File Number: 39997

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK)

BETWEEN:

JENNIFER BASQUE

APPELLANT
(Respondent)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

APPELLANT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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A. OVERVIEW

1. "Anyone who can make you believe absurdities can make you commit atrocities."[1]

2. The Appellant is seeking to apply credit for pre-trial driving prohibition to the time applied at sentencing, and the remaining time at sentencing falling below the mandatory minimum. This argument is based on principles of statutory interpretation as failing same, leads to results that are absurd and inconsistent with Parliament's intent in s. 259(1) of the *Criminal Code*[2], including in relation to mandatory minimum driving prohibitions.

3. It is the Appellant's position that the Supreme Court of Canada should grant the appeal and restore the trial judge's decision as affirmed by the summary conviction appeal court. In *Lacasse*[3], this Court gave the offender credit for having been prohibited from driving for over two years by virtue of a condition in a recognizance pending trial. The Appellant is seeking to extend this remedy to the possibility that the remaining time to be served under a driving prohibition would fall below a statutorily mandated minimum.

4. Applying this Court's decision in *Lacasse* to reduce the driving prohibitions under s. 259(1) generally, but interpreting the minimum prohibitions and s. 719(1) as requiring them to commence on sentencing, without any consideration of a bail-related driving prohibition, produces results that are absurd and creates internal incoherence that defeats the scheme of punishment established by s. 259(1).

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[1] *Voltaire* 1765
[2] *Criminal Code*, R.S.C., c. C-46, L.R.C. (1985), ch. C-46 , L.R.C. (1985), ch. C-46 (hereinafter referred to as the "*Criminal Code*").
[3] *R. v. Lacasse*, 2015 SCC 64, 2015 CSC 64 (hereinafter referred to as "*Lacasse"*).

5. In the present case, the Court of Appeal of New Brunswick, in a split decision[4], came to a ruling that the full mandatory minimum driving prohibitions under s. 259(1) of the *Criminal Code* must commence on date of sentencing to be served entirely on that date onward, without consideration of any period the offender was prohibited from driving before sentencing in relation to bail, under s. 515 of the *Criminal Code*.

6. While the Court of Appeal of New Brunswick ruled in favour of a strict application of the law and insisting on a constitutional challenge to achieve the Appellant's desired outcome, we submit that this case is not about challenging the constitutional validity of mandatory minimum sentence but more about giving credit where credit is due.

7. The Supreme Court of Canada, in *Lacasse*, stipulated that a judge **must** take into account the duration of any bail-related driving prohibition when imposing a driving prohibition as additional punishment on sentencing (emphasis added).

8. The discrete issue in the present case is whether this credit can reduce the prohibition that commences on the date of sentencing to a remainder that is less than the applicable minimum.

9. In the present case, it is our position, without a doubt, that the Appellant must be prohibited from driving for not less than the applicable minimum period of one year. We are not challenging the prohibition's constitutional validity. On the other hand, we posit that an interpretive analysis of ss. 259(1), 719(1) and the general sentencing framework permits credit for bail-related driving prohibition, that can reduce the net remaining prohibition that commences on date of sentencing to less than the applicable minimum, so long as the total driving prohibition exceeds the mandatory minimum.

[4] *R. v. Basque*, 2021 NBCA 50 (hereinafter referred to as "*Basque*").

B. STATEMENT OF FACTS

10. The Appellant, Jennifer Basque, was charged on October 7, 2017 for driving a motor vehicle while her blood alcohol concentration exceeded 80 mg/100ml.

11. On November 30, 2017, the Appellant entered into a court undertaking with a condition prohibiting her from driving a motor vehicle until the matter was concluded.

12. The Appellant entered a guilty plea to the offence on October 22, 2018 and was sentenced on August 12, 2019.

13. The Appellant's intentions were to make an application for a curative discharge and the sentencing date was adjourned for this purpose.

14. Ultimately, when they returned to court on August 12, 2019, the Appellant chose not to seek the curative discharge and go straight to sentencing.

15. At sentencing, the sentencing judge took account of the fact that the Appellant was on an undertaking not to drive since November 30, 2017. The sentencing judge considered the prohibition to be served by essentially ordering a one-year driving prohibition back-dated to November 30, 2017.

16. The Crown's appeal of the sentencing judge's decision was dismissed by the summary conviction appeal judge who reasoned that, in view of the decision in *Lacasse* and guided by the interpretive analysis in *R. v. Wust*[5], a proper interpretation of s. 259(1) required credit be given for the Appellant's bail-related driving prohibition, even though it reduced the net remaining time of the driving prohibition to be served from the date of sentencing to below the applicable one-year minimum.

[5] *R. v. Wust*, 2000 SCC 18, 2000 CSC 18 (hereinafter referred to as "*Wust*").

17. On appeal to the Court of Appeal of New Brunswick, the Crown asserted that, absent an express provision in the *Criminal Code* stating otherwise, principles of statutory interpretation require Parliament to be taken as intending that the minimum prohibition be imposed on and commence from sentencing. In a two-to-one decision, the interpretation advanced by the Crown was accepted by the Court of Appeal and stipulated that absent a constitutional challenge the mandatory minimum must be served in its entirety as of the date of sentencing.

