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Correction: In our August 2016 issue, vol. 37 no. 2, page 29, Annamaria Enenajor’s name was misspelled. We apologize for the error.
The issue of delay in the courts is a constant one. If the funding of the justice system is the poor cousin of resource allocation for the other branches of government, then the funding of the defence of the indigent is a third cousin, twice removed—and we’d better get a DNA test (at our expense by the way) to make sure we are even that remotely related.

The recent announcement of the government to appoint more judges, more Crowns, and more duty counsel will only continue the rapid pace of uninformed guilty pleas. And it starts with so much nobility of purpose too. To begin, there will be more judges and so we will get faster trials—great. Next, there will be more “Super” Crowns who will be making bail decisions; and yes, that could and should lead to more releases which is good. It’s not like the government hasn’t known about the bail problem for years, but hey, better later than never. These Crowns will also be vetting files for early and better plea positions. And who will be advising the masses of arrestees? Why, duty counsel, and right in the jail, and then in court. Cradle to grave service potentially. And here is where the grinding down of the presumed innocent begins. Who will counter balance the “Super” Crowns? Not experienced counsel of choice. That is not to say the Crowns won’t be fair; they will do their best. But they need input, and advocacy from the defence. And strong advocacy only comes with doing trials, not just bail hearings and guilty pleas.

I don’t disparage our duty counsel colleagues or think they are unethical, as has been said from time to time in various circles. I just don’t like lawyers being put in a situation of having to risk providing sub-standard service in preparing for bail hearings, and I especially don’t like the fact that they are rounding up a corral full of people to plead guilty without opening a file, without reviewing disclosure, without research and without trial experience. Yes, it is all ethical, at least according to our regulator, because it views the important task of representing someone on a guilty plea as providing summary advice. But G. Arthur Martin said that before you plead someone guilty you should do the same preparation as you would for trial. Yes there may be rare exceptions. But what G. Arthur Martin meant was you better know what the case is all about, and that can’t happen in a summary advice situation. The CLA has advocated for strong standards, and is always willing to work with LSUC and LAO to get there.

What I really don’t like about the use of a duty counsel model to represent the defence is the fact that this erosion of the private bar is still seen as an administrative matter for Legal Aid, and not a matter for a broader, more open policy discussion by the government and public. And that is a big shame for a government that says it cares about poverty reduction, and indigenous reconciliation, not to mention mental health and addiction issues. A strong, independent defence bar is critical to tackling these challenges.
Justice delayed is justice denied. It is one of the most oft-cited aphorisms in law. Yet rarely does it precede (or punctuate) as dramatic a change in the law as it did in R. v. Jordan. In re-writing the test for unreasonable delay under s. 11(b) of the Charter, the Supreme Court of Canada issued its most consequential criminal law judgment—since it re-wrote the test for s. 24(2) of the Charter in R. v. Grant.

In Jordan, the majority justified its overhaul of the jurisprudence by pointing to the “culture of complacency” that had developed “within the system towards delay.” Whether the new regime will be successful in changing this culture remains to be seen. Certainly the reaction of the defence bar is divided. On one hand, the test for determining unreasonable delay has been considerably simplified, and periods of time can no longer be characterized as “neutral” or “inherent” to chip away at what would otherwise be an intolerable period of delay. On the other hand, a presumptive ceiling of 18 months in provincial court is anything but reasonable. Indeed, even the majority acknowledged that “(h)ere is little reason to be satisfied” with 18 months because that is “a long time to wait for justice.” The fact that the majority nevertheless accepted 18 months shows that judicial reluctance to grant the remedy (of a stay) is still cramping judicial interpretation of the right.

For more on Jordan (and the companion case, R. v. Williamson), we have an excellent article from Erin Dann. Erin was co-counsel with Frank Addario for the Criminal Lawyers’ Association in the Supreme Court, and her breakdown of Jordan and Williamson is a must-read. In fact, Erin’s analysis may be the most guidance we get for a while, as the Court allows for a “transition” period during which the new s. 11(b) regime must be applied with sensitivity to any reliance that parties may have placed on the old regime. What this means in practice will be difficult to sort out. It’s somewhat ironic that even as the Court establishes a new framework to reduce delay, it feels compelled to delay its implementation.

Of course, delayed implementation of constitutional rulings is nothing new. Where the Court finds that a particular police practice is unconstitutional, it often suggests that law enforcement should be given a grace period before unconstitutionally obtained evidence is excluded. Similarly, where the Court invalidates legislation for violating the Charter; it often suspends the declaration of invalidity for 12 months or more—all while leaving an unconstitutional offence on the books, under which individuals can be arrested, incarcerated, and prosecuted. It is unfortunate that for so many of our clients, justice continues to be delayed.

Beyond Jordan, there have been several other recent developments of significance in our field. Graeme Hamilton gives us a primer on Joseph Groia’s dispute with the Law Society, which culminated in a recent decision from the Court of Appeal. Owen Goddard has an informative piece on the Court of Appeal’s decision in R. v. Quick, and what that tells us about how we should advise our clients of the consequences of a guilty plea. Annamaria Enenajor has written an interesting article on the “plain smell” doctrine, which allows police to arrest based on the smell of marijuana, and how that doctrine might be affected by the legalization of marijuana. Andrew Burgess discusses the latest developments in sentencing and explores creative ways of going below mandatory minimums. Continuing on the theme of sentencing, Ryan Heighton looks at how the courts are grappling with the goals of deterrence and rehabilitation when confronted with the newest drug on the block: fentanyl. And finally, Lorne Sabsay and Angela Ruffo take a look at the unfortunate criminal law consequences that might attach to assisting refugees, which is particularly relevant given the ongoing Syrian refugee crisis.

Finally, change is afoot at For the Defence. This edition marks the first time in eight years that Breese Davies is no longer an editor. For as long as I can remember, For the Defence was the only legal publication that I made a point of reading every time it landed on my desk—and I was far from the only one. That is a tribute to Breese’s vision and all of the hard work that she poured into this journal. I will miss working alongside her and benefiting from her guidance. At the same time, I am thrilled that Jill Makepeace has joined me as co-editor. As many of you know, Jill practises criminal law at Greenspan Humphrey Lavine. What you may not know is that she has been contributing to this publication for years as the author of The Docket. (We are lucky to have Lauren Wilhelm from Dean D. Paquette & Associate taking over this feature.) Jill is an excellent writer and exemplifies the best of our profession in her commitment to a lifelong journey of learning in service of her clients. It is only fitting that she now take the baton from Breese. Welcome aboard, Jill!

Gerald Chan
Matthew Gourlay

Though the political tides have changed, the Supreme Court continues to be confronted with important cases dealing with the legacy of the Harper government’s crime agenda. Mandatory minimum sentences were a cornerstone of that program and, at least until Jordan swept away 25 years of s. 11(b) jurisprudence (more on that in a moment), it seemed clear to me that the Court’s treatment of mandatory minimums was the most dramatic recent jurisprudential development in the criminal law field. Earlier this year, Dirk Derstine and Janani Shanmuganathan acted for the CLA in R. v. Lloyd, 2016 SCC 13, in which a divided Court struck down a one-year mandatory minimum in the CDSA for a second drug trafficking offence. More significant than this particular result, I think, was the Chief Justice’s candid statement that mandatory minimums applicable to “offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people”—read: almost all of them—will be “vulnerable to constitutional challenge.” It’s difficult to see how any significant mandatory minimum jail sentence, possibly excepting those for murder and a few other particularly heinous crimes, will survive judicial scrutiny in the post-Lloyd world. This is good news, and we should be gratified by the role the Association was able to play in bringing it about.

Lloyd notwithstanding, the blockbuster decision of the year so far was probably R. v. Jordan, 2016 SCC 27, in which the Court rewrote the book on s. 11(b). Of course, we won’t know the full implications for some time: that is the nature of delay. On behalf of the Association, Frank Addario and Erin Dann made cogent and eventually influential submissions in favour of a principled approach that eschews the “micro-counting” of days and arbitrary assignments of blame that had come to characterize the Morin analysis. You can quibble with the details of the majority judgment’s calculus, but I think the thrust of this reform is a salutary one. We will see.

In a pair of cases released on the same day—Minister of National Revenue v. Thompson, 2016 SCC 21, Canada (Attorney General) v. Chambre des notaires du Québec, 2016 SCC 20—the Court affirmed and extended its robust approach to the protection of solicitor-client privilege. The Court appears to have been greatly assisted by the work done by the team from Stockwoods LLP acting for the Association: Brian Gover, Michal Fairburn (as she then was), Justin Safayeni and Carlo Di Carlo.

In R. v. Safarzadeh-Markhall, 2016 SCC 14, the Court struck down an egregious restriction on credit for pre-sentence custody, with Ingrid Grant ably representing the CLA. Other significant cases in which the Association recently intervened include R. v. Saeed, 2016 SCC 24 (Howard Krongold and Vanessa MacDonnell), dealing with search incident to arrest; World Bank Group v. Wallace, 2016 SCC 15 (Scott Hutchison and Sam Walker), about the immunity of international organizations from domestic subpoenas; and R. v. Borowiec, 2016 SCC 11 (Jonathan Dawe and Michael Dineen), about the elements of infanticide. Inexplicably, the Association took a pass on R. v. D.L.W., 2016 SCC 22, the Court’s recent entry into the elements of bestiality.

In the Court of Appeal, Sue Chapman acted for the Association in R. v. Marakah, 2016 ONCA 542, an important case on standing for s. 8 purposes and, more specifically, the reasonable expectation of privacy in text messages. The case is now headed to Ottawa on the strength of LaForme J.A.’s dissent. John Norris represented the CLA in Trinity Western University v. The Law Society of Upper Canada, 2016 ONCA 518, where the Court of Appeal upheld the Law Society’s refusal of accreditation. That case too is likely bound for the Supreme Court, given the disparate decisions reached by courts in Nova Scotia and British Columbia.

In the fall, Lou Strezos will be intervening for the Association in R. v. Bradshaw, in which the Court will be asked to put the brakes on some of the more extravagant manifestations of that earlier case’s broad approach to hearsay. In R. v. Bingley, Mark Halfyard and Bram Vandebeek took on the proper legal characterization of “Drug Recognition Expert” evidence in impaired driving prosecutions. A number of other important cases in which the Association has a stake are expected to be heard in the months ahead and in the midst of summer’s languor we are busy lining up counsel and hammering out positions.

On behalf of the Committee, which is co-chaired by Michael Lacy and Daniel Brown, I would like to express our gratitude for the top-notch work that has been done by all the counsel mentioned above and many others over the past several months. It is all pro bono, it is sometimes thankless—but it makes a real difference to the Association’s members and the administration of justice more broadly.
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The Right to Silence and Self-Incrimination:
• Any confessions by accused persons as a result of their participation in a “Mr. Big” sting operation is presumptively inadmissible unless the Crown is able to establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect: R. v. Hart (2014 S.C.C.)

Expert Witnesses:
• When an expert may be considered impartial by the court: White Burgess Langille Immun v. Abbott and Haliburton Co. (2015 S.C.C.)
• When police officers may be qualified as an expert as it relates to their job description: R. v. Sekhon (2014 S.C.C.)
• Setting the limits to which counsel may educate their experts: Moore v. Getahun (2015 Ont. C.A.)

Revised, expanded discussions on:
• Ways to control a witness’ testimony, and ways in which control can be lost
• Impeachment of the witnesses by prior inconsistent statements
• Cross-examination approaches to identification witnesses that successfully challenge evidence described as “the overwhelming factor leading to wrongful convictions”

*Impeachment of the witnesses by prior inconsistent statements
• Setting the limits to which counsel may educate their experts: Moore v. Getahun (2015 Ont. C.A.)

New in this Edition
Case Law Highlights
•Goodwin v. British Columbia
• R. v. Lloyd
• R. v. Borawiec
• R. v. Safarzadeh-Markhali
• R. v. Getling

Legislative Amendments
• Economic Action Plan 2015 Act
• The Justice for Animals in Service Act
• The Common Sense Firearms Licensing Act
• The Tougher Penalties for Child Predators Act
• The Respect for Communities Act
• The Anti-Terrorism Act, 2015
• An Act to Amend the Criminal Code (Exploitation and Trafficking in Persons)
• Victims’ Bill of Rights

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In *R. v. Jordan*, a majority of the Supreme Court of Canada decided that the old way of adjudicating s. 11(b) applications wasn’t working. The Morin framework was overly complex, fostered a “culture of complacency” towards delay and did little to encourage speedy trials. By imposing presumptive limitation periods beyond which the Crown bears the onus of justifying the excessive delay, the new framework offers a welcome simplification of the 11(b) analysis and sends the message that chronic institutional delay is no excuse for violating a Charter right. Unfortunately, the presumptive ceilings may be set too high to succeed in their goal of reducing systemic delay. There is a danger they could result in increased tolerance for delay, especially in straightforward matters that proceed in provincial court.

**A. The Decision**

Justices Moldaver, Karakatsanis and Brown wrote the majority decision, supported by Justices Abella and Côté. The new framework for s. 11(b) is summarized in their judgment as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie out-
side the Crown’s control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case’s complexity, the delay is reasonable.

• **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

Defence delay has two components: 1) waiver, which must be clear and unequivocal; and 2) delay caused by the conduct of the defence. This includes tactics, such as frivolous applications, that are deliberately calculated to cause delay. Defence-caused delay also accrues when the court and Crown are ready to proceed but the defence is not. Importantly, however, periods of time during which the court or Crown are unavailable will not constitute defence delay, “even if defence counsel is also unavailable.”

It is noteworthy that in applying its new framework, the majority rejected the Crown’s argument that Mr. Jordan was equally culpable in the delay in bringing his matter to trial. The majority found that while the conduct of the defence reflected a general complacency, much of the resulting delay was “not attributable solely to the defence.” For example, the Crown shared responsibility for delay resulting from the underestimation of time needed for a preliminary hearing and for delay caused by consent adjournments. This delay was not deducted from the period under scrutiny by the Court.

In order to rebut the presumption of unreasonableness, the Crown must justify the excessive delay by establishing the presence of exceptional circumstances. Exceptional circumstances will generally fall within one of two categories: discrete events (such as illness or family emergencies) and particularly complex cases (including those involving voluminous disclosure, novel legal issues or numerous charges). A circumstance will only be exceptional where it is reasonably unforeseen or unavoidable and it cannot be reasonably remedied.

The presence of exceptional circumstances is the **only basis** on which the Crown can discharge its burden and prove that delay beyond the ceiling is reasonable and justified. Those circumstances must be genuinely outside the Crown’s control and ability to remedy. The Crown cannot rely on chronic institutional delay, the seriousness/gravity of the offence, or the absence of prejudice to justify delay that exceeds the ceiling.

