S.C.C. File No.: 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)

-and-

ATTORNEY GENERAL OF ALBERTA

INTERVENER

FACTUM OF THE RESPONDENT
PURSUANT TO RULES 36 AND 42 – *RULES OF THE SUPREME COURT OF CANADA*

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PART I: OVERVIEW AND FACTS

I. Overview

1. At 3:10am on October 7th, 2017, Jennifer Basque was driving her car while her blood alcohol concentration exceeded the legal limit.[1] Following her arrest and subsequent release from custody, she was placed on a pre-trial driving prohibition, a prohibition which lasted 21 months and ended on the day she was sentenced.

2. As part of her sentence, the trial judge was required to prohibit Ms. Basque from driving for a mandatory minimum period of at least one year.[2] Ms. Basque asked the trial court to credit her for the 21 months she was previously prohibited from driving. The issue: mandatory minimums, as with all sentences, take effect on the day they are imposed.[3] In other words, absent specific limitations outlined in the *Criminal Code*, mandatory minimum driving prohibitions must be ordered on a *go-forward basis*, beginning on the day they are imposed. The *Criminal Code* is clear and unambiguous on this point.

3. Ms. Basque's request thus raised an important question, being whether a pre-trial driving prohibition can be credited to the extent that the go-forward prohibition imposed as part of an offender's sentence can dive below the mandatory minimum. Courts across Canada have been divided on the answer to this question.[4] The issue is now before this Court for final determination.

4. The essence of this appeal boils down to whether there exists any statutory or common law authority which permits a sentencing court to credit a pre-trial driving prohibition below a mandatory minimum. Ms. Basque says such authority does exist. The Crown disagrees, and so did the majority of the New Brunswick Court of Appeal.

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[1] Contrary to the now repealed section 253(1)(b) of the *Criminal Code* R.S.C., 1985 c. C-46.
[2] Section 259(1)(a) of the *Criminal Code*, repealed and replaced with the nearly identical section 320.24(2)(a).
[3] Section 719(1) of the *Criminal Code*; see also section 718.3(2) of the *Criminal Code*.
[4] *R v Basque* 2021 NBCA 50 at paras 41-42 [*Basque* NBCA].

5. Mandatory minimum sentences are inherently inflexible. They are meant to be. Indeed, they constitute Parliamentary bulwarks against judicial discretion. Not only that, but they represent a forceful expression of governmental policy in the area of criminal law.[5] Accordingly, absent a successful constitutional challenge, courts *must* give them effect when they apply.[6] And, absent a common law or statutory exception, mandatory minimums must be ordered on a go-forward basis on the day they are imposed.[7]

6. These principles lead to an inescapable conclusion: although credit for a pre-trial driving prohibition can be given to a post-sentencing prohibition generally,[8] such credit cannot be given to the extent that the go-forward sentence is reduced below the mandatory minimum floor created by Parliament.

7. The Crown, without hesitation, acknowledges the compelling fairness concerns that underpin the Appellant's central argument before this Court. Those concerns are meritorious and worthy of sincere consideration. Nonetheless, they are not sufficient to displace the crystal-clear wording of the *Criminal Code*, nor the unambiguous intent of Parliament. Put simply, absent a successful constitutional challenge, courts have a duty to give effect to the clear intent of Parliament, even if concerns for unfairness arise.[9]

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[5] *R v Nasogaluak* 2010 SCC 6 at para 45; *R v Lloyd* 2016 SCC 13 at para 60.
[6] *Nasogaluak* at paras 45 and 63; *R v Ferguson* 2008 SCC 6 at para 54.
[7] Section 719(1) of the *Criminal Code*; See also section 718.3(2) of the *Criminal Code*.
[8] *R v Lacasse* 2015 SCC 64 at para 113.
[9] *R v McIntosh* [1995] 1 SCR 686 at paras 18, 28 and 34; *Canada v Canada North Group Inc.* 2021 SCC 30 at para 251, Justices Rowe, Brown and Abella, in dissent, but not on this point. At para 254 Justice Moldaver, who dissented as well, indicated he was in "substantial agreement" with Justices Rowe, Brown and Abella. *R v McColl* 2008 ABCA 287 at para 14; *R v Clark* 2008 ABCA 271 at paras 18-20; *Beattie v National Frontier Insurance Co.* 2003 CanLII 2715 (ONCA) at para 15; *R v Huggins* 2010 ONCA 746 at para 17; *Bedwell v McGill* 2008 BCCA 526 at para 31.