18. We respectfully disagree and this decision is now the subject of appeal in the present case.

PART II – QUESTIONS IN ISSUE

19. Did the sentencing judge commit an error of law by granting time served on a mandatory driving prohibition order?

20. Is time served on a driving prohibition pursuant to a defendant's interim release deductible from a mandatory minimum driving prohibition on sentence that would leave the remaining time to be served on sentence below the mandatory minimum?

21. Does the Supreme Court of Canada's direction on the issue in *Lacasse* that dealt with a discretionary order on sentence which said pre-trial driving suspension must be deducted from the time on sentence apply to mandatory minimum prohibition orders?

PART III – STATEMENT OF ARGUMENT

22. On sentencing matters, appellate courts are required to show deference to the trial judge's decision, absent an error in law, an error in principle or the imposition of a sentence that is demonstrably unfit in the circumstances: *Lacasse*[6] at paras 39-55. The standard of review for what the Crown characterized as an illegal sentence is a question of law and the correctness standard applies: *Housen v Nikolaisen*[7]; *R v Morin*[8].

23. We submit that the appeal should be granted. The decision to give the accused credit for the time serving a driving prohibition while on a court undertaking and resulting in a net remaining prohibition at the date of sentencing that falls below the mandatory minimum is legitimate based on principles of statutory interpretation. To that end, this court need not be concerned with issues of inherent jurisdiction, nor issues of raising a charter argument at sentencing challenging the constitutional validity of the mandatory minimum sentence. The result can be achieved by applying principles of statutory interpretation.

24. The former section 253(1)(b) of the *Criminal Code* stated that it is an offence for a person to operate a motor vehicle if he or she has "consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood".

25. The former section 259(1)(a) of the *Criminal Code* required the sentencing court to make an order prohibiting the convicted person from operating a motor vehicle "for a first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year".

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[6] *Lacasse, supra* note 3.
[7] *Housen v Nikolaisen*, 2002 SCC 33, 2002 CSC 33.
[8] *R v Morin*, [1992] 3 SCR 286. [1992] 3 RCS 286.

26. The applicability of those sections continue under the new impaired driving related provisions and any case law derived from the present case will continue to have jurisprudential value moving forward under the new framework.

27. The predecessors to the current driving prohibition penalties for impaired driving were enacted in 1985. Despite a provision not being added to the most recent *Criminal Code* amendments to expressly permit a bail-related driving prohibition to be taken into account on sentencing, similar to s. 719(3) in relation to presentence custody, the ability to do so has been an accepted sentencing principle, as this Court recognized in *Lacasse*, referring to *R. v. Sharma*[9], as well as *R. v. Pellicore*[10], *R. v. Williams*[11], and *Bilodeau v. R.*[12]

28. The comments of Lamer C.J., as he then was, made in *Sharma* featured prominently in the reasons of Wagner C.J. in *Lacasse*. Lamer C.J. said an offender whose bail conditions included a driving prohibition "had already begun serving his sentence:"

> [...] The appellant's liberty interest was clearly prejudiced by the bail conditions to which he was subject for the entire 13- month period between the charge being laid and the matter being brought to trial. Those bail conditions included a complete prohibition on driving, a prohibition which would have been imposed as part of his sentence had he been found guilty following a prompt trial. Essentially, **the appellant had already begun serving his sentence**, a state of affairs which calls for haste in bringing a matter to trial.[13]
>
> (emphasis added)

29. In *Pellicore*, the decision of the Court of Appeal for Ontario was recorded in the endorsement of Robbins J.A.:

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[9] *R. v. Sharma*, [1992] 1 SCR 814, [1992] 1 RCS 814 (hereinafter referred to as "*Sharma*").
[10] *R. v. Pellicore*, [1997] O.J. No. 226 (ONCA) (hereinafter referred to as *"Pellicore*").
[11] *R. v. Williams*, 2009 NBPC 16, 2009 ANB 86 (hereinafter referred to as "*Williams*").
[12] *R. v. Bilodeau*, 2013 QCCA 980 (hereinafter referred to as "*Bilodeau*").
[13] *Sharma*, *supra* note 9 page 815.

> The Crown concedes that the appropriate period for the driving prohibition in this case was 5 years. We agree with this and in light of the fact that the appellant had been prohibited pursuant to be back order from driving for approximately 3 years. This period should be taken into account, and the trial judge did. Accordingly, the prohibition at the date of sentence should have been two years. Of this period 1 year 9 months has now expired. The appellant has now filed fresh evidence which indicates that she has a job offer which requires the use of a car to transport her to her place of employment and, in addition, to her circumstances with respect to her access to her children. In all the circumstances, we would vacate the remainder of the present driving prohibition. The appeal is allowed accordingly[14].

