The Law Society of Manitoba

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CRIMINAL PROCEDURE

Chapter 3

Trial, Sentence and Appeal

September 2023

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A. CONDUCTING A TRIAL

1. Trial Preparation

Preparation is the key ingredient in conducting an effective trial. This is especially true for new counsel, where meticulous preparation can make up for courtroom inexperience. Proper preparation will enhance your in-court performance. Do not make the mistake of putting performance before preparation.

> In a criminal trial, the most important document is the sworn information (or indictment in King's Bench). This document sets out what the Crown must prove at trial. It sets out who is alleged to have done what to whom and when. These are the essential elements of the case.
>
> Before trial preparation begins, lawyers for the defence and the Crown should check to see if the information is sworn properly, and is worded correctly. The Crown should review the information to ensure that each element of the offence can be proven. At the end of the evidence, the lawyers for the defence should again review the information to ensure that the Crown has proven each element of the case. If they have not, it could be fatal to the Crown's case.

Trial preparation begins as you collect the applicable facts and law right at the beginning of a matter. Always consider how you are going to apply the law and introduce the relevant facts into evidence at trial.

2. Developing a Theory of the Case

A theory of the case (called by some a "game plan") is critical. What you want is an explanation to put before the court which, in turn, will dictate your trial strategy. Your task is to figure out how the evidence supports your theory of the case, and you must make your story more convincing than the story advanced by the other side. When developing your theory of the case, remember sincerity, simplicity and common sense should be applied because those are the components of a persuasive argument.

Developing a theory of the case involves four parts:

- garnering the facts (by interviewing witnesses, surveying the scene and obtaining documentary evidence);
- finding the applicable law;
- considering how you will get the necessary facts into evidence; and
- assessing the other side's theory of the case and preparing to defend against the other side's case.

a) Conflicting Theories

The clearest and simplest way to present a case is by having one theory. For example,

> *"My client didn't commit the offence."*

But it can get more complicated. For example,

> *"You can't prove that my client committed the offence. But if you can prove that it was my client, the act was in self-defence, while under duress, and my client was too drunk to know what was happening. Besides, this whole proceeding is an abuse of process."*

You have to consider how multiple theories impact on one another. Some theories are compatible. For example, you may have several allegations of negligence in your theory, which allegations do not conflict but rather complement one another by showing, cumulatively, a very negligent party. Other theories of the case might conflict with each other if both were pursued. For example, these two possible theories of the case conflict with each other:

> *"I know I didn't do it because I went straight home from the party."*
>
> and
>
> *"I was too drunk to remember anything about the night of the party."*

When your case analysis is complete you can assess the strength or weakness of your case and the risk of trial versus the certainty of a guilty plea. If the matter is destined for trial (on a firm "not guilty" plea for example), you can start immediately to frame your final argument.

The first step in your preparation after you have reviewed the sworn information or indictment, is to figure out your argument, keeping in mind that you must maintain the flexibility to accommodate certain unforeseen trial evidence. When you know what you will argue, you can work backwards to figure out what you have to prove to be able to make that argument.

When you know what it is you have to prove, you can determine what evidence you need to call or elicit from the other side's witnesses as proof. You must determine what must be proven or challenged and gather all of the evidence including witnesses and work out the details of the argument you will make -- all in advance of the trial.

Your trial preparation is organized around what you will argue in your final submissions. This is the true test of trial preparation. A fundamental principle of trial advocacy is that by knowing your final argument in advance, you will ensure the trial evidence that is presented in court sets up the frame to support your final argument.

3. Preparing a Trial Notebook

You must be in a position to quickly and accurately retrieve your preparation notes at trial, so spend some time in advance on the organization of your material. A trial notebook is recommended. Trial notebooks can take many forms but a simple one is an 8 1/2 x 11" three ring-binder with tabs for:

a) A checklist of the elements needed to prove your case;

b) A summary of the facts;

c) A legal memorandum summarizing the results of your research;

d) Court documents organized in chronological order;

e) A trial chart setting out the elements of the law that must be proved, how each element will be proved (witness or documentary), and the exhibits to be entered by each witness;

f) A trial plan listing the order of witnesses and an estimate as to when they will be called, and how long their evidence should take;

g) Copies of all documents for opposing counsel and the judge;

h) Your opening statement;

i) Witness materials:
   - include a background sheet or witness summary;
   - any documents related to particular witnesses;
   - witness statements or highlighted excerpts from a preliminary transcript; and
   - potential questions.
   - be sure to check whether the witness spoke to other witnesses about the matter or made other verbal comments;
   - in particular, check the police officers' notes for verbal statements made before the formal written or videotaped statement;

j) Closing argument, prepared in advance but with white space left to accommodate trial evidence;

k) List of authorities (and copies of the relevant cases for the judge, preferably in a separate bound book of authorities).

4. Other Out-of-Court Preparation

> Effective direct or cross-examination is based on knowing the witness's evidence. The witness's testimony must be considered within your theory of the case or your opponent's theory of the case.

Therefore, before trial, ask yourself:

- Why is that witness being called?
- How can that witness help the other side's case?
- How can that witness help your case?
- How does that witness's testimony fit into your theory of the case?
- How can you challenge the witness's testimony?

The following steps can help the defence predict the witness's evidence in advance:

a) Review the witness's evidence given at the preliminary (if there was one);

b) Review materials from other proceedings involving the same witness (i.e., a statement of claim filed in a corresponding civil proceeding or affidavits from a family law proceeding);

c) Review the Crown disclosure;

d) Request additional disclosure if necessary. For example, copies of criminal records of witnesses may be relevant. When ordering a criminal record, you may also ask the Crown attorney to provide the criminal files relating to that record;

e) Interview witnesses. There is no property in witnesses and it is open to you, as defence counsel, to interview Crown witnesses. Be aware, however, that these witnesses may misconstrue your approach as pressure. Make certain that you advise the witness who you are, be clear that you cannot give them any legal advice, do not pressure the witness, and, above all, interview the witness with someone else present as a witness for you – that person also may be able to assist you by taking notes;

f) View the crime scene. It is amazing what you will learn by going to the scene yourself. Diagrams and witness's statements come to life. This will also place you in a powerful position in cross-examining a witness, especially if you are examining one who assumes you are ignorant of the real crime scene.

5. Notice Requirements

The requirements to give notice in criminal litigation are increasing.

The *Criminal Code* requires notice of the introduction of documentary evidence in a variety of forms. For example, a party intending to produce a certificate of an analyst, qualified medical practitioner or qualified technician as evidence under the Part regarding impaired driving, must give reasonable notice before the trial to the other party of their intention to produce it and a copy of the certificate under section 320.32(2).

The *Canada Evidence Act* imposes notice requirements for documentary evidence (see ss. 28, 29(6) and 30(7)).

The November 4, 2013 *Practice Directives for Contested Matters* in the Provincial Court of Manitoba (PC Contested Practice Directives) require that a notice of application in Form 1 be filed for all pre-trial applications, trial applications and third-party applications, (except for ex parte applications or other applications that do not require notice be given unless forms are designated) (see s. 1.02(1) and s. 6.01).

For example, under PC Contested Practice Directives section 6.04(1) a notice of application must be filed and served at least 2 days before the first returnable date of the application and not less than 30 days before the hearing of the application. All supporting documents must be filed and served at least 14 days before the hearing date. Under section 6.04(2) any material the respondent intends to rely on in response must be filed and served at least 7 days before the hearing date of the application.

For matters proceeding in King's Bench, the Court of King's Bench Rules provide direction for notice requirements for filing notices of applications and notices of motions.

Notice is also required when:

- Defence counsel seeks to cross-examine a complainant on prior sexual conduct (*Criminal Code,* s. 276 and *Criminal Code,* ss. 278.92 and 278.93);
- An accused seeks production of records that contain personal information for which there is a reasonable expectation of privacy (*Criminal Code,* ss.278.1 to 278.91);
- An accused seeks to admit a record relating to a complainant that is in the possession or control of the accused (*Criminal Code,* ss. 278.92 and 278.93);
- Either party wants to call expert opinion evidence (*Criminal Code,* s. 657.3);
- Constitutional questions will be argued (*The Constitutional Questions Act,* ss. 3, 4 and 7);

- Applications for relief are sought under section 24 of the Charter, as set out in the Criminal Proceedings Rules of the Manitoba Court of King's Bench (ss. 15 and 16) and in the Provincial Court (see Practice Directive 9);
- Accused has alibi evidence (see John Burchill, *Alibi Evidence: Responsibility for Disclosure and Investigation*, 2018 CanLII Docs 202, 2018 41-3 *Manitoba Law Journal* 99).

6. Subpoenas

Section 699 of the *Code* discusses subpoenas for witnesses. It is a good practice to serve subpoenas on all witnesses if you require them to give evidence. If for some reason the witness does not attend at trial, a request for an adjournment to locate the witness is more likely to succeed if the witness was served with a subpoena.

If the accused wishes to save the cost of serving subpoenas, defence counsel could remind the accused that if for some reason the witness is detained or does not arrive and no subpoena was served, the court might not grant an adjournment of the trial. If the witness's evidence is crucial, its absence could affect the trial outcome and possibly the accused's liberty. The cost of a subpoena is a small price to pay in context.

7. Pre-Trial Conferences

In the Provincial Court, counsel may request a judicially presided case management conference to discuss resolution or clarify matters for trial. Case Management conferences are mandatory for all hearings that are set for three days or more to ensure efficiency. They are also mandatory for all sexual offences where a *voir dire* is required before trial.

In the Court of King's Bench, both a resolution conference and a pre-trial conference are mandatory for jury trials. For judge-alone trials, a pre-trial conference will be conducted for the dual purpose of attempting meaningful resolution of the matters and, where resolution is not possible, efficiently preparing the matters for trial.

For both resolution and pre-trial conferences, the prosecutor must file a brief in the approved form and serve it on the counsel for all accused, and any self-represented accused at least 14 days before the conference. Counsel for the accused, or any self-represented accused must file a brief in the approved form and serve it on the prosecutor and counsel for all accused at least 7 days before the conference. Counsel must attend both pre-trial and resolution conferences prepared to discuss all aspects of the case, and, in the case of the pre-trial conference, prepared to set trial dates.

See the *King's Bench* and *Provincial Court* sections of the Manitoba Courts website for further details.

8. The Trial

a) Introductions and Identification

The Crown is the first to identify itself. Sometimes the Crown also introduces defence counsel to the court as a matter of courtesy. Otherwise, defence counsel stands after the Crown introduction and introduces themselves. Each counsel is to provide their name, their title and preferred pronouns.

The accused's location in the courtroom is a matter of judicial discretion. The default is that the accused sits in the gallery immediately behind defence counsel table. Defence counsel must ask the judge for permission before permitting the accused to sit at the counsel table. Many judges and justices will allow an accused to be seated with defence counsel in the absence of any specific security concerns about the particular accused, if defence counsel states that having the accused at the counsel table is necessary.

If the identity of the accused is at issue, it is a good idea for defence counsel to take special steps to address the matter before trial so that the judge and the Crown are aware that the accused will be present in the courtroom and will be seeking to be identified while sitting in the general gallery.

If a witness's ability to accurately identify the accused is at issue, defence counsel must ensure that the accused is present in court. Defence counsel should inform the Crown that the accused is in the courtroom, inform the court that identity is at issue and request the court's permission to have the accused sit among those who are seated in the courtroom and not necessarily immediately behind defence counsel table. Defence counsel should ensure that the Crown and the court know who the accused is, and where they are seated before the identity witness is permitted in the courtroom or called to the stand.

b) Motions

Pre-trial motions proceed at trial after the preliminary introductions and other matters are addressed. The most common pre-trial motions are applications to exclude witnesses from the courtroom, publication bans for the complainant, or measures to assist child or vulnerable witnesses. If a motion will take considerable time, the clerk, opposing counsel, the court and witnesses should be made aware of this fact in advance. In some cases, pre-trial motions can take place in advance of the trial date by arrangements made with the judge and other counsel at a pre-trial hearing. Depending on the nature of the motion, supporting materials may need to be filed in advance in compliance with the practice directives or the timelines set by the pre-trial judge.

c) Direct Examination

As a general rule, leading a witness during direct examination is prohibited. It is, however, appropriate and preferable to save time by leading the witness through the background information to the substantive issues where those background facts are not contentious. It is not appropriate to lead the witness on any matter of substance on a direct examination.

It is important to listen carefully to what a witness says in direct examination. If credibility is in issue, it is very important to record verbatim what the witness has to say about critical matters for later use in cross-examination. Otherwise, concentrate on the important areas and do not try to write everything down. Often lawyers worry so much about their cross-examination questions that they fail to carefully listen to what the witness is saying in direct examination.

In addition to listening to the witness, watch the witness. Consider the witness's demeanour. This may dictate the approach you adopt with the witness. What impression is the witness making on the judge? Can you exploit any of those characteristics? For example, is the witness prone to exaggeration? Is the witness indecisive? The age, gender or vulnerability of the witness may also dictate your approach. You must be very careful that you are not perceived as bullying or taking advantage of a vulnerable witness.

Finally, once the other side concludes their direct examination do not be rushed into your cross-examination. If you need time to collect your thoughts and organize your materials, ask the court for a few moments. Generally, your request will be granted. If you have been caught off guard by surprise evidence, you may request a longer adjournment.

d) Cross-Examination

Prepare for cross-examination by developing a list of the information or admissions you need and those you want to elicit from the witness. You should review the witness's previous statements or testimony and prepare your summary. Draft your questions to be sure they are clear and permit clear answers. Avoid compound questions to prevent confusion. In cross-examination, your goal is to advance your theory of the case.

One technique is to prepare a flowchart of the questioning to be pursued.

Always commit the existence of the prior statements or testimony to memory and make detailed notes of any statements and previously sworn statements given by a witness that you want to use to impeach a witness. Have the transcript of the preliminary inquiry or the witness statement ready. The procedure for impeaching a

witness is discussed below.

You may choose not to cross-examine a witness if:

- The evidence given in direct examination is neutral;
- Parts of the evidence given in direct examination are helpful (you may not wish to allow the witness to recant or clarify that testimony in cross-examination);
- The evidence given in direct examination does not detract from the position advanced by your client.

You would normally choose to cross-examine a witness when:

- The witness gave contradictory evidence in a previous statement and must be confronted with the statement (*Canada Evidence Act*, ss. 10 and 11), either because you want to impeach the witness's credibility or because you need the prior statement to be adopted to make your case;
- The witness can give helpful evidence to your client's case that needs to be elicited;
- There is a contradictory version of the events and the witness must be given the chance to address the other version under the rule in *Browne v. Dunn.* (*Browne v. Dunn*, (1893), 6 R.67; 1893 CanLII 65 (FOREP): *If counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while the witness is in the witness box*);
- You want to draw out evidence from the witness that shows bias, or inconsistencies or illogical conclusions that will bolster your argument that the witness's evidence on those points should not be given much weight.

In your preparation and during your questioning of the witness, consider the following purposes of cross-examination:

- Obtain admissions which are helpful to your case;
- Weaken the weight of the witness's testimony by obtaining contradictory or less definite answers;
- Draw out evidence to show bias;
- Draw out evidence that allows you to attack the witness's credibility;
- Impeach the witness's testimony.

The form your cross-examination takes will vary with the sophistication of the witness. However, these elementary rules apply to most cross-examinations:

- Always ask leading questions. Don't ask open-ended questions;
- Ask only one question at a time;

- Keep the wording of your questions simple and direct;
- Ask questions which call for a simple and direct answer;
- Always permit the witness to fully answer your question before asking the next question;
- Listen to the answer and be sure the witness has answered the question.

Even if there is no objection to the question you pose to a witness, be aware that multiple or complex questions calling for open-ended responses usually lead to undesirable responses and sometimes cause outright confusion about the evidence. Open-ended questions give the witness the chance to explain away any inconsistency and take control of the examination.

There are also general guidelines for how to conduct a cross-examination:

- Witnesses should be treated with courtesy and respect. Aggressive questioning may be required if a witness is being evasive or lying and credibility is in issue. In other cases, attacking a witness is usually unnecessary;
- Avoid sarcastic, rude or insulting conduct or questioning. Even if the witness appears to have an unsavoury character, a rude cross-examination technique may lead the court or a jury to sympathize with the witness. Rule 5.1-2(m) of the *Code of Professional Conduct* says "When acting as an advocate, a lawyer must not needlessly abuse, hector or harass a witness." Unnecessarily hostile or aggressive behaviour toward a witness is unprofessional behaviour;
- Children, the elderly, persons of limited intelligence or sophistication, or other potentially vulnerable persons must be handled carefully in a non-threatening manner. Confusing and upsetting the witness will not prove to the court that the witness lacks credibility. It may cause the court or a jury to sympathize with the witness whose understanding or recall is weak;
- If expert evidence is at issue, retain an expert to assist you in preparing meaningful cross-examination questions;
- Do not try to trick witnesses. If you have to trick the witness into an answer, it shows that you are afraid to ask an honest question of the witness;
- Be fair in questioning a witness and be honest in later describing the answers given;
- Be scrupulous in repeating the exact question and answer given when confronting a witness with a prior inconsistent statement;
- Do not ask improper objectionable questions or solicit evidence or answers which you know are inadmissible.

More detailed information on conducting a cross-examination is set out below.

e) Re-Direct Examination

The commonly stated purpose of re-direct examination is to allow the witness to clarify testimony weakened by cross-examination. You are not permitted to conduct a re-direct examination to bring in new evidence that was not presented in direct examination. You may be allowed to conduct a re-direct examination to have the witness clarify discrepancies between the evidence given on direct examination and that elicited on cross-examination which clarifying answer may restore a witness's weakened credibility.

Always consider the wisdom of re-examination. Be aware that an unnecessary re-direct examination may result in further hardening the position taken by the witness in cross-examination or compound errors made in the witness's testimony while under cross-examination.

Seek leave of the court before conducting a re-direct examination. The court may ask about the subject matter of the re-examination and the length of time required for it.

f) Objections

Object if there is a basis for an objection to a question and staying silent will hurt your case. Object if it is important to have your objection to the evidence on the trial record.

The objecting party may ask the court to exclude a witness while the objection is debated if there is a reason to do so. The objecting party may ask that the jury be excluded if listening to an extended argument between counsel regarding the objection may be prejudicial to a fair trial.

All objections should follow a similar format:

- Stand and say, "Objection"; whenever you speak to the court, you must stand.
- State the basis for the objection to the court; i.e. "Counsel is leading their witness on direct"; look to the judge for a ruling.
- If necessary, provide any authority or explanation in support of the objection; (this may be necessary if the objection is an unusual one). Then sit down and wait for the court's ruling.

  The Court may rule immediately on the objection; or

  The Court may call on opposing counsel for a response to your objection.

- If the Court calls on opposing counsel for a response to your objection, you must stay sitting. Do not interrupt while opposing counsel stands and speaks. Wait for opposing counsel to finish.
- If you want to reply to opposing counsel's submission on the objection, stand after opposing counsel is finished, and ask the court for permission to reply, i.e. "May I respond, Your Honour/My Lady/My Lord?" If the court says yes, state your response to the court and not directly to opposing counsel. When replying, don't just re-hash the same reasons you already gave in support of the objection.
- Then sit and wait for the court's ruling; remember that if the judge speaks to you directly at any time, you must stand.

Common objections to questions include:

- Calls for hearsay to prove the truth of the matter - inadmissible as evidence;
- Leading the witness in a direct examination on material facts;
- Not relevant to the issues in this case;
- Calls for opinion evidence where the witness is not qualified as an expert;
- Asked and answered already;
- Is arguing and not asking a question;
- Asking the witness to speculate as to why someone else did something or what someone else thought – the witness has no first-hand knowledge;
- Fact is already admitted on the record;
- Beyond the scope of re-direct examination.

g) Arguments/Closing Submissions

You should prepare an outline of your argument or closing submission in advance of the trial. Preparing your argument in advance frames your conduct of the trial and helps you determine which witnesses you may require and what questions if any, you need to ask in cross-examination of the other side's witnesses.

The final details of your argument must be based upon the evidence given at the trial so leave room in your draft outline for adding notes about the evidence as it is given during the hearing.

It is essential that your final argument address all of the important evidence given at trial, both positive and negative.

Crown counsel must prove the essential elements of the offence. The Crown counsel's argument will explain how the evidence from the trial proves each of those elements. The Crown counsel's argument will also refute any evidence led by defence counsel if that evidence is refutable.

In the argument for the accused's case, defence counsel will use the same evidence but will use it to show that the Crown has not discharged its burden to prove one or more essential elements of the charge(s). Defence counsel will also use the evidence in argument to assert any positive defences.

The order of closing submissions is determined by section 651 of the *Criminal Code*.

If the trial is long, the evidence complex, or the matter particularly serious, a request for a brief adjournment before presenting final argument or closing submissions may be appropriate.

h) Judgment/Charge to the Jury

The charge to the jury is a common source for grounds for appeal. Crown and defence counsel have the right to object to the charge. In Manitoba, most judges hold pre-charge meetings to permit counsel to comment on the content of the draft charge prepared by the judge.

When the judge reads the charge to the jury, it is vital to listen carefully to every word to determine whether an objection to any part of the charge is warranted or whether the charge could form the basis for an appeal.

Be familiar with the standard charges available for particular offences and ensure that the court has fully and correctly explained the law before allowing the jury to begin its deliberations. You should object if the court fails to direct the jury on vital points. While not decisive, failure of counsel to object is a factor in appellate review. Counsel has a duty to assist the trial judge to ensure that a jury is properly instructed (see *R. v. Khela*, 2009 SCC 4).

See National Judicial Institute – *Model Jury Instruction.*

B. PRACTICAL TIPS FOR A SUCCESSFUL CROSS-EXAMINATION

1. Preparing to Cross Examine

No part of a trial causes more anxiety to novice counsel than the cross-examination. Perhaps this is caused in part by the theatrical portrayal in the media of the cross-examiner wrenching a confession from a witness and freeing the "obviously" innocent accused. Most lawyers who have had long and distinguished careers have never had a witness make a surprise confession from the stand or take responsibility for a crime. It is also difficult to get a witness to admit to outright perjury. However, all criminal law lawyers will acknowledge that cross-examination is by far the most important tool for defending an accused client. Wigmore called cross-examination the "greatest legal engine for the discovery of truth ever invented." Most trial counsel would agree.

The key to any successful cross-examination is preparation. Criminal and civil disclosure rules should be used to assist in your preparation. The experience of being surprised by a witness's evidence should be the exception rather than the rule. However, it is important to remember that if you are truly taken by surprise by some evidence that could not have been discovered in advance of the trial, it is permitted and reasonable to ask for an adjournment to prepare to deal with it.

When you are preparing your cross-examination, start by asking yourself the question: "What do I intend to accomplish by this cross-examination?" You must know the elements of the offence and what the Crown must prove beyond a reasonable doubt. You must know exactly the elements of the defence you are going to argue.

Listen carefully to the witness's direct examination and consider these questions before you decide whether you should cross-examine the witness. Despite your preparation, sometimes cross-examination is not necessary. Ask yourself:

a) Has the Witness Hurt You?

For example, if an identification witness testifies on a robbery charge, "I think that's the person I saw, but I'm not sure," there is no need to cross-examine. The witness has not hurt the case because in law this testimony does not constitute proof beyond a reasonable doubt. If you have not listened carefully to the direct evidence or if you do not know the law, you might cross-examine and end up with the witness saying, "I wasn't sure before, but now I am positive."

b) Did the Witness Leave Something Important Out of Testimony?

Don't give the witness a chance to repair the testimony. If the witness or opposing counsel forgot something important don't cross-examine in that area. It only serves to twig the memory of the witness and opposing counsel. If you do not deal with that area in cross-examination, re-direct examination on the subject will be inadmissible. Sometimes the most effective advocacy is not to cross-examine the witness at all.

c) What Can I Accomplish by My Cross-Examination?

Often times, witnesses must be cross-examined. For example, if you wish to contradict a witness with later testimony, fairness (and the law – see the Rule in *Browne v. Dunn*) requires that you put the contradictory version to the witness so that the witness is given the chance to respond. If you fail to do this, the result may be that your later contradictory evidence is inadmissible or its weight will be severely diminished.

If a witness has given evidence harmful to the case, it will be necessary to cross-examine in an attempt to weaken that evidence.

Consider if you must cross-examine to prevent the implication that you accept the evidence as it was given on direct. There is no rule of law to the effect that the evidence must be accepted if you have not cross-examined on it, but the failure to cross-examine on evidence can be relevant to the weight attached to that evidence in your argument. If evidence has not been challenged or contradicted, the court may rely on it in coming to a decision.

It is therefore important to understand the purposes of cross-examination.

2. Purposes of Cross-Examination

There are two basic purposes of cross-examination:

a) obtain helpful admissions or evidence; and

b) contradict or impeach the witness.

These are two very broad categories but, in most cases, they cover the range of cross-examination. The order may also be important. It seems logical that when you are attempting to obtain helpful evidence from a witness you want to have a positive rapport with that witness. Any discrediting cross-examination should, therefore, come after you have finished trying to get helpful admissions or evidence from that witness. You may decide not to discredit the witness if the admissions are very good!

It is often said, "Never ask a question in cross-examination if you don't know the answer you are going to get." This is a helpful statement to keep in mind generally, but it must be balanced with how much risk is necessary to take in your client's particular case. In some situations, you will not know answers to questions that must be asked in cross-examination, despite the risk of a "bad answer".

What is important is to gauge the risk of asking the question and to balance this risk against the strength of your case. If you have a strong case with good credible evidence of your own to call, then you will want to take little, if any, risks in cross-examination. Conversely, if your case is weak and you are going to lose anyway, then you may have to go fishing and hope for the best. This risk/benefit analysis, along with an understanding of the purposes of cross-examination, may help in formulating the type of questions you will ask.

a) Obtaining Helpful Admissions

A witness in direct examination will rarely provide solely damaging evidence. A low-risk cross-examination can concentrate on re-emphasizing the parts of the direct evidence that were favourable. This is low-risk because the witness has testified to it before. This is not an invitation to repeat the entire direct examination in a sneering voice. Rather, it is designed to set a positive tone with the witness through the use of non-threatening questions and to re-emphasize for the fact-finder those things that are helpful.

A second way to obtain helpful admissions with virtually no risk is to question the witness on favourable material to be found in a secondary source. The secondary sources in a criminal case will often consist of preliminary transcripts or witness statements. The cross-examiner anticipates that the witness will be consistent with the earlier statements and will provide helpful information. If the witness changes testimony the cross-examination is still considered safe in that the secondary source may then be used to impeach that witness's credibility.

Finally, when one is attempting to elicit favourable testimony it is important to consider what the witness should reasonably admit based on human experience and logic. The common-sense principle is that most humans behave logically. Using the risk/benefit analysis, questions based on human experience may be classified as medium risky because there are exceptions to every rule. However, even if the witness's answers in cross-examination do not accord with logical human experience you have at least planted the seed with the fact-finder that this witness's evidence should be carefully scrutinized because it was illogical.

Consider, for example, the cross-examination of a bank teller who was held up at gunpoint. Human experience tells us that the following questions are virtually risk-free and will elicit favourable responses to weaken the identification of the accused by the bank teller.

Q. You were frightened at this time?

Q. You were frightened you would be shot?

Q. You were staring at the gun because you were frightened you would be shot?

Q. You were afraid and did not want to anger the robber?

Q. You concentrated on listening and following the robber's directions because you were afraid?

It is human nature for a person who is afraid of a weapon to fixate on that weapon. That is logical behaviour. The above questions, or variations on them, are designed to point out that the witness behaved logically. It is possible that in cross-examination the witness will deny staring at the weapon because the witness may have taken a bank orientation course that trained all tellers to study the face of a robber during a robbery. However, if the witness denies being afraid or staring at the weapon but cannot provide a reasonable explanation for not behaving logically, then that is something to point out to the fact-finder which may influence that fact-finder's assessment of the witness's credibility.

b) Contradicting or Impeaching a Witness

There is certainly no definitive dividing line between eliciting favourable responses in cross-examination and using cross-examination to impeach a witness's credibility. Consider the identification witness who was not wearing prescription glasses needed for clear distance vision. The cross-examination is designed to elicit favourable responses on the witness's need for glasses and at the same time cast doubt on the identification by challenging the witness's veracity. Notwithstanding this, cross-examination designed to impeach a witness generally focuses on five main areas:

i. discrediting the witness based on bias, prejudice or motive;

ii. discrediting the testimony based on memory and perception;

iii. discrediting the testimony based on inherent plausibility;

iv. discrediting the witness based on other evidence; and

v. discrediting the witness based on prior inconsistent statements.

When you attempt to contradict or impeach a witness what you are attempting to do is to suggest that the testimony is probably less true than the fact-finder was led to believe at the end of the direct examination. You only need to raise a doubt as to credibility - not prove that the person is a perjurer.

i. Discrediting the Witness Based on Bias, Prejudice or Motive

Human experience tells us that a close relationship may colour observation. Pointing out the close relationship allows the trier of fact to put the witness's evidence in perspective. A Crown attorney will usually undertake this form of cross-examination when the defence presents alibi witnesses who are friends and family. The purpose is not to get the witness to admit to lying, just to point out the relationship. Similarly, if a witness has a motive for testifying it is necessary to point this out.

Defence counsel will always cross-examine to draw out that motive where an accomplice testifies against the accused after receiving a benefit. Rarely will the witness admit to lying, but the motive has the potential to weaken the impact of the accomplice's testimony. It is, however, important to recognize that it is improper for a Crown attorney to suggest that an accused has a motive to lie merely to avoid conviction. Such an assumption flies in the face of the presumption of innocence.

ii. Discrediting the Testimony Based on Memory and Perception

Witnesses are usually testifying as to observations that occurred months or even years before. While most witnesses are trying to be as honest and objective as possible, the reality is that human memory fades over time and is not reliable. Most humans fill in the gaps in what is remembered, to make the memory make sense.

Cross-examination in this area requires the questioner to consider human experience. What would a reasonable person remember? For example, is it more common to remember if a person had a beard or wore glasses than it is to remember the shape of their face or the colour of their eyes? Isn't the gist of a conversation much easier to remember than the exact words spoken? Cross-examination that elicits an admission that no notes were made at the time or that more detail is provided now than in the past are low-risk questions. The answers can be used in your argument to point out that the evidence should have less weight or lower credibility when it is contrary to the human experience.

Cross-examination may also be directed to the witness's ability to observe in the first place. Once again it is important to consider human experience. For example, consider once again the bank teller who is being robbed at gunpoint who testifies that the event took five minutes so there was ample time to note the appearance of the robber. The cross-examination might go something like this:

Q. Many people enter the bank each day, correct?

Q. You don't pay special attention to every person who enters because you are working?

Q You had no reason that morning to pay special attention when this person entered the bank, did you?

Q. Then he pulled out a gun and you became very frightened?

Q. You thought you might be shot?

Q. You weren't looking at your watch or your phone at any time while the gun was out, were you?

Q. I expect it felt like ages until he left?

Q. You were concentrating on the gun and following directions, weren't you?

Q. Understandably, you certainly weren't concentrating on the time?

Q. So, when you say it took five minutes, you could be wrong?

Q. It could be a minute or two less?

Q. It's very hard to say, isn't it?

These are relatively risk-free questions. The questions emphasize the circumstances that impact on the initial observation. If the witness disagrees with you and swears to be able to accurately remember the time despite admitting to those circumstances, then the fact-finder will question the witness's reliability.

iii. Discrediting the Testimony Based on Inherent Plausibility

Cross-examination based on exposing actions inconsistent with common experience is perhaps the most widely used and most effective form of cross-examination. As stated earlier, the purpose of such cross-examination is to help the fact-finder assess how likely it is that, in that circumstance, the witness would have behaved in the way the witness describes if that behavior is inconsistent with common experience. The cross-examination is testing the plausibility of the witness's testimony.