II. Facts

8. At 3:10am on October 7th, 2017, the Appellant was driving her car in Moncton, New Brunswick. More specifically, she was swerving and occasionally driving over the solid yellow line.[10] By happenstance, a police officer was following her and observed her hazardous driving.[11] The officer pulled her over and, during his interactions with her, collected grounds to suspect the Appellant was driving while impaired by alcohol. He therefore demanded the Appellant furnish a sample of her breath into an approved roadside screening device, which ultimately registered a "Fail".

9. The Appellant was then arrested for impaired driving and brought to the local police station where she furnished two further samples of her breath into an approved instrument. Those samples revealed that the Appellant's blood alcohol concentration consisted of 130 milligrams of alcohol in one hundred millilitres of blood.[12] As a result, she was charged with driving with a blood-alcohol concentration that exceeded the legal limit (eighty milligrams of alcohol in one hundred millilitres of blood).[13]

10. On November 29th, 2017, the Appellant was brought into custody and was detained overnight. The next day, on November 30th, 2017, the Appellant was released from custody.[14] As a condition of her release, she was prohibited from driving anywhere in Canada.[15] This prohibition remained in effect for 21 months until the Appellant was convicted by way of guilty plea and later sentenced.[16] Parenthetically, it must be noted that the root cause for the lengthy delay between release and sentencing was due to the Appellant initially pursuing, but later

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[10] Appellant's Record, Part I, page 3.
[11] Appellant's Record, Part I, pages 3-4.
[12] Appellant's Record, Part I, pages 3-4.
[13] Contrary to the now-repealed section 253(1)(b) of the *Criminal Code*.
[14] Appellant's Record, Part I, page 152.
[15] Appellant's Record, Part I, page 16, line 21.
[16] *Basque* NBCA at para 3.

abandoning, a curative discharge application for her alcohol-related driving offence.[17] Various adjournments were granted to the Appellant during the time she sought a discharge.[18]

III. Judgments Below

A. *New Brunswick Provincial Court (McCarroll J.)*

11. At the Appellant's sentencing hearing, her trial counsel invited the court to credit the Appellant for her 21-month pre-trial driving prohibition. Trial counsel acknowledged the presence of the one-year mandatory minimum driving prohibition prescribed by the *Criminal Code* but argued that the Appellant's time spent on a pre-trial prohibition could be credited such that a go-forward prohibition was not required.[19] The sentencing judge agreed.

12. In accepting the Appellant's request, the sentencing judge backdated the imposition of the Appellant's sentence to November 30th, 2017 (the day of her release from custody). He did so to avoid imposing the mandatory minimum prohibition on a go-forward basis. This was an error in law: a sentence commences when it is imposed,[20] and there is no jurisdiction to backdate it.

B. *New Brunswick Court of Queen's Bench, 2020 NBQB 130 (Justice Dysart)*

13. In a Crown appeal to the New Brunswick Court of Queen's Bench, Justice Dysart concluded that the sentencing judge erred in backdating the Appellant's sentence. He ruled, however, that credit for the 21-month pre-trial driving prohibition could nonetheless be given such that a go-forward one-year driving prohibition was not required.[21]

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[17] Pursuant to the now-repealed section 255(5) of the *Criminal Code*.
[18] *Basque* NBCA at para 3; see also *R v Basque* 2020 NBQB 130 at para 4 [*Basque* NBQB].
[19] 259(1)(a) of the *Criminal Code*, repealed but replaced with the nearly identical section 320.24(2)(a)). See also *Basque* NBCA at paras 10 and 13.
[20] Section 719(1) of the *Criminal Code*; see also *Basque* NBCA at para 8; *R v Wust* 2000 SCC 18 at para 23; *Lacasse* at para 106.
[21] *Basque* NBQB at paras 29-30.

