreme Court of Canada held that an offence under section 121(1)(d) of the *Criminal Code* “requires that the promised influence be in fact connected to a matter of business that relates to government” and “a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate.”

The Supreme Court described the elements of an offence under section 121(1)(d) as being the following:

1. having or pretending to have influence with the government, a minister, or an official;
2. directly or indirectly demanding, accepting, or offering or agreeing to accept a reward, advantage or benefit of any kind for oneself or another person;
3. as consideration for the cooperation, assistance, exercise of influence, or an act or omission;
4. in connection with a transaction of business with or any matter of business relating to the government.

15. *R. v. Carson*, 2018 SCC 12, [2018] 423 D.L.R. 389 (Can.).

The Supreme Court also held, at paragraph 24, that the phrase “any matter of business relating to the government” must be “interpreted broadly. A matter of business relates to the government if it depends on government action or could be facilitated by government, given its mandate. Thus, s. 121(1)(d) captures promises to exercise influence to change or expand government programs.”

The Court indicated that section 121(1)(d)

criminalizes the selling of influence in connection with any matter of business relating to the government. The accused does not need to actually have influence with the government, endeavour to exercise influence, or succeed in influencing government to be found guilty of this offence. Indeed, the text of s. 121(1)(d) explicitly targets everyone “having or pretending to have influence with the government.” The offence is complete once the accused demands a benefit in exchange for a promise to exercise influence in connection with a matter of business that relates to government.

The Supreme Court concluded that the accused’s

promised assistance was in connection with a matter of business relating to the government. . . . By demanding a benefit in exchange for his promise to exercise his influence with the government to H2O’s advantage, Mr. Carson undermined the appearance of government integrity. This is exactly the type of conduct s. 121(1)(d)(i) is intended to prohibit.

FIRST-DEGREE MURDER DURING A FORCIBLE CONFINEMENT:

Section 231(5)(e) of the *Criminal Code* indicates that if the death of a person is caused during the commission of the offence of forcible confinement, the murder is first-degree murder:

Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit [either kidnapping or forcible confinement].

In *R. v. Magoon*, the accused were charged with the offence of first-degree murder and convicted of the offence of second-degree murder.¹⁶ The offence involved the killing of a young child (Meika) by the child’s father and step-mother. The trial judge had acquitted the accused of first-degree murder on the basis that they had not forcibly confined Meika while inflicting the blows that killed her.

The accused appealed from the second-degree murder conviction, and the Crown appealed from the acquittal on the charge of first-degree murder.

The Alberta Court of Appeal allowed the Crown’s appeal and entered a conviction for first-degree murder. The accused

appealed to the Supreme Court of Canada. The appeal was dismissed.

The Supreme Court of Canada held that the Court of Appeal did not err in finding the accused guilty of first-degree murder. It held that the five elements of the offence as set out in the section 231(5)(e) of the *Criminal Code*, including a forcible confinement, had been established at the trial.

The Supreme Court indicated, at paragraph 61, that pursuant to section 231(5) of the *Criminal Code*, “second degree murder becomes first degree murder where the accused commits the murder in conjunction with one of the other offences listed in that section, such as sexual assault or kidnapping. All of the offences listed in s. 231(5) involve unlawful domination.”

The Supreme Court referred to its decision in *R. v. Harbottle*, and indicated that “for an accused to be convicted of first degree murder under s. 231(5) of the *Criminal Code* the Crown must establish beyond a reasonable doubt that”:

- (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime; (2) the accused was guilty of the murder of the victim; (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim; (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and (5) the crimes of domination and murder were part of the same transaction.

The Supreme Court indicated that at “issue in this case are the first and fifth *Harbottle* elements: Was Meika unlawfully confined, and were the unlawful confinement and murder part of the same transaction? We begin with the first element—unlawful confinement.

FORCIBLE CONFINEMENT:

Section 279(2) of the *Criminal Code* states:

- (2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

The Supreme Court of Canada held, at paragraph 64, that pursuant to section 279(2) of the *Criminal Code*, the Crown must show that:

- (1) the accused confined the victim, and (2) the confinement was unlawful. . . . [U]nlawful confinement occurs if

16. *R. v. Magoon*, 2018 SCC 14, [2018] 361 C.C.C. 1 (Can.).

