I. Introduction

This article outlines the criminal cases decided by the Supreme Court of Canada and Manitoba Court of Appeal released between March 2021 and June 2023. The purpose in memorializing this jurisprudence is to provide a concise reference for criminal law practitioners and law students. We hope to provide the reader with an accessible update that outlines the topography and shape of the most dynamic and fast-moving area of public law.

Throughout this period, social movements and events, both in the Canadian context and abroad, have been plentiful. As the pillars of social justice meant to be reflexive to the currents of contemporary society, the courts play the important role of distilling and responding to shifts in modern normative behaviour. This article seeks to explore and comment the most important and impactful cases that have been decided by the Manitoba Court of Appeal (MBCA) and the Supreme Court of Canada (SCC) during this period. To do so, we examine the jurisprudence of the MBCA and SCC from the period of March 2021 to June 2023 and comment on the significant developments within the criminal law. To enhance the written content included, similar to the previous editions of the Robsoncrim "Year in Review" articles, we have attached an appendix comprised of statistical infographics highlighting the quantitative breakdown of the MBCA and SCC decisions between March 2021 and June 2023.

Compared to 2020, the SCC decisions between March 2021 and June 2023 have been significantly longer with a multitude of dissents providing an array of different perspectives.[1] Of particular note is the case of *R v J.J.* 2022 SCC 28, which contains a daunting length of 263 pages, 491 paragraphs, and 3 partial dissents.[2] The comprehensive and thorough nature of such lengthy judgments may provide an effective guide to lower courts, but their sacrifice of brevity and clarity do little to educate the public. The law can be complex but the role of courts must be to communicate clearly. Protracted cases continue to perpetuate the stigma surrounding the law that it is an inaccessible and convoluted sphere of knowledge beyond the grasp of the layperson.

II. Methodology

Similar to previous Robsoncrim Year in Review articles, both quantitative and qualitative analyses were utilized to illustrate the trends within the jurisprudence.[3] Cases from the dates of March 2021 until June 2023 were drawn from three sources: *CanlII*, a publicly accessible legal database from the Canadian Legal Information Institute; *Lexum*, the Supreme Court of Canada's own website; and *WestlawNext*, a subscription-based database from Thomson Reuters Canada. Cases were analyzed and briefed with their themes, results, and rulings noted. In the prescribed period there were a total of 66 criminal law cases heard by the SCC and 115 heard by the MBCA.

[1] See e.g. *R v C.P.*, 2021 SCC 19; *R v G.F.*, 2021 SCC 20; *R v Chouhan*, 2021 SCC 26; *R v Khill*, 2021 SCC 37; *R v Parranto*, 2021 SCC 46.
[2] *R v J.J.*, 2022 SCC 28 [*J.J.*].
[3] See David Ireland, "Year in Review" (2021) 44:4 Man LJ 208; Brayden McDonald & Kathleen Kerr-Donohue, "Robson Crim Year in Review" (2020) 43:4 Man LJ 245

Cases were organized into one of seven categories - *Charter*, Defences, Evidence, Search and Seizure (as a specific subset of the *Charter*), Sentencing, Trial Procedure, and Miscellaneous. While many cases could fall into more than one category, our discretion was utilized in such circumstances to organize the case into the category we felt represented the gravamen of the case. As such, each case is arranged into the one category found to be most fitting for its content, even if that case had multiple appellate categories. In consideration of this methodology, it should be noted that some degree of subjectivity is implicit in the categorization process regardless of our best efforts to ensure its objectivity. It is also important to note that some of these categories contained a significant number of cases. Where this occurred, only the most relevant and impactful rulings were the included to ensure brevity.

III. Statistics: SCC

A. Court of Origin

Overall, 66 criminal law appeals were heard from the SCC between March 2021 and June 2023. The majority came from Ontario (n=19/66), British Columbia (n= 14/66), Alberta (n=13/66) and Quebec (n=11/66). Other provinces provided a substantially lower amount such as Saskatchewan (n=3/66), Newfoundland and Labrador (n=2/66), Nova Scotia (n=1/66) and Manitoba (n=1/66). There was one case from Martial Appeal Court of Canada (n=1/66). There were no cases coming from New Brunswick, Prince Edward Island, Northwest Territories, Yukon, Nunavut, or the Federal Court of Appeal.

B. Appellant versus Respondent Rates

Defence counsel appeared as appellant in 53% of cases (n=35/66). The Crown appeared as appellant in 47% of cases (n=31/66).

C. Overall Success Rates

Defence counsel succeeded in 24% of appeals (n=15/66) while the Crown was successful in 76% of appeals (n=50/66). One appeal was categorized as a mixed result (n=1/66).

D. Appellant Categories

Charter (n=22/66) and Evidence (n=17/66) were the most common grounds of appeal with the former accounting for 33% of appeals and the latter 26%. Miscellaneous formed 20% of the appeals, (n=13/66), Search and Seizure 8% (n=5/66), Trial Procedure 6% (n=4/66), Defences 4% (n=3/66) and Sentencing only 3% (n=2/66).

IV. Case Analysis: SCC

A. Charter

A significant portion of *Charter* related appeals declared various *Criminal Code* provisions unconstitutional and dealt with numerous contentious topics within the realm of criminal law.

One contentious topic that attracted much debate amongst both the courts and academics alike was the constitutionality of section 33.1 of the *Criminal Code*. Originally enacted following the controversial decision of the SCC in *R v Daviault,* s. 33.1 rejected self-induced intoxication as a defence for any general intent offence that involved interference with, or threats of

interference to, the bodily integrity of another person.[4] Importantly, this absolute rejection also extended to self-induced intoxication akin to automatism, essentially barring an accused from utilizing this common law defence. In the case of *R v Brown*, the constitutionality of S. 33.1 was finally brought to the chopping block as its fate rested before the SCC. The accused in *Brown* took a potent dose of psilocybin that made him lose voluntary control over his actions.[5] He proceeded to break into 2 homes in this manic state and assault a woman with a broom handle, leading to various charges including break and enter and aggravated assault. The accused attempted to argue that he was not guilty on the basis of automatism, but the Crown invoked section 33.1 to preclude self-induced intoxication automatism as a defence to the aggravated assault.[6] At issue before the SCC was whether s. 33.1 violated ss. 7 and 11(d) of the *Charter*. Writing for a unanimous court, Justice Kasirer began with the s. 7 analysis and explained that s. 33.1 can hold individuals liable even where their intoxication carries no objective foreseeability of harm and when they did not intend the offence.[7] He explained that a trier of fact cannot simply infer a marked departure from the standard of care just because the accused was intoxicated. However, s. 33.1 essentially does this by insisting that a marked departure has occurred whenever a violent act has transpired while an individual is in an extreme state of voluntary intoxication akin to automatism. This has the effect of holding an accused liable where a loss of control and the risk of harm was unforeseeable and where the accused's conduct did not actually constitute a marked departure from the standard of a reasonable person. On this basis, the court found that s. 33.1 infringed upon the s. 7 principle of fundamental justice that penal liability requires proof of fault reflecting the offence and punishment faced by the accused.[8] In essence, s. 33.1 was able to elicit a conviction without the constitutionally required *mens rea* standard and operate as a transformative force morphing general intent offences into absolute liability offences when they are committed during extreme intoxication. Additionally, the court found that by holding an accused criminally responsible irrespective of involuntary conduct, s. 33.1 also breached s. 7 as involuntariness negates the *actus reus* and voluntariness being required for the conviction of a crime is a principle of fundamental justice.[9]

Turning to the s. 11(d) *Charter* claim, the court found that the presumption of innocence was infringed by s. 33.1. By removing the defence that the accused lacked the general intent or voluntariness to commit the violent offence, section 33.1 effectively substitutes the fault and voluntariness requirements of the violent offence with the fault and voluntariness of self-induced intoxication.[10] This was held to be an improper substitution allowing for a conviction to occur via s. 33.1 even when a reasonable doubt remains as to the accused's voluntariness and fault in respect to the violent general intent offence. Consequently, it was held that s. 33.1 ran contrary to the presumption of innocence and violated section 11(d) of the *Charter*. [11] The court then began a s.1 *Oakes* analysis to determine whether the violations of ss. 7 and 11(d) could be justified.

[4] See e.g. *R v Daviault*, [1994] 3 SCR. 63, 118 DLR (4th) 469 [*Daviault*]; *Criminal Code*, RSC 1985, c C-46, s 33.1.
[5] *R v Brown*, 2022 SCC 18 at paras 15-16 [*Brown*].
[6] *Ibid* at paras 20-21.
[7] *Ibid* at paras 92-93.
[8] *Ibid*.
[9] *Ibid* at paras 95-96.
[10] *Ibid* at para 103.
[11] *Ibid* at para 105.

Concluding that less minimally impairing alternatives were available to reach parliament's objectives and that the deleterious effects of s. 33.1 outweighed its salutary effects, s. 33.1 was declared of no force and effect. This ruling allows for self-induced intoxication akin to automatism, for the first time since 1995, to operate as a defence to general intent violent offences. As such, the accused was acquitted of breaking and entering and committing aggravating assault because of self-induced intoxication akin to automatism.[12]

Another case in which the constitutionality of a long-standing Criminal Code provision hung in the balance was *R v Bissonette*. In this case Chief Justice Wagner, writing for a unanimous court, found that s. 754.51, which allows for judges to impose consecutive 25-year parole ineligibility periods for multiple counts of murder, breached section 12 of the *Charter* and declared the provision of no force and effect.[13] The SCC reasoned that section 12 has the following two prongs: (1) The first protects against punishment which is grossly disproportionate in effect in comparison to what would have been appropriate in light of human dignity; and (2) the second protects against punishment which by its nature is intrinsically at odds with human dignity.[14] According to the court, a punishment that opposes human dignity will be grossly disproportionate and contrary to the first prong. In terms of s. 745.51, the SCC held that it only allows for consecutive 25-year sentences to be imposed, setting a minimum of at least 50 years imprisonment for anyone the provision is applied to. Outlining that the average life expectancy of an inmate is 60, the court equated s. 745.51 to a life sentence without a realistic possibility of parole and found this to deprive the offender of the ability to re-enter society and presume that an offender lacks the moral autonomy needed for rehabilitation.[15] According to the court, rehabilitation is tied into human nature as it reflects that humans possess the ability to reform. By disregarding this, s. 745.51 was seen to be degrading and contradictory to human dignity by running in opposition to rehabilitation and the foundations of the administration of justice which are premised upon the respect of all individuals' worth.[16] As such, s. 745.51 was found to breach both prongs of section 12 as the court held that a life sentence without the chance of parole is incompatible with human nature. This strong stance taken by the SCC essentially indicates that sentences which negate the objective of rehabilitation from the outset and provide no realistic possibility of it are at odds with human dignity and breach section 12 of the *Charter*. Interestingly, the SCC made a point to explicitly state that what constitutes cruel and unusual punishment evolves alongside societal standards and changing socio-political realities of contemporary life.[17] Such a statement is consonant with the perception of the constitution as a living tree and signifies that progressive shifts within the societal sphere may impact judicial decision-making in a manner disposed towards a rehabilitative regime.

Forming yet another constitutional challenge, the accused in *R v J.J.* alleged that sections 278.92 to 278.94 (impugned provisions) of the *Criminal Code* infringed upon the right to silence

[12] *Ibid* at para 167.
[13] *R v Bissonette*, 2022 SCC 23 at paras 119, 133-134 [*Bissonette*].
[14] *Ibid* at para 60.
[15] *Ibid* at para 77.
[16] *Ibid* at paras 83-87.
[17] *Ibid* at para 65.

and privilege against self incrimination under ss. 7 and 11(c), the right to a fair trial under ss.7 and 11(d), and the right to make full answer and defence under ss.7 and 11(d) of the *Charter*.[18] These provisions are statutory procedures governing the admissibility of complainants' private records held by an accused person in the context of a sexual assault case.[19] Writing for a six judge majority, Chief Justice Wagner and Justice Moldaver found that s. 11(c) did not apply as the impugned provisions do not compel the accused to testify. They also expressed that the s. 11(d) and s. 7 analyses could be considered together. Their reasoning for this was that s. 11(d) expresses and compliments the procedural principles of fundamental justice under s. 7 that the accused has the right to trial fairness and the right to make a full answer and defence.[20] Addressing the extensive arguments relating to the *Charter* challenges, the majority held that the impugned provisions did not breach ss. 7 or 11(d) of the charter and are constitutional in their entirety as they apply to s. 276 evidence applications and private record applications.[21] Dissenting in part, Justices Brown, Rowe, and Côté, in their own respective reasons found the impugned provisions to be unconstitutional and would have immediately declared them of no force and effect with the exception of the sections relating to the existing s. 276 regime.[22]

Continuing the theme of *Charter* infringing provisions, the amendments to the *Criminal Code* abolishing peremptory challenges were at issue in *R v Chouhan*. These amendments came into effect the day that the accused was poised to begin his jury selection for his first-degree murder trial on September 19, 2019. He then alleged that the abolition of peremptory challenges infringed upon ss. 11(d) and 11(f) of the *Charter* and was therefore unconstitutional.[23] Justices Moldaver, Brown, and Wagner explained that the amendments which abolished these challenges also provided various mechanisms to ensure an independent and impartial jury such as the challenges for cause (s. 638) and stand aside power (s. 633) provisions. In consideration of these securities, they held that these procedures ensure an accused's right to an independent and impartial jury pursuant to s. 11(d) of the *Charter* and that the abolition of peremptory challenges did not infringe this right.[24] In terms of the 11(f) challenge, the accused argued that the abolition of peremptory challenges infringed his right to a jury trial by denying him an impartial and representative jury. Justices Moldaver, Brown and Wagner swiftly dismissed this argument. They held that s. 11(f) offers no specific right to impartiality greater than the one offered in s. 11(d), and in terms of representativeness, that the abolition of peremptory challenges does not affect that aspect of jury selection.[25] Having to deal with the application of the abolition of peremptory challenges as well, they found that the amendments were procedural in nature and that they applied retroactively and therefore immediately to all jury selection processes that began on or after September 19, 2019.[26] In their own judgement Justices Martin, Karakatsanis and Kasirer reached the same disposition but parted ways on how stand asides and challenges for

[18] *J.J.*, *supra* note 2 at para 10.
[19] *Ibid* at para 3.
[20] *Ibid* at para 123.
[21] *Ibid* at paras 191-192.
[22] *Ibid* at paras 320, 438, 491.
[23] *R v Chouhan*, 2021 SCC 26 at para 1 [*Chouhan*].
[24] *Ibid* at para 36.
[25] *Ibid* at para 85.
[26] *Ibid* at paras 100, 102.

cause should be developed.[27] Justice Rowe also concurred but felt compelled to write a separate judgment expanding on the risk of constitutionalizing statutory provisions via jurisprudence.[28] Dissenting in part, Justice Abella agreed with the constitutionality of the abolition but would have found that the amendments were prospective.[29] Lastly, Justice Côté would have struck down the amendments in part, finding them to be unconstitutional.[30] Thus, in an 8-1 split, the court ruled that the abolition of peremptory challenges is constitutional, and in a 7-2 split, that the abolition was a procedural amendment operating retroactively.

Commenting on the intricacies of diversity and racial composition within the jury, Moldaver, Brown and Wagner sternly advanced that the representativeness and impartiality of a jury does not rest on the diversity of that jury. They felt that absolute diversity is unattainable but that abolishing peremptory challenges would augment jury diversity by making it so jurors cannot be simply dismissed based on race.[31] In terms of enhancing diversity further, they spoke on the ability of parliament to craft legislative reform to bolster jury diversity if they so wished.[32] In light of such comments, it will be interesting to see whether parliament responds and opts to increase jury diversity. Perhaps the situation of Colton Boushie, which prompted the peremptory challenge abolishment legislation, another instance of societal outrage levied at racial bias within the institution of the jury will be necessary to spark further change.

While most *Charter* challenges dealt with Criminal Code provisions, the case of *R v CP* concerned the constitutionality of section 37(10) of the *Youth Criminal Justice Act* (*YCJA*). The accused, a youth at the time, had been convicted of sexual assault. At issue before the SCC was the reasonableness of the verdict along with the constitutionality of section 37(10) of the *YCJA* as the accused alleged that it infringed upon sections 7 and 15 of the *Charter*.[33] S. 37(10) deems that, unlike adults, young persons have no automatic right of appeal to the SCC.[34] While eight of the nine judges agreed that the verdict was reasonable, the constitutional question was much more contentious. Justices Abella, Karakatsanis and Martin felt that s. 37(10) was a *prima facie* infringement upon s. 15 of the *Charter* that could not be upheld via s.1 as it drew distinctions based on age and made young people more susceptible to wrongful convictions.[35] Concurring on the issue of verdict reasonableness but disagreeing on the matter of constitutional muster, Justices Wagner, Moldaver, Brown and Rowe held that s. 37(10) does not perpetuate disadvantage but balances the interests of young persons through ensuring prompt resolution to their legal proceedings and appellate review.[36] In addition, they added that s. 37(10) applies to the Crown and provides a safeguard to young people from Crown appeals as of right to the SCC.[37] Finding no breach of s. 7 of the *Charter* either, they upheld s. 37(10) as constitutional.

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[27] *Ibid* at para 105.
[28] *Ibid* at paras 129, 138.
[29] *Ibid* at paras 200, 208.
[30] *Ibid* at para 293.
[31] *Ibid* at paras 38-40, 43.
[32] *Ibid* at para 82.
[33] *R v C.P.*, 2021 SCC 19 at para 2 [*C.P.*].
[34] *Youth Criminal Justice Act*, SC 2002, c 1, s 37(10).
[35] *C.P.*, *supra* note 33 at paras 58, 87.
[36] *Ibid* at para 155.
[37] *Ibid* at para 163.

Agreeing in his own reasons, Justice Kasirer found that s. 15 of the *Charter* was breached by s. 37(10) but could be upheld through s. 1 of the *Charter*.[38] In dissent, Justice Côté felt the constitutional issue was moot after finding that the verdict was unreasonable.[39] The implications of this constitutional ruling, especially by Justices Wagner, Moldaver, Brown and Rowe, reveal a *parens patriae* mindset purporting that brevity and promptness in judicial proceedings represents the best interests of Canadian youth in light of their vulnerabilities.

Moving away from the constitutionality of provisions, the SCC also dealt with the section 10(b) *Charter* right to counsel and confirmed an instance whereupon this right renews. *In R v Dussault*, at issue was whether the accused had a renewed right to consult counsel and if the police, by failing to allow him to do so, breached his section 10(b) *Charter* right. Throughout the interrogation, the police seemingly made the accused doubt the advice given to him by the lawyer he talked to when he initially exercised his right to counsel. Eventually, the accused went on to make an incriminating statement and sought to exclude it.[40] The SCC pointed to the categories of changed circumstances which warrant a renewed right to counsel as explained in *R v Sinclair*. Specifically, the third category, which imposes a renewed right to counsel when there is reason to believe that the information provided to an accused was deficient. Expanding on *Sinclair*, the court explained that this third category is engaged where police undermine the legal advice given to a detainee and it is objectively observable that this has occurred.[41] They noted that police conduct causing the detainee to doubt the legal correctness of the advice they received or the trustworthiness of the lawyer who provided it, are instances where police behaviour undermines the legal advice given to the detainee.[42] In essence, the court held that a detainee gains a renewed right to consult counsel when police conduct, whether intentional or not, undermines the legal advice given to the detainee and it is objectively observable that this has happened. Finding that the police caused the accused to doubt his lawyer, the court concluded that the police ought to have given him the opportunity to re-consult and failed to do so. A section 10(b) breach of the accused's rights was found and the incriminating statement was excluded.[43] In another 10(b) related case, the majority of the court in *R v Lafrance*, ruled that the purpose of 10(b) is to "meaningfully redress the imbalance of power between the state and the detainee" and that this can only be done by ensuring that detainees receive legal advice accounting for the particular situation they face that is given to them in a manner they understand.[44] The effects of both these rulings upon 10(b) seemingly bolster the right to counsel for a detainee while also signalling to police that they must remain cognizant and alert to the dynamic situations of an arrest and interrogation to ensure they realize when the right to counsel is renewed.

A fascinating issue pertaining to section 35(1) of the *Constitution Act*, 1982, was brought before the SCC in the case of *R v Desautel*. Namely, whether Aboriginal peoples located outside

[38] *Ibid* at paras 166, 216.
[39] *Ibid* at para 295.
[40] *R v Dussault*, 2022 SCC 16 at paras 15-17 [*Dussault*]. See *R v Sinclair*, 2010 SCC 35 at para 52 [*Sinclair*].
[41] *Ibid* at para 41.
[42] *Ibid* at para 45.
[43] *Ibid* at paras 55-56.
[44] *Ibid* at para 77.

of Canada can assert an Aboriginal right protected by section 35(1). To fall within the scope of protection of s. 35(1), an Aboriginal group must be considered an "Aboriginal people of Canada" as per the wording of that section.[45] Embarking on a purposive interpretation of s. 35(1) to ascertain what constitutes an "Aboriginal people of Canada", the majority outlined that the purposes of s. 35(1) are to recognize prior occupation of Canada by Aboriginal groups and to reconcile their modern existence with Crown sovereignty.[46] They found it implicit within these purposes that "Aboriginal people of Canada", as mentioned in s. 35(1), means the modern day successors of the Aboriginal groups that occupied Canada during the time of European contact. Following this logic, the majority advanced that this can include Aboriginal groups that now reside outside of Canada if they are modern successors of Aboriginal groups that occupied Canada during European contact.[47] Thus, an Aboriginal group whose members are not Canadian citizens nor residents are privy to the constitutional rights enshrined in section 35(1) if that group meets this successor requirement. A broader theme to be drawn from this ruling is the idea that, according to the court's logic, reconciliation expands beyond the Canadian sphere and extends globally. One must wonder whether the extension of certain Aboriginal rights to non-Canadian citizens or residents in light of *Desautel* can be deemed a watershed opening up the potential for the extension of other rights to non-citizens and individuals abroad.