The way to prepare for this cross-examination is to put yourself in the shoes of the witness and ask yourself what you would have done in such a situation. Try to figure out any explanations that the witness might have for acting differently than would be expected. If you can think of possible explanations for the witness's unusual actions or statements, then, at the beginning of the cross-examination in such cases, attempt to close the doors.

For example, return to the bank teller held at gunpoint. Before your planned cross-examination to point out that all the teller's attention would be focused on the weapon, first ask whether the teller received any special training on what to do during a hold-up. If the teller answers no, then a cross-examination on weapon fixation will likely be successful. If the teller answers yes, then you should fall back on your planning and your risk/benefit analysis. You will have decided in advance if it is still worthwhile to probe the area and hope for the best if the teller answers yes. By anticipating possible escape routes beforehand and planning out your actions, you can avoid having a great cross-examination completely deflated by the witness offering a logical explanation suddenly at the end of the questioning.

iv. Discrediting the Witness Based on Other Evidence

If you wish to discredit a witness based on other evidence, then you must consider the rule in *Browne v. Dunn* (1893), 6 R. 67, 1893 CanLII 65 (FOREP). This rule provides that if counsel is going to challenge the credibility of a witness by calling contradictory evidence on a particular matter, the witness must be given the chance to address the contradictory evidence in cross-examination while the witness is in the witness box.

In *R. v. Verney,* 1993 CanLII 14688 (ONCA), 87 C.C.C. (3d) 363 (Ont.C.A.) Finlayson J.A. outlined the purpose and scope of the rule:

> *Browne v. Dunn is a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter. It is not, however, an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief, putting him on notice of every detail that the defence does not accept. Defence counsel must be free to use his own judgment about how to cross-examine a hostile witness. Having the witness repeat in cross-examination everything he said in chief is rarely the tactic of choice.*

The Alberta Court of Appeal stated in *R. v. Werkman,* 2007 ABCA 130 (CanLII) at paragraph 9-11, 219 C.C.C. (3d) 406 at paragraph 409 that:

> *Though it is not necessary to cross-examine upon minor details in the evidence, a witness should be provided with an opportunity to give evidence on matters of substance that will be contradicted (authorities omitted).*

The essence of the rule in *Browne v. Dunn,* is that if you intend to contradict the witness later on a material point by calling contradictory evidence, you must ask the witness about that contradictory evidence when you are cross-examining that witness.

If you do not comply with the rule in *Browne v. Dunn* then the judge may determine the appropriate remedy which could include ordering that the witness be recalled and given the chance to explain the witness's side of the story on the contradictory evidence.

In *R. v. McNeill*, 2000 CanLII 4897 (ONCA) the court quoted the rule in *Browne v. Dunn* and its underlying purpose and offered a possible solution if there is a breach of the rule but the witness is not recalled:

> *[49] In those cases where it is impossible or highly impracticable to have the witness recalled or where the trial judge otherwise determines that recall is inappropriate, it should be left to the trial judge to decide whether a special instruction should be given to the jury. If one is warranted, the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it. The jury should also be told that they may take this into account in assessing the credibility of the opposing witness.*
>
> *[50] Depending on the circumstances, there may be other permissible ways of rectifying the problem…*

Your witness's later contradictory evidence may be given no weight by the fact-finder if you have failed to follow the rule in *Browne v. Dunn* when cross-examining.

v. Discrediting the Witness Based on Prior Inconsistent Statements

This is a very dramatic trial technique though it must be used effectively to be persuasive. Its purpose is very simple - to show that the witness cannot be believed because the evidence given at the trial is not consistent with other statements the witness has given before the trial.

Effective impeachment with a prior inconsistent statement requires that you demonstrate the inconsistency by first having the witness clearly state the version given in evidence at the trial and then, after the witness acknowledges having made a prior statement, you read out the version given in the prior statement. The inconsistency between the two versions should be obvious and relevant.

Therefore, the first step is to get the witness to clearly state the trial version. It is also important to keep it simple. If the answer is complex, break down the witness's answer into all its parts and impeach each fact separately. Failure to do this will severely hamper the impact.

It is also important to keep the chance of future impeachment in mind when you are conducting a preliminary hearing. If witnesses give long, convoluted

answers to a question, break the answer down to its parts through the use of leading questions. Then if it becomes necessary to impeach the witness at trial, the witness's answers from the preliminary hearing transcript are useful for impeachment because they are clear and unambiguous.

The technique for impeaching a witness is set out in sections 10 and 11 of the *Canada Evidence Act*.

Canada Evidence Act section 10 deals with the cross-examination based on a statement that has been made in writing or recorded on an audio or video tape or otherwise.

> ***Cross-examination as to previous statements***
> *10(1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness's attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.*

Canada Evidence Act section 11 deals with the cross-examination based on a previous oral statement.

> ***Cross-examination as to previous oral statements***
> *[11] Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.*

If you intend to contradict the witness with a prior statement, these sections of the *Canada Evidence Act* generally require that before your contradictory proof can be given you must have followed these steps:

i. You must direct the witness's attention to the time, place and circumstances of the prior statement, and

ii. You must ask the witness if the witness will acknowledge making the prior statement, then,

- If the witness denies having made the statement or equivocates as to whether the statement was made, counsel may then prove that the statement was made, either by producing the recorded statement (s. 10) or by proving the statement during the presentation of the accused's case (s. 11);
- If the witness admits to making the prior statement, then the inconsistent part of the prior statement is put to the witness.

It may be sufficient for the cross-examiner to point out the inconsistency. If you are the cross-examiner, pause and consider carefully before you go further and ask the witness to explain the inconsistency or try to get the witness to adopt the version most favourable to your case. Questions directed to these goals may present the witness with the opportunity to try to explain the inconsistency and thus enhance their credibility.

Most prior inconsistent statements used in court are found in witness statements or preliminary inquiry transcripts. It is important to establish the "credibility" of these documents, especially in a jury trial. For example, you might set up the production of the prior inconsistent statement from a transcript with such questions as:

Q. You attended a court proceeding called a preliminary inquiry on [a certain date]?

Q. On that occasion you swore to tell the truth?

Q. And you told the truth on that day, didn't you?

Or when dealing with a statement:

Q. You wanted to cooperate with the police when you gave your statement?

Q. You wanted to be as helpful as possible?

Q. You told the police the truth on that day?

Then read the contradictory evidence to the witness.

Closely related to impeachment through inconsistent statements is impeachment through omissions. This technique is extremely useful if the witness has prepared a written report that has left out important details but the witness suddenly gives oral testimony of those important details at trial. This technique works well for example if you are cross-examining police officers who have no written reference to the particular important detail in their notebooks or the official reports.

Consider the following set of questions:

Q. Officer, you testified that the accused confessed to you when you made the arrest?

Q. You said the accused told you, "It's my dope, just don't arrest my friend."

Q. You're sure that those are his exact words?

Q. You've made notes of your actions in this case?

Q. You were taught during your police training to make accurate notes?

Q. You were taught to include all important information in your notes?

Q. This is important because you deal with hundreds of people and many cases between arrest and trial?

Q. You make these notes so you can refresh your memory?

Q. You make these notes so you can give accurate testimony at trial?

Q. You read your notes before you testified to refresh your memory about this case?

Q. Show me in your notes where you recorded the statement, "It's my dope, just don't arrest my friend."

A. It's not in there.

Cross-examination concerning omissions is another example of the theme referred to previously - the common human experience. Common experience suggests important material will be recorded. Failure to do so raises a doubt as to credibility.

3. Cross-Examination on Collateral vs. Non-Collateral Issues

In Canada, there are very few rules that limit the scope of cross-examination. Counsel are not restricted to cross-examining on issues raised in the direct examination but are given wide freedom to question witnesses on issues of credibility. This rule differs from many jurisdictions in the United States that limit cross-examination to those topics raised in examination-in-chief.

The general rule is that the Crown may not call evidence in rebuttal to contradict the answers given on a collateral matter: *Latour v. R.*, 1976 CanLII 145 (SCC).

Evidence may be called to contradict testimony given by a witness on a matter relevant to an issue in the case; but, to ensure that trials do not get bogged down in a multiplicity of issues, a sound rule has developed which states that:

> *The answers to questions put to a witness in cross-examination on collateral matters must be taken as final. Evidence may not be called to contradict a witness's testimony on a collateral matter.*

The rule does not prohibit a vigorous cross-examination of the witness on the collateral matter. You are not bound by the first answer received in cross-examination on the matter and are entitled to pursue the matter in depth during your cross-examination. But this rule prevents you from calling a witness in your case to contradict the first witness's answers on the collateral matter because the evidence is not relevant to an issue in the case. You might feel that the fact the witness is lying about a collateral matter should be important enough to warrant calling evidence to prove the witness lied, but this rule prevents you from doing just that.

The rule prohibiting the calling of evidence to prove a collateral matter frequently arises because of the wide latitude you are given on cross-examination. It is permissible to ask cross-examination questions about a collateral matter. However, if you ask a question on a collateral matter, and the witness gives an answer that you know you can prove is a false answer, you are stuck with the answer, even if it is false. The only remedy for the witness giving a false answer on a collateral matter to the issues at the trial is a separate charge of perjury against the witness.

There is no easy dividing line between collateral and non-collateral issues. The classic definition of collateral is found in *A.G. v. Hitchcock* (1847), 1 Exch. 91 at 99:

> *The test of whether a matter is collateral or not is this:*
>
> *If the answer of a witness is a matter which you would be allowed on your own part to prove in evidence - if it has such a connection with the issues, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him.*

In *Manning, Mewett & Sankoff: Criminal Law*, 5th edition, (LexisNexis Canada, 2015) the authors offer this definition:

> *If the evidence has no relevance except as to credibility of a prior witness, then it is collateral, but if the evidence is relevant to prove some matter that is in issue or has been put in issue by the testimony of that prior witness, then it is not collateral even if its incidental effect is to attack the credibility of that witness.*

Evidence going to bias or motive will not be considered collateral evidence. An example of evidence challenged as collateral but found to be relevant to bias is found in *R. v. Lindlau*, 1978 CanLII 2366 (ONCA) where a husband was charged with assaulting his estranged wife. In *Lindlau*, the defence wished to show that the complainant had tried to get the accused in

trouble on a previous occasion by making a false allegation of assault. At Crown's objection, the trial judge refused to permit the defence counsel to ask the complainant if she had falsely told the police that the accused had stabbed a man with whom the complainant had been living. The trial judge held the question was not relevant and did not permit other evidence on the matter. The Ontario Court of Appeal stated that a false allegation against the accused was evidence that was not collateral, because if the evidence were true, it tended to prove bias against the accused.

The case of *R. v. Cassibo*, 1982 CanLII 1953 (ONCA) provides an example of evidence that was not collateral because it related to the direct fact in issue which was: Did the crime occur? In *Cassibo*, the defence alleged the complainants had fabricated their testimony on incest. A magazine was found in one complainant's room according to the mother, containing an article about a false allegation of incest. The trial judge allowed the magazine to be filed as an exhibit but stopped any further cross-examination once the complainants said they had not read it. The general rule is that the defence cannot contradict the answers of the witnesses concerning collateral matters by calling the evidence of other witnesses. The trial judge said this was cross-examination on a collateral matter. Martin J.A., on behalf of the Ontario Court of Appeal, indicated that the cross-examination on the magazines related to the truthfulness of the complainants' testimony on the very issue before the court and therefore it was not collateral evidence.

R. v. Rafael, 1972 CanLII 640 (ONCA) is an example where evidence was found to be on a collateral issue. The accused was charged with a series of frauds. The accused gave evidence and was asked in cross-examination whether he had filed income tax returns over the years. He answered that question by stating that he had done so except for two or three years when his books were under seizure by Crown authorities. The Crown then called evidence in reply to prove that the accused had not filed any income tax returns for a period of some ten years, so far as the records of the Department disclosed. The Ontario Court of Appeal was unanimous in holding that this evidence went solely to credibility and was purely collateral:

> *Without discussing in any way the objection to this evidence as being hearsay … we are all of the opinion that the accused had been cross-examined upon a collateral matter relating only to his credibility and that the Crown was bound by the answer received and was not entitled to call evidence to contradict it.*

The court held that the error in permitting the reply evidence to be called lead to a miscarriage of justice because the trial judge struggled with ruling on credibility of the various witnesses and the trial judge stated that in making conclusions, she attached great significance to the proof of the accused's lie. The conviction was set aside and the indictment was quashed.

Similarly, in *R. v. J.H.*, 2013 ONCA 693 (CanLII) the accused was convicted on four counts but only appealed his conviction for sexual assault of the complainant. The Ontario Court of Appeal ruled that the accused's cross-examination of the complainant on whether she had ever made or encouraged a false motor vehicle accident report in the past went solely to her

credibility and was, therefore, collateral and any further evidence about that issue was inadmissible due to a contravention of the collateral facts rule.

See also *R. v. A.C.*, 2018 ONCA 333 (CanLII).

4. Cross-Examination of the Accused

While the rules respecting the scope of cross-examination of an accused are for the most part the same as the rules respecting any other witness, some special issues arise because of certain constitutional and evidentiary rules that are specific to accused persons.

Remember that you cannot ask certain types of questions:

a) Don't impinge on the accused's right to remain silent.

b) Don't imply that the accused's evidence is not worthy of belief because they had access to the Crown disclosures.

c) Don't ask the accused to comment on another witness's credibility.

d) Don't ask the accused to come up with an explanation for another witness's motive to fabricate.

e) Don't cross-examine the accused on their bad character if the accused has not put their good character in issue.

f) Don't cross-examine the accused on the details of a criminal conviction unless the accused has put their good character in issue.

g) Don't cross-examine an accused on a youth court record without complying with the restrictions, prohibitions and processes governing access to and use of those records set out in Part 6 of the *Youth Criminal Justice Act*.

a) Impinging on the Accused's Right to Remain Silent

You cannot ask the accused questions that impinge on their right to remain silent.

Because the accused has a constitutional right to remain silent, it is improper to probe the accused on the decision to invoke that right. This point was reinforced by the Manitoba Court of Appeal in *R. v. Wojcik*, 2002 MBCA 82 where Scott C.J.M., for a unanimous court, stated at paragraph17:

Succinctly stated, the right to silence is of such importance that the accused's invoking of the right cannot directly or indirectly be used as proof of guilt.

Avoid asking an accused why the right to remain silent was exercised or any question that implies that the accused's story is less credible because it was not disclosed to the police. Even in situations where the accused offers an alibi, it is important to remember that there is no obligation on an accused to disclose the alibi at the first available opportunity since such an obligation would conflict with the constitutional right to remain silent; *R. v. Cleghorn*, 1995 CanLII 63 (SCC). The only obligation on an accused is to disclose the details of the alibi sufficiently in advance of trial to allow it to be fairly investigated.

It is improper to imply on cross-examination that the accused has any onus to prove innocence. In *Usereau c. R.*, 2010 QCCA 894 (CanLII) DNA evidence was taken from a hood of a jacket found at the scene of the offence and it matched DNA from the accused's blood sample taken under a warrant. When the accused testified at trial, he conceded he owned the jacket to which the hood had been attached, but he testified that others used the jacket at the club where he performed security services.

On cross-examination, the Crown asked the accused why he had not arranged for his expert to test the hood for other DNA evidence if he was suggesting that someone else may have worn it. Defence counsel objected that the questions were not legitimate because their obvious purpose was to imply that the accused failed to take a step that could have cleared him of the charge but did not do so because he knew the result would be unfavourable to his defence. The Quebec Court of Appeal agreed that the line of cross-examination was improper because it suggested that the accused had an onus to establish his innocence.

b) Implying that the Accused's Evidence is not Worthy of Belief due to Access to Crown Disclosures

You should not ask questions of the accused that imply their evidence is not worthy of belief because the accused had access to the Crown disclosures.

While questions concerning disclosure are appropriate in some situations, they are always potentially dangerous…the prudent course whenever Crown counsel wish to cross-examine on matters relating to disclosure is to vet the proposed line of questioning with the trial judge in the absence of the jury; R. v. White, 1999 CanLII 3695 (ONCA).

Crown counsel must be careful not to impugn the accused's credibility during cross-examination merely because the accused has exercised their constitutional rights to receive and review the disclosure before testifying; (See *R. v. Schell*, 2000 CanLII 16917

(ONCA), *R. v. Thain*, 2009 ONCA 223 (CanLII) and, *Gahan v. R.*, 2014 NBCA 18 (CanLII), all of which quote *R. v. White:*

> *As a matter of common sense, there may be considerable force to the suggestion that a person who gets full advance notice of the other side's evidence and testifies last is in a position to tailor his or her evidence to fit the disclosure… That inference, no matter how logical, cannot be drawn without turning fundamental constitutional rights into a trap for accused persons. Where any such suggestion seeps into the cross-examination of an accused, it must be eradicated by the trial judge.*

On the other hand, there are circumstances where such cross-examination is permissible. For example, in *R. v. F.E.E.*, 2011 ONCA 783 (CanLII), to challenge the veracity of the alibi proffered by the accused, it was permissible for the Crown to point out in cross-examination that the accused's alibi notice was given after disclosure had been made and the disclosure contained details of where and when the complainant said the offence had taken place, so the accused could tailor the time and place of the alibi evidence.

There is a fine line between permissible and impermissible cross-examination in this area. Before embarking on a line of questioning that suggests the accused's evidence has been tailored to fit the disclosure, it would be wise to obtain a ruling from the trial judge.

c) Questions About Another Witness's Credibility

You cannot ask the accused to comment on another witness's credibility.

Numerous appellate level decisions have reiterated the impropriety of asking one witness to comment on the credibility of another witness. For example, in *R. v. Logiacco*, 1984 CanLII 3459 (ONCA) at page 383, the Ontario Court of Appeal stated:

> *The opinion of a witness as to the truthfulness of another witness is irrelevant and can be of no help to a court in resolving the case before it.*

This is especially so if you are asking an accused to comment on another witness's testimony. The Ontario Court of Appeal in *R. v. Rose*, 2001 CanLII 24079 (ONCA), citing five of their previous decisions, stated at paragraph 27:

> *Further, this court has held repeatedly that it is improper to call upon an accused to comment on the credibility of his accusers: [authorities omitted]. Crown counsel did this repeatedly during the course of the cross-examination. Questions of this nature suggest that there is some onus on an accused person to provide a motive for the Crown witness's testimony and, as such, they undermine the presumption of innocence.*

The court in *Rose* determined that it was improper to ask questions such as, at paragraph 25 of the judgment:

> *"When the police state … are they inaccurate, or are they lying?" and "This is a conspiracy against you, is it?"*

The improper cross-examination resulted in a new trial.

In *R. v. D.M.*, 2022 ONCA 429 the Ontario Court of Appeal confirmed that this rule remains unchanged (para. 68).

d) Motivation for Another Witness's Fabrication

You cannot ask the accused to come up with an explanation for another witness's motive to fabricate.

Closely related to the prohibition on asking an accused to comment on the credibility of a witness is the prohibition on asking the accused to speculate as to why a witness may have testified to a certain version of events. Such questions shift the onus by making the accused come up with an explanation for the testimony proffered by the Crown.

Numerous appellate decisions have disapproved of such questions. For example, in *R. v. Henderson*, 1999 CanLII 2358 (ONCA), Labrosse J.A. on behalf of the Ontario Court of Appeal stated:

> *Crown counsel's questioning required the appellant to provide an alternate explanation for the complainant's behaviour that was not premised on his guilt. Such an explanation would have required the appellant to either comment upon the complainant's credibility or to give an opinion that he was clearly not qualified to give, explaining why her conduct was inconsistent with someone who had been sexually assaulted. Clearly questions of this nature are improper and unfair. This Court has on numerous occasions disapproved of such questions: see, for instance, R. v. Vandenberghe*, 1995 CanLII 1439 (ONCA).

The Manitoba Court of Appeal ruled in *R. v. R. (A.)*, 1994 CanLII 4524 (MBCA) that the question "Do you have any theory or opinion as to why [the complainant] would lie about this?" was improper. The court stated, per Twaddle J.A.:

> *Quite apart from the irrelevancy of the accused's opinion, this type of question is mischievous in that it tends to place an improper burden on the accused to account for another's conduct. The inability of the accused to explain a conflict between his evidence and that of a Crown witness is not, of itself, a ground for disbelieving the accused.*

The same point was made by the British Columbia Court of Appeal in *R. v. Ellard*, 2003 BCCA 68 (CanLII):

[22] The potential prejudice arising from this form of questioning is that it tends to shift the burden of proof from the Crown to the accused. It could induce a jury to analyze the case on the reasoning that if an accused cannot say why a witness would give false evidence against her, the witness's testimony may be true. The risk of such a course of reasoning undermines the presumption of innocence and the doctrine of reasonable doubt. The mind of the trier of fact must remain firmly fixed on whether the Crown proved its case on the requisite standard and not be diverted by the question whether the accused provided a motive for a witness to lie.

e) Evidence of Bad Character

You cannot cross-examine the accused on the evidence of their bad character if the accused has not first put their good character in issue. But you can cross-examine any other witness on their bad character.

This is succinctly explained in paragraph 32 of *R v. Tymchyshyn (C) et al*, 2016 MBCA 73 (CanLII), appeal to SCC dismissed at *2019 CanLII 55711 (SCC)*:

[32] The general rule (with limited exceptions) is that the Crown cannot introduce bad-character evidence of an accused. The basis for this rule is not that such evidence is necessarily irrelevant but, rather, that it would create undue prejudice to an accused [authorities omitted]...

The policy for this rule is based on the assumption that the prejudicial effect of the evidence that shows that the accused is not a good or law-abiding person will generally outweigh its probative value; the danger exists that the fact-finder (for example, a jury) may convict the accused of the current charge based on the accused's bad reputation rather than based on the evidence presented.

There are three exceptions to this rule. The exceptions are summarized by Cory J. writing for the majority on this point, in *R. v. G.(S.G.)*, 1997 CanLII 311 (SCC) at paragraph 63:

[63] It is trite law that "character evidence which shows only that the accused is the type of person likely to have committed the offence in question is inadmissible" (emphasis in original): [authorities omitted].

However, there are three general exceptions under which evidence of bad character of the accused can be adduced:
(1) where the evidence is relevant to an issue in the case: [authorities omitted];
(2) where the accused puts her character in issue: [authorities omitted];
(3) where the evidence is adduced incidentally to proper cross-examination of the accused on her credibility: [authorities omitted].

i. Relevance of Bad Character of the Accused

- **As background and context:**

In *R. v. Guimond and Lamirande*, 2002 MBCA 41 (CanLII), leave to appeal to SCC refused, [2002] S.C.C.A. No. 203, [on the issue of search of an inmate's personal property and seizure of documents] the trial judge accepted the Crown's argument that the accused's association with the Indian Posse was relevant because it provided background and context for what occurred.

On appeal, Scott C.J.M. reviewed the authorities and concluded (at paras. 85-87):

> *[85] In my opinion, the evidence was properly admitted to provide the essential background and context within which Lamirande and the others came together, planned, and executed the robbery. It was relevant and necessary to place into context Desjarlais' evidence which detailed the sophisticated robbery plans, the use of a get-away vehicle, and the agreement to "smoke" any person who chose to get in the way. Without it, the Crown's case would have made little sense. Counsel for Lamirande is simply wrong when he submits that background and context alone are never enough to justify the admission of such evidence.*
>
> *[86] P.K. McWilliams, Q.C., in* ***Canadian Criminal Evidence*** *(3rd Ed.) at p. 10:10510, puts the matter very well:*
>
> *"In some cases, it is unavoidable that the prosecution adduce evidence as part of its case to set the milieu and activity of the accused and the other witnesses to show the context or narrative even though it reveals that they are involved in criminal activity."*
>
> *[87] To summarize, if the "evidence is also relevant to a given issue" (R. v. B. (F.F.), 1993 CanLII 167 (SCC), [1993] 1 S.C.R. 697), "directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means" (R. v. G. (S.G.), 1997 CanLII 311 (SCC), [1997] 2 S.C.R. 716] and R. v. Davison et al. (1974), 1974 CanLII 787 (ONCA), 20 C.C.C. (2d) 424 (Ont. C.A.)), "necessary to the development of the Crown's case" (Rowbotham [(1988), 1988 CanLII 147 (ONCA), 25 O.A.C. 321]), or simply provides "background" (Robertson [1987 CanLII 61 (SCC), [1987] 1 S.C.R. 918]), or "context" (MacDonald [(1990), 1990 CanLII 11021 (ONCA), 38 O.A.C. 9]), then it is admissible, subject of course to the probative value outweighing the evidence's prejudicial effect, as it so clearly did in this case. It is not simply bad character evidence.*

In *R. v. Violette*, 2008 BCSC 920 (CanLII), the court dealt with an application by the Crown to tender expert evidence related to the nature and characteristics of the Hells Angels motorcycle club and its main purposes of facilitating or committing serious criminal offences for the material benefit of its members.

The accused were charged with committing offences in connection with a criminal organization and wanted the evidence excluded.

> *[80] In my view, [the expert's] evidence does not fall within this exclusionary rule, as it is not evidence that is sought to be tendered to establish that the accused are the type of persons likely to have committed the offences charged in the indictment. Rather, his evidence relates to the criminality of a group alleged to be a criminal organization, which is an essential element of the section 467.12 and section 467.13 offences.*

Applying the MBCA case *Lamirande*, the court in *Violette* said in paragraph 84 "such evidence is not presumptively excluded simply because it connects the accused with a gang or group".

The court in *Violette* also applied *R. v. Terezakis*, 2007 BCCA 384 (CanLII) quoting Mackenzie J.A. at paragraph 46 of that judgement, "Criminal organization offences make evidence of general propensity and bad character probative that would otherwise be excluded as prejudicial. …"

In *R. v. Labossière*, 2014 MBCA 89 (CanLII) evidence of the accused's prior criminal involvement was found to have been properly admitted, applying *Lamirande*. The Court of Appeal found that the charge to the jury made the risk of prejudicial effect low.

> *[20] The trial judge weighed the probative value and the prejudicial effect of the proposed evidence and concluded that it was admissible. In her charge, she told the jury that "this evidence was only allowed to show you how the relationship developed between Jérémie Toupin and [the accused]."*
>
> *[21] The accused says that if evidence of his prior criminal involvement was admissible for the purpose of narrative, the evidence led was more prejudicial than was necessary to accomplish that purpose. The Crown says that the accused's criminal involvement was important to permit the jury to understand how the relationship between the accused and Toupin developed and how he came to offer Toupin money to commit the murders.*
>
> *[22] In my view, the evidence in question was relevant, probative and properly admitted by the trial judge (R. v. L.B.; R. v. M.A.G. (1997), 1997 CanLII 3187 (ONCA), 102 O.A.C. 104 at para. 81 (C.A.)) …*
>
> *[23] In the present case, the purpose of the evidence was not to show that the accused had the propensity to commit murder, but rather to reveal to the jury why the accused would ask Toupin to do the killings, why Toupin would agree to do so, and why the accused would trust Toupin to carry them out. The nature of the relationship, how it developed and the mutual trust that existed between the two was clearly relevant to issues other than the propensity or disposition of the accused.*

[24] The trial judge charged the jury twice in relation to the use they could make of this evidence, stating that the evidence relating to the accused's prior criminal involvement did not mean that because he had previously been involved in criminal activity, he "was therefore the sort of person who might be involved in the killings." In light of these instructions, the risk of prejudicial effect from the evidence was low.

ii. Does the Accused Put Their Character in Issue?

- **Not by tendering evidence of the bad character of the victim**

Note that the accused does not put their own character in issue by attacking the character of the victim or by tendering evidence showing a history of violent conduct on the part of the victim.

In *R. v. Wilson*, 1999 CanLII 4245 (MBCA), leave to appeal refused ((1999) 139 CCC (3D) vi (SCC)) the accused's threats towards a former girlfriend were not admissible at the trial for the alleged murder of his wife even though the accused led evidence about the character of his wife.

49 [I]t is important not to confuse the issue of the character of the accused with that of the victim or a witness. The character of the victim, or of a witness, be it good or bad, is not subject to the same exclusionary rules as the character of the accused. …

51 The character of a witness may be put in issue by the defence with impunity. In R. v. Arcangioli, [1994 CanLII 107 (SCC)] Major J. at p. 139, affirmed that evidence of the accused's bad character is normally excluded unless the accused has put character in issue or the evidence as [sic] otherwise relevant … Consequently, "[s]o long as it is relevant and not otherwise excluded by the rules of evidence, evidence of the bad character of a third party can be adduced by the defence."

Where character evidence about a witness who is not the accused is relevant, it will be received unless the trial judge concludes that its potential to prejudice the jury substantially outweighs its probative value.

- **Not by tendering evidence of the bad character of a co-accused**

Tymchyshyn addressed the operation of the rule as it applies to co-accused in a joint trial:

[33] Where there are co-accused in a joint trial, an accused may call bad-character evidence relating to another co-accused in order to show that it is more likely that the co-accused committed the crime in question. However, the admission of such evidence is subject to the proviso that its probative value must outweigh its prejudicial effect. … In R v. Suzack (CV) et al (2000), 2000 CanLII 5630 (ONCA), 128 OAC 140, *the Court noted that,*

where such a situation exists, an accused is not necessarily entitled to the same trial as if he or she had been tried alone. Rather, the respective rights of all of the accused must be balanced (see paras. 111-14).

[34] In R v. Pollock (R) et al (2004), 2004 CanLII 16082 (ONCA), 188 OAC 37, *leave to appeal to the SCC refused, [2004] SCCA No 405 (QL), Rosenberg JA, writing for a unanimous Court, held that before evidence of bad character could be elicited by a co-accused, an evidentiary foundation was required (at para. 106):*

[S]ince evidence of propensity or bad character can carry a very grave risk of prejudice to the fair trial of the accused against whom the evidence is led, it is incumbent on the trial judge to examine closely the probative value of the evidence and the purposes for which the evidence is tendered. In my view, in a joint trial, counsel's mere assertion that the evidence is necessary for the accused to make full answer and defence is not sufficient given the grave potential for prejudice to the fair trial of a co-accused. There must be some evidentiary foundation to support this assertion. That foundation may come during the Crown's case through evidence of Crown witnesses in chief or through cross-examination. In some cases, the evidentiary foundation may not be laid until the defence case. If so, the prejudicial character evidence would only be admissible, if at all, at that time. The need for this evidentiary foundation is not simply to avoid irrelevant evidence entering the record. An evidentiary foundation is essential to ensure fair management of the trial. The need for the highly prejudicial evidence can be properly assessed only when the accused demonstrates through evidence the contours of the defence. Until then, the trial judge is left to speculate on the importance and necessity of this evidence. [emphasis added]

- **Not by simply admitting past criminal convictions**

Section 12 of the *Canada Evidence Act* limits the cross-examination of an accused on the accused's criminal record to the fact of the conviction, the date, the charge and the sentence imposed. However, if an accused puts their character in issue, the accused can face an expanded cross-examination on their criminal record under section 666 of the *Criminal Code*.

Evidence of character
666 Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

- **Not by Crown compelling accused to put the character in issue**

In *R. v. Bricker,* 1994 CanLII 630 (ONCA) the Crown brought out the accused's belief in honesty and forthrightness in cross-examination and the trial judge ruled that by so stating his belief, the accused had put his character in issue. The Court of Appeal stated:

> *The prosecutor cannot compel an accused to put his character in issue and therefore a prosecutor cannot by his cross-examination adduce good character evidence in order to provide a basis for questioning an accused on his criminal record.*

In *Bricker*, ultimately, the Court of Appeal concluded that the trial judge was correct to permit the Crown to cross-examine on the accused's complete record, but for the wrong reason.