30. In *Williams*, the offender's presentence driving prohibition arose in an undertaking given when he entered a guilty plea and the matter was adjourned for sentencing. Mr. Williams asked that the driving prohibition be ordered as part of his sentence to commence as of the date of his undertaking. The Crown requested a driving prohibition of between three to five years, and Mr. Williams advocated for 12 to 18 months. Walsh, Prov. Ct. J. stated:

> [...] Although I am not permitted to back date a prohibition order (See: R. v. Bryden (2007) 323 N.B.R. (2d) 119 (Q.B.)), I have taken into consideration the time you have been prohibited from driving pending sentence in arriving at the [twenty-two] (22) month length.[15]

31. *Bilodeau* involved two counts of dangerous driving causing death during a street race. The sentencing judge imposed a three-year term of imprisonment, along with a seven-year driving prohibition. Mr. Bilodeau, 19 years of age at the time of the offence, appealed only the duration of his driving prohibition. Prior to being sentenced, Mr. Bilodeau had been prohibited from driving for three and a half years. The Court of Appeal of Quebec fully canvassed the sentencing principles applicable in the circumstances, noting they were equally relevant to the imposition of a driving prohibition as punishment. The court concluded the sentencing judge erred in their analysis and the seven-year driving

[14] *Pellicore*, *supra* note 10 para 1.
[15] *Williams*, *supra* note 11 para 31.

prohibition was unwarranted and unreasonable. Gascon J.A., as he then was, stated the following in relation to the presentence driving prohibition:

> The appellant has been subject to a driving prohibition since he was 19 years old. The cumulative effect of the presentence driving prohibition, the jail sentence and the prohibition that will follow will result in him being unable to drive for most of his twenties. This particular reality cannot be ignored. Without having to deduct the entire period of the presentence driving prohibition, it remains a factor to be considered in the analysis of the reasonableness and appropriateness of the prohibition to be imposed under s. 259(3.3)(b) of the Criminal Code. Counsel for the respondent did agree on this point at the hearing. In this case, it proves to be rather lengthy[16].

32. These decisions before *Lacasse* reflect a relatively sparse commentary and body of case law regarding the use of pre-sentence driving prohibitions on sentence.

33. In *Lacasse* the Supreme Court of Canada reduced a driving prohibition imposed under s. 259(2) of the *Criminal Code* from four years and seven months to two years and four months, giving the offender credit for having been prohibited from driving for over two years by virtue of a condition in a recognizance pending trial. The Court addressed the pre-prohibition driving restriction in the following passages (at paras 111 to 114):

> Another question concerning the driving prohibition arose at the hearing. The respondent submits that, because he entered into a recognizance under which he was not to drive from July 5, 2011, the date he was released on conditions, until October 4, 2013, the date of his sentencing, he should be credited for that period. In the same way as the conditions of pre-trial detention, the length of a presentence driving prohibition can be considered in analyzing the reasonableness of the prohibition: *R. v. Bilodeau*, 2013 QCCA 980, at para. 75 (CanLII); see also *R. v. Williams*, 2009 NBPC 16 (CanLII), 346 N.B.R. (2d) 164.
>
> The courts have seemed quite reluctant to grant a credit where the release of the accused was subject to restrictions, given that such restrictive release conditions are not equivalent to actually being in custody ("bail is not jail"): *R. v. Downes*(2006), 2006 CanLII 3957 (ON CA), 79 O.R. (3d)

[16] *Bilodeau*, *supra* note 12, para 75.

> 321 (C.A.); *R. v. Ijam*, 2007 ONCA 597 (CanLII), 87 O.R. (3d) 81, at para. 36; *R. v. Panday*, 2007 ONCA 598 (CanLII), 87 O.R. (3d) 1.
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> **In the instant case, the driving prohibition has the same effect regardless of whether it was imposed before or after the respondent was sentenced.** In *R. v. Sharma*, 1992 CanLII 90 (SCC), [1992] 1 S.C.R. 814, Lamer C.J., dissenting, explained that the accused had in fact begun serving his sentence, given that the driving prohibition would have been imposed as part of his sentence had he been tried and found guilty within a reasonable time. In short, where a driving prohibition is not only one of the release conditions imposed on an accused but also part of the sentence imposed upon his or her conviction, **the length of the presentence driving prohibition must be subtracted from the prohibition imposed in the context of the sentence.**
>
> In my view, therefore, the driving prohibition of four years and seven months imposed in this case is demonstrably unfit and must be reduced to two years and four months to take account of the recognizance entered into by the respondent under which he was to refrain from driving from his release date until his sentencing date (two years and three months)[17].

34. Agreeing with Wagner C.J. on this issue, Gascon J. stated (in his dissent):

> Turning to the issue of the driving prohibition, I agree with my colleague that the Court of Appeal and the trial judge both erred in failing to take into account the length of the presentence driving prohibition. In their defence, the issue was not raised until the hearing in this Court, at which the appellant in fact agreed that it was a relevant consideration.
>
> In R. v. Bilodeau, 2013 QCCA 980, I expressed the opinion that [TRANSLATION] "[a]lthough the length of the presentence driving prohibition need not be subtracted in equal measure, it is nonetheless a factor to be considered in analyzing the reasonableness and appropriateness of the prohibition to be imposed under section 259(3.3)(b) Cr. C.": para. 75 (CanLII). The Ontario Court of Appeal had already expressed a similar view in R. v. Pellicore, [1997] O.J. No. 226 (QL), at para. 1. The same reasoning also applies under s. 259(2)(a.1) Cr. C. In the instant case, I therefore consider it appropriate to reduce the length of the driving prohibition as my colleague suggests, that is, by the entire period during which the respondent was subject to a prohibition as part of his release conditions before being sentenced[18].