“for any significant period of time [the victim] was coercively restrained or directed contrary to her wishes, so that she could not move about according to her own inclination and desire” The “restriction need not be to a particular place or involve total physical restraint.” . . . Restraint of the victim through physical acts of violence is sufficient but not necessary to establish unlawful confinement. Confinement can be effected “by fear, intimidation and psychological and other means.”

Regarding children, the Supreme Court of Canada indicated that “a finding of confinement does not require evidence of a child being physically bound or locked up; it can just as easily result from evidence of controlling conduct.”

The Supreme Court of Canada concluded that there was “no doubt that Meika was confined on Sunday. She was coercively restrained and directed contrary to her wishes. And the confinement was clearly unlawful. The acts of ‘discipline’ were grossly disproportionate, cruel, degrading, deliberately harmful, and far exceeded any acceptable form of parenting.”

PART OF THE SAME TRANSACTION?

The Supreme Court concluded that “the unlawful confinement and murder were part of the same transaction”:

The course of unlawful confinement leading up to Meika’s death was . . . the “continuing illegal domination” of Meika, representing an “exploitation of the position of power created by the underlying crime.” . . . And the unlawful confinement persisted right up to the moment Meika lost consciousness.

CONCLUSION—MAGOON:

The Supreme Court concluded “that Ms. Magoon and Mr. Jordan unlawfully confined Meika, and the unlawful confinement and murder were two distinct criminal acts that formed part of a single transaction. The Court of Appeal of Alberta did not err in substituting verdicts of guilty for first degree murder.”

FAILING TO PROVIDE THE NECESSITIES OF LIFE:

Section 215 of the *Criminal Code* makes it an offence for a parent to fail to provide “the necessities of life” to a “person under [their] charge.”

In *R. v. Stephan*, the accused were convicted of the offence of failing to provide the necessities of life to their child.¹⁷ Their one-year-old son died when the accused parents did not take him to a doctor but chose to treat him with homeopathic remedies. The parents were charged and convicted with failing to provide the necessities of life.

An appeal to the Alberta Court of Appeal by the accused was dismissed (Justice O’Ferrall dissenting). The accused

appealed to the Supreme Court of Canada. In a brief oral judgment, the Supreme Court allowed the appeal, stating: “[T]he learned trial judge conflated the *actus reus* and *mens rea* of the offence and did not sufficiently explain the concept of marked departure in a way that the jury could understand and apply it. Accordingly, we . . . quash the conviction and order a new trial.”¹⁸

FAILING TO REMAIN AT THE SCENE OF AN ACCIDENT:

In *R. v. Seipp*, the accused was convicted of the offence of failing to stop at the scene of an accident, contrary to section 252(1) of the *Criminal Code*.¹⁹ His appeal to the British Columbia Court of Appeal was dismissed.

He appealed to the Supreme Court of Canada. That appeal was dismissed. The Supreme Court of Canada considered the appeal on the issue of whether the necessary intent had been proven at the trial. In a brief oral judgment, the Court stated:

The evidence on which Mr. Seipp relies is that he fled the scene to avoid criminal liability for possession of a stolen vehicle. This is not evidence to the contrary. Rather, it is evidence that Mr. Seipp intended to avoid criminal or civil liability from his care, charge, or control of the vehicle involved in the accident. Such an intent falls within the ambit of the *mens rea* established by the expression “intent to escape civil or criminal liability” in s. 252(1).

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

SECTIONS 10(B) AND 24(2):

Section 10(b) of the *Charter* guarantees every arrested or detained person in Canada the right to contact counsel “without delay.” Section 24(2) of the *Charter* allows a trial judge to exclude evidence if the evidence was obtained in violation of the *Charter*.

In *R. v. G.T.D.*, the accused was convicted of the offence of sexual assault.²⁰ His appeal to the Court of Appeal of Alberta was dismissed. He appealed to the Supreme Court of Canada on the issue of whether evidence led at the trial should have been excluded based upon his right to contact counsel having been infringed.

The appeal was allowed. In a brief oral judgment, the Supreme Court of Canada indicated that the accused’s right to contact counsel was infringed and that the evidence obtained should be excluded:

The right to counsel under s. 10 (b) of the *Charter* obliges police to “‘hold off’ from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel” (*R. v.*

17. *R. v. Stephan*, 2018 SCC 21, [2018] 423 D.L.R. 52 (Can.).