Although there were multiple SCC cases concerning *R v Jordan* and s. 11(b) of the *Charter*, of particular importance was the case of *R v J.F.*[48] In *J.F.*, the SCC had to answer novel questions relating to retrials and unreasonable delay. After a retrial was ordered for the accused, he attempted to file a s. 11(b) motion for a stay of proceedings alleging that his right to a trial in a reasonable time had been infringed upon based on the delay in his first trial.[49] The questions for the SCC was whether an accused can file a s. 11(b) motion based on delay in their first trial after a new trial has already been ordered and whether the presumptive *Jordan* ceilings apply to retrials.[50] Writing for an eight judge majority, Chief Justice Wagner held that when a new trial is ordered, the calculation of delay restarts at zero.[51] In terms of bringing a s. 11(b) motion at re-trial for delay in the first trial, it was ruled that an accused cannot do this as it was deemed to be inefficient and problematic in light of the proactive duties set out in *Jordan*.[52] Concerning the issue of the presumptive *Jordan* ceilings, Chief Justice Wagner held that the ceilings remain the same in a retrial as they would in a normal trial.[53] However, he also added that if the reasonableness of delay in a retrial is being assessed, but the delay falls below the presumptive ceiling, then two factors should be considered. First, that a retrial should be prioritized in scheduling hearings and, second, that retrials should generally take less time than a first trial.[54]

[45] *R v Desautel*, 2021 SCC 17 at para 18 [*Desautel*].
[46] *Ibid* at para 31.
[47] *Ibid*.
[48] See *R v Jordan*, 2016 SCC 27.
[49] *R v J.F.*, 2022 SCC 17 at para 11 [*J.F.*].
[50] *Ibid* at para 21.
[51] *Ibid* at para 53.
[52] *Ibid*.
[53] *Ibid* at paras 65-66.
[54] *Ibid* at paras 70-71.

Adding further to the jurisprudence surrounding *Jordan* and 11(b), the SCC in *R v Safdar* affirmed its previous decision in *R v K.G.K.* that the presumptive ceilings set out in Jordan only apply "to the end of the evidence and argument at trial, and no further."[55] At trial, following the evidence and arguments on the merits of the allegation, the accused brought a s. 11(b) *Charter* motion for unreasonable delay and the judge granted it finding a net delay of 32 months. [56] The Crown appealed the stay order and contended that the trial judge's inclusion of the period spanning from the end of the evidence and argument until the release of the stay decision was an error. The Ontario Court of Appeal (ONCA) referred to the decision of the SCC in *K.G.K* and found that the trial judge erred by including the period between the end of the evidence and argument to the decision on the stay motion in the delay calculation.[57] On these grounds, the ONCA allowed the appeal and set aside the stay. In response, one of the accused, Mr. Sadfar, appealed to the SCC.[58] The SCC unanimously upheld its previous ruling in *K.G.K* that the presumptive ceilings set out in Jordan only run up to the conclusion of evidence and argument at trial and do not continue after. As such, they dismissed the appeal.[59]

Also worth mentioning is the impactful case of *R v Albashir*. *Albashir* is an extremely important decision rendered by the SCC concerning suspended declarations of invalidity and their temporal nature. At issue was whether the suspended declaration of invalidity advanced by the SCC in their *Canada (Attorney General) v. Bedford* decision operated prospectively or retroactively.[60] The majority explained that declarations of invalidity are presumptively retroactive but that this can be rebutted by necessary implication where the purpose of the suspension requires the declaration to operate purely in a prospective manner.[61] They reasoned that the purpose of a suspended declaration is to protect an important public interest that would be harmed by an immediate declaration. If retroactive application would hinder this purpose, then the majority maintained that the suspended declaration must operate prospectively.[62] Applying this logic, the majority concluded that the suspension in *Bedford* required a prospective application in consideration of its purpose which was related to concerns over leaving sex work unregulated. If the declaration was retroactive, it would have rendered offenders unable to be charged after the suspension ended for offences committed during the period of the suspension and would have undermined the protection of vulnerable sex workers, whereas enhancing their protection was one of the main purposes of the *Bedford* decision. [63] On these grounds, the majority found it appropriate to declare that the *Bedford* suspension operated prospectively. Taking a different stance, the dissent felt that the strong presumption in favour of retroactive

[55] *R v K.G.K*, 2020 SCC 7 at para 3 [*K.G.K.*]; *R v Safdar*, 2022 SCC 21 at para 1-2 *[Safdar*].
[56] *Safdar*, *supra* note 55 at para 1.
[57] *Ibid* at paras 20, 27.
[58] *Ibid* at para 71.
[59] *Ibid* at para 1-2.
[60] *R v Albashir*, 2021 SCC 48 at para 25 [*Albashir*]; *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].
[61] *Albashir*, *supra* note 60 at paras 44-46.
[62] *Ibid* at para 52.
[63] *Ibid* at para 55.

declarations made it so only an explicit and clear statement that a declaration is prospective will suffice.[64]

In *R v Sharma* the court dealt with the application of conditional sentences, and whether s.742.1(e)(ii) violates an accused ss.7 and 15 *Charter* right. Sharma arrived in Toronto with 1.97 kilograms of cocaine.[65] She confessed to the RCMP that her partner promised her $20,000, and at the time she was two months behind on rent. Ms. Sharma is of Ojibwa ancestry and a member of Saugeen First Nation. She plead guilty to importing cocaine. Appropriately, the court requested a *Gladue* sentencing report. Within this report it was disclosed that Sharma's grandmother was a residential school survival, her mother had spent time in foster care, and that Sharma had been sexually assaulted and had never completed her schooling due to financial concerns.[66] Sharma sought out to receive a conditional sentence which aligns with s. 718.2(e) of the *Criminal Code,* a provision that informs judges to consider alternatives to imprisonment as a means to reduce the overrepresentation of Indigenous offenders in prison.[67] At trial, Sharma was denied a conditional sentence because she pled guilty to an offence which prevents this type of sentence, this is listed under the conditional sentencing regime of s.742.1 of the *Criminal Code*. The key issue here is whether s. 742.1(b) and (c) is unconstitutional as it prevents an accused from receiving a conditional sentence, which could violate their s. 7 and s. 15 *Charter* right. At trial, the sentencing judge confirmed that this *Criminal Code* provision does not violate her *Charter* rights and imposed an 18-month prison sentence.[68] At the appellate level, Sharma appealed her sentence and the dismissal of her s. 15 challenge to s. 742.1(c), the court also allowed her to challenge the constitutionality of s. 742.1(e)(ii). The appellate judge found that this provision does discriminate against Indigenous offenders, and it infringed both her s. 7 and 15 *Charter* right.[69] The Crown appealed, and at the Supreme Court Chief Justice Brown and Rowe, who wrote for the majority, allowed the appeal. The majority stated that while the over-incarceration of Indigenous offenders is undeniable, Sharma was not successful at demonstrating that there is a disproportionate impact of this provision against Indigenous offenders, her s. 15 *Charter* infringement was dismissed.[70] The two-step test used for assessing a s. 15 claim require that the claimant demonstrate that the impugned law firstly creates a distinction based on enumerated or analogous grounds on its face or in its impact, and imposes a burden or denies a benefit which reinforces the disadvantage.[71] The majority confirmed that Sharma was unable to satisfy her burden at the first step of this test. [72] Regarding the s. 7 *Charter* claim, the test applied is whether the impugned provision limits Sharma's liberty interests in a manner that accords with the principles of fundamental justice.[73] Sharma argued that the provision was arbitrary and overbroad, these two concepts consider the connection of the purpose of the law and its

[64] *Ibid* at para 91.
[65] *R v Sharma*, 2022 SCC 39 at para 2 [*Sharma*].
[66] *Ibid* at paras 5-6.
[67] *Ibid* at paras 8.
[68] *Ibid* at para 15-19.
[69] *Ibid* at para 21.
[70] *Ibid* at para 83.
[71] *Ibid* at para 27.
[72] *Ibid* at para 36.
[73] *Ibid* at para 85.

limitations on ones life, liberty and security of the person.[74] Ultimately, the majority disagreed and found that the impugned provision was neither arbitrary or overbroad. The majority found that s.742.1(e)(ii) maximum sentence aligns with its objective of enhancing consistency in conditional sentencing by ensuring imprisonment is the typical punishment for serious offences.[75] Nevertheless, the systemic oppression experienced by Indigenous women is a critical issue that is intersected within the circumstances of this case.

R v Hills is a constitutional challenge to the application of mandatory minimum sentences where the accused was successful in determining that s. 244.2 of the *Criminal Code* constitutes a cruel and unusual punishment, violating s. 12 of the *Charter*. The companion appeal of this case, *R v Hilbach,* along with *Hills,* have provided the court with an opportunity to clarify legal principles and provide a modified framework which will determine the constitutionality of a mandatory minimum sentencing provisions.[76] In *Hills,* the accused consumed a large amount of prescription medication and alcohol. While intoxicated, he left his home with a baseball bat and a loaded rifle. Hills swung his bat and fired a shot at a passing car, the driver called 9-1-1. Before the police arrived, Hills began smashing the windows of an unoccupied car, then proceeded towards a nearby home where he fired at a window, which went into the living room and struck the drywall. The family that occupied the home hit the panic button on their security system. The father heard Hills trying to break through the front door, after arming himself with an axe the family proceeded to call 9-1-1 and hide in the basement. By the time the officers arrived, several rounds had been shot into the walls and windows of the home.[77] Hills pled guilty to four offences, including discharging a firearm into a house contrary to s. 244.2(1)(a) of the Criminal Code.[78] The offence carried a four-year mandatory minimum sentence. Hills challenged this sentence under s. 12 of the *Charter* through example of a hypothetical scenario where a young person intentionally discharges an air-powered pistol at a residence which is incapable of perforating the walls of a home. The trial judge agreed, finding that this would be a cruel and unusual punishment. The judge sentenced Hills to three and a half years in prison. The Crown appealed both the sentence, and the finding that his *Charter* right had been infringed. Ultimately, the Court of Appeal restored the mandatory minimum sentence and sentenced Hills to four years in prison.[79] At the Supreme Court, majority ruled that the four-year mandatory minimum is grossly disproportionate through their s. 12 analysis.[80] As seen in the *Bissonette* decision, there is two prongs when determining a cruel and unusual punishment. The first prong deals with the severity of a punishment, while the second prong deals with punishment that is "intrinsically incompatible with human dignity".[81] Mandatory minimums are typically analyzed under the first prong, however, the SCC recognized in this decision that the s. 12 framework lacks applicability and cohesion. A critical takeaway from this decision is that the s.12 framework was modified to

[74] *Ibid* at para 86.
[75] *Ibid* at para 111.
[76] *R v Hills,* 2023 SCC 2 at para 1 [*Hills*].
[77] *Ibid* at paras 16-19.
[78] *Ibid* at para 20.
[79] *Ibid* at paras 24-26.
[80] *Ibid* at para 169.
[81] *Bissonette, Supra* note 13, para 60.

aid the court when challenged with the constitutionality of mandatory minimum sentences under section 12 of the *Charter*. First, a court must determine a fit and proportionate sentence for the offence which aligns with the principles of sentencing from the *Code.* Second, the court must then decide if the mandatory sentence is grossly disproportionate to the fit and proportionate sentence.[82] Through this modified framework, the majority found that the language of "firearm" in the *Code* is inclusive to air-powered rifles, paintball guns, and other objects that may be classified as a "firearm" but is not able to perforate the wall of a home. The majority found that, "it would shock the conscience of Canadians to learn that an offender can receive four years of imprisonment for an activity that possesses more or less the same risk to the public as throwing a stone through the window of a residential home".[83]

The final *Charter* case worth mentioning is *R v Tessier,* which dealt with the critical issue of an accused's s.7 *Charter* right, as well as the voluntariness of a statement when there is a lack of proper police caution. The victim was found dead in a ditch by a rural road near Carstairs, Alberta.[84] Tessier was thought to be the last person to see the victim alive, he was requested by the police to come for an interview. Sargeant White, an experienced homicide officer, did not caution the accused that he had the right to remain silent, or that his statement could be used as evidence, or the right to retain and instruct counsel because he claimed Tessier was not a suspect at the time.[85] During a second interview, the accused revealed having retrieved a firearm from a shooting range, following this the police went to his apartment to confirm that the firearm was still in his closet, the police found it was not.[86] Tessier asked White if he should call a lawyer, this is when the accused was read his rights and cautioned.[87] Tessier did not confess, but he was charged with first degree murder in 2015 when his DNA matched a cigarette found near the scene.[88] His answers to police questions included comments that the Crown sought to introduce at trial, however, since the police never provided Tessier with proper police caution, his statements may be excluded at trial. Tessier sought to have these statements removed as evidence as they violated his s. 7 *Charter* rights. The ABCA agreed with Tessier and overturned his conviction on the basis that it was never properly considered whether his statements were voluntary, given the lack of caution. This decision conceptualizes voluntariness through whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority.[89] A contextual inquiry is conducted when determining the voluntariness of a statement in which the burden is placed on the Crown to demonstrate beyond a reasonable doubt that a statement made by an accused is voluntary. The first step is determining whether the accused was a suspect. Then, it may be important to consider the *Oickle* factors which include whether the police made any threats or promises, if there is presence of police trickery, elements of oppression, and whether the suspect had an operating mind at the time of

[82] *Ibid* at para 177.
[83] *Ibid* at para 163.
[84] *R. v Tessier,* 2022 SCC 35 at para 14 [*Tessier*].
[85] *Ibid* at para 16.
[86] *Ibid* at para 21.
[87] *Ibid*.
[88] *Ibid* at para 22.
[89] *Ibid* at para 68.

questioning.[90] Ultimately, the SCC disagreed with the ABCA and determined that even in the absence of caution, and even if he was considered a suspect at the time of questioning, the record confirms that the trial judge's determination on voluntariness should not have been disturbed on appeal.[91] Evidently, the confessions rule is a delicate balancing act between protecting the individual, while allowing the police to properly investigate crimes.

B. Defences

Of the 66 criminal law appeals heard by the SCC between March 2021 and June 2023, three of them neatly fall into the category of defences.

The case of *R v Ghotra* involved a 26-year-old medical student, the accused, who met a Peel Regional police officer in a chat room who was posing as a 14- year-old girl under the name of "Mia_aqt98". In mere minutes, the accused turned the conversation sexual and was unaware that "Mia" was an alias created by the Peel police to catch online predators. [92] The accused proceeded to be explicitly sexual in further conversations with Mia, claiming that he would do sexual acts with her and alluded to having intercourse. The accused eventually asked to meet Mia and went to see her at her at an apartment where officers were waiting to arrest him. Upon arrest, and after speaking with duty counsel, the appellant gave a statement.[93] At trial the accused brought forth an application for stay based on entrapment that was dismissed by the trial judge. He appealed to the ONCA on the basis that the judge erred by finding he was not entrapped and that his 10(b) right to counsel had been violated.[94] The majority of the ONCA reiterated previous SCC precedent and case law surrounding entrapment. Namely, that police may only present an individual with an opportunity to commit a crime if they already have reasonable suspicion that the individual is already engaged in criminal activity or where there is "a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring."[95] The majority agreed with the trial judge that the police did not actually offer the accused an opportunity to commit a crime and articulated the following rule in support: "where, as here, the police conduct is nothing other than placing a potential victim in an accused's line of vision, and where the accused is given no reason to believe that the victim would be a willing participant in the offence committed, the police have not provided an opportunity to commit an offence."[96] The 10(b) claim was also swiftly dismissed by the ONCA majority. In dissent, Justice Nordheimer agreed with the majority on the 10(b) claim but found that the police entrapped the accused.[97] The accused appealed to the SCC based on the disparity between the majority and dissent. In a one sentence oral judgement, the SCC dismissed the appeal for the reasons of the ONCA majority. By simply agreeing with the reasons of the ONCA majority, the SCC seems to have endorsed the majority's statements concerning entrapment.

[90] *Ibid* at para 87.
[91] *Ibid* at para 13.
[92] *R v Ghotra*, 2020 ONCA 373 at para 1 [*Ghotra*].
[93] *Ibid* at paras 9-10.
[94] *Ibid* at para 2.
[95] *Ibid* at para 19 quoting *R v Mack*, [1988] 2 S.C.R. 903 at para 463.
[96] *Ibid* at para 31.
[97] *Ibid* at para 44.

In the case of *R v Alas*, the accused went to a bar with his fiancé and met his friend Ms. Isaacs and her mother there. Numerous interactions between the deceased and Ms. Isaacs took place where she was grabbed, pulled, or hit with a door by the deceased.[98] Ms. Isaacs told the accused about this and he was angry and wanted to hurt the deceased but eventually cooled down after playing some pool.[99] The women went outside and the accused went to stand with them when he saw the deceased getting ready to leave. The deceased taunted the women and the accused transferred a knife from his pants to his jacket pocket in preparation for an altercation. There were varying accounts that the deceased attempted to strike, lunge, or swing at the women. Seeing this, the appellant jumped into the fray and stabbed the deceased in the neck. The accused and the women fled the scene and the deceased died shortly after. [100] The trial judge dismissed the defence of provocation finding that there was no air of reality to it and the accused appealed this holding arguing that there was.[101] While the majority of the ONCA found that there was an air of reality to the defence of provocation and ordered a new trial, Justice MacPherson, in dissent, disagreed and would have dismissed the appeal.[102] The Crown appealed to the SCC as of right. For the SCC, the central issue pertaining to the provocation test was whether the accused acted before he had time for his passion to cool. They pointed out that the accused told the women he would go outside if the deceased went outside, then went outside in anticipation of an altercation. When the deceased also went outside he got into a verbal altercation with the accused who had prepared his knife, and then immediately stabbed the deceased when he lunged forward. There was an element of preparation evident in the fact pattern that the majority could not ignore. Taking this all into consideration, the court was satisfied that the accused did not act on the sudden but rather anticipated and instigated the culmination of the altercation.[103]

The most important of the defence-related cases in the timeframe examined is *R v Khill*. *Khill* represents the SCC's first opportunity to consider the reformed self-defence provisions with a specific focus on the factor of the accused's role in the incident pursuant to s. 34(2)(c) of the *Criminal Code*. In this case, the accused found an intruder, Mr. Styres, rummaging in his vehicle so he grabbed his shotgun and went outside. He shouted for Mr. Styres to put his hands up, and when Mr. Styres turned around, the accused shot him.[104] Claiming self-defence, the accused contended that based on his previous military training pertaining to hand movements, it looked like Mr. Styres had a gun and was going to shoot him.[105] This observation turned out to be mistaken, and Mr. Styres eventually succumbed to his injuries. [106]

The main issue at trial was whether the shooting was done in self-defence. While the trial judge charged the jury on the requisite elements of self-defence along with the statutory reasonableness factors to aid their assessment of the reasonableness of the accused's act, the trial judge did not instruct the jury to consider the accused's role in the incident. The accused's role in

[98] *R v Alas*, 2021 ONCA 224 at para 6 [*Alas*].
[99] *Ibid* at para 14.
[100] *Ibid* at paras 26-27, 31-32.
[101] *Ibid* at para 2.
[102] *Ibid* at paras 64, 86.
[103] *Ibid* at paras 3-5.
[104] *R v Khill*, 2021 SCC 37 at paras 7-13 [*Khill*].
[105] *Ibid* at para 8.
[106] *Ibid* at paras 18-19.

the incident is a factor listed under s. 34(2)(c) as a consideration to help the trier of fact determine whether the act was reasonable.[107] Eventually, the jury went on to find the accused not guilty. This verdict was unanimously overturned by the ONCA and a new trial was ordered. They found the trial judge erred by failing to inform the jury to consider the accused's role in the incident as a factor in assessing reasonableness.[108] The accused appealed to the SCC, contending that the 2013 amendments to self-defence were not meant to substantially alter the protection of self-defence; that there was no material error in the jury instructions; and that s. 34(2)(c) is only meant to be focused on unlawful, morally blameworthy, or provocative conduct on the part of the accused similar to how it was based in the previous legislation. In addition, he asserted that s. 34(2)(c) is not meant to direct a jury to consider if pro-social or morally blameless conduct can defeat a self-defence claim. Since the accused was not engaged in unlawful, provocative, or morally blameworthy conduct, the accused asserted that it was not an error of law for the trial judge to not instruct the jury to consider his role in the incident.[109]

Justice Martin, writing for a 5-judge majority, embarked upon an assessment of the old and new self-defence provisions. She explained that the new provisions enacted significant substantive change to self-defence and that s. 34(2)(c) must be interpreted in light of these expansive changes and not solely by reference to the old self-defence provisions as the accused attempted to argue. Engaging in an exercise of statutory interpretation, the majority found that the language of s. 34(2)(c) captures a broad temporal scope and a wide spectrum of behaviour not limited only to wrongful or unlawful conduct.[110] Taking this into consideration, the majority concluded that s. 34(2)(c) signals that "the trier of fact should consider the accused's conduct from the beginning to the end of the "incident" giving rise to the "act", as long as that conduct is relevant to the ultimate assessment of whether the accused's act was reasonable."[111] Additionally, they held that the accused's conduct, irrespective of whether it was morally blameworthy or pro-social, is to be taken into account in assessing the reasonableness of the final act which led to the charge.[112] The majority also reviewed the three inquiries for the self-defence test under s. 34(1) and condensed the names of these inquiries into (1) the catalyst, (2) the motive, and (3) the response.[113] The person's role in the incident, where relevant, is to help asses the response stage which looks at the reasonableness of the accused's act. This is to be considered by the trier of fact amongst the other factors listed in 34(2) in a holistic global fashion. However, the majority points out that it is not automatically an error if one of the factors listed in 34(2) are not charged to the jury. They must be relevant, worthy of consideration and applicable to warrant mention.[114] Providing guidance, the majority stated that instances where a trespasser is confronted in a manner where there is little alternative but to kill or be killed, the accused role in the incident will always be a significant factor. Applying these findings to the case, the majority found that the accused's role in the incident was a potentially substantial factor

[107] *Ibid* at para 19.
[108] *Ibid* at para 21.
[109] *Ibid* at para 24-25.
[110] *Ibid* at para 25.
[111] *Ibid* at para 82.
[112] *Ibid* at para 96.
[113] *Ibid* at para 51.
[114] *Ibid* at para 127.

in assessing reasonableness and felt the jury could drawn a different conclusion if properly instructed .[115] As such, the majority held that the failure to instruct the jury on this matter was a material error bearing on the acquittal, thus dismissing the appeal and ordering a new trial.[116]

C. Evidence

Similar to the Charter category, a substantial number of appeals within the SCC were related to evidence. While some cases dealt solely with the application of the appellate review standards, many provided rulings of significance providing guidance to lower courts.