14. In his analysis, Justice Dysart considered *R v Bryden*,[22] a 2007 decision of the New Brunswick Court of Queen's Bench which dealt with the same issue. In *Bryden*, the Court held that sentencing judges do not have jurisdiction to credit a pre-trial driving prohibition below the mandatory minimum floor. Justice Dysart held that this Court's decision in *Lacasse*[23] altered the legal landscape and thus cast into doubt the validity and correctness of *Bryden*.[24]

15. Having effectively concluded that *Bryden* was no longer good law, Justice Dysart found himself persuaded by the decisions in *R v Bland*,[25] and *R v Edwards*.[26] In those decisions, the respective courts held that credit for a pre-trial driving prohibition may be given to the extent that the go-forward sentencing prohibition is less than the mandatory minimum. Equipped with these decisions, and convinced of their correctness, Justice Dysart dismissed the Crown's appeal.[27]

C. *New Brunswick Court of Appeal, 2021 NBCA 50 (Chief Justice Richard and Justice Baird – Justice French Dissenting)*

16. The Crown's decision to appeal to the New Brunswick Court of Appeal was purely propelled by concerns about the divergent lower court rulings on the issue.[28] Put simply, clarification of the law was required. In a split judgment, a majority of the Court of Appeal (Chief Justice Richard and Justice Baird) concluded that a sentencing court did not have jurisdiction to credit an accused with their time spent on a pre-trial driving prohibition to the extent that it would result in a go-forward sentence that fell below the mandatory minimum.[29]

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[22] *R v Bryden* 2007 NBQB 316.
[23] *R v Lacasse* 2015 SCC 64.
[24] *Basque* NBQB at para 21.
[25] *R v Bland* 2016 YKSC 61.
[26] *R v Edwards* 2016 CanLII 27326 (NLPC).
[27] *Basque* NBQB at paras 27-32.
[28] *Basque* NBCA at para 12. The divergent rulings were *R v Bryden* 2007 NBQB 316 and *R v Basque* 2020 NBQB 130.
[29] *Basque* NBCA at paras 6 and 39-40.

17. Writing for the majority, Chief Justice Richard conducted an interpretive analysis of the *Criminal Code* and held that section 259(1)(a) was clear and unambiguous.[30] He concluded that, absent a successful *Charter* challenge, courts are required to give effect to the clear intent of Parliament and order the mandatory minimum driving prohibition on a go-forward basis.[31] However, in the unique circumstances of the appeal, and in light of the Crown's concession that the Appellant should never have been on a pre-trial driving prohibition in the first place, the Court exercised its discretion to stay the execution of the sentence.[32]

18. Justice French, in dissent, reached the opposite conclusion and would have dismissed the Crown's appeal.[33] He held that the principles of statutory interpretation as well as fundamental fairness compelled the result reached by Justice Dysart, and not the one reached by the majority of the Court of Appeal.

PART II: RESPONDENT'S POSITION ON THE ISSUES

19. There is a single issue in this appeal:

> **Does a sentencing court have jurisdiction to credit an offender's pre-trial driving prohibition to the extent that the go-forward sentencing prohibition can be reduced below the mandatory minimum prescribed by the *Criminal Code*?**
>
> No. The *Criminal Code* is clear and unambiguous on this point: mandatory minimum driving prohibitions take effect on the day they are imposed, on a go-forward basis.[34] There is no statutory nor common law basis which permits a

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[30] *Basque* NBCA at paras 6 and 26.
[31] *Basque* NBCA at paras 6 and 39-40.
[32] *Basque* NBCA at paras 43-54. The Crown had invited the Court to stay the sentence.
[33] *Basque* NBCA at paras 56-132.
[34] Sections 259(1)(a) (now-repealed), 719(1) and 718.3 of the *Criminal Code*.

court to credit a pre-trial driving prohibition below the mandatory minimum.[35] In the circumstances, courts must give effect to the clear wording contained in the *Criminal Code*, despite concerns for unfair results.