Admitting to having a criminal record is not an assertion of good character: see *Regina v. St. Pierre*, 1974 CanLII 874 (ONCA). Such an admission is quite different from testifying as to not having a criminal record, which, implicitly, is a statement of good character: see *Morris v. The Queen,* 1978 CanLII 168 (SCC).

iii. Cross-Examination is Not Unlimited Once Character is in Issue

In *R. v. M.M.*, 1995 CanLII 16231 (MBCA), the Manitoba Court of Appeal stated:

> *Even when the accused puts his character in issue, cross-examination is not unlimited. The evidence of good character can be rebutted, but cross-examination is not a licence to raise matters which are prejudicial to the accused, and which neither rebut the accused's assertion of good character, nor are probative of the charge which the accused faces.*

In *R. v. Rose*, 2001 CanLII 24079 (ONCA) questions concerning the accused's manner of dress and the fulfillment of his fiscal responsibilities were deemed irrelevant and improper on a charge of trafficking in narcotics.

In *R. v. A.J.R.* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.) questions related to promiscuity, the character of the accused's friends and the paternity of his son, were all deemed irrelevant and abusive on charges of incest and sexual assault.

In *R. v. Ejiofor*, 2002 CanLII 19541 (ONCA), on a charge of trafficking in cocaine, questions concerning the fact that a number of the accused's friends had criminal records for serious drug offences, were ruled improper. In ordering a new trial the court stated:

> *Not only were the questions irrelevant, they were potentially very prejudicial. I can think of no reason for putting these questions to the appellant other than to suggest the inference that because the appellant associated with drug importers, he was a drug importer and, therefore, had*

to know that there was cocaine in the vehicle. Counsel for the appellant properly described this line of reasoning as suggesting guilt by association. It offends one of the most fundamental principles of the criminal law. People can only be convicted for what they do, not for the company they keep.

f) Cross-Examining on the Details of a Criminal Conviction

You may not cross-examine an accused on the details of a criminal conviction unless the accused has put their good character in issue.

Section 12 of the *Canada Evidence Act* allows any witness to be cross-examined on that witness's criminal record. The stated purpose of such cross-examination is to test the credibility of the witness. The accused who testifies is subject to this same section.

If the witness denies the conviction or refuses to answer, you may prove the conviction as described in *Canada Evidence Act* section 12(2)(a) and (b) by producing a certificate and proof of identity.

If the witness is NOT the accused, you can go further and also cross-examine the witness on the details of the offence. See *R. v. Burgar*, 2010 ABCA 318 (CanLII).

[123] Furthermore, while an accused can only be cross-examined on the bare bones of his or her criminal record, the charge, the date and the punishment imposed, an ordinary witness can be cross-examined on the underlying facts of the conviction (R. v. Miller (1998), 1998 CanLII 5115 (ONCA), 131 C.C.C. (3d) 141 (Ont. C.A.)). Indeed, an ordinary witness can even be cross-examined on the underlying facts behind outstanding charges (R. v. Gonzague (1983), 1983 CanLII 3541 (ONCA), 4 C.C.C. (3d) 505 (Ont. C.A.)). R. v. Borden, 2017 NSCA 45 (CanLII). However, if the witness who is testifying is the accused, you can still use section 12 of the Canada Evidence Act to cross-examine the accused on the accused's criminal record, but you are limited in your cross-examination. You may ask questions only about the name of the offence, the date and the place of the conviction and the penalty imposed. Before testifying, the accused can seek a ruling by the trial judge to limit the portions of the accused's criminal record that can be used by the Crown for cross-examination.

The Supreme Court of Canada upheld the constitutionality of section 12 in *R. v. Corbett*, 1988 CanLII 80 (SCC) stating that the section did not infringe the presumption of innocence. Further, the court concluded that information as to prior record was relevant and the fact-finder ought not to be deprived of this important information. The court opined that the interests of the accused could be met by clear instructions that advised the jury as to the limited use to be made of the record. The court also held that the trial judge had the discretion to limit the cross-examination if this was in the interests of justice.

R. v. Bomberry, 2010 ONCA 542 is an example of a *Corbett* ruling. Before testifying, the accused brought an application requesting that the trial judge edit the accused's record of criminal convictions for its use under section 12 of the *Canada Evidence Act.*

At the appeal, the court applied *Corbett* and concluded that the trial judge had erred in allowing the accused, on trial for murder, to be cross-examined on four previous assault convictions to prevent an imbalance in the perception of her character compared to the character of the Crown witnesses. The court said:

> *[48] Not only were the assault convictions unnecessary for the task of assessing the appellant's credibility, but they were also potentially very prejudicial to her in terms of opening the door to propensity reasoning. … [T]hey portrayed the appellant as a person prone to violence…*
>
> *[49] [T]here was plenty of other evidence admitted at trial … to show that the appellant was not a person of good character. There was no need to add the four assault convictions to what was already a strong body of evidence on this point.*
>
> *[50] Defence counsel only challenged the accuracy and reliability of the evidence of the Crown witnesses, not their good character. There is a distinction. Questioning witnesses' accounts of events and challenging the accuracy of those accounts does not create the potential for the kind of imbalance discussed in Corbett: R. v. W.B, 2000 CanLII 5750 (ONCA), 145 C.C.C. (3d) 498 at paragraphs 46-47.*

However, you are NOT permitted to cross-examine the accused on the detailed circumstances of the crimes. See *The Queen v. Ladouceur*, 2001 CanLII 15696 (QC CA).

In *R. v. Laurier* (Ont. C.A.), [1983] O.J. No. 195 [not available on CanLII], the accused was the appellant. In cross-examination at trial, crown counsel improperly cross-examined the accused about the details of a prior conviction for robbery, which conviction had already been admitted by the accused in his examination-in-chief. At paragraphs 9-10, the court describes the improper questioning and repeats the rule about the limits of cross-examination of an accused:

> *[9] In examination-in-chief, defence counsel asked the appellant about his criminal record. The appellant admitted a conviction for robbery at Barrie on March 31, 1978, for which he had received a sentence of 9 months. In cross-examination, Crown Counsel read to the appellant the details of the charge, as contained in the indictment. The appellant admitted that he had pleaded guilty to that charge. Crown Counsel then proceeded to examine the appellant at length concerning the details of the offence. In particular, he tried, without success, to get the appellant to admit that the appellant's co-accused had used a knife in the course of the robbery and that the appellant had known of the co-accused's possession of the knife.*
>
> *[10] In cross-examining an accused about his prior criminal record, Crown Counsel is entitled to ask for the name of the crime, the substance and effect of the indictment, the place of the conviction and the penalty, but he is not entitled to*

cross-examine the accused about the details of the offences: see R. v. McLaughlin (1974), 20 C.C.C. (2d) 59; R. v. Boyce (1975), 23 C.C.C. (2d) 16. …

R. v. M.C., 2019 ONCA 502 (CanLII), summarizes the law and the policy behind the limits on the admissibility of previous convictions:

[53] Section 12(1) of the CEA authorizes questioning of a witness about whether the witness has been convicted of any offence. The provision reflects a legislative judgment by Parliament that evidence of prior convictions is relevant to a witness's credibility; in other words, to the testimonial trustworthiness of the witness: Corbett, at p. 685, per Dickson C.J., and p. 720, per La Forest J. (dissenting) R. v. Brown (1978), 1978 CanLII 2396 (ONCA), 38 C.C.C. (2d) 339 (Ont. C.A.), at p. 342.

[54] The rationale upon which section 12(1) admits prior convictions in relation to credibility is that the character of the witness, evidenced by the prior conviction(s), is a relevant fact in assessing the testimonial reliability of the witness: Corbett, at pp. 685-86, citing R. v. Stratton (1978), 1978 CanLII 1644 (ONCA), 42 C.C.C. (2d) 449 (Ont. C.A.), at p. 461.

[55] Courts have been vigilant to circumscribe the extent to which the Crown may use prior convictions of an accused who testifies. Questioning is limited to the facts of the conviction, including the offence of which the accused was convicted; the date and place of the conviction; and the punishment imposed: Corbett, at pp. 696-97; Stratton, at pp. 466-67; R. v. Laurier (1983), 1 O.A.C. 128 (C.A.), at p. 130. The cross-examination cannot extend to the conduct on which the conviction was based, at least in cases where the accused has not put his or her character in issue, or to whether the accused testified at trial: Corbett, at pp. 696-97; Stratton, at pp. 466-67.

[56] The weight to be assigned to prior convictions in assessing the trustworthiness of the accused as a witness is a variable, not a constant. For example, convictions of offences involving dishonesty or false statements have a greater bearing on whether an accused witness is likely to be truthful: Brown, at p. 342; Corbett, at pp. 720-21, per La Forest J. (dissenting). Similarly, offences demonstrative of a disregard for court orders or the administration of justice: R. v. Gayle (2001), 2001 CanLII 4447 (ONCA), 154 C.C.C. (3d) 221 (Ont. C.A.), at para. 81, leave to appeal refused, [2001] S.C.C.A. No. 359; R. v. Thompson (2000), 2000 CanLII 5746 (ONCA), 146 C.C.C. (3d) 128 (Ont. C.A.), at para. 31.

[57] In general terms, the probative value of prior convictions with respect to the testimonial trustworthiness of an accused witness varies with the nature and number of prior convictions and their proximity to the time when the accused witness is giving evidence: Corbett, at pp. 720-21, per La Forest J. (dissenting); Brown, at p. 342.

[58] A trial judge has a discretion to exclude evidence of previous convictions when the probative value of those convictions on the issue of testimonial trustworthiness is exceeded by their prejudicial effect. This discretion represents an exception to the general inclusionary rule, which follows from Parliament's legislative determination in enacting section 12(1) of the CEA, that prior convictions are relevant to a witness's testimonial trustworthiness: Corbett, at p. 697, per Dickson C.J., and pp. 720-22, 739-40, per La Forest J. (dissenting).

[59] No closed list of factors informs the exercise of the exclusionary discretion for which Corbett provides. But some are acknowledged as relevant. The nature of the convictions. The proximity or remoteness of the convictions to the time of the testimony. Any similarity between the previous convictions and the offences charged. And potentially, the need to maintain a balance between the position of the accused and that of a Crown witness whose credibility has been impeached on the basis of prior convictions or otherwise: Corbett, at pp. 740-44, per La Forest J. (dissenting); Brown, at p. 342; R. v. McManus, 2017 ONCA 188 (CanLII), 353 C.C.C. (3d) 493, at para. 82.

[60] To invoke the exclusionary discretion in a jury trial, an accused applies at the conclusion of the case for the Crown for an order restricting the number of convictions on which the accused may be questioned should she or he testify: R. v. Underwood, 1998 CanLII 839 (SCC), [1998] 1 S.C.R. 77, at paras. 7-9. In a trial without a jury, the need for such a formal application may be questionable: see R. v. A.B., 2016 ABQB 733 (CanLII), at para. 33.

You are also not permitted to cross-examine any accused on the facts underlying past charges that resulted in acquittals or withdrawals. Permitting such cross-examination strikes at the heart of trial fairness for the accused. It is fundamental to the administration of the criminal law that an acquittal is the equivalent of a finding of innocence. An acquittal preserves the presumption of the innocence of the accused. See *Grdic v. The Queen*, 1985 CanLII 34 (SCC) quoting *Double Jeopardy* by Martin L. Friedland, Faculty of Law, University of Toronto. (Oxford: at the Clarendon Press. 1969); See also *R. v. Akins*, 2002 CanLII 44926 (ONCA).

g) Cross-Examining on a Youth Court Record

You may not cross-examine an accused on a Youth Court record without complying with the restrictions, prohibitions and processes governing access to and use of those records set out in Part 6 of the *Youth Criminal Justice Act* (S.C. 2002, c.1)

i. Can a Person be Cross-Examined on a Youth Court Record?

There is conflicting law at the trial level as to whether a person may be cross-examined on a youth court record. (See *R. v. Sheik-Qasim*, 2007 CanLII 52983

(ON SC), and *R. v. Upton*, 2008 NSSC 338 (CanLII)). But in 2018, the British Columbia Court of Appeal considered both *Sheik-Qasim* and *Upton* and decided that defence counsel could not use a person's youth court record in cross-examination. In *R. v. Hammerstrom*, 2018 BCCA 269 (CanLII) Bauman, J.A., writing for the unanimous court said:

> *[56] In my view, the contest here simply comes down to choosing an interpretation of the provisions in play "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21. Here, that means recognizing that section 82(1) does not eradicate youth court convictions for the purposes of section 12 of the CEA, but before use of that record may be made, resort must be had to the restrictions, prohibitions and processes governing access to and use of those records set out in Part 6 of the YCJA. That in no way renders the opening words of section 82(1) "subject to section 12 of the Canada Evidence Act…" superfluous; it simply places certain further requirements on the exercise of that section 12 right. … And as was noted in Sheik-Qasim, one of the principles of the YCJA is that the privacy rights of young persons are protected so as to protect them from stigmatization and encourage their rehabilitation. It would be inconsistent with the language, structure, and purpose of the YCJA to find that the provisions governing use of records are completely divorced from the provisions governing access to those records. There would be no protection of a young person's privacy if an accused could use the records without restriction. It would also circumvent the procedure in section 123 which generally requires that notice be given to the young person whose records are being sought.*
>
> *[57] In my view, this interpretation properly balances the competing policy rationales at play in this case by affording an accused the opportunity to make a full answer and defence, but also providing judicial scrutiny of the use of a young person's YCJA records by a youth justice court judge who has experience with the unique circumstances of these types of cases. Simply ordering a publication ban is not sufficient, since it would undermine the principles of rehabilitation and reintegration of a young person to automatically allow a record to be used without first hearing from the affected young person and considering the factors set out by Parliament in section 123 such as whether disclosure is necessary "in the interest of the proper administration of justice." (emphasis added)*

5. Charter Section 13 – Accused's Prior Testimony

May you use an accused's prior testimony to impeach that accused?

Section 13 of the *Canadian Charter of Rights and Freedoms* states:

> *13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.*

The section has proved challenging to interpret and has given rise to several judgments from the Supreme Court.

One issue that flows from section 13 is whether prior testimony by an accused may be used in cross-examination to impeach that accused.

The Supreme Court first considered this point in *R. v. Mannion*, 1986 CanLII 31 (SCC).

The question was re-examined and *Mannion* was overruled in *R. v. Henry*, 2005 SCC 76 (CanLII).

The issue was then further clarified in *R. v. Nedelcu*, 2012 SCC 59 (CanLII).

In *Mannion*, the Crown used evidence from the accused given at his first trial to cross-examine him at his retrial. The court held that the cross-examination was improper and a violation of Charter section 13.

In *Henry*, the court overruled *Mannion* and held that section 13 only applies in situations in which the *quid pro quo* is engaged.

> *… section 13 embodies a quid pro quo: when a witness who is compelled to give evidence in a proceeding is exposed to the risk of self-incrimination, the state offers, in exchange for that witness's testimony, protection against the subsequent use of that evidence against the witness.*

Under section 13, the *quid pro quo* refers to a witness's *compelled* evidence in exchange for a guarantee that the Crown will not use that evidence against that person in another proceeding.

It concluded that the purpose of section 13 is to protect a witness from being incriminated by evidence that was compelled from them, and to protect individuals from being indirectly compelled to incriminate themselves. But if an accused voluntarily testifies, Charter section 13 has no application, and the accused may be cross-examined on previous testimony.

The two accused in *Henry* told a different story under oath at their retrial than they had at their first trial.

> *Here, the accused freely testified at their first trial and freely testified at their second trial. The compulsion, which is the source of the quid pro quo which in turn lies at the root of section 13, was missing. Accordingly, their section 13 Charter rights were not*

violated by the Crown's cross-examination. They were in no need of protection "from being indirectly compelled to incriminate themselves".

In *Nedelcu* the accused was appealing his conviction for dangerous driving causing bodily harm and impaired driving causing bodily harm. He argued that his section 13 rights against self-incrimination were breached when the Crown cross-examined him at the criminal trial using the evidence he gave under oath in an examination for discovery in a civil suit. In the civil suit brought by the deceased motorcycle passenger's family against him, the accused testified he had no memory of the events. Subsequently, at his criminal trial, he testified that his passenger was responsible for the accident.

[20] On its own, Mr. Nedelcu's "I … remember nothing" testimony from his discovery could not have been used by the Crown to prove or assist in proving one or more of the essential elements of the criminal charges he was facing — dangerous driving causing bodily harm and impaired driving causing bodily harm. I say "on its own" because in theory, if the Crown were able to prove that Mr. Nedelcu had concocted his discovery evidence with a view to deliberately misleading the court and obstructing the course of justice, that finding would constitute evidence of consciousness of guilt from which the trier of fact could, if it chose to, infer guilt.

[21] But realistically, that scenario is one with which we need not be concerned. Any attempt on the Crown's part to convert Mr. Nedelcu's "non-incriminating" evidence from the discovery into potentially "incriminating evidence" at his criminal trial would trigger the application of section 13 and the protection afforded by it. And that would be self-defeating. It would disentitle the Crown from being able to use Mr. Nedelcu's "non-incriminating" discovery evidence for impeachment purposes — the sole purpose of the exercise. In short, the Crown would know that it could not suggest in cross-examination that the prior evidence had been concocted, nor could it lead any evidence to that effect.

[22] The mere possibility that evidence, which is otherwise "non-incriminating", can be converted into "incriminating" evidence if the Crown were to take the added steps needed to make it so, is not enough to trigger the application of section 13. The use of Mr. Nedelcu's discovery evidence to test his credibility, and nothing else, could not convert his discovery evidence into incriminating evidence. The discovery evidence would retain its original characteristics and it would not become evidence from which the triers of fact could infer guilt.

[23] While it is true that Mr. Nedelcu's inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused's testimony does not create evidence for the Crown — any more than the rejection of an accused's alibi evidence does, absent a finding on independent evidence, that the alibi has been concocted. (See R. v. Hibbert, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 61-67.) As Arbour J. observed at para. 67 of Hibbert:

> *A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury.*
>
> *…*
>
> *[87] although section 13 refers to the notion of incrimination, the evidence in issue need not be incriminating at the time it is given. In light of the purpose of the section, the incriminating nature of the evidence must be evaluated only in the context of the second proceeding. For the purposes of section 13, incriminating evidence is any evidence the Crown tenders as part of its case against the accused.*

The majority in *Nedelcu* held that the cross-examination of the accused on the contradiction between the evidence on the discovery and the trial evidence was permissible because the evidence at discovery, though compelled, was not "incriminating." The majority defined "incriminating" at paragraph 9 as meaning evidence that "prove[s] or assist[s] in proving one or more of the essential elements of the offence for which the witness is being tried."

Le Bel J., in dissent, opined that having to decide if evidence was incriminating or not would lead to uncertainty. However, the majority was satisfied that trial judges would not have a difficult time deciding if evidence was incriminating in the sense that it could be used to prove guilt (para. 36).

It is important in deciding whether to undertake a cross-examination based on previous compelled evidence to be very familiar with the law.

An interesting discussion of the *Nedelcu* decision and how it works with civil proceedings can be found in the May 2019 decision of Dewar, J in *The Director of Criminal Property and Forfeiture v. Gurniak et al*, 2019 MBQB 80 (Winnipeg Centre).

The defendants in *Gurniak* did not want to be compelled to testify in the civil suit's examination for discovery until after the criminal proceedings against them were completed. They were concerned that by compelling their answers under discovery in the forfeiture civil case, the information will become available which could result in derivative evidence that might be used against them in their later criminal trial if the information was transmitted to the police or the Federal Crown. In that way, the defendants argued, they are prejudiced by the difficulty they have in identifying exactly what statements compelled in the discovery during the civil proceeding might be incriminating in a later criminal proceeding.

Dewar, J. granted a stay of the civil proceedings and said:

> *[34] I accept that the protections against self-incrimination are not perfect. The Nedelcu decision does result in potential uncertainty for an accused person. No one truly knows as to what use particular answers given at a prior proceeding will be put at a subsequent criminal trial. Answers which seem innocuous at one time may well prove useful to an astute Crown attorney during a cross-examination of an accused at trial,*

or, may illuminate more contentious facts and suggest a path to other evidence which could be adduced to discrediting an accused at a criminal trial yet to be heard.

The appeal in *Gurniak* was granted. The Court of Appeal discussed the Use Immunity and Derivative Use Immunity and the interaction of the evidence obtained in the civil trials for Criminal Property and Forfeiture matters with the principle against self-incrimination. Steel, JA stated:

> *[50] There is a difference between the doctrines of use immunity and derivative use immunity. Use immunity refers to the direct admission of evidence obtained from a compelled statement. The defendants concede that section 13 of the Charter and sections 5(1) and 5(2) of the Canada Evidence Act (the Evidence Act (Canada)), prohibit the direct admission of evidence obtained from a compelled statement in subsequent matters.*
>
> *[52] More problematic than the use immunity doctrine is the derivative use immunity doctrine. The derivative use immunity doctrine refers to incriminating evidence which is obtained independently as a result of compelled evidence and which could be used to prove the guilt of the accused in subsequent criminal proceedings. The general intention of the principle of derivative use immunity is to protect witnesses against the possibility of their evidence or testimony being used indirectly as a means of gathering incriminating derivative evidence.*

Steel, JA reviewed the case law, and concluded:

> *[57] Thus, it is clear that both the issue of derivative use immunity is for the trial judge in the subsequent proceeding to determine and the onus in the criminal proceeding would be on the defendants to establish a Charter breach on a balance of probabilities. Concerns regarding derivative use immunity are properly considered when they actually arise (i.e., in the subsequent proceeding) (see Nedelcu at para 16). In the civil forfeiture context, this means that, if the civil proceeding advances before the criminal prosecution and the Crown attempts to use derivative evidence in the criminal prosecution, it is at the criminal trial that arguments regarding derivative use immunity can be advanced (see McNair at para 23).*
>
> *[58] Moreover, the law surrounding derivative use immunity requires the existence of actual derivative evidence and an attempt to use it in a subsequent proceeding. The theoretical possibility of incriminating derivative evidence is not sufficient.*
>
> *[59] That is why it is important to remember that, in the present case, at this point, the defendants' arguments are purely hypothetical. No evidence of specific prejudice has been tendered. The defendants are not arguing about the exclusion of evidence in relation to actual derivative evidence. Rather, they are arguing on the basis of a possibility that, if the present case progresses (i.e., if it is not stayed), then an evidentiary question about derivative evidence might arise in their criminal cases.*

6. Ethical Considerations in Cross-Examination

Cross-examination may be broad in scope and vigorous, particularly when the goal is to undermine credibility. However, even within this wide ambit, certain questions or lines of questions may not be permitted because of the need to ensure respect for the administration of justice.

a) Not Unbridled Licence

The Supreme Court of Canada examined the ethical limitations on cross-examination in *R. v. Lyttle*, 2004 SCC 5 (CanLII). While the court recognized that cross-examiners must be given wide latitude, the court also cautioned that wide latitude "does not mean unbridled licence" and that counsel are "barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value."

R. v. Logiacco, 1984 CanLII 3459 (ONCA) has several examples of highly inappropriate cross-examination questions by the Crown. The Ontario Court of Appeal described the cross-examination of the accused by the Crown as frequently irrelevant, often distracting and repeatedly abusive and insulting and found that it must have belittled and demeaned the accused in the eyes of the jury.

b) Good Faith Basis for Cross-Exam Questions

Lyttle also dealt with the issue of whether it is ethical for a lawyer to suggest something in cross-examination that the lawyer cannot prove or has no intention of proving.

At issue in *Lyttle* was whether it was appropriate for defence counsel to suggest to a complainant that he had been beaten for non-payment of a drug debt and that he had falsely identified the accused as his assailant to protect the real offenders. This was the defence theory, but there was no independent evidence to support this proposition. The trial judge had restricted this line of cross-examination but the Supreme Court of Canada concluded that the questioning ought to have been allowed.

Justices Major and Fish, for the court, stated at paragraph 47 *(emphasis added):*

> *… [A] question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for reticent witnesses to concede suggested facts — in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.*

If you have a good faith basis for asking the question of the witness, you need not be able to prove the subject matter of the question independently. The court explained what it meant by a good faith basis as:

> *[48] In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.*

R. v. Mallory, 2007 ONCA 46 (CanLII) is an example of a situation where the court found that the Crown Attorney did not have a "good faith foundation" for the cross-examination. The Crown determined that an informant was too unreliable to call as a witness in its case but then cross-examined the accused on the informant's statement. The Ontario Court of Appeal found this was improper and stated (at para. 253):

> *...the authorities are clear that the Crown is not entitled to reject a witness's evidence in its own case as unreliable and then use that unreliable evidence later to cross-examine the accused. The Crown simply cannot have it both ways. If the Crown does not call a witness because that witness's statement is viewed as untruthful or unreliable, the Crown cannot later put suggestions to the accused during cross-examination on the basis of that statement.*

c) The Code of Professional Conduct

The *Code of Professional Conduct* also places limits on the scope of a defence counsel's cross-examination. If the accused has admitted to you, as defence counsel, all the factual and mental elements necessary to constitute the charged offence, the *Code Chapter 5.1 The Lawyer as Advocate* applies. Under Advocacy 5.1-1 Commentary 10 the Code states:

> *[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up*

an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

d) Cross-Examining Crown Witnesses

You, as defence counsel, may attempt to undermine the credibility of a Crown witness by questioning the character of that witness in a manner that is designed to reveal any flaws in their character. In so doing, you may cross-examine the witness's general character by exploring, within reasonable limits, all manner of past acts of alleged misconduct. Such questioning is relevant to the credibility of the witness.

See *R. v. Davidson, DeRosie and MacArthur*, 1974 CanLII 787 (ONCA) at pages 441-442, leave denied, [1974] S.C.R. viii.

R. v. Mitchell, 2008 ONCA 757 (CanLII) at paragraphs 17-19.

R. v. Boyne, 2012 SKCA 124 (CanLII) at paragraph 47, leave denied, [2013] S.C.C.A. No. 54.

You are permitted to cross-examine Crown witnesses, within reasonable limits, on the details of their criminal records. You are limited by the bounds of relevance and the discretion of the trial Judge, who must balance the probative value of such cross-examination against its prejudicial effect.

See *R. v. Miller*, 1998 CanLII 5115 (ONCA) at paragraphs 15-25.

R. v. Burgar, 2010 ABCA 318 (CanLII) at paragraph 12.

You are permitted to cross-examine Crown witnesses, within reasonable limits, as to the factual details of alleged misconduct by the witness that has not yet resulted in a criminal charge or conviction. This includes questions about the factual allegations in an outstanding indictment that has not yet come to trial and/or the factual allegations underlying a finding of guilt that led to the imposition of a conditional or absolute discharge.

See:

R. v. Gassyt and Markowitz, 1998 CanLII 5976 (ONCA) at paragraphs 34-40.

R. v. Miller, 1998 CanLII 5115 (ON CA) at paragraphs 15-25 and 9.

R. v. Titus, 1983 CanLII 49 (SCC).

R. v. Chartrand, 2002 CanLII 6331 (ONCA) at paragraphs 10-11 and also see *R. v. Cullen*, 1989 CanLII 7241 (ONCA).

Acquittal is a different matter. An acquittal is not a conviction for section 12(1) of the *Canada Evidence Act*.

Where the witness has been tried on criminal charges and acquitted, you may not question the witness as to the factual allegations underlying those not guilty verdicts by suggesting that the witness may have engaged in the alleged misconduct. *Grdic v. The Queen*, 1985 CanLII 34 (SCC) at paragraph 35 says:

> *To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of 'not proven', which is not, has never been, and should not be part of our law.*

For cross-examination purposes, the verdict of acquittal renders the person's "connection to the conduct underlying the charge" entirely innocent. See *R. v. Akins*, 2002 CanLII 44926 (ONCA).

7. Conclusion

Preparation is the key to effective cross-examination. Thoroughly investigating the facts, thinking about human nature and the logic of peoples' actions and researching the law will all assist you in developing the right questions. Becoming effective at presentation will come with practice. Remember that sarcastic, aggressive and argumentative cross-examinations are unnecessary, ineffective and unethical.

C. SENTENCING

1. Introduction

The sentencing process is a vital part of the practice of criminal law. A sentencing hearing takes place following a conviction at trial or on the acceptance of a guilty plea.

Just as with a trial, when speaking to sentence, good advocacy and preparation are necessary to ensure that counsel act in the best interest of their client, no matter whether the client is an individual or His Majesty the King.

> Defence counsel should be aware of what sentences are available, and what impact those sentences might have on their client. Both defence and Crown counsel must be aware of what law surrounds the particular offence (including any sentencing ranges), what ancillary orders may be applicable, what materials should be given to the judge in advance of the sentencing proceeding, and lastly what sentence is realistic in the circumstances. Good defence counsel will communicate with their client so that they can convey the appropriate message to the sentencing judge at the right time.

In the *Criminal Code*, Part XXIII Sentencing, sections 716 to 751 address the use of alternative measures for dealing with adults charged with an offence, the statutory purposes and principles of sentencing, the procedure at a sentencing hearing, and the various sentences available.

2. Alternative Measures (Adult)

The *Criminal Code* defines ***alternative measures*** as measures other than judicial proceedings under the *Criminal Code* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence.

Section 717(1) provides that alternative measures can be used to deal with an adult who is alleged to have committed an offence only if that disposition is not inconsistent with the protection of society and that the conditions (a) – (g) spelled out in the section are met.

Note that subsection 717(2) does not permit the use of alternative measures if the person denies involvement in the offence or wants the charges dealt with by the court.

Note as well that subsection 717(4) is clear that the use of alternative measures is not a bar to proceedings being laid against the person under the *Criminal Code*, but the court can dismiss the charge if the person has complied with the alternative measures. The court has

the discretion to dismiss the charge if, in the court's opinion, the prosecution would be unfair in the circumstances.

3. Statutory Purposes and Principles of Sentencing

There are four basic elements to the sentencing process:

1. The accused is found guilty, after a trial or by plea;
2. The facts of the offence that are relevant to the sentencing are determined by agreement or by the court after evidence is called;
3. The Crown and the defence make submissions to the court as to the appropriate sentence;
4. The court renders the sentence.

a) The Fundamental Purpose of Sentencing

The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society through the imposition of just sanctions.

A sanction is considered just when its objective is to denounce unlawful conduct and its harm to victims or the community, to deter the offender and others from committing offences, to separate the offender from society, to help rehabilitate the offender, to provide reparations for harm done to a victim or the community, or to promote a sense of responsibility in the offender and acknowledgment of the harm done to the victim or the community. Note *R v. KNDW*, 2020 MBCA 52 (CanLII) at paragraph 30.

> *[30] When determining the sentence to be imposed, judges will consider evidence concerning the victims presented during the trial (see section 724 of the Code) or by VISs (see section 722). Section 2 of the Code defines "victim" to include, for the purposes of section 722, a person who has suffered emotional harm "as the result of the commission of an offence against any other person." As stated in Friesen sections 2 and 722 of the Code recognise "that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed" (at para. 62).*

The objectives regarding sanctions are set out in section 718 (a-e) of the *Code*. The emphasis on any one of these objectives will vary with the nature of the crime, the circumstances under which it was committed and the individual who committed it.

When imposing a just sanction, the court must proceed on an individual, case-by-case basis to craft a sentence for the particular offence committed by the particular offender, harming the particular victim, in the particular community while being mindful that equally blameworthy offenders ought to receive similar punishment for similar offences in similar circumstances. The various sentencing principles guide the court.

> The fundamental principle of sentencing is that every sentence must be proportionate to the "gravity of the offence and the degree of responsibility of the offender" (s. 718.1). Proportionality is achieved when the aggravating or mitigating circumstances and the other sentencing principles as set out in subsection 718.2 are considered by the sentencing court.

Section 718.2 (a) provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. It sets out a number of circumstances that are deemed statutorily aggravating. For example, an aggravating circumstance is "evidence that the offender, in committing the offence, abused the offender's *intimate partner or a member of the victim or the offender's family.*" (See s. 718.2 (a) (ii)).