One such case is *R v Cowan* which the accused, Mr. Cowan, was arrested and charged with armed robbery after two individuals robbed a Subway. He provided a statement to police that he was not involved in the robbery, but admitted he told a group of friends how to commit the robbery. These friends included Mr. Tone, Littleman, Mr. Fiddler, and Mr. Robinson.[117] At trial, the Crown advanced two theories of liability. First, that Cowan was the masked robber and a principal offender, or, second, that Cowan was a party to the armed robbery as he either aided or abetted the commission of the offence under s. 21(1)(c) of the *Criminal Code* or counselled its commission under s. 22(1).[118] These were both rejected at trial, and in respect to the second theory that Cowan was a party on the basis of abetting or counselling, the trial judge held that the Crown needed to prove on the evidence that Tone and Littleman were the individuals who committed the offence as the principal offenders. It is important to note that nowhere in the record did the Crown assert that only Littleman and Tone could have committed the robbery.[119] Cowan was acquitted on these grounds and the Crown appealed. A majority of the SKCA found that the trial judge erred by claiming that the Crown had to prove that Tone and Littleman were principal offenders in the robbery in order to convict Cowan of being a party based on abetting or counselling. They held that this error had a material effect on the acquittal and ordered a new trial but limited it solely to the Crown's ground of appeal concerning Cowan's liability as a party since the court had unanimously dismissed the Crown's principal liability appeal ground.[120]

A critical outcome of *Cowan* is that the majority of the SCC clarified the law surrounding criminal liability as a party. They stated that the specific identity of the principal offender(s) and their role in the impugned offence is not required to be shown by the Crown to elicit a conviction based on party liability via abetting or counselling.[121] Rather, it is sufficient to show that any one of the offenders that the accused party encouraged to commit the offence went on and participated in some manner, whether as a principal or party. If one of those individuals committed it as a principal, then the accused would be guilty as an abettor and counsellor. On the other hand, if one of them went on to participate in it as a party, then the accused would be guilty as a counsellor.[122] Applied to the case, the majority reasoned that the trial judge erred in law by requiring that the Crown prove that Littleman and Tone were principal offenders in order to

[115] *Ibid* at para 130, 133.
[116] *Ibid* at para 142.
[117] *R v Cowan*, 2021 SCC 45 at paras 1-2, 11 [*Cowan*].
[118] *Ibid* at para 3.
[119] *Ibid* at paras 19, 23.
[120] *Ibid* at paras 22-23.
[121] *Ibid* at para 33.
[122] *Ibid* at para 37.

convict Cowan as a party. According to the court, this error was one that materially affected the verdict. The majority then held that the SKCA erred by limiting it to only one theory of liability as this was beyond the powers given to appellate courts to order a new trial pursuant to section 686(8).[123] Limiting a trial to only one avenue of liability was seen as antithetical to the interests of justice as it would hinder the ability of a trier of fact to consider all theories of liability that have an air of reality and would undermine the search for truth.[124] As such, the court found it appropriate to set aside the limitation on the new trial set by the SKCA and order a full new trial on the charge of armed robbery.[125]

Another evidence-related case providing practical guidance is *R v J.D.* In *J.D.*, the court was tasked with interpreting section 669.2 of the *Criminal Code* which pertains to the replacing of a judge in the context of ongoing judicial proceedings and the rules, including those of an evidentiary nature, that go along with it. The respondent, *J.D.*, was charged with 18 counts of sexual assault committed upon minors between 1974 and 1993. At trial in 2016, an issue led to the trial being postponed. During this initial delay, the presiding judge fell ill and the trial was postponed seven more times until the parties were informed in 2017 that a new judge would replace the ill judge pursuant to section 669.2 of the Criminal Code.[126] At this time only one person, C.D., had given testimony and been heard by the first judge. Both defence and Crown counsel agreed that the transcript of C.D's testimony should be given to the new judge. When the second trial commenced, defence counsel repeated this consent and the transcript was admitted as evidence on the merits by the new judge. [127] The accused appealed, arguing that the trial judge erred in admitting the evidence of C.D's testimony. Unanimously, the Quebec Court of Appeal (QCCA) held that according to s. 669.2, the trial judge should have undertaken a two-step test, which they failed to do, in order to admit C.D's testimony into evidence. The appeal was allowed, a new trial was ordered on 4 of the sexual assault counts, and the Crown appealed.[128]

Unanimously, the SCC explained that where a new judge is appointed to an ongoing proceeding pursuant to s. 669.2 of the Criminal Code, a transcript of witness testimony from the first trial can be filed as evidence within the second trial if the transcript is duly filed by the parties and they both consent to its filing. According to the SCC, this is all that is needed and the two-part test advanced by the QCCA is not required to be met. [129] They added that the new judge does have the power to intervene and not allow a transcript to be filed if he or she finds that filing it would undermine trial fairness and have a prejudicial effect. Applying this, the court held that the parties in the second trial duly filed C.D's transcript and consented to its filing. Then, the new judge must determine the weight to be given to that evidence. On this basis the court allowed the appeal and restored the convictions

Continuing the theme of practical guidance, the SCC in *R v Morrow* determined whether an obstruction of justice could be inferred from the evidentiary record. In this case, the accused

[123] *Ibid* at paras 48, 57.
[124] *Ibid* at para 64.
[125] *Ibid* at para 74.
[126] *R v J.D.*, 2022 SCC 15 at paras 6-8 [*J.D.*]; *Criminal Code*, RSC 1985, c C-46, s 669.2.
[127] *J.D.*, *supra* note 126 at para 9.
[128] *Ibid* at para 15.
[129] *Ibid* at paras 27, 29, 35.

had previously been charged with criminal harassment of the complainant and was released on recognizance which included the condition that he was not to contact or attend the residence of the complainant.[130] Days after, the complainant contacted the father of the accused to ask if there was a way for her to withdraw the charges. The father passed this information to the appellant who made inquiries of how to do so.[131] Instead of relaying the information back to his father, the accused went to the residence of the complainant, explained to her how she could withdraw the charges and forcibly kissed her. The complainant testified she was scared and felt pressured and did not want to kiss the accused but did so to get him out of her residence.[132]

At trial, the appellant was convicted of sexual assault, obstructing justice, and breach of bail conditions. He appealed on various grounds, with the most important ground being the argument that the trial judge's reasons for the conviction of obstruction of justice were inadequate.[133] It is important to note that obstruction of justice requires something corrupt or illicit about the conduct of the accused in order to elicit a conviction. The majority of the Alberta Court of Appeal (ABCA) dismissed the appeal. They agreed with the trial judge's inference that the appellant going to the complainant's home was an attempt to pressure and dissuade her, by corrupt means, to drop the charges. They held that such an inference was available to make based on the evidentiary record.[134] Dissenting, Justice Slatter felt that the evidentiary record did not support that the accused engaged in illicit or corrupt conduct.[135] Upon appeal to the SCC, Justice Côté agreed with Justice Slatter and held that appealing to or preying on affection are not corrupt or illicit means but means of persuasion which do not constitute obstruction of justice. [136] Ultimately, the majority of the SCC concurred with the reasons of the majority of the ABCA, affirming that appealing to and preying on affection can constitute corrupt means and thus lead to an obstruction of justice. Mentioning the fact that survivors of domestic abuse are specifically vulnerable to manipulation and intimidation, the majority felt that the accused's actions were indeed an attempt to dissuade the complainant, by corrupt means, from providing evidence and proceeding with the harassment charge.[137]

In *R v Gerrard* the accused repeatably assaulted, threatened, and damaged the property of Ms. Day, his common law spouse, over the course of eight years.[138] The trial devolved into a 'he said she said' contest and the trial judge had to apply *R v W.(D.*) to asses credibility.[139] The trial judge felt that Ms. Day's evidence did not convey a desire to lie and was not embellished, she accepted the evidence of Ms. Day.[140] After being given a global sentence of 30 months incarceration followed by 2 years probation, the accused appealed and contended that the trial

[130] *R v Morrow,* 2020 ABCA 407 at para 1 [*Morrow*].
[131] *Ibid* at para 24.
[132] *Ibid* at para 1.
[133] *Ibid* at para 3.
[134] *Ibid* at paras 16-17.
[135] *Ibid* at paras 21, 28.
[136] *Ibid* at para 4.
[137] *Ibid* at paras 1-3.
[138] *R v Gerrard,* 2021 NSCA 59 at para 1 [*Gerrard*].
[139] *Ibid* at paras 5, 8. See *R v W.(D.*), [1991] 1 S.C.R. 742.
[140] *Ibid* at para 20.

judge erred in the application of *W.(D).*, erred in assessing the credibility of Ms. Day, and gave him an illegal global sentence.[141]

The SCC had to rule on the *W.(D).* and credibility assessment issues. Dealing with the *W.(D).* assessment, a unanimous court held that it was irrelevant that the trial judge considered Ms. Day's credibility before the accused and that such an occurrence did not automatically result in a reversal of the burden of proof as the accused so alleged. They articulated that the reasons of the trial judge demonstrate that Ms. Day's evidence was properly assessed relative to the evidence of the accused and the other witnesses. Turning to the credibility assessment, the court explained that significant deference is owed to credibility assessments and felt appellate intervention was unjustified. The court took the time, however, to comment on the motive to lie and lack of embellishment in the context of credibility assessments. They explained that lack of evidence of a motive to lie can be relevant in assessing credibility as it suggests a witness may be more truthful. However, where this is done, a trial judge must stay cognizant of two risks. First, the lack of evidence of a motive to lie is not evidence disproving a particular motive to lie; and, second, that it is an error to reverse the burden of proof by requiring the accused to show why a complainant had a motive to lie.[142] In terms of lack of embellishment, the court held that this cannot be an indicator that a witness is more likely to be telling the truth and cannot be used as a justification to strengthen credibility. They stated that lack of embellishment simply does not weigh against credibility but nonetheless may be relevant in assessing credibility as it can aid in the consideration of whether a witness had a motive to lie.[143]

Within the case of *R v Samaniego*, the court was afforded the opportunity to clarify and rule on the scope of the trial management power that judges possess. At trial, counsel for the accused engaged in a lengthy cross-examination of a witness and several lines of questioning were dismissed by the trial judge.[144] Eventually, the accused and co-accused were convicted of possession of a loaded restricted firearm.[145] The accused appealed his conviction and the issue at hand was the dismissal of four lines of questioning during the accused's cross-examination of the witness. While the majority of the ONCA held that this was an appropriate exercise of the trial judge's trial management powers, Justice Paccioco dissented and found that these dismissals were all evidentiary rulings to be governed by the law of evidence and not by trial management powers.[146] The majority of the SCC explained that the trial management power allows trial judges to manage the court and confers upon them the ability to restrict a cross examination that is "unduly repetitive, rambling, argumentative, misleading, or irrelevant."[147] They added that trial management powers cannot be used as a shield to protect erroneous evidentiary decisions and that trial management rulings are to be given deference absent an error in principle or unreasonable exercise. Moreover, on appellate review, they should be examined in the context of

[141] *Ibid* at para 33.
[142] *Gerrard*, *supra* note 138 at 4-5.
[143] *Ibid* at 5-6.
[144] *R v Samaniego*, 2022 SCC 9 at paras 11, 27 [*Samaniego*].
[145] *Ibid* at para 105.
[146] *Ibid* at para 3.
[147] *Ibid* at para 22.

the trial as a whole and not as isolated incidents.[148] After conveying this standard, the majority held that three of the four lines of questioning were reasonably dismissed by the trial judge in accordance with the trial management power. However, one of the dismissals was seen as an error. In this circumstance, the trial judge restricted cross-examination of a witnesses' testimony at the preliminary inquiry which was given before he adopted his police statement that was admitted as past recollection record.[149] Although this was seen by the majority to constitute an erroneous evidentiary ruling beyond the scope of the trial management power, they applied the *curative proviso* and dismissed the accused's appeal.[150]

Arguably one of the most impactful evidence-related cases from the period reviewed is *R v G.F*. On the night of a camping trip, the complainant was severely intoxicated and passed out in the respondents', G. F. and R. Bs, trailer. The complainant awoke to them starting to unclothe and perform sexual acts on her and testified that she told them to stop but they continued. She testified feeling unable to make a choice in the matter of whether she could participate or not. On the other hand, one of the respondents, G.F., testified that the complainant was hardly intoxicated, consented to the activities in question and that he asked for, and received, assurances of this consent on multiple occasions.[151] The trial judge accepted the complainant's testimony and moved to convict the respondents, finding that the intoxication of the complainant led to her incapacity to consent. Interestingly, the trial judge did not engage in the full two-step analysis of *R v Hutchinson* and instead addressed consent and incapacity together, ruling that no consent is obtained where there is an incapacity to consent to the sexual activity in question.[152] On appeal, the ONCA declared this an error of law, holding that when consent and capacity to consent are addressed, the two-step *Hutchinson* analysis must be followed and consent must be addressed in the first part of the test and incapacity as a vitiating factor in the second.[153]

The majority of the SCC ruled that consent and incapacity do not need to be analyzed separately as logically the capacity to consent is a necessary precondition to subjective consent and not a vitiating factor.[154] They delineated this on the basis that vitiating factors only invalidate consent whereas incapacity prevents subjective consent from even existing due to an inability to formulate a conscious agreement to sexual activity.[155] Re-iterating previous precedent, the majority explained that if the Crown can prove that the complainant was incapable of understanding any one of the following four factors, then the complainant was incapable of consenting. These factors are: (1) the physical act; (2) that the act is sexual in nature; (3) the specific identity of the complainant's partner or partners; and (4) that they have the choice to refuse to participate in the sexual activity.[156] Synthesizing this with their finding that capacity is a precondition to consent, the majority stated that if any of these four factors are not understood by the complainant, then there is an incapacity to consent, consent would be rendered non-

[148] *Ibid* at para 24.
[149] *Ibid* at paras 57-58.
[150] *Ibid* at paras 64, 72-73, 74, 78.
[151] *R. v. G.F.*, 2021 SCC 20 at para 10 [*G.F.*].
[152] *Ibid* at para 14. See *R v Hutchinson* 2014 SCC 19.
[153] *Ibid* at paras 17, 18.
[154] *Ibid* at paras 24, 47.
[155] *Ibid* at para 41.
[156] *Ibid* at para 57.

existent, and there would be no consent to vitiate. Essentially, if the Crown proves beyond a reasonable doubt that any one of these factors were not present, then the complainant was incapable of forming subjective consent and the *actus reus* of sexual assault is established.[157] As a matter of logic and practicality, the SCC's ruling in *G.F.* provides a more succinct route of analysis in cases involving the capacity to consent. By expanding beyond strict adherence to *Hutchinson*, the court has provided evolution within the realm of consent in sexual assault cases that truly recognizes the inextricable link between the capacity to consent and consent.

D. Search and Seizure

Overall, 5 cases during the period studied can be said to fall within the search and seizure category. Of particular note is the case of *R v Stairs* which modified and narrowed the ability of police to search a home incident to arrest in certain circumstances.

In *Stairs*, police were alerted that a man was striking a female passenger in his car. After locating the car in a driveway, the police entered the home believing the women may be in danger. Police shouted for occupants to come upstairs with their hands up and a woman bearing fresh injuries did so while Mr. Stairs, the accused, locked himself in another room.[158] After eventually complying, the accused was arrested. One of the officers conducted a visual clearing search of the basement living room and spotted in plain sight a container of meth on the floor and a Ziplock bag of meth next to the coffee table.[159] The accused was charged with possession for the purpose of trafficking.[160] Once the case reached the SCC, a five-judge majority felt it was necessary to modify the common law standard for search incident to arrest in a home, ultimately making the standard stricter if the area of the home searched is outside of the arrested person's physical control. The majority explained that a search incident to arrest only extends to the surrounding area of an arrest and there are two subcategories within that surrounding area.[161] According to the majority, these are areas within the physical control of the accused at the time of arrest and areas outside the physical control of that person, but which can be considered part of the surrounding area because they are sufficiently proximate to the arrest. To determine whether an area is sufficiently proximate to the arrest, the question is whether there is a link between the location and purpose of the search and the grounds of arrest.[162] According to the majority, the standard for search incident to arrest in a home applies differently to these two spatial categories. While the first one—areas within the physical control of the arrested accused at the time of arrest—requires the normal common law test for search incident to arrest, the second subcategory was modified by the court. Where the police search a home incident to arrest and the area searched is outside the physical control of the arrested person but can be considered part of the surrounding area due to its sufficient proximity to the arrest, the court added the following modifications:

[157] *Ibid* at para 58.
[158] *R v Stairs*, 2022 SCC 11 at paras 11-14 [*Stairs*].
[159] *Ibid* at paras 15-16.
[160] *Ibid* at para 3.
[161] *Ibid* at para 79.
[162] *Ibid* at para 60.

> (1) The police "must have reason to suspect that a search of areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused;"[163] and
>
> (2) "the search must be conducted in a reasonable manner, tailored to the heightened privacy interests in a home."[164]

The first modification imposes a reasonable suspicion standard upon police. This requires police to show objectively discernible facts assessed against the totality of the circumstances that give rise to the suspicion of the risk along with a reason to suspect that the search will address that risk.[165] The second modification is meant to constrain police when they go beyond the physical area in control of the arrested person in order to respect the heightened privacy interests in a home.[166] The 3-judge dissent felt that searches incident to arrest in a home require a general modification, not just in certain spatial circumstances. They would have required that the search involve a reasonable suspicion standard and be limited to the nature of the arrest and the temporal and spatial proximity between the arrest and the search.[167]

While the modified test does not extend wholly to searches of a home incident to arrest, it nevertheless constrains the ability of law enforcement to go beyond the physical area in control of the arrested person. Although this applies only in certain spatial circumstances and not to home searches incident to arrest generally, this is an improvement upon the previous standard from *R v Caslake* which required merely "some reasonable basis" to justify the search.[168]

The case of *R v Tim* involved Mr. Tim, the accused, whose vehicle hit a road sign and veered off the road. Police arrived at the scene and asked for his driver license and other documents. When he went to retrieve those items, the officer saw a bag with a yellow pill in it that he recognized as gabapentin.[169] Thinking that it was a controlled drug under the CDSA, which it is not, the officer arrested the accused. Following this arrest, four searches were conducted including a pat down incident to arrest, a search of the car, another search of the appellant, and a strip search at the police station. These yielded numerous drugs and weapons including fentanyl, Xanax and multiple handguns.[170]

At issue was whether the ss. 8 and 9 *Charter* rights of the accused had been breached and whether the evidence should be excluded pursuant to s. 24(2) of the *Charter*. The SCC majority, following its precedent from *Frey v. Fedoruk* and *Kosoian v. Société de transport de Montréal*, upheld that a lawful arrest cannot be based on a mistake of law. They explained that where an officer is aware of the facts and wrongly concludes that they amount to an offence, when as a

[163] *Ibid* at para 65.
[164] *Ibid* at para 56.
[165] *Ibid* at para 65, 68.
[166] *Ibid* at para 78.
[167] *Ibid* at paras 127, 132.
[168] *R v Caslake*, [1998] 1 SCR 51 at para 20, SCJ No. 3 [*Caslake*].
[169] *R v Tim*, 2022 SCC 12 at para 7 [*Tim*].
[170] *Ibid* at paras 9-12.

matter of law they do not, the arrest is not lawful as it is a mistake of law.[171] Applied to the case, the officer's arrest based on his subjective belief that the gabapentin was a controlled substance was deemed a mistake of law and therefore unlawful and in breach of the appellant's s. 9 rights.[172] Moving onto the s. 8 claim, the Crown conceded that if the arrest was found to be unlawful, then the initial pat down and car search would be unlawful as they would fail on the first step of the *Collins* framework.[173] Agreeing, the majority found these searches to be in breach of the accused's s. 8 rights but determined that the second search of the appellant and the strip search were conducted reasonably.[174] Following the finding that the first two searches breached the accused's s. 8 rights, the majority engaged in a section 24(2) analysis to determine whether the evidence should be excluded. Employing the *Grant* test, the majority felt excluding the evidence would punish the police unduly and damage the repute of the justice system. Upon this basis, they decided that admitting the evidence was appropriate.[175] Dissenting, Justice Brown agreed with the breaches of s. 8 and s. 9 but would have excluded the evidence as he felt that admitting it would bring the administration of justice into disrepute.[176]

Another case falling into the search and seizure category is *R v Ali*. In *Ali* police were informed that two individuals were using a residence to engage in large scale cocaine trafficking operations. Police obtained a search warrant, entered the residence, and arrested the accused who had large amounts of cash, a cell phone, and marijuana on his person. When he was stripped searched, bags of cocaine were found in his buttocks area. [177] At issue was whether the strip search was reasonable and whether the evidence utilized to warrant the strip search was hearsay that could not be used to justify the search.[178] The majority of the SCC reiterated the test from *Golden* for a strip search incident to arrest and found that there were reasonable and probable grounds to justify the strip search as, based on the totality of the circumstances, there was evidence that the accused had possibly concealed drugs in or around his buttocks. [179] In terms of the hearsay argument, the majority gave it no effect as the accused conceded that the impugned evidence was not hearsay and it stood uncontradicted by defence counsel.[180] Based on these findings, the majority dismissed the appeal.

The final search and seizure case to mention is *R v Reilly*. In *Reilly*, police were informed that the accused was one of four masked perpetrators that robbed a Boss Vapes store and Deer Lake market store with a gun. [181] Studying the surveillance footage, the police found that one of the individuals in both robberies had a slim build, a black under armour hoodie, a black mask with a white skull logo, grey sweatpants and Nike shoes. The police developed a plan to go to the residence of the accused and arrest him but did not obtain a warrant. They entered the house

[171] *Ibid* at paras 27-28.
[172] *Ibid* at para 45.
[173] *Ibid* at para 48; R v Collins [1987] 1 SCR 265 at para 23, SCJ No. 15 [*Collins*].
[174] *Ibid* at paras 52, 64, 68.
[175] *Ibid* at para 99-100.
[176] *Ibid* at paras 103-104.
[177] *R v Ali*, 2020 ABCA 344 at para 2 [*Ali*].
[178] *Ibid* at para 6.
[179] *Ibid* at paras 12-3.
[180] *Ibid* at para 4.
[181] *R v Reilly*, 2020 BCCA 369 at para 9 [*Reilly*].

without warrant and arrested the accused. During a clearing search of the residence, the police saw vape juice and a black mask. An information to obtain (ITO) was drafted and a search warrant for the accused's residence was issued the following day. Upon searching the residence the next day, the police seized several packs of cigarettes, numerous vape products, grey sweatpants, a black mask with a white skull logo, black gloves, a black under armour hoodie, Nike running shoes, a model rifle and a loaded magazine.[182] The accused filed a motion making a ss. 8 and 24(2) *Charter* claim seeking to exclude the evidence by attacking the validity of the search warrant obtained through what the accused claimed was a facially invalid ITO.[183] The trial judge found the search warrant issued following the ITO was valid and concluded that the evidence was admissible via the *Grant* test for s. 24(2) despite the s. 8 *Charter* breaches from the warrantless entry and arrest.[184] The accused appealed, alleging that the trial judge erred by concluding that the search warrant was valid and by not excluding the evidence in light of the warrantless entry and arrest. [185]

The majority of the BCCA felt that the ITO provided sufficient information for the issuing judge to infer the accused was a perpetrator of both the robberies and that items connected to those offences was in his residence. As such, the majority held that the trial judge did not commit any material error and correctly concluded that the search warrant was valid.[186] Turning to the exclusion of evidence, the majority found that the trial judge erred in principle in the first part of the *Grant* test by considering the conduct of the police that was charter-compliant to be mitigating of the seriousness of their charter breaches.[187] In addition, they found that the trial judge erred in principle by assessing whether the administration of justice would be brought into disrepute separately at both the first and second parts of the *Grant* analysis.[188] Rather, as the majority states, this is to be assessed at the end of all 3 *Grant* inquiries in a balancing exercise of all factors together to determine whether admitting the evidence would bring the administration of justice into disrepute. [189] Finding these errors within the 24(2) analysis, the majority undertook a fresh 24(2) analysis and concluded that the police misconduct was so serious that it is necessary to exclude the evidence in order to preserve the repute of the justice system. As a result, they allowed the appeal, excluded the evidence, quashed the convictions, and ordered a new trial.[190] Dissenting, Justice Wilcock found that the trial judge properly undertook the 24(2) analysis and made no errors. [191] He would have dismissed the appeal. The Crown proceeded to appeal to the SCC. A unanimous court agreed with the reasons of the majority of the BCCA. Taking no issue with the fresh 24(2) analysis conducted by the majority, the court saw no reason to interfere and affirmed the exclusion of evidence.