PART III – LAW AND ARGUMENT

A. *The Standard of Review*

20. This appeal centers around an issue of statutory interpretation and thus raises a pure question of law.[36] As a result, the standard of review is that of correctness.[37]

B. *Clarifying What is and is not at Issue in This Appeal*

21. At the outset, the Crown wishes to highlight an important distinction that is central to this appeal. This appeal is not about whether a pre-trial driving prohibition may be credited at the sentencing stage. This Court has already settled that question; a pre-trial driving prohibition *must* be credited at sentencing if the offender is to receive a post-sentence driving prohibition.[38] Rather, the issue on appeal is whether a pre-trial driving prohibition can be credited *to the extent that the go-forward sentence dives below the mandatory minimum floor*.

C. *The Statutory Regime*

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[35] *R v Sohal* 2019 ABCA 293 at paras 14-15 and 26; *Basque* NBCA at paras 21-28. *R v Rezek* 2008 CarswellOnt 553 at para 17

[36] *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 at page 577; *Canadian National Railway Co. v Canada (Attorney General)* 2014 SCC 40 at para 33; *Geophysical Service Incorporated v EnCana Corporation* 2017 ABCA 125, at para 75, leave to appeal refused 2017 CanLII 80435 (SCC); *R v Kasim* 2011 ABCA 336 at para 8.

[37] *Housen v Nikolaisen* 2002 SCC 33 at paras 8-9.

[38] *Lacasse* at para 113.

22. The outcome of this appeal turns on the correct reading to be given to the now-repealed section 259(1)(a) of the *Criminal Code*.[39] Section 259(1)(a), with emphasis added, is reproduced below:

Mandatory order of prohibition	**Ordonnance d'interdiction obligatoire**
259 (1) When an offender is convicted of an offence committed under section 253 or 254 […] the court that sentences the offender **shall**, in addition to any other punishment that may be imposed for that offence, **make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be**,	**259 (1)** Lorsqu'un contrevenant est déclaré coupable d'une infraction prévue aux articles 253 ou […] le tribunal qui lui inflige une peine **doit**, en plus de toute autre peine applicable à cette infraction, **rendre une ordonnance lui interdisant de conduire un véhicule à moteur dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public, un bateau, un aéronef ou du matériel ferroviaire :**
(a) 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;**	**a) pour une première infraction, durant une période minimale d'un an** et maximale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné;

23. In addition to section 259(1)(a), the Crown reproduces the interrelated sections 718.3(2) and 719 of the *Criminal Code*, with emphasis added:

Discretion respecting punishment	**Appréciation du tribunal**
718.3(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, **subject to the limitations prescribed in the enactment**, in the discretion of the court that convicts a	**718.3(2)** Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, **sous réserve des restrictions contenues dans la disposition**, laissée à l'appréciation du tribunal qui condamne

[39] Although section 259(1)(a) of the *Criminal Code* has been repealed, it has been replaced with the nearly identical section 320.24(2)(a) of the *Criminal Code*; see *Basque* NBCA at para 13. As the Appellant helpfully points out in her submissions, the outcome of this appeal remains important for future cases given the enactment of section 320.24(2)(a) of the *Criminal Code*.

person who commits the offence, but **no punishment is a minimum punishment unless it is declared to be a minimum punishment.**	l'auteur de l'infraction, **mais nulle peine n'est une peine minimale à moins qu'elle ne soit déclarée telle.**

Commencement of sentence **719 (1) A sentence commences when it is imposed**, except where a relevant enactment otherwise provides.	**Début de la peine** **719 (1) La peine commence au moment où elle est infligée**, sauf lorsque le texte législatif applicable y pourvoit de façon différente.

24. The combined effect of these provisions, along with pronouncements from this Court, lead to the following conclusions, all of which inform the Crown's position on appeal:

a. Upon being convicted for a first offence of driving with a blood alcohol concentration above the legal limit, an offender at sentencing *must* receive, at a minimum, a one-year driving prohibition;[40]

b. The one-year driving prohibition commences on the day it is imposed except where a relevant enactment otherwise provides.[41] There is no relevant exception applicable in this case; and

c. Sentencing remains in the discretion of the sentencing judge, subject to the limitations placed on that discretion contained in the *Criminal Code*, such as mandatory minimum sentences.[42] Put another way, despite the discretionary nature of sentencing, mandatory minimums mandate a floor below which judges cannot go. It is presumed that Parliament intentionally chooses to exclude judicial discretion when it enacts mandatory minimum sentences. Accordingly, absent a successful constitutional challenge, courts must give effect to mandatory minimum sentences.[43]