Prejudice suffered by an accused, or the lack thereof, no longer plays any role in determining whether s. 11(b) has been violated. It remains possible for a defendant to demonstrate a violation of s. 11(b) even where the delay falls beneath the relevant presumptive ceiling. However, such findings are expected to be rare. The defence must show both that the delay was markedly longer than necessary and that the defence took proactive steps to move the matter forward.

The new framework, including the presumptive ceiling, applies to cases currently within the system subject to two qualifications. First, a “transition exceptional circumstance” may apply where the delay exceeds the ceiling and the Crown satisfies the court that the delay is based on the parties’ reasonable reliance on the law as it previously existed. Second, where the total delay falls below the ceiling, the defence does not need to demonstrate that it took initiative to expedite mat-
This step involves determining on the disposition of a case like this one?

B. The Dissent

Justice Cromwell, writing for Chief Justice McLachlin and Justices Wagner and Gascon, concurred in the result in Jordan, but offered a strongly-worded rebuke of the analysis developed by the majority. The minority describes the new framework as unnecessary, unprincipled and unlikely to achieve its purported goals.

The minority held that with “modest adjustments” and “additional clarification,” the Morin framework should continue to govern the adjudication of s. 11(b) claims. It proposed to regroup the Morin factors under four analytical steps:

The minority describes the new framework as unnecessary, unprincipled and unlikely to achieve its purported goals.

First, is an unreasonable delay inquiry justified? This is a threshold question answered by examining the overall period between the charge and completion of trial.

Second, what is a reasonable time for the disposition of a case like this one? This step involves determining on an objective basis what would be a reasonable time for the trial of a case like the one under review. The objective standard of reasonableness has two components: i) institutional delay and ii) inherent time requirements of the case. The acceptable period of institutional delay is determined in accordance with the guidelines from Morin (eight to ten months in provincial courts and six to eight months in superior courts). The inherent time requirements are “determined on the basis of judicial experience, supplemented by submissions of counsel and evidence in relation to the reasonable time requirements of a case of a similar nature to the one under review.”

Third, how much delay that occurred counts against the state? A reviewing court would review the amount of time actually taken to bring the matter to trial and identify any portion of the delay that should not count against the state. This primarily would involve determining how much delay is attributable to the accused.

Fourth, was the delay that counts against the state unreasonable? Where the actual delay attributable to the state is longer than what is objectively reasonable, the reviewing court would determine whether the excess delay could be justified. The burden of justifying the excess delay would be on the Crown. Substantial excess delay might be reasonable where there is “a particularly strong societal interest in the prosecution proceeding on its merits” or where the excess delay “results from temporary and extraordinary pressures on counsel or the system.” If the delay is shorter than the objectively reasonable time requirement, the presence of actual prejudice could make the delay nevertheless unreasonable in the particular circumstances of the case.

C. The Good

The Stated Goal: Reduce Delay and Increase Predictability

Whether it achieves its goal or not, the majority’s stated purpose in developing a new framework was to put an end to ever-increasing tolerance for excessive delay in the criminal justice system. The majority found that the Morin analysis—as interpreted and applied by trial and provincial appellate courts over the past two decades—fostered “a culture of complacency within the system towards delay.” The new framework is meant to create incentives to expedite criminal cases and “effect positive change within the justice system.”

By establishing presumptive ceilings, the majority provides a prospective target for state actors rather than focusing exclusively—as Morin did—on a retrospective inquiry of reasonableness. The hope is that the new framework will also introduce a measure of simplicity and predictability in delay applications.

The decision makes clear that in assessing a s. 11(b) claim, a court is not required to account for every single day from charge to trial and assign it to a particular category of delay identified in Morin. Trial judges are directed that they “should not parse each day or month, as has been the common practice since Morin, to determine whether each step was reasonably required.” The majority recognized that this sort of “micro-counting” analysis was inefficient, unpredictable and was applied in a manner that allowed for “tolerance of ever-increasing delay.”

Less Reliance on Judicial “Guesstimations”

The new framework does away with the complicated task of determining the “inherent time requirements” of a case. Under Morin (even with the modifications proposed in the minority judgment) the delay attributed to the state, and thus subject to Charter scrutiny, did not include the time period considered to be reasonably required to get the matter ready for trial. The inherent time requirement
Over time, calculations of “inherent” or “neutral” delay tended to whittle away at the institutional delay attributed to the state.

was a nebulous feature and included time taken to hire counsel, prepare disclosure, conduct multiple Crown and judicial pre-trials, clear counsel’s schedule and prepare for trial.

Over time, calculations of “inherent” or “neutral” delay tended to whittle away at the institutional delay attributed to the state. This was perhaps best exemplified in R. v. Lahiry, where Justice Code held that:

if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the court has available for the trial is 12 months in the future, then systemic congestion in the court is the cause of only two months of delay. The other ten months is delay that the accused needs, for entirely beneficial reasons, in order to allow his/her counsel of choice to prepare the case for trial and to accommodate it in an otherwise busy calendar. It is good and necessary delay that would have occurred in any event, even if the court had earlier available dates. It is a fiction to characterize this kind of useful delay as unwarranted or unreasonable or prejudicial.15

Though purportedly aimed at injecting a dose of realism into the s. 11(b) analysis, the concept of “trial readiness” instead imposed a legal fiction over the reality of institutional delay. Justice McLeod put the matter plainly:

I still don’t understand what the OCA meant by saying that “counsel require time to clear their schedule so they can be available for the hearing”. Nor do I agree that a further period of time has to be neutralized to account for trial preparation—because my experience is that as a general proposition lawyers don’t allocate time to preparation. This is a bureaucratic construct that means nothing to practicing criminal lawyers. To the extent that advance preparation is done, it occurs when the opportunity arises. Otherwise, lawyers prepare when necessary—usually shortly before the trial commences, working around other scheduled court events.16

The reassignment of delay from “institutional” to “inherent” acted as an inflationary mechanism to steadily increase the length of tolerable delay under the Morin framework. The rejection of this approach is a positive development as is the majority’s explicit statement that periods of time when
the defence is not available will not count as defence delay if court and Crown are also unavailable.17

The majority is equally clear that the defence must be allowed preparation time “even where the court and the Crown are ready to proceed.” Defence actions legitimately taken to respond to the charges fall outside the scope of “defence delay.” The necessity of defence preparation time and non-frivolous defence applications and requests were accounted for in setting the ceilings at 18 and 30 months. The periods of time necessary for legitimate defence efforts are not to be deducted as defence delay.18

The Application of the New Framework in R. v. Williamson

The application of the Jordan framework in the companion case of R. v. Williamson is instructive. The majority upheld the stay imposed by the Court of Appeal finding that there was no justification for exceeding the 30-month ceiling. The case—a prosecution of historic sexual offences—did not “remotely” qualify as exceptionally complex and the majority found that the record did not disclose any discrete, exception-
al circumstances beyond the Crown’s control.19

The latter finding is significant given the evidence before the application judge that part of the delay was caused by one of two jury courtrooms in Kingston being monopolized by a long high-profile multiple-murder. The majority concluded that it was reasonable to expect some additional delay in scheduling as a result of these circumstances but found that the Crown had made no effort to mitigate the problem. This reasoning suggests that if Crowns are to succeed in justifying delay beyond the ceiling, they must demonstrate that they made efforts to combat delay even where that delay is not the Crown’s “fault.” Applying the “transitional exception circumstances,” the majority held that reliance on the previous state of the law could not justify the time it took to bring the matter to trial.20

In contrast, the dissenting judges concluded that the delay was reasonable even though it exceeded the objectively reasonable delay by over five months. In reaching this conclusion, the dissent stressed the fact that Mr. Williamson had ultimately been found guilty and that the charges against him were very serious. The societal interest in resolution on the merits of the case justified the excessive delay given that it was not “clearly unreasonable.”21

D. The Bad

Onus on the Accused to Expedite Proceedings

In unfortunate ways, the majority judgment reflects and perpetuates a cynical approach to s. 11(b) claims that presumes that many accused individuals want to have their trials delayed “for as long as possible.”22 The notion that defendants desire and seek the violation of one of their fundamental legal rights has informed s. 11(b) analysis since Askov. This is unfair. Delay prolongs the “exquisite agony” of waiting for trial. It does not relieve it.23 As Michael Code (as he then was) wrote in Trial Within a Reasonable Time, to suggest that a stay is a windfall for an accused is to engage in an “ex post facto analysis of rights violations” and confuses a constitutional remedy for the harm done by state action with a “benefit.”24

In Jordan, the majority finds that one of the failings of the Morin framework was that it did not encourage defence counsel (or any other justice system participant) to take preventative measures to address inefficient practices.25 The new framework is aimed at removing incentives for accused individuals to remain passive in the face of delay. Instead it encourages the defence to be part of the solution.26 In doing so, the framework imposes a positive obligation on accused individuals to bring themselves to trial within a reasonable time.

Where the total delay falls beneath the presumptive ceiling the onus rests on the defence to prove that the delay was unreasonable. To establish a violation of s. 11(b), the defence must establish not only that the case took “markedly longer than it reasonably should have,” but also that the defence
“took meaningful steps” to attempt to expedite the proceedings.

This is a change to the law. As the majority recognizes, taking initiative to expedite matters was not expressly required by the Morin framework. It is an additional burden on the accused that Cromwell J. characterizes as “a judicially created diminishment of a constitutional right.” There is no principled reason why the defence should have to establish anything more than that the case took “markedly” longer than it should have. As the minority judgment points out, sustained efforts by defence counsel have no bearing on whether the time it took the state to bring the matter to trial was reasonable.

Conversely, the exceptional circumstances relied on by the Crown to rebut the presumption of unreasonableness above the ceiling do not have to be rare or even "entirely uncommon." The examples provided by the majority confirm that qualifying exceptional circumstances do not need to be particularly exceptional. The category of "discrete events" includes medical and family emergencies as well as unexpectedly recanting witnesses. The category of "particularly complex" includes cases involving "voluminous disclosure," charges covering a long time period, and cases where there are a large number of pre-trial applications.

On a more positive note, the majority emphasizes that it will not be enough for the Crown to simply point to the complexity of the case or a past difficulty in bringing the matter to trial. The Crown must also show that it took reasonable steps to avoid and address problems as they arose. Complexity, according to the majority, is not a circumstance that is truly outside the Crown’s control where the Crown fails to initiate, develop and execute a plan to minimize the delay associated with complex cases. Moreover, the majority specifically notes that a typical murder trial will "not usually be sufficiently complex" to amount to an exceptional circumstance.

The majority directed that "for most cases currently in the system, the majority—particularly for provincial court matters. The danger is that they will permit a greater tolerance for delay rather than reduce it. The majority in Jordan acknowledges that the ceilings it set are "not

The Crown must also show that it took reasonable steps to avoid and address problems as they arise.

As a practical matter, defence counsel who anticipate that the total delay will fall below the ceiling must be particularly diligent in pushing cases forward. Courts will look for:

• Meaningful attempts to set early hearing dates;
• Cooperation and responsiveness to the Crown and the court;
• Putting the Crown on notice when delay is becoming an issue; and
• Conducting applications reasonably and expeditiously.

"Exceptional" Doesn’t Mean Rare or Uncommon

The majority anticipates that stays beneath the ceiling will be rare.

E. The Ugly

The central complaint about the new 11(b) framework is that the presumptive ceilings have been set too high—particularly for provincial court matters. The danger is that they will permit a greater tolerance for delay rather than reduce it.

The majority in Jordan acknowledges that the ceilings it set are "not

aspirational target[s]" but rather reflect "the realities we currently face." That is unfortunate. The current reality in Canadian trial courts—as is repeatedly acknowledged by the majority—is that they are plagued by a culture of complacency towards delay. Setting a ceiling that is descriptive (i.e. that reflects how long it currently takes to complete a trial) rather than prescriptive (i.e. that tells the state how long a case should take) does not "foster constructive incentives" for reducing delay. It encourages the status quo to continue.

It is noteworthy that applying the Jordan framework, the delay in Askov would not have been presumptively unreasonable. Although the total delay in that case was over 30 months, the state was only responsible for 24—the remaining delay was attributed to the defence. It was 24 months of delay that
the Supreme Court found intolerable. That was 26 years ago. The government has had ample time to address the problem identified in Askov. It is difficult to see how instituting a more forgiving approach at this stage will help to reduce systemic delays.

The Jordan framework will likely make it easier to establish a breach of s. 11(b) and obtain a stay of proceedings where the delay is particularly egregious. That’s a good thing. We do not need a complicated, micro-accounting approach to tell us that it is unreasonable for a provincial court trial to take over two years.

**Reports from the frontlines are mixed.**

Conversely, however, the high ceiling may permit a greater tolerance for unreasonable delay so long as it does not rise to the level of abject failure to move a case forward. The ceiling does nothing to prevent—and indeed may encourage—inefficiency for a year and a half in provincial courts. Even where delay extends well beyond the acceptable guidelines articulated over two decades ago in Morin, a breach of s. 11(b) will rarely be found if the total time to trial is less than 18 months.

Moreover, the presence of actual prejudice is no longer a factor the defence can rely on to show that delay below the ceiling was unreasonable. The demonstration of extreme actual prejudice as a result of lengthy delay caused solely by a lack of institutional resources does not weigh in favour of a stay below the ceiling. Instead, establishing a breach requires the defendant to prove she made sustained efforts to bring herself to trial more quickly. This is particularly troublesome given that the same ceiling appears to apply whether the accused is a young person, an adult or a corporate entity, and whether he is detained pending trial or released on a promise to appear.

**F. Going Forward**

The judges in the minority concluded that the ceilings established by the new framework are so high that “they risk being meaningless” in the vast majority of cases and are unlikely to improve the pace at which most cases move through the system. That concern is shared by many defence counsel.

Reports from the frontlines are mixed. It appears the streamlined analysis has not reduced s. 11(b) posting in set-date courts, though it may have changed its focus. It is an open question as to whether defence counsel need to file transcripts in cases where delay exceeds the ceiling. Clearly practice directions, such as those for Toronto courts that direct counsel to include in their s. 11(b) application, “a chart or other breakdown of the relevant time periods with an apportionment of each to inherent time requirements, other neutral periods, Crown delay, defence delay/waiver and institutional delay,” will have to be revised. Judges, Crowns and defence counsel are all struggling to interpret the nuance of the majority’s decision and its implications.

In the absence of data about current delay, it is difficult to predict the impact the new framework will have. A review of the statistics set out in the minority’s decision offers some hints. It appears that in the majority of cases—about 80%—where courts found a s. 11(b) breach using the Morin analysis, the total delay exceeded the presumptive ceilings. That means 20% of stays were granted where the delay was at or below the ceilings. In those cases, in order to obtain a stay, the defence may well have demonstrated efforts to expedite the proceedings.

The cases examined by the Court showed an average “net” delay of 44 months and a median “net” delay of 37 months for superior court cases in which stays were granted. The same figures for provincial court trials were 27 months and 24.5 months respectively. The minority also notes that 13% of the cases in provincial court in British Columbia have been pending for over 18 months. It points to these statistics to suggest that that “dramatic improvements” will be required to avoid thousands of judicial stays.