Other sentencing principles set out in section 718.2 include:

ii. the parity principle: similar sentences for similar offenders in similar circumstances committing similar offences;

iii. the totality principle: in the case of consecutive sentences, the total length of incarceration should not be unduly long or harsh;

iv. the individual deterrence principle: the first incarceration of an offender, especially a youthful offender, should be as short as possible and tailored to the individual circumstances of the offender rather than general deterrence;

v. the denunciation principle: in the case of offences against children [718.01], peace officers [718.02], certain animals [718.03], and vulnerable persons [718.04], denunciation and deterrence must be given primary consideration;

vi. the rehabilitation principle: prefer that incarceration not be the first choice if less restrictive sanctions may be appropriate in the circumstances;

vii. the reparation principle: all available sanctions other than imprisonment should be considered for all offenders with particular attention to the particular hardships and systemic discriminations facing Aboriginal persons in Canada.

The *Code* also requires that a sentencing court takes into account additional considerations related to specific victims.

Subsection 718.04 explicitly requires that the principles of denunciation and deterrence be the primary considerations for a court when sentencing an offender for offences involving the abuse of a person who is vulnerable because of personal circumstances – including a person who is vulnerable because the person is Aboriginal and female.

Denunciation is "the communication of society's condemnation of the offender's conduct" (Lamer C.J. in *R. v. Proulx,* 2000 SCC 5 (CanLII) at para. 102). It is "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values" (Lamer C.J. in *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC) at para. 81). When applicable, denunciation usually prevails over the principle of rehabilitation.

There are additional sentencing considerations concerning offences involving the abuse of an intimate partner. In the *Criminal Code*, the term intimate partner of a person includes their current or former spouse, common-law partner and dating partner.

Section 718.201 states that a court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

When sentencing an offender who used, threatened or attempted violence against an intimate partner in the commission of the indictable offence before the court, if that offender has prior convictions for offences involving violence against an intimate partner, subsection 718.3(8) permits the sentencing court to impose a term of imprisonment that is greater than the maximum penalty for the particular offence before the court, subject to limits set out in the subsection based on the original maximum term for the offence.

b) Gladue Reports and the Reparation Principle

Section 718.2(e) has been referred to as the reparation principle. *R. v. Gladue*, 1999 CanLII 679 (SCC), and *R. v. Ipeelee,* 2012 SCC 13 are the two Supreme Court of Canada cases that explain how the sentencing judge and counsel are to give effect to the application of section 718.2(e).

Section 718.2(e) has a remedial purpose which is to reduce the serious problem of the over-representation of aboriginal people in prisons by imposing a judicial duty on sentencing judges to consider all available sanctions other than imprisonment that are reasonable in the circumstances "with particular attention to the circumstances of aboriginal offenders". Sentencing judges must undertake the sentencing of aboriginal

offenders individually, but also differently because the circumstances of aboriginal people are unique.

Section 718.2(e) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue* at para. 37).

Justice LeBel said at paragraph 77 of *Ipeelee*:

> *[t]he overwhelming message emanating from the various reports and commissions on Aboriginal people's involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism.*

Gladue recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal persons that bear on the sentencing process.

In paragraph 93 of the reasons for judgment in *Gladue*, the SCC summarized the factors a judge must consider when sentencing an Aboriginal offender. These factors, often called *Gladue* factors, include the requirement that the judge must consider:

> *(a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and*
>
> *(b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of the offender's particular aboriginal heritage or connection.*

Section 718.2(e) requires judges to be informed about the circumstances of aboriginal persons and directs judges to craft sentences after considering those unique systemic and background factors that affect Aboriginal people in Canada.

Because of *Gladue*, every Aboriginal person facing sentencing before the court has the right to have their unique background and the effects of colonization considered by the court. Even if an Aboriginal person waives their *Gladue* rights at sentencing, under section 718.2(e), the judge still must take judicial notice of the effects of colonization on the circumstances of aboriginal persons. (See *R. v. Park,* 2016 MBCA 107).

Judges must take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and prepared reports, such as a pre-sentence report prepared by probation services or a private Gladue report prepared at the request of counsel. (*Gladue* at paras. 83-84).

A Gladue Report is a specialized report produced for the court that presents a holistic picture of the Aboriginal person by including detailed information about their background and the specific circumstances that brought them before the court. Each report must give details of the effects of colonization on the Aboriginal person and their family and community, sometimes going back several generations.

The report should give the judge the detailed information they need to apply the *Gladue* principles to the treatment of the Aboriginal person by the court. The judge needs to be able to answer these important questions:

- Why is this particular Aboriginal person before the court?
- What sentencing options other than jail are available to this Aboriginal person that might help them address the issues that got them into trouble with the law?
- For the Aboriginal person in jail, to what extent do the options for rehabilitation address the unique systemic and background factors?

(*Gladue Report Guide*, Legal Services Society of British Columbia, February 2022, p. 23)

A Gladue report is an indispensable sentencing tool that the Crown Attorney and the defence should provide the court at a sentencing hearing for an Aboriginal offender to assist a judge in fulfilling the duties under section 718.2(e) of the *Criminal Code*.

For more details about Gladue Reports:

- Listen to CPD Podcast with Mitch Walker, report writer, *Gladue Reports and the Healing Approach to Criminal Justice*;
- Also read online: *Gladue Report Guide*, Legal Services Society of British Columbia, February 2022.

When setting an appropriate sentence, judges must explain how they took into account the systemic and background factors that affect the lives of Aboriginal people in Canada. Simply referring to these factors isn't enough. In *Ipeelee* the Supreme Court confirmed that there doesn't have to be a direct link between the particular offence/offender and the effects of colonization and systemic racism against Aboriginal peoples; the effects must be taken into account when sentencing an Aboriginal person in Canada.

Gladue rights apply to all Aboriginal persons wherever they reside, whether on- or off-reserve; in a large city or a rural area. In defining the relevant aboriginal community to achieve an effective sentence, the term "community" must be defined broadly to include any network of support and interaction that might be available to the offender, including one in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

Ipeelee clarified that *Gladue* rights apply to all crimes under the *Criminal Code*, even very serious ones. If an Aboriginal person commits a serious crime, a sentence of incarceration may have to be imposed, but *Gladue* principles still apply when the judge is deciding the length of the jail sentence. In every case, the judge must make a decision based on the specific details of an Aboriginal person's case and impose a sentence that is appropriate for the Aboriginal person, the victim, and the community.

Gladue principles apply whenever an Aboriginal person's freedom is at risk and they have been considered by courts in Canada at bail and sentencing hearings, at appeals, parole hearings, Mental Health Review Board hearings, not-criminally-responsible hearings, dangerous and long-term offender hearings and civil contempt decisions.

In *R. v. L.L.D.G.*, 2012 MBCA 106 (CanLII), the court was critical of a pre-sentence report that was of little help when all it contained about the Aboriginal person before the court was "*a short history of the accused's home community and the general loss of culture and identity that has afflicted aboriginal communities generally*" (para. 31).

In *Ipeelee,* LeBel, J stated:

> *[87] The **sentencing** judge has a statutory duty, imposed by section 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders. Failure to apply Gladue in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the Gladue principles **is required in every case involving an Aboriginal offender, including breach of [a long-term supervision order],** and a failure to do so constitutes an error justifying appellate intervention.*
> Emphasis added.

The Court in *Ipeelee* pointed out errors with the implementation of aboriginal sentencing after *Gladue*.

It is an error to require an offender to establish a causal link between *Gladue* factors and the offence before the background factors can be considered (see paras. 81–83).

It is an error to conclude that *Gladue* principles do not apply to serious or violent offences. See *Ipeelee* paragraphs 84 – 85. *R v. Sanderson,* 2018 MBCA 63 (CanLII), applied *Ipeelee* to dangerous offender proceedings, requiring consideration of the *Gladue* factors and consideration of the protection of the public in such proceedings.

> Systemic and background factors may bear on the culpability of the offender to the extent that they shed light on their level of moral blameworthiness. Failing to take these circumstances into account violates the fundamental principle of sentencing - that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The court must take notice of systemic and background factors even where there is no apparent connection to the offender. This will not necessarily impact the sentence. See: *R v. Rennie,* 2017 MBCA 44 (CanLII) at para. 20:

> *[20] A sentencing judge cannot simply ignore the fact that an offender has an Aboriginal background, but on the other hand, she or he is not bound to find that such a background will automatically lead to a conclusion that the offender has been disadvantaged because of that background. … A sentencing judge must consider the Gladue principles when dealing with an Aboriginal offender, but there will be instances, as in the case before us, where little weight is to be attributed to those principles because of the facts surrounding the offender in question.*

> Below are excerpts from the Gladue Submission Guide and the Gladue Report Guide, February 2022 of the Legal Services Society in BC. Both are written in plain language and may be useful when explaining the reports to clients. The checklists can be adapted for counsel's use.

i. Defence Counsel

Not all judges know the history of Aboriginal peoples in Canada and how some issues affect all Aboriginal peoples. As defence counsel, in your *Gladue* submission, tell the judge how Aboriginal history may have led your client to commit the offence. Tell the judge about:

- your client's family and community history;
- the challenges, called *Gladue factors*, your client faced and still faces as an Aboriginal person in Canada; and

- what kind of restorative justice or community sentences are available to your client, how they can help your client work through the issues that brought your client before the court, and why they can help your client.

Gladue factors are events that affect Aboriginal peoples in general and affected your client, your client's family, or your client's community in particular. In your submission, be prepared to give details about the factors that shaped your client's life.

Listed below are factors that may have formed part of your client's background. To prepare your submissions, consider what information needs to be shared with the Court to provide context to your submission. The goal is to assist the Court in determining whether these factors serve to reduce moral blameworthiness and to determine an appropriate sentence. Consider how best to put forward the *Gladue factors*.

- Abuse: sexual, physical, emotional, verbal, spiritual
- Alcohol or drug abuse, including Fetal Alcohol Spectrum Disorder (FASD)
- Loss of connection to Aboriginal community (including loss of identity, culture, traditions)
- Criminal involvement (history)
- Health (mental and physical: suicidal thoughts or attempts, depression, trauma, diagnosed disorders)
- An Aboriginal community breaking apart
- The early death of family or friends because of substance abuse, violence, suicide
- Lack of employment opportunity and low income
- Family breakdown: divorce, family violence, alcohol or drug abuse
- Lack of educational opportunity
- Foster care or adoption (Aboriginal or non-Aboriginal foster or adoptive parents)
- Effects of Indian residential school, day school, Métis (or other) boarding school (including mistreatment, loss of family contact, loss of culture, substance abuse, violence, settlement payments)
- Interventions, treatment, or counselling: alcohol, drug, psychological, trauma, grief
- Loss or denial of Indian status or membership recognition
- Living situation: past, present, future
- Poverty: past and present experiences
- Quality of relationships: positive and negative relationships with family, extended family, community
- Racism: direct or indirect, in society and institutions (community, school, workplace, jail, foster care, adoption system)
- Violence or witnessing violence

ii. The Gladue Report and Report Writers

In *R. v. Lawson*, 2012 BCCA 508, the Court of Appeal said the Gladue report writer isn't an advocate and shouldn't advocate on behalf of the Aboriginal person. Reports should *"be balanced, not advance the writer's own opinions, or recommend to the court any specific sentences or options."* They should also "*provide the court with realistic restorative justice options or rehabilitative programs available."*

In *R. v. Florence*, 2015 BCCA 414 (CanLII), the court stated that:

> *although, … Gladue reports are not expert reports, they must be balanced, objective, and contain detailed and accurate information with respect to an offender's Aboriginal heritage and its impact on the offender. These reports are not immune from challenge if either the Crown or the offender has reason to believe any of those requirements have not been met. To the extent statutory authority may be necessary to compel the author of a Gladue report to appear and be examined, it can be found in section 723(4) of the Criminal Code, which provides:*
>
> > *Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.*

In *R. v. Paul*, 2014 BCCA 81, the BC Court of Appeal addressed the standard a Gladue report must meet to be helpful to the judge at sentencing. There are persons in BC who specialize in writing Gladue Reports. The court said Gladue report writers should:

- provide the court with the Aboriginal person's historical, cultural, and systemic background factors without bias, and should check against other available reports, such as a pre-sentence report (with Gladue component), forensic psychiatric report, or report/letter from a remand centre psychologist;
- address any contradictions or discrepancies between reports; and
- exercise due diligence and corroborate information as much as possible or risk undermining the report's credibility and reliability and giving the report little weight.

Gladue Report Guide on Restorative justice and community sentences.

Gladue principles encourage judges to use restorative justice when sentencing Aboriginal people. They have to consider all options other than jail. This is meant to restore balance and harmony to the community. The focus is on repairing the crime's harm and giving the Aboriginal person before the court and any victims opportunities to heal. This may lead to a sentence more appropriate and meaningful to the Aboriginal person's Aboriginal culture.

iii. Restorative Justice Principles also Apply to Youth Offenders

The judge considers the views of the Aboriginal person's community about the crime and the community's justice traditions. They may order the Aboriginal person to participate in a healing circle and other culturally appropriate programs. The person is held accountable to the community, and the community is part of the process. However, support from the community (family, friends, or others) may not mean support of the community (chief and council or the broader community).

Many Aboriginal communities have restorative justice programs available. However, sometimes even the Aboriginal community concludes that only a time of isolation or removal from the community will restore balance.

If a restorative justice program specifically related to the Aboriginal person's distinct background isn't available, there may be mainstream treatments or counselling programs to help them address the issues that got them into trouble with the law.

If the judge decides a restorative justice option (such as a treatment program or release with conditions) is more appropriate than jail, they may order a community sentence. This type of sentence allows the Aboriginal person convicted of a crime to serve all or part of their sentence in the community.

Normally they are required to report to a probation officer. The probation officer monitors their time in the community and may require them to attend various programs or counselling, and monitors their movement or other conditions. The Aboriginal person may have to go to drug or alcohol rehabilitation, anger management, or counselling. If an Aboriginal person receives a community sentence, they may get less or no time in jail.

c) Sentencing Aboriginal Offenders

In *R. v. Gladue*, 1999 CanLII 679 (SCC), the Supreme Court noted that section 718.2(e) is remedial and requires the sentencing judge to pay particular attention to the circumstances of aboriginal offenders because of the unique background and systemic factors which may have played a role in bringing the offender before the courts.

The sentencing judge's consideration will also include the types of sentencing procedures and sanctions that may be appropriate in the circumstances, because of the offender's particular aboriginal heritage or connection. At paragraphs 69 and 74 the Supreme Court observed:

> *[69] In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.*
>
> ...
>
> *[74] It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing, and sentencing circles and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions ...*

Sentencing circles are not mandated in the *Criminal Code.* There are no fixed guidelines for the conduct of a sentencing circle and the judge conducting the sentencing hearing may elect to suggest a sentencing circle in appropriate cases. If the offender is willing and there is a community willing to undertake the obligation of community support, a sentencing circle might be considered. A local band office may be willing to conduct one of these if the offender is eligible.

Re: guidelines for sentencing circles see:

R. v. Morin, 1995 CanLII 3999 (SK CA) at paragraph 8 the court referred to seven criteria to be considered

R. v. B.L., 2002 ABCA 44 (CanLII)

R. v. J.J., 2004 NLCA 81 (CanLII)

R v. McDonald, 2012 SKQB 158 (CanLII)

4. Additional Factors in Sentencing

a) Abuse of the Offender's Spouse or Child

R. v. Brown, 1992 ABCA 132 (CanLII)

R. v. Squires, 2012 NLCA 20 (CanLII)

R. v. Gardiner, 2017 MBCA 57 (CanLII)

R. v. Ganesan, 2017 NUCA 7 (CanLII)

R v. JCW, 2020 MBCA 40 (CanLII)

b) Abuse of the Offender's Intimate Partner or a Member of the Victim or Offender's Family

Other Sentencing Principles – Aggravating factor - *Criminal Code section 718.2(a)(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family.*

R. v. Mitchell, 2020 CanLII 33884 (NL PC)

R. v. Blais, 2020 CanLII 2701 (NL PC)

R v. KNDW, 2020 MBCA 52 (CanLII) at paragraph 29

c) The Attitude of Accused to the Offence

d) Breach of Trust

Other Sentencing Principles in Criminal Code section 718.2(a)(iii) - evidence that the offender, in committing the offence, abused a position of trust or authority concerning the victim.

Counsel should also be aware of section 380.1 of the *Criminal Code*, which sets out aggravating factors specific to the breach of trust offences of fraud, insider trading and making a false prospectus.

The importance of general deterrence as a sentencing principle in situations involving a breach of trust. See *R. v. Oliphant*, 1995 ABCA 492 (CanLII).

R. v. McIvor, 1996 ABCA 154 (CanLII); (but see *R. v. Penttila*, 2020 BCCA 63 (CanLII), declined to follow McIvor and found instead gambling disorder may be mitigating).

Regina v. McEachern, 1978 CanLII 2506 (ONCA)

R. v. Bunn, 2000 SCC 9 (CanLII), [2000] 1 SCR 183

R. v. Birrell, 2003 MBCA 57 (CanLII):

> *[13] Lastly, I observe that the statements in McEachern, relied on so strongly by the sentencing judge to the effect that exceptional circumstances must exist to impose a sentence other than imprisonment, should now be read in light of the more recent pronouncements of the Supreme Court of Canada relating to the discretion of a sentencing judge and the introduction of the conditional sentencing regime.*

R. v. Zaborowicz, 2014 MBPC 30 (CanLII):

> *As clearly stated in Canadian case law, in substantial thefts of this nature involving a breach of trust, the primary sentencing objectives are the denunciation of the crime and the deterrence of the accused and others from committing similar offences.*

R. v. Grant-Jury, 2020 MBPC 6 (CanLII).

e) Accused's General Good Character

In most criminal sentencing, the fact that the offender has no previous record will be mitigating. However, some Canadian courts have said that some kinds of offences are unsuited to mitigation for this reason. For example, in *R. v. Spiller*, 1969 CanLII 950 (BC CA), the offender pleaded guilty to stealing and falsifying documents which amounted to a $492,000.00 loss to her employer, a chartered bank.

On the issue of the perpetrator's general good character the court said the following:

> *Good character may be a mitigating circumstance in some kinds of crime, i.e., an isolated case of criminal negligence or an unpremeditated assault in a fit of anger. But in my opinion, this is not so where the offence is a series of acts planned and carried out over a lengthy period. The person of good character who can appreciate to the full how wrong what he is doing is, seems to me just as culpable as a person of poor character who appreciates less clearly the wrongness of his acts. As the learned Magistrate said in his report:*
>
> *"As one of the most senior female employees on the staff of the bank, she had acquired the confidence and trust of her fellow employees, and thus an opportunity to control other accounts with which she had to deal to cover her defalcations."*
>
> *She used her apparent good character to enable her to perpetrate her crime. Now, her counsel wants to use it in mitigation of penalty.*

f) Accused's Submissions

Criminal Code section 726 requires a sentencing judge to give an accused the option of speaking before imposing a sentence. The accused does not have to make a submission.

g) Age of the Accused

R. v. Rabie (1995), 174 A.R. 164 (C.A.) (not available on CanLII):

> *Given the fact that this accused is a young person never having served in custody before, and the fact of his confessions to other crimes potentially prevented other trials, witnesses and trial time, we believe a sentence of five years is a fit one under the circumstances and we decline to interfere. We therefore dismiss the appeal.*

R. v. R. (A.), 1994 CanLII 4524 (MBCA), infirmity of the accused is a factor to be considered and may warrant a reduction in the sentence. The court also noted that advanced age, although usually a mitigating factor, does not necessarily entitle an accused to a non-incarceratory sentence (paras. 34-37).

R. v. J.A.G., 2008 MBCA 55.

R. v. Anderson, 2015 MBCA 30, 315 Man. R. (2d) 301 at paragraph 31 "his youth at the time of the offence is a mitigating factor even when imposing an adult sentence".

h) Character of the Accused

R. v. Angelillo, 2006 S.C.C. 55 (CanLII): The objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court.

R. v. Kunicki, 2014 MBCA 22 (CanLII) at paragraph 47: in general, evidence of acts that have resulted neither in charges nor in convictions could properly be adduced to shed light on the offender's background and character (see para. 17). While such facts may not be used to punish the offender more severely, they may be relevant and admissible in that they relate to the sentencing objectives and principles as set out in the *Code* (see para. 30).

R v. Fehr, 2018 MBCA 131 (CanLII): Accused's rehabilitative efforts and the mental health conditions from which she was suffering were not found to be a significant consideration that would operate to detract to any significant degree from her degree of responsibility. The underlying facts of the plot to kill were particularly egregious and aggravating.

R v. Johnson, 2020 MBCA 10 (CanLII) at paragraph 13:

> *…When the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is more on the offence committed (the conduct), than on the offender (the personal circumstances of the accused). Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role. See R v. McMillan (BW), 2016 MBCA 12; and Clayton C Ruby et al, Sentencing, 9th ed (Toronto: LexisNexis, 2017) at para 1.18.*

i) Collateral Consequences of the Sentence on the Accused

R v. Pham, 2013 SCC 15: A sentencing judge may exercise their discretion to take collateral immigration consequences into account, provided that the sentence ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. The significance of collateral immigration consequences will depend on the facts of the case.

However, it remains that they are but one of the relevant factors that a sentencing judge may take into account in determining an appropriate sentence. Those consequences must not be allowed to skew the process either in favour of or against deportation. Further, it remains open to the sentencing judge to conclude that even a minimal reduction of a sentence would render it inappropriate in light of the gravity of the offence and the degree of responsibility of the offender.

R. v. Suter, 2018 SCC 34: Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to examine collateral consequences. A collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender. Collateral consequences do not need to be foreseeable, nor must they flow naturally from the conviction, sentence, or commission of the offence, but they must relate to the offence and the circumstances of the offender.

Collateral Consequences of Criminal Convictions Quick Tips and the *Canadian Bar Association's Collateral Consequences of Criminal Convictions report* offer lawyers speaking to sentence some potential implications of a finding of guilt, beyond incarceration. Each chapter ends with a list of 'Counsel Considerations'. The Quick Tips brochure summarizes those lists for easy reference – as with the report, it does not provide legal advice, but flags issues for counsel's further exploration.

j) Conduct Before the Offence

See: *Collateral Consequences of Criminal Convictions Quick Tips*:

> *R. v. Angelillo, 2006 S.C.C. 55 (CanLII); a judge should consider the circumstances of an offence that the accused has not been charged with but that could constitute evidence of the offender's character and reputation.*

k) Conduct After the Offence

Gavin v. R., 2009 QCCA 1 (CanLII) at paragraph 28, the Court of Appeal noted that:

> *The manner in which the defence is conducted is generally not relevant to sentencing and does not constitute an aggravating circumstance potentially justifying a harsher sentence than what would otherwise be appropriate, whether the situation involved threats made against witnesses for the prosecution: R. v. Sawchyn (1981), 1981 ABCA 173 (CanLII), 60 C.C.C. (2d) 200 (Alta C.A.), false testimony: R. v. Kreutziger (2005), 2005 BCCA 231 (CanLII), 196 C.C.C. (3d) 282 (B.C.C.A.); R. v. Kozy (1990), 1990 CanLII 2625 (ONCA), 58 C.C.C. (3d) 500 (Ont. C.A.) R. v. Fuller, 2005 ABCA 192, lawyer's tactics: R. v. Beauchamp, 2005 QCCA 580 (CanLII), [2005] R.J.Q. 1595 (Que. C.A.), or the filing of false documents: R. v. Zeek, 2004 BCCA 42.*

And at paragraph 29, the Court clarified that the prevailing tendency is to see lack of remorse:

> *as a neutral element in no way giving rise to a harsher sentence than what would otherwise be appropriate. Similarly, misconduct on the part of the defence does not justify imposing a harsher sentence; to do so would be to sentence the accused for an offence of which he has not been convicted.*

R v. Zaborowicz, 2014 MBPC 30 (CanLII), reviews restitution cases and the role of restitution in sentencing; here accused had to be garnished to collect.

l) Community Impact Statements

Section 722.(1) of the *Criminal Code* directs that the court shall consider any statement made by an individual on a community's behalf.

m) Consecutive or Concurrent Sentences (Multiple Convictions)

R. v. Draper, 2010 MBCA 35

It should be noted that there are instances where the court *must* impose consecutive sentences: the commission of an offence against a police officer (s. 270.03), and sexual offences against a child (s. 718.3(7)).

See the section on sentencing below for more on consecutive/concurrent sentences.

n) Crown's Submissions

R. v. Power, 1994 CanLII 126 (SCC): The Crown is charged with representing the community's interest in seeing that justice is done (at page 616).

R. v. Sinclair, 2004 MBCA 48

R. v. Geddes, 2005 MBCA 122

R. v. Nahanee, 2022 SCC 37: The public interest test adopted in *R. v. Anthony-Cook*, 2016 SCC 43, which instructs judges not to depart from a joint sentencing submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, must remain confined to joint submissions. It does not, and should not, apply to contested sentencing hearings following a guilty plea. However, if the sentencing judge presiding over a contested sentencing hearing is of a mind to impose a harsher sentence than what the Crown has proposed, they should notify the parties and give them an opportunity to make further submissions, failing which they run the risk of having the harsher sentence overturned on appeal.

o) Dangerous/Long-Term Offender

Does Part XXIV of the *Criminal Code* apply?

p) Delay by the Crown

R. v. Nesbitt, 2012 BCCA 243

q) Different Customs or Culture

R. v. Anderson, 2021 NSCA 62: Use of Impact of Race and Culture Assessments (IRCA) Reports can be a valuable resource for sentencing judges. They are conduits of information about the history of anti-Black racism and discrimination and its effects. Mining the rich seam of information in IRCAs ensures relevant systemic and background factors are integrated into crafting a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender. They can play a role in reducing reliance on incarceration for African Nova Scotian offenders. The systemic factors described in the respondent's IRCA and his experiences as an African Nova Scotian navigating racism and marginalization are not unique. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into the systemic and background factors detailed in an IRCA or otherwise raised in the sentencing of an African Nova Scotian offender.

r) Disorders/Addictions

R. v. Draper, 2010 MBCA 35 (CanLII):

> *A drug addiction is not an excuse, but it is a fact to be taken into account and weighed along with many other factors in sentencing. As indicated in R. v. Priest, 1996 CanLII 1381 (ONCA) factors that may accentuate the gravity of the crime cannot blind the judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed.*

R. v. Grant-Jury, 2020 MBPC 6: *What consideration should be given to Ms. Grant-Jury's affliction with gambling?*

R. v. Penttila, 2020 BCCA 63 (CanLII) at paragraphs 67, 68 and 71, 72:

> *[67] The medical classification of gambling disorders for diagnostic and treatment purposes has changed considerably since McDougall was decided. As noted earlier, the appellant was found by both Dr. Lopes and Dr. Morgan to meet the diagnostic criteria for Gambling Disorder/Addiction. In my view, and without having regard to any of the new material put forward by the appellant, this Court can take judicial notice of the fact that with the release of the fifth edition of the DSM in May 2013, pathological gambling was reclassified from an impulse control disorder to a non-substance addictive disorder.*
>
> *[68] The attachment of a medical label to an identified cluster of behaviours for diagnostic and treatment purposes does not, however, mean that the diagnosis will always be mitigating. But it is important for sentencing judges to consider whether an offender has a medically recognized disorder and, if so, whether that disorder caused or contributed to the commission of an offence.*
>
> *[71] To the extent that McIvor and its progeny stand for the proposition that a diagnosed gambling disorder found to have caused or contributed to the commission of an offence can never amount to a mitigating circumstance warranting the imposition of a lesser sentence, I would decline to follow this line of authority.*
>
> *[72] With respect, a more nuanced and flexible approach is required. In my view, this is the inevitable consequence of an individualized sentencing process. To measure and properly reflect the moral culpability of an offender, sentencing judges must take into account the existence of disorders that are capable of impairing judgment.*

s) Disparity of Sentence Between Co-Accused

Section 718.2(b) of the *Criminal Code* states a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

R. v. McDonnell, 1997 CanLII 389 (SCC)

R. v. T. (V. J.), 2006 MBCA 142 (CanLII)

R. v. Gladue, 1999 CanLII 679 (SCC):

> *While it is incumbent on a sentencing judge to consider the principle of parity, it cannot eclipse other relevant sentencing principles.*

R v. Rocha, 2009 MBCA 26 (CanLII) at paragraphs 60-63:

> *The principle of parity is not absolute and a disparate sentence will not violate the parity principle as long as it is warranted. As noted by the sentencing judge, the principle of parity also involves parity among the broader spectrum of similar offenders who have committed similar offences.*

t) Offences Related to a Dwelling-House - Was it Occupied?

Criminal Code section 348.1 Aggravating circumstance - home invasion

R. v. McCowan (K.J.), 2010 MBCA 45

u) Education and Intelligence

v) Exceptional Circumstances

R v. Peters, 2015 MBCA 119

R v. Tran (A), 2015 MBCA 120

R v. Racca, 2015 MBCA 121

R. v. Burnett, 2017 MBCA 122:

> *[21] The concept of "exceptional circumstances" is a common-law sentencing principle that is "nebulous and devoid of a precise definition" (Tran at paragraph 17) There has been a lack of coherent formulation of the principle historically. Sometimes it has been used to refer to the type of sentence that is to be imposed absent exceptional circumstances (e.g., imprisonment for drug trafficking—see R. v. Stevens, [1973] MJ No 7 at para 1 (CA); or for serious commercial fraud or theft involving a breach of trust—see Regina v. Grossman 1980 CanLII 2846 (ONCA), 53 CCC (2d) 143 at 145 (Ont CA)). On other occasions, it has been used to refer to the length of sentence to be imposed absent exceptional circumstances (e.g., a two-year*

sentence for break and enter of a dwelling-house—see R v. Scanlon, 1995 CanLII 16417 (MBCA), 1995 CarswellMan 332 at paras 10-13 (CA); or a three to five-year sentence for importation of one kilogram of cocaine and a six to eight-year sentence for importation of multiple kilograms of cocaine—see R v. Cunningham 1996 CanLII 1311 (ONCA), 104 CCC (3d) 542 at 546-47 (Ont CA)).

[22] Leaving aside this theoretical confusion, the practical effect of this sentencing principle is that it acts as a safety valve for the justice system in the "rare case" where the circumstances are "above and beyond the norm" ((R v. Voong, 2015 BCCA 285 at paragraph 59). While Lacasse was not a case about the exceptional-circumstances principle, the concept is easily reconcilable with the observation of Wagner J that "it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit" (at para 58).

w) Factual Circumstances of the Offence

x) Family Background

y) Family Obligations

R. v. Vien, 2009 ONCA 729

z) Financial Difficulties of the Accused

R. v. Ross (1996), 185 A.R. 224 at 227 (Prov. Ct.) (not available on CanLII)

R. v. Huszti (1999), 230 A.R. 135 at paragraph 29:

...this case graphically illustrates the desirability, indeed the obligation, for a sentencing court to make the fullest inquiry as to the personal financial circumstances and ability to pay of an accused person before imposing restitution as a condition of probation, and for the court not to impose such a condition where the probability is high, as was clearly the case here, that, because of impoverishment, the accused will be unable to meet that condition...