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[40] Section 259(1)(a) of the *Criminal Code*, repealed and replaced with section 320.24(2)(a).
[41] Section 719(1) of the *Criminal Code*.
[42] Section 718.3 of the *Criminal Code*; *Ferguson* at para 54; *Nasogaluak* at paras 45 and 63.
[43] *Nasogaluak* at paras 45 and 63; *Ferguson* at para 54.

25. With the foregoing in mind, and given that no constitutional challenge has been raised by the Appellant, some statutory or common law justification must be found in order to breach the mandatory minimum floor prescribed by Parliament in section 259(1)(a) of the *Criminal Code*.[44] No such justification exists.

D. *There is no Common Law Justification Which Permits a Sentencing Court to Credit Below the Mandatory Minimum Driving Prohibition*

26. A central feature of the Appellant's position is that, when applied contextually, and by implication and extension, this Court's decisions in *Lacasse* and *Wust* provide sentencing judges with the common law authority to undercut the mandatory minimum go-forward driving prohibition prescribed by the *Criminal Code*. The Crown disagrees. *Lacasse* and *Wust* are informative, not determinative. In fact, they are distinguishable.

i. *Lacasse* did not Squarely Address the Issue Before the Court in This Appeal

27. *Lacasse* was a sentence appeal to this Court wherein the offender had been convicted of two counts of dangerous driving causing death. Following his convictions, he received a 6 ½ year custodial sentence as well as an 11-year discretionary driving prohibition. In addition to the lengthy driving prohibition imposed upon the offender at sentencing, he had been on a pre-trial driving prohibition for a period of 2 years and 3 months.[45]

28. Writing for the majority, Justice Wagner (as he then was)[46] acknowledged the punitive nature of a driving prohibition, regardless as to whether it is served as part of a pre-trial release condition or as part of a sentence.[47] To that end, he held that where a driving prohibition is not only one of the release conditions imposed on an accused but also part of the sentence "the length of the presentence driving prohibition must be subtracted from the prohibition imposed in the context of the sentence."[48]

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[44] *Sohal* at para 13.
[45] *Lacasse* at para 111.
[46] Hereinafter referred to as Chief Justice Wagner.
[47] *Lacasse* at para 113.
[48] *Lacasse* at para 113.

29. The Appellant argues that this statement, by extension, applies to driving prohibitions generally, regardless as to whether they are discretionary or mandatory and regardless as to whether it causes a court to breach a mandatory minimum.[49] The Appellant is not alone in that interpretation. Justice Dysart of the Court of Queen's Bench arrived at the same conclusion,[50] and so too did Justice French, in dissent, at the Court of Appeal.[51] This interpretation of *Lacasse*, however, fails to take into account the following:

    a. **First,** *Lacasse* was dealing with a discretionary driving prohibition, not a mandatory one.[52] The issue of crediting a pre-trial driving prohibition below the mandatory minimum was not at issue in *Lacasse*. Accordingly, it is incorrect to posit that *Lacasse* can be applied to driving prohibitions generally, regardless as to whether they are discretionary or mandatory. As Chief Justice Richard put it, to endorse the interpretation of *Lacasse* put forth by the Appellant "would render inapplicable an otherwise constitutional mandatory minimum and could presumably apply to other mandatory minimums. If the Supreme Court had intended that outcome, it undoubtedly would have said so."[53]

    b. **Second,** in *Lacasse*, almost immediately prior to stating that credit for a pre-trial driving prohibition "must" be granted where a sentencing prohibition is to be imposed, Chief Justice Wagner acknowledged the applicability of section 719(1) of the *Criminal Code* and the fact "that a sentence must commence when it is imposed."[54] This only serves to confirm that Chief Justice Wagner's comments were not meant to be interpreted as applying to mandatory minimum sentences.