[182] *Ibid* at para 10, 13-14.
[183] *Ibid* at para 18-22.
[184] *Ibid* at paras 26, 35.
[185] *Ibid* at para 28.
[186] *Ibid* at para 46.
[187] *Ibid* at para 93.
[188] *Ibid* at para 109.
[189] *Ibid* at para 115.
[190] *Ibid* at para 153.
[191] *Ibid* at para 180-181.

E. Sentencing

In terms of sentencing cases, the SCC was rather quiet during this period with only *R v Parranto* and *R v Nahanee* fitting within the sentencing category. As this may be, *Parranto* was a highly contentious case amongst the court garnering four separate judgements and providing a definitive answer on the validity of starting points in sentencing.

In *Parranto* there were two appellants, Mr. Felix and Mr. Parranto, who both pled guilty to various unrelated offences including fentanyl trafficking pursuant to section 5(1) and 5(2) of the *Controlled Drugs and Substances Act*. Both were found to be operational minds in wholesale commercial fentanyl trafficking schemes. At trial, they were tried separately and Parranto received an 11-year sentence while Felix received a 7-year sentence. These sentences were appealed to the ABCA and were heard jointly. The purpose of this joint hearing was to set a starting point for wholesale fentanyl trafficking which the ABCA set at 9 years. Following this ruling, both Felix and Parranto were levied increased sentences, Felix now faced 10 years and Parranto 14 years. They both appealed, arguing that the starting point methodology should be abolished and that the ABCA erred in increasing their sentences. [192]

Writing for a four judge majority, Justices Brown and Martin held that starting points are a valid form of appellate sentencing guidance when properly treated as nonbinding.[193] They stated that starting points do not hinder proportionality or individualization in sentencing as judges can begin at the starting point and move up or down from it based on individualized factors.[194] According to Brown and Martin, starting points promote stability and reduce idiosyncrasies in sentencing, thereby ensuring consistent applications of sentencing in lower courts.[195] In essence, the arguments of Brown and Martin purport that starting points are a useful guide for courts that aid in the overall process of sentencing. As such, they held that starting points are a valid form of appellate court guidance and should not be abolished.[196] Concerning the sentences given by the ABCA, the majority felt that in light of the gravity of the offences and the aggravating circumstances, that the sentences imposed at trial were unfit and that the ABCA was correct to increase them.[197] Based on these reasons, the majority dismissed both appeals.

Justice Rowe, in his own judgement, concurred with the majority on the issue of the sentences given by the ABCA but disagreed with their stance on starting points and argued that they should be abolished.[198] According to Justice Rowe, a proportional and just sentence is elicited through an individualized process, starting points threaten this individualization as their very purpose is the reduction of idiosyncrasies.[199] Adding further to his contentions, Rowe criticized starting points for building in the mitigating factors of good character and no criminal record. He claimed that this effectively bars the use of multiple mitigating factors by an accused

[192] *R v Parranto*, 2021 SCC 46 at para 2 [*Parranto*].
[193] *Ibid* at para 3.
[194] *Ibid* at paras 44-47.
[195] *Ibid* at para 15.
[196] *Ibid* at para 83.
[197] *Ibid* at paras 67, 77, 81.
[198] *Ibid* at paras 102, 106.
[199] *Ibid* at para 114.

that could otherwise be used to justify a lower sentence.[200] Ultimately, based on these concerns, Justice Rowe would have abolished starting points.

Although concurring with the majority on the matter of the sentences imposed by the ABCA, Justice Moldaver, writing for himself and Justice Côté, agreed with the reasons of Justice Rowe for abolishing starting points.[201] Justice Moldaver felt compelled to write his own reasons to address the gravity of trafficking in fentanyl. He argued that more severe penalties should be imposed for largescale fentanyl trafficking and that these sentences should be somewhere in the range of mid-level double digit imprisonment up to and including life imprisonment.[202] Dissenting, Abella and Karakatsanis believed appellate intervention was not justified as the sentencing judge did not make any material errors. In terms of starting points, they agreed with the reasons of the majority that they should remain a valid form of appellate court guidance.[203] Thus, based on the variance of differing opinions in *Parranto,* starting points were upheld as a valid form of appellate court sentencing guidance in a 6-3 split between judges.

The only other sentencing case brough to the Supreme Court was *R v Nahanee*. Nahanee plead guilty to two counts of sexual assault against his nieces, he admitted to assaulting one niece once and assaulting the other niece so frequently that he had lost count.[204] Both nieces suffered immense harm, both physically and emotionally. At sentencing, the Crown requested a sentence between four to six years imprisonment while Nahanee's lawyer requested a sentence of three to three-and-a-half years.[205] Ultimately, the judge sentenced Nahanee to a global sentence of eight years imprisonment, expanding beyond the maximum recommended sentence by the Crown.[206] Nahanee appealed his sentence to the BCCA raising the ground of appeal that the "public interest test" adopted from *R v Anthony-Cook* should apply to his case.[207] This test provides guidance for judges when Crown and Defence agree to a specific sentence in exchange for a guilty plea. It provides the parties with certainty that the sentence jointly proposed will be the sentence imposed. It avoids the need for lengthy and expensive trials by saving time, resources, and expenses further enabling the justice system to function efficiently and effectively. The test requires that judges should impose this jointly recommended sentence unless it would bring the administration of justice into disrepute.[208] The BCCA, and ultimately the Supreme Court, dismissed Nahanee's appeal. A critical takeaway here is that the Supreme Court confirmed that *Anthony-Cook* test does not apply to contested sentencing hearings following a guilty plea, this test only applies to joint submissions.[209] However, the majority confirmed that judges must notify parties if they intend to impose a harsher sentence than what is sought by the Crown to allow the opportunity to make further submissions.[210] Nahanee was

[200] *Ibid* at paras 127, 185.
[201] *Ibid* at paras 84-85.
[202] *Ibid* at para 86.
[203] *Ibid* at para 205.
[204] *R v Nahanee*, 2022 SCC 37 at para 8 [*Nahanee*].
[205] *Ibid* at paras 13-15.
[206] *Ibid* at para 17.
[207] *Ibid* at para 24.
[208] *Ibid* at para 1.
[209] *Ibid* at para 4.
[210] *Ibid* at para 43.

never granted this opportunity. Nevertheless, Nahanee also did not have further information to impact his sentence, so even if he had received notice the sentence likely would not have been impacted.[211] Since the majority found that the trial judge provided adequate reasons for exceeding the sentence from the Crown, the eight-year sentence was deemed not unfit. Further, the *Friesen* decision released two months prior, confirms that harsh prison sentences for sexual offences against children should not be unusual.[212]

F. Trial Procedure

Turning to matters relating to trial procedure, 5 out of the 66 criminal cases in the SCC between March 2021 to June 2023 fell into this category.

In *R v Esseghaier*, two respondents, Esseghaeir and Jaser, were charged with various terrorism offences. Due to the nature of the case, it was agreed that challenges of cause were required to ensure an impartial jury.[213] Jaser wished to utilize the rotating triers procedure for trying challenges for cause and asked the judge to use discretion to ensure prospective jurors were excluded from the courtroom during the challenge for cause process. If this could not be done, Jaser wanted to utilize the static triers method. The trial judge rejected this request and concluded that a trial judge can no longer exercise the authority to exclude unsworn jurors from the courtroom where the rotating triers process was being used. As a result, the trial judge imposed the static triers methodology and both Esseghaeir and Jaser were convicted and sentenced to life imprisonment.[214] Upon appeal, the ONCA felt that this was improper, that the judge had the authority to do what was requested, and that it was unreasonable not to exercise that authority. The jury was deemed improperly constructed, the convictions were overturned, and the *curative proviso* in s. 686(1)(b)(iv) of the *Criminal Code* was seen as unable to apply. [215] The Crown appealed and the question for the SCC to answer was whether the *curative proviso* can cure procedural errors that occur during the jury selection process.[216] A unanimous court ruled that the *curative proviso* can cure procedural errors that have occurred in the jury selection process if: (1) the trial court had jurisdiction to try the class of offence in question; and (2) the appellant was not prejudiced in the sense that they were deprived of their s. 11(d) *Charter* right to a fair trial by an independent and impartial jury. Where an appellant shows a procedural error led to an improperly constructed jury, the onus is then on the Crown to show on a balance of probabilities that the appellant was not deprived of their right to a fair trial by an independent and impartial jury.[217] In the case at hand, the SCC found that the Crown was able to show that the appellant was not deprived of their s. 11(d) right and suffered no prejudice.[218] As such, the SCC found that the curative proviso applied and allowed the appeal, restored the convictions, and remit the other grounds of appeal to the ONCA.[219] This ruling not only provides practical

[211] *Ibid* at para 5.
[212] *Ibid* at para 68.
[213] *R v Esseghaier*, 2021 SCC 9 at para 4 [*Esseghaier*].
[214] *Ibid* at paras 5-7.
[215] *Ibid* at paras 28-29.
[216] *Ibid* at para 3.
[217] *Ibid* at paras 47-48, 64.
[218] *Ibid* at paras 54-56.
[219] *Ibid* at paras 57, 66.

guidance for the determination of whether the *curative proviso* applies in cases of erroneous jury selection, but also confirms the *curative proviso's* ability to act as a safeguard for judicial errors in those circumstances as long as the accused's s. 11(d) *Charter* rights are not prejudiced.

The case of *R v Pope* involved a situation where the accused stabbed the deceased and fled from the scene.[220] At trial, the jury convicted the accused of second-degree murder. He appealed this conviction alleging that the trial judge improperly instructed the jury in respect to the included offence of manslaughter and his flight from the scene.[221] The majority of the Newfoundland and Labrador court of appeal (NLCA) found significant issues with the trial judge's charge to the jury concerning manslaughter. They determined that the trial judge failed to describe the required intent for manslaughter, gave the jury an inaccurate and misleading written aid in the decision tree, and gave them an ambiguous explanation and example when they asked for help.[222] Taking this all into account alongside the standard of review for jury instructions, which requires a functional approach reviewing the jury instructions in their entirety, the majority held that the jury was not properly instructed. Due to their finding that the jury was not properly instructed on manslaughter, the majority felt no need to consider the second ground of appeal and ordered a new trial. [223] In dissent, Justice Goodridge agreed that there was an error in the decision tree but that it was not one of a serious reviewable nature when considered in light of the entirety of the jury instructions. [224] He felt the instructions on manslaughter were otherwise properly conveyed in accordance with model jury instructions.[225] Also finding that the trial judge did not err on the second ground of appeal, Justice Goodridge would have dismissed the appeal. The Crown appealed to the SCC and the question was whether the trial judge improperly instructed the jury in regard to manslaughter. In a 5-4 split, the majority agreed with the reasons of the majority of the NLCA and ordered a new trial, thereby dismissing the Crown's appeal.

Arguably the most impactful procedural case coming out of the SCC in the period studied is *R v Sullivan*. *Sullivan* involved two accused, Mr. Sullivan and Mr. Chan. In the case of Sullivan, he stabbed his mother in a drug induced psychosis where he had no voluntary control after ingesting a copious amount of his prescription drug Wellbutrin in a failed suicide attempt.[226] In an unrelated event, Chan ingested psilocybin after he came home from the bar with friends and began acting erratically. He eventually broke into his father's house and stabbed his father and his partner. Chan's father went on to die from these injuries.[227] At trial, Sullivan was found to be acting involuntarily but section 33.1 of the Criminal Code was invoked and self-induced intoxication akin to automatism was precluded as a defence.[228] In terms of Chan, he argued that the trial judge was bound by previous decisions of the Ontario Superior Court which found s. 33.1 to be unconstitutional as a result of the doctrine of horizontal *stare decisis*. The

[220] *R v Pope*, 2021 NLCA 47 at para 2 [*Pope*].
[221] *Ibid* at para 5.
[222] *Ibid* at para 29.
[223] *Ibid* at para 33.
[224] *Ibid* at para 49.
[225] *Ibid* at para 54.
[226] *R v Sullivan*, 2022 SCC 19 at para 10 [*Sullivan*].
[227] *Ibid* at paras 12-14.
[228] *Ibid* at paras 15-16.

major issue for the SCC was when a declaration issued by a superior court pursuant to s. 52(1) of the Constitution Act, 1982, can be considered binding on courts of coordinate jurisdiction. According to the SCC, a declaration of unconstitutionality constitutes binding precedent within the confines of the doctrine of *stare decisis.*[229] They explained that this essentially means that a declaration of unconstitutionality by a superior court will bind courts of coordinate jurisdiction within a province as a result of horizontal *stare decisis*.[230] Providing further guidance to the operational nature of this doctrine, the SCC explained that the framework from *Re Hansard Spruce Mills* can be utilized to determine when it applies.[231] Adopting and adapting this framework in a condensed manner, the SCC produced the following rule of law:

> Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
> 2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or
> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.[232]

Applying this to the case of Mr. Chan, the court found that the trial judge should have followed an Ontario Superior Court case that found 33.1 unconstitutional and met the *Spruce Mills* criteria.[233] Moving on to the second issue, which was whether the SCC had jurisdiction to hear Chan's cross-appeal from the ONCA after they ordered a new trial, the SCC held that where an accused is convicted of an indictable offence at trial and is granted a new trial, ss. 691 and 692 of the *Criminal Code* do not provide a route of appeal and neither does any other statutory authority.[234] As such, they quashed the cross-appeal for want of jurisdiction and confirmed the order of a new trial for Mr. Chan.[235] In terms of Sullivan, the SCC simply reiterated that s 33.1 is unconstitutional and of no force and effect as per *R v Brown* and upheld his acquittal by the ONCA on the basis of self-induced intoxication automatism.[236]

The guidance provided in *Sullivan* leads to some interesting deliberations. Declaring that binding decisions of Superior Courts are to be followed by courts of coordinate jurisdiction, the SCC has moved to enhance judicial conformity in trial courts by constraining the ability of trial judges to reach different decisions of constitutionality except in narrow circumstances where the *Spruce Mills* criteria aren't met. While this increases uniformity in ruling and will likely expedite certain cases, judicial diversity is circumscribed for trial judges and different rulings of constitutionality will mostly be the task of appellate courts. Although the foundational doctrine

[229] *Ibid* at para 53.
[230] *Ibid* at para 65.
[231] See *Re Hansard Spruce Mills*, [1954] BCJ No. 136, 4 D.L.R. 590 [*Hansard*].
[232] *Ibid* at para 75.
[233] *Ibid* at para 84.
[234] *Ibid* at paras 89-90.
[235] *Ibid* at para 99.
[236] *Ibid* at paras 32, 98.

of *stare decisis* imputes such an effect, it is apt to question whether the paradigms of expediency and conformity are worth sacrificing the variance of legal opinions that trial judges can provide.

G. Miscellaneous

There were thirteen cases which were categorized as falling within the miscellaneous category. In *R v R. V.* the accused was charged with historical sexual offences spanning from 1995 to 2003. This included sexual assault, sexual interference and invitation to sexual touching. The complainant was the only witness and testified in relation to multiple occasions whereupon R.V. sexually abused her when she was between the ages of 7 to 13. [237] At trial, the judge failed to properly instruct the jury that the force required for sexual assault was the exact same as the touching required to find guilt for the other two offences. [238] As a result, The jury proceeded to convict R.V of sexual interference and sexual touching but acquit him of sexual assault.[239] R.V appealed, alleging that the verdicts were inconsistent and the Crown cross-appealed, alleging that the charge to the jury was confusing and amounted to an error in law.[240] At issue before the SCC was whether a legal error in jury instructions can reconcile apparently inconsistent verdicts, what the appropriate disposition of an inconsistent verdicts appeal is where there is an error of law in the jury instructions, and whether the verdict rendered by the jury at trial was inconsistent.[241] The 7 judge majority held that when there is a legal error in jury instructions that leads to inconsistent verdicts, the Crown may reconcile this inconsistency if they "satisfy the court to a high degree of certainty that there was a legal error in the jury instructions and that the error:

> (1) had a material bearing on the acquittal;
> (2) was immaterial to the conviction; and
> (3) reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct."[242]

According to the majority, if the court is satisfied that these elements are met and can exclude to a high degree of certainty all other reasonable explanations for how the jury rendered its verdicts, the legal error caused the inconsistency and any inconsistency in verdicts is thus reconciled. [243] In terms of the appropriate disposition of an inconsistent verdicts appeal where there is an error of law in the jury instructions and it is shown that those verdicts are not actually inconsistent, the majority only provided guidance in cases where the Crown cross-appeals. They stated that where this occurs and the Crown has cross-appealed, the acquittal must be set aside and the most appropriate remedy may be to enter a stay of proceedings rather than a retrial. [244]

Applying the framework developed to the verdict in the case, the majority found that the inconsistent verdicts were reconciled and concluded that a stay of proceedings on the sexual

[237] *R v R V*, 2021 SCC 10 at paras 9-10.
[238] *Ibid* at para 6.
[239] *Ibid* at para 19.
[240] *Ibid* at para 2.
[241] *Ibid* at para 27.
[242] *Ibid* at para 33.
[243] *Ibid* at para 35.
[244] *Ibid* at para 45.

assault charge was appropriate.[245] Interestingly, in their concluding statements, the majority adds that the Crown should not burden the trial process by proceeding with duplicative counts as they did in the case at hand. The most optimal solution to decrease inconsistent verdicts, according to the majority, is for the Crown to avoid needless duplication of charges.[246]

At issue in *R v Kirkpatrick* was the analytical framework applicable when a complainant agrees to sexual intercourse conditional on condom use but the accused chooses not to wear one.[247] In *Kirkpatrick,* the complainant made it clear to the accused that she would only have sex with him if he wore a condom.[248] When the two met to have sex, the accused took a condom from his bedside table and they initially had sex with a condom. The accused tried to initiate sex a second time later in the night and the complainant saw him turn towards his bedside table, from where he had previously obtained a condom, and thought he had put one on. Thinking he had put on a condom, they engaged in sexual intercourse. After *Kirkpatrick* ejaculated inside her, the complainant realized that he had not been wearing a condom.[249] The accused was charged with sexual assault and acquitted at trial. The BCCA unanimously overturned the acquittal and the accused appealed to the SCC. The question was whether condom use should form part of the 'sexual activity in question' under s. 273.1(1) or whether condom use is irrelevant to the presence or absence of consent under s. 273.1(1) but can be vitiated on the basis of fraud under s. 265(3)(c) of the *Criminal Code.*[250] The majority explained that, in accordance with *Hutchinson*, the complainant must agree to the specific physical sex act which forms the 'sexual activity in question' in order to have consent.[251] Concerning condoms, the majority stated that condom use forms part of the 'sexual activity in question' under s. 273.1(1) because sex with a condom is a different physical sex act than sex without a condom.[252] Further supporting this premise, the majority added that such an interpretation of s.273.1 is consistent with parliament's various objectives in relation to the sexual assault prohibitions.[253] Situating condom use outside of the ambit of s. 273.1 and it's principles relating to consent was seen by the majority to run in opposition to the goals of parliament in relation to the sexual assault prohibitions and threaten the foundational principles of consent.[254] Distinguishing the case from *Hutchinson*, the majority stated that *Hutchinson* stands for the principle that cases involving instances of condom sabotage and deceit should be analyzed pursuant to the fraud provisions under s. 265(3)(c). They explained that *Hutchinson* does not stand for the precedent that all cases involving condom use are to be placed outside of s. 273.1 and tried via the fraud provisions.[255] Rather, *Hutchinson* applies where the complainant finds out after a sexual act that the accused was wearing a sabotaged condom and he was aware that it was sabotaged. In juxtaposition, the majority

[245] *Ibid* at paras 70, 80.
[246] *Ibid* at paras 78-79.
[247] *R v Kirkpatrick*, 2022 SCC 33 at para 1 [*Kirkpatrick*].
[248] *Ibid* at para 5.
[249] *Ibid* at paras 9-10.
[250] *Ibid* at para 1.
[251] *Ibid* at para 42; *R v Hutchinson* 2014 SCC 19 at para 54 [*Hutchinson*].
[252] *Ibid* at paras 42-44.
[253] *Ibid* at paras 45, 56.
[254] *Ibid* at paras 55, 65.
[255] *Ibid* at paras 82-83.

explained that where the complainant's consent to intercourse is conditional on condom use, then condom use becomes part of the 'sexual activity in question' and is governed by the consent analysis pursuant to s. 273.1.[256] Thus, based on this ruling, when consent to sexual intercourse is conditional on condom use, then there is no consent to intercourse without a condom. In these circumstances, if a sexual partner nevertheless proceeds in intercourse without a condom, they can be held liable for sexual assault. Applied to the situation of the accused, the majority found that the complainant clearly conveyed she would not consent to sex without a condom yet the accused proceeded to have sex with her anyways despite failing to wear one. As such, the BCCA's verdict overturning the acquittal and ordering a new trial was upheld.[257] In concurrence, Justices Côté, Brown, Rowe and Wagner agreed with the disposition but found that *Hutchinson* was not distinguishable and that the proper analysis for condom use is via s. 265(3)(c).[258]

R v Strathdee was an interesting case pertaining to liability in the context of group assaults. At least five men, including the accused Mr. Strathdee, engaged in a group attack on several men. Multiple victims were stabbed and Mr. Tong was stabbed to death.[259] No evidence pointed to who the individual was that inflicted the fatal wound upon Tong. The issue before the SCC was whether a person is liable for manslaughter as a joint principal where he or she participates in a group assault involving multiple victims but there is no evidence that they personally assaulted the victim who died. Clarifying the law, the SCC explained that joint principal liability exists where two or more individuals come together with an intention to commit an offence, they are present during the commission of the offence and contribute to the commission. They ruled that in the context of a group assault, except where there is an intervening event, the actions of all participants constitute a significant contributing cause to all the injuries caused by the group assault. Seeing as manslaughter requires that the impugned conduct of the accused constitute a significant contributing cause, the SCC upheld the accused's conviction by the ABCA. [260] Based off this ruling, an interesting causation dilemma seems to possibly appear where a group assault leads to a death and the charges levied against participants are advanced as murder in the first degree. As known from the jurisprudence surrounding causation in murder, first-degree murder requires a causation standard of a substantial and integral cause of death while a significant contributing cause remains a lower standard.[261] This could make it more difficult to establish a first-degree murder charge for joint principals in the context of a group assault.