The minority’s complaint is that the proposed ceilings are unrealistic and that their implementation “risks large numbers of judicial stays.” That complaint is difficult to reconcile with the minority’s other objection that the ceilings are too high to be meaningful. But it is not necessarily bad news for the defence bar or our clients. If Justice Cromwell is correct, we should see a significant increase in stays unless dramatic improvements are made in cases where the delay is at the “top end.” The risk, however, is that as prosecutors and the courts expend resources to ensure serious, moderately complex cases are heard within the time limits, other more straightforward matters will regress toward the presumptive ceiling.

That said, the majority’s clear message in Jordan is that the new framework is not meant to allow “the parties or the courts to operate business as usual.” The ceilings were designed to promote timely trials. If they fail to achieve that goal, the numbers, and the considerations that inform them, can be revisited. For now, there is a compelling argument that any questions left open in Jordan must be resolved in accordance with the spirit of the decision: that the new analysis is meant to
act as an incentive for efficiency, that the framework cannot be interpreted as permitting the continuation of the status quo and that timely justice is a constitutional imperative that cannot take a back seat to stubborn systemic delay.

Postscript

In the time between the writing of this article and its publication, the Superior Court has developed a new practice direction for s. 11(b) applications and a number of decisions have been released applying the Jordan framework and its “transitional” features.

The practice direction suggests a reluctance to let go of the Morin approach. It continues to place the onus of ordering transcripts on defence counsel and (for transition cases) requires a detailed breakdown of the period of delay with each time period being attributed to one of the five Morin categories of delay. The inclusion of this requirement is particularly noteworthy given the Supreme Court’s specific direction that trial judges should no longer parse every day or month in determining s. 11(b) applications.


A cursory review of the post-Jordan decisions suggests the most contentious issue going forward will (not surprisingly) involve the determination of what counts as “defence delay.” More decisions are inevitably coming. A thorough review of those cases and a discussion of the themes and trends emerging in the case law will have to wait for another article.

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NOTES:

2 Ibid. at paras. 61-64.
3 Ibid. at paras. 121-123.
4 Ibid. at paras. 70-80.
5 Ibid. at paras. 69 and 81.
6 Ibid. at para. 82-83.
7 Ibid. at paras. 96-99.
8 Ibid. at para. 163.
9 Ibid. at paras. 173-184.
10 Ibid. at paras. 186-195.
11 Ibid. at paras. 196-206.
12 Ibid. at paras. 4 and 104.
13 Ibid. at para. 35.
14 Ibid. at paras. 91 and 37.
15 R. v. Labir, 2011 ONSC 6780, 2011 CarswellOnt 12516, 90 C.R. (6th) 90 (Ont. S.C.J.) at para. 34. Cited with approval in R. v. Tran, 2012 ONCA 18, 2012 CarswellOnt 509 (Ont. C.A.) at para. 32, where Simmons J.A. held that parties should not be deemed automatically to be ready to conduct a hearing as of the date a trial is set since counsel require time to clear their schedule and prepare for the hearing.
17 R. v. Jordan, supra at para. 64.
18 Ibid. at para. 65.
20 Ibid. at paras. 28 and 30.
21 Ibid. at para. 80.
24 Michael A. Code, Trial Within a Reasonable Time (Toronto: Carswell, 1992) at p. iii.
25 Ibid. at p. iv.
27 Ibid. at paras. 21 and 86.
28 Ibid. at para. 99.
29 Ibid. at para. 264.
30 Ibid. at para. 85.
31 Ibid. at paras. 72-73 and 77.
32 Ibid. at paras. 70 and 78-79.
33 Ibid. at paras. 101-102.
34 Ibid. at para. 56.
35 Ibid. at para. 51.
36 Ibid. at paras. 254 and 276.
37 Ibid. at para. 279.
38 Ibid. at para. 283.
39 Ibid. at para. 279.
40 Ibid. at para. 57.
Much ink has been spilled on the decisions in the matter of The Law Society of Upper Canada v. Groia. You are aware that there is a controversy. You have probably caught a CLE panel discussion (or three) on “civility.” You may have even read the Law Society or Divisional Court decisions. But you have likely not had time to read the 445-paragraph tome released by the Ontario Court of Appeal on June 14th. “What exactly is the fuss about?” you ask. And that question is followed by, “Could this happen to me?”

The Background

In the mid-1990s, Bre-X Minerals Ltd. was the darling of the Toronto Stock Exchange. Starting as a penny stock, the junior mining company’s share price soared after it was reported to be sitting on a massive gold deposit in Borneo.¹

Unfortunately for investors, the only thing that was massive was the scale of the fraud. When it was discovered that ore samples from the deposit had been salted with gold dust, billions of dollars of market capitalization were wiped out. Bre-X ultimately filed for bankruptcy protection.²

In 1999, the Ontario Securities Commission (the “OSC”) brought eight Securities Act charges against Bre-X’s Vice-President, Exploration, John Felderhof. Felderhof retained Joseph Groia to represent him. Felderhof’s trial started in October 2000 before Hryn J.
and consumed 160 days of court time over nearl seven years. At the end of the trial, Felderhof was acquitted of all eight charges.  

The trial was unquestionably acrimonious. The first half was dominated by disputes about whether OSC prosecutors had complied with their Stinchcombe disclosure obligation, as well as disputes about the admissibility of documents.  

Seventy days into the trial, the OSC brought an application for judicial review, seeking an order prohibiting the continuation of the trial before Hryn J., as well as an order quashing rulings he had made in the course of the trial. The application was premised, in part, on the trial judge's alleged failure to control Groia's uncivil conduct, which, it was argued, had led to a loss of jurisdiction.  

The investigation was instead triggered by a Law Society staff member reading an article about the Felderhof trial.  

The Complaint  
There was no complaint, per se. Neither the trial judge nor the judge hearing the application for judicial review complained to the Law Society. Nor did the justices of the Court of Appeal, to whom the OSC appealed after their application for judicial review was dismissed. The prosecutors did not complain. No witnesses complained. Groia's client did not complain.  

The investigation was instead triggered by a Law Society staff member reading an article about the Felderhof trial. Surprising, perhaps, but not uncommon at the Law Society. Investigations are routinely triggered by stories in the popular press, judgments that Law Society staff become aware of, as well as investigations into other lawyers.  

However, in the circumstances of this particular case, the fact that no one who was actually present at the Felderhof trial complained has spurred much of the ensuing controversy.  

The Charges  
The essence of the allegations against Groia was that he had made unfounded allegations of prosecutorial misconduct against the OSC prosecutors, improperly impugning the integrity of his opponents.  

Before the trial started, Groia had locked horns with OSC prosecutors over their disclosure obligations. He alleged that they had reneged on specific promises made to the defence. This allegation formed the basis for a 16-day Stinchcombe application that was brought at the outset of the trial.  

As the trial progressed, the dispute about production morphed into a dispute about the admissibility of documents. It came to a head between days 52 and 68 of the trial. Although the Law Society's application was originally framed to encompass a broader timeframe, it is for this time period specifically that the allegations have stuck—through the original hearing, the appeal to the Law Society Appeal Panel, the appeal to the Divisional Court, and now, the appeal to the Court of Appeal.  

It is almost impossible to describe what Groia did without one's bias as to the ultimate result coming through, but I'll try. Groia took the position that the production of certain documents to him through the normal disclosure process amounted to a concession of authenticity and relevance, such that he was entitled to enter these documents into evidence without calling witnesses who would be able to identify them. When the OSC prosecutors objected, Groia alleged that they were resiling from earlier statements made to the defence and to the Court. What is more, Groia alleged that they were only doing this when it suited them, using a "conviction filter" to assess when they would admit certain documents. During this timeframe, Groia also repeatedly referred to the prosecution as the "Government." This was alleged to be a sarcastic reference intended to cast aspersions on opposing counsel.  

The Holding  
Despite the much-touted significance of the case to the Bar, the test for incivility that was crafted is applicable to only a very narrow set of circumstances. This is as it must be, said Cronk J.A., writing for the majority in the Court of Appeal, because "[t]he highly contextual and fact-specific nature of incivility necessarily requires... when is it professional misconduct to make allegations of prosecutorial misconduct or impugn the integrity of opposing counsel?  

affording the disciplinary body leeway in fashioning a test that is appropriate in the circumstances of the particular case."  

In this case, the issue was framed as follows: when is it professional misconduct to make allegations of prosecutorial misconduct or impugn the integrity of opposing counsel?  

The answer is that you may be subject to sanction unless the allegations are made in good faith and have a reasonable basis. Furthermore, you are to avoid the use of invective to raise the issue. That said, an "isolated lapse of judgment or occasional disparaging comment about another participant in
litigation generally should not be viewed as triggering disciplinary action.\textsuperscript{13}

In this case, Groia’s conduct between day 52 and day 68 met the test because it constituted a “relentless personal attack on the integrity and bona fides of the prosecutors” which did not have a reasonable basis.\textsuperscript{14}

More generally, uncivil conduct has been defined as “potent displays of disrespect for the participants in the justice system, that go beyond mere rudeness or discourtesy.”\textsuperscript{15} When incivility is alleged, Cronk J.A. held that “the relevant question is whether the type of proven conduct at issue, in the applicable context and factual circumstances, may reasonably and, hence, objectively be said to fall below the standard of conduct for advocates that the public and the profession at large have a right to expect.”\textsuperscript{16}

\textbf{The Controversy}

The two main points of controversy that have been topics of discussion in the legal community since the Groia prosecution got underway are brought to the fore in Brown J.A.’s dissent in the Court of Appeal. First, Justice Brown takes up the issue of who should be the final arbiter of when a barrister’s in-court conduct crosses the line.\textsuperscript{17} In his view, the courts should not cede their authority to the professional regulator over what happens in court. Whereas the majority found that a differential review of the regulator’s decision employing a reasonableness standard was appropriate, Justice Brown would have reviewed the regulator’s decision on a correctness standard. This would not have ousted the Law Society’s jurisdiction, but it would have given the courts the “final word.”\textsuperscript{18}

Second, Justice Brown expressed concerns about a test for incivility that focuses exclusively on what the barrister did, without any inquiry into the dynamic between the barrister and the presiding judge or the effect of the alleged misconduct on the fairness of the in-court proceeding.\textsuperscript{19} He warned that it is necessary to take into account all of the surrounding circumstances, as “retrospective transcript-based reviews contain inherent limitations...which risk turning the review into an exercise in Monday-morning quarterbacking.”\textsuperscript{20}

This case brought these concerns into sharp relief. As mentioned previously, neither the presiding judge nor anyone else involved in the Felderhof matter complained to the Law Society. The Law Society called no witnesses in its case against Groia. It relied on the decisions rendered on the application for judicial review, transcripts of various parts of the Felderhof prosecution, and correspondence between Groia and the OSC.\textsuperscript{21} The majority’s decision in the Court of Appeal, as well as the decisions below, focus almost exclusively on what Groia did.\textsuperscript{22}

This was, in Justice Brown’s view, an error. His assessment was that the regulator had employed an unduly myopic approach, writing “in the context of a 160-day trial, the [regulator] focused on complaints about defence counsel’s conduct which spanned six days of trial time, by the end of which the trial judge had ruled that Mr. Groia was not to repeat the allegations, a direction reiterated by [the Court of Appeal], and with which Mr. Groia complied.”\textsuperscript{23} Furthermore, Brown J.A. found that Groia’s conduct had not prevented the prosecution from having a fair trial.\textsuperscript{24}

\textbf{The Next Battle}

Having been through three levels of review already, it’s tough to say whether this case will get a fourth. The Supreme Court recently ruled on several issues related to a lawyer’s civility obligation in \textit{Doré v. Barreau du Québec}.\textsuperscript{25} While the standard of review issue is an interesting one, it really relates to the application of the existing analytical framework and not an overhaul of it. This case has certainly garnered attention from the Bar, the Bench, and the popular press, but that alone may not be enough for it to go further.

\textbf{The Upshot for Your Practice}

If the Court of Appeal’s decision is the final word, there is not a lot of concrete guidance for you about when you might cross the line to being uncivil. The test will get fleshed out on a case-by-case basis, and lawyers who are brought before their regulator will be assessed on whether their conduct fell below the standard of conduct that the profession and the public reasonably expected of advocates.

On the specific issue of comments about opposing counsel, the outcome in Groia underscores the importance of being careful about what you say. Your comments, if you are to make any, must be informed and you must exercise restraint. Otherwise you might be locking horns with your regulator next.
Graeme Hamilton is a senior associate at Borden Ladner Gervais LLP where he practices criminal, regulatory and corporate commercial litigation. He has been counsel in a number of Law Society disciplinary matters.

NOTES:
1 “Bre-X,” Wikipedia: https://en.m.wikipedia.org/wiki/Bre-X.
2 Ibid.
4 Ibid. at paras. 15-17.
5 Ibid. at paras. 18-19.
6 Ibid. at paras. 244, 250.
7 Ibid. at para. 251.
8 Ibid. at paras. 26, 28-29.
10 Court of Appeal Decision, supra at para. 410.
11 Ibid. at para. 125.
12 Ibid. at para. 36, 178.
13 Ibid. at para. 140.
15 Ibid. at para. 120.
16 Ibid. at para. 125.
17 Ibid. at paras. 263-267.
18 Ibid. at para. 313.
19 Ibid. at para. 319.
20 Ibid. at para. 318.
22 Court of Appeal Decision, supra at paras. 420-423.
23 Ibid. at para. 428.
24 Ibid. at para. 429-434.
25 2012 SCC 12.

Criminal defense lawyers in the United States since the 1970’s, Mark J. Mahoney and James P. Harrington are Past Presidents of the of the New York State Association of Criminal Defense Lawyers. Both are also members of the National Association of Criminal Defense Lawyers; Mark is a member of the Criminal Lawyers Association.

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R. v. Quick: What it Means for a Plea to be Informed

by Owen Goddard

Introduction

The Court of Appeal’s recent decision in R. v. Quick tries to answer a vexing question—what does it mean for an accused’s plea to be informed? Every criminal lawyer knows that a guilty plea isn’t valid if the accused doesn’t understand its consequences, but what does that really entail? Two decades ago, in R. v. T. (R.), the Ontario Court of Appeal told us that an informed accused must have an “appreciation of the penalty he faces.” While this makes it clear accused people must understand that their guilty plea exposes them to the possibility of jail, a fine, or whatever other penalty the judge might impose, just how far does this “appreciation” need to go? Does it include other orders the judge can make on sentencing, like DNA orders? Does it include “penalties” that might be imposed not by the judge but by other statutes, like the Highway Traffic Act or the Immigration and Refugee Protection Act? Does the accused’s appreciation ever need to extend beyond penalties imposed by the state to those that might be imposed by someone else, like an employer?