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[17] *Lacasse*, *supra* note 3 para 111 to 114.
[18] *Lacasse*, *supra* note 3 para 176 and 177.

35. The key point to be taken from *Lacasse* is that this Court departed from the long-standing legal fiction that a driving prohibition before trial is completely divorced from the sentence imposed after trial (and conviction).

36. Applying this Court's decision in *Lacasse* to reduce the driving prohibitions under s. 259(1) generally, but interpreting the minimum prohibitions and s. 719(1) of the *Criminal Code* as requiring them to commence on sentencing, therefore nullifying any credit, produces results that are absurd and creates internal incoherence that defeats the scheme of punishment established by s. 259(1).

37. Guided by the interpretive analysis in *Wust*, where the Supreme Court of Canada discussed the interplay between mandatory minimum sentences and credit for pre-trial custody, we rely on comments from Arbour J who provided the following guidance for interpreting such sentences:

> Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality [...].
>
> [...]
>
> Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum[19].
>
> In accordance with the umbrella principle of statutory interpretation expressed by this Court in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at paras. 20-23, mandatory minimum sentences must be understood in the full context of the sentencing scheme, including the management of sentences provided for in the Corrections and Conditional Release Act, S.C. 1992, c. 20. Several provisions of the Code, and of other federal

[19] *Wust, supra* note 5, para 22.

> statutes, provide for various forms of punishment upon conviction for an offence. Most enactments providing for the possibility of imprisonment do so by establishing a maximum term of imprisonment. In deciding on the appropriate sentence, the court is directed by Part XXIII of the Code to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case. In arriving at a fit sentence, the court must also be alive to some computing rules, for example, the rule that sentences cannot normally be back- or post-dated: s. 719(1) of the Code; see also R. v. Patterson (1946), 87 C.C.C. 86 (Ont. C.A.), at p. 87, per Robertson C.J., and R. v. Sloan (1947), 87 C.C.C. 198 (Ont. C.A.), at pp. 198-99, per Roach J.A., cited with approval by Rosenberg J.A., in McDonald, supra, [(1998, 127 C.C.C. (3d) 57], at p. 71[20].

38. Nevertheless, it has been argued that driving related pre-sentence conditions do not have a s. 719(3) equivalent, similar to what was argued in *Wust* and therefore the interpretive analysis does not apply in the present case. However, let's not forget that long before s. 719(3) was added to the *Criminal Code* in 1972, courts still considered the time an offender had spent in presentence custody as a principle of sentencing. The principle was referenced to in *R. v. Sloan*[21]:

> This court has had occasion to recently point out in Rex v. Patterson, [[1947] O.W.N. 146], that there is no authority for the "dating back of any sentence". The sentence can only bear the date on which it is imposed and any term of imprisonment contained therein cannot begin to run earlier than the date of the sentence itself. This is not to say that the Court cannot take into consideration, in imposing sentence, any period of incarceration which the accused has already undergone between the date of his arrest and the date of the sentence, but such period cannot form part of the term imposed by the sentence. If the Court is of the opinion that the circumstance justifies such a course, it may reduce the term of imprisonment, which it would otherwise impose, by the whole or part of the period of imprisonment already served[22].

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[20] *Wust, supra* note 5, para 18,22-23.
[21] *R. v. Sloan*, [1947] O.J. No. 43 (ONCA).
[22] *Sloan, ibid*, para 2.

39. In *Wust*, Arbour J went on to confirm the position previously taken by the Ontario Court of Appeal in *R v McDonald*[23] (1998), 40 OR (3d) 641 (CA), that remand credit, once applied to the sentence as determined by a court, can have the effect of reducing the sentence, as imposed, to less than the mandatory minimum, stating:

> In his judgment, Rosenberg J.A. employed several well-established rules of statutory interpretation to conclude as he did, at p. 69, that s. 719(3) provides sentencing judges with a "substantive power to count pre-sentence custody in fixing the length of the sentence". I agree with his analysis. In particular, I approve of his reference to the principle that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 29, per Lamer C.J.); to the need to interpret legislation so as to avoid conflict between its internal provisions, to avoid absurd results by searching for internal coherence and consistency in the statute; and finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, per Lamer J. (as he then was)[24]

40. Rosenberg JA in *McDonald*, held that s 719(3) could be applied to the mandatory minimum sentence of four years for robbery with a firearm. Rosenberg JA discussed a number of principles applicable to the interpretation of penal statutes and stated the following in relation to the principle respecting the interpretation of statutes to avoid absurd results:

> In R. v. McIntosh, supra at p. 704, Lamer C.J.C. also referred to the rule of statutory interpretation where absurdity is alleged. He quoted with approval from the decision of Lord Macmillan in Altrincham Electric Supply Ltd. v. Sale Urban District Council (1936), 154 L.T. 379 at 388 (H.L.):
>
> > [...] if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the latter, even although the latter may correspond more closely with the literal reading of the words employed. [Emphasis in original.]