In *R v Vallières*, the accused was part of a maple syrup theft and trafficking operation. Overall, a total of 9,571 barrels were stolen from the Fédération des producteurs acéricoles du Québec, totalling a market value of $18,000,000. According to the accused, he earned $10,000,000 in gross income and approximately $1,000,000 in profit.[262] On top of trafficking,

[256] *Ibid* at paras 102-103.
[257] *Ibid* at para 106.
[258] *Ibid* at paras 167, 309.
[259] *R v Strathdee*, 2020 ABCA 443 at para 7 [*Strathdee*].
[260] *Ibid* at para 4.
[261] See R v Harbottle, [1993] 3 SCR 306 at 307-308, SCJ No. 58 [*Harbottle*].
[262] *R v Vallières*, 2022 SCC 10 at paras 6, 8 [*Vallières*].

the accused purchased syrup in fraud of the federation's rights.[263] At trial, the accused was found guilty of theft, fraud and trafficking in property obtained by crime. A fine in lieu was ordered by the trial judge who stated he had no other option but to impose a fine equivalent in value to the property that was the proceeds of crime and that had been in the control or possession of the accused. The evidence established beyond a reasonable doubt that the accused had received $10,000,000 from the crimes he committed and the judge ordered this amount minus restitution to be paid.[264] Upon appeal, the QCCA held that the trial judge erred in claiming that he had no other choice but to impose the $10,000,000 fine. Rather, they explained that he had the discretion to impose a fine mirroring the profit derived from criminal activity if the fine satisfied the objectives of deprivation of proceeds and deterrence. On these grounds, the QCCA imposed a fine in lieu of $1,000,000 minus restitution. The Crown appealed this ruling to the SCC.[265]

The SCC took this opportunity to clarify the law surrounding a fine in lieu of forfeiture of the proceeds of crime. A unanimous court ruled that a fine in lieu of forfeiture of the proceeds of crime can be imposed where the forfeiture of the proceeds of crime is unlikely or impracticable and requires:

> (1) the judge to decide whether to impose a fine in lieu; and
> (2) the Crown to show the offender had possession of the impugned property, and if they did, illustrate its value by reference to the evidence.[266]

When such a fine is imposed, the SCC held that an offender must pay a fine equal to the value that are the proceeds of crime and that the fine is not to be limited solely to the profits made.[267] This was found to include gross income derived from the sale of property obtained by crime.[268] An exception to this is where there is multiple co-accused. Where this occurs, a co-offender's fine may be decreased below total value and be apportioned amongst the co-accused as long as the total value of the property derived from crime is distributed amongst them. [269] The accused has the burden of demonstrating this, but the Crown has a duty to apportion the value between co-accused in any case that they have evidence illustrating simultaneous or successive possession of the property to avoid the risk of double recovery.[270] However, to exercise this discretion, a court must be satisfied with certain measures. Namely, for there to be apportionment, the other alleged accomplice(s) must have been charged as well and the evidence must show that the co-accused had possession of the same property at some point.[271]

In R v Sundman the SCC had to determine whether the victim, Mr. McLeod, was unlawfully confined at the time he was shot by the accused as this would make the accused liable for first degree murder pursuant to s. 231(5) of the *Criminal Code*.[272] The accused unlawfully

[263] *Ibid* at para 7.
[264] *Ibid* at para 11.
[265] *Ibid* at paras 17-18.
[266] *Ibid* at paras 35-36.
[267] *Ibid* at para 26.
[268] *Ibid* at para 29.
[269] *Ibid* at para 39.
[270] *Ibid* at paras 39, 52.
[271] *Ibid* at paras 44, 46.
[272] *R v Sundman*, 2022 SCC at para 19 [*Sundman*].

confined the victim, Mr. McLeod, in a pickup truck and assaulted him repeatedly with a handgun. McLeod jumped from the truck to escape and the accused shot him 3 times, but did not manage to kill him. Eventually, an accomplice of the accused found Mr. McLeod laying down wounded and shot him at close range killing him in the process. The trial judge acquitted the accused of first-degree murder, claiming that when Mr. McLeod escaped the truck, he was no longer unlawfully confined and the murder was not committed during the offence of unlawful confinement.[273] The BCCA unanimously overturned this decision finding that he was still unlawfully confined and the accused appealed to the SCC as of right. [274]

A unanimous court in the SCC explained that s. 231(5) of the criminal code requires five factors to be met to operate: (1) an underlying crime of domination; (2) murder; (3) substantial cause; (4) no intervening act; and (5) the same transaction. Two tests can be utilized interchangeably to discern whether the same transaction factor is met. The single transaction test asks if the offence of domination under 231(5) and the killing form part of one continuous sequence of events forming a single transaction.[275] On the other hand, the temporal and causal connection test asks whether the domination offence under 231(5) and the murder have a close temporal connection. A temporal connection exists when the domination offence and killing are close in time and a causal connection exists where the offender's reasons or motivation for the killing is linked to, or arises from, the domination of the victim.[276] In addition, the court also added that that, for 231(5) to lead to a conviction for first-degree murder, the underlying domination offence and the killing must involve two separate and distinct criminal acts.[277] Applied to the case, the court deemed that Mr. McLeod was still coercively restrained when he jumped from the truck and ran for his life. As such, the court found that he was still unlawfully confined and went on to apply the single transaction test. They concluded that the accused murdered Mr. McLeod while committing the unlawful confinement as the murder and confinement were part of one continuous sequence forming a single transaction. On this basis, they upheld the accused's conviction for first degree murder and dismissed the appeal.[278]

The final case to mention from the miscellaneous category is *R v White*. Following his trial, Mr. White appealed, arguing that he had received ineffective assistance of counsel on the basis that his lawyer at the time, Mr. Matthews, failed to acquire his informed instructions concerning his election as to a mode of trial. [279] The majority of the NLCA allowed the appeal and ordered a new trial. They claimed that for the purposes of ineffective assistance of counsel, an accused is not required to establish prejudice when trial fairness is in issue to establish a miscarriage of justice.[280] On this basis, they found that Mr. Matthews failed to properly instruct or discuss with Mr. White his right to elect the mode of trial and that this incompetence

[273] *Ibid* at paras 2-3.
[274] *Ibid* at paras 15-16.
[275] *Ibid* at para 28-29.
[276] *Ibid* at paras 33-34.
[277] *Ibid* at para 40.
[278] *Ibid* at para 49.
[279] *Ibid* at para 4.
[280] *Ibid* at para 12.

undermined the fairness of the trial and resulted in a miscarriage of justice.[281] In dissent, Justice Hoegg disagreed. He believed that trial prejudice or conduct that is so serious as to shake confidence in the administration of justice is necessary to establish a miscarriage of justice.[282] She felt that Mr. White had not suffered prejudice and dismissed the appeal.[283] In agreeance with Hoegg, the SCC felt no miscarriage of justice had transpired. They reasoned that failure to discuss and elicit instructions pertaining to an accused's defence may, but not always, raise questions of procedural fairness and result in trial unfairness. Although this may be the case, they held that the loss of such decisions does not in and of itself warrant a new trial on the ground of ineffective assistance of counsel. Rather, an accused must show more than a mere loss of choice.[284] According to the court, the accused must show subjective prejudice such that they can demonstrate there was a reasonable possibility they would have acted differently. The court found that Mr. White failed to do so.[285] Agreeing with Hoegg, the court also held that the loss of Mr. White's right to elect was serious but did not rise to the standard of being so serious as to shake public confidence in the administration of justice and result in a miscarriage of justice.[286]

V. Comments: SCC

The decisions from the Supreme Court of Canada during this period addresses centralizing the accused in the sentencing process. Two decisions, *Bissonnette* and *Parranto*, have brought forward contentious issues regarding the sentencing of an offender which has resulted in systemic change.

In *Parranto,* the court addresses the ethicalities of starting point sentences. While the majority confirms that they are necessary part of sentencing, the dissent believes a proportional and just sentence is elicited through the individualization of a sentence. Generally, the application of starting points prevents this process of individualization. Starting point sentences are a means of standardizing the sentencing process, which may prevent an accused from having the opportunity to recieve a lower sentence that may be justified based on their individual circumstances. This contradicts the landmark *Bisonette* decision which declared that life sentences without the realistic possibility of parole violate section 12 of the *Charter*. This decision reflects that idea that sentences which negate the objective of rehabilitation from the outset breach section 12 of the *Charter*. When connecting this to the Parranto decision we see some contradictions. Starting points are applied from the outset focusing on the offence rather than the offender and may prevent fair opportunities for rehabilitation.

Bissonnette has caused change by encouraging the application of the sentencing principle of rehabilitation. Typically, in first degree murder convictions, the courts heavily consider the principles of deterrence and denunciation, which can leave the principle of rehabilitation behind. This could allow lower courts to encourage valuing rehabilitation over retribution. As this

[281] *Ibid* at paras 23-24.
[282] *Ibid* at para 50.
[283] *Ibid* at para 68.
[284] *R v White*, 2022 SCC 7 at 4 [*White*].
[285] *Ibid* at para 5.
[286] *Ibid.*

decision dealt with the sentencing of the Quebec mosque shooter, its sensitive nature meant it was susceptible to criticism as it dealt with issues of bigotry and islamophobia. Impacted communities expressed dissatisfaction with the decision as he received a successful appeal despite the vulgarity of his actions. Bissonette committed multiple murders and won his case which deeply unsettled impacted communities and Canada at large.

The case of *Stairs* also modified law to better protect the accused through constraining the police when conducting search and seizures in a home incident to arrest. This case dealt with the central issue of how do we balance the privacy interests of an accused with allowing law enforcement to conduct searches incident to arrest? While Stairs was ultimately found guilty, this modification tightened criteria for officers to follow when dealing with specific areas of which are outside the accused's personal control yet remain proximate to the arrest, as extensive warrantless searches have a large potential of violating an accused *Charter* rights. Police must now carefully tailor searches to protect these privacy interests. This decision follows a similar narrative as seen in *Bissonette* in which the interests of the accused are being prioritized. It will be interesting to see in the coming years if there is a trend of these SCC decisions within lower courts, where and accused's interests will be further protected.

VI: Statistics: MBCA

A. Appellant versus Respondent Rates

From March 2021 through June 2023 the MBCA heard 115 criminal law appeals. Defence counsel appeared as appellant in 83% of these appeals (n=95/115) and the Crown appeared as appellant in 15% (n=17/115). Both parties cross-appealed in 2% of the appeals (n=3/115).

B. Overall Success Rates

Defence counsel was only successful in 21% of appeals (n=24/115) while the Crown was successful in 77% (n=89/115). In 2% of the cases there was either no win for either party, or the appeal was adjourned (n=2/115). A success rate of only 21% is quite low and is a somewhat troubling statistic for the local defence bar.

C. Appellant Categories

The most prevalent categories of appeal in the MBCA from March 2021 to June 2023 were sentencing at 30% of appeals (n=34/115) and evidence at 27% (n=31/115). Trial procedure formed 21% (n=24/115) of appeals followed by miscellaneous at 12% (n=14/115). Lastly, Charter (n=4/115), Search and Seizure (n=3/115), and Defences (n=3/115) made up 3% of appeals.

VII. Case Analysis: MBCA

A. Charter

Only five of the criminal law appeals heard by the MBCA between March 2021 to June 2023 were *Charter* appeals. In *R v Bernier* the court had to rule on the constitutionality of s. 229 of the Highway Traffic Act (HTA). The accused was charged with being an owner of a vehicle with respect to two photo radar traffic tickets under s. 229 of the HTA. He contended that s. 229

created a presumption that he was driver, which was one that he must rebut, and therefore breached s. 11(d) of the *Charter*.[287] A unanimous panel of five judges ruled that s. 229 of the HTA does not violate s. 11(d) of the *Charter*. They held that s. 229 does not create a presumption that the owner of the vehicle is driving, nor does it create the possibility that an accused will be convicted even with a reasonable doubt as to ownership of the vehicle and/or the traffic violation.[288]

The court in *R v Burg and Khan* had to rule on whether a Crown decision to proceed by direct indictment breached the s. 7 and 11(b) *Charter* rights of the accused.[289] In this case, the Crown filed for direct indictment against the accused as they were concerned that the trial would not be able to be completed within the 18-month *Jordan* ceiling for the Manitoba Provincial Court (MBPC). At trial, which occurred within 22.5 months, both accused were found guilty of conspiracy to traffic cocaine and one of the accused, Mr. Khan, was found guilty of extortion.[290] The accused appealed, alleging that having a direct indictment filed for the purpose of moving a case from the MBPC to the MBQB to extend the *Jordan* ceiling was an abuse of process by the Crown that breached their s. 7 rights. Additionally, they contended that the delay in bringing the case to trial in the MBQB that resulted from filing the direct indictment was unreasonable and breached their s.11(b) rights.[291] Dealing with the s. 7 claim, the MBCA found that there was no abuse of process and agreed with the trial judge that the Crown had acted in good faith, been mindful of the accused's s. 11(b) rights, and made efforts to expedite the process throughout.[292] They also drew specific attention to the Crown's constitutional obligation to ensure that individuals who are supposed to go to trial do end up going to trial and referred to jurisprudence that recognized the use of a direct indictment to ensure the Jordan ceiling is not exceeded.[293] Turning to the s. 11(b) claim, the court concurred with the trial judge's conclusion that the case did not take markedly longer than it should have in light of the factual findings made as to the complexity of the case and length of other similar cases. On this basis, it was found that there was no s.11(b) violation.[294] On these grounds, the appeal was dismissed.

R v Z (MJ) involved a rather contentious set of comments made by a police officer to the accused. The accused was convicted of various sexual assault offences related to the nephews of his husband who were children at the time. During an interview, an officer made comments that were insulting, verbally abusive, and denigrated the political views of the accused and his husband, the accused's sexual orientation, and the accused's experience and recovery from sexual assault.[295] The accused motioned for a stay of proceedings based on the officer's behavior, alleging that it constituted an abuse of process, therefore contravening his s.7 *Charter*

[287] *R v Bernier*, 2021 MBCA 21 at para 3 [*Bernier*].
[288] *Ibid* at paras 11, 18.
[289] *R v Burg and Khan*, 2021 MBCA 77 at para 1 [*Burg and Khan*].
[290] *Ibid* at paras 6, 12.
[291] *Ibid* at paras 3-4.
[292] *Ibid* at para 54.
[293] *Ibid* at paras 55-56. See *R v CMM*, 2017 MBCA 105 [*CMM*].
[294] *Ibid* at para 66.
[295] *R v Z (MJ)*, 2022 MBCA 61 at paras 12, 26-27 [*Z(MJ)*].

right. [296] Upon appeal to the MBCA, the court took the opportunity to clarify the law surrounding abuse of process claims involving a stay of proceedings. The court held that, although the tests for abuse of process and the first step in the stay of proceedings test from *R v Babos* have not always been differentiated, that the proper analytical framework is to differentiate the two.[297] As such, a judge conducting an analysis for a stay of proceedings based on an abuse of process should first identify and apply the legal test for whether there has been an abuse of process and thus a breach of s. 7, and then, if necessary, proceed to consider the *Babos* test for a stay of proceedings.[298] The court held that the trial judge committed a palpable and overriding error by finding no breach of s.7 and ruled that the officer's conduct amounted to an abuse of process in the residual category, therefore constituting a s. 7 breach.[299] This residual category is engaged where state conduct- does not undermine trial fairness, but risks undermining the integrity of the judicial process Finding that there was an abuse of process causing a s. 7 breach, the court moved on to determine whether a stay of proceedings was warranted according to the *Babos* test. The extremely serious nature of the sexual crimes and society's interest in seeing justice done was found by the MBCA to outweigh the state's misconduct and make it so this was not one of the "clearest of cases" where a stay of proceedings was warranted.[300] On these grounds, the accused's appeal was dismissed.

In *R v Swanson* the accused appeals conviction for firearms offences, which follows the trial judge's dismissal of his argument that pursuant to s.24(2) of the *Charter* where the evidence obtained during a search of his home should be excluded. In this case, the accused had purchased a firearm suppressor which authorities intercepted before its delivery. The RCMP then obtained and executed two search warrants, where they seized restricted and non-restricted firearms, firearm suppressors, 3D printers, air guns, ammunition, and digital storage devices.[301] At trial the accused argued that the judge who issued the warrants was biased as the judge has a prior professional relationship with the accused's wife that ended acrimoniously.[302] While the Crown recognized the bias, and confirmed that this search did breach his s. 8 *Charter* rights, they argued that the evidence should still be admissible. Ultimately the trial judge agreed with the Crown and concluded that the admission of evidence would not bring the administration of justice into disrepute, the accused was convicted.[303] At the Court of Appeal, it was decided that the trial judge did not err in their decision, and the appeal was dismissed.[304] There is evidence that the trial judge correctly applied the three-pronged *Grant* test when determining whether to exclude the evidence. The test requires consideration of (1) the seriousness of the *Charter* infringement; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in adjudicating the case on its merits.[305] Further, while a reasonable apprehension of bias

[296] *Ibid* at para 13.
[297] *Ibid* at para 57. See *R v Babos*, 2014 SCC 16 [*Babos*].
[298] *Ibid* at para 59.
[299] *Ibid* at para 65.
[300] *Ibid* at para 82.
[301] R v Swanson, 2023 MBCA 43 at para 3 [*Swanson*].
[302] *Ibid* at para 4.
[303] *Ibid* at para 5.
[304] *Ibid* at para 7.
[305] *Ibid* at para 9.

is a form of misconduct, it is evident that the police had no knowledge of the judge's prior personal connection with the accused's wife. When considering the entire context, it is clear the officers did not seek out that particular judge, significant time had passed since the Judge's last interaction with the wife, and there was limited connection of the wife to the residence that was searched.[306] Overall, the trial judge made no error and in considering the situation there is found to be no basis for appellate intervention.

The last *Charter* case is R v *Tarapaski*. The police received a 9-1-1 call that the accused was behaving not in his right mind and was out of control. When the police arrived, the accused was arrested twice. The first arrest was minutes after police arrived and it was for mischief, then while walking to the car he was cautioned by being told that he "need not say anything" and that anything he said "may be used as evidence".[307] While searching Tarapaski they found stolen ID and .22 calibre ammunition, and while searching the home they found a modified object that appeared to be a firearm in plain view. The officer then placed the object on the hood of the car, and the accused made a statement stating that it was his BB gun.[308] He was not arrested for a firearm offence at this time. At the police station he was provided opportunity to speak with counsel, but his requested lawyer did not answer the phone. The officers offered to call another lawyer or his parents, but at this time the accused became increasingly upset. He ripped the cable for the interview room phone off the wall and wrapped it around his neck. He was detained and was not able to speak to his lawyer until 9:30am. At trial, the accused argued his *Charter* rights had been infringed, this included his right to silence and right to counsel, arguing that this statement to police should be excluded.[309] The trial judge, in considering the totality of the circumstances, determined that there was no breach. Two clear issues at the appellate court is whether the item found by police is defined as a firearm and whether the accused's Charter rights were breached.

The court applied the Supreme Court case of *Covin* which provides a three step process for when a court can consider whether a firearm can be adapted for use and what is the acceptable amount of adaptation. The process is as follows:

1. Identifies the purpose of a *Criminal Code* provision as prohibition on use or possession of a firearm or other weapon;
2. Evaluates the relevant time and difficulty for repair/conversion of a firearm, for example:
    a.) in the commission of an offence, the firearm must be capable of repair or conversion during the commission of the offence, and
    b.) for a possession offence, the firearm must be capable of repair or conversion in "a relatively short period of time with relative ease";
3. Determines whether either:
    a.) an ordinary person could repair or convert the firearm during that time, or
    b.) the accused could make operable or convert the firearm during that time."[310]

[306] *Ibid* at para 10.
[307] *R v Tarapaski*, 2022 MBCA 74 at para 6 [*Tarapaski*].
[308] *Ibid* at para 8.
[309] *Ibid* at paras 9- 12.
[310] *R v Vader*, 2012 ABQB 288 at paras 103-105 [*Vader*].

Ultimately, the court was able to draw reasonable inferences as to adaptability because the expert evidence that the methods used to render the firearm operable were easy and straightforward.[311] Regarding the claim that his *Charter* rights were violated, the appeal court dismissed this. Regarding s.10(a) it was found there was no breach because the charges the accused was informed of upon his arrest were reasonable at the time of the arrest, and he knew the jeopardy he was facing.[312] Further, regarding s.10(b) the accused was provided with an opportunity to contact counsel at the first opportunity, and it was ultimately his fault that he did not execute this opportunity with due diligence. Given his erratic and disruptive behaviour, it was reasonable for the police not to attempt another opportunity to contact counsel until the next morning.[313] For the accused's right to silence, the appellate judge concluded that he was aware his statement could be used as evidence, while the specific phrase "can be used against you" may have been preferable, it was not required.[314] Lastly, even if there was a Charter breach the appellate judge confirmed that he would not have excluded the statement under s. 24(2) regardless.

B. Defences

Defences was the lowest represented category of appeal in the MBCA between the dates studied. In *R v Roulette* the accused was charged with stabbing his cousin, the complainant. The evidence was tenuous at best and the trial record established that the accused had no recollection of how the stabbing occurred and his actions post-altercation were arguably consistent with the possibility of an accident. [315] Dismissing the prospect of accident, the trial judge convicted the accused of aggravated assault and sentenced him to 14 months imprisonment. The accused appealed both the conviction and the sentence. Concerning the conviction appeal, the accused argued that the trial judge dismissed the available inference of accident which led to a reasonable doubt as to his guilt. Concurring, the Crown said the evidence cannot disprove an inference of accident and joined the accused in asking for an acquittal to be entered.[316] Upon review of the trial record, the MBCA found that there was no reasonable view of the evidence precluding the inference of the defence of accident. This being the case, the MBCA acquitted the accused.