These questions have dogged courts for decades. It seems there is no simple answer or bright line rule that will lead to fair results in every case, and the courts have reached inconsistent conclusions. In Alberta, the Court of Appeal has essentially held that an informed accused only needs to understand the penalties that may be imposed by the judge: “[a]n unexpected penalty . . . after a voluntary and informed plea of guilty does not . . . justify a change of plea.” Two trial judgments in Ontario adopted this conclusion as well. But its support has not been universal. Two other decisions from the Ontario Superior Court—R. v. Stewart and R. v. Grewal—held that
the accused must have a broader understanding of the consequences of a plea before it will be informed. In both of those cases, guilty pleas were set aside as uninformed because the accused did not understand the driver's licence suspensions that accompanied them under the Highway Traffic Act.

Justice Laskin's decision in Quick is the Ontario Court of Appeal's first attempt to bring clarity to this area of law. In the judgment, the Court creates an entirely subjective test that essentially says a plea is uninformed if there is a “realistic likelihood” that an accused, informed of an unforeseen consequence, would have pleaded not guilty and gone to trial.

...Quick is the Ontario Court of Appeal’s first attempt to bring clarity to this area of law.

It is a good judgment from the Court of Appeal, one that strives toward creating a fair test that gives meaning to the timeless requirement that a valid guilty plea must be informed. But, as we will see, it leaves much to be resolved in future cases.

Facts

Quick was charged with dangerous driving. He had two prior driving offences on his record. Under the Highway Traffic Act, automatic licence suspensions accompany convictions for Criminal Code driving offences—the first conviction gets you a one-year suspension, the second is three years, and the third is indefinite. There is only one exception to the Highway Traffic Act's escalating penalties: they reset if you go 10 years without another conviction for a driving offence.

Because of his two prior convictions, Quick was facing an indefinite suspension under the Highway Traffic Act if he was convicted of dangerous driving. There were only two ways he could avoid losing his licence potentially for life: by beating the charge at trial, or by getting himself under the HTA's 10-year limitation period. Making use of the limitation period was a real possibility in his case because his last conviction for a driving offence was 9-1/2 years old. If he had delayed a conviction by just six months, his licence would only have been suspended for a year.

But Quick did not try to wait out the limitation period, nor did he fight the dangerous driving charge at trial. Instead, he pleaded guilty. In an affidavit filed as fresh evidence on appeal, Quick said that his lawyer told him that if he pleaded guilty his licence would be suspended for one year and he would get a reformatory sentence. Quick—a truck driver who depended on his licence for his livelihood—took the deal and pleaded guilty that day. He found out about the indefinite licence suspension under the HTA while he was serving his sentence and started an appeal. Trial counsel admitted that she and Quick did not discuss the HTA consequences of pleading guilty to dangerous driving.

The Appeal

On appeal, the Crown argued that the Court should adopt the precedent from the Alberta Court of Appeal and the Ontario decisions that followed it; the "consequences" of a plea the accused needs to know about are limited to those that the sentencing judge may impose. Quick argued that the Court should adopt the reasoning in Stewart and Grewał and find that "consequences" should include anything that would have affected his decision to plead guilty.

The Court of Appeal largely accepted Quick's argument. Justice Laskin referred back to the Court's decision 20 years earlier in T. (R.) and noted that the "consequences" of a plea the accused must understand are limited to those that are "legally relevant." Justice Laskin's task in the judgment was to figure out what "legally relevant" means.

Justice Laskin held that legally relevant penalties must "at least" include penalties that are "imposed by the state." This includes even "non-criminal" penalties the state imposes for Criminal Code offences. There was "no doubt" that a driver's licence suspension was "legally relevant" because it was a penalty imposed by the state for a Criminal Code offence.

However, Justice Laskin was careful to put limits on this rule. He held that an informed plea does not require the accused to understand "every conceivable collateral consequence of the plea," even those that might be "legally relevant."
but who was unable to drive anyway because of his health.\textsuperscript{11}

Each case requires a “fact-specific inquiry” to determine “the legal relevance and the significance of the collateral consequence to the accused.”\textsuperscript{12} A “simple way” to measure significance is to ask whether “there is a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty” and gone to trial. The test is entirely subjective because an informed plea “requires that the accused pleading guilty be aware of the significant collateral consequence.”\textsuperscript{13}

\textbf{What Quick Means Going Forward}

The decision in \textit{Quick} brings helpful clarity to a confusing area of law. At least we now know definitively that an accused must be informed of at least some collateral consequences beyond those set out in the \textit{Criminal Code} when she pleads guilty. It is now clear that an accused who pleads guilty while unaware of a consequence under the \textit{Highway Traffic Act} or the \textit{Immigration and Refugee Protection Act} has a strong claim that his or her plea was uninformed.

But uncertainty remains in two key areas. First, Justice Laskin tells us that some unanticipated consequences will be too remote, too insignificant, or too similar to the consequences that were anticipated to render a plea invalid. But how will courts draw the line? What does it mean for a consequence to be too remote? At what point does a consequence become “too insignificant”? And what counts as a “similar” consequence?

Second, Justice Laskin deliberately leaves open an intriguing question when he says that legally relevant consequences “at least” include penalties imposed by the state. The door is not shut on claiming an unforeseen consequence imposed by an entity other than the state renders a plea invalid. On one hand, this makes sense—if the test is truly subjective, why does it matter who is imposing the unanticipated consequence? On the other hand, it becomes difficult to see where the line is. If an accused pleads guilty to an offence and is automatically fired by his employer under a term of his employment contract he did not know about, could that render the plea invalid?

\textit{Quick} does not provide a lot of guidance on these questions, but it’s easy to forgive the judgment for this. They are not easy questions to answer. The common law develops incrementally, case by case. The decision in \textit{Quick} resolves a relatively straightforward set of facts and sets out important general principles that will apply in the future. But there is only one way to resolve the uncertainty that remains, and it is good news for criminal lawyers. The difficult cases that will arise will need to be litigated.

Owen Goddard is an associate at Breese Davies Law where he practises criminal law, working on both trials and appeals. He was co-counsel with Breese Davies in \textit{R. v. Quick}.

\textbf{NOTES:}

\begin{enumerate}
\item 2011 CarswellOnt 18959, 2011 ONSC 4288 (Ont. S.C.J.).
\item \textit{Quick}, supra at para. 27.
\item \textit{Ibid.} at para. 28.
\item \textit{Ibid.} at para. 30.
\item \textit{Ibid.} at para. 31.
\item \textit{Ibid.} at para. 32.
\item \textit{Ibid.} at para. 35.
\item \textit{Ibid.} at para. 37.
\item \textit{Ibid.} at para. 38.
\end{enumerate}
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On April 20, 2016, the Liberal government formally announced its plan to introduce legislation next spring that would legalize, regulate and restrict access to marijuana. The Liberal government has since launched a task force that will closely evaluate every aspect of marijuana legalization, from production and distribution, to packaging and taxation. While this legislative reform will undoubtedly overhaul the substantive rules around marijuana access and use, it also has the potential to disrupt the procedural landscape of drug prosecutions.

Why? Because marijuana is the gateway drug to warrantless searches.

More precisely, the strong smell of marijuana, often described as “overwhelming,” “emanating,” “pungent,” and “overpowering,” has featured prominently in case law as the basis of reasonable and probable grounds to arrest for drug possession under the authority of s. 495(1)(b) of the Criminal Code. Once under arrest, the accused is subject to a search incident to arrest. In these cases, the lawfulness of the arrest and subsequent incidental search often depends on the reasonableness of the inference of present possession—which is a criminal offence—that can be drawn from the odour of marijuana.

Borrowing a term from American case law, the principles surrounding whether and in what circumstances the odour of marijuana could constitute...
reasonable grounds to believe that an offence is being committed is sometimes referred to as the “plain smell” doctrine. While still in its embryonic phase, it is safe to presume that the new marijuana legislation will permit the possession of some, but not all, quantities of marijuana. Indeed, in a recently released discussion paper, the government identified reducing the burden on the justice system associated with simple possession offences as one of its objectives. Thus, at the very least, the forthcoming legislation will disrupt the once sound association between the possession of marijuana and criminality which is at the heart of the “plain smell” doctrine.

... the “plain smell” doctrine, to the extent that there is one, lacks uniformity.

I. The Highs and Lows of the “Plain Smell” Doctrine in Canada

In Canada, the “plain smell” doctrine, to the extent that there is one, lacks uniformity. Cases where the odour of marijuana is a factor leading to an arrest reveal a variety of judicial opinions regarding whether smell alone can create reasonable grounds. The inconsistency arises from province to province and sometimes even within the same province. Additionally, some cases appear to have established a distinction between the smell of burnt marijuana and raw or vegetative marijuana.

The leading case on this issue in Ontario is R. v. Polashek. Polashek was an appeal from a conviction for possession for the purpose of trafficking. The accused was stopped by a police officer for a Highway Traffic Act violation. Over the course of a 20-30 second conversation with the accused, the officer detected a “strong odour” of marijuana emanating from the vehicle. He saw no smoke and testified at trial that he could not tell whether the odour was of burnt or unburnt marijuana. The officer told the accused that he smelled marijuana. The accused looked around the vehicle and responded, “No, you don’t.” The officer asked the accused to get out of the vehicle and searched him. He found cannabis resin in the accused's pockets, arrested him, continued his search and found over $4000 in cash in the accused's pockets. At trial, the officer testified that the use of drugs in the area where the stop had occurred was “fairly predominant.” The trial judge held that the officer had both objective and subjective grounds for arresting the appellant and was entitled to conduct a search before placing him under arrest.

On appeal, the issue was whether the appellant's arrest and the search of his person and his car incident to arrest could be justified solely on the basis of the smell of marijuana emanating from his vehicle. The appellant argued that the odour of marijuana alone could not provide reasonable grounds to believe that he was committing an offence. Rosenberg J.A. writing for the Court agreed in part. He held that in Polashek's case, the odour of marijuana alone would not have constituted reasonable grounds for arrest. However, since other circumstances also supported the lawful arrest—the accused's response to the officer's questions, the fact that he looked around his vehicle, the area where he had been stopped and the time of night—the arrest was justified.

Rosenberg J.A. then went on to state that despite the fact that the smell on its own was insufficient in the present case, he “would not go so far as the appellant by stating that the presence of the smell of marijuana can never provide the requisite reasonable and probable grounds for an arrest.” Rather, the “circumstances under which the olfactory observation was made will determine the matter.” In particular, he stated that some officers, through experience or training, can convince a trial judge that they “possess sufficient expertise that their opinion of present possession can be relied upon.”

Based on the reasoning in Polashek, many lower courts in Ontario have been reluctant to find reasonable grounds based on the smell of marijuana alone. In most cases where the smell of marijuana supported a lawful arrest, other corroborating factors were also present and relied upon by the arresting officer. These factors include: “awareness of the accused's public advocacy of the use of marijuana;” the presence of cigarette rolling paper and eye drops in the accused's vehicle; “physical observation of drug impairment;” and “the presence of residual smoke and large amounts of cash.” In this line of cases, courts held that where the reasonable and probable grounds were based solely on the strong odour of marijuana, there was no objective basis to conclude that the accused was in possession of the drug.

While the Ontario Court of Appeal in Polashek cautioned against placing undue reliance on the smell of marijuana alone, it also recently confirmed
that “there is no legal barrier to the use of such evidence” in *R. v. Morris* and *R. v. Valentine.* In contrast to the cases referred to above that rely on the cautious approach adopted in *Polashek,* some lower courts have interpreted *Morris* and *Valentine* as opening the door to finding that the smell of marijuana on its own is sufficient for an arrest. For example, in *R. v. Cousins,* Justice Kelly referenced *Polashek* and *Morris* and concluded that “[t]he smell of marijuana, alone, can provide reasonable and probable grounds for arrest.” For the most part, however, Ontario courts tend to look for corroborating circumstances to indicate possession beyond the smell of marijuana.

... some lower courts have interpreted *Morris* and *Valentine* as opening the door to finding that the smell of marijuana on its own is sufficient for an arrest.

The approach taken in *Cousins* reflects case law from Alberta and British Columbia where a number of courts have enthusiastically accepted that the strong odour of “fresh,” “uncut,” or “vegetative” marijuana is sufficient, on its own, to support a reasonable and probable grounds for arrest.” For the most part, however, Ontario courts tend to look for corroborating circumstances to indicate possession beyond the smell of marijuana.

II. Cannabis Conversion: How the New Marijuana Laws Might Transform the “Plain Smell” Doctrine

While there remain inconsistencies in the approaches taken by courts across the country, the legitimacy of the “plain smell” doctrine hinges on the assumption that where the smell of marijuana indicates present possession, all such possession will be illegal. The new marijuana laws will inject the variable of legal possession into this already confusing calculus.

While the contours of the new legislation have yet to be determined, a consideration of the way that this upheaval might impact the “plain smell” doctrine is by no means premature. Regardless of the details of the ultimate regulation, at the very least, the new laws will legalize the possession of certain quantities of marijuana, while the possession of other quantities will remain illegal. Whereas once the smell of marijuana could only have meant illegal possession, when the legislation comes into effect, it may also become evidence of the possession of an amount of marijuana permissible by law for recreational use.

Given this new reality, what significance should attach to the smell of marijuana?

... some lower courts have interpreted *Morris* and *Valentine* as opening the door to finding that the smell of marijuana on its own is sufficient for an arrest.

... the presence of some marijuana, not necessarily a criminal amount, “it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause.”

By contrast, Colorado, another state that has legalized and regulated marijuana, has taken a different approach to the “plain smell” doctrine. Since 2012, it has been legal for adults in Colorado twenty-one years of age and older to possess up to an ounce of marijuana. Yet, the highest court in Colorado recently held that the odor of marijuana continues to be relevant to finding probable cause to arrest. In *People v. Zuniga,* the court reasoned...
that even though possession of one ounce or less of marijuana is allowed under Colorado law, many marijuana-related activities remain illegal and, as a result, the odour of marijuana can support an inference that a crime is ongoing.32

In his compelling dissent in Zuniga, Justice Hood challenged the reasoning of the majority of the Supreme Court of Colorado. He argued that given that the mere odour of marijuana no longer signifies a violation of the law, a constellation of factors which are otherwise innocuous, but which include the smell of marijuana may give rise to reasonable suspicion, but are incapable of amounting to probable cause. He concluded that since the 2012 legislative reform, “it no longer stands to reason

that the same probability of state-law criminality attends the scent of marijuana.33

The distinction between legal and illegal possession in Canada will likely be based on weight.40 Returning to the criteria in Polashek, while officer training and experience relating to the smell of marijuana might provide reasonable grounds to believe that an accused is in possession of a substance, it is difficult to believe that experience or training can equip a state official to smell the difference between a legal and an illegal quantity of marijuana. In fact, this was the criticism levelled by Justice Hood in response to the majority’s attempt to tie the strength of an odour to the weight of its source.41 He responded:

perhaps because the scent alone is meaningless, the majority also contends that “detection of a 'heavy odor' of raw marijuana contributed to the Trooper’s conclusion that marijuana was in the vehicle, potentially in an illegal amount... But this is puzzling because it suggests that a "heavy” smell actually has something to do with weight... Nothing here demonstrates that the pungency of a smell relates to the amount of the substance giving off the scent.40

It defies credulity to suggest that, in the ordinary course, the weight of marijuana can be discerned from its smell.