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[49] See, for example, Appellant's Submissions at paras 60-63.
[50] *Basque* NBQB at paras 20-21 and 26-28.
[51] *Basque* NBCA at paras 120-121.
[52] *Lacasse* at para 107. The driving prohibition in *Lacasse* was ordered pursuant to the now-repealed section 259(2)(a.1) of the *Criminal Code*, a provision which allowed for a discretionary driving prohibition to be ordered at sentence; see also *Basque* NBCA at para 18.
[53] *Basque* NBCA at para 18, see also para 19.
[54] *Lacasse* at para 106.

c. **Third,** in the body of Chief Justice Wagner's judgment, he recognized and reiterated that, although a sentencing judge has broad discretion, their sentencing discretion must nonetheless remain "within the limits established by law."[55] This recognition undermines the Appellant's assertion that *Lacasse* stands for the broad proposition that credit must be given for a pre-trial driving prohibition at sentencing, regardless as to the nature and source of the sentencing prohibition to be imposed.

ii. *Wust* was Anchored to Section 719(3) of the *Criminal Code*, a Provision With no Applicability to the Case at Bar

30. Section 719(3) of the *Criminal Code* specifically, and explicitly, provides sentencing judges with the discretionary authority to credit an offender at sentencing with their time served while in pre-trial custody.[56] However, the introduction of section 719(3) created ambiguity and internal conflict within the *Criminal Code*. Specifically, the *Criminal Code* was silent on the application of section 719(3) to mandatory minimums.

31. In *Wust*, this Court was tasked with resolving this ambiguity and determining whether section 719(3) provided judges with the authority to credit an offender for their time spent in pre-trial custody such that their go-forward sentence could be reduced below an applicable custodial mandatory minimum. In resolving this ambiguity, Justice Arbour, through a thoughtful exercise of statutory interpretation, held that section 719(3) did provide courts with such discretion.[57] As Justice Arbour put it, the conclusion in *Wust* was the product of "the application of sound principles of statutory interpretation."[58]

32. The Appellant, by analogy, relies on *Wust* and the interpretive analysis contained therein to support her position that such credit should similarly be given for pre-trial driving prohibitions. This argument, however, does not account for the fact that this Court's analysis in *Wust* was

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[55] *Lacasse* at para 39; *Sohal* at para 24.
[56] Section 719(3) of the *Criminal Code*.
[57] *R v Wust* 2000 SCC 18 at para 34.
[58] *Wust* at para 33.

anchored to the existence of section 719(3) of the *Criminal Code*, a provision with no applicability to driving prohibitions.[59] Not only that, but the conclusion in *Wust* was informed and influenced by the "usually harsh nature of pre-sentencing custody",[60] a factor which similarly has no applicability to driving prohibitions.

33. *Wust* therefore has important analytical applicability to this case, save for one glaring distinction: there is no statutory equivalent to section 719(3) which applies to pre-trial driving prohibitions. As a result, unlike *Wust*, no ambiguity arises when assessing the legislative provisions at issue in this appeal. Overreliance on *Wust* in the circumstances of this case is thus improper.[61] In fact, "*Wust* does not recognize any general mandate of sentencing judges to use abstract considerations of fairness or proportionality to reduce sentences below a mandatory minimum."[62]

34. In effect, the interpretation of *Wust* put forth by the Appellant is one which would render section 719(3) meaningless. It would erode the narrow scope of section 719(3), notwithstanding its limited application, which is stated to be for custodial sentences only.[63] If accepted, the Appellant's reading of *Wust* would allow credit to be given for any pre-trial prohibition (such as pre-trial driving prohibitions or weapons and firearms prohibitions)[64] below the mandatory minimum floor set by Parliament. This result is entirely inconsistent with Parliament's decision to narrowly circumscribe the application of section 719(3).

iii. The Common Law Does Not Authorize a Sentencing Court to Credit a Pre-Trial Driving Prohibition Below the Mandatory Minimum

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[59] *Basque* NBCA at paras 24-25; *Sohal* at para 18.
[60] *Wust* at paras 38-43.
[61] *Basque* NBCA at para 24.
[62] *Sohal* at para 19.
[63] *Basque* NBCA at para 27.
[64] See, for example, section 109 of the *Criminal Code* which prescribes mandatory minimum prohibition orders for firearms and related weapons.