The second case involving defences *is R v Kinnavanthong*. This case concerned an accused in a drug debt collection group who went to the residence of the deceased and another victim, R.T. R.T explained that one of the men accompanying the accused sprayed bear mace and yelled "shoot him in the leg." The accused proceeded to shoot the deceased and R.T But claimed his intention was not to kill but he panicked and started shooting when he walked into the cloud of mace.[317] At trial the judge found no air of reality to the defences of self-defence and accident and the accused was convicted of numerous offenses, At a dangerous offenders hearing, where the accused had to appear by videoconference due to COVID-19, he was deemed a dangerous offender and given an indeterminate sentence.[318] The accused appealed, alleging that

[311] *Tarapaski*, supra note 307 at para 33.
[312] *Ibid* at para 49.
[313] *Ibid* at para 81.
[314] *Ibid* at para 70.
[315] *R v Roulette,* 2021 MBCA 95 at paras 5-6 [*Roulette*].
[316] *Ibid* at paras 1-3.
[317] *R v Kinnavanthong*, 2022 MBCA 49 at paras 3-5 [*Kinnavanthong*].
[318] *Ibid* at paras 8-11.

the trial judge erred by finding no air of reality for self-defence and accident and by hearing the dangerous offenders application without him present. In addition, he claimed that the indeterminate sentence was demonstrably unfit. [319] Swiftly, the court dismissed the air of reality arguments and found that the trial judge correctly concluded there was no evidence reasonably capable of supporting an acquittal. On the issue of the dangerous offender hearing, the accused attempted to argue that the provisions of the Criminal Code meant that the sentencing hearing could not proceed without his physical presence. The court disagreed with this interpretation and held that under the circumstances of COVID-19, the trial judge properly utilized his discretion in ordering the accused to appear by videoconference. On the issue of the sentence being unfit, the court referenced the accused's large and violent criminal record, aggressive behaviour, and high risk of recidivism as reasons supporting the indeterminate sentence in the circumstances. [320]

The final defence case heard at the MBCA was *R v King*, a case which dealt with the application of the s.34 *Criminal Code* provision and self-defence. The Crown appeals the accused's acquittal of a charge of second-degree murder in connection with the stabbing death of Shaylynne Hunter.[321] The accused, co-accused, and deceased were at a party with drinking and drugs, with descriptions of the deceased becoming "uncontrollable" after ingesting cocaine. Over the course of the evening arguments occurred between the three parties over alcohol and an alleged lost purse.[322] The criminal event occurred when the parties moved into the back lane where the accused stabbed the deceased 21 times, with the ultimate cause of death being blood loss. The deceased was found to be in an advanced state of intoxication at the time of the offence, and the Crown at trial failed to disprove the defence of self-defence.[323] The Crown believes that legal errors impacted the finding and is seeking a new trial. Of specific focus at the appellate level was that the judge erred in their application of section 34 of the *Criminal Code*.[324] Under s. 34(1) are three fundamental questions which are addressed when a claim of self-defence is raised, (1) under s. 34(1)(a) the accused must reasonable believe that force/threat of force is being used against them; (2) under s. 34(1)(b) the subjective purpose for responding to the threat must be to protect themselves or others; and (3) under s. 34(1)(c) their actions must be reasonable in the circumstances.[325] At the Court of Appeal it was found that the trial judge did not err in their findings of section 34(1)(a) and 34(1)(b), and while there was concern about the modified objective test in section 34(1)(c), ultimately it was found they did not err with this application either.[326] Moving on to s. 34(2), the there are nine non-exhaustive elements that are taken into account when an accused's actions are considered reasonable in the circumstances.[327] Much of the judgement at the appeal level was concerned with s.34(2)(c) which considers the persons role in the incident. The Supreme Court decision of *Khill* was applied to conceptualize this concept, where it was determined that the entirely of the interactions between an accused and

[319] *Ibid* at para 11.
[320] *Ibid* at paras 23, 27, 31-32.
[321] *R v King*, 2023 MBCA 37 at para 1 [*King*].
[322] *Ibid* at para 5.
[323] *Ibid* at para 2.
[324] *Ibid* at para 16.
[325] *Khill*, *supra* note 104 at para 37.
[326] *King*, *supra* note 321 at para 36.
[327] *Supra* note 325.

victim must be considered. The trial judge had conducted a narrow analysis and failed to consider the evidence of the escalating verbal dispute between the accused and deceased.[328] The appellate court determined that this narrow analysis was an error in law. Further, regarding s. 34(2)(g), which refers to the nature and proportionality of the persons response to the use or threat of force, it was determined that key evidence was not discussed in detail. The appeal judge thought that the evidence that the deceased remained upright with no defensive wounds, and that the accused immediately disengaged when the deceased backed away was critical details that was due further attention.[329] Nevertheless, despite these legal errors the appeal is dismissed because the trial judges' ultimate finding that the Crown had not disproved the accused's defence or self-defence beyond a reasonable doubt was correct.[330] Even though legal errors were found in the application of the test for self-defence, these errors had no impact on the verdict.

C. Evidence

While many evidence cases in the MBCA during the period reviewed were simply applications of evidentiary standards of review in instances such as credibility assessments or the misapprehension of evidence, there are still numerous cases warranting mention.

The case of *R v Sutherland* involved an accused who, according to his accomplice Mr. Conway who testified against him, helped repeatedly stab and rob the deceased.[331] The accused denied this and the trial essentially became a credibility contest between Conway and the accused. Evidence was adduced by RCMP officer Sergeant Catellier who the trial judge, following a *voir dire*, concluded could provide opinion evidence for the Crown on various matters related to DNA.[332] He was not an expert or scientist in DNA and his knowledge of DNA was based on his 18 years on-the-job experience as a police officer. At trial, counsel for the accused stated that Conway "got a deal", implying that Conway implicated the accused to procure a reduced charge, rather than because the accused was guilty. Based on this comment, the trial judge provided a curative instruction to the jury and corrected trial counsel.[333] At trial, the jury found the accused guilty of second-degree murder and the accused appealed. He alleged that the curative instruction was an error and that the trial judge erred in admitting some of Sgt. Catellier's testimony when it was opinion evidence that could only be given by a qualified expert.[334] The majority of the MBCA swiftly dismissed the curative instruction claim and turned to the evidence of Sgt. Catellier. [335] They found that the primary question was whether the opinion stated could be formed only by an individual with special training or expertise, which would be expert opinion evidence, or if the opinion is based on ordinary experience, which would be a lay opinion.[336] The court pointed out that expressions of opinion by officers pertaining to compendious statements of facts concerned with matters within ordinary officer

[328] *Ibid* at para 49.
[329] *Ibid* at para 52.
[330] *Ibid* at para 63.
[331] *R v Sutherland,* 2022 MBCA 23 at paras 3-4 [*Sutherland*].
[332] *Ibid* at para 12.
[333] *Ibid* at para 23.
[334] *Ibid* at para 1.
[335] *Ibid* at paras 30-31.
[336] *Ibid* at para 40.

training and experience are admissible as lay opinion evidence.[337] However, in respect to evidence regarding DNA, the court held that the law generally requires an expert to give such testimony and that certain testimony provided by Catellier was highly specialized and not matters within ordinary police knowledge. [338] Although admitting some of Catellier's evidence was found to be an error, the court applied the curative proviso and dismissed the appeal. [339]

Another case involving the tension between expert and lay evidence was *R v Courchene*. The accused and an accomplice broke into a home that had been vacant since the owner's death and stole three rifles, two shotguns and an airsoft pistol. At trial, it had to be proven that the items stolen were firearms and the Crown relied on evidence from the deceased house owner's son and son-in-law to prove this. The accused was convicted of breaking, entering and stealing a firearm under section 98(1)(b) of the criminal code and appealed on the ground that the verdict was unreasonable as the trial judge misapprehended the evidence by treating the deceased house owner's son-in-law as an expert witness.[340] Unanimously, the MBCA dismissed the appeal and explained that the Crown may prove an item fell within the definition of firearm by inference from the totality of the circumstances. Adding to this, they held that evidence as to the condition of an item or thing from a lay witness is properly admissible for a trial judge to draw inferences from. Following this logic, the court found that the trial judge drew reasonable inferences from the son-in-law's evidence as he was familiar with the alleged firearms from his military background and personal history servicing and firing them.[341]

In R v *JM*, the MBCA reiterated the standard of review for the admissibility of video statement evidence within a reasonable time. The accused in *JM* sexually assaulted his great niece in 2012-2013 when she was 11. She disclosed the sexual assault in 2015 but did not make a statement.[342] In 2017 she made a video statement identifying the accused, but when shown a driver license photo of the accused from 2004 she said that was not him. At trial, the accused was convicted of sexual assault and sexual interference and was sentenced to five years imprisonment. He appealed, alleging that the video statement was not made in a reasonable time after the offences and that it was an error for the judge to rule on the video's admissibility without having first watched it. In addition, he contended that the verdicts were unreasonable and sought leave to appeal on the grounds his sentence was unfit.[343] Dealing with the video statement, the court explained that a finding of fact that a video statement was made in a reasonable time should not be interfered with unless there is an egregious error committed by misconstruing or failing to recognize evidence or by reaching an erroneous conclusion.[344] Moreover, they added that whether a video statement is made in a reasonable time is a case-specific inquiry considered in light of the case and its relevant factors.[345] On this basis, the court

[337] *Ibid* at para 45.
[338] *Ibid* at para 49.
[339] *Ibid* at paras 75, 81.
[340] *R v Courchene*, 2021 MBCA 24 at paras 1-5 [*Courchene*].
[341] *Ibid* at paras 5, 7.
[342] *R v JM*, 2022 MBCA 25 at paras 4-6 [*JM*].
[343] *Ibid* at paras 1-2.
[344] *Ibid* at para 24.
[345] *Ibid* at para 31.

was satisfied that the trial judge made no errors and properly analyzed and weighed the relevant factors to admit the video pursuant to s. 712.1 of the *Criminal Code.* They also commented that prior to a ruling on admissibility, a video statement should be played during a *voir dire.* Nevertheless, the court held that the trial judge's failure to view the statement prior to his admissibility ruling did no substantial harm to the trial.[346] In terms of the misapprehension of evidence and sentence appeals, the court applied the standards of review and found no errors.[347]

At issue in the case of *R v Morrissette* was the trial judge drawing an inference that the accused had knowledge and control of a firearm and ammunition although there was no direct evidence of the accused's possession.[348] The MBCA, reiterating previous precedent, explained that in circumstances where there exists no direct evidence of possession of an item, then the circumstantial evidence must show or lead to the inference that the accused had knowledge or control of the item in order to elicit a conviction for a possession based offence. In addition, they added that to draw a reasonable inference of guilt, the test from *R v Villaroman* SCC 33 is to be used. Applied to the case, the MBCA felt that the trial judge properly followed these rules and drew reasonable inferences. [349]

Of final brief note are the cases of *R v DAB* and *R v Lariviere*, namely for the comments of the MBCA. In *Dab*, the court sternly reminded the Crown that their right to appeal an acquittal is severely curtailed and restricted solely to questions of law. They added that, even where the Crown can show there was an error of law, there must be a reasonable degree of certainty this error was material to the verdict rendered.[350] The court in *Lariviere* had to deal with the assertion that ambiguous remarks by the trial judge show that an adverse inference was drawn against the accused in a credibility assessment. Swiftly dismissing this, the MBCA commented that their job as an appellate court is not to peruse through the judges reasons in search of an error but to consider whether there is a reasonable and intelligent pathway to the credibility finding made that can be derived from the reasons of the trial judge.[351]

D. Search and Seizure

Similar to *Charter* and Defences, Search and Seizure was another category featuring a rather low number of cases in the MBCA. At issue in *R v Telfer* was whether evidence obtained by the Winnipeg Police without a production order (WPS) from Budget Car Rental Service breached the accused's s. 8 *Charter* right. This evidence included the accused's, along with his co-accused's, cell phone numbers, names, credit card numbers and driver's license numbers (Budget evidence). [352] It was procured after the WPS discovered that a Jeep rented from Budget was used in a shooting. The accused contended that the Budget evidence should be removed as he had a reasonable expectation of privacy (REP) in that information and the WPS obtained it in

[346] *Ibid* at paras 35-36, 38-40.
[347] *Ibid* at paras 47, 51.
[348] *R v Morrissette*, 2022 MBCA 8 at paras 2, 10 [*Morrissette*].
[349] *Ibid* at paras 11-12.
[350] *R v DAB*, 2022 MBCA 45 at para 5 [*DAB*].
[351] *R v Lariviere*, 2021 MBCA 76 at paras 10-11, 14-15 [*Lariviere*].
[352] *R v Telfer*, 2021 MBCA 38 at paras 7-8 [*Telfer*].

breach of his s. 8 right. [353] Employing the totality of the circumstances test to determine whether the accused had a REP in the Budget information, the court held that the accused would not have an objective REP in the subject matter of the budget evidence.[354] They reasoned that much of the Budget information was required to be accessible to the public and was open to inspection to anyone via s. 22 of the Highway traffic Act (HTA). Moreover, the contractual rental agreement between Budget and its customers permits Budget to disclose customer information if required or permitted by law or to take action regarding illegal activities or violations of the terms of service. Stating that there is nothing improper about police asking for documents that a person is not prohibited by law from disclosing, the court found that the information was either completely publicly accessible under section 22 of the HTA or that budget was entitled to share it with the WPS under their rental agreement. [355] Interestingly, such a ruling illustrates that depending on the information sought, there will be no REP in information provided to car rental businesses in Manitoba if that information is open to inspection by the public under section 22 of the HTA and/or the rental businesses' rental agreement enables that info to be shared.

Involving search and seizure in the context of cellular devices, the MBCA in *R v F (JM)* was faced with ruling on whether a cell phone seized by police without warrant and before they informed the accused of his right to counsel breached his s. 8 and 10(b) *Charter* rights. This occurred after the accused, a youth at the time, stated that the cell phone was his when his sister took it out of her pocket as they conversed with police in the foyer of the accused's father's home.[356] At trial, the judge admitted the evidence even though he concluded that the accused's statement was obtained in breach of his s. 10(b) right to counsel and found no breach of s .8. Utilizing the information on the phone, the trial judge convicted the accused of first-degree murder. [357] The MBCA found that the trial judge erred by admitting the accused's statement that the phone was his as the judge failed to consider s. 146 of the Youth Criminal Justice Act. This provision holds that a young person's statement is presumed to be inadmissible unless the Crown proves beyond a reasonable doubt that the provision does not apply, or if it does, that its statutory requirements are met.[358] Seeing as the trial judge did not consider the Crown's failure to discharge this burden, the accused's statement was presumptively inadmissible and the trial judge erred by not considering s. 146 of the YCJA alongside his admissibility analysis under s. 24(2) of the *Charter*. Turning to the seizure of the phone, the court drew a functional link between *R v Reeves* and *R v Fearon* to find that the trial judge erred by ruling that the accused's privacy interest lay solely in the informational content of the cell phone and not in the device itself.[359] Rather, according to the MBCA, an accused has a REP in a cellular device itself, not solely in its informational content.[360] Seeing as the accused's statement was inadmissible, that the phone was not subject to seizure without that statement, and that the accused's section 8 and

[353] *Ibid* at paras 41-42.
[354] *Ibid* at para 64.
[355] *Ibid* at paras 39, 45.
[356] *R v F (JM)*, 2022 MBCA 52 at paras 9-10 [*F(JM)*].
[357] *Ibid* at paras 15-16, 20-21.
[358] *Ibid* at para 32.
[359] *Ibid* at para 47. See *R v Reeves*, 2018 SCC 56 and *R v Fearon*, 2014 SCC 77.
[360] *Ibid* at para 53.

10(b) rights were breached, the court conducted a fresh 24(2) analysis.[361] The MBCA ultimately excluded the cell phone evidence and ordered a new trial.[362] Such a ruling recognizes the heightened privacy interests that individuals have in their phone in modern times. Operating akin to an appendage to the human body, almost everybody within contemporary Canadian society has a cellular device. While the informational content on the device is undoubtedly private, how could one not have a REP in the device itself considering that it acts as a direct gateway of accessibility to that informational content? Nevertheless, based on the precedent set in *F (JM)*, it is accepted in Manitoba that a mere seizure of a cell phone, without yet prying into its informational content, engages an individuals privacy interest and REP.

The final Search and Seizure related case of mention is *R v McKenzie.* In *McKenzie*, an accused was observed running through back yards clutching his body. Officer Beattie recognized the accused as a long-time gang member who often carried weapons and believed he was concealing one. A chase ensued after Beattie called out to detain the accused for investigative purposes. After catching up with the accused, Beattie pinned him to a wall, observed that the fanny pack he was carrying was already 75% open and lifted the flap to fully open it. He shined his flashlight inside and discovered a handgun and later located 37 grams of fentanyl, 46 grams of meth, and other drug trafficking related items in the accused's jacket after arrest.[363] At trial, the accused attempted to have the drugs and firearms evidence excluded pursuant to section 24(2) of the charter and alleged that his sections 8 and 9 *Charter* rights were breached by the police. The trial judged dismissed these claims and the accused appealed, claiming that the trial judge erred in applying the law.[364] Employing the *Waterfield* test, the court determined that sections 8 and 9 of the *Charter* were not breached and both the detention and search were done reasonably in accordance with the common law.[365] As such, the appeal was dismissed.

E. Sentencing

The bulk of appeals heard at the MBCA between March 2021 to June 2023 pertained to sentencing and included a variety of themes along with two dissenting judgements. One such consistent theme was an assortment of cases dealing with the principle of totality. In *R v Bourassa*, the accused pled guilty to four charges and was given a global sentence of 7 years. The accused appealed his sentence, alleging that the trial judge did not properly apply the totality principle, thus resulting in a demonstrably unfit sentence.[366] In the MBCA, a unanimous court held that the trial judge did consider totality although she failed to explicitly mention it, and that this failure had no impact on the sentence given. They added that where totality is considered, judges should explicitly state that they considered totality and which sentence, or sentences, they are reducing through that principal.[367] This judgement is consistent with the MBCA's ruling in *R v Derksen* where the parties asked for the accused's appeal to be granted so clarification could be given on which sentences the sentencing judge reduced via totality. Although the sentencing

[361] *Ibid* at para 59.
[362] *Ibid* at paras 65, 69, 74-76.
[363] *R v McKenzie*, 2022 MBCA 3 at paras 6-9 [*McKenzie*].
[364] *Ibid* at para 4.
[365] *Ibid* at paras 29-30, 43.
[366] *R v Bourassa*, 2022 MBCA 9 at para 1 [*Bourassa*].
[367] *Ibid* at para 10.

judge applied the totality principle, they did not explicitly mention which sentence or sentences were reduced. [368] By looking at the reasons of the sentencing judge, the court determined which sentence the totality reduction was applied to and also stated that where the totality principle is used, a judge must address how the allocation of the reduction is to be applied to the individual sentences.[369] While this almost mirrors the judgement given in *Bourassa*, the court in *Bourassa* utilized the word 'should' instead of 'must'. [370] Although quibbling over such minor semantic variations seems minute and finicky, 'should' does not connote an absolute requirement as does the word 'must'. This issue arose once again in the case of *R v Glennie*. In *Glennie*, the accused was levied a total of 15 years incarceration for a multitude of concurrent and consecutive offences. The sentencing judge reduced this by three years in accordance with the principal of totality did not apportion this reduction to specific offences. [371] Similar to *Bourassa*, the MBCA held that a sentencing judge should explicitly apportion the totality reduction to specific offenses. If they fail to do so, and a case reaches the appellate court, then that appellate court has the responsibility to distribute the totality reduction amongst the specific offences. [372] It seems then, that based on *Glennie* and *Bourassa*, trial judges should explicitly state how they are apportioning totality reductions amongst individual sentences but do not commit a significant error by failing to do so as the Court of Appeal can allocate the reductions if necessary.