Canada’s new marijuana legislation might also affect the distinction in the "plain smell" doctrine that exists between the smell of "burnt" marijuana and "raw," “unburnt,” “growing” or “vegetative" marijuana. In some jurisdictions, like Colorado, recreational users are permitted to cultivate their own plants for personal use.52 So long as users are allowed to possess some quantity of fresh marijuana for recreational use, all of the scents described above would be indicative of legal possession and would render the distinction between burnt and unburnt marijuana meaningless. However, if the new Canadian legislation prohibits recreational users from cultivating their own plants, then the kind of smell detected may continue to be relevant at least to the extent that law enforcement officials appear capable of smelling not just "fresh" marijuana, but "growing" marijuana as well.53 The Parliamentary Secretary to the Minister of Justice, Bill Blair, recently signalled that Canada would not be going down the route of Colorado. In a press conference, Bill Blair stated that as one of the government’s legislative objectives is to keep organized crime out of the trade, the government would be looking to put into place a regulatory framework that would “control the production and distribution of marijuana.”54 In a regulatory framework that strictly controls production of marijuana, growing your own plants may remain illegal. Therefore, the relevance of the “plain smell” doctrine may persist in this context.

III. Anticipating Challenges to the “Plain Smell” Doctrine

Despite its acceptance across the country, smell evidence cannot escape its inherent weaknesses. It can be challenged as precariously reliable, highly subjective and largely incapable of objective verification.56 In Polashek, Rosenberg J.A. spelled out the attendant risks associated with over-reliance on subjective smell evidence, citing the reasons of Doherty J.A. in R. v. Simpson. In Simpson, Doherty J.A. observed that "subjectively based

assessments can too easily mask discriminatory conduct based on such irrelevant factors such as the detainee’s sex, colour age, ethnic origin or sexual orientation.” Concern over the subjectivity and therefore, reliability of smell evidence was also recently reiterated, albeit briefly, in the Court of Appeal’s reasons in R. v. Gravesande.57

In addition to these inherent weaknesses, once the new marijuana laws are in effect, there might be room to argue, ... that any variation of the “plain smell” doctrine has limited utility going forward.

... once the new marijuana laws are in effect, there might be room to argue, ... that any variation of the “plain smell” doctrine has limited utility going forward.
strong smell might lead to an inference of possession, it is incapable of indicating whether that possession is lawful or unlawful.

Finally, the new marijuana laws should be taken as an invitation to revisit the conclusions in Valentine and Miller and the line of “plain smell” doctrine cases that, without hesitation, accept the association between the smell of marijuana and criminality. As Justice Hood astutely observed of a post-legalization Colorado:

...even if the odor of marijuana is relevant, how suspicious is it these days? I worry there may be a tendency to let this aroma keep tipping the balance in favor of searches, stops and arrests despite the decision of the people of Colorado to legalize possession of marijuana in small quantities.42

Ultimately, once the new legislation transforms the legal landscape with respect to marijuana, any challenge to the “plain smell” doctrine is supported by the simple and uncontroversial principle that individuals participating in a lawful activity ought to be left alone by the state.

NOTES:


2 Ibid.


10 Ibid.

11 Polashek, supra note 7.

12 Ibid.

13 Ibid. at para. 14.

14 Ibid. at para. 14.


23 R. v. Huebschwerlen, 1997 CarswellYukon 73, 10 C.R. (5th) 121 (Y.T. Terr. Ct.), per Lilies Terr. Ct. J., see paras. 37-40. Cf. Webster, supra note 22 (the smell of burnt marijuana alone was sufficient to provide reasonable and probable grounds for an arrest).

24 Although medical marijuana access legislation allows for the possibility of legal possession, there are no cases examining this as a factor that affects the existence of reasonable and probable grounds based on smell. The only case in Ontario to somewhat contemplate this issue is R. v. Tait, 2015 CarswellOnt 3665, [2015] O.J. No. 1329 (Ont. C.J.) where the defendant submitted that s. 8 imposed a duty on an arresting officer to make sure that the marijuana he detected was not for medical use even if such a right to possession was never claimed. The court rejected this submission at para. 36 as “setting the bar for reasonable and probable grounds far above where it legally belongs.”


28 Ibid. at para. 1055.

29 Ibid. at para. 1058.


The fundamental principle of criminal sentencing is that a sentence must be “tailored to the nature of the offence and the circumstances of the offender.” In theory, every sentence should be fully responsive to both criminal conduct and unique offender circumstances. But despite the theoretically equal prominence of these two variables, in practice, offender circumstances often get short shrift.

Sentences are almost infinitely responsive to the nature of criminal conduct. For one, the Criminal Code contains hundreds of different offence provisions and subtle differences in conduct trigger wholly different sentencing ranges. Offender circumstances can only determine where in the statutory range prescribed for specific conduct a sentence should fall. The narrower this range, the less of a role offender circumstances can play. To use an extreme example, if an offence carried a mandatory minimum of 12 months and a maximum punishment of 13 months, offender circumstances would play essentially no role at all.

This paper will discuss two ways in which sentencing ranges are narrowed and the role of offender circumstances correspondingly diminished, as well as recent judicial pushback with respect to both.
Mandatory Minimums and Unusual Offender Circumstances

An obvious way in which sentencing ranges are narrowed is through the creation of mandatory minimum sentences. The closer a mandatory minimum is to the average or normal sentence given for a particular offence, the narrower the effective sentencing range will be. Courts have struck down a variety of mandatory minimums in recent years, but they have not done so for the reason discussed here—that by narrowing the sentencing range for particular conduct, mandatory minimums lessen the sensitivity of punishment to offender circumstances. Rather, courts have struck down mandatory minimums where the minimum punishment exceeds the gravity of hypothetical conduct captured by the offence. Consider the following analysis from the Supreme Court in Nur, which is typical:2

Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, “stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. . . . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public” (para. 51). At this end of the range—indeed for the vast majority of offences—a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years’ imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code.

While the Court in Nur stated that “personal characteristics cannot be entirely excluded” from reasonable hypotheticals,4 it also instructed courts to “avoid characteristics that would produce remote or far-fetched examples.”5 In practice, reasonable hypotheticals in mandatory minimum cases are almost always people of generic circumstances whose conduct falls at the very low end of the spectrum. They are not people whose conduct is exceptional, but who, for example, display exceptional rehabilitative prospects.

Mandatory minimums are bad for more than one reason and striking them down on the basis that the offence-creating provision captures conduct not sufficiently serious to warrant the minimum sentence is a positive development. But it leaves open the question of what should happen to the offender whose conduct would ordinarily warrant the mandatory minimum punishment, but whose circumstances warrant a lesser punishment. The Supreme Court, in Ferguson, held that constitutional exemptions from mandatory minimums are not available based on offender circumstances, but nothing in Ferguson would necessarily prohibit a Court from striking down a mandatory minimum on the basis of a reasonable hypothetical defendant (or actual defendant) whose unique circumstances warrant a lesser punishment.

In Nasogoluak, the Supreme Court considered mandatory minimums in the context of state misconduct. The accused in that case pled guilty to impaired driving and flight from police. The trial judge held that the police had used excessive force in arresting him and, thus, had breached his rights under s. 7 of the Charter. As a remedy under s. 24(1), the trial judge reduced the accused’s sentence below the mandatory minimum. The Crown appealed and the Alberta Court of Appeal reversed, holding that a judge has no discretion to reduce a sentence below a statutorily mandated minimum sentence. The Supreme Court of Canada dismissed both a further appeal by the Crown and a cross-appeal by the defence. But Justice LeBel, writing for the Court, made the following comments in obiter:6

The judgments relying on s. 24(1) appear to have been concerned about instances of abuse of process or misconduct by state agents in the course of the events leading to an arrest, to charges or to other criminal procedures. But, inasmuch as they relate to the offender and the offence, those facts become relevant circumstances within the meaning of the sentencing provisions of the Criminal Code. As such, they become part of the factors that sentencing judges will take into consideration in order to determine the proper punishment of the offender, without a need to turn to s. 24(1). . . .

I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the Charter, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender. In that case, the validity of

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ANDREW BURGESS

ONE SIZE DOES NOT FIT ALL: CRIMINAL SENTENCES ARE NOT BATHROBES

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the law would not be at stake, the sole concern being the specific conduct of those state agents.

[Emphasis added.]

_Nasogaluak_ appears to leave the door open a crack in the case of a single mitigating offender circumstance—such as being the victim of a police beating or some other form of serious state misconduct. But it does not discuss other exceptional offender circumstances, such as compelling rehabilitative prospects or _Gladue_ facts.

The reasoning in _Nasogaluak_ was picked up and taken a bit further in the recent Ontario case of _Donnelly._ In _Donnelly_, currently on reserve at the Ontario Court of Appeal, Justice Nordheimer considered the case of an accused whose _Charter_ rights were violated by the police and who also had severe mental health issues and was at a high risk for suicide in prison. In sentencing him to a conditional sentence (below the mandatory minimum for making child pornography), he stated:7

_blockquote

Were it not for the unique circumstances that Mr. Donnelly's situation reveals, I would have no hesitation in sentencing Mr. Donnelly to the mandatory minimum of one year, as reflecting an appropriate reduction for the Charter violations. To do that, however, is to ignore, or turn a blind eye to, the reality of Mr. Donnelly's mental health. In fact, this case brings into sharp focus the question as to how serious courts will treat mental health issues. In that regard, it should be remembered that Mr. Donnelly does not seek, as a remedy for his Charter violations, that he be given a lesser sentence than would otherwise be warranted. Rather, he seeks the opportunity to serve his sentence, not in jail, but in the community under strict terms.

As should be apparent from all of the above, Mr. Donnelly's fragile mental state, especially his heightened risk for suicide, is directly linked with the breaches of his _Charter_ rights that occurred during his prior incarceration. In that regard, I take two things as certainties. One is that, if Mr. Donnelly is incarcerated, he will be subject to verbal and physical abuse both by other inmates and, as well, by some correctional officers. It is simply too well-known that this type of conduct occurs to ignore that reality—a reality confirmed by Mr. Donnelly's own experience. One consequence of that reality is that Mr. Donnelly may find himself in protective custody for much, if not all, of his sentence. It is also well-known that time spent in protective custody, or segregation, is even more difficult time. The other is that, if Mr. Donnelly is incarcerated, there is a very high risk that he will attempt suicide, and there is a very significant prospect that he can be successful in that effort. As the CSC report amply demonstrates, correctional facilities are seemingly incapable of preventing inmates from committing suicide, even where the risk of suicide is well-known.

[Emphasis added.]

It is noteworthy that the Court first stated that absent Mr. Donnelly's exceptional circumstances, a sentence equal to the mandatory minimum would have been a sufficient discount for the police misconduct in the case. This goes further than the Supreme Court in _Nasogaluak_, which contemplated going below the mandatory minimum solely as a discount for exceptional state misconduct and not because of a combination of state misconduct and the offender's personal circumstances.

But the result in _Donnelly_ is intuitive—just. If we ordinarily reduce sentences both for less severe conduct and where warranted by an offender's personal circumstances, why should a mandatory minimum that prevents us from doing the former be unconstitutional, but one that prevents us from doing the latter not be so? Movement in the law typically follows an incongruity between legal rules and basic fairness norms, and this area of the law, as evidenced by _Donnelly_ and hopefully more cases to come, is one in which defence counsel should continue to push the envelope.

**Ranges Within Ranges**

A second way in which sentencing ranges are narrowed (and the role of offender circumstances diminished) is through the creation by appellate courts of sub-categories or ranges within individual offences. For instance, in drug trafficking cases, appellate courts have created sentencing ranges based on particular quantities of drugs and have held that these

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**Movement in the law typically follows an incongruity between legal rules and basic fairness norms ...**

ranges should only be departed from in "exceptional circumstances." Consider the following passage from the Ontario Court of Appeal's decision in _Cunningham_, setting out the orthodoxy position:8

[Al]bsent exceptional or extenuating circumstances, a sentence in the range of three to five years is warranted for first offender couriers found guilty of importing a kilogram, more or less, of cocaine for personal gain.

Under such an approach, small differences in the gravity of _conduct_—a different quantity of drugs, for example—may presumptively move a defendant into an entirely different sentencing range. But a change in an offender's _circumstances_ must be "exceptional" before it can move the defendant to a different range.

The Supreme Court has repeatedly
cautioned that sentencing ranges cannot become rigid straightjackets. For instance, in *Nasogaluak*, the Court stated:

> It must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered “averages”, let alone straightjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case . . .

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision.

Interestingly, nowhere did the Supreme Court in *Lacasse* mention or discuss the doctrine of exceptional circumstances in arriving at its conclusion. Because of this, some commentators and judges have taken the view that *Lacasse* eliminated or substantially changed the doctrine of exceptional circumstances. Professor Tim Quigley, for instance, in the “Comment” that accompanies the publication of *Lacasse* in the Criminal Reports, stated that: “For good or ill, this will lead to more sentencing flexibility at the trial level and less intervention at the appellate level.”

Similarly, in *McGill*, Justice Green of the Ontario Court of Justice, stated that:

> The majority’s reasons in *R. c. Lacasse* almost inevitably invite reconsideration of sentencing courts’ reliance on “ranges” and “exceptional circumstances”.

**McGill** concerned an Aboriginal defendant who had had a difficult upbringing, pled guilty to drug trafficking, and, between the time of his arrest and the time of his sentencing, made great strides in turning his life around. Justice Green sentenced him to a suspended sentence and probation for trafficking 300 grams of cocaine—a sentence well below the settled range. In doing so, he offered his opinion that the doctrine of exceptional circumstances as traditionally understood may no longer be good law, but also that McGill’s personal circumstances would qualify as exceptional in any event.

The Saskatchewan Court of Appeal in *R. v. Peyachew*, after reviewing the relevant passages from *Lacasse*, recently stated:

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**The Supreme Court has repeatedly cautioned that sentencing ranges cannot become rigid straightjackets.**

Similarly, in *Pham*, the Court stated:

> As a corollary to sentence individualization, the parity principle requires that a sentence be similar to those imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b) of the Criminal Code). In other words, “if the personal circumstances of the offender are different, different sentences will be justified” (C. C. Ruby, G. J. Chan and N. R. Hasan, Sentencing (8th ed. 2012), at §2.41). [Emphasis added.]

Despite these periodic cautions, appellate courts in various provinces have continued to apply the doctrine of exceptional circumstances. At the same time, they have struggled to define exactly what would qualify as an exceptional circumstance. For example, in *Tran*, the Manitoba Court of Appeal stated that: “The reliance on ‘exceptional circumstances’ in dealing with sentences is not a new concept, but it is one that remains somewhat nebulous and devoid of a precise definition.”