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[23] *R v McDonald* , [1998] OJ No 2990 (ONCA).
[24] *Wust, supra* note 5, para 34.

Lamer C.J.C. also referred with approval to a judgment of La Forest J.A. in New Brunswick v. Estabrooks Pontiac Buick Ltd. (1982), 44 N.B.R. (2d) 201 at 210 (C.A.). La Forest J.A. made the point in that case that an apparent absurdity flowing from the plain language of a provision cannot create an ambiguity. On the other hand, the fact that the words as interpreted would give an unreasonable result is a good reason to closely scrutinize the statute to "make abundantly certain" that the words are not susceptible of some other meaning. For, as he said, "it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity." In my view, an interpretation of the provisions in the present case that would not permit a court to take pre-sentence custody into account to reduce the sentence below four years would result in an absurd and unjust result.

In R. v. Lapierre, supra at p. 346, Proulx J.A. gave an example something along the following lines. Assume the accused is charged with an offence contrary to s. 344(a) and is either refused bail or is unable to meet the bail set by the court. Assume further that the accused intends to plead not guilty and wishes to exercise his right to a jury trial. Counsel for the Intervener in this appeal conceded that it could take a year for the accused to be tried by a jury in this province, even if the accused is in custody. Assume the accused is convicted and successfully appeals against that conviction and a new trial is ordered. With the delay in obtaining transcripts a further year elapses before the accused's appeal is heard and a new trial ordered. The new trial is heard within four months and the accused is again convicted. In all, the accused has spent over two years in custody.

If s. 719 precludes the court from taking these periods into account, the accused must now be sentenced to a further four years in the penitentiary. It seems to me that quite apart from any Charter considerations, Parliament could not have intended such an unfair and unjust result. The answer must lie in permitting the sentencing judge to make use of the express authority in s. 719(3). It may be that the "sentence" only commences when it is imposed but as I have said above, the "punishment" began, in effect and in substance, from the point when the offender was taken into custody as a result of that offence. Such an interpretation is, to use the words of Lord Macmillan, one that is consonant with justice and good sense. Put another way, even assuming some ambiguity in the interplay between s. 344(a) and s. 719, I am not prepared to assume that Parliament intended to perpetrate an injustice or absurdity, where an interpretation that would avoid that result and is consistent with Parliament's intent is clearly available. This interpretation also has the advantage of consistency with some of the other

> provisions of the Code concerning sentencing. I will briefly turn to some of those other provisions.[25]

41. Further, analyzing the words within s. 259(1) is only part of the interpretative exercise. As explained in *Rizzo & Rizzo Shoes Ltd. (Re)*[26], "statutory interpretation cannot be founded on the wording of the legislation alone":

> Although much has been written about the interpretation of legislation [...] Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament[27].

42. In *Wust*, the Supreme Court approved of the need to both interpret legislation so as to avoid conflict between its internal provisions and "to avoid absurd results by searching for internal coherence and consistency in the statute:

> In his judgment, Rosenberg J.A. employed several well-established rules of statutory interpretation to conclude as he did, at p. 69, that s. 719(3) provides sentencing judges with a "substantive power to count pre-sentence custody in fixing the length of the sentence". I agree with his analysis. In particular, I approve of his reference to the principle that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused (see R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 29, per Lamer C.J.); to the need to interpret legislation so as to avoid conflict between its internal provisions, to avoid absurd results by searching for internal coherence and consistency in the statute; and finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the Charter: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078, per

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[25] *MacDonald, supra* note 23 at paras. 52-56.
[26] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, [1998] 1 RCS 27.
[27] *Rizzo*, *ibid* at para 21.

> Lamer J. (as he then was). Without repeating Rosenberg J.A.'s analysis here, I wish to make a few observations[28].

43. In *Wust*, the Supreme Court used consequential analysis to determine that interpretation of s. 719(3) not applicable to minimum sentence would produce absurd results. Consequential analysis requires applying the proposed interpretation of the law to the facts to determine whether the interpretation produces absurd results that do not align with the purpose of the legislation. In analyzing the consequences of such an interpretation, Arbour J. stated:

> [...] Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation of s. 719(3) and s. 344(a) that would reward the worst offender and penalize the least offender is surely to be avoided[29].

44. The consequential analysis forms an essential part of the required analysis in this case. It is helpful to identify the results of the interpretation advanced by the Crown. They are similar to those that were characterized to be absurd and/or unintended by the Supreme Court in *Wust*. In this case, the absurd results arise from recognizing the *Lacasse* principle applies to s. 259(1) but interprets it, with s. 719(1), as requiring the minimum prohibition to commence on sentencing regardless of any period during which the offender was subject to a bail-related driving prohibition.

45. Ultimately, Arbour J in *Wust* indicated that imposing a mandatory minimum sentence regardless of time served, "would be offensive both to rationality and justice[30]".