35. To recap, *Lacasse* and *Wust* do not support the broad proposition that a sentencing judge retains the common law discretion to reduce a pre-trial driving prohibition below the mandatory minimum. In essence, this was the conclusion arrived at by the majority of the New Brunswick Court of Appeal in *Basque* as well as the Alberta Court of Appeal in *Sohal*. Relatedly, however, the Ontario Court of Appeal's decision in *Panday*[65] supports the same interpretation.

36. In *Panday*, the Ontario Court of Appeal reaffirmed the principle that strict bail conditions are a mitigating factor on sentence and may be considered in order to reduce a sentence generally. Strict bail conditions may not, however, reduce a sentence below a custodial mandatory minimum.[66] Central to the Court of Appeal's analysis was the fact that section 719(3) is specifically tailored to address time spent in pre-trial "custody". It does not apply to other forms of pre-trial restrictions.[67]

E. *There is no Statutory Authority to Credit Below the Mandatory Minimum Driving Prohibition*

37. As observed, the question in this appeal revolves around whether there is some form of statutory or common law authority which permits a sentencing court to undercut a legislated mandatory minimum driving prohibition. As the preceding paragraphs have established, no such common law authority exists. The question remains as to whether there is statutory authority which permits such credit to be given. The answer is no, there is none.

38. There is a complete absence of any *express* statutory authority which permits a sentencing court to credit a pre-trial driving prohibition below the mandatory minimum. To the contrary, the *Criminal Code* is clear and unambiguous: mandatory minimum driving prohibitions take effect on the day they are imposed, on a go-forward basis.[68]

39. Given that no *express* statutory authority exists, the only avenue left is to determine whether the principles of statutory interpretation can flexibly cloak section 259(1)(a) with the generous

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[65] *R v Panday* 2007 ONCA 598, leave to appeal refused, 2008 CanLII 18974 (SCC).
[66] *Panday* at paras 22-23, 35 and 44; *R v Shi* 2015 ONCA 646 at para 5.
[67] *Panday* at paras 22-23, 35 and 44.
[68] Sections 259(1)(a) (now-repealed), 719(1) and 718.3 of the *Criminal Code*.

interpretation argued for by the Appellant. If so, then it can be said that there does exist statutory authority to arrive at the Appellant's desired result. As will be seen, however, this is not the case.

40. The principles of statutory interpretation are not limitless. They do not permit courts to rewrite the meaning of an unambiguous legislative provision simply because concerns regarding fundamental fairness arise. Absent a constitutional challenge, where no ambiguity is present in a statutory provision, then the clear words attached to that provision must be given effect, even if it leads to unfair, unjust or absurd result.[69] With this in mind, and given that section 259(1)(a) of the *Criminal Code* is not subject to any ambiguity, the clear intent of Parliament must be upheld.

i. The Principles of Statutory Interpretation are Well-Established

41. It is beyond dispute that the words of a legislative provision must 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."[70] To that end, the plain reading of a text alone is not determinative, nor is it sufficient. Rather, an exercise of statutory interpretation additionally requires consideration of context, purpose and relevant legal norms.[71] Although it is presumed that the ordinary meaning of the text is the one intended by the legislature, a more

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[69] *McIntosh* at paras 18, 24 and 34; *Canada North Group Inc.* at para 251 (Justices Rowe, Brown and Abella, in dissent, but not on this point). Justice Moldaver, in dissent at para 254, indicated he was in "substantial agreement" with Justices Rowe, Brown and Abella; *McColl* at para 14; *Clark* at paras 18-20; *National Frontier Insurance Co.* at para 15; *Huggins* at para 17; *Bedwell* at para 31.

[70] *Bell ExpressVu Limited Partnership v Rex* 2002 SCC 42 at para 26; *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 at para 21; *R v J.J.* 2022 SCC 28 at para 17; *R v Alex* 2017 SCC 37 at para 24.