The Supreme Court returned to this issue last year in *Lacasse*. The trial judge had given the defendant a sentence well above the range established by the Quebec Court of Appeal for the offence of impaired driving causing death. The Court of Appeal allowed the defendant’s appeal, and, on further appeal, the Supreme Court re-instated the trial judge’s sentence, stating:

> Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered “averages”, let alone straightjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case . . .

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The Saskatchewan Court of Appeal in *R. v. Peyachew*, after reviewing the relevant passages from *Lacasse*, recently stated:
Because individualization and parity of sentences must be reconciled for a sentence to be proportionate..., the range of sentences previously imposed in respect of similar offences committed by similar offenders in similar circumstances remains a relevant consideration in sentencing.

However, in another recent case, the Ontario Court of Appeal in DiBenedetto, by way of a brief Endorsement, held that a constellation of mitigating factors “support[s] a sentence at the lower end of the appropriate range” for trafficking in “sinister” drugs; it does not redraw the boundaries of the range nor “amount to circumstances justifying a significant departure from the range.”

There is, therefore, some confusion amongst lower courts as to the effect of Lacasse: did it do away with the exceptional circumstances doctrine or did it merely reaffirm that judges were permitted to depart from settled ranges in rare cases? The former would seem to be more consistent with the fundamental principle of sentence proportionality. Why should precise individualization of sentences be reserved for exceptional cases?

**Conclusion**

Defence counsel should continue to push in these areas. If a mandatory minimum constitutes cruel and unusual punishment for anyone, it should be struck down. Reasonable hypotheticals do not have to be exclusively conduct-based and counsel should suggest hypothetical defendants with compelling rehabilitative prospects or Gladue factors. Defence counsel should also consider challenges to mandatory minimums premised on the idea that total deprivation of sentencing discretion is itself a s. 7 violation, even where it does not violate s. 12, using circumstances-based reasonable hypotheticals. Finally, defence counsel should argue that Lacasse has changed the law of sentencing substantively and has done away with any requirement to prove exceptional circumstances in order to depart from an established sentencing range.

Andrew Burgess practises criminal law in Toronto.

**NOTES:**

3. Ibid., at paras. 74-76.
5. Nasogaluak, supra note 1, at paras. 63-64.

Both cases were appealed to the Ontario Court of Appeal and are currently under reserve.

14. Ibid. at paras. 57-58.
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A Fentanyl Primer: Sentencing Disparity for the New Drug on the Block

by Ryan Heighton

Introduction

Every so often, a drug gains widespread street popularity, and the criminal justice system must quickly respond. Recently, fentanyl has been thrust to the forefront of the public consciousness, being cited as the cause of death for recording artist Prince, as well as hundreds of Canadians. In Western Canada, a public health crisis has been declared as a result of a rapidly rising number of fentanyl-related overdose deaths.1

Fentanyl abuse in the streets has become so ubiquitous, so quickly, that *Maclean's Magazine* ran a feature detailing the danger and destruction of the super opioid.2 Being up to 100 times as potent as morphine, and over 20 times as potent as heroin, fentanyl has been taking a toll on users, particularly those who are opiate-naïve. Fentanyl is said to have overtaken heroin as the most common cause of opiate-related deaths in Ontario.3

Of course, since fentanyl has become prevalent in the streets, it has been subject to scrutiny in the criminal courts. Sentencing decisions prior to 2014 are scant, and what has ensued in the past three years is the jurisprudential equivalent of anarchy. Judges have struggled with how to address the fentanyl problem, while federal crowns have asked for unrivalled penitentiary sentences. As defence counsel, we can only try to weather the storm and advocate for our clients, many of...
What is Fentanyl?

Fentanyl is a synthetic opioid that has traditionally been used to treat long-term, severe pain issues in patients. In the patch form (typically prescribed under the brand name Duragesic), a metered dosage of 12, 25, 50, 75, or 100 micrograms per hour (mcg/h) is delivered to the patient. These are hourly doses, and because the patches are effective for 72 hours, the total matrix of the patch contains much higher than the advertised dose. Thus, the total fentanyl content in a single patch ranges from 2.1 milligrams (12 mcg/h patch) up to 16.8 mg (100 mcg/h patch).

It is quite literally a pain treatment of last resort.

A dose of fentanyl has a very quick onset, of less than five minutes, and a very short duration of action, up to one hour, depending on the mode of delivery (it is also delivered intravenously or sublingually, by lozenge). This is the reason why a metered hourly dose is typically prescribed in the patch form, and why the drug is so ripe for abuse. By way of contrast, heroin has a duration of action of up to five hours, which provides effects that last nearly four times as long as does fentanyl.

The actual half-life of fentanyl depends on the mode of delivery. When used transdermally through the patch, it is quite lengthy, because it creates a reservoir of the drug in the skin. When taken more directly into the bloodstream, such as through inhalation, intravenously, or sublingually, the half-life is shortened, but the effects are more immediate and severe. Because of the great potency of fentanyl, it is generally only prescribed to individuals who are already being treated with strong opiates, and have built a tolerance. It is quite literally a pain treatment of last resort.

Street Usage

Pills and Powder

Street demand for “fake oxy” pills proliferated in 2012 when OxyContin effectively went off the pharmaceutical market and was replaced with OxyNEO, a ‘safer’ form of the drug. This new form of opiate pill for pain management solved many of the abuse problems associated with OxyContin. The new formulation prevents crushing (obviating snorting) and dissolving (obviating injecting or inhaling), as the tablets contain an ingredient that creates a gummy substance when dissolved.

Many experts expected heroin to make a comeback in light of this change, but in its stead, fentanyl became prominent in the streets. As a result of the higher potency of fentanyl, relative to heroin or oxycodone, fentanyl yields much greater profit. In effect, 1/20 the dose can create the same effects as an equivalent dose of heroin. The one caveat is that because of the shorter duration of action, the fentanyl high is not maintained for nearly as long as that of heroin.

For dealers, it is a perfect situation because fentanyl is less expensive, has higher yield, and has a shorter effective dose.

Fentanyl powder can be purchased very inexpensively in bulk, with much of it being imported. Because it is also a synthetic opioid, unlike heroin or morphine, fentanyl can also be synthesized in a procedure similar to that of cooking crystal methamphetamine. The powder can then be pressed into pills, which is extremely common in Western Canada. The RCMP have made a number of busts of pill-press operations. More recently, it has been cut down and sold in the powder form, similarly to heroin. This is becoming increasingly common in Southwestern Ontario. Known on the street by a number of names, most commonly “China White”, it is typically sold in “points” (0.1 g or 100 mg increments). These typically sell for $20-30, similar to the west coast price for a “fake oxy” pill, and the doses are of similar strength to a dose...
of street heroin. As such, the fentanyl content of the powder is very low, given its potency. In one of my recent Waterloo Region cases, the purity of the powder seized was approximately 1.6% fentanyl, or 16 mg per gram.

**Patches**

For the average person, fentanyl patches are still the most accessible form of the drug. It is for this reason that, especially in Ontario, the majority of the fentanyl case law involves the illegal possession or trafficking of patches. The illicit use of patches poses its own particular form of danger, largely due to the method of use. Users often purchase whole or cut portions of patches (which are often sold in smaller strips to maximize profits), and use the drug by chewing the patch like gum (for sublingual absorption), melting and injecting, or melting and inhaling. As there may be “hot spots” or unequal distribution of the drug in the patch, this is particularly dangerous. It is difficult for the end user to know what type of dose they are receiving, which often results in fatality.

**Sentencing Tariffs**

Not surprisingly, as fentanyl use on the streets ramped up post-2012, so did instances of criminal prosecution for the possession and trafficking of the drug. As often occurs, the Public Prosecution Service of Canada has regularly sought very high sentences in the interests of general deterrence and denunciation. With such sharp increases in fentanyl-related overdoses, there has been a plethora of bad press surrounding the drug for federal crowns to hang their hats on. However, as with every new drug, the courts have struggled to reach a consensus with respect to a sentencing range.

The Ontario Court of Appeal (ONCA) has held that even for a first offender, sentences from heroin can command penitentiary time. It naturally follows then, that fentanyl, a synthetic opioid considerably stronger than heroin, should warrant similar or greater sentences. That said, sentencing in Canada is individualized, and does not operate in a vacuum. The circumstances of the offence and the offender must be taken into consideration, and the sentence must be proportionate to the gravity of the offence.

Since the use of fentanyl as a street drug has only ramped up in the past decade, there are no reported sentencing decisions related to fentanyl possession prior to 2014. As such, we are still in the formative stages of establishing a range for this drug. The sentence to be imposed appears to depend on the amount and strength of the drug involved, and of course the classic aggravating and mitigating factors. However, even within these factors, there has been great disparity in sentencing, and in some cases a gross over-emphasis on general deterrence and denunciation.

Simple possession of fentanyl, pursuant to s. 4(1) of the *Controlled Drugs and Substances Act* (CDSA) generally nets lower reformatory sentences, and in exceptional cases, conditional and non-custodial sentences. In these cases, addiction and ability to be reformed have been essential considerations. This was also the case in an Alberta decision involving an accused convicted of possessing cocaine, crack cocaine, and over 300 fentanyl pills for the purpose of trafficking.

In trafficking and possession for the purpose of trafficking cases, pursuant to ss. 5(1) and 5(2) of the CDSA, respectively, sentences have ranged greatly, with 30 months of custody being imposed for possessing two fentanyl patches and for possessing 50 fentanyl patches. Most recently, the ONCA effectively split this difference and upheld a 30-month sentence for a man with 20 fentanyl patches for the purpose of trafficking. As such, there is great disparity on the “lower end” of sentences for trafficking fentanyl. While sentences are highly fact specific, the Supreme Court has held that similar offenders and circumstances should warrant similar sentences, and parity should be sought, where possible.

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Other sentences in the upper reformatory to under-three-year range have generally involved possession or trafficking of less than 30 patches, and where there are fewer patches, there tend to be significant aggravating factors or other drugs. In an unreported decision from Waterloo Region involving the possession of 14.5 g of fentanyl powder (unknown purity) and 26 g of crystal methamphetamine for the purposes of trafficking, a four-year, ten-month sentence was imposed where the accused had a lengthy record and was found to have limited rehabilitative prospects.

On the higher end, three- to six-year penitentiary sentences have been imposed for trafficking greater numbers of patches and pills, with many of these decisions coming from a large...
scale bust of a fentanyl trafficking operation in Simcoe County. On the highest end of fentanyl trafficking sentences, a nine-year joint submission for the trafficking of some 990-100 mcg/h patches in an extensive operation of prescription forgery by a young mother with a limited record, was overturned by the ONCA, deemed unfit, and substituted with a six-year global sentence (with five years being attributed concurrently to the 20 counts of fentanyl trafficking). In the only currently reported decision for fentanyl production, the Alberta Court of Queen’s Bench imposed a five-year sentence, noting that the accused had started the production operation again while on bail awaiting trial.

In the fentanyl sentencing decisions to-date, the harm to the community has been overemphasized relative to the treatment of addictions. Penitentiary sentences serve as a limited deterrent to addict-traffickers in a general sense, and public funds would be much better invested in harm reduction and rehabilitation programs. It was only in May 2016 that Naloxone, a powerful antidote for opiate overdoses, was made available without prescription in Ontario. This is a positive, albeit minor, first step toward employing effective strategies to combat the increasing fentanyl problem.

Until more substantial change in public policy is brought to fight addiction and street drug use, we as a group must combat the use of the penitentiary as a rehabilitation centre and advocate for more rehabilitative measures in sentencing. This is not to say that fentanyl trafficking should never warrant penitentiary sentences, but it should not be presumptive. Federal crowns have clear duty to combat unduly harsh sentences to-date involving fentanyl trafficking where he practises criminal defence.

We run the risk of an Americanized sentencing regime if this approach is taken.

Defence Approach at Sentencing

Although fentanyl is said to have twenty times the potency of heroin, this does not mean that trafficking the substance should automatically net mid-range penitentiary sentences. We run the risk of an Americanized sentencing regime if this approach is taken. The majority of drug traffickers are doing so to feed their own addictions, and in the spirit of s. 10 of the CDSA, an emphasis must also be placed on treatment and rehabilitation.

With threats of “W-18,” a new designer drug apparently 100 times as potent as fentanyl, being reported in the media earlier this year, it is essential to get a handle on sentences for fentanyl. If the current trends continue, then potential trafficking sentences for first offenders found with such a designer drug could surpass those for manslaughter or aggravated sexual assault. This is not to minimize the dangers of controlled substances and their potentially insidious nature, but is to emphasize the need for more parity in the principles of sentencing across criminal offences.

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Until more substantial change in public policy is brought to fight addiction and street drug use, we as a group must combat the use of the penitentiary as a rehabilitation centre and advocate for more rehabilitative measures in sentencing. This is not to say that fentanyl trafficking should never warrant penitentiary sentences, but it should not be presumptive. Federal crowns have clear duty to combat unduly harsh sentences, and as advocates, we have a duty to combat unduly harsh sentences. Certainly there will be times where there is a strategic advantage to the joint submission, but without wholesale amounts of drugs, we are creating bad law by joining the Crown in recommending 5+ year penitentiary sentences for our drug addicted clients, without significant aggravating factors. The range for these drug offences will only come down if we force it down.

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NOTES:


4 Ibid. at para. 7.


7 Ibid.


10 Ibid.

11 The different methods of fentanyl use and their treatment at sentencing in the criminal courts are discussed.
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1880. [2015] A.J. No. 1080 (Alta. Prov. Ct.): the accused was also found in possession of a loaded sawed-off shotgun, but due to his drug addiction, for which he entered into a residential treatment program prior to sentencing, a nine-month time-served sentence was imposed because further custody would be contrary to the rehabilitative efforts made.

19 R. v. Gatfield, 2015 CarswellOnt 14606, [2015] O.J. No. 5019 (Ont. C.J.) (a decision from the Ontario Court of Justice in Chatham). The same judge also imposed a 30-month sentence for the trafficking of 2.25 mcg/h patches in an unreported decision, R. v. Srokosz (December 12, 2014), and placed a great deal of emphasis on general deterrence and the role of fentanyl in the Chatham-Kent community.

19 R. v. Medeiros-Sousa, 2014 CarswellOnt 16531, [2014] O.J. No. 4515 (Ont. C.J.). The accused was a 46-year-old first offender who stole from the pharmacy at which she was employed. Thousands of oxycodone and hydromorphone pills were also stolen, and the crime seemed to be related to an oxycodone addiction.