46. With *Lacasse* and *Wust* as the basis for the Applicant's argument, we recognize that the case law on the issue has been divided. Courts across Canada have been divided on the

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[28] *Wust*, *supra* note 5, para 34.
[29] *Wust*, *supra* note 5, para 42.
[30] *Wust*, *supra* note 5, para 33

issue of granting credit for driving prohibitions and/or suspensions before trial and whether such credit can reduce the sentence below the mandatory minimum.

47. Cases like *R. v. Sohal*[31], 2019 ABCA 293 and *R. v. Froese*[32], 2020 MBQB 11 stand for the proposition that pre-trial driving prohibition can not be deducted from the overall sentence, however those cases dealt with a pre-trial driving prohibition pursuant to provincial statute (the so-called "administrative driving suspension"). Those case are clearly distinguishable from the case at bar.

48. We are not arguing to allow a sentencing court to apply provisions of provincial statutes, such as the provincially enacted motor vehicle or highway traffic legislation, to depart from a mandatory minimum sentence. In this respect, the provincial legislation has no impact. Further, we agree that it is contrary to Canadian constitutional principles to allow provincial legislation to effectively vary provisions of valid federal legislation.

49. In cases like *R v Rezek*[33], [2008] O.J. No. 709 (ONCJ), Duncan J held that the mandatory minimum driving prohibition cannot be reduced to take into account time spent by the accused on bail when he was prohibited from driving as a term of his recognizance.

50. Likewise, in *R v Bryden*[34], 2007 NBQB 316, 2007 NBBR 316, Grant J reversed the trial judge's decision, finding that a mandatory minimum driving prohibition period cannot be reduced by the time between the guilty plea and the passing of sentence during which the accused's licence was suspended.

51. We submit however that those cases have been superseded in 2015 by the Supreme Court of Canada in *Lacasse.*

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[31] *R. v. Sohal*, 2019 ABCA 293.
[32] *R. v. Froese*, 2020 MBQB 11.
[33] *R v Rezek*, [2008] O.J. No. 709 (ONCJ).
[34] *R v Bryden*, 2007 NBQB 316, 2007 NBBR 316.

52. This issue was directly addressed in *R v Bland*[35], 2016 YKSC 61, where Gower J affirmed the sentencing judge's decision to credit the accused with a pre-trial driving prohibition that had been imposed as part of his recognizance and thereby impose a driving prohibition below the mandatory minimum. Gower J referred to a statement by Paciocco J in *R. v. Pham*[36] 2013 ONCJ 635, that in the case of mandatory driving prohibitions, judges must consult "the general principles of sentencing that have not been legislated", and suggested that those principles likely included "equity, rationality, fairness, justice and common sense regularly employed as a matter of common law[37].

53. In response to the Crown's objection in *Bland* that there is no statutory provision equivalent to s 719(3) that allows for credit to be applied on sentencing based on release conditions imposed in a recognizance, Gower J stated (at paras 21-23):

> As I understand the Crown's first argument on this appeal, the sentencing judge erred in principle by relying on Wust, because that case was an exercise in statutory interpretation in order to resolve the apparent conflict between ss 344(a) and 719(3) of the Code. However, in the case at bar, the Crown says there is no such statutory provision equivalent to s 719(3) that allows for credit to be applied upon sentencing based on release conditions imposed in a recognizance (such as in the case at bar) or other forms of process while on judicial interim release. Absent such a statutory provision, the sentencing judge had no statutory basis to reduce the offender's driving prohibition.
>
> The flaw in this argument is that the absence of such a statutory provision did not trouble the Supreme Court of Canada in *Lacasse* when it credited the offender with the time served under the pre-sentence driving prohibition and reduced the length of the prohibition imposed at sentencing accordingly. Further, to the extent that s 259(1) is silent on the issue of credit, I agree with the respondent's counsel that it creates an ambiguity which must be resolved in favour of offenders in a manner consistent with the *Charter*.
>
> It must also be remembered that prior to the enactment of ss 719(3) to (3.3) of the *Code*, courts routinely credited offenders with pre-sentence custody on the basis of the unlegislated general principles of sentencing referred to

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[35] *R. v. Bland*, 2016 YKSC 61 (hereinafter referred to as "*Bland*").
[36] *R. v. Pham*, 2013 ONCJ 635 (hereinafter referred to as "*Pham*").
[37] *Pham*, *ibid*, para 13.

> by Paciocco J in *Pham*, such as equity, rationality, fairness, justice and common sense[38].

54. Relying on *Wust*, Gower J cites the principles of statutory interpretation that when a court applies both s 259 and s 719(3) of the Code, Parliament must not have intended to perpetrate an injustice or an absurdity. Gower J quoting Arbour J in *Wust* stated:

> Rather, it should be assumed "that Parliament intended these two sections to be interpreted harmoniously and consistently within the overall context of the criminal justice system's sentencing regime[39].