R. v. Schmidt, 2006 ABPC 245

R. *v. Williston*, 2015 ABPC 194

aa) First Custodial Term

R. v. Priest, 1996 CanLII 1381 (ONCA)

R. v. Hogg, 2004 MBQB 16 (CanLII) at paragraph 27:

Normally the courts would not incarcerate a young first offender unless the offence was so serious that there was no reasonable alternative. This is such an offence. However, although imprisonment is warranted, the length of a first term of incarceration should be significantly shorter than with repeat offenders or first offenders who the court finds pose a continuing danger to the public.

bb) Gang Actions and Mentality

Section 718.2(a)(iv) of the *Criminal Code*: *(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization.*

R. v. MacIntyre, 1992 ABCA 319 (CanLII), 135 A.R. 166 at 167

R. v. Kirton, 2007 MBCA 38 (CanLII)

R. v. Guimond (MJ) et al, 2016 MBCA 18: The exceptional regime in the *Code* in relation to criminal organization offences does not include shortcuts as to proof of the attributes of a criminal organization, or an accused's involvement with the criminal organization, for the purposes of sentencing. Accordingly, absent agreement, the Crown must prove the character of the criminal organization as well as the nature of an accused's involvement in the criminal organization with admissible evidence, whether from the facts and inferences to be drawn from a predicate offence, expert evidence or otherwise.

cc) General Deterrence

In *R. v. P.(B.W.); N.(B.V.)*, 2006 SCC 27 (CanLII) at paragraph 2:

General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.

dd) The Gravity of the Offence (Maximum Punishment) and Moral Blameworthiness

R. v. M. (C.A.), 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500

R. v. Proulx, 2000 SCC 5 (CanLII), [2000] 1 S.C.R. 61

In *R. v. Solowan*, 2008 SCC 62 (CanLII), [2008] 3 S.C.R. 309 at paragraph [3]:

The "worst offender, worst offence" principle invoked by the appellant in the Court of Appeal has been laid to rest. It no longer operates as a constraint on the

imposition of a maximum sentence where a maximum sentence is otherwise appropriate, bearing in mind the principles of sentencing set out in Part XXIII of the Criminal Code, R.S.C. 1985, c. C-46: R. v. Cheddesingh, [2004] 1 S.C.R. 433, 2004 SCC 16; R. v. L.M., [2008] 2 S.C.R. 163, 2008 SCC 31. Unwarranted resort to maximum sentences is adequately precluded by a proper application of those principles, notably the fundamental principle of proportionality set out in section 718.1 of the Code, and Parliament's direction in section 718.2(d) and (e) to impose the least restrictive sanction appropriate in the circumstances: see R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688.

R. v. L.M., 2008 SCC 31 (CanLII), [2008] 2 S.C.R. 163 at paragraph 18:

[18] This individualized sentencing process is part of a system in which Parliament has established a very broad range of sentences that can in some cases extend from a suspended sentence to life imprisonment. The Criminal Code provides for a maximum sentence for each offence. However, it seems that the maximum sentence is not always imposed where it could or should be, as judges are influenced by an idea or viewpoint to the effect that maximum sentences should be reserved for the worst cases involving the worst circumstances and the worst criminals. As can be seen in the case at bar, the influence of this notion is such that it sometimes leads judges to write horror stories that are always worse than the cases before them. As a result, maximum sentences become almost theoretical…

ee) Joint Submissions on Sentence

Anthony-Cook v. Her Majesty the Queen, 2016 SCC 43: Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest."

R. v. Cheema, 2019 BCCA 268 (CanLII): Joint submissions provide a degree of certainty to all concerned that the benefits underlying the agreement will be respected, which has been described as an "instrumental feature" of the criminal justice system.

R. v. McIvor, 2019 MBCA 34 (CanLII) at paragraph 40: In *R. v. Anthony-Cook*, 2016 SCC 43, Moldaver, J. concluded that the public interest test ought to be used when a judge is considering the acceptability of a joint submission.

ff) Lack of Remorse

R. v. E.S., 1997 CanLII 11513 (NB CA), where Ryan J.A. stated at paragraph 6:

> *A failure to express remorse after a plea of guilty may be taken into consideration by the sentencing judge as callous but it is not an aggravating factor. More so, if an accused is found guilty following a trial. Lack of remorse after a finding of guilt is not a factor to be considered. The conclusion of the trial judge or a jury as to the accused's guilt is an opinion based upon the evidence presented. It is not an absolute. Many persons have had their convictions reversed.*

R. v. Valentini, 1999 CanLII 1885 (ONCA):

> *In sentencing V to 15 years' imprisonment, the trial judge erred in considering the fact that he expressed no remorse as an aggravating factor. While a sincere expression of remorse can be an important mitigating factor, it should only be considered aggravating in very unusual circumstances such as where the accused's attitude toward a crime demonstrates a substantial likelihood of future dangerousness. In this case, the finding of lack of remorse appeared to rest on nothing more than the continued assertion of innocence in the face of a guilty verdict following a trial. To treat lack of remorse as an aggravating factor in those circumstances comes close to increasing the sentence because the accused exercised his right to make full answer and defence.*

R. v. Cormier, 1999 CanLII 13118 (NB CA):

> *The Court held that remorse shown by an accused can be viewed as a mitigating factor. The sentencing judge can take it into account as a facet of the accused's character. The Court of Appeal held, however, that the consideration of lack of remorse by an accused as an aggravating factor is incorrect.*

HMTQ v. Wilder et al, 2004 BCSC 644 (CanLII): *The part remorse plays in sentencing was explained by Taylor J.A. in R. v. Anderson*, 1992 CanLII 6002 (BC CA), 74 C.C.C. (3d) 523 (B.C.C.A.) at 535-536.

R. v. Kravchenko, 2020 MBCA 30 (CanLII) at paragraph 25: *The judge's classification of a lack of remorse being an aggravating factor was an error in principle (see R. v. Wishlow, 2013 MBCA 34 at para. 3; and R. v. Giesbrecht, 2019 MBCA 35 at para. 193).*

gg) Mental Condition

Regina v. Robinson, 1974 CanLII 1491 (ONCA) (1974), 19 C.C.C. (2d) 193 at 197-8

R. v. Hynes, 1991 CanLII 6851 (NL CA)

R. v. Adamo, 2013 MBQB 225 (CanLII):

> *[31] Absent public safety concerns, then, mental illness is usually a mitigating factor. Punishment and specific and general deterrence are of little use when dealing with a person who has offended, at least in part, because of mental illness.*

R. v. JED, 2018 MBCA 123 (CanLII) at paragraph 73*:*

> *First, in determining whether a mental disorder affects the moral culpability of an offender, a court should consider whether the evidence indicates that the offender's cognitive defects undermine the offender's capacity: (1) to restrain urges and impulses; (2) to appreciate that his or her acts were morally wrong; and (3) to comprehend the link between the punishment imposed by the court and the crime for which he or she has been convicted. The mental illness does not have to have caused the offender to commit the crime. It is sufficient that the mental illness contributed to the commission of the offence. Second, the magnitude of the cognitive deficits must be considered so that the degree of moral blameworthiness can be commensurate with the magnitude of those deficits. Third, public safety issues will always have to be taken into account as well.*

hh) Motive for the Offence (Good or Bad)

R. v. Clayton, 2014 ABCA 27

R. v. Sandouga, 2002 ABCA 196

ii) Offences Within a Jail

jj) If the Offender is an Organization

Criminal Code subsections 718.21 (a) – (j)

kk) Physical Condition of the Accused

R. v. R. (A.), 1994 CanLII 4524 (MBCA)

R. v. Andrews (J.W.L.), 2004 MBCA 60 (CanLII)

R. v. Corneau, 2022 BCSC 1185

ll) Place of Detention

R. v. Phillips, 2006 CanLII 26363 (MB PC) at paragraph 34:

> *… I am convinced that the only meaningful rehabilitation and reparation will take place if Ms. Phillips remains in the community. A custodial sentence would be more punitive toward Ms. Phillips than it would be to most other offenders, in that she would be incarcerated far away from her young son.*

R. v. D.L. (No. 3), 2005 ONCJ 386 (CanLII):

> *…Pre-trial custody is also considered more onerous because detention facilities ordinarily do not provide the facilities and programs available in a post-sentence facility: R. v. Rezaie (1997) 1996 CanLII 1241 (ONCA), 112 CCC 3d 97 (Ont CA). "The defendant spent his pre-trial custody time at Toronto Youth Assessment Centre (TYAC), a particularly disagreeable place of detention for youth that has now been closed following a government report into conditions there. The defendant was victimized by other inmates. It was hard time. I think that five months at TYAC for the defendant should be considered to be the equivalent of ten months at any of the more benign secure custody facilities described in evidence by Mr. Windebank.*

mm) Police Misconduct

R. v. Pigeon, 1992 CanLII 869 (BC CA), 73 CCC (3d) 337 at 343

R. v. Nasogaluak, 2010 SCC 6 (CanLII), [2010] 1 SCR 206

nn) Premeditation

R. v. Atwal, 1990 CanLII 10930 (BC CA), 57 C.C.C. (3d) 143 at 149

oo) Pre-Trial Custody Credit Absent a Good Reason Otherwise

Pre-sentence custody (*Criminal Code*, s. 719(3)) permits a court to take into account any pre-sentence custody when determining a sentence but limits the credit for pre-sentencing custody to a maximum of one day for each day spent in pre-sentencing custody.

Section 719(3.1) allows a court to increase the credit given for pre-sentence custody to a maximum of one and a half days for each day spent in custody "if the circumstances justify it." This section was amended in 2019 to remove specific limitations on enhanced credit. Prior to this amendment, the following cases addressed section 719(3.1).

In *R. v. Safarzadeh-Markhali*, 2016 SCC 14 (CanLII), the Supreme Court of Canada held that section 719(3.1) was unconstitutional in its application to offenders who have been denied bail primarily based on section 524(8) of the *Code*.

In *R. v. Summers*, 2014 SCC 26 (CanLII), [2014] 1 SCR 575 the Supreme Court of Canada held that the loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely.

However, if it appears to a sentencing judge that an offender will be denied early release, there is no reason to assign enhanced credit for the meaningless lost opportunity.

The onus is on the offender to demonstrate that he should be awarded enhanced credit based upon his pre-sentence detention.

R. v. Dyck, 2014 MBCA 51 (CanLII) at paragraph 15: "Although the issue of pre-sentence credit is discretionary, adequate reasons must be given for the decision reached."

R. v. Wells, 1988 ABCA 26 (CanLII), 85 AR 81at 82 (C.A.)). Where an accused is on parole and re-offends, the pre-sentence custody resulting from the breach is not a consideration for the sentencing court. The reasoning behind this approach is that the time now being served is for the prior offence and not the one recently committed.

pp) Prevalence of the Same Crime in the Community

R. v. Priest, 1996 CanLII 1381 (ONCA): "The principles to be applied where there appears to be an unusually high incidence of a particular crime in the community have been set down by this court. In 1978, Arnup J.A. in *R. v. Sears,* 1978 CanLII 2277 (ONCA), 39 C.C.C. (2d) 199 at p. 200, 2 C.R. (3d) S-27 (Ont. C.A.), pointed out that prevalence of a particular crime in the community can never be more than one factor to be taken into account."

R. v. R.K., 2001 CanLII 26261 (MB PC): "Vicious beating deaths remain a problem in our community".

R. v. Foianesi, 2011 MBCA 33 (CanLII): "It has long been recognized that the prevalence of a particular crime in the community, or its absence, can be a relevant sentencing factor (see *R. v. Marsden* (D.G.), 2004 MBCA 121…; *R. v. Priest* (1996), 1996 CanLII 1381 (ONCA)", … *"the frequency or prevalence of a particular offence will bring general deterrence into play when it might not otherwise have been an important consideration."*

R. v. Kotelko and Lindell, 2011 MBPC 76 (CanLII): "the type of theft staged as a robbery committed by these offenders seems uncommon in Manitoba"… "The fact that robberies such as this are rare is a further factor which diminishes the need to emphasize general deterrence."

R. v. Nguyen, 2013 ONCA 51 (CanLII) at paragraphs 3 and 4: "There was nothing wrong with the trial judge's observations about the prevalence of marijuana grow operations in his community and the need for denunciation."

R. v. Guimond, 2014 MBPC 37 (CanLII): The court described the exceptional vulnerability of taxi drivers and the prevalence of this type of crime in the community as exceptional aggravating factors warranting imposition of "a much heavier sentence".

qq) Previous Record (Young Offender and Adult)

R. v. Hastings, 1985 ABCA 20 (CanLII)

R. v. Carrier, 1996 ABCA 133 (CanLII)

R. v. Brady, 1998 ABCA 7 (CanLII)

R. v. Angelillo, 2006 SCC 55 (CanLII)

rr) Prosecutorial Misconduct

ss) Prospects of Accused's Rehabilitation

Section 718(d) of the *Criminal Code* lists rehabilitation as one of the fundamental principles of sentencing. In *R. v. Zaborowicz*, 2014 MBPC 30 (CanLII) the principle of rehabilitation was considered by the court in sentencing on a guilty plea to theft over $5000.

> *A general definition of this principle was provided in the case of Vartzokas v. Zanker, which is a Supreme Court decision from 1989. What follows is a quote from page 279 of that case:*
>
> *Rehabilitation as an object of sentencing is aimed at renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who have fallen into wrongdoing by reason of physical or mental infirmity, or a disadvantaged background. It applies equally to those who while not suffering such disadvantages nevertheless lapse into wrongdoing. The object of the court is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary objective of the criminal law, which is the protection of the community...*
>
> *The sentencing judge concluded:*
>
> *As the jail sentence in this case will be less than two years, probation will be employed in either case. Counselling is available in jail as it is in the community. I do not believe that anything the criminal system can provide Ms. Zaborowicz would be interfered with by a custodial sentence. While Ms. Zaborowicz's rehabilitation is one of the significant considerations, this sentencing, as with all sentencings, must balance all significant considerations. The Supreme Court of Canada summed this up succinctly in R. v. Lyons, a 1987 Supreme Court decision, which states at page 22:*
>
> *"In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the*

crime and the circumstances of the offender."

Having looked at the nature of the crime and the circumstances of Ms. Zaborowicz, and having asked myself whether the purpose and principles of sentencing can be met within the context of a Conditional Sentence Order, I have come to the conclusion that they cannot. In this case, the aggravating facts of this offence outweigh the mitigating factors and circumstances of the offender. This is a serious offence with significant moral blameworthiness.

tt) Provocation by the Victim

R. v. Stone, 1999 CanLII 688 (SCC), [1999] 2 SCR 290

uu) Racial Motivation

Criminal Code section 718.2(a)(i) Other Sentencing Principles; evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor.

R. v. Keshane, 2005 SKCA 18 (CanLII) at paragraph 39: The law has long recognized that racial motivation in the commission of an offence against the person adds to the seriousness of the offence and invites a firm response that is oriented toward denunciation and deterrence.

vv) Section 725 *Criminal Code*

R. v. Angelillo, 2006 SCC 55 (CanLII)

R. v. Larche, 2006 SCC 56 (CanLII), [2006] 2 SCR 762)

ww) Stale Offences

R. v. Thompson, 1989 ABCA 212 (CanLII), 50 C.C.C. (3d) 126 at 129-30 an accused who demonstrated successful rehabilitation as a result of his having “jumped bail” many years before is entitled to little consideration as mitigating factors.

R. v. S.S., 1992 ABCA 352 (CanLII), 78 C.C.C. (3d) 451 at 455; also known as *R. v. Spence*; it is the leading Alberta authority on the treatment of sentencing for “historical” offences.

R. v. R. (A.), 1994 CanLII 4524 (MBCA)

R. v. WWM, 2006 CanLII 3262 (ONCA)

R. v. Fones (D.), 2012 MBCA 110 (CanLII)

R. v. James, 2013 MBCA 14

xx) Use of Violence/Threats of Violence

R. v. MacCormack (C.J.), 2009 ONCA 72 (CanLII)

R. v. Steele (J.M.), 2013 MBCA 21 (CanLII)

yy) Victim Impact Statements

Section 722 of the *Criminal Code* directs that the court shall consider any statement of a victim.

zz) Victim Surcharge

R. v. Boudreault, 2018 SCC 58 (CanLII), [2018] 3 SCR 599 at paragraph 94:

> *I conclude that the victim surcharge scheme, although intended to achieve a valid penal purpose, violates section 12 in the case of offenders like Mr. Boudreault, Mr. Larocque, and Mr. Michael. It leaves sentencing judges with no choice. They must impose the surcharge in every case. They cannot consider the most marginalized offenders' inability to pay, the likelihood that they will face a repeated deprivation of liberty for committal hearings or the indefinite nature of the punishment. They cannot apply the fundamental principles of sentencing, seek to foster rehabilitation in appropriate cases, or adjust the sentence for Indigenous offenders. To return to the ultimate question in these appeals, the impact and effects of the surcharge, taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable. Put differently, they are cruel and unusual, and, therefore, violate section 12.*

In 2019 an amendment to the victim surcharge (s. 737 of the *Criminal Code*) was passed which allowed an offender an exemption if they could establish that it would cause undue hardship.

aaa) Vulnerability of the Victim

R. v. Hodson, 2001 ABCA 111 (CanLII) at paragraph 14 recognizes the particular vulnerability of clerks working in fast-food outlets, convenience stores and gas bars, particularly when working night shifts.

bbb) Accused on Bail, Probation or Parole at the Time of the Offence

R. v. McIvor, 2020 MBQB 117

R. v. Schuff, 2021 MBCA 54 at paragraph 7

ccc) Work Record

R. v. King, 1990 CanLII 11107 (MBCA), Huband, J.A. at paragraph 11: When the accused finished high school, he joined the workforce. He has accumulated assets sufficient to cause one to infer that he is responsible with his earnings. For the last four years, he has been steadily employed and has built a favourable work record at Boeing of Canada. He enjoys his work and his employer is pleased with his performance. Representatives of Boeing of Canada were present at the time of the sentencing hearing before Webster, P.C.J., and again in this court, in order to affirm the willingness of the employer to continue the accused's employment if he receives a sentence which can be served intermittently.

R. v. Large, [1984] O.J. No. 155 (QL) (not available on CanLII) (ONCA) was considered in *R. v. Kotelko and Lindell*, 2011 MBPC 76 (CanLII) at paragraph 202. In *Large,* the Court of Appeal overturned a suspended sentence for a robbery of a variety store but replaced it with a 90-day intermittent sentence. The first offender was 23 at the time of sentencing, had a good work record and steady employment. The offence was completely out of character for him. The Court held that the gravity of the offence and general deterrence required the imposition of a custodial term. However, given the offender's profile and mitigating circumstances, the Court held that an intermittent sentence of 90 days would be sufficient.

R. v. Harb, 2001 MBCA 180 (CanLII): The accused was convicted of dangerous driving causing bodily harm. On the appeal from a sentence of imprisonment to be served in the community subject to conditions, the court commented on the purposes for which a sentenced prisoner ought to be allowed to leave their home if subjected to house arrest.

> *[18] Permitting an offender to be absent from his or her home during a period of house arrest for purposes of employment is a sensible exception to the condition of house arrest. It promotes responsibility, affords the offender an opportunity to earn a legitimate income, permits the offender to gain work experience and obviates the undesirable hiatus in the offender's work record. The sentencing judge, if stipulating the hours of approved absence, should remember that in many cases the hours of work are chosen by the employer, not the employee. Overtime, including weekend hours, is sometimes a requirement. The judge exposes the offender to loss of employment if the hours of permitted absence are too rigidly set.*

ddd) Youthful First Offender

R. v. McCormick, 1979 CanLII 2958 (MBCA), upheld a three-month sentence for a 20-year-old offender who committed an armed robbery of a motor vehicle service station at knifepoint. "the primary consideration in determining the length the sentence for youthful first offenders is what period is needed to impress on the particular offender before the court the gravity of the offence. Such a term need not be lengthy."

R. v. Priest, 1996 CanLII 1381 (ONCA): The primary objectives in sentencing a first offender are individual deterrence and rehabilitation. Exclude "very serious offences and offences involving violence" from the principle.

R. v. Kuzniak and Woycheshen, 1989 CanLII 7319 (MBCA).

R. v. Carleton (J.K.), 2012 MBPC 54 offers a comprehensive review of the approach by courts to sentencing youthful first-time offenders.

R. v. Hansell, 2015 MBQB 109 (CanLII), par. [19] *"particularly in the case of a youthful offender, the first sentence of imprisonment should focus on the particular offender, including the requirements of individual deterrence. Its length ought not to be governed by the factor of general deterrence.* See *R. v. Vandale and Maciejewski, 1974 CanLII 1610 (ONCA)*."

5. Guilty Plea

A plea of guilty can be used as a mitigating factor. However, every accused has a constitutional right to maintain innocence and to insist on a trial. Therefore, if an accused pleads not guilty, that is not considered an aggravating factor in sentencing. An accused cannot be punished for having exercised those rights.

The primary reasons for treating a guilty plea as a mitigating factor are:

a) It is an Indication of Remorse

R. v. Scanlon (D.J.), 1995 CanLII 16417 (MBCA)

R. v. Simon, 2007 MBCA 97 (CanLII)

R. v. Reader (M.), 2008 MBCA 42 (CanLII)

R. v. D.W.E., 2011 MBQB 6 (CanLII)

R. v. Sharafi, 2014 BCCA 55 (CanLII)

R. v. Lacasse, 2015 SCC 64 at paragraphs 81 and 119: *The trial judge was also right to attach less weight to the remorse expressed by the respondent and to his guilty plea because of the lateness of that plea. A plea entered at the last minute before the trial is not deserving of as much consideration as one that was entered promptly: R. v. O.(C.), 2008 ONCA 518, 91 O.R. (3d) 528, at paragraphs 16-17; R. v. Wright, 2013 ABCA 428, 566 A.R. 192, at paragraph 12.*

b) It Relieves Witnesses and/or Victims from Testifying and Reliving the Crime

Regina v. Shanower, 1972 CanLII 1367 (ONCA), 8 C.C.C. (2d) 52

R. v. Hachey, 1998 ABPC 87 (CanLII)

R. v. C.A, 2015 NUCJ 31 (CanLII)

c) It Saves the Expense of a Trial

R. v. Spiller, 1969 CanLII 950 (BC CA):

> *I do not think that that is a principle of universal application, though it may well be appropriate to apply it in some cases, and I do not think that any significant weight should be given to the plea of guilty here: the respondent knew that she was inescapably caught.*

Regina v. Johnston and Tremayne, 1970 CanLII 281 (ONCA): "*these two men pleaded guilty and thus saved the community a great deal of expense".*

MacMillan Bloedel Ltd. v. Brown, 1994 CanLII 3254 (BC CA): McEachern, C.J.B.C at paragraphs 58-60:

> *[58] The better views, in my judgment, are those adopted by the Ontario Court of Appeal in Johnston, namely, that a plea of guilty saves the community a great deal of expense. I also think that such a plea is an honest response by an offender who admits his or her wrong and does not require the Crown to prove the case; nor does the accused pretend that the facts are different from what they are admitted to be.*
>
> *[59] There is a philosophical danger in giving a discount for a plea of guilty. That is that an accused who does not plead guilty may appear to be punished more severely for standing on constitutional rights to have the case proven beyond a reasonable doubt before an independent and impartial tribunal: Canadian Charter of Rights and Freedoms, section 11(d).*
>
> *[60] This risk can be minimized by ensuring that a proper sentence be established for the offence, and for that sentence to be reduced appropriately when a plea of guilty is entered. In this way it is made plain that the discount for pleading guilty operates in reduction from a proper sentence rather than the other way around.*

R v. Dyck, 2014 SKCA 93 (CanLII), at paragraph 39:

Factors mentioned as mitigating in the context of a charge of aggravated sexual assault include:

> *(a) The accused entered a guilty plea. The value of a guilty plea is increased when it is entered in a timely manner. For example, see: J.J.L. at paras. 66–67; Ogushing at para. 11; Neganoban at para. 2; J.B. at para. 1; A.L.R. at para. 27; Hachey at paras. 66 and 68 of the trial decision; J.R.B. at paras. 10, 13; Patey at para. 8; Schwartz at para. 38; Lemay at para. 7; Craig at para. 1; and S.(W.B.) at 551–552 and 558.*

The "discount" for a guilty plea may be markedly decreased where the prosecution's case is strong and a conviction is virtually assured. The mitigating effect of a guilty plea

may also be reduced where it is not timely or where the witnesses have already testified at the preliminary inquiry.

6. Factors Not Normally Considered

a) Previous Acquittals or Pardons and Untried Offences

R. v. J.C.L. (1987), 36 C.C.C. (3d) 32 at 42 (Nfld. C.A.)

R. v. Stringer, (1992), 69 C.C.C. (3d) 535 at 542 (Nfld. C.A.)):

> *There is also a question as to whether other criminal conduct ought to be considered by a trial judge in sentencing an accused person. Obviously, the criminal record of the convicted person is relevant. If, however, a convicted person has committed other crimes either before or after his conviction and before sentencing then these should be the subject of separate prosecutions and, if convictions result, separate sentences.... The underlying principle of sentencing is protection of society. No doubt one of the goals of imprisonment is to keep a prisoner out of circulation but that is not the main purpose of imprisonment. Imprisonment is designed primarily for general and specific deterrence and to punish the appellant for his criminal behaviour. A convicted person is being sentenced for what he did. The penitentiaries are not designed for the incarceration of people who, if released, would represent a danger to society.*

See also *Criminal Code* section 725, which permits some other offences to be taken into account.

b) Facts Justifying a More Serious Offence

R. v. Giesbrecht, 2019 MBCA 35 (CanLII):

> *[177] Subject to those cases where section 725 of the Code applies (which has no relevance to this case), a sentencing judge must consider the charge for which an accused was convicted, not some other more serious charge which the facts may support but for which he or she was not convicted (see R. v. Doerksen (1990), 1990 CanLII 10927 (MBCA), 53 CCC (3d) 509 at 519-20 (Man CA)). As Russell JA explained in R. v. Roberts, 2006 ABCA 113, leave to appeal to SCC refused, 30282 (21 June 2017) (at para. 19):*
>
> *An offender cannot be punished for unproven acts: Gardiner, supra [R. v. Gardiner 1982 CanLII 30 (SCC), [1982] 2 SCR 368]; Brown supra [R. v. Brown 1991 CanLII 73 (SCC), [1991] 2 SCR 518]; R. v. Lees 1979 CanLII 43 (SCC), [1979] 2 S.C.R. 749. Doing so would violate the presumption of innocence, the principle of proportionality, and statutory rules governing the imposition of sentence for unproven acts: Criminal Code, section 725.*

c) Character of the Victim

R. v. Oppong, 2017 ONSC 6684 (CanLII), at paragraphs 26–27 and 33:

> *[26] Mr. Haye did not provide a victim impact statement. Mr. Rodocker and Mr. Jaksa argued that I should take into account the character of Mr. Haye. Mr. Haye is himself a former gang member. He dealt drugs. He also robbed other drug dealers. It is not, Mr. Rodocker argued, the same as kidnapping and holding for ransom, say, an innocent shopkeeper.*
>
> *[27]... it is not a principle of sentencing that the low moral character of the victim is a mitigating factor;...*
>
> *[33]...the focus of the sentencing hearing should be on crafting a fit sentence for the offender. The focus should not be on the character of the victim. The character of the victim is different from the impact on the victim, which is a legitimate thing to take into account.*

d) Possible Parole

Subject to the court's power to delay parole under section 743.6:

R. v. Labuik, 1984 CanLII 3656 (MBCA), 29 Man. R. (2d) 256, [1984] M.J. No. 30:

> *To reduce a sentence to mitigate the effect of forfeiture of parole is to circumvent the provisions of s. 21(1) of the Parole Act and, in effect, lessen the sentence which the appellant was serving, albeit in the community since January 14, 1974, for the previous offences. I think this is a departure from proper principles of sentencing.*

R. v. Monias, 2018 MBQB 29 (CanLII), at paragraph 7:

> *While parole eligibility is not usually a relevant consideration in sentencing (see, for example, R. v. Labuik (1984), 1984 CanLII 3656 (MBCA), 29 Man. R. (2d) 256 (Man. C.A.)), in this case, the impact of the sentence on parole eligibility is the only way to assess the severity of the sentence.*

e) Correctional Department Rulings

f) Financial Means

Generally not considered, except in fixing the amount of a fine.

g) Fixed Policy for the Same Offence

h) Need for Treatment (Extended Sentence)

i) Possibility of Harm in Jail

j) Community Impact Statements

Note: Section 722.2.

k) Tactics at Trial by Defence Counsel or Accused

Regina v. Kozy, 1990 CanLII 2625 (ONCA), 58 C.C.C. (3d) 500 at 507 (Ont. C.A.), *R. v. McWhinnie*, 1981 CanLII 1212 (AB QB), 25 C.R. (3rd) 342 (appeal dismissed (1981), 25 C.R. (3rd) 343 (Alta. C.A.)).

7. Sentencing Hearings

Sections 720 through 729 set out the procedure for sentencing hearings, prescribe the evidence which may be received at the hearing, and contain special provisions for ensuring receipt of certain items of evidence. See *Gladue Reports* discussed earlier.

Section 11(b) of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be tried within a reasonable time. In *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631 the Supreme Court established ceilings beyond which delay would be presumed to be unreasonable under section 11(b).

Sentencing must take place expeditiously after a finding of guilt or entry of a guilty plea (s. 720).

a) Time Limit for Rendering a Verdict

Justice Doherty of the Ontario Court of Appeal in *R. v. Charley*, 2019 ONCA 726, makes a strong case for a separate presumptive ceiling for what he termed "post-verdict delay" (the time it took to sentence the offender). At paragraph 3: "*Post-verdict delay, for the purposes of applying a presumptive ceiling, should be assessed separately from pre-verdict delay and should be subject to its own presumptive ceiling at five months.*"

On September 25, 2019, the Supreme Court of Canada heard argument in *R. v. K.G.K.* (Docket No. 38532) addressing two questions:

i. Does section 11(b) apply to verdict deliberation time, namely the time taken by a trial judge to deliberate and render a decision after the evidence and closing arguments at trial have been made; and, if so

ii. Is verdict deliberation time included in the presumptive ceilings established in *Jordan*?

In *K.G.K.* the accused was charged on April 11, 2013. The trial concluded on January 21, 2016. The accused filed a delay motion on October 24, 2016 and the trial judge issued a decision convicting the accused on October 25, 2016. The trial judge took slightly over nine months to render his verdict in a relatively straightforward case of minimal to modest complexity. The Manitoba Court of Appeal decided in *R. v. KGK*, 2019 MBCA

9 (CanLII) that the Jordan framework did not apply to judicial deliberation time, with Hamilton J.A. dissenting.

The Supreme Court rendered its decision in *R. v. K.G.K.*, 2020 SCC 7 (CanLII), on March 20, 2020. In paragraphs 3 and 4 of Moldaver, J.'s decision, he answered the two questions and offered guidance for determining how to assess verdict deliberation time where the accused claims that the section 11(b) right has been infringed.

> *[3] Turning to the first of these questions, it is settled law that the protection of section 11(b) extends beyond the end of the evidence and argument at trial, up to and including the date upon which sentence is imposed (*see *R. v. Rahey*, *1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588*; *R. v. MacDougall*, *1998 CanLII 763 (SCC), [1998] 3 S.C.R. 45). It follows from this that verdict deliberation time, which necessarily precedes the imposition of sentence, is subject to s. 11(b) scrutiny. Second, for the reasons that follow, I am of the view that the ceilings in Jordan, beyond which delay is presumed to be unreasonable under s. 11(b), apply to the end of the evidence and argument at trial, and no further. They do not include verdict deliberation time.*
>
> *[4] Those conclusions give rise to a further question, namely: how should the delay attributable to verdict deliberation time be assessed in determining whether an accused's right to be tried within a reasonable time has been infringed? The answer, in my view, is that an accused's right to be tried within a reasonable time under s. 11(b) will have been infringed where the verdict deliberation time is found to have taken markedly longer than it reasonably should have in all of the circumstances. The burden on the accused is, as I will explain, a heavy one due to the operation of the presumption of judicial integrity. This presumption presupposes that trial judges are best placed to balance the various considerations that inform verdict deliberation time, and that the verdict deliberation time taken by a judge in a particular case was no longer than reasonably necessary in the circumstances.*
>
> Emphasis added.