Reference to and the use of *R v Friesen* also occurred throughout various sentencing appeals. The MBCA in *R v Bunn* dealt with an appeal by both the accused and the Crown. While the accused's appeal was swiftly dismissed, the Crown's sentencing appeal was thoroughly explored. According to the Crown, sentences for sexual assaults involving adults should be raised to reflect society's, and the courts', deepened understanding of the harm to victims. [373] The Crown referred to *Friesen* in which the SCC raised sentences for sexual offences against children on the basis that the courts have a deeper understanding of the gravity of harm of these offences. Upon this premise, the Crown contended that by analogy this deeper understanding also translates to the harm caused by sexual assaults on adults and thus sentences should be raised for such offences.[374] Writing for a unanimous court, Justice Cameron agreed that the harsher sentencing principles of *Friesen* should not be limited to solely sexual assaults against children. However, he also acknowledged the constraints set by *Friesen* that prior sentencing ranges should generally only be changed or departed from where parliament raises the maximum sentence for an offence and where society's understanding of the severity of the harm arising from that offence increases.[375] Although it was recognized by the MBCA that this deepened understanding of harm to victims was present, the court explained that parliament had not increased the maximum offence for sexual assault since it was enacted in 1983. [376] As this was the case, the MBCA did not provide appellate guidance in the form of a new sentencing range or

[368] *R v Derksen*, 2022 MBCA 6 at paras 1-3 [*Derksen*].
[369] *Ibid* at para 5.
[370] *Supra* note 310 at para 10.
[371] *R v Glennie*, 2022 MBCA 21 at para 3 [*Glennie*].
[372] *Ibid* at paras 7-8.
[373] *R v Bunn*, 2022 MBCA 34 at para 2 [*Bunn*].
[374] *Ibid* at para 32.
[375] *Ibid* at para 73.
[376] *Ibid* at para 113.

starting point for sexual assault involving adults, but instead offered non-quantitative direction. This direction was that sentencing judges should feel free in cases of sexual assaults to impose sentences that reflect society's and the courts' deepened understanding of harm and respect the legislative provisions that also recognize such harm.[377] This ruling seems to be a nod by the MBCA that trial judges in Manitoba can feel free to impose more stringent sentences for sexual assaults involving adults by referencing society's and the courts' deeper understanding of the harm caused by such offences. Interestingly, Justice Cameron's statement that the principles in Friesen should not be limited solely to cases involving sexual offences against children indicates the idea within the MBCA, at least in some capacity, that the stricter sentencing regime of *Friesen* should translate across various offences.[378]

Indeed, this idea manifested itself further in the MBCA's ruling in *R v Wood*. The accused in *Wood* was married to the deceased and they were both Indigenous living in the northern community of St. Theresa Point First Nation. Due to previous history of domestic abuse the accused was prohibited, by court order, from contacting her.[379] The accused and the deceased went to the accused's brother house to drink and use drugs and the brother's girlfriend witnessed the accused punching the deceased and heard stomping. When the brother returned to the house after getting cigarettes, he found the deceased lying on the floor. He went to get help, but upon return, the deceased was dead. [380] The accused was sentenced to 18 years imprisonment for manslaughter and appealed alleging the sentence was unfit. Unanimously, the court referred to their recent ruling in *Bunn* that the principles in *Friesen* should not be limited solely to cases of child sexual abuse. Reiterating the principle that sentences should depart from starting ranges when parliament raises the maximum sentence and when society's understanding of the severity of the harm increases, the court found that unlike *Bunn*, this was directly applicable to the case at hand. Referring to the creation of *Criminal Code* ss. 718.04 and 718.201, in 2019 the court reasoned that their creation, which came out of recommendations from *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* directly signals evolving societal understanding of the harm and vulnerability of intimate partner violence (IPV) and its harm on victims who are Indigenous and female.[381] The court also turned to section 718.3(8) which was also a new sentencing provision enacted in 2019 via Bill c-75. This section stipulates that where the accused is convicted of an IPV related offence and has been previously convicted of an IPV related offence, the court may choose to impose a term of imprisonment more than the maximum set for the offence.[382] Referring to the aforementioned principle from *Friesen*, the court held that section 718.3(8) further "reinforces the position that, for offences where violence is perpetrated against an intimate partner who is vulnerable because of personal circumstances including because the person is Aboriginal and female—Parliament intended the court to consider these factors and increase sentences where appropriate." [383] In consideration of

[377] *Ibid* at para 122.
[378] *Ibid* at para 72.
[379] *R v Wood*, 2022 MBCA 46 at para 3 [*Wood*].
[380] *Ibid* at para 8.
[381] *Ibid* at para 32.
[382] *Ibid* at para 48.
[383] *Ibid* at para 49.

these provisions, the court found that the *Friesen* principle for departing from sentencing ranges can apply in instances of intimate partner violence where the victim is an Indigenous woman. The 18-year sentence for manslaughter, although exceeding even the high end of the range, was found to be proportionate based on the circumstances and was upheld by the MBCA.[384]

Furthering the theme of increasing sentences, the MBCA in *R v Alcorn* set out to meaningfully raise sentences for soliciting child prostitutes. At trial, the accused was convicted of one count of obtaining sexual services for consideration from a person under the age of 18 pursuant to section 286.1(2) of the *Criminal Code* and was sentenced to 15 months imprisonment.[385] The MBCA in *Alcorn* ruled that the correct gravity of the offence to be applied when it comes to s. 286.1(2) is one equivalent to the gravity of the offence of sexual assault, sexual interference and sexual exploitation against children.[386] This change, according to the MBCA, is meant to "meaningfully increase sentences" by ensuring a lower gravity of the offence is not ascribed to s. 286.1(2) by trial judges during sentencing as it had been in this case.[387] By applying a lower gravity of the offence to section 286.1(2) in her proportionality assessment, the court held that the trial judge erred in principle. The court also found that the trial judge erred in principle in her moral culpability assessment by finding that the absence of an aggravating factor made the sexual exploitation of the victim less serious.[388] As such, the Crown's appeal was allowed and the accused's sentence was varied to five years imprisonment.[389]

Guidance was also provided by the MBCA pertaining to sentencing for fentanyl trafficking. In the 2020 case of *R v Petrowski*, the MBCA declined to set a sentencing range for fentanyl trafficking as they felt that Manitoba was not yet ready to develop one in light of the available jurisprudence.[390] This sentiment changed in *R v Mclean* where the court ruled that "the range of sentence for someone minimally involved in mid-level fentanyl trafficking, such as a courier or custodian without some decision-making authority or responsibility in the trafficking activity, is six to eight years' imprisonment."[391] The degree of responsibility of the offender was highlighted to illustrate the sentencing disparity that should exist between offenders who are lower-mid level drug couriers or custodians to mid and high level trafficking operators with decision making authority in the trafficking operation.[392] This generally indicates that an accused who is more than minimally involved in mid-level fentanyl trafficking and has some decision making authority in the operation should be levied a sentence above the range set in *Mclean*.

Of the 115 criminal law appeals heard by the MBCA between March 2021 to June 2023, there were only two dissents and both pertained to sentencing related appeals. *R v SADF* involved an accused who moved in to act as a caretaker for his six-year-old daughter and her eight-year-old stepsister at the residence of the mother and stepfather of his daughter. The

[384] *Ibid* at paras 66-67, 69.
[385] *R v Alcorn*, 2021 MBCA 101 at para 7 [*Alcorn*].
[386] *Ibid* at para 45.
[387] *Ibid* at para 49.
[388] *Ibid* at para 58.
[389] *Ibid* at para 79
[390] *R v Petrowski*, 2020 MBCA 78 at para 35 [*Petrowski*].
[391] *R v McLean*, 2022 MBCA 60 at para 118 [*McLean*].
[392] *Ibid* at para 121.

accused, on various occasions, sexually assaulted both the children while the adults were at work.[393] At trial, the accused was convicted of two counts of sexual interference. The sentencing judge specifically pointed to the accused's lack of record and history of being sexually abused to impose a sentence of six years' incarceration. This sentence was further reduced via the totality principle as the sentencing judge concluded that a six-year sentence would be crushing on the prospect of the accused's rehabilitation and varied the sentence to four years and six months. [394] The Crown appealed, alleging that the judge failed to appropriately consider the gravity of the offence and the moral blameworthiness of the accused, erred in her application of totality, and imposed an unfit sentence.[395] Forming the majority, Justices Burnett and Spivak allowed the appeal and raised the sentence to six years imprisonment. They held that by focusing on the personal circumstances of the accused instead of the offence, and by failing to acknowledge that denunciation and deterrence were to be prioritized, the trial judge underestimated the gravity of the offence and the accused's high moral culpability, thereby committing an error.[396] In terms of totality, the majority held that the judge only considered one of the five factors laid out in *R v Hutchings*, which should be contemplated when totality is advanced. All five should be considered and balanced together and the majority felt that nothing indicated in the sentencing judge's reasons that she weighed the other four.[397] In dissent, Justice Monnin felt the sentencing judge was entitled to consider the accused's previous sexual abuse history to assess moral culpability and reduce the sentence. Concerning totality, Monnin felt that it was not necessary for the sentencing judge to explicitly explain her reasoning pertaining to every factor in the *Hutchings* totality analysis and that she presumably considered these factors anyways. As such, Justice Monnin would have dismissed the appeal and felt that the sentence was appropriate.[398]

The other case involving a dissenting justice was *R v Letkemen*. *Letkemen* involved an RCMP officer, the accused, who got into a car chase with a Jeep. Without supervisor input, the accused used the force of his cruiser to perform a pit maneuver and slammed into the Jeep. The accused then continued to chase the jeep and slammed into it again, causing serious injury to Ms. Flett. Following this event, the accused approached the Jeep with his firearm drawn and the Jeep barrelled towards him and struck his foot. He fired into the Jeep, killing Mr. Campbell and injuring Ms. Flett.[399] The accused was found guilty of criminal negligence causing bodily harm for the second collision and dangerous driving causing bodily harm for the first collision. Concerning the shooting, the accused was acquitted of all charges. [400] He was sentenced to a three-year probation order with compulsory conditions along with a condition to perform 240 hours of community service in 18 months. In addition, he was issued a fine of $10,000 to be paid within 3 years and was also given a 12-month driving prohibition. The Crown appealed, alleging that the trial judge mischaracterized the moral blameworthiness of the accused, overemphasized

[393] *R v SADF*, 2021 MBCA 22 at paras 4-10 [*SADF*].
[394] *Ibid* at paras 14-15.
[395] *Ibid* at para 17.
[396] *Ibid* at paras 32-34, 35-37.
[397] *Ibid* at paras 44-47.
[398] *Ibid* at paras 64, 67-68.
[399] *R v Letkeman*, 2021 MBCA 68 at paras 6-11 [*Letkeman*].
[400] *Ibid* at para 11.

the accused's personal circumstances, and imposed an unfit sentence.[401] Forming the majority, Justices Spivak and Simonsen found that the trial judge underestimated the accused's moral blameworthiness and erred in imposing a sentence inadequately focussed on deterrence and denunciation. They held that these were principal errors with a material impact on the sentence, which ultimately led to it being unfit.[402] Finding no need for rehabilitation, the majority set aside the probation order and the community service and imposed a ten-month custodial sentence minus 7 months for the fine paid and community service already performed for a total sentence of 3 months imprisonment. Going further, the majority granted a stay of execution of the custodial sentence.[403] Dissenting, Justice Burnett found the moral blameworthiness of the accused high and the sentence imposed by the trial judge to be incomprehensibly low. Finding the accused highly culpable, Burnett would have imposed a 36-month sentence minus 6 months for the community service for a go ahead of 30 months incarceration. This would include setting aside the probation order and a repayment of the fine paid by the accused.[404] Justice Burnett felt that the majority's sentence failed to maintain public confidence in the justice system and did not convey that police officers will be severely punished for committing offenses of a serious criminal nature.[405]

F. Trial Procedure

Twenty-four of the criminal law appeals during the time period reviewed fell within the trial procedure category. A fair portion of these cases are part of proceedings related to various cases outlined in the miscellaneous category. One such case is *R v Hjorleifson*, 2022 MBCA 27. At trial the accused was convicted of assault and uttering threats and appealed to an SCA judge on three grounds that were dismissed.[406] As explained below in the miscellaneous section, he appealed to the MBCA and leave to appeal was granted on an ineffective assistance of counsel claim that was subsequently dismissed when heard.[407] The accused, in the current case being discussed, then sought a motion pursuant to rule 46.2 of the Manitoba Court of Appeal Rules, MR 555/88R to have his appeal reheard and filed an argumentative memorandum addressing the motion.[408] Referring to the rule they set out in *Rémillard v Rémillard* that "the rehearing of an appeal is to be 'granted only in exceptional circumstances, where the interests of justice manifestly compel such a course of action," the court found none of the issues raised by the accused met this test and dismissed the appeal.[409]

Another case involving multiple proceedings is *R v Nygard.* In *R v Nygard* 2021 MBCA 42, the respondent Peter Nygard was wanted in the U.S.A on charges of racketeering conspiracy, sex trafficking conspiracy, sex trafficking, transportation of a minor for prostitution and transportation for prostitution. He was arrested in accordance with a provisional arrest warrant

[401] *Ibid* at paras 1, 4.
[402] *Ibid* at para 58.
[403] *Ibid* at paras 72, 79.
[404] *Ibid* at para 159.
[405] *Ibid* at para 163.
[406] *R v Hjorleifson*, 2021 MBCA 69 at para 1 [*Hjorleifson*].
[407] *Ibid* at para 11.
[408] *Ibid* at para 1.
[409] *Rémillard v Rémillard*, 2015 MBCA 42 at para 8 [*Rémillard*].

pursuant to section 13 of the Extradition Act.[410] Nygard sought judicial interim release with a proposed bail plan pursuant to section 18(1)(b) of the extradition act and the application judge in the Manitoba Court of Queen's Bench (MBQB) issued a detention order upon Nygard.[411]At the commencement of the proceedings, the Attorney General requested a publication ban. Justice Pfuetzner ordered a publication ban on any information in the proceedings that could identify victims unless the victim consented to having their identity publicized. He also set forth an interim ban on publication of any information within the proceedings which could identify witnesses until he could make a decisive decision on this issue. The current appeal was his final ruling on that matter.[412] It is important to note that before any publication ban was in place, Nygard placed evidence before the application judge in the MBQB that revealed the names of witnesses and victims which led to their names becoming part of the public record.[413]

Pfuetzner provided guidance concerning the branches of the *Dagenais/Mentuck* test which outline the proper requirements for when a publication ban should be ordered. [414] Applying these tenants, Pfuetzner felt that in relation to the first ground, since the information revealing the identities of witnesses and victims had already become part of the public record, there was no need for a ban as it would be of little consequence.[415] Finding that the first branch of the test was not met, Pfuetzner dismissed the order and lifted the interim publication ban.[416]

The conclusion of the case of *R v Thomas* finally came to an end after it had been in limbo for nearly a decade. [417] In *R v Thomas*, 2021 MBCA 66, the MBCA explained that this lengthy appeal process was the result of a multitude of factors including multiple different counsels withdrawing due to breakdowns in the solicitor/client relationship.[418] The court held that it was imperative that the appeal be dealt with expeditiously and fairly to get finality and that it was no longer in the interests of justice to continue the section 684(1) order that kept appointing counsel to the accused.[419] To reach this finality and deal with the appeal quickly and fairly, the court held that an *amicus* counsel was to be retained for the next appeal hearing and the accused is to provide the court with a fresh evidence affidavit to support their claim that they made an involuntary statement of guilt. [420] This final hearing took place in *R v Thomas*, 2022 MBCA 19. The accused alleged that the guilty plea she made was involuntary as she made it due to her compromised mental state resulting from mental illness and to change her custodial circumstances. To support this claim, the accused attempted to provide fresh evidence in the form of her affidavit describing her state of mind when the plea was entered. She also contended that the evidence is not capable of establishing she had the intent for murder.[421] Relating to the

[410] *R v Nygard* 2021 MBCA 42 at paras 4-5 [*Nygard*].
[411] *Ibid* at para 5.
[412] *Ibid* at paras 2-3.
[413] *Ibid* at paras 6-8.
[414] See *R v Mentuck*, 2001 SCC 76 at para 32 for an outline of the *Dagenais/Mentuck* utilized.
[415] *Ibid* at paras 20-21.
[416] *Ibid* at para 28.
[417] *R v Thomas*, 2021 MBCA 66 at para 1 [*Thomas*].
[418] *Ibid* at paras 2-3.
[419] *Ibid* at paras 1, 14.
[420] *Ibid* at paras 15-16.
[421] *Ibid* paras 1-2.

fresh evidence, the court instructed that where unfairness in the trial process is said to result in a miscarriage of justice, the applicable test is not *Palmer v. The Queen* but the test set out in *R v Richard (DR) et al*.[422] Applying this test, the court was satisfied and found it was in the interest of justice to admit the accused's affidavit into evidence.[423] Moving on to the voluntariness issue, the MBCA explained that the court must consider the totality of the circumstances to inform a decision. Utilizing the 6 factors outlined in *R v Desrochers* to aid in this analysis, the MBCA concluded that the accused failed to establish that her guilty plea was involuntary.[424] They also found that the evidence revealed that the accused had the requisite intent for murder.[425] Thus, after nearly a decade of criminal proceedings, the case of *R v Thomas* finally came to a close.

In the case of *R v Onakpoya aka Kerrhs,* the accused was directly indicted by the Crown on a charge of aggravated assault. Prior to the trial, the accused brought a motion to quash the direct indictment and have the proceedings remitted to provincial court for a preliminary inquiry. The motion judge dismissed the motion and the accused appealed this decision. The Crown applied to quash this notice of appeal alleging that the MBCA has no jurisdiction to hear such an appeal as it comes from an interlocutory decision.[426] Engaging in their analysis, the MBCA held that they generally do not have the ability to hear interlocutory appeals in criminal matters. However, they also explained that pursuant to s. 784(1) of the Criminal Code, a right to appeal an interlocutory decision exists whereupon that decision refuses or grants a prerogative remedy.[427] While the accused attempted to argue that the appeal dealt with the prerogative remedy of *certiorari*, nowhere was it mentioned in the accused's motion or the motion judges reasons. As a result, the court held that the appeal did not deal with *certiorari,* that the s. 784(1) exception did not apply, and that the appeal is dismissed.[428]

Perhaps the most important procedural case coming out of the MBCA between March 2021 to July 2022 is *R v Siwicki*. The court was tasked with interpreting section 479 of the Criminal Code and providing guidance on whether the parties or the court choose the venue of sentencing in a criminal proceeding pursuant to that section. Section 479 allows criminal matters to be transferred to another venue under certain conditions.[429] Engaging in an exercise of statutory interpretation, s. 479 was seen as an antiquated vestige of the past that no longer has any relevance in Manitoba. Instead, the court reasoned that a judge's jurisdiction to consider a venue change request is pursuant to s. 470 and there is a strong presumption that a matter should be tried where the offence was committed. [430] Citing the administrative powers conferred upon the courts by legislative provisions and the constitution, the MBCA concluded that irrespective of s. 479, the courts, not the parties, have the final word on where a sentencing hearing will

[422] *Ibid* at para 23. See *R v Richard (DR) et al*, 2013 MBCA 105; *Palmer v The Queen*, [1980] 1 SCR 759.
[423] *Ibid* at para 31.
[424] *Ibid* at 35-43. See *R v Desrochers*, 2019 MBCA 120 at para 19.
[425] *Ibid* at para 40.
[426] *R v Onakpoya aka Kerrhs*, 2021 MBCA 74 at paras 1-3 [*Kerrhs*].
[427] *Ibid* at para 7.
[428] *Ibid* at paras 9-11.
[429] *R v Siwicki*, 2022 MBCA 53 at paras 2-3 [*Siwicki*].
[430] *Ibid* at paras 37-40.

occur.[431] Even if the Crown consents to a transfer request by an accused, the court still retains the decisive say on the matter. [432] According to the MBCA, allowing the parties to control judicial function would potentially obstruct the proper administration of justice and cannot be a manner left to them.[433]

G. Miscellaneous

A fair portion of the appeals heard in the MBCA between March 2021 through June 2023 fit neatly into the miscellaneous category of appeals. In *R v Airmaster Sales Ltd* the accused was issued two offence notices for speeding and authorized an individual named Sweryda to act as its representative in court pursuant to section 53(1) of the Provincial Offences Act (POA).[434] On the date of the trial, a judicial justice of the peace (JJP) dismissed Sweryda finding that their conduct was beyond the intention of s. 53(1) and set a new trial date. The accused failed to show up to the new trial date and default convictions were entered. The accused appealed to have them set aside and argued that the decision of the JJP to remove the representative led to the default convictions and that the JJP erred in interpreting section 53 of the POA. [435] An SCA judge found that the accused's non-appearance to court was what constituted the default convictions, not the removal of Sweryda. The SCA judge also found that the JJP correctly interpreted s. 53 of the POA. Following this ruling, the accused motioned for leave to appeal to the MBCA.[436] The application for leave was denied by a unanimous court as they found that there was no question of law as required for leave to be granted. They held that the JJP's ruling in removing the representative was based on an examination of the record and evidence and was a finding of fact, or at most, a finding of mixed fact and law and did not raise a question of law alone.[437]

Another case involving an accused seeking leave to appeal was *R v Hjorleifson*, 2021 MBCA 69. At trial, the accused was convicted of one count of assault and uttering threats. He appealed on three grounds to an SCA judge and these were dismissed. He then sought leave to appeal the decision of the SCA judge for dismissing his appeal. [438] Presiding over the motion, Justice Pfuetzner found that three of the accused's four grounds of appeal did not raise a question of law or did not have any merit. [439] However, one ground of appeal, which alleged that the accused received ineffective assistance of counsel, was seen by Pfuetzner to be an arguable case. Thus, he allowed leave to appeal on the basis that this was not a second-level appeal and the risk of potential injustice justified it.[440] When this appeal was heard, a unanimous court let the accused admit fresh evidence to support the ineffective assistance of counsel claim but ultimately

[431] *Ibid* at paras 46, 51.
[432] *Ibid* at para 70.
[433] *Ibid* at para 56.
[434] *R v Airmaster Sales Ltd*, 2021 MBCA 30 at para 2 [*Airmaster*].
[435] *Ibid* at paras 6-7.
[436] *Ibid* at paras 10-14.
[437] *Ibid* at para 19.
[438] *Hjorleifson*, *supra* note 406 at paras 1, 3.
[439] *Ibid* at paras 10-12.
[440] *Ibid* at paras 17-18.

dismissed the appeal and found that there was no miscarriage of justice as the accused was unable to discharge the prejudice component of the ineffective assistance of counsel test. [441]

Following the theme of ineffective assistance of counsel, the court dealt with such a claim once again in *R v Leslie.* It was determined that the accused's counsel engaged in an improper cross-examination of the complainant which breached the rule in *Browne v Dunn*, thereby materially affecting the credibility assessments of all the parties and undermining the verdict.[442] The ineffective assistance of counsel in these circumstances was seen to undermine the reliability of the verdict and therefore constitute a miscarriage of justice. As such, the accused's appeal was granted, the conviction was quashed, and a new trial was ordered.[443]

The last case worth mentioning is *R v Nygard*, forming another one of the Peter Nygard related cases permeating the Manitoba courts. The MBCA had to rule on the detention order imposed upon Nygard by an application judge in the Court of Queen's Bench.[444] When he sought judicial interim release with a proposed bail plan pursuant to section 18(1)(b) of the extradition act, he was denied by the application judge. In response Nygard applied for review of the judicial interim release by the court of appeal via section 18(2) of the extradition act and an order for release pending his extradition hearing. He submitted that the application judge made five errors in principle and that there have been material changes in circumstances that make it so his detention is no longer necessary.[445] A reviewing appellate judge may vary an initial bail decision pursuant to section 18(2) of the extradition act provided the initial decision contains an error in principle or there is a material change in the circumstances. [446] However, a unanimous MBCA felt this was not the case. They found that neither of the alleged errors in principle constituted principal errors and the proposed changes in circumstances did nothing to materially attenuate the issues identified in Nygard's initial bail plan by the application judge. As such, the MBCA dismissed the review application and upheld the interim detention order issued by the application judge. [447]

VIII: Comments: MBCA

The sentencing process was of importance in the MBCA, with a theme of this provincial court applying harsher sentencing principles which emerged through the decisions of *Bunn* and *Wood.* The MBCA expanded on the previous SCC decision of *Friesen* in *Bunn*, where a unanimous court confirmed that harsher sentencing principles should not be limited to sexual assaults against children, it should be expanded to include sexual assaults against adults. Of interest is that the court offered guidance not in the form of a starting point or new sentencing range, but rather encourages the imposition of a sentence that reflects society's and the courts understanding of harm. This could allow for opportunity to assign harsher sentences as our social understanding of harm cause by sexual assault continues to expand. *Bunn* is the wider

[441] *Ibid* at paras 9-11.
[442] *R v Leslie*, 2021 MBCA 29 at para 51-52 [*Leslie*].
[443] *Ibid* at para 55.
[444] *R v Nygard*, 2021 MBCA 27 at para 3 [*Nygard*].
[445] *Ibid* at para 10.
[446] *Ibid* at para 24.
[447] *Ibid* at para 45.

application of a strict sentencing principle, which is interesting as it contradicts the Supreme Courts *Bissonnette* decision which prioritized rehabilitation over social interest.

Harsher sentencing principles were applied in *Wood* which dealt with issues of violence against Indigenous women, this critical issue is of increasing awareness in society. The court decided that *Bunn* was directly applicable to the case at hand, and used support from *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* which directly signals evolving societal understanding of the harm and vulnerability of intimate partner violence and its harm on female Indigenous victims. Further expanding this sentencing principle, the *Friesen* sentencing principle for departing from a sentencing range may also occur in instances of intimate partner violence where the victim is an Indigenous women.