55. Gower J in *Bland* raised several situations which could result in absurdity should the court not give credit for pre-sentence driving prohibition (para 18 – 20):

> 18 A similar type of absurdity could arise under s 259(1) if courts are not entitled to give credit resulting in driving prohibitions below the mandatory minimum of one year. The decision of the Québec Court of Appeal in R v Bilodeau, 2013 QCCA 980, gives rise to such a potential absurdity. That case dealt with the mandatory minimum driving prohibition in s 259(3.3)(b) of the Code, which applies when an offender has been convicted of causing death by criminal negligence while street racing or dangerous operation of a motor vehicle while street racing, and requires the court to impose a driving prohibition of not less than one year for either of these offences. Bilodeau was an offender who was originally sentenced to a driving prohibition of seven years. However, the Court of Appeal credited the offender with a pre-sentence driving prohibition, imposed as a bail condition, of three-and-a-half years and reduced the prohibition on appeal from seven to five years. The issue of the mandatory minimum prohibition of one year did not arise because the Court of Appeal was dealing with a sentence well in excess of the minimum.
>
> Nevertheless, Bilodeau was referred to with approval by both the majority and dissenting decisions in Lacasse. The potential absurdity, similar to that referred to by Arbour J in Wust, is that the worst offender facing a sentence under s 259(3.3) would benefit from pre-sentence credit, because they would have a prohibition well in excess of the minimum, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing driving prohibition. To borrow the words of Arbour J, an interpretation s 259(1) of the Code that would

[38] *Bland, supra* note 35, para: 21 to 23.
[39] *Bland, supra* note 35, para 17.

> reward the worst offender and penalize the least offender is surely to be avoided. In my view, this reductio ad absurdum reasoning also neutralizes the Crown's argument on the "limitations" referred to in s 718.3(1) of the Code.
>
> The respondent's counsel also referred to the type of absurdity which arose in Pham, i.e. persons who successfully appeal a conviction to which a mandatory driving prohibition attaches will have to serve a second identical prohibition if they are convicted a second time. In addition, failing to credit for pre-sentence driving prohibitions could result in disparity between similarly situated offenders, as they could end up serving total driving prohibitions of differing lengths, depending on how long it takes for their matters to be resolved in court. This, said counsel, offends the principle of parity of sentencing codified pursuant to s 718.2(b) of the Code. I agree with these submissions.
>
> The Crown sought to distinguish Pham on the basis that the offender there had actually served the 15-month driving prohibition as part of his sentence following the initial conviction, whereas in the case at bar we are dealing with a pre-sentence driving prohibition resulting from a recognizance, which is focused on the issue of public safety and protecting the public, as opposed to a prohibition imposed as part of a sentence, which is intended to be punitive. I do not accept this distinction. First of all, sentencing options such as jail, fines, probation conditions, and driving prohibitions can all be considered to be both for the purpose of punishing the offender as well as for the purpose of protecting the public. Secondly, the Supreme Court in Lacasse (at para 113) seemed to have had no difficulty treating a pre-sentence driving prohibition as part of the offender's sentence, noting that even if the driving prohibition was imposed before sentence, an offender can be considered to have "begun serving his sentence" under that pre-sentence prohibition, if a further driving prohibition is imposed upon his or her conviction. Accordingly, credit for the pre-sentence prohibition "must" be given[40].

56. Similarly, in *R. v. Edwards*[41], 2016 NJ 165, the Court found no reason to distinguish between mandatory driving prohibitions and discretionary driving prohibitions in terms of accounting for the credit that must be given. The driving prohibition was deemed to have been served in its entirety. In so finding, Linehan J stated:

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[40] *Bland, supra* note 35, para: 18 to 20.
[41] *R. v. Edwards*, 2016 NJ 165 (NLPC) (hereinafter referred to as "*Edwards*").

22 The direction of the Court in R. v. Lacasse is clear that the length of presentence driving prohibitions must be subtracted from a s. 259(2) prohibition. The Court did not address s. 259(1) prohibitions, but to hold that in such cases offenders would be treated differently, would be unjust and not in accordance with how the Supreme Court of Canada dealt with mandatory minimum sentences in R. v. W.(L.W.), 2000 CarswellBC 749 (SCC).

23 In R. v. W.(L.W.), the Court held that remand credit, once applied to the sentence as determined by a court, can have the effect of reducing the sentence, as imposed, to less than the mandatory minimum. Arbour, J. in writing for the Court addressed this issue, beginning at paragraph 22:

22 Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum.

23 In accordance with the umbrella principle of statutory interpretation expressed by this Court in Rizzo & Rizzo Shoes Ltd,., Re, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23, mandatory minimum sentences must be understood in the full context of the sentencing scheme, including the management of sentences provided for in the Corrections and Conditional Release Act, S.C. 1992, c. 20. Several provisions of the Code, and of other federal statutes, provide for various forms of punishment upon conviction for an offence. Most enactments providing for the possibility of imprisonment do so by establishing a maximum term of imprisonment. In deciding on the appropriate sentence, the court is directed by Part XXIII of the Code to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case. In arriving at a fit sentence, the court must also be alive to some computing rules, for example, the rule that sentences cannot normally be back- or post-dated: s. 719(1) of the Code; see also R. v. Patterson (1946), 87 C.C.C. 86 (Ont. C.A.) at p. 87, per Robertson C.J., and R. v. Sloan (1947), 87 C.C.C. 198 (Ont. C.A.) at pp. 198-99, per Roach J.A., cited with approval by Rosenberg J.A., in McDonald, [1998] O.J. No. 2990 at p. 71.