18. In his dissenting reasons in the Alberta Court of Appeal, Justice O’Ferrall held that the trial judge had failed to properly instruct the jury “with respect to: (1) what a failure would have consisted of for the purpose of the second element of the *actus reus*, and (2) the evidence it should have considered in assessing whether there

had been a failure” and “erred in law in articulating the second element of the *actus reus* of the offence of failing to provide the necessities of life.” [2017] ABCA 380 (Can. Alta. C.A.).

19. *R. v. Seipp*, 2018 SCC 1, [2018] 362 C.C.C. 2 (Can.).

20. *R. v. G.T.D.*, 2018 SCC 7, [2018] 359 C.C.C. 340 (Can.).

Prosper, [1994] 3 S.C.R. 236, at p. 269). The first issue in this appeal is whether the question “Do you wish to say anything?,” asked at the conclusion of the standard caution . . . after G.T.D. had already invoked his right to counsel, violated this duty to “hold off.” We are all of the view that it did, because it elicited a statement from G.T.D.²¹

SENTENCING

Refusing to Comply with a Breathalyzer Demand After Causing an Accident Resulting in Death and the Effect of “Collateral Consequences” and Mistake of Law on Sentencing:

In *R. v. Suter*, the accused drove his vehicle onto a restaurant patio, killing a young child. The circumstances were described by the Supreme Court of Canada in the following manner:

While the vehicle was stopped in that space, Mrs. Suter turned to her husband and exclaimed “Maybe we should just get a divorce.” At about the same moment, she realized that the vehicle was inching forward, and she yelled at her husband to stop. Unfortunately, Mr. Suter’s foot had come off the brake pedal and instead of hitting the brake, he pressed down on the gas pedal. The vehicle accelerated through the glass partition and within a second or two, it slammed into the restaurant wall.²²

After the collision, the accused was pulled from his vehicle and beaten by people at the scene. Subsequently, he was abducted by a group of vigilantes who used a set of pruning shears to cut off his thumb.

When the accused was arrested, the police made a demand for samples of his breath to be provided for alcohol content analysis. He spoke to counsel and refused to comply with the demand. He subsequently was charged with and pleaded guilty to the offence of refusing to provide a breath sample knowing that he caused an accident resulting in a death, contrary to section 255(3.2) of the *Criminal Code*. An expert report filed at the sentence hearing indicated that the accused “would not have blown ‘over 80’ [the lawful limit in Canada] had he provided the police with a breath sample.” The sentencing judge described the offence as an “accident caused by a non-impaired driving error.”

The sentencing judge imposed a period of four months of imprisonment and a thirty-month driving prohibition. The Crown appealed.

The Court of Appeal of Alberta allowed the Crown’s appeal and increased the period of imprisonment imposed to a period

of twenty-six months. The accused was granted leave to appeal by the Supreme Court of Canada.

The appeal was allowed. The Supreme Court concluded that the four-month period of imprisonment imposed by the sentencing judge was “manifestly inadequate.” However, it also held that the sentence imposed by the Court of Appeal was excessive. The Supreme Court reduced that sentence imposed to time served (approximately ten-and-one-half months), but upheld the driving prohibition.

The Supreme Court held that the Alberta Court of Appeal

improperly recast the accident as one caused by health and alcohol problems, anger, and distraction. It reweighed the evidence and looked to external factors that had no bearing on the gravity of the offence for which Mr. Suter was charged, nor on Mr. Suter’s level of moral blameworthiness. In doing so, the court effectively punished Mr. Suter for a careless driving or dangerous driving causing death offence for which he was neither tried nor convicted. This was an error in principle that . . . resulted in the imposition of an unfit sentence.

COLLATERAL CONSEQUENCES:

The Supreme Court indicated that there “is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself.” The Supreme Court described a collateral consequence as “any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.” The Supreme Court concluded that the sentencing judge “correctly” considered “the vigilante violence experienced by Mr. Suter could be considered—to a limited extent—when crafting an appropriate sentence.”

The Supreme Court held that collateral consequences “cannot be used to reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender.”