The Court acknowledged that the nine months was a lengthy delay, but found that K.G.K. had not met his onus of establishing that his right to be tried within a reasonable time under *section 11(b)* was violated. At paragraph 5, Mr. Justice Moldaver, writing on behalf of eight of the nine-panel justices stated:

> *While this case is close to the line, I cannot say that the time taken by the trial judge to arrive at his verdict was markedly longer than it reasonably should have been in all of the circumstances. Accordingly, I would dismiss the appeal.*

Therefore, when determining if the accused's section 11(b) right to be tried within a reasonable time has been violated, the time the judge takes before delivering a verdict is included but the specific timelines established in *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631 do not apply to the time the judge takes to render a verdict. The

Jordan timelines were established to address a specific systemic problem in getting criminal matters to hearing within a reasonable time.

The question as to whether there is a time limit for delivering a verdict has not been answered as definitively as it was in *Jordan* regarding general delay, but there is an answer from the Supreme Court nonetheless. The accused must establish that the deliberations took markedly longer than they should have in all of the circumstances and the burden on the accused to establish that is a heavy one, due to the operation of the presumption of judicial integrity.

b) Submissions on Facts

Section 723(1) requires a judge to allow both counsel to make submissions on the facts before imposing any sentence whether after a trial or on a guilty plea.

> ***Submissions on facts***
> *723 (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.*

If an accused is convicted after a trial which has taken place before a judge and jury, the jury is not permitted to state the findings of fact that caused them to arrive at their verdict of guilty. The sentencing judge may draw such inferences as are reasonable from the evidence and the fact that the jury found the accused guilty of the elements of the offence.

R. v. Tempelaar, 1995 CanLII 133 (SCC),] 1 S.C.R. 760 (S.C.C.) at 760

R. v. Tuckey, Baynham and Walsh, 1985 CanLII 3509 (ONCA), 46 C.R. (3d) 97 (Ont. C.A.)

Balfour Q.H. Der, *The Jury: A Handbook of Law and Procedure* (Toronto: Butterworths, 1989) at 11.7.1)

R. v. Braun, 1995 CanLII 16075 (MBCA), applied *R. v. Brown*, 1991 CanLII 73 (SCC), [1991] 2 SCR 518:

> *... where Stevenson J., speaking for the court said:*
>
> *In its factum filed here the Crown set out the English position, again quoting Thomas from an article, "Establishing A Factual Basis for Sentencing", [1970] Crim. L.R. 80, at p. 82, where he says:*
>
> > *... the Court of Appeal has developed the principle that where the factual implication of the jury's verdict is clear, the sentencer is bound to accept it and a sentence which is excessive in the light of the facts implied in the verdict will be reduced ... This principle can only apply however where the factual implication of the jury's verdict is clear; where ... the factual implication is*

> *ambiguous, the court has held that the sentencer should not attempt to follow the logical processes of the jury, but may come to his own independent determination of the relevant facts.*
>
> *This statement reflects the correct principle, namely, that the sentencer is bound by the express and implied factual implications of the jury's verdict.*

There is simply no way of knowing which facts the jury relied upon in coming to its verdict.

R. v. Woodard, 2009 MBCA 42 (CanLII), a fit and appropriate sentence will be determined in part by the facts as found by the trier of fact. When a guilty verdict is returned by a jury, it is impossible to know exactly which facts it accepted or rejected. In such circumstances, the sentencing judge is permitted to interpret the jury's verdict (see s. 724 of the *Criminal Code*).

This interpretation will be guided by the trial judge's instruction to the jury which identified the issues the jury had to decide, by the jury's verdict and by the following two governing principles which were conveniently set out by McLachlin C.J.C. in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 (at paras. 17-18):

> *Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": R. v. Brown, 1991 CanLII 73 (SCC), [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, section 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: Brown; R. v. Braun (1995), 1995 CanLII 16075 (MBCA), 95 C.C.C. (3d) 443 (Man. C.A.).*

If an accused is convicted after a trial conducted by a judge sitting alone, the facts upon which sentence is based are the findings of fact made by the court. Although a convicted person has the right to call evidence or give evidence at the sentencing hearing, this right is limited by the nature of the issues before the court. The accused is normally not able to call evidence aimed at destroying the basis on which the finding of guilt was made. If the accused were allowed to call evidence that attacked the roots the conviction rested upon, it would tend to bring the administration of justice into disrepute.

On sentencing after a guilty plea, Crown and defence counsel are entitled to make submissions on the facts and to call any relevant evidence. A guilty plea is no more than an admission of the essential legal ingredients of the offence. Sometimes some facts are relevant to mitigate or aggravate the offence. The particular facts of the offence and offender must be established during the sentencing hearing before the sentence is pronounced. See sections 723(1) and 724(3) and *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477.

Facts can be established in one of two ways: by admissions or by calling evidence. The Crown will normally allege the relevant facts and the accused is then called upon to admit those facts on the record. Silence is not an admission of the facts alleged by the Crown.

Crown and defence normally discuss the facts to be alleged in advance of the sentencing hearing. In many cases, the Crown and defence submit agreed facts to the court. If the Crown and/or the defence have facts that one or the other side cannot admit, those would be adduced at sentencing during counsels' respective submissions to the sentencing judge. If the facts outside the other counsel's knowledge are background information, for example, counsel may simply allege them as part of their submission on sentencing.

If the facts that are relevant to the nature or length of a sentence to be imposed are disputed by the other side, evidence of the facts, (sometimes *vive voce* evidence) must be called during the sentencing hearing to assist the court in determining a sentence. Note that under section 723(3) the court may on its motion, require the production of evidence or witnesses who have personal knowledge of the matter and are compellable.

Proof of the facts is established by calling evidence under oath. However, there is some relaxation of the strict rules of evidence on a sentencing hearing. In general, hearsay evidence is admissible at sentencing proceedings – see section 723(5) and *R. v. Kunicki*, 2014 MBCA 22 (CanLII):

> *[25] I disagree with the Crown's position that, in the circumstances of this case, section 724(3) of the Code operates to compel an accused person to produce evidence of such quality as would be admissible in a trial. To be clear, however, this does not mean that in every case the sentencing judge is compelled to accept an accused's explanation provided by way of submissions of counsel. See R. v. Coss (T.A.), 2012 MBQB 272, 285 Man.R. (2d) 89. The determination as to whether to accept the hearsay evidence or not, and the weight to be placed on it, is one for the sentencing judge.*

The Crown may put in a confession without the necessity of proving voluntariness. See *Wilband v. The Queen*, 1966 CanLII 3 (SCC), [1967] SCR 14; and

R. v. McKay, 2004 MBQB 146 (CanLII) at paragraph 26*:*

> *[26] The applicability of the confession rule to sentence proceedings was addressed in the case of Wilband v. The Queen, 1966 CanLII 3 (SCC), [1967] 2 C.C.C. 6 (S.C.C.). Fauteux J., for the majority of the court, stated that the confession rule, which excludes incriminating statements not affirmatively proved to have been made voluntarily, is a rule which has been designed for proceedings where, broadly speaking, the guilt or innocence of a person charged with an offence is the matter in issue. The rule has not been established for proceedings related to the*

determination of a sentence. That dicta was again approved by the Supreme Court of Canada in Lyons v. The Queen 1987 CanLII 25 (SCC), 37 C.C.C. (3d) 1 (S.C.C.) at pp. 39-40 and Regina v. Jones 1994 CanLII 85 (SCC), 89 C.C.C. (3d) 353 (S.C.C.) at pp. 388-89.

In a sentencing hearing, the standard of proof of disputed facts is on a balance of probabilities (s. 724(3)(d)). As a general rule, the burden of proof rests on the Crown where the fact alleged is aggravating and, on the accused, where it is mitigating. Often this will not be an easy question to determine. The Crown has the burden to prove any aggravating facts or the existence of prior convictions beyond a reasonable doubt: (s. 724(3)(e)).

Disputed facts

724(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

Failure to prove a fact in dispute will result in the fact being ignored, or acceptance of the version of the facts which is more favourable to the accused (*R. v. Wellard, Schau and Kolsteren reported as R. v. Wellard*, 1982 ABCA 104 (CanLII).

The Court of Appeal will not permit either side to re-argue the facts found by the trial judge, but if the accused wants to rely on facts regarding mitigation that were not in evidence during the trial, a sentencing hearing can be held and the sentencing judge can draw inferences from the facts proven there. (*R. v. Tolera*, [1999] 1 Cr. App. R. 29 (U.K.C.A.)).

In *R. v. E.B.C.*, [2005] ABCA 61, the court held:

[8] Absent an error in principle, failure to consider relevant factors, or overemphasis on appropriate factors, we can only vary a sentence if it is demonstrably unfit: R. v. C.A.M., 1996 CanLII 230 (S.C.C.), [1996] 1 S.C.R. 500 at para. 90. [reported as R. v. M. (C.A.), 1996 CanLII 230 (SCC)].

c) Pre-Sentence Report

Section 721 provides for the preparation and filing of a pre-sentence report by a probation officer to assist the court in the sentencing process. Section 721(3) sets out what matters must be contained in a pre-sentence report, unless the court otherwise specifies, including the accused's age, level of maturity, character, criminal record, behaviour, attitude and willingness to make amends, and any matter required by the regulations.

Pre-sentence reports are now often required by the court in determining the availability of conditional sentencing options. In Manitoba the pre-sentence report will include a risk assessment completed under the Level of Service/Case management Inventory (LS/CMI) and the recommendations of Manitoba Corrections.

A copy of the report is provided to the Crown, the defence and the court. Counsel should review it carefully to determine compliance with section 721 and advise the court on any matters which contravene that provision. If there are inconsistencies or inaccuracies, counsel may subpoena the report writer along with other witnesses at the sentencing hearing. If the report contains disputed facts, evidence will be called at the hearing to allow the court to make a proper finding.

Pre-trial psychiatric assessments may be admitted at a sentencing hearing. In *R. v. Jones*, 1994 CanLII 85 (SCC), [1994] 2 SCR 229, Gonthier J. speaking for a majority of the court states:

> *Once guilt has been established, our fundamental principles of justice dictate a focus on the most appropriate sentence for the guilty party. To assume that section 7 post-trial protection should be identical to pre-trial and trial protection ignores a rather critical intervening fact: the accused has been found guilty of a crime. Having so found, the court places greater emphasis on the interests of society in developing a sentence that is appropriate to the guilty party. Evidence introduced at trial may be used in this assessment. I would argue that evidence emerging from the psychiatric evaluation should be similarly treated.*

Gladue Reports are different from pre-sentence reports. See detailed discussion about Gladue reports earlier in the material.

d) Previous Convictions and Notice of Greater Punishment

If the convicted accused facing sentencing has prior convictions that may warrant a greater punishment, section 727 requires the Crown to satisfy the court that the accused has been notified before plea that a greater punishment will be sought.

> ***Previous conviction***
> *727 (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason*

thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

Procedure

(2) Where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the offender was notified in accordance with subsection (1), ask whether the offender was previously convicted and, if the offender does not admit to any previous convictions, evidence of previous convictions may be adduced.

Where hearing ex parte

(3) Where a summary conviction court holds a trial pursuant to subsection 803(2) and convicts the offender, the court may, whether or not the offender was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the offender and, if any such conviction is proved, may impose a greater punishment by reason thereof.

Organizations

(4) lf, under section 623, the court proceeds with the trial of an organization that has not appeared and pleaded and convicts the organization, the court may, whether or not the organization was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the organization and, if any such conviction is proved, may impose a greater punishment by reason of that conviction.

Section does not apply

(5) This section does not apply to a person referred to in paragraph 745(b).

8. Sentences Available

There are various types of sentences available under the *Criminal Code*.

a) Discharge

The court may discharge the accused after a finding of guilt (s. 730). The discharge is noted on the offender's criminal record, but the effect of a discharge is that the offender is deemed "not to have been convicted." A record of the discharge is kept in the CPIC database and will appear on any printout of the offender's record until the applicable period has lapsed.

A discharge may be conditional or absolute. An absolute discharge takes effect immediately. A conditional discharge must be combined with probation and extends over a specified period. Should the conditions of probation be met, the discharge

becomes absolute after the expiry of the probationary term.

Discharges are often used for less serious offences committed by offenders who do not have prior criminal records. However, they are not limited to cases of trivial or unintentional offences.

The discharge option is only available if certain conditions are met:

- The offender is a person, not a corporation;
- The offence does not carry a minimum sentence;
- The offence does not have a maximum punishment of fourteen years or more;
- The discharge is in the best interests of the accused and not contrary to the public interest.

The courts consider several other factors in considering whether or not a discharge would be an appropriate disposition:

- The nature of the offence (the more serious the offence, the less likely a discharge will be granted);
- Prevalence of the offence;
- The motivation for committing the offence (mercantile, or something other than self-interest);
- Value of the property lost or stolen;
- A calculated or planned offence as opposed to spur of the moment;
- Whether the public should know, as a matter of record, that the accused has committed the crime.

b) Probation

In the appropriate circumstance on a finding of guilt, a court can impose probation in one of five ways:

- Suspend the passing of sentence, if no minimum punishment is prescribed by law, and direct that the offender be released on conditions prescribed in a probation order (suspended sentence with probation);
- Direct that the offender comply with a probation order in addition to a fine;
- Direct that the offender comply with a probation order in addition to a term of imprisonment not exceeding two years;
- Imprison the offender intermittently for a term not exceeding 90 days and on probation when the offender is not imprisoned; or

- Direct that the offender be discharged conditionally on conditions prescribed in a probation order.

Before making a probation order, a court will consider whether section 109 or section 110 is applicable (prohibition against possessing firearms or other restricted weapons after conviction for specified offences).

A probation order must not be for longer than three years. It must contain the following compulsory conditions:

- Keep the peace and be of good behaviour (prohibits violation of criminal, provincial and municipal legislation and requires the offender to refrain from disorderly conduct that unduly disrupts and violates public peace and good order);
- Appear before the court when required to do so;
- Notify the court or probation officer in advance of any change of name or address and promptly notify the court or probation officer of any change of employment or profession.

i. Statutory Optional Conditions: (see s. 732.1(3) of the *Criminal Code*)

- Report to a probation officer;
- Remain within the court's jurisdiction unless written permission to leave is obtained from the court or a probation officer;
- Abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order or from going to any place or geographic area specified in the order, except in accordance with any specified conditions that the court considers necessary;
- Abstain from the consumption of non-medically prescribed drugs and/or alcohol;
- Abstain from owning, possessing or carrying a weapon;
- Provide for the support or care of dependents;
- Perform up to 240 hours of community service over a period not exceeding 18 months;
- Participate consensually in a treatment program;
- Other reasonable conditions that the court considers desirable.

ii. Other Reasonable Conditions

- If a probation condition is attached as a purely or primarily punitive measure, that would be unreasonable. See *R. v. Woroby (T.W.)*, 2003 MBCA 41, 173 Man.R. (2d) 178;
- A reasonable condition will generally be linked to the offence, but not always. It may be that although not linked to the specific offence, the condition is linked to the needs of the offender. As long as there is a nexus between the offender and the offender's rehabilitation, the protection of the community and the offender's reintegration into the community, the condition could be considered reasonable. See *R. v. Traverse*, 2006 MBCA 7 and *R. v. Shoker*, 2006 SCC 44 (CanLII), [2006] 2 SCR 399;
- Pay restitution to the victim of the offence (*R. v. Siemens*, 1999 CanLII 18651 (MBCA), 26 C.R. (5th) 302). The means of the offender is not a governing factor in determining whether restitution should be directed or the value of the restitution (*R. v. Cadieux*, [2004] ABCA 98*; R. v. Griffiths*, [2005] ABCA 131*;* the Supreme Court has recognized that the offender's inability to pay should not dissuade a court from making a restitution order, particularly where the offender committed a breach of trust: see *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC)*,* [1990] 1 SCR 1005);
- Confine the accused to home for the purposes of rehabilitation, except when working or when the probation officer grants permission to be absent;
- Not live in the community where the offence was committed (however, in *R. v. Cardinal*, [1999] ABQB 323 (CanLII)*;* (1999), 242 A.R. 373, the court held that banishment was an unreasonable condition; *R. v. Fuller*, 1968 CanLII 792 (MBCA)*; R. v. Malboeuf*, 1982 CanLII 2540 (SK CA)). In *R. v. Rowe*, 2006 CanLII 32312 (ON CA) – at paragraph 5 "banishment remains the exception rather than the rule. It has been said on more than one occasion that banishment orders "should not be encouraged";
- No contact with a person under the age of 18.

If there is no term of imprisonment, the probation order commences immediately (s. 732.2(1)(a)).

Where an accused is on a conditional sentence or a conditional release, the probation order begins when the sentence expires (s. 732.2(1)).

i. Suspended Sentence Plus Probation

A sentencing court may, in appropriate cases, suspend the passing of a sentence and place an accused on probation, but may not suspend the

operation of a sentence after it has been passed. A suspended sentence may be revoked if the accused breaches probation, or is conviction of an offence while on probation, but only while the term of probation is in effect (s. 732.2(5d)).

ii. Intermittent Sentence Plus Probation

Any sentence of 90 days or less may be served intermittently (s. 732).

The court must specify the times the sentence is to be served. Normally this section is invoked to permit an accused to maintain employment while serving the sentence on days off from employment. However, an order of this type is not limited to reasons of employment (*R. v. Parisian*, 1993 CanLII 14662 (MBCA), 81 C.C.C. (3d) 351).

An intermittent sentence must be accompanied by a term of probation, which is in effect whenever the accused is not in custody. On application by the accused, the intermittent sentence can be changed to "straight custody time" (served on consecutive days instead of intermittently).

Consecutive terms of intermittent sentences where the totality of the sentences exceeds 90 days are not permitted. The authority for that principle is *R. v. Middleton*, 2009 SCC 21 (CanLII), [2009] 1 SCR 674:

> *The chaining of intermittent sentences beyond the 90-day limit established by Parliament defeats the very object of section 732(1) and disregards the correctional principles that it was meant to serve.*

The combination of an intermittent and a conditional sentence – even when their aggregate duration exceeds 90 days – is permitted (*Middleton* at para. 47).

iii. Jail Sentence Plus Probation

If a probation order is combined with imprisonment, the probationary term begins when the accused is released from jail. The effect of the order is not delayed until the expiry of the sentence (s. 732.2(1); *R. v. Nutter*, 1970 CanLII 1095 (BC CA), 7 C.C.C. (2d) 224; *R. v. Constant*, 1978 CanLII 2300 (MBCA), 40 C.C.C. (2d) 329.

c) Fines

A fine is available as a punishment for any crime. If the offence is prosecuted by way of summary conviction, the maximum fine is set out in section 787(1). There are exceptions to this maximum. Simple possession under the *Controlled Drugs and Substances Act* carries a maximum fine of $1,000 for a first offence. The maximum fine for indictable offences is unlimited.

Before imposing a fine, the court must be satisfied that the offender can pay the fine (s. 734(2)) or discharge the fine by work credit through the fine option program (s. 736)).

When the court makes an order imposing a fine, it is required to set out not only the amount but how the fine is to be paid and the deadline by which the fine or any portion of it must be paid and any other appropriate terms (s. 734.1).

An offender is in default of payment if the fine has not been paid in full by the time set out in the order (s. 734(3)). An extension of time to pay can only be granted by the court if the offender applies to change the order before the time to pay set out in the order has expired (s. 734.3).

Where an offender is fined under section 734, then, according to subsection 734(4), a term of imprisonment (determined according to s. 734(5)), shall be deemed to be imposed if the offender defaults in payment of the fine.

If an offender fails to pay a fine by the time set out in the order and has not applied for any change to the order to extend the time for payment under section 734.3 before then, that offender may face:

- a suspension or refusal to renew or issue a licence or permit under section 734.5 until the fine is paid; or
- having a judgement registered against them and civil remedies pursued to collect the outstanding fine under section 734.6; or
- being incarcerated under a committal order according to section 734.7.

For information about reducing imprisonment with part payment and the minimum accepted as part payment after committal, see section 734.8.

d) Restitution

Restitution by the offender can be ordered by the sentencing judge under the *Criminal Code* either as a condition of a probation order under section 732.1 or as a stand-alone order under section 738 or section 739.

i. As a Condition of a Probation Order

Restitution as a condition of a probation order made against an individual is authorized under section 732.1(3)(h): *(h) comply with such other reasonable conditions as the court considers desirable…for protecting society and for facilitating the offender's successful reintegration into the community.*

Restitution as a condition of a probation order made against an organization is authorized under section 732.1(3.1)(a): *(a) make restitution to a person for any loss or damage that they suffered as a result of the offence.*

If the offender fails to pay the restitution ordered as a condition of probation under section 732.1, the offender commits the offence of breach of a probation order and can be prosecuted in criminal court.

ii. As a Stand-Alone Order

A stand-alone order that an offender pay restitution to another person under section 738 may be made by the court at the court's initiative or on the application of the Crown in addition to any other measure imposed on the offender. The stand-alone order of restitution can be made against the offender whether the offender is convicted or discharged under section 730.

Under section 739 the court can also order an offender who is convicted or discharged under section 730 to pay restitution to a person acting in good faith who paid the offender for the transfer or conveyance of or loaned money to the offender on the security of any property obtained as a result of the commission of the offence, where that property has been returned to the lawful owner.

The offender's financial means or [in]ability to pay does not prevent the court from making an order under section 738 or 739 according to section 739.1.

See also *R. v. Cadieux,* 2004 ABCA 98 at paragraph 9:

> *More important, an offender's means have limited import in cases of fraud: Depriving an offender of the fruits of his or her crime continues to be one of the overarching goals of a restitution order.*

If a court makes an order of restitution under section 738 or 739, notice of the content of the order, or a copy of the order, is given to the person to whom the restitution is ordered to be paid (s. 741.1). If the offender fails to pay the restitution ordered under section 738 or 739, the order can be enforced by registering it in the civil court and enforcing it as if it were a private judgment. (See *R. v. Wuckert,* 2000 MBCA 5 (CanLII) at para. 9).

Restitution under section 738 may be made for losses occasioned as a result of the commission of the offence or the arrest or attempted arrest of the offender or as a result of the offence. See paragraphs 738(1)(a-e) for details.

Sections 738 and 739 relieve a victim of a criminal offence from having to sue the offender civilly for damages, or assists in partial recovery of some damages in advance of civil proceedings. However, it does not affect a victim's right to sue civilly (s. 741.2).

An order of restitution made by a sentencing judge against an offender is a discretionary order and is part of the punishment of the offender.

An important authority is *R. v. Siemens (K. G.)* (1999), 1999 CanLII 18651 (MBCA), where the court, starting at paragraph 8, itemizes a thorough list of factors to be considered regarding orders of restitution.

See also:

R. v. Zelensky, 1978 CanLII 8 (SCC): [A]n order for compensation should only be made with restraint and with caution.

R. v. Scherer, 1984 CanLII 3594 (ONCA): Leave to appeal to the Supreme Court of Canada refused December 17, 1984. [T]he means of the offender is a factor to be considered, but that it is not a controlling factor in every case.

R. v. Fitzgibbon, 1990 CanLII 102 (SCC): [T]he Law Society is properly entitled to be subrogated to the rights of the victim and was entitled to be named as the beneficiary of the compensation order.

R. v. Hoyt (1992), 1992 CanLII 6006 (BC CA): Where imprisonment is absolutely necessary, either because of the nature of the offence or because of the history of the offender, it cannot be avoided or replaced by a compensation order. On the other hand, where such an order is a particularly apt form of sanction, it can and should be used either to replace or to reduce what would otherwise be a fit sentence of imprisonment in all of the circumstance.

R. v. Spellacy (R.A.) (1995), 1995 CanLII 9898 (NL CA): A compensation order which would ruin the accused financially, thus impairing his chances of rehabilitation, should not be imposed.

R. v. Biegus (1999), 1999 CanLII 3815 (ONCA): A restitution order made by a sentencing court survives any bankruptcy of the accused: *Bankruptcy and Insolvency Act*. Therefore, it is there for life. It is not intended to be such a burden that it may affect the prospects for rehabilitation of the accused. That is why ability to pay is one of the factors which the court must consider.

R. v. Wuckert, 2000 MBCA 5 (CanLII): adopted a similar approach to that stipulated in Siemens.

R. v. Scott, 2003 MBCA 147 (CanLII): relied on Fitzgibbon in ruling that a restitution order could be made in favour of the Manitoba Public Insurance Corporation.

R. v. Popert, 2010 ONCA 89 (CanLII): when more than one person is involved in the commission of an offence, other considerations must be taken into account in order to ensure that imposition of a restitution order on a given offender does not "work an unfairness as between the perpetrators".

R. v. Suomu, 2018 MBPC 3 (CanLII): the complainant had suffered bodily and psychological harm as a result of being a victim of child pornography. A stand alone restitution order in the amount of $5,000 was awarded.

R. v. Winterburn, 2019 MBPC 22 (CanLII): determined that restitution would not be ordered, as the offender had no real prospects after release from imprisonment of having an income that could support a meaningful contribution to restitution.

R. v. J.A., 2019 MBQB 112 (CanLII): Section 738.1(b) of the *Criminal Code* facilitates restitution in those circumstances where there has been "bodily or psychological harm to any person as a result of the commission of the offence…by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable". The power to make a restitution order is discretionary and is to be exercised with regard to certain objectives and factors. Included in those factors is that punishment, in the form of a restitution order, should result in a corresponding reduction in other forms of punishment which might be imposed.

The rationale for these orders is that they support the principle of general deterrence.

e) Prohibitions

i. Weapons Prohibition

Criminal Code sections 109 and 110 set out the offences that can attract prohibition orders prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order. See also section 114 regarding the required surrender of prohibited items and section 115 regarding the forfeiture of items prohibited. Section 113 permits an offender who is subject to a prohibition or will be subject to a prohibition to seek to have the prohibition order lifted for the only employment open to the offender or the necessary sustenance of the offender or the offender's family.

ii. Driving Prohibition

Criminal Code section 320.24 sets out the offences that can attract a mandatory or discretionary prohibition that prohibits the offender from operating the type of conveyance in question for a period of time.

> Driving prohibitions can also be imposed under *The Highway Traffic Act* of Manitoba for various driving and motor vehicle-related offences under the *Criminal Code* (see Part VIII.1 Offences Relating to Conveyances). The suspensions and disqualifications under the provincial legislation are often the penalties that most concern the accused who faces an impaired driving sentence process. Defence counsel should thoroughly explain to the accused both the provincial prohibitions and the *Criminal Code* penalties before plea and sentence in these types of offences.

iii. Section 161 Prohibition Orders

Criminal Code section 161(1.1) sets out the offences for which a court may impose an order prohibiting the offender from:

> *(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;*
>
> *(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;*
>
> *(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;*
>
> *(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or*
>
> *(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.*

This is a discretionary order that is considered a punishment (*R. v. K.R.J.*, 2016 SCC 31). It can be imposed for any length of time up to life.

f) Conditional Sentence

A conditional sentence is an alternative to the incarceration of the offender in a prison. Such a sentence permits the offender to serve the sentence of imprisonment under supervision in the community. A conditional sentence is not available if the court imposes a sentence of imprisonment of two years or more. The pre-conditions that must be met for a conditional sentence order to be imposed have been amended since the conditional sentence order was first introduced as a sentencing option in 1996. The most recent amendments in 2022 removed many of the restrictions that had limited the use of conditional sentences order.

Conditional sentence orders cannot be "stacked" so that the total exceeds two years less a day (*R. v. Frechette*, 2001 MBCA 66 (CanLII) at para. 4).

Section 742.1 governs the imposition of conditional sentences:

> ***742.1*** *If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the*

sentence in the community, subject to the conditions imposed under section 742.3, if:

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence under any of the following provisions:
(i) section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),
(ii) section 269.1 (torture), or
(iii section 318 (advocating genocide); and

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

In *R. v. Proulx*, 2000 SCC 5 (CanLII), the Supreme Court articulated its position on conditional sentences. Although *Proulx* predated several amendments to the CSO sections, it is still the leading case on the principles the court should consider when imposing a conditional sentence. *Proulx* sets out the methodology for deliberations on whether a conditional sentence would be appropriate.

In *R. v. Wells*, 2000 SCC 10 (CanLII), the court held that the principle of restorative justice applies to all offenders, but deterrence and denunciation are still to be considered paramount in matters involving serious offences. Consideration of the gravity of the offence and the blameworthiness of the offender are still to be considered in arriving at a fit sentence (*R. v. M. (C.A.)*, 1996 CanLII 230 (S.C.C.)).

The court cannot impose a blended sentence, which combines a conditional sentence with a term of imprisonment or a suspended sentence (*R. v. Hirtle* cited as *R. v. C.G.H.,* 1999 CanLII 18449 (NS CA)). However, a conditional sentence that confines an offender to a residential treatment facility for a set period, followed by a probationary term does not constitute a blended sentence. Incarceration in a penal setting is different from a period of confinement in a treatment facility. The latter could be ordered as a condition of a conditional sentence (*R. v. Knoblauch*, 2000 SCC 58 (CanLII)).

If the offender breaches any of the conditions imposed in a conditional sentence, a hearing must be conducted to determine what should be done concerning the breach (s. 742.6). The onus of proof is on the Crown to satisfy the court on a balance of probabilities that the offender has breached a condition without any reasonable excuse. The onus to establish a reasonable excuse is on the offender.

Upon finding a breach, the court has the following options:

- take no action;
- change the optional conditions;
- order the offender into custody to serve a portion of the conditional sentence there and then release the offender back into the community for the remainder of the sentence;
- order the offender into custody to serve the entire remainder of the sentence.

The hearing concerning breached conditions must be held within 30 days of the breach or as soon thereafter as is practicable (s. 742.6(3)).

In the event of a breach, the hearing should take place in the same court that imposed the original sentence (but the original judge does not have to hear the case) (*R. v. Tomic*, 2000 ABCA 192 (CanLII).

g) Victim Surcharge

Under the mandatory language of subsection 737(1) of the *Criminal Code*, an offender who is convicted or discharged under the *Criminal Code* or the *Controlled Drugs and Substances Act* shall pay a victim surcharge in addition to any other punishment imposed. The amount of the surcharge is calculated under subsection 737(2), (30 percent of any fine imposed, or, if no fine is imposed, $100 for an offence punishable by summary conviction and $200 for an offence punishable by indictment) but the court can impose a higher amount under subsection 737(3) if the court considers it appropriate and is satisfied that the offender can pay the higher amount.

However, under subsection 737(2.1), on the application of the offender or on its own motion, the court can order that the offender shall not pay a victim surcharge or shall pay a reduced amount if it is satisfied that the victim surcharge would cause undue hardship to the offender or would be disproportionate to the gravity of the offence or the degree of responsibility of the offender. Subsection 737(2.4) requires the court to set out its reasons on the record if it makes an order under subsection 737(2.1). Undue hardship is defined in subsection 737(2.2) and specifically, undue hardship does not include the incarceration of the offender (s. 737(2.3)).

The time for payment of the surcharge is set in subsection 737(4) as either the time set by regulation or if no time has been so established, the surcharge is payable within a reasonable time after its imposition. In Manitoba, the victim surcharge is generally made due at the same time that any fine imposed as punishment is due.

h) Imprisonment in a Federal Penitentiary (Federal Time)

When an offender is sentenced to incarceration for two years or more (or whenever the aggregate of the terms imposed amount to two years or more), the offender will be incarcerated in a federal penitentiary (s. 743.1).

An offender who is subject to long-term supervision under Part XXIV Dangerous Offenders and Long term Offenders, and is sentenced for another offence during the period of the supervision shall be sentenced to imprisonment in a federal penitentiary (s. 743.1(3.1).