[…]

> 34 In his judgment, Rosenberg J.A. employed several well-established rules of statutory interpretation to conclude as he did, at p. 69, that s. 719(3) provides sentencing judges with a "substantive power to count presentence custody in fixing the length of the sentence". I agree with his analysis. In particular, I approve of his reference to the principle that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused (see R. v. McIntosh, [1995] 1 S.C.R. 686 (S.C.C.) at para. 29, per Lamer C.J.); to the need to interpret legislation so as to avoid conflict between its internal provisions, to avoid absurd results by searching for internal coherence and consistency in the statute; and finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the Charter: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 (S.C.C.) at p. 1078, per Lamer J. (as he then was)[42].

57. In the present case, the driving suspension created by the court undertaking is the same as what was considered in *Lacasse, Bland* and *Edwards.* The court need not be concerned with the fact that *Lacasse* was dealing with a discretionary order as opposed to a mandatory one. The principles of statutory interpretation applied to both situations remain the same. To do otherwise would result in absurdity.

58. Further, the pre-trial condition not to drive has an overwhelmingly punitive impact on the accused. To the accused, the basis of her inability to drive for a period of one year is immaterial as it is all the same whether it occurred as a result of being a condition of her recognizance or being imposed on sentencing. The punitive effect on the convicted person is the same whenever it is imposed.

59. Further, failing to subtract the period of pre-trial driving prohibition pursuant to a court undertaking would be to inflict a form of double punishment on the Appellant. Despite the fact that the *Criminal Code* does not expressly have provisions in relation to pre-trial driving prohibition on a court undertaking similar to periods of incarceration, the court can achieve same while applying the principles of statutory interpretation. Where the interaction between the *Criminal Code* provisions have an unjust punitive effect, the

[42] *Edwards*, *ibid*, para 22, 23 and 34.

sentencing issue must be resolved in favour of the accused and tailored to her individual circumstances[43] . Finally, prior to the enactment of ss 719(3) to (3.3) of the *Code*, courts routinely credited offenders with pre-sentence custody on the basis of the unlegislated general principles of sentencing[44].

60. Interpreting s. 259(1) so as to permit credit for a bail-related driving prohibition generally (as per *Lacasse*), but requiring the minimum driving prohibition to commence on sentencing regardless of the bail-related prohibition, produces results that are similar to those identified in *Wust*, which were described as absurd.

61. Moreover, restricting the *Lacasse* principle in this way is also contrary to the carefully crafted purpose set out in s. 259(1), producing an internal inconsistency within the provision itself. It prevents the provision from having the desired effect, for example, of sanctioning the offender more severely where there are circumstances that warrant a sentence at the maximum end of the applicable range. In such a case, the length of the post-sentence driving prohibition and the total length of the driving prohibition are the same (or nearly so) whether or not the more serious aggravating factors are present. An interpretation that requires minimum sentences to be applied in this manner, from the time of sentencing, defeats all other objectives of the s. 259(1) sentencing scheme.

62. In my view, *Lacasse* does more than simply recognize, as the Crown argues, that the length of a driving prohibition imposed as a condition of bail can be reduced from the "discretionary portion" of a driving prohibition sentence. The Supreme Court confirmed in *Lacasse* that, as a general rule, the length of a driving prohibition imposed as a condition of bail should be reduced from the length of the otherwise just and appropriate driving prohibition sentence. *Lacasse* recognizes that being subject to a driving prohibition as a condition of bail is equivalent to serving the prohibition in advance. This follows from the nature of the principle, as described by Wagner C.J. He concluded, agreeing with Lamer

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[43] *Wust*, *supra* note 5 at paras 22 and 34.
[44] *Pham*, *supra* note 36 at para 13.

C.J.C. in *Sharma*, that "whether the driving prohibition is imposed before or after sentencing, its effect is the same[45]" (para. 113). The principle is based on a rationale that is equally applicable to the nature of pre-sentence custody, and the method used by Wagner C.J. in considering the requisite period is also similar. Indeed, the principle is described in as general terms as is the principle relating to pre-sentence custody in s. 719(3).

63. In sum, as French J.A. dissenting in the present case stated, *Lacasse* affirmed the necessity of taking into account a bail-related driving prohibition on sentencing, a principle that is undeniably embedded within the sentencing scheme of the *Code* and that applies generally whether a mandatory or discretionary order being in play[46].

[45] *Lacasse, supra* note 3 para 113.
[46] *Basque, supra* note 4 para 121.

PART IV – SUBMISSIONS CONCERNING COSTS

64. The Appellant makes no submissions on costs.

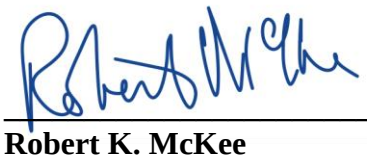
PART V – ORDER SOUGHT

65. We respectfully submit that the Supreme Court of Canada should grant the appeal and restore the trial judge's decision as affirmed by the Summary Conviction Appeal Court.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

66. Not applicable.

RESPECTFULLY SUBMITTED this 24th day of May, 2022.



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