MISTAKE OF LAW:

The Supreme Court indicated that though a mistake of law

is not a defence to a criminal charge . . . mistake of law can nevertheless be used as a mitigating factor in sentencing . . . This is because offenders who honestly but mistakenly believe in the lawfulness of their actions are less morally blameworthy than offenders who—in committing the same offence—are unsure about the lawfulness of their actions, or know that their actions are unlawful.

21. In *R. v. Ippak*, 2018 NUCA 3, [2018] Nu. J. No. 18, it was suggested that *G.T.D.* stands for the proposition that proof of “a systemic and institutional pattern of *Charter* violations by a police service” will make the breach more likely to result in exclusion of evidence:

The Supreme Court of Canada’s recent decision in *R. v. GTD*, 2018 SCC 7, allowing the accused’s appeal on the basis of the dissenting reasons of Veldhuis JA of this Court in *R. v. GTD*,

2017 ABCA 274 [GTD], reiterates the seriousness of breaches where the evidence lead at trial establishes a systemic and institutional pattern of *Charter* violations by a police service. That matter concerned s 10(b) breaches by police whose standard caution card asked all arrestees whether they wished to say anything about the offence being charged after the arrestee was advised and asserted his or her right to counsel, triggering the state’s obligation to hold-off eliciting evidence.

22. *R. v. Suter*, 2018 SCC 34, [2018] 363 C.C.C. 1 (Can.).

REFUSAL CHARGES AND LACK OF IMPAIRMENT:

The Supreme Court held that although “a finding of non-impairment is a relevant mitigating factor when sentencing an offender for a refusal offence, its mitigating effect must be limited.” The Court indicated that “the seriousness of the offence and the moral blameworthiness of the offender stem primarily from the refusal itself, and not from the offender’s level of impairment.”

AN APPROPRIATE SENTENCE:

The Supreme Court indicated that “the sentencing range for the s. 255(3.2) offence is the same as for impaired driving causing death and driving ‘over 80’ causing death—low penitentiary sentences of 2 or 3 years to more substantial penitentiary sentences of 8 to 10 years, depending on the circumstances.”

After referring to the “attenuating circumstances” present, the Supreme Court concluded that a period of “15 to 18 months’ imprisonment” would have been an appropriate sentence “while not losing sight of the gravity of the [offense]:

But for these attenuating circumstances, I am of the view that a sentence of three to five years in the penitentiary would not have been out of line.

Unlawfully refusing to provide the police with a breath sample after having caused an accident resulting in a death is an extremely serious offence. . . . It carries with it a maximum punishment of life imprisonment—and with good cause. When a person refuses to provide a breath sample in response to a lawful request, this deprives the police, the court, the public at large, and the family of the deceased of the best evidence as to the driver's blood alcohol level and state of impairment. Moreover, it places a barrier in the way of the ongoing efforts and pressing objective of deterring, denouncing, and putting an end to the scourge of impaired driving.

CONCLUSION—SUTER:

Though the Supreme Court concluded that a fit sentence at the time of sentencing would have been one of fifteen to eighteen months of imprisonment, it imposed a sentence of time served because the accused

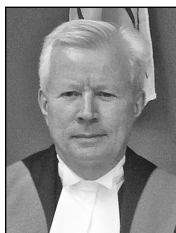
spent almost nine months awaiting this Court's decision . . . to now impose on Mr. Suter what would have been a fit disposition at the time he was sentenced would cause him undue hardship, and serve no useful purpose. In short, it would not be in the interests of justice to reincarcerate Mr. Suter at this time.

CONCLUSION

As we have seen, the Supreme Court of Canada has considered a number of important issues in the criminal law context in 2018, including issues of evidence, procedure, and sentencing.

Interestingly, we have also seen the Supreme Court issue brief oral judgments in cases which appeared to raise important questions of law. These brief judgments can be tantalizingly difficult to apply. It is particularly interesting that these judgments are primarily rendered in appeals that have come before the Supreme Court as of right.

Finally, which of these judgments will have the greatest long-term impact? I would choose the Supreme Court's decision in *Gubbins* because the Court's decision in this case settles a long-standing disclosure issue in Canada. As the Supreme Court noted in *Gubbins*: "Canadian courts have differed as to which disclosure regime applies to breathalyzer maintenance records." Now, this issue is settled.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judge. Judge Gorman's work has been widely published. Suggestions to Judge Gorman may be sent to provincial.court.nl.ca.

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Answers to Crossword

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