In Manitoba, there is no federal institution for women. The federal men's penitentiary is Stony Mountain Institution. The institutional profile on *Corrections Canada* website says:

> *Stony Mountain Institution is located in the Rural Municipality of Rockwood immediately adjacent to the community of Stony Mountain, Manitoba, approximately 24 kilometres north of Winnipeg, Manitoba. It is prominently situated on a limestone outcrop 30 metres above the surrounding prairie landscape.*
>
> *Stony Mountain Institution was commissioned in 1873 and commenced operations in January 1877. Of the five federal prisons constructed in Canada in the 19th century, Stony Mountain remains one of only two still operating. A new administration building was constructed between 1931 and 1947 and was designated a Federal Heritage Building (FHBRO) in 2002.*
>
> *In 1962, Rockwood Institution, a minimum-security facility, was established immediately adjacent to Stony Mountain Institution.*
>
> *Stony Mountain is a clustered institution, with a residential-style minimum facility, consisting of small group accommodation houses; a dome-style medium facility with direct observation cell ranges, and the range-style maximum facility with direct observation cell ranges.*
>
> *Maximum security site rated capacity: 96*
>
> *Medium security site rated capacity: 484*
>
> *Minimum security site rated capacity: 217*

i) Imprisonment in a Provincial Prison (Provincial Time)

Subsection 743.1(3) provides that a person sentenced to imprisonment for a term of two years less a day will be imprisoned in a prison or another place of confinement, other than a penitentiary, within the province in which the person is convicted unless a special prison is prescribed by law or the sentence is governed by subsections 743.1(1), 743.1(2), 743.1(3.1), 743.1(4) or 743.1(5).

Persons serving provincial time can earn a reduction of up to two-thirds of their sentence for good behaviour. In Manitoba the general practice is to release after two-

thirds of the sentence has been served, assuming the offender has good behaviour while in custody.

In Manitoba, the provincial prisons are called Correctional Centres and include (details of rated capacity and current rates are from *CTV* as of January 27, 2020):

Women's Correctional Centre - Rated capacity for 196 offenders. Currently holding 217.

The Pas Correctional Centre - Rated capacity for 110 males and four females, with a temporary holding unit for youth. Currently holding 138.

Milner Ridge Correctional Centre - Rated capacity for 524 adult males. Currently holding 442

Headingley Correctional Centre - Rated capacity for 549 adult males. Currently holding 750.

Dauphin Correctional Center (this facility has since closed).

Brandon Correctional Centre - Rated capacity for 244 adult males and eight females with a short-term holding unit for youth. Currently holding 302.

j) Concurrent, Consecutive and Global Sentences

Under Part XXIII Sentencing – Punishment Generally, section 718.3 addresses degrees of punishment (s. 718.3(1)). Subsections 718.3(4)–(7) address cumulative sentencing, which occurs when the offender is being sentenced for more than one offence at one time and when the offender is already serving one sentence when being sentenced for another offence.

Where there is a relationship between the offences committed or where they form part of one transaction, a court will normally impose concurrent sentences, meaning that the separate sentences will be served at the same time.

Where the court is sentencing the offender for more than one offence and there is no relationship between the offences committed, the court will impose consecutive sentences, meaning the sentences will be served one after the other.

Paragraph 718.2(c) provides that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

If a court imposes consecutive sentences, it will consider the totality or global effect of the sentence in relation to the offences.

Concurrent vs Consecutive Sentences and Totality

At paragraph 34 of *R. v. McIvor*, 2019 MBCA 34 (CanLII) Justice LeMaistre wrote for the majority:

> *[34] In R. v. RJ, 2017 MBCA 13 (CanLII), Mainella JA explained the proper procedure for sentencing when the accused is facing multiple counts (at para 13):*
>
> *First, the judge examines the degree of nexus between the offences, as required by section 718.3(4) of the Code, to decide whether any or all of the offences will be served concurrently or consecutively. Second, where concurrent sentences are imposed, the judge determines a fit sentence for the most serious offence and makes the other sentences lesser in length or determines a single sentence for the set of offences. Where concurrent sentences are imposed, the judge is required to ensure that the length of the sentence does not give an offender a free ride for any criminal conduct. Alternatively, if consecutive sentences are imposed, the judge determines a fit sentence for each offence. Third, in the case of consecutive sentences, the judge totals the sentences and then gives the combined sentence a last look in accordance with the totality principle to see if the combined sentence is "unduly long or harsh" because it exceeds the overall culpability of the offender (see section 718.2(c) of the Code). Fourth, where the judge determines that the combined sentence is excessive, the sentence is adjusted to the point where it is proportional to the offender's overall culpability. When a sentence is reduced to maintain the fundamental principle of proportionality, the judge must, as far as possible, ensure that the offender does not get a free ride on any criminal conduct.*

And *R. v. McIvor*, 2019 MBCA 34 (CanLII) at paragraph 94, in Justice Simonsen's dissent:

> *[94]... Where consecutive sentences are imposed, totality is to be considered at the end of the analysis, after the sentences have been set, to ensure that the total of the consecutive sentences does not exceed an offender's overall moral culpability and to prevent a crushing sentence, that is, a sentence not in keeping with the offender's record and prospects for rehabilitation (see Wozny at para 60; and R. v. Hutchings, 2012 NLCA 2 at para 84). If the judge decides that the total sentence is excessive, it must be adjusted appropriately (see Draper at para 30 [R. v. Draper, 2010 MBCA 35 (CanLII)]).*

In *R. v. Park*, 2016 MBCA 107 the court discussed the application of the totality principle in the context of sentencing an offender when they are serving another sentence. At paragraph 10:

> *The jurisprudence confirms that, in applying the totality principle, the court can and should look to the unexpired sentence still to be served by the accused (see R. v. Johnson (F), 2012 ONCA 339, 291 OAC 350), but only to the unexpired portion.*

k) Mandatory, Minimum and Life Sentences

Jail time is available as a punishment for any crime.

No punishment is a minimum punishment unless it is declared to be a minimum punishment (s. 718.3(2)). The maximum term for violence involving an intimate partner where there has been a prior conviction is set out in subsection 718.3(8).

There are only two crimes that bear a lifetime in jail as a mandatory punishment:

i. **Murder** (section 235)

ii. **High treason** (section 47)

The following offences carry minimum sentences of jail time (always double-check if the minimum sentence has been challenged in this or other jurisdictions before assuming it is mandatory):

i. **Weapons offences** (sections 99 [trafficking in] and 100 [possession for purpose of trafficking], and section 103 [importing or exporting unauthorized]);

ii. **Sexual interference** (section 151);

iii. **Invitation to sexual touching** (section 152);

iv. **Sexual exploitation** (section 153);

v. **Child pornography offences** (section 163.1);

vi. **Procuring sexual activity by parent or guardian** (section 170);

vii. **Householder permitting sexual activity** (section 171);

viii. **Making sexually explicit material available to a child** (section 171.1);

ix. **Luring a child** (section 172.1);

x. **Agreement or arrangement to commit a sexual offence against a child** (section 172.2);

xi. **Various book-making, pool-selling offences** (section 202);

xii. **Placing bets for others for consideration** (section 203);

xiii. **Criminal negligence causing death with a firearm** (section 220(a));

xiv. **Attempt murder in certain circumstances** (section 239);

xv. **Discharge firearm with intent** (section 244);

xvi. **Sexual assault (complainant under 16 years of age)** (section 271);

xvii. **Sexual assault with a firearm** (section 272) **and aggravated sexual assault with a firearm** (section 273);

xviii. **Kidnapping with a firearm** (subsections 279(1) to (1.3));

xix. **Robbery with a firearm** (section 344);

xx. **Extortion with a firearm** (section 346);

xxi. **Income tax evasion** (section 239(2) *Income Tax Act* of Canada).

The imposition of a maximum sentence will by its very nature be imposed only rarely and is only appropriate if the offence is of sufficient gravity and the offender displays sufficient blameworthiness. (*R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16).

If the offence is prosecuted by summary conviction, the maximum jail term is two years less a day (s. 787) unless otherwise stated in the punishment section for the offence.

The maximum jail term for indictable offences varies with the seriousness of the offence but will never be less than two years for an indictable offence. The maximum term is specified in the punishment section for each offence. For example, section 85 use of a firearm during the commission of an offence prescribes a sentence of not more than 14 years. This offence previously carried a minimum sentence, which was deleted in 2022.

9. Discretion in Sentencing

Parliament has explicitly vested discretion in sentencing judges. The sentencing judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*R. v. Lacasse,* 2015 SCC 64 (CanLII) at para. 39).

In *R. v. L.M.,* 2008 SCC 31 (CanLII) at paragraph 17 the court describes sentencing:

> *[17] Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process (s. 718.1 Cr. C.; R. v. Johnson, [2003] 2 S.C.R. 357, 2003 SCC 46, at para. 22; R. v. Proulx, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82). To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the Criminal Code.*

a) Broad Discretion of Sentencing Judge

Sentencing judges exercise "considerable discretion" subject only to statutory rules and appeal.

R v. M (CA), 1996 CanLII 230 (SCC) at paragraph 92:

> *It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for*

> *a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.*

It is well established that appellate courts cannot interfere with sentencing decisions lightly:

R. v. Shropshire, 1995 CanLII 47 (SCC), [1995] 4 S.C.R. 227 at paragraph 48

R. v. L.F.W., 2000 SCC 6, [2000] 1 S.C.R. 132 at paragraph 25

R. v. L.M., 2008 SCC 31, [2008] 2 S.C.R. 163 at paragraph 14

R. v. Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R. 206 at paragraph 46

R. v. Lacasse, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paragraph 39

An appellate court should only interfere with a sentence in one of two situations:

- where the sentence imposed by the sentencing judge is “demonstrably unfit”;

or

- where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence imposed.

A sentence that falls outside of a certain sentencing range is not necessarily unfit:

Lacasse, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paragraph 58

R. v. Nasogaluak, 2010 SCC 6 (CanLII), [2010] 1 SCR 206 at paragraph 44

Sentencing ranges are merely guidelines and are just “*one tool among others that are intended to aid trial judges in their work*” (*Lacasse*, at para. 69). It follows that deviation from a sentencing range does not automatically justify appellate intervention (*Lacasse* at para. 67). *R. v. Suter*, 2018 SCC 34 (CanLII), [2018] 2 SCR 496 [23].

This was confirmed by the Supreme Court of Canada again in *R. v. Friesen*, 2020 SCC 9 (CanLII), an appeal of the decision of the Manitoba Court of Appeal. The court stated that sentencing ranges and starting points for a sentence for a particular offence are guidelines, not hard and fast rules. Appellate courts cannot treat the sentencing judge’s departure from or failure to refer to ranges or starting points as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range or starting point been applied by the sentencing judge. Appellate courts cannot interpret or apply the standard of review to enforce ranges or starting points; to do so would be to usurp the role of Parliament in creating categories of offences.

It was argued in *Friesen* that starting points can fetter discretion, limit the effect of case-specific factors, and result in sentences that cluster around the starting point. Concerns were raised by counsel that the effect of starting points is an unjustified higher rate of imprisonment and the reproduction of systemic bias against Indigenous offenders. The argument was also made that although many mitigating factors are "built into" a starting point, the starting point can become in effect a minimum sentence.

The Court commented that the Alberta Court of Appeal has repeatedly defended the utility of the starting point methodology in the face of these concerns (see *R. v. Arcand,* 2010 ABCA 363 (CanLII) at paras. 130-146; and *R. v. Parranto,* 2019 ABCA 457, 98 Alta. L.R. (6th) 114, at paras. 28-38), but the Court declined to comment on the merits of those concerns.

The Court emphasized that nothing in the reasons of *Friesen* should be taken to suggest that starting points are no longer a permissible form of appellate guidance to a sentencing judge. But note that at paragraph 41 the court says:

> *While we have determined that this case does not provide an appropriate opportunity to assess the merits of these concerns, they raise an issue of importance that should be resolved in an appropriate case.*

Note however that the appellate court does set the approach to be used in sentencing (*Friesen* para. 34). In *R. v. KNDW,* 2020 MBCA 52, Chief Justice Chartier, writing for the court, stated at paragraph 2:

> *In Friesen, the Supreme Court pressed the reset button with respect to the approach to be used in sentencing for sexual offences against children and directed that these sentences should better reflect both the gravity of the offence and Parliament's intention in amending the Criminal Code (the Code) provisions with respect to these offences.*

The law requires a sentence to be fit; it does not require the sentence to be perfect (if such an outcome is possible). So long as a sentencing judge respects the principle of proportionality, based on a reasonable application of the relevant sentencing principles and objectives to the circumstances, the judge may impose a sentence that departs, upward or downward, from a judicially created sentencing range or starting point (see *R. v. McCowan (KJ),* 2010 MBCA 45 (CanLII) at para. 11; *R. v. Lacasse,* 2015 SCC 64 at paras. 57-61; and *R. v. R.J.,* 2017 MBCA 13 (CanLII) at para. 18).

Although a sentence must be tailored or individualized to the particular offence, the particular circumstances and the particular offender, there is a tariff or range of sentences for most offences. The tariff represents an average sentence with a high end of the range for bad facts and a bad offender (aggravating circumstances) and a low end of the range for less serious facts and an accused of previous good character (mitigating circumstances). Often the range for a particular offence is unarticulated

and may vary from province to province. *"…a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes"* (*R v. M (CA)*, 1996 CanLII 230 (SCC)).

Sentencing ranges and starting points are "tools" (*Lacasse* at paras. 2 and 57) that appellate courts have designed to minimize the disparity of sentences between similar offenders committing a particular offence in like circumstances (s. 718.2(b)).

These sentencing tools are, however, not rigid tariffs that fetter the discretion of a sentencing judge to impose an individualized sentence.

The law does not require a sentencing judge to find "exceptional circumstances" to justify imposing a sentence that departs downward from a judicially created starting point or sentencing range (see *R. v. Burnett*, 2017 MBCA 122 (CanLII) at para. 25).

In *R. v. Stone*, 1999 CanLII 688 (SCC) (1999) 134 C.C.C. (3d) 353 (S.C.C.) Justice Bastarache said that a clarity requirement must be read into appellate court authority (for the categorization of the offence covered by a starting point) because such guidelines would not be useful without a clear description of the category created and the logic behind the starting point appropriate to it. He also said that the same need for clarity was also required for ranges of sentences set by appellate courts.

In *R. v. McDonnell*, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948 the court observed that a provincial appellate court is free to assist lower courts by suggesting guidelines for serious offences, but those guidelines are not binding on trial courts. The appellate court should extend great deference to the trial court's decisions regarding the length of sentence, or whether consecutive or concurrent sentences should be ordered, unless the decision made by the trial court is "demonstrably unfit." The appellate court may set aside the trial court's decision if the trial court erred in principle or failed to consider or overemphasized a relevant factor.

> *That said, sentencing guidelines are just that and the overarching consideration in sentencing an offender is to ensure that the sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender," said the majority in R. v. Siwicki, 2019 MBCA 104 (CanLII) leave to appeal to Supreme Court of Canada dismissed 2020 CanLII 25167 (SCC).*

b) "Exceptional Circumstances"

In *R. v. Burnett*, 2017 MBCA 122 (CanLII), the Manitoba Court of Appeal confirmed that the application of exceptional circumstances to affect a sentence would only apply in rare cases.

The notion of exceptional circumstances is somewhat nebulous, but the court commented at paragraph 22:

> *…the practical effect of this sentencing principle is that it acts as a safety valve for the justice system in the "rare case" where the circumstances are "above and beyond the norm" (R. v. Voong, 2015 BCCA 285 (CanLII) at para. 59). While Lacasse was not a case about the exceptional-circumstances principle, the concept is easily reconcilable with the observation of Wagner J that "it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit" (at para. 58).*

Sentencing judges must not "conflate 'sympathetic circumstances' with 'exceptional circumstances'" in imposing sentence (*Burnett* at paras. 27-33).

A finding relating to exceptional circumstances is entitled to "great deference" on appeal (*Burnett* at para. 31). However, "the limited and rare role exceptional circumstances should play in day-to-day sentencing in the courts of this province, even for a sympathetic accused" (at para. 41) is important to remember.

c) Re-Incarceration and the Imposition of a Fit Sentence

In *R. v. Burnett,* the court addressed the question: should the accused be re-incarcerated despite already having served his custodial sentence? The court concluded that gives rise to a perception of unfairness, is a hardship and may risk the long term security of the community if any of the positive steps the offender may have taken toward rehabilitation are lost (para. 38).

However, the court also noted that in the case of serious offences where denunciation and deterrence are the primary considerations, re-incarceration might be necessary. The court adopted the observations of the Ontario Court of Appeal in *R. v. Smickle*, 2014 ONCA 49 (CanLII), and referred to the following cases:

R v. GGS, 2016 MBCA 109 (CanLII)

R v. McMillan, 2016 MBCA 12 (CanLII) at paragraph 36

R v. Norton, 2016 MBCA 79 (CanLII) at paragraphs 58-64

R v. Anderson, 2017 MBCA 31 (CanLII) at paragraph 32

R v. Okemow cited as R v. J.M.O. 2017 MBCA 59 (CanLII) at paragraphs 141-42

At the end of the day, the exercise of discretion as to whether re-incarceration will serve the ends of justice is a contextual and fact-driven analysis applied to the individual situation.

10. Pardons and Remissions (Section 748)

His Majesty can extend the "royal mercy" to any person sentenced to imprisonment under a federal enactment (s. 748(1)). The Governor in Council can grant a free or a conditional pardon to any person convicted of a criminal offence (s. 748(2)). If a free pardon is granted by the

Governor in Council, the person is deemed to have never committed the offence (s. 748(3)). A pardon cannot be used to mitigate or prevent punishment on a subsequent conviction for an offence other than the pardoned offence (s. 748(4)).

Although the term pardon still appears in the *Criminal Code*, in March 2012, the *Safe Streets and Communities Act* amended the *Criminal Records Act,* to substitute the term "record suspension" for the term "pardon", which term was repealed. The amendments extended the ineligibility periods for applications for a record suspension and made certain offences ineligible for a record suspension.

The waiting period for a record suspension is 5 years for all summary conviction offences and 10 years for all indictable offences (*Criminal Records Act*, s. 4).

Individuals convicted of sexual offences against minors (with certain exceptions) and those who have been convicted of more than three indictable offences, each with a sentence of two or more years, are ineligible for a record suspension (*Criminal Records Act*, s. 4).

Under *Criminal Records Act* section 2.1(1) the Parole Board of Canada (the Board) has exclusive jurisdiction and absolute discretion to order, refuse to order or revoke a record suspension.

Applications may be made to the Board for a record suspension under the *Criminal Records Act*. The record suspension applies to offences under federal statutes or regulations.

The effect of the record suspension is that the offender's criminal record is removed from an accessible filing cabinet to a sealed filing cabinet.

Under section 7 of the *Criminal Records Act*, the record suspension may be revoked by the Board:

> *(a) if the person to whom it relates is subsequently convicted of an offence referred to in paragraph 4(1)(b), other than an offence referred to in subparagraph 7.2(a)(ii);*
>
> *(b) on evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct; or*
>
> *(c) on evidence establishing to the satisfaction of the Board that the person to whom it relates knowingly made a false or deceptive statement in relation to the application for the record suspension, or knowingly concealed some material particular in relation to that application.*

Under section 7.2 of the *Criminal Records Act*, a record suspension ceases to have effect if:

> *(a) the person to whom it relates is subsequently convicted of*
>
> *(i) an offence referred to in paragraph 4(1)(a), or*
>
> *(ii) an offence under the Criminal Code other than an offence under subsection 320.14(1) [impaired driving] or 320.15(1) [a refusal to comply with a demand] of that Act — or under the Cannabis Act, the Controlled Drugs and Substances Act, the Firearms Act, Part III or IV of the Food and Drugs Act or the*

Narcotic Control Act, chapter N-1 of the Revised Statutes of Canada, 1985 — that is punishable either on conviction on indictment or on summary conviction; or

(b) the Board is convinced by new information that the person was not eligible for the record suspension when it was ordered.

The fact that the person has been pardoned or had their record suspended may not be accepted by other countries. The pardon/record suspension does not erase the conviction from the person's criminal record. In many cases, the United States and other countries will not acknowledge pardons or record suspensions on drug convictions, even if the offence occurred many years before the application to travel in the U.S. If a person seeks a record suspension for travel purposes, contact the authorities in the destination country to determine if the suspension will be recognized.

D. CHECKLIST FOR DEFENCE COUNSEL - PREPARATION OF SUBMISSIONS TO SENTENCE

1. The Offender

1) What is the offender's background – age, education, relationship status, children, ethnic background, employment record, community ties etc.?

2) Are there systemic or other reasons in the offender's background that have contributed to the commission of this crime?

3) What health or social problems does the offender face at the present – for example, alcoholism or drug addiction/dependency, illiteracy, homelessness, poverty, mental illness?

4) What is the offender's attitude to the offence?

5) What is the offender's past contact with the criminal justice system?

6) What are the consequences to the offender of a conviction – loss of a job, loss of home, deportation, etc.?

7) Has there been any pre-sentence custody time served by the offender?

8) What steps have been taken by the offender since being charged?

To prepare for the submission, defence counsel should consider obtaining letters of reference from members of the community, a certificate or letter confirming the offender's completion of any relevant program, a Gladue report, a pre-sentence report or any other documentation or objective evidence that supports any mitigation or rehabilitation submissions to be made on behalf of the offender. While a purely oral submission is permitted, relevant documentary support is generally well-received.

2. The Offence

1) Was the offence planned or was it committed on the spur of the moment? Was it a single act or part of a continuing enterprise?

2) What were the consequences of the crime and were these consequences intended or foreseeable?

3) Did the offence involve a breach of trust? Was the victim a member of a particularly vulnerable class?

4) What was the offender's role in the offence?

5) Did the offence involve weapons or violence?

6) What was the monetary loss?

7) What was the offender's motivation for committing the offence?

8) Was there any evidence that the offence was committed for the benefit of, at the direction of, or in association with a criminal organization (s. 718.2(a)(iv))?

3. Protection of the Public and Deterrence

1) Does the offender's record or the facts of the case indicate a need to remove the offender from society for an extended period?

2) Is this the type of offence where general deterrence is a legitimate consideration (for example, impaired driving)?

3) Is this the type of offence that raises legitimate fear in the community?

4. Rehabilitation and Restorative Justice

1) Is there a gap in the record indicating that the offender can live in the community without violating the law?

2) Is the offender prepared to address lifestyle issues such as alcohol or drug addiction?

3) Does the offender have supports in the community?

4) What is the attitude of the community to the offence?

5) What resources are available that can be brought to bear to address the issues faced by the offender?

6) What is the position of the victim?

E. RIGHTS OF APPEAL

1. Indictable Appeals

Summary conviction appeals are dealt with in Part XXVII of the *Criminal Code* and are discussed below under section 2.

Appeals to the Court of Appeal in indictable matters are governed by Part XXI of the *Criminal Code*.

The most common appeals are of sentence and conviction decisions. There are other rights of appeal found in other parts of the *Criminal Code*. For example, section 784 provides an appeal from a decision granting or refusing relief by way of an extraordinary remedy. Section 759 governs appeals of decisions concerning dangerous offenders and long term offenders.

In addition to the *Criminal Code* provisions, be aware of the rules of the court which are passed under section 482 of the *Criminal Code.*

a) The Notice of Appeal

The Manitoba Court of Appeal prescribes the form of the Notice of Appeal, the time for service and the filing and manner of service according to section 678 of the *Criminal Code*. The rules are set out in the *Manitoba Criminal Appeal Rules* (Criminal Appeal Rules).

The term "initiating document" in the rules means the first document filed to commence an appeal process and includes a Notice of Appeal and a notice of application for leave to appeal.

Rule 3(1) of the Criminal Appeal Rules provides that Form 1 is the initiating document for an appeal by an accused and it lists the information that must be included.

Rule 3(1.1) of the Criminal Appeal Rules provides that an initiating document for a Crown appeal shall be in Form 2 in the case of an appeal from an acquittal, and Form 3 in the case of an appeal from a sentence. It lists the information that must be included in each case.

Rule 4.1(1) of the Criminal Appeal Rules provides that where leave to appeal is required on an indictable offence, leave may be sought on motion before a judge in chambers; or from the court in conjunction with the hearing of the appeal on its merits.

The Notice of Appeal must be filed within 30 days after the sentence (Rules 5.1 and 6.1) and the motion for leave should be filed at the same time and can be argued with the hearing of the appeal on its merits.

The accused's Notice of Appeal must be in Form 1. The Crown Notice of Appeal shall be in Form 2 in the case of an appeal from acquittal and in Form 3 in the case of an appeal from sentence. These are found in the schedule to the rules and are included in the precedents to this chapter.

Rule 4.1(2) of the Criminal Appeal Rules provides that where an appeal is from a decision of a summary conviction appeal court, (usually the King's Bench court), a motion for leave to appeal shall be filed no later than 30 days after the date of sentence or acquittal before a judge in chambers, and the Notice of Appeal must be filed within 7 days after the leave is granted (Rule 4(2)).

Rule 4 (2) of the Criminal Appeal Rules provides that if an application is made for leave to appeal from the summary conviction appeal court, a separate Notice of Appeal shall be filed within 7 days after the order granting leave to appeal is made.

Otherwise, the Notice of Appeal may be included in the same document when an application is made for leave to appeal, and no further separate Notice of Appeal is necessary if the application for leave is granted (Rule 4(1) of the Criminal Appeal Rules).

Rules 5(1) and 6(1) of the Criminal Appeal Rules prescribe that if the accused or the Crown is appealing the conviction and/or sentence, the Notice of Appeal must be filed in quadruplicate no later than 30 days after the date of sentence.

At the time of filing the initiating document, the appellant must confirm that a transcript has been ordered or explain why that has not been done and request an extension (Rule 11).

> Under Rules 11 and 26 of the Criminal Appeal Rules, the registrar has the power to deem that the appeal has been abandoned if the strict requirements regarding ordering and filing the transcript have not been met.

Section 678(2) of the *Criminal Code* provides that the Court of Appeal has jurisdiction to extend the time within which the Notice of Appeal must be filed. If a Notice of Appeal is not filed on time it is necessary to file a notice of motion with a supporting affidavit asking the court to extend the time for filing the appeal. Do not assume that the Court of Appeal will extend the time.

The leading case in Manitoba is *R. v. D.B.R.*, 2005 MBCA 21 (CanLII) where Hamilton, J.A. sets out the necessary criteria to be met by the party seeking the order to extend the time for filing an appeal. The principles to be applied in determining whether the time for filing a sentence appeal ought to be extended were reviewed and set out in *R. v. Giesbrecht (E.H.)*, 2007 MBCA 112 (CanLII), reproduced below:

[11] Much has been written on this subject. The leading Manitoba cases are R. v. Mohammed (1989), 1989 CanLII 7168 (MBCA), 61 Man.R. (2d) 192 (C.A.), and R. v. D.B.R., 2005 MBCA 21. As noted by Hamilton J.A. in D.B.R. (at para. 6):

An order to extend time is a discretionary order, with the overriding objective that justice be done in the circumstances. The criteria that are normally considered on such an application are:

1. *there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;*
2. *there is a reasonable explanation for the delay; and*
3. *there are arguable grounds of appeal.*

Hamilton J.A. went on to describe this last criterion as "a low threshold"; one which "is meant to ensure that the appeal is not frivolous" (at para. 7).

...

[13] ...in Mohammed Twaddle J.A. affirmed that "An extension of time is not to be granted automatically. There is a burden on the applicant for relief to show cause why he should receive it" (at para. 23).

[14] Similar factors were applied by the Supreme Court in R. v. Roberge, 2005 SCC 48, [2005] 2 S.C.R. 469, when considering the principles to be applied on an application to extend the time to appeal to that court. Sopinka J., writing for the court, noted that while the court has traditionally "adopted a generous approach in granting extensions of time," there were guidelines (one being whether there was a proper explanation for the delay), but (at para. 6):

> *The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.*

[15] Nevertheless, a review of the numerous authorities concerning the factors to be addressed on an application to extend time for an appeal confirms that whether a proper explanation for the delay has been presented is often of critical importance to the success or failure of the application. As Hill J. commented in R. v. Bhandal, 2005 CanLII 16604 (ON SC), [2005] O.T.C. 423 (S.C.J.) (at para. 12):

> *A bona fide intention to appeal within the prescribed appeal period "is not, by itself, dispositive" of the application to extend time. R. v. Stapledon, 2000 CanLII 46916 (NB CA), [2000] N.B.J. No. 74 (QL) (C.A.), at para. 5. The appropriate confidence, however, in an intention to appeal within the 30-day period may be somewhat shaken by the inadequacy of the explanation for the delay.*

[16] In the excellent summary on the factors to be considered by Mr. Justice E. G. Ewaschuk, Criminal Pleadings & Practice in Canada, looseleaf, 2nd ed. (Aurora: Canada Law Book, 2007), he notes (at para. 23:3080):

> *Generally, an extension of time will not be granted where: (a) there was "no intention" established to "appeal within the prescribed time", and (b) the "delay has not been adequately explained".*
>
> *R. v. Thomas, 1990 CanLII 141 (SCC), [1990] 1 S.C.R. 713*
>
> *…*
>
> *[22] In R. v. McAvoy, 2005 BCCA 325, 213 B.C.A.C. 218, the British Columbia Court of Appeal concluded that an intention to appeal that was subsequently abandoned may amount to there being no bona fide intention to appeal.*
>
> *[23] A lack of intention to appeal is not inevitably determinative. See R. v. Strattner (H.G.) (1992), 1992 CanLII 13195 (MBCA), 83 Man.R. (2d) 190 (C.A.), per Helper J.A. (at para. 13):*
>
> > *Although the lack of an intention to appeal against conviction will not necessarily defeat an application for an extension of time in which to bring such proceedings, it is a factor to be considered in determining the merit of the application.*
> >
> > *This is because, as we have seen, the ultimate objective is that justice be done.*

The affidavit in support of the application must include facts to explain the delay and to show that the applicant had a bona fide intention to appeal before the expiration of the time to appeal. In the argument, counsel must persuade the court that justice will not be done if the applicant is prohibited from proceeding because of the missed filing date.

On a motion to extend the time to file an appeal it is also important to attach a draft Notice of Appeal setting out the grounds of appeal as an exhibit to the affidavit. At the hearing seeking leave to extend the time, counsel should refer to the draft notice and the judge's reasons or the transcript to make an oral argument that there is an arguable ground of appeal. The applicant seeking the extension of time is not required to establish that the appeal will succeed, but it is necessary to show that it is arguable. (*R. v. Gruener*, 1979 CanLII 3030 (ONCA) (1979), 46 C.C.C. (2d) 88).

Note that in *R. v. D.B.R.*, 2005 MBCA 21 at paragraph 7, the court stated that:

> *The arguable grounds test is to be distinguished from the test of "probably succeed." (See R. v. Watkins (J.) (1999), 1999 CanLII 1374 (ONCA), 121 O.A.C. 352, in which Goudge J.A. quotes the comments of Thorson J.A. in R. v. Gruener (1979), 1979 CanLII 3030 (ONCA), 46 C.C.C. (2d) 88 at 91 (Ont. C.A.).) In other words, it is a low threshold and is meant to ensure that the appeal is not frivolous.*

b) Grounds of Appeal

Sections 675 and 676 of the *Criminal Code* set out the basis for an appeal in detail for the convicted person and the Crown respectively.

The person convicted by a trial court in proceedings by indictment has many bases for an appeal. The offender may appeal to the Court of Appeal:

- against the conviction and/or the sentence imposed (s. 675(1));
- against a summary conviction or sentence that was tried with an indictable offence under specified conditions (s. 675(1.1));
- against imprisonment terms in specific circumstances that affect the offender's eligibility for parole (ss. 675(2), 2.1, 2.2 and 2.3));
- against a verdict of not criminally responsible (NCR) because of mental disorder or a verdict of unfit to stand trial (s. 675(3)).

Where a judge of the court of appeal refuses to grant leave to appeal under section 675, if the appellant files a notice in writing with the court within seven days after the refusal, the appellant may have the application for leave to appeal determined by the court of appeal (other than where the appeal was against the sentence alone) (s. 675(4)).