The implications from *Bunn* and *Wood* convey that the MBCA is beginning to expand the precedent provided in *Friesen* by rationalizing the translation of its stricter sentencing regime across different offences instead of just confining it to cases of child sexual abuse. Although this keeps in touch with societal understanding and can illustrate the harm caused to specific marginalized groups, this approach is also oriented towards a more retributive paradigm of justice. While not necessarily a bad thing, it will be interesting to see how the expansion of the *Friesen* principles by the MBCA will affect other offences in the future.

IX: Conclusion

The landmark decisions delivered by the Supreme Court of Canada in the 2022-2023 period have been conducive to reflect dynamic societal interests. Similarly, the Manitoba Court of Appeal stands as a critical component of the provinces legal system as it plays a paramount role in ensuring the integrity of this provinces judicial process. Both levels delegated a wide range of Criminal Law issues. Specifically, this Year in Review noted how the Supreme Court decisions prioritized the accused's interests, as seen in *Bisonette* through their understanding of protecting an accused's rehabilitative interests. While at the provincial level, we saw stricter sentencing principles being integrated into the judicial process in *Bunn* and *Wood*. The province remains committed to protecting the rights and liberties of Manitobans, but it is of interest to see how the trend of rehabilitation seen at the Supreme Court level will impact the lower provincial court. Evidently, both theses courts continue to shape the Canadian judicial system in a progressive and current manner.

Appendix I: Table of Authorities

Supreme Court of Canada Cases – March 2021 to June 2023

Charter

R v Albashir, 2021 SCC 48
R v Bissonette, 2022 SCC 23
R v Boulanger, 2022 SCC 2
R v Brown, 2022 SCC 18
R v Desautel, 2021 SCC 17
R v Dussault, 2022 SCC 16
R v Chouhan, 2021 SCC 26
R v C.P., 2021 SCC 19
R v Lafrance, 2022 SCC 32
R. v. Lai, 2021 SCC 52
R v Ste-Marie, 2022 SCC 3
R v J.F., 2022 SCC 17
R v J J., 2022 SCC 28
R v Safdar, 2022 SCC 21
R v Goforth, 2022 SCC 25
R v Tessier, 2022 SCC 35
R v Ndhlovu, 2022 SCC 38
R v Sharma, 2022 SCC 39
R v Hills, 2023 SCC 2
R v Hilbach, 2023 SCC 3
R v McColman, 2023 SCC 8
R v Hanan, 2023 SCC 12

Defences

R v Alas, 2022 SCC 14
R v Ghotra, 2021 SCC 12
R v Khill, 2021 SCC 37

Evidence

R v A.E., 2022 SCC 4
R v Badger, 2022 SCC 20
R v Brunelle, 2022 SCC 5
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R v Dingwall 2021 SCC 35.
R v Gerrard, 2022 SCC 13
R v G.F., 2021 SCC 20
R v Gul, 2021 SCC 14
R v J.D., 2022 SCC 15
R v Morrow, 2021 SCC 21

R v Ramos, 2021 SCC
R v Sheikh, 2021 SCC 13
R v Samaniego, 2022 SCC 9
R v Smith, 2021 SCC 16
R v Schneider, 2022 SCC 34
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R v Metzger, 2023 SCC 5

Search and Seizure
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R v Stairs, 2022 SCC 11
R v Tim, 2022 SCC 12
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R v Parranto, 2021 SCC 46
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R v Haevischer, 2023 SCC 11

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R v Vallières, 2022 SCC 10
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R v Ramelson, 2022 SCC 44
R v Jaffer, 2022 SCC 45
R v Haniffa, 2022 SCC 46
R v Dare, 2022 SCC 47
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R v Breault, 2023 SCC 9

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Charter
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R v Burg and Khan, 2021 MBCA 77

R v Z (MJ), 2022 MBCA 61
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R v Kinnavanthong, 2022 MBCA 49
R v King, 2023 MBCA 37

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R v Bear, 2022 MBCA 4
R v Courchene, 2021 MBCA 24
R v Cleveland, 2022 MBCA 54
R v DAB, 2022 MBCA 45
R v Darch, 2021 MBCA 67
R v Flett et al, 2021 MBCA 104
R v GS, 2022 MBCA 35
R v JDW, 2021 MBCA 49
R v JM, 2022 MBCA 25
R v KGP, 2021 MBCA 79
R v Lariviere, 2021 MBCA 76
R v Linklater, 2021 MBCA 65
R v Markwick, 2022 MBCA 20
R v McIvor, 2021 MBCA 55
R v Morrissette, 2022 MBCA 8
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R v TPR, 2022 MBCA 1
R v Thorassie, 2021 MBCA 37
R v Meilleur, 2022 MBCA 71
R v Beardy, 2022 MBCA 90
R v S (D), 2022 MBCA 94
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R v NBT, 2023 MBCA 1
R v Assi, 2023 MBCA 2
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R v Telfer, 2021 MBCA 38

Sentencing
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R v Abdisalam, 2021 MBCA 97
R v Alcorn, 2021 MBCA 10
R v Antczak, 2021 MBCA 39
R v BAJN, 2021 MBCA 32
R v Bourassa, 2022 MBCA 9
R v Bunn, 2022 MBCA 34
R v Debler, 2022 MBCA 15
R v Derksen, 2022 MBCA 6
R v Glennie, 2022 MBCA 21
R v Hall, 2022 MBCA 59
R v Keating, 2022 MBCA 32
R v Letkeman, 2021 MBCA 68
R v Lewyc-Sullivan, 2021 MBCA 92
R v McLean, 2022 MBCA 60
R v Meeches, 2021 MBCA 26
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R v Schuff, 2021 MBCA 54
R v St. Paul, 2021 MBCA 31
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R v Wood, 2022 MBCA 46
R v Sinclair, 2022 MBCA 65
R v Ostamas, 2022 MBCA 68
R v Krywonizka, 2022 MBCA 85
R v Caribou, 2022 MBCA 95
R v Osborne, 2022 MBCA 96
R v Lavallee, 2022 MBCA 100
R v Boutell, 2023 MBCA 16
R v Cerezo-Brennan, 2023 MBCA 17
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R v Kehler, 2023 MBCA 44
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Trial Procedure
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R v Moar, 2022 MBCA 36
R v Nygard, 2021 MBCA 42

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R v Reimer, 2022 MBCA 55
R v Siwicki, 2022 MBCA 53
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R v Logan, 2022 MBCA 97
R v Bradburn, 2022 MBCA 98
R v Braun, 2023 MBCA 4
R v AAK, 2023 MBCA 8
R v Mitchell, 2023 MBCA 10
R v Williams, 2023 MBCA 11
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Appendix II: Statistical Tables and Graphical Representations

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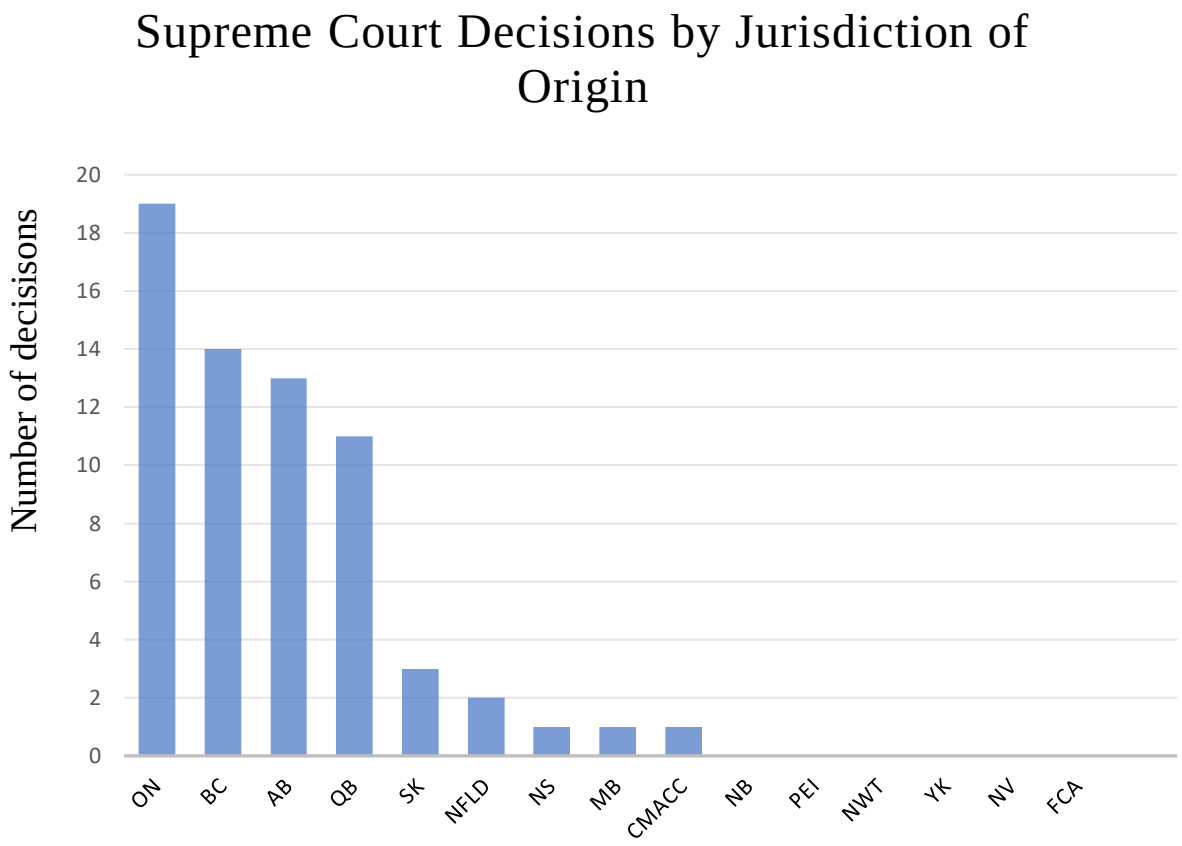
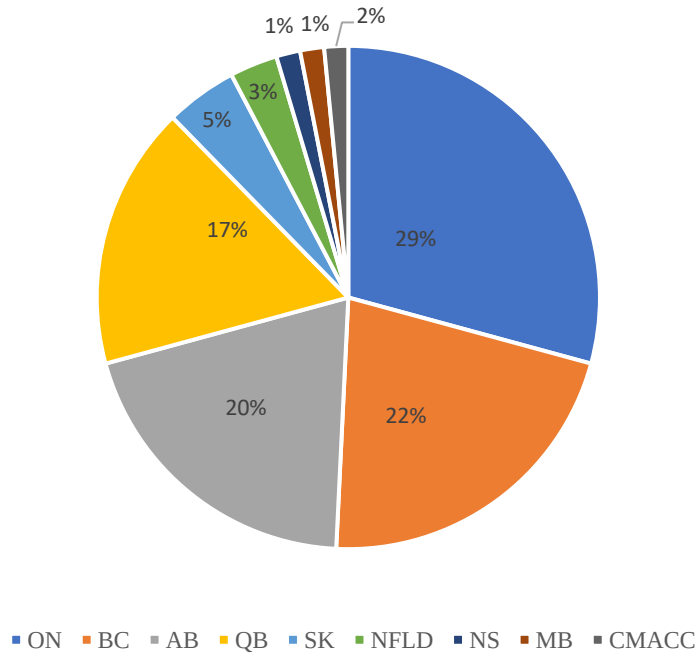
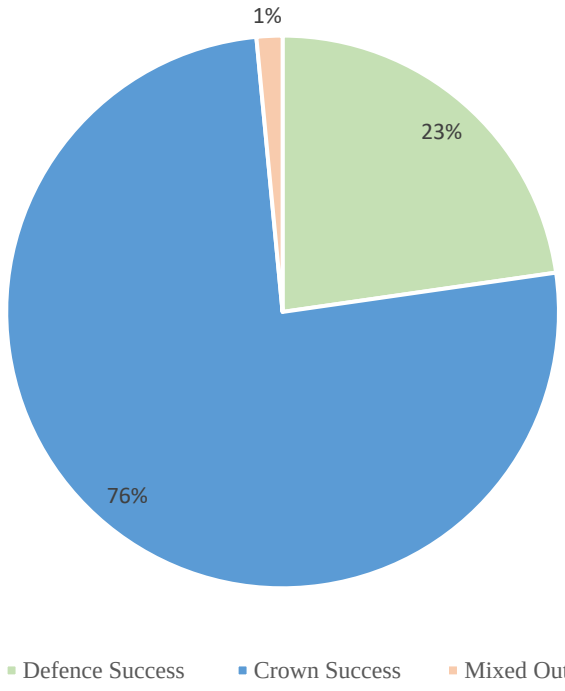
Statistical Infographics of SCC Decisions: March 2021 to July 2022



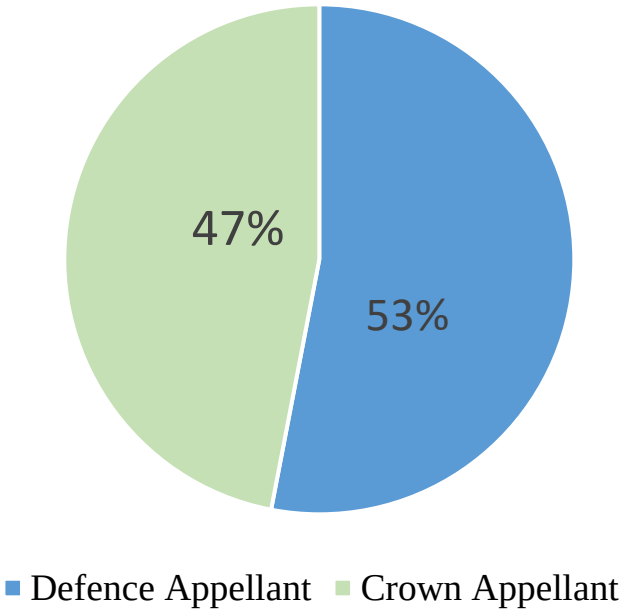
Proportion of Supreme Court Cases by Jurisdiction of Origin March 2021 - June 2023



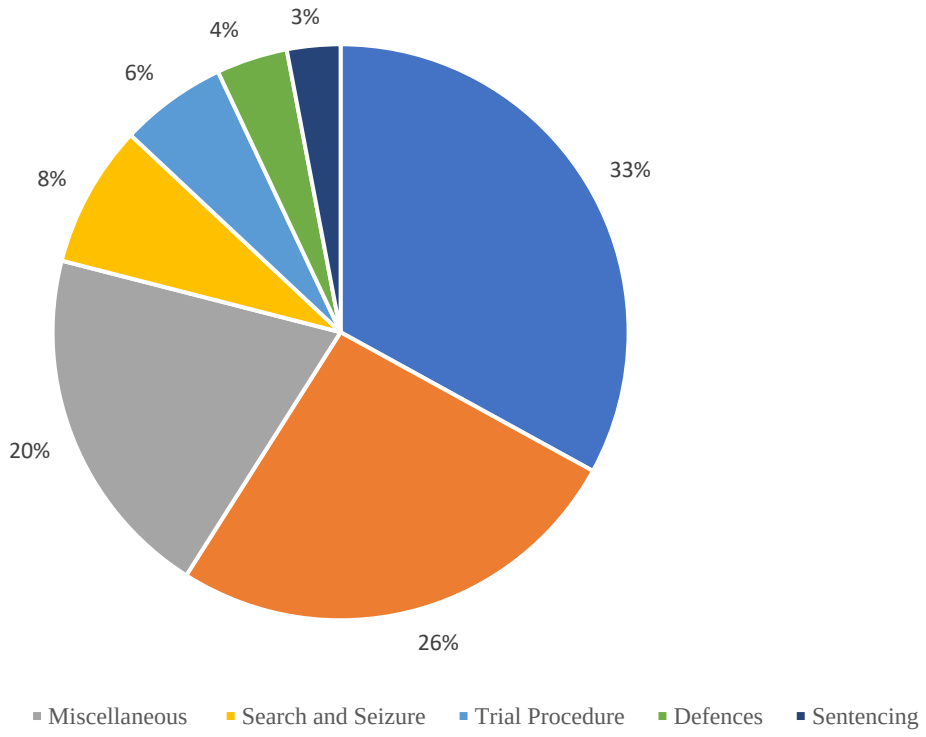
Outcomes of SCC Decisions March 2021 - June 2023



Appearances as Appellants in Supreme Court Decisions March 2021 - June 2023

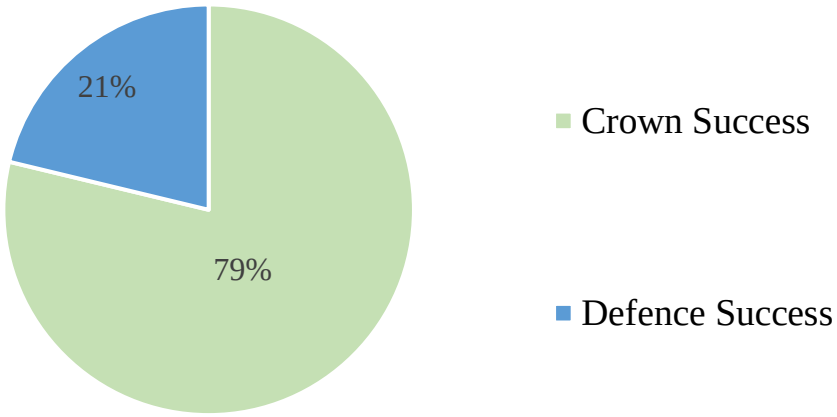


Grounds of Appeal Supreme Court Decisions March 2021-June 2023

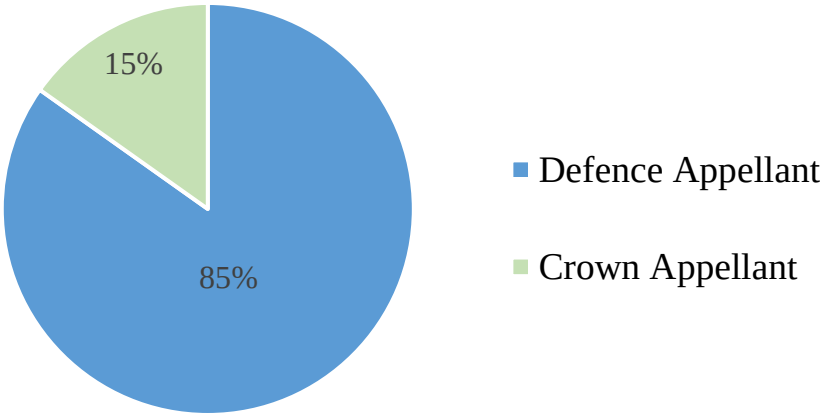


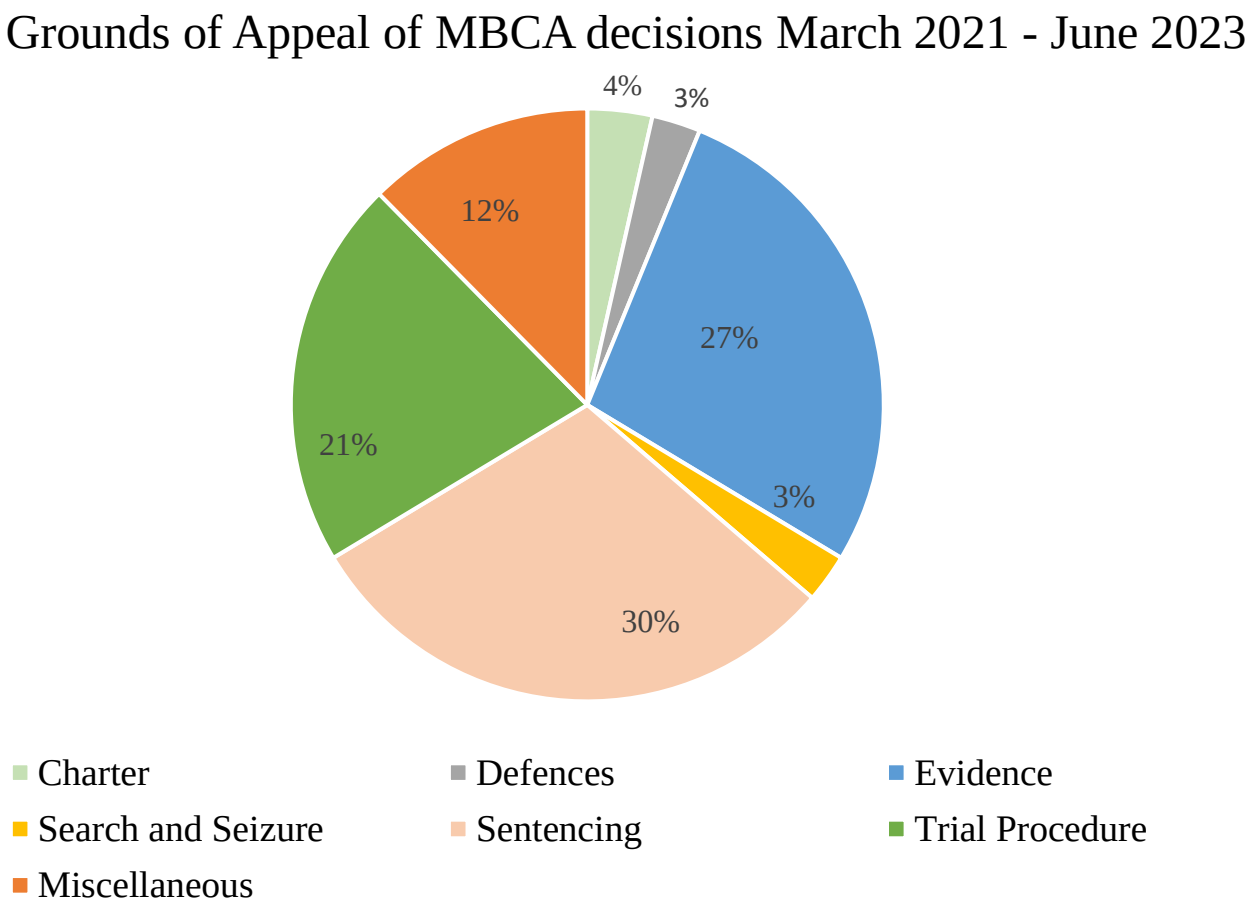
Statistical Infographics of MBCA Decisions: March 2021 to June 2023

Outcomes of MBCA Decisions March 2021 - June 2023



Appearances as Appellants in MBCA decisions March 2021 - July 2022




Grounds of Appeal of MBCA decisions March 2021 - June 2023
4%
3%
27%
3%
30%
21%
12%
Charter
Defences
Evidence
Search and Seizure
Sentencing
Trial Procedure
Miscellaneous