22 R. v. McArdur, 2016 ONCJ 244, 2016 CarswellOnt 6756 (Ont. C.J.): a two-year sentence was imposed for an addicted first offender who stole extensive amounts of narcotics using a stolen prescription pad, and was found in possession of 60 fentanyl patches for the purposes of trafficking, in addition to a number of hydromorphone pills—the sentence was noted as exceptional due to the accused's up front rehabilitative work and rehabilitative potential; Cloutier, supra note 3: a 27-month sentence was imposed for trafficking two fentanyl patches from the accused's prescription, where the motivator was financial gain; R. v. Rak, 2015 CarswellOnt 15163, [2015] O.J. No. 5182 (Ont. C.J.): a 22-month sentence was imposed for trafficking a single fentanyl patch, where the accused had a related trafficking record; R. v. Reid, 2015 CarswellNS 802, [2015] N.S.J. No. 405 (N.S. S.C.): a 30-month sentence was imposed for trafficking an unknown number of fentanyl patches where there was a notable breach of trust, but rehabilitative potential for the accused; R. v. McMahon & Edwards, unreported (December 18, 2014), Gilthero J. (Ont. S.C.J.): a 32-month sentence was imposed for a mother and son who trafficked 30 fentanyl patches; R. v. Miller (August 11, 2014), Doc. 14-0857, [2014] O.J. No. 7866 (Ont. C.J.) and R. v. Klammer, 2016 ONSC 4038, 2016 CarswellOnt 9709 (Ont. S.C.J.): 33-month sentences were imposed for trafficking 14-50 mcg/h and 6-100 mcg/h patches, respectively. R. v. Forget, 2016 CarswellOnt 10417 (Ont. S.C.J.) appears to be an exception to this, where a three-year sentence was imposed for over 150 fentanyl patches, where other drugs were also present.

23 R. v. Holtz, unreported (June 23, 2016), Westman J., Kitchener (Ont. C.J.). It should be noted that at this time there are no reported sentencing decisions involving fentanyl powder.

24 R. v. Brooker (May 15, 2014), Wilson J., [2014] O.J. No. 2609 (Ont. C.J.): a four-year sentence (joint submission) was imposed for trafficking 23 patches, where the accused was an addict also found in possession of a large quantity of hydromorphone pills; R. v. Rouley (March 13, 2014), Beatty J., [2014] O.J. No. 2610 (Ont. C.J.) and R. v. Smith, 2015 CarswellOnt 12603, [2015] O.J. No. 4385 (Ont. S.C.J.): joint submissions were accepted for 4.5-year sentences, for 50 and an unknown number of fentanyl patches, respectively, where the latter was an Aboriginal person with a Gladue report before the Court; R. v. Lu, 2016 CarswellOnt 239, [2016] O.J. No. 128 (Ont. S.C.J.): a five-year global sentence was imposed where the accused was found with 522 fentanyl pills, kilograms of marijuana,
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and a related record; R. v. Mitchell (April 17, 2014), Doc. 13/2353-01, [2014] O.J. No. 2556 (Ont. C.J.) and R. v. Enn-Liberty (August 11, 2014), Doc. 13-6632, [2014] O.J. No. 4784 (Ont. C.J.): joint submissions were accepted for six-year sentences, for 64-100 mcg/hr and an unknown number of fentanyl patches, respectively, where the former was an addict; R. v. Castro, 2015 CarswellNWT 112, [2015] N.W.T.J. No. 94 (N.W.T. S.C.): a six-year global sentence was imposed where the accused was found with over 600 fentanyl pills and a half-kilogram of crack cocaine.


28 Supra note 15.


32 Baks, supra note 26. The ONCA reduced a nine-year joint submission to six years (with five being attributed to the 20 counts of fentanyl trafficking), even though the amount of fentanyl trafficked was 15 times greater than that in any previously reported decision.
The Immigration and Refugee Protection Act (IRPA) creates a number of criminal offences related to counseling misrepresentation, document fraud, and aiding/abetting the commission of offences under the IRPA. In the first year of the IRPA's enactment, the British Columbia Provincial Court acknowledged that the legislation's purpose is to combat “the growing problem” of illegal immigration and to curtail the role of organized crime and other persons who profit from such activity. Accordingly, the Act includes a number of general offences to discourage “enabling activities” such as withholding relevant information.1

Over the past year, there has been much reported about the millions of people fleeing war-torn Syria. Thousands of Syrian refugees have come to Canada through the Canadian government’s resettlement plan.

Notwithstanding our country’s current
welcoming strategy for refugees (at least those from Syria), many former attempts to provide humanitarian assistance to those seeking refuge in Canada have led to criminal prosecution under the IRPA enforcement provisions.

The Supreme Court of Canada made this observation in *R. v. Appulonappa*, which declared the former s. 117 of the IRPA unconstitutional insofar as it permitted prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to refugee claimants by family members.

In *R. v. Mahamoud*, the Ontario Court of Justice was faced with these issues before the Supreme Court’s ruling in *Appulonappa*. In *Mahamoud*, a dual American/Canadian citizen escorted his niece from Dubai to Toronto where she made a refugee claim. Mahamoud’s niece had fled Somalia after a member of the terrorist organization, Al-Shabab, tried to marry her. Knowing that she would be killed if she did not marry the man, the niece made her way to Dubai where she lived with the accused’s wife and family for some time. When the family planned to move back to Somalia, the niece met her uncle at the airport to travel with him to Canada. When they arrived in Toronto she applied for refugee status. The accused was charged with, and ultimately acquitted of, IRPA charges related to fraudulent documents and aiding his niece to make misrepresentations.

Besides *Appulonappa* and *Mahamoud*, there remains little jurisprudence dealing with the application of the IRPA enforcement provisions dealing with assistance to would-be refugees. Focusing on the offences engaged in *Mahamoud* under ss. 122 and 126 of the IRPA, this article aims to provide a guide for defending these types of cases.

**The Legislative Scheme**

Section 122 of the IRPA criminalized the use of official documents for the purpose of contravening the statute:

122 (1) No person shall, in order to contravene this Act,

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person’s identity;

(b) use such a document, including for the purpose of entering or remaining in Canada; or

(c) import, export or deal in such a document.

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

123 (1) Every person who contravenes

(a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and

(b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

126 Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

**Proving the Offence: s. 122**

Section 122 criminalizes conduct relating to the possession and use of identity documents, when done for the purpose of contravening the IRPA. This includes:

(a) Possessing identity documents (passport, visa, etc.);

(b) Using an identity document to enter or stay in Canada; or

(c) Importing, exporting or otherwise dealing in such a document.
Each specified type of conduct, of course, imports its own mens rea component. Further, the overarching mens rea component of s. 122 requires that the Crown establish that the offending conduct was done with the specific purpose of contravening the IRPA. In other words, it is not enough that the Crown has established possession, use, or dealing of the identity document. The Crown must, in addition, prove the accused’s intention to possess, use, or deal with the document for the purpose of contravening the statute: see R. v. Aghani.1

When the identity document in issue is forged, blank, incomplete, altered or not genuine, there is a presumption that the person engaging in the offending conduct is doing so with an intention to contravene the IRPA. The Embassy in Dubai had issued a genuine Canadian passport containing passports at the international mail centre in Vancouver. One of the passports was blank and the other passport had been altered by the removal of a photograph and by the fraudulent insertion of biographical data.7 The accused was charged under s. 122(1)(a): possessing a Canadian passport for the purpose of contravening the IRPA. The Crown sought to establish mens rea by adducing expert evidence about the use that could be made of the document in Canada to contravene the IRPA. In allowing the expert evidence, the Court drew an analogy between s. 122 and the manner in which intent can be proven in drug prosecutions:

The expert testimony proffered in this case is analogous in many ways to the expert testimony called by the Crown in prosecutions for possession of drugs for the purpose of trafficking. In both instances, the Crown, in addition to proving possession, must also prove the accused’s intention with respect to a particular item—whether it be a passport or an illegal drug. Intention may be established by inference based on all of the circumstances. Expert testimony indicating the value of the prohibited item and describing the various ways in which it can be sold and used illegally provides the trier of fact with information that is both necessary and relevant in terms of assessing the circumstances and determining whether the Crown has established the requisite mens rea beyond a reasonable doubt.9

Proving the Offence: s. 126

Section 126 of the IRPA criminalizes counselling, or assisting another, to make misrepresentations, or withhold material facts, that could or does induce an error in the administration of the statute. In Mabamoud, Justice Clark explained that, “[t]he essence of this charge is that it requires one to knowingly misrepresent or withhold material facts relating to a

Where the presumption does not apply, the Crown must call evidence to establish that the accused had the necessary intention...

What makes this analysis interesting, however, is the extent to which the presumption set out in subsection (2) assists the Crown in proving the charge. This presumption provides that possession of a forged document, or a document that is blank, incomplete, altered or not genuine, is, in the absence of evidence to the contrary, proof that the person intends to contravene the Act. However, the subject passport, according to the agreed statement of facts was deemed “genuine”. It was not forged, blank, or incomplete. As for being “altered”, this word implied that it was issued by the embassy and then something was done to it subsequently to change it. There is insufficient evidence, however, to support this.6

Even where the prerequisites from the presumption are met, the accused may rely on evidence to rebut it. For example, in Mabamoud, the evidence was that the accused had no involvement in obtaining the passport in issue. Nor had he made any attempts to use it in any way. Thus, even if the presumption had applied, it was rebutted on the facts in that case.

Where the presumption does not apply, the Crown must call evidence to establish that the accused had the necessary intention to contravene the IRPA. The Crown should be put to the strict proof of establishing the necessary prerequisites for the presumption to apply. As was revealed in Mabamoud, the application of the presumption may not always be clear.

It was conceded by the defence in Mabamoud that the accused was in possession of the relevant identity document. This was a passport that had been issued in the name of the accused’s daughter, but bore the photo of his niece. Despite this, the evidence from Passport Canada established that although the passport was fraudulently obtained, it was nonetheless genuinely issued. The Embassy in Dubai had issued a genuine Canadian passport with the incorrect photograph. The passport was therefore not forged, blank, incomplete, altered, or not genuine.

Accordingly, the Crown was not entitled to benefit from the statutory presumption that the accused possessed the identity document for the purpose of contravening the IRPA. Justice Clark commented on this particular issue:

This language of inducing or even potentially inducing an error under the Act suggests that s. 126 can capture a broad range of activity.
relevant matter that could have induced an error in the administration of the Act.9 This language of inducing or even potentially inducing an error under the Act suggests that s. 126 can capture a broad range of activity. As was demonstrated in Dinten,10 it includes compromising a potential future investigation.

In Dinten, the Court concluded that taking possession, and subsequently disposing, of passports compromised any investigation which could have been done. Such disposition of passports was held to warrant charges under s. 122. The Court in Dinten concluded that such an action, “could induce an error in the administration of this Act.” Similarly, such action compromised any investigation to determine whether the airline had complied with its obligation to ensure that persons have proper documentation under s. 148 and therefore did induce an error in the administration of the IRPA.

Even where it is established that the misrepresentation or withholding of a material fact could induce an error in the IRPA, the Crown must still prove that the accused had knowledge that the misrepresentations were being made to induce the error and that he actually counsel, induce, aid or abet the person in making those misrepresentations.

Clearly, if the accused does not have knowledge of the misrepresentations, s/he cannot be found guilty. This was the successful defence in R. v. Aderbigbe. The accused was charged under s. 128(a) of the IRPA with knowingly misrepresenting or withholding material facts relating to a relevant matter that could have induced an error in the administration of the Act. He was also charged under s. 131 of the IRPA with attempting to aid and abet a person in contravening the statute.

It was agreed that the accused had driven his companion to the border where he presented his own valid identification to a CBSA agent. His companion presented a U.S. permanent resident card belonging to a different person. The accused testified in his own defence that he was not aware that his companion was using someone else’s permanent resident card. Considering all of the evidence, the Court was left with “a very real doubt”11 as to whether the accused knowingly misrepresented or withheld material facts, or that he knowingly attempted to aid and abet his companion in contravention of the IRPA.

In Mahamoud, the accused, and his niece, arrived at Pearson Airport from Dubai via Amsterdam. The accused presented his declaration card and his U.S. passport to the primary border services officer (BSO) and then, when he was sent to secondary examination he presented his Canadian passport. He also had in his possession a Canadian passport issued in Dubai for a young adult in the name of his daughter but with a photo of his niece in it, as well as a photocopy of a Somali passport in the name of his daughter. Mahamoud also had boarding passes and baggage stickers with his own name and with the name of his daughter.

Mahamoud’s niece presented herself in a separate inspection line, provided her name, advised she had no documents, and made a claim for refugee status. The thrust of her evidence was that other than his travelling with her, her uncle did nothing. He did not participate in the issuance of the passport with her photo on it, he did not tell her what to say to the BSOs, nor did he advise her to do anything particular when she got to the border.

First, it was not established that the niece’s actions could induce an error in the IRPA. She never used a passport to try to enter Canada. The only evidence was that she came to make a refugee claim (without any travel documents in her possession at all), which is not contrary to the statute. Further, even if inferences were available about the niece making misrepresentations, Justice Clark held that these inferences, “do not serve as proof that [the accused] either encouraged, directed, or otherwise aided and abetted her in so doing. The threshold of finding [the accused] to have had either actual knowledge or that he was willfully blind to [his niece’s] actions has not been made out beyond a reasonable doubt.”

Writing specifically about the knowledge that is required on the part of an aider to ground a conviction under s. 126, Justice Clark concluded:

The Court is mindful of the statement made by associate Chief Justice O’Connor in R. v. Helsdon [2007 CarswellOnt 336 (Ont. C.A.)] that a higher level of mens rea must be proven against one who aids or abets than on the principal. The word “knoingly” in section 126 requires proof that one must subjectively advert to a specific objective and must have knowledge of the facts that constitute that objective. On that basis, the Court finds that AM did not know beyond a reasonable doubt that he was doing something to cause [his niece] to misrepresent herself for the purpose of contravening the Act.

Additional Considerations Following R. v. Appulonappa

Although Mahamoud was won on the basis that the Crown had not proven the elements of the offence beyond a reasonable doubt, his conduct was precisely that which the Supreme Court of Canada read out of the provision in Appulonappa as a remedy for the constitutional overbreadth of s. 117: providing humanitarian aid to asylum-seekers. Section 117 (as it was at the time of the alleged offences in Appulonappa) read as follows: “No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.”

The Supreme Court determined that the purpose of s. 117, “is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada.” Insofar as it captured such conduct, s. 117 was held to be overbroad as bearing no relation to its objective. To be clear, on a statutory interpretation analysis of the text, the purpose of ss. 122 and 126 appears to be broader than s. 117. While s. 117 appears
directly under the heading “Human Smuggling and Trafficking” in the IRPA, ss. 122-123 appear under the heading “Offences Related to Documents” and ss. 124-131 appear under the heading “General Offences”. Nonetheless, the Court’s comments about Canada’s international obligations invite the argument that even these broader enforcement provisions must not capture humanitarian aid to asylum seekers.

The following passages from Appulonappa are instructive:

... the Court’s comments about Canada’s international obligations invite the argument that even these broader enforcement provisions must not capture humanitarian aid to asylum seekers.