The Crown has similar bases for appealing a decision including an appeal:

- against an acquittal or a verdict of NCR on account of mental disorder (s. 676(1)(a));
- against an order of the Court of King's Bench that quashes an indictment or refuses or fails to exercise jurisdiction (s. 676(1)(b));
- against an order of a trial court (Provincial Court or Court of King's Bench) that stays proceedings or quashes an indictment (s. 676(1)(c));
- with leave of the appeal court or appeal judge against the sentence unless the sentence is fixed by law (s. 676(1)(d));
- with leave of the court of appeal or appeal judge against a verdict of acquittal on a summary conviction offence or a summary conviction offence sentence if the summary conviction offence was tried with an indictable offence under specified conditions (s. 676(1.1)(a-c));
- an acquittal of an offence where the accused has been convicted or discharged under section 730 of any other offence (s. 676(2));
- against a verdict that an accused is unfit to stand trial on a question of law alone (s. 676(3));
- against certain court decisions affecting the term of parole (ss. 676(4-6)).

The main difference between the rights set out for the convicted person and the Crown regarding an appeal is in the available grounds for an appeal against conviction/ acquittal.

The convicted person may appeal a conviction on any of three grounds, namely,

1. on a question of law alone; or
2. with leave or a certificate from the trial judge on a question of fact or mixed law and fact; or
3. with leave on any ground of appeal that appears to the appeal court to be a sufficient ground of appeal.

The Crown, on the other hand, may appeal an acquittal only on a question of law alone.

Both the Crown and the convicted person may appeal an order of costs against them or the amount of the costs ordered with leave of the appeal court or an appellate judge.

Although the *Code* indicates that leave must be granted to the convicted person to appeal questions of fact or mixed fact and law, the Court of Appeal rarely, if ever, insists on a formal leave application. Rather, the practice in the Manitoba Court of Appeal is to hear the appeal and the leave application as one and to grant or dismiss the appeal on its merits.

In preparing a Notice of Appeal it is important to try to articulate the grounds of appeal in as clear and specific language as possible. This is usually easier to do if you have been involved in the trial. If you are retained solely to do the appeal it is a good idea to discuss the case with trial counsel and ask for some help when drafting the Notice of Appeal.

> Notices of Appeal must be filed within the time limits set out in the Criminal Appeal Rules. It may be difficult to draft a Notice of Appeal that is as complete as you want within the 30-day time limit. In such situations, it is appropriate to file a Notice of Appeal that is limited in scope within the time limit to preserve the appeal. Then, when you read the transcripts and formulate the arguments in more detail, you may draft an amended Notice of Appeal, and serve it on the Crown and include it in the Appeal Book.

Sometimes you may decide to abandon some of the grounds that were included in the original Notice of Appeal. In such a situation you must make it clear to the Crown and the court in advance that you will not be arguing these grounds. This can usually be done by simply ensuring that the factum accurately sets out the grounds which will be

argued. The court is sensitive to the fact that notices of appeal must be filed often before transcripts are ready. Ultimately, the only concern the court will have is that all parties are fully informed of the matters that will be argued at the hearing.

c) Sentence Appeals

Sentence appeals are the most common criminal appeals and sections 675 and 676 set out that right for the convicted person and the Crown.

The *Criminal Code* requires that all sentence appeals need leave of the court whether the appeal is brought by the Crown or the convicted person.

The Manitoba Court of Appeal tends to combine the leave application with the actual appeal hearing under Criminal Appeal Rule 30 except where the convicted person is seeking release from incarceration pending the hearing of the appeal against sentence alone. Section 679(1)(b) provides that the granting of leave to appeal is a condition precedent to any release of the convicted person pending appeal when the appeal is against sentence only, so the leave application is dealt with in a hearing which is separate from the sentence appeal hearing.

When preparing a Notice of Appeal against a sentence it is not usually necessary to draft extensive grounds of appeal. The most common ground in an appeal by the convicted person is that the sentence is harsh and excessive given the circumstances of the offence and the background of the offender. The Crown normally alleges that the sentence is inadequate in that it inadequately reflects the gravity of the offence and the background of the offender.

When advising a client concerning an appeal against a sentence it is important to discuss the principles from the decision of the Supreme Court of Canada in *Hill v. The Queen*, 1975 CanLII 1190 (SCC), 25 C.C.C. (2d) 6 where the court concluded that it has the power to vary a sentence in either direction once the fitness of that sentence has been put in issue. For example, based on this authority, the court could increase a sentence on an accused's appeal even if the Crown has not served a Notice of Appeal against the sentence.

> Hill is good law and means that once an appeal against sentence is filed the whole issue is open, however, historically the Manitoba Court of Appeal has not increased the sentence on a sentence appeal when the Crown has not filed a Notice of Appeal against the sentence. Although that has been the practice, there is no guarantee that the practice will continue. A convicted person who wants to appeal a sentence only should be informed of the risk that the sentence could be increased.

Section 687 of the *Code* provides that where an appeal is taken against the sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the "fitness of the sentence." If the sentence is fit, the appeal is dismissed. If the sentence is unfit, it is varied and replaces the original sentence.

It is not an easy job for a court to determine whether a sentence is fit. The Court of Appeal is not to determine whether it would have given the same sentence had it been sitting in the first instance. The Court of Appeal is to determine if the sentencing judge has given the proper weight and priority to the various facts and principles that determine a sentence.

Appellate courts throughout the country are reluctant to interfere with the discretion of the sentencing judge. However, all will do so in the appropriate circumstances. The concept of appropriate circumstances has been defined quite broadly and would certainly include inadequate consideration being given to well-known sentencing principles. As is evident from the following discussion, the circumstances in which appellate courts interfere continues to develop.

The leading case on this point espousing the basic notion that an appellate court should only intervene in appropriate circumstances is *R. v. M. (C.A.)*, 1996 CanLII 230 (S.C.C.). The Supreme Court of Canada said: "*absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit*." (*para. 90*).

The Manitoba Court of Appeal discussed this in *R. v. Wozny*, 2010 MBCA 115 (CanLII) in paragraphs 10 and 35-36:

> *[10*] *An error in principle includes failing to consider a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to a relevant factor or overemphasizing an appropriate factor. See Shropshire [R. v. Shropshire, 1995 CanLII 47 (SCC)*], *M. (C.A.), L.M. [R. v. L.M., 2008 SCC 31 (CanLII)]; Arbuthnot [R. v. Arbuthnot, 2009 MBCA 106 (CanLII),]; and R. v. McDonnell, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948.*
>
> *[35] Sentencing is a delicate art. The law is clear that sentencing judges are permitted a substantial discretion in the imposition of sentence, both as regards duration of the sentence and the type of sentence (that is, consecutive or concurrent) imposed. See M. (C.A.), L.M.; and McDonnell.*
>
> *36 Lamer C.J.C. explained the rationale for this substantial discretion in M. (C.A.) when he wrote (at para. 91):*
>
> > *.... A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front*

> *lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.*

More recently, the Supreme Court arguably expanded on the role of appellate intervention in *R. v. Friesen*, 2020 SCC 9 (CanLII) at paragraphs 34 and 35:

> *(2) Role of Appellate Courts*
>
> *[34] Appellate courts have a dual role in sentence appeals (Lacasse, at paras. 36-37). Correcting errors in sentencing ensures both that the principles of sentencing are correctly applied and that sentences are not demonstrably unfit. Appellate courts also have a role in developing the law and providing guidance. Usually, in keeping with the common law emphasis on precedent, appellate guidance reflects and summarizes the existing law. The appellate court will distill many precedents into a single statement, a range of sentences or perhaps a starting point, that the sentencing judge can more readily use.*
>
> *[35] Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders (R. v. Stone, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, at para. 239). When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit sentence (Lacasse, at para. 57). That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences.*

Ironically, the Supreme Court overruled the Manitoba Court of Appeal in *Friesen* and reinstated the sentence imposed by the Manitoba Provincial Court judge. It may be argued that this may signal that the Supreme Court continues to endorse the earlier case law, but that appellate courts should be prepared to adapt precedent where it seems necessary to change with the demands of modern society.

d) Factums and Appeal Books

Rules 19 and 20 of the Manitoba Criminal Appeal Rules provide that where leave to appeal has been granted or an application for leave to appeal is to be considered at the same time as the Notice of Appeal, the appellant shall file with the registrar and serve on the respondent an appellant's factum within 45 days after receipt by the registrar of the transcript (or where a transcript is not required, the Appeal Book). The respondent shall file with the registrar and serve on the appellant a respondent's factum within 30 days after being served with the appellant's factum.

The Court of Appeal registrar fixes the dates for court hearings and will not give a date for the hearing of the appeal until the appellant's factum has been filed. While there are provisions for the registrar to fix a date for the respondent to file a factum if the appellant has not met the time deadlines (Rule 25(3) Criminal Appeal Rules) and limited provision for an extension of time to be sought (Rule 21) the appellant who fails to file the factum within the time limits set out in the rules may find that the appeal will be deemed to be abandoned under Rule 25(4).

But note that if the accused is an unrepresented party, Criminal Appeal Rule 24 permits that accused to file a written argument with the registrar at any time before the day of the hearing. An unrepresented accused is also entitled to a hearing without filing a written argument or a case book.

Rule 22 of the Criminal Appeal Rules provides that the format of the factum is governed by the Court of Appeal Rules (Civil and Language) Reg. 555/88 R [Civil Appeal Rules].

The *Court of Appeal Practice Guidelines* of July 2003 supplement the Civil Appeal Rules and set out detailed requirements for the preparation of material for the court, including the size of the font, the length of a factum, and recommendations for colour coding the material. Non-complying materials will be rejected. Strict timelines apply when filing materials.

The Crown is responsible for the preparation and filing of the Appeal Book (Criminal Appeal Rule 18) within 30 days after the initiating document is filed if the Crown is the appellant, or within 30 days after the factum is filed by the appellant if the Crown is the respondent.

In cases involving an appeal of a sentence only, the Crown shall prepare and file the Appeal Book as soon as practicable after the initiating document is filed (Criminal Appeal Rule 18(1.1)) and where an application for leave to appeal is made, the Crown shall prepare and file an Appeal Book where practicable (Criminal Appeal Rule 18(2)).

The Crown is also responsible for delivering a copy of the filed Appeal Book to the parties.

Under Criminal Appeal Rule 18(7) a party may file a supplementary Appeal Book containing materials relevant to the appeal that may have been omitted from the Appeal Book filed by the Crown.

The Appeal Book is designed to provide the court with an easy reference book of all the relevant court documents and paper exhibits. Therefore, an Appeal Book in a criminal case will always include a copy of the indictment or information, a copy of the Notice of Appeal, and any easily photocopied exhibits such as pre-sentence reports or medical reports. The Appeal Book is extremely important in a sentence appeal since it should contain any reference letters or other documents that were filed at the time of trial.

Criminal Appeal Rule 22 dictates that a factum should be prepared according to the Court of Appeal Rules (Regulation 555/88 R (Civil Appeal Rules).

> The factum is probably the most important document filed in an appeal. Strict adherence to the rules is required and non-conforming material will be rejected.

For example, under Civil Appeal Rule 29(1) the content of a factum is detailed and a factum will not be accepted for filing unless it specifically states the basis of the court's jurisdiction and the applicable standard of review for each issue under appeal. The factum for a sentence appeal may be abbreviated. The statement of facts and argument are still important, but you may leave out the points in issue and relief claimed.

The factum need not be lengthy and must be less than 30 pages unless leave for a longer factum is given. Review the rules, as the court is very particular as to the number of pages it will allow.

The factum is normally divided into four parts (see Civil Appeal Rule 29(1)):

1. Introduction - setting out a concise overview or explanation as to what is involved in the appeal;
2. Statement of Facts;
3. List of Issues - both the appellant and the respondent must provide a concise statement identifying the issues and their position on each. The statement must also set out the basis for the court's jurisdiction to determine the appeal and the standard for review; and
4. Argument, appropriate statutes, regulations and case law must be attached and the amount of time required for argument must be indicated.

The statement of facts is an extremely important part of the factum and should be prepared carefully. A good statement of facts will direct the judges to the important parts of the evidence. For example, in a criminal murder case if there is no issue that the accused died as a result of a gunshot wound then the evidence of the pathologist may be summarized in one line and it can be made clear to the court in the facts that this evidence is not in issue. The statement of facts should highlight the portions of the evidence that are critical to the argument that will follow. For example, if drunkenness is in issue it would help the court if the parts of the evidence dealing with drunkenness were highlighted.

The points in issue need not be taken directly from the Notice of Appeal. Rather, the points in issue should reflect the issues that you have determined will be argued at the hearing.

The standard of review is an important issue that must be clearly addressed as it determines the level of defence to be accorded to the trial judge's decision. Where there is a question of law the standard of review is one of correctness and no deference is owed. However, significance deference is given when it is a question of fact or a question of mixed fact and law. Determining the standard of review will require consideration of the *Criminal Code* and/or jurisprudence.

The argument should be divided to match the points in issue. The written argument should be set out in numbered paragraphs so that you can easily reference them during your oral argument before the court.

Each judge of the Court of Appeal has a Judges' Book of Authorities containing authorities frequently relied on. There will be additions to, and deletions from, the Judges' Book of Authorities from time to time. The March 30, 2009 *Notice from the Court of Appeal* re: the Judges' Book of Authorities has a list of those authorities attached. In preparing a Book of Authorities (also known as a casebook) for the court, counsel should not include copies of the authorities contained in the Judges' Book of Authorities. However, extracts from those authorities to which counsel intend to refer should be included in the factum or Book of Authorities/Casebook.

Included cases should be edited to provide the court only with the portion of the case that is relevant to the argument. Of course, your editing must be done fairly to reflect the relevant context on the particular portion being referenced.

e) Ineffective Assistance of Counsel

The Manitoba Court of Appeal has provided specific direction for criminal appeals relying upon ineffective assistance of counsel as a ground of appeal that need to be complied with.

See *Practice Direction "Allegation of Ineffective Assistance of Counsel"* (December 14, 2022) and *R. v. Le (TD)*, 2011 MBCA 83.

f) Powers of the Court of Appeal

In considering the last issue, which is the relief sought, it is important to have regard to the powers of the Court of Appeal as set out in the *Criminal Code* section 686 on an appeal against a conviction or an acquittal, and section 687 on an appeal against sentence. The court should be asked to do only that which it has jurisdiction to do.

One of the most important parts of section 686 is section 686(1)(b)(iii) often called the curative proviso provision.

> ***686 (1)*** *On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal …*
>
> *(b) may dismiss the appeal where …*
>
> *(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, …*

This section provides that even though there is a ground of appeal that has merit, the Court of Appeal may still dismiss the appeal if its opinion is that no substantial wrong or miscarriage of justice has occurred. The Supreme Court of Canada determined in *Vézeau v. The Queen*, 1976 CanLII 7 (SCC), that the section applies equally to the Crown when it appeals an acquittal decision. Even if the Crown establishes that there was an error in law, the court may dismiss the appeal unless the Crown satisfies the court that the verdict would not necessarily have been the same.

As Mr. Justice Sopinka said in *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 SCR 345 at paragraphs 9 and 80:

> *[9] The onus resting on the Crown when it appeals an acquittal was settled in Vézeau v. The Queen, 1976 CanLII 7 (SCC), [1977] 2 S.C.R. 277. It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed…*
>
> *[80] I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.*

The proviso section is designed to prevent re-trials in circumstances where the verdict is likely to remain the same.

Note, however, where there has been a directed verdict, as explained by Hamilton JA in *R. v. O'Kane*, 2012 MBCA 82 (CanLII) (at para. 40):

> *The test to be applied by a trial judge on a directed-verdict motion is whether "there is admissible evidence which could, if it were believed, result in a conviction"* (*R. v. Arcuri, 2001 SCC 54 at para. 21, [2001] 2 S.C.R. 828). It is the same test that is applied by a preliminary inquiry judge when determining whether an accused should be committed to stand trial.*

On a directed verdict, the Court of Appeal will likely grant a new trial if there is an error of law by the judge. This was explained in *O'Kane* in paragraphs 63 and 64:

> *[63] The question that must be addressed is: What is the appropriate test for ordering a new trial in a directed verdict appeal? The articulation of the tests set out in Vézeau, Sutton and Graveline differ somewhat. The test set out in Vézeau and Sutton is focussed on whether the verdict might have been different, whereas the test in Graveline is focussed on the effect of the trial judge's error. Depending on which formulation is adopted, these two tests could have different effects in directed verdict cases. This is because, in a directed verdict case, it is obvious that the error had an impact on the verdict and the test is easily met. However, if the reviewing court is instead supposed to inquire whether the verdict would potentially have been different absent the error, it invites a more probing review of the case.*
>
> *[64] I am of the view that the appropriate approach is found in Greenwood and Collins. These decisions of the Ontario Court of Appeal caution appellate courts from speculating as to what might have happened had the trial judge not directed the verdict and that only in exceptional cases will a new trial not be required despite the trial judge's legal error. It seems to me that this explains why most cases involving appeals of directed acquittals do not address the Crown's burden, as it is obviously met.*
>
> (emphasis added)

2. Summary Conviction Appeals

Part XXVII of the *Criminal Code* deals with summary convictions.

R. v. McDougall (M.), 2014 MBCA 95 (CanLII) explains at paragraphs 13 to 15:

> *[13] The legislative scheme pertaining to appeals from summary conviction offences under the Code is set forth in Part XXVII of the Code, which clearly creates two avenues of appeal; namely, an appeal under s. 813 and an appeal under s. 830.*
>
> *[14] As regards the former, the relevant sections of the Code are ss. 812-828; s. 813 creating the right of appeal and s. 822 stipulating the power of the appeal court. As to the latter, the relevant sections of the Code are ss. 829-838; s. 830 creating the right of appeal and s. 834 stipulating the powers of the appeal court.*

[15] In R. v. Petri (V.R.), 2003 MBCA 25, 173 Man.R. (2d) 96*, Philp J.A. wrote (at paras. 4, 6-8 and 11):*

> *Two distinct and different rights of appeal are given in the Code in summary conviction proceedings, and distinct and different powers are given to the appeal court in each case. Section 813 provides for an appeal (in Manitoba, to the Court of Queen's Bench) by a defendant or by the informant or by the Crown against determinations and dispositions in summary conviction proceedings (the section 813 appeal). Unlike the provisions relating to appeals in proceedings in respect of indictable offences, leave to appeal is not required by a defendant, the informant or the Crown on a s. 813 appeal and there are no restrictions on the grounds that may be raised.*

The powers of the appeal court on a s. 813 appeal are found in s. 822(1) …

…..

The second right of appeal in summary conviction proceedings (in Manitoba, to the Court of Queen's Bench or to the Court of Appeal) is found in s. 830 of the Code (the s. 830 appeal). Section 830(1) provides:

> *830(1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that:*
>
> *(a) it is erroneous in point of law;*
> *(b) it is in excess of jurisdiction; or*
> *(c) it constitutes a refusal or failure to exercise jurisdiction.*

The powers that the appeal court may exercise on such an appeal, however, differ from those that may be exercised by the appeal court on an appeal taken pursuant to s. 813. The powers of the appeal court on a s. 830 appeal are prescribed in s. 834(1) ….

The s. 830 appeal is now virtually indistinguishable in its form from a s. 813 appeal. (See the comments of Scott, C.J.M., in R. v. Higgins (M.D.) [(1994), 1994 CanLII 6405 (MBCA), 92 Man.R. (2d) 142], at paras. 30-32.) What distinguishes the two kinds of appeal are not matters of form, but of substance; namely, the grounds upon which an appeal may be brought, the court to which it may be taken and the powers that may be exercised by the appeal court on the appeal.

[16] An appeal under s. 813 is to an "appeal court" defined under s. 812 as being, in Manitoba, the Court of Queen's Bench.

[17] An appeal under s. 830 is to an "appeal court" defined under s. 829(1) as being, in any province, the superior court of criminal jurisdiction for the province. Section 2 of the Code defines "superior court of criminal jurisdiction" in Manitoba as the Court of Appeal or the Court of Queen's Bench.

[18] The result is that, in Manitoba, a s. 813 appeal is brought to the Court of Queen's Bench, whereas a s. 830 appeal may be brought to the Court of Appeal or the Court of Queen's Bench.

[19] Of specific note, relative to the motion before me, neither s. 813 (s. 812 to and including s. 828) nor s. 830(1) (s. 829 to and including s. 838) requires the obtaining of leave to appeal to the "appeal court" as defined for the purpose of appeals under those sections.

[20] Lastly, s. 839(1) of the Code provides for further appeal from the appeal court to the Court of Appeal in respect of summary conviction proceedings, as follows:

Appeals to Court of Appeal

Appeal on question of law
839.(1) … an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
(a) a decision of a court in respect of an appeal under section 822; or
(b) a decision of an appeal court under section 834, except where that court is the court of appeal.

[21] In my opinion, an appeal to the Court of Appeal under s. 839(1) is confined to cases which have first proceeded to the Court of Queen's Bench, whether as an appeal from a decision of an appeal court under s. 822 (i.e., the s. 813 appeal) or from a decision of an appeal court under s. 834, except where the appeal court is the Court of Appeal (i.e., the s. 830 appeal).

[22] In other words, where the appeal is brought under s. 830 and the appellant chooses to appeal to the Court of Appeal (and not to the Court of Queen's Bench), there is no right of appeal to the Court of Appeal under s. 839(1).

[23] Of note, it is only by reason of the language of s. 839(1) that leave to appeal a summary conviction to the Court of Appeal is required.
…

[29] I conclude by noting that it is clear from a reading of ss. 813 and 830 of the Code that the jurisdiction of the court hearing a s. 813 appeal is much broader than that of the court hearing a s. 830 appeal. Thus, the preferred course will ordinarily be, in my view, an appeal to the Court of Queen's Bench (see R. v. Orbanski (C.), 2002 MBCA 20 at para. 4, 170 Man.R. (2d) 6, per Twaddle J.A.).

[30] In my opinion, the prudent course here is to appeal to the Court of Queen's Bench pursuant to s. 813 of the Code. This avoids any jurisdictional argument as to whether, under s. 830, the Court of Appeal as the appeal court has the jurisdiction to hear this case, a sentence appeal.

In Manitoba, appeals from a summary conviction trial are heard in the Court of King's Bench. Section 813 is broadly worded and provides that both the Attorney-General and the accused have a right of appeal without leave from:

- a conviction, or
- a stay, or
- a dismissal, or
- a verdict of unfit to stand trial or not criminally responsible on account of mental disorder, or
- a sentence passed on the accused.

Therefore, the Crown does have a right in summary conviction matters to appeal errors of fact although such a right does not exist for indictable offences.

For summary conviction offences as explained above, section 830 provides another form of appeal based on the transcript or an agreed statement of facts, again without the need for leave to appeal.

> ***Appeals***
> *830(1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that*
> *(a) it is erroneous in point of law;*
> *(b) it is in excess of jurisdiction; or*
> *(c) it constitutes a refusal or failure to exercise jurisdiction.*
>
> ***Form of appeal***
> *(2) An appeal under this section shall be based on a transcript of the proceedings appealed from unless the appellant files with the appeal court, within fifteen days of the filing of the notice of appeal, a statement of facts agreed to in writing by the respondent.*

This is a much narrower right of appeal and replaced a former provision referred to as a stated case. As a matter of course all appeals in Manitoba are brought according to section 813, even though they are based on the transcript from the court below.

The documentation for a summary conviction appeal need not be as formal as that in the Court of Appeal. A prepared form (found in the precedents) is used as the originating document. The factum and Appeal Book may be combined into one document. The same consideration should be given to preparing the factum for a summary conviction appeal so that the King's Bench judge and the other side are aware of the arguments.

F. PRECEDENTS

1. Notice of Appeal - Summary Conviction Offence

Form 8

KB File No._____
Ticket No._____

THE KING'S BENCH
_____ Centre

BETWEEN:

HIS MAJESTY THE KING,

Respondent,

-and-

(Accused), Appellant.

NOTICE OF APPEAL

_____
_____
_____
_____

(name, address, email address, telephone and
fax numbers of the person filing the document)

KB File No._____
Ticket No._____

THE KING'S BENCH
_____ Centre

BETWEEN:

HIS MAJESTY THE KING,

Respondent,

- and –

(Accused) Appellant,

NOTICE OF APPEAL

TAKE NOTICE that the Appellant appeals from the following:

[WHERE PROCEEDING WAS COMMENCED BY AN INFORMATION]:

☐ ACQUITTAL ☐ CONVICTION ☐ SENTENCE ☐ ORDER

made by Judge/Justice:_____ at:

1. Court Location of Conviction/Dismissal/Sentence/Order:

   ☐ 408 York Avenue, Winnipeg, Manitoba – Courtroom:_____

   ☐ 373 Broadway, Winnipeg, Manitoba

   ☐ _____
   (Other Court Location)

2. Offence(s) at issue:_____
   _____
   _____

3. Date of conviction, dismissal, or order:_____

4. Sentence imposed, if applicable:_____
   _____

5. Date of sentence:_____

6. REASONS FOR APPEAL: (State concisely)_____

_____

_____

7. The Appellant wants the Court to:_____

_____

_____

8. The address for service of the Appellant or Counsel is:

_____

(Provide email address or, if you do not have email, street address)

☐ No evidence recorded

☐ Evidence recorded – transcript ordered

☐ Appellant seeks to proceed under section 830 of the *Code* on agreed facts

☐ Appellant will request a *de novo* hearing under section 822 of the *Code* (Notice of Motion is attached)

Dated this _____ day of _____, 20___

_____

Signature of Appellant or Counsel

_____

Print Name of Appellant or Counsel

☐ I have read the information sheet "Guide for Provincial Offences Act Appeals"

You will be contacted at the email address you provided once the transcripts have been completed. If you did not provide an email address, a letter will be sent to the physical address you provided.

2. Notice of Appeal/Notice of Application for Leave to Appeal by Accused

Form 1

Notice of Appeal/Notice of Application for Leave to Appeal by Accused

IN THE MATTER OF _____
(name of accused in full)

_____ convicted (or pleaded guilty) on the _____ day of _____20___,
(D.O.B. D/M/Y)

of_____ before _____
(state the charge(s) in full) (name of judge)

at the_____ in _____, and was sentenced on
(name of court) (court centre)

the _____ day of _____ 20_____ before _____ at the
(name of judge)

_____ in _____, and now in custody at _____ or
(name of court) (court centre) (name of institution or penitentiary)

whose last known address is:_____

The accused intends to _____ to The Court of Appeal against the
(appeal or apply for leave to appeal)

_____ on the following grounds:
(conviction and/or sentence)

_____

_____

And such further grounds as counsel may advise and This Honourable Court may permit.

The accused wishes to present his/her case and argument_____
(in writing or by oral argument)

The accused _____ to be present in person at the hearing of the appeal.
(desires or does not desire)

WAS ORAL EVIDENCE TENDERED AT TRIAL? ☐ YES ☐ NO

HAS A TRANSCRIPT OF THE EVIDENCE WITH RESPECT TO CONVICTION AND/OR SENTENCE BEEN ORDERED FROM TRANSCRIPTION SERVICES? ☐ YES ☐ NO

HAS A COURT ORDER OR LEGISLATION IMPOSED A PUBLICATION BAN IN RELATION TO THE TRIAL OR OTHER PROCEEDING THAT IS THE SUBJECT OF THE APPEAL? ☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE PUBLICATION BAN:

_____

_____

HAS ACCESS TO THE COURT FILE BEEN RESTRICTED BY COURT ORDER OR LEGISLATION?

☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE RESTRICTION TO THE COURT FILE:_____

_____

Address for service for the accused is_____

(Address of accused or counsel for accused)

DATED this _____day of _____, 20____

_____

Signature of accused or counsel for accused

TO: The Registrar of The Court of Appeal
Law Courts Building
100E - 408 York Avenue
Winnipeg, MB R3C 0P9

AND TO: The Attorney General of Manitoba OR The Attorney General of Canada

3. Notice of Appeal/Notice of Application for Leave to Appeal from Acquittal by Crown

Form 2
(Subrule 3(1.1))

Notice of Appeal/Notice of Application for Leave to Appeal from Acquittal by Crown

IN THE MATTER OF _____ _____ acquitted on the
(name of accused in full) (D.O.B D/M/Y)

_____ day of
_____20
_____, of
_____
(state the charge(s) in full)
before _____ at the _____ in _____
(name of judge) (name of court) (court centre)

Last known address of accused:
_____
_____

The Attorney General of the Province of Manitoba/The Attorney General of Canada,
_____
(appeals or applies for leave to appeal)

to The Court of Appeal against the acquittal of the accused on the following grounds:
_____
_____
_____
_____

And such further grounds as counsel may advise and This Honourable Court may permit.

The Court will be asked to reverse the acquittal and
_____
_____

The address for service of the Attorney General is:
_____
_____

WAS ORAL EVIDENCE TENDERED AT TRIAL? ☐ YES ☐ NO

HAS A TRANSCRIPT OF ALL RELEVANT EVIDENCE BEEN ORDERED FROM TRANSCRIPTION SERVICES?
☐ YES ☐ NO

HAS A COURT ORDER OR LEGISLATION IMPOSED A PUBLICATION BAN IN RELATION TO THE TRIAL OR OTHER PROCEEDING THAT IS THE SUBJECT OF THE APPEAL?
☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE PUBLICATION BAN:

_____

_____

HAS ACCESS TO THE COURT FILE BEEN RESTRICTED BY COURT ORDER OR LEGISLATION?
☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE RESTRICTION TO THE COURT FILE:

_____

_____

DATED this
_____ day of
_____20
_____.

_____
Signature of counsel

TO: The Registrar of The Court of Appeal
Law Courts Building
100E - 408 York Avenue
Winnipeg, MB R3C 0P9
AND TO: The accused
AND TO: Counsel for the accused

4. Notice of Appeal/Notice of Application for Leave to Appeal from Sentence by Crown

Form 3
(Subrule 3(1.1))

Notice of Appeal/Notice of Application for Leave to Appeal from Sentence by Crown

IN THE MATTER OF _____ _____ convicted (or pleaded guilty) on the
(name of accused in full) (D.O.B D/M/Y)

_____ day of
_____20
_____, of
_____
(state the charge(s) in full)
before _____ at the _____ in _____
(name of judge) (name of court) (court centre)

and was sentenced on the _____ day
of _____20
_____ before

_____ at the _____ in _____ and now in custody at
(name of judge) (name of court) (court centre)

_____
(name of institution or penitentiary)

or

whose last known address is:
_____

The Attorney General of the Province of Manitoba/The Attorney General of Canada,
_____ to The Court of Appeal against the sentence imposed on
(appeals or applies for leave to appeal)

the accused on the following grounds:
_____
_____
_____

And such further grounds as counsel may advise and This Honourable Court may permit. The Court of Appeal will be asked to impose a fit sentence.

The address for service of the Attorney General is:

_____

_____

HAS A TRANSCRIPT OF ALL RELEVANT EVIDENCE FROM THE SENTENCING HEARING BEEN ORDERED FROM TRANSCRIPTION SERVICES? ☐ YES ☐ NO

HAS A COURT ORDER OR LEGISLATION IMPOSED A PUBLICATION BAN IN RELATION TO THE TRIAL OR OTHER PROCEEDING THAT IS THE SUBJECT OF THE APPEAL?

☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE PUBLICATION BAN:

_____

_____

_____

HAS ACCESS TO THE COURT FILE BEEN RESTRICTED BY COURT ORDER OR LEGISLATION?

☐ YES ☐ NO

IF YES, ATTACH A COPY OF THE ORDER IF AVAILABLE OR PROVIDE DETAILS ON THE RESTRICTION TO THE COURT FILE:

_____

_____

DATED this

_____ day of

_____ 20

_____

_____

Signature of counsel

TO: The Registrar of The Court of Appeal
Law Courts Building
100E - 408 York Avenue
Winnipeg, MB R3C 0P9

AND TO: The accused

AND TO: Counsel for the accused