As a matter of statutory interpretation, legislation is presumed to comply with Canada’s international obligations, and courts should avoid interpretations that would violate those obligations ...

The provisions of the IRPA relating to the fight against the assisting of unauthorized entry of persons to Canada respond to Canada’s international commitments related to these matters in the Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (“Refugee Convention”), [etc.]

The Refugee Convention reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the territory of the foreign state without authorization, “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”: art. 31(1).

Thus, to the extent that ss. 122 and 126 allow for the prosecution of persons making legitimate humanitarian efforts to assist refugee claimants, it would appear that these provisions run afoul of the spirit of the international treaties to which Canada is a party. It can therefore be argued that ss. 122 and 126 do not pass constitutional scrutiny. This should be kept in mind when considering the defences available where the evidence establishes that a person charged under the IRPA enforcement laws was engaged in legitimate humanitarian assistance to a refugee.

CONCLUSION

In dealing with any criminal offences under the IRPA defence counsel should be mindful of the intentions of the client in carrying out the allegedly proscribed action. Proving the possession of the impugned documents, or the fact of misrepresentation does not end the matter.

The reasons why the client may have contravened the IRPA are exceedingly important. Even where the Crown has prima facie proof of a technical violation, an accused may escape conviction where the motives for engaging in the impugned behaviour are humanitarian in nature.

Indeed, after the Supreme Court’s decision in Appulonappa, the prosecution of those who seek to assist refugees for real humanitarian reasons may result in a finding of constitutional overbreadth.

Lorne Sabsay practises criminal law at Cohen, Sabsay LLP. Angela Ruffo practises criminal law at Doucette Santoro Furgiuele. ... these provisions run afoul of the spirit of the international treaties to which Canada is a party.

NOTES:

3 2015 CarswellOnt 12265, 37 Imm. L.R. (4th) 79 (Ont. C.J.).
5 IRPA, s. 122(2).
6 R. v. Mahamoud, supra note 3 (Ont. C.J.) at para. 89.
7 It is not clear why the presumption in s. 122(2) did not apply in this case as it is apparent that the passports in issue attracted the presumption.
8 R. v. Aghani, supra note 4 at para. 38.
9 R. v. Mahamoud, supra note 3 (Ont. C.J.) at para. 85.
12 R. v. Mahamoud, supra note 3 (Ont. C.J.) at para. 87.
13 Section 117 of IRPA now reads: “No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.”
14 R. v. Appulonappa, supra note 2 at paras. 40-43.
UNREASONABLE DELAY

New analytical framework – Presumptive ceilings of delay – Sections 11(b) and 24(1) of the Charter – Accused and nine others were charged with a number of drug offences – Total delay to the conclusion of superior court trial was 49-1/2 months – Presumptive ceiling on time to bring an accused to trial is 18 months in the provincial court and 30 months in the superior court – Defence delay is omitted from the calculation – Once ceiling is reached there is a presumption of unreasonableness, stay of proceedings unless Crown demonstrates exceptional circumstances – Exceptional circumstances are those outside of the Crown’s control, unforeseen, unavoidable and cannot be remedied – Transitional exceptional circumstance may exist for cases already in the system – When delay is below the ceiling, defence bears onus to demonstrate unreasonableness, stay of proceedings only granted in clearest of cases – Appeal allowed, stay of proceedings entered.

R. v. Jordan, 2016 SCC 27, 2016 CarswellBC 1864; Moldaver, Karakatsanis and Brown JJ. (Abella and Cote JJ. concurring); Cromwell J. dissenting (McLachlin C.J. and Wagner and Gascon JJ. concurring)

Application of new analytical framework – Transitional exceptional circumstance – Sections 11(b) and 24(1) of the Charter – Accused was charged with serious historical sexual offences in January of 2009, but preliminary hearing was rescheduled twice, concluding in May 2010 – Trial dates in superior court not available for 14 months due to lack of availability of appropriate courtroom to accommodate a jury – Total delay was 35-1/2 months – 1-1/2 months caused by defence – Trial judge dismissed the s. 11(b) application – Court of Appeal dismissed and entered a stay of proceedings – 34 months of delay is presumptively unreasonable – Transitional exceptional circumstance does not apply in this case as the prior framework does not justify three year delay – Case was straightforward, institutional delay exceeded the Morin guidelines by seven months, Crown made no effort to expedite the trial, while the defence was diligent – Seriousness of the offence does not dilute s. 11(b) – Stay of proceedings upheld.

R. v. Williamson, 2016 SCC 28, 2016 CarswellOnt 10704; Moldaver, Karakatsanis and Brown JJ. (Abella and Cote JJ. concurring); McLachlin C.J. concurring in result; Cromwell J. dissenting (Wagner and Gascon JJ. concurring)

SEARCH AND SEIZURE

Sexual assault investigation – Scope of search incident to arrest – Warrantless penile swab – Sections 8 and 24(2) of the Charter – Central issue at trial was identification – Penile swab taken by police at the time of arrest was without a warrant or consent – Complainant’s DNA was found on the accused’s penis – Penile swab seeks to seize the complainant’s bodily materials, therefore no personal information about the accused is revealed, it is quick, not penetrative, and the evidence will degrade over time – Important law enforcement objectives are achieved when extending common law power of search incident to arrest to penile swabs, namely preservation of important, reliable evidence – Privacy interest engaged is similar to strip searches – Reasonable grounds standard and guidelines for the process will provide protection – If accused’s DNA is obtained in the process, police must get a warrant to use it for any purpose – Penile swab did not violate s. 8 of the Charter – Appeal dismissed.

R. v. Saeed, 2016 SCC 24, 2016 CarswellAlta 1145; Moldaver J. (McLachlin C.J. and Cromwell, Wagner, Gascon, Cote and Brown JJ. concurring); Karakatsanis J. concurring; Abella J. dissenting

General search warrant – Search incident to arrest – “Bedpan vigil search” for drugs – Sections 487.01 and 503 of the Criminal Code – Sections 8 and 24(2) of the Charter – Police obtained a general warrant authorizing the accused’s detention until he had a bowel movement to remove suspected packages of drugs from his rectum upon arrest – Accused was detained for 43 hours before appearing before a Justice, 21 hours of which he was handcuffed with hands above chest – While detained, accused suffered withdrawal symptoms, yet police failed to monitor that condition – Packages of drugs were excreted and subsequently tendered as evidence in support of conviction – Bedpan vigil search can be authorized by a general warrant – Warrant was invalid as it authorized indefinite detention without bringing the accused before a Justice in accordance with s. 503 of the Code – Manner of search not reasonable, due to inadequate regard for accused’s dignity and medical issues – Administration of justice would be brought into disrepute if evidence admitted – Appeal allowed, acquittals entered.

R. v. Poirier, 2016 ONCA 582, 2016 CarswellOnt 11532; Weiler J.A. (Simmons and Epstein JJ.A. concurring)

EVIDENCE

Production order – Historical text messages – Part VI authorizations – Meaning of interception – Section 487.012 of the Criminal Code – Accused were convicted of firearm and drug trafficking – During the investiga-
tion, police obtained a production order for cell phone records and historical text messages – As a result of text messages seized about potential sale of gun, police obtained a further wiretap authorization – Accused challenged the production order, argued that the proper route was a Part VI authorization – Part VI of the Code deals with interception of private communications, which includes text messages – Interception applies to prospective communications, and is surveillance – Obtaining historical text messages causes no interference between place of origin and destination, therefore no interception has occurred – It is a search and seizure to obtain historical text messages, thus a production order was appropriate – Appeal dismissed


CarswellOnt 10858; MacPherson J.A. (MacFarland and LaForme JJ.A. concurring)

**OFFENCES**

Bestiality – *Actus reus* – Essential elements – Whether scope of liability should be expanded – Should penetration be required – Section 160(1) of the Criminal Code – Accused was convicted of a number of sexual offences on his step-daughters, including bestiality – Accused spread peanut butter on complainant’s vagina and took photographs while dog licked it off – Parliament has stated the term “bestiality” but has not defined its elements, therefore, must assume the common law definition – Well established legal meaning of bestiality is intercourse between a human and animal, penetration has always been an essential element – Legislative changes to the offence over time have not expressly expanded the scope of the offence – Trial judge erred by broadening the scope of liability – Expanding scope of liability could make victim co-perpetrator – Appeal dismissed

**Regina v. D.L.W.,** 2016 SCC 22, 2016 CarswellBC 1552; Cromwell J. (McLachlin C.J. and Moldaver, Karakatsanis, Cote and Brown JJ. concurring); Abella J. dissenting

**SENTENCING**

Ancillary orders – Legislative amendments – Retroactive application – Test for “punishment” – Section 11(i) of the Charter – Section 161(1)(c) and (d) of the Criminal Code – In 2013, accused pleaded guilty to incest and making child pornography between 2008 and 2011 – Sentencing judge found that 2012 amendments to s. 161 could not be applied retroactively as they constituted punishment pursuant to s. 11(i) of the Charter – A measure will constitute punishment if it is a consequence of conviction that forms part of sanctions to which a person may be liable, and either (i) it furthers the purpose and principles of sentencing, or (ii) it has a significant impact on liberty and security interests – 2012 amendments to s. 161 are punishment and retroactive application violates s. 11(i) – Retroactive application of s. 161(1)(c), which prohibits contact with anyone under the age of 16, is not a reasonable limit under s. 1 – Retroactive application of s. 161(1)(d), which prohibits using the Internet or other digital network, is a reasonable limit pursuant to s. 1, as the benefits outweigh the deleterious effects

Chris Sewrattan

Member Profile

by Craig Bottomley

Straight outta Scarborough, it’s Chris Sewrattan!! In the coming days, Chris returns to the practice of criminal law as a sole practitioner after finishing his Masters at Osgoode. Chris, I think I speak for all of us at the bar when I say, why on earth would you want to do that? Go get a PhD! Sigh, well, if you are determined to come back we may as well make fun of you first.

On to the questions!!

Name: Chris Sewrattan
City/Town: Toronto
Year of Call: 2012

QUESTIONS

Finish the Sentence
1. If I never went to law school, I would have become . . . A high school counsellor. Surely you would have told yourself not to go into criminal law!

2. If I could change careers tomorrow, I would become... A computer programmer. Ok, I know you. You know I know you. Playing Call of Duty until 3:00 a.m. does not qualify you to be a computer programmer.

3. If I win 10 million dollars, I will... Complete a PhD in law. See! I knew it!!

4. If I could appoint the next Chief Justice of Canada it would be. . . . (not a lawyer or judge) bell hooks. Feminism is for everyone.

5. Oscar Isaac will play me in the movie based on my life. Why? Is Aziz Ansari booked?

6. Diane Guerrero (from Orange is the New Black) will play my love interest in the movie. Does that make you Flaca?

7. Prime Minister Trudeau is . . . Skipping leg day.

8. Canada’s next Prime Minister is... White. You only say that because of the uninterrupted streak.

9. If I could pick one injustice to undo it would be... The ads that play before a YouTube video. Finally, someone with the courage to speak emerges from the shadows!

10. If I could solve one issue it would be... How does Craig Bottomley have more hair than me? It’s a blessing. It’s a curse.

11. If I could represent/defend a historical figure it would be... Sir Walter Raleigh. Best last words ever, spoken to his axe-wielding executioner: Strike, man! Strike!

12. If I was to be executed, my last meal would be... Roti and Chicken Curry. This is a solid choice.


14. Boy I really screwed up when... I asked Feldman JA why she is so short with counsel. Most of good advocacy is knowing what not to say.

15. My hero is . . . Professor Sonia Lawrence. You and I worked together. We both know it is C.M. Punk. Look at you pretending to be sophisticated!!

16. My favourite section of the Criminal Code is... 650.01 - Designation of Counsel. A godsend.

17. If I could legalize an activity it would be... Conspiracy. Hear, hear! Itmesses up my win/loss ratio!

18. If I could criminalize an activity it would be... Posting to the listserv more than 5 times a week. Straight indictable.

19. Most people don’t know that I . . . am not Trevin David (Daniel Brown’s senior associate). You’re not Trevin David!!?!

20. The strangest thing I have eaten is... Hassar (pronounced “hassa”. It’s a thorny catfish from South America).

21. I really embarrassed myself when I . . . Showed up to an appeal fresh from a car crash. I’ve never been more impressed. This is absolutely what it means to be a defence lawyer. You’re as hard as Christmas candy.

22. My pet peeve is... Waiting outside the trial coordinators office at Old City Hall.

23. The toughest challenge in my life has been . . . Getting into law school. That was harder than getting to the Court of Appeal after getting hit by a car??

24. If I could be reincarnated, I would come back as... One of Jay-Z’s kids. You could be his 100th problem.

25. I am afraid of . . . Snakes. Great. Now I have to find a way to hide a snake in your gown bag. You know I don’t have time for this.
26. I believe in... Harvey Dent. *I hope that won't stop you from challenging the Dent Act.*

27. In high school I was a... Nerd. *Yeah, the above Batman reference was a hint.*

28. In undergrad I was a... Nerd. *Well, there's always room for growth in law school.*

29. In law school I was a... Nerd. *Sigh.*

30. If my dog could speak s/he would say... *Wha gwan starbai?* *Your dog is gonna get profiled.*

31. Legal Aid Ontario... *Has suppressed the future criminal defence bar.*

**Choices**

1. Stella Artois or Molson Canadian? *You know... you raise them. You do the best you can. You send them out into the world. Sometimes they disappoint you.*

2. Grilled Rib Eye or Grilled Tofu? *We need to chat.*

3. Alfa Romeo or Mercedes Benz? *For what? Tofu?*

4. Out late and sleep in or in bed by 10 and up at 6? *Um, I totally know the difference, but maybe you could explain it to the rest of the class. You know, for their sake.*

5. Superman or Wonder Woman? *Well, at least I taught you something.*

6. Manolo or Crocs? *Tell him to hurry up.*

7. Plasma or LCD? *I like this answer.*

8. Judge – Fish J. *Yup.*


11. Hotel – Trump Toronto. *How will you get over the wall?*


14. Rob Ford or Doug Ford? *We may have to update this.*

15. Prime Minister Doug Ford or 5 years of recession? *Cash paying drunk driving case or legal aid murder?*

16. Starbucks or Tim Horton’s? *Tell him to hurry up.*

17. Blackberry or iPhone? *I like this answer.*

18. Hockey or Soccer? *He'll love it!*

19. Drunk or stoned? *Favourites: 1. Guitarist – Prince. This is the correct answer. If you disagree, go watch him play While My Guitar Gently Weeps. Then call me to tell me you were wrong.*

20. Dog or Cat? *Tell him to hurry up.*

21. Canoe or Speedboat? *Tell him to hurry up.*

22. Muskoka cottage or condo in Florida? *Tell him to hurry up.*

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30. Naughty or nice? *Tell him to hurry up.*

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REASONABLE DOUBT?

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