[71] *McLean v British Columbia (Securities Commission)* 2013 SCC 67 at para 43; *Alex* at para 31; *ATCO Gas & Pipelines Ltd. V Alberta (Energy & Utilities Board)* 2006 SCC 4 at para 48.

fulsome analysis is required because words that appear clear and unambiguous "may in fact prove to be ambiguous once placed in their context."[72]

42. Bearing the above in mind, mandatory minimum sentences must nonetheless be interpreted "in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system."[73] In the end, when a court interprets a legislative provision, it must form an impression of the meaning of the text and infer what rule the legislature intended to enact.[74] The goal is to give effect to legislative intent.[75]

ii. Parliament Intended That Mandatory Driving Prohibitions be Issued on a Go-Forward Basis

43. When Parliament enacts a mandatory minimum, it explicitly intends to remove judicial discretion.[76] Parliament's intent is to have a direct say in the appropriate sanction for a particular offence. However, in order to breathe life into mandatory minimums, courts must give them effect by ordering them when they apply.

44. As with all mandatory minimum sentences, "Parliament must be taken to have intended what it stated".[77] In the context of this case, Parliament therefore must be taken to have intended exactly what it stated through the various provisions of the *Criminal Code*: a mandatory minimum driving prohibition must be imposed on a go-forward basis, on the date the sentence is imposed.[78] This is the object of the section 259(1)(a), and the provision must be read in a manner that best ensures the attainment of this objective.[79]

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[72] *Alex* at para 31.
[73] *Wust* at para 22.
[74] *R v Ali* 2019 ONCA 1006 at para 47; *Geophysical Service Incorporated v EnCana Corporation* 2017 ABCA 125 at para 78, leave to appeal refused 2017 CanLII 80435 (SCC); Ruth Sullivan, *The Construction of Statutes,* 7th edition (Markham: LexisNexis Canada, June 2022) at pages 8-9.
[75] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* 20222 SCC 30 at para 47.
[76] *Ferguson* at para 54.
[77] *Ferguson* at para 54.
[78] Sections 259(1)(a) (now-repealed), 719(1) and 718.3 of the *Criminal Code*.
[79] Section 12 *Interpretation Act*, RSC, 1985, c. I-21.

45. It is not difficult to understand Parliament's desire to reach into its legislative arsenal and enact mandatory minimum sentences associated with alcohol-related driving offences: deter drunk driving. Indeed, Parliament's laudable decision to deter impaired driving is consistent with this Court's acknowledgment that impaired drivers are criminal contributors to the wreaking of havoc on Canadian roadways every year, inexcusably taking the lives of numerous Canadians while putting others at risk of the same harm.[80] As Chief Justice Wager put it, "[d]espite countless awareness campaigns conducted over the years, impaired driving offences still cause more deaths than any other offences in Canada."[81]

46. This Court has equally recognized that Parliament and all Provinces have responded to the pressing danger of impaired driving.[82] That response undoubtedly stimulated Parliament's decision to enact mandatory minimum driving prohibitions, and Parliament has made it clear through the *Criminal Code* that its intent is to ensure that driving prohibitions are ordered on a go-forward basis, on the day they are imposed, regardless as to the existence of a pre-trial driving prohibition.[83] There are two further sub-considerations that shed light on this point.

a. Parliament does not view a driving prohibition the same way it views pre-trial custody

47. Time spent on a pre-trial driving prohibition is not akin to time spent in pre-trial custody.[84] Put bluntly, driving is a privilege. Liberty is a fundamental right. The absence of a statutory equivalent to section 719(3) of the *Criminal Code* applicable to driving prohibitions thus speaks volume to the fact that Parliament does not, nor has it ever intended to, treat driving prohibitions like pre-trial custody. There is evidence of this proposition within the four corners of the *Criminal Code*.

48. Where an accused is convicted of an alcohol-related driving offence, they may seek a suspension of their driving prohibition pending appeal. Where such an application is made, the

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[80] *R v Bernshaw* [1995] 1 SCR 254 at para 16; *Lacasse* at para 8; see also *Alex* at para 1; *Goodwin v British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46 at para 1.
[81] *Lacasse* at para 7.
[82] *Goodwin v British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46 at para 1.
[83] Sections 259(1)(a) (now-repealed), 719(1) and 718.3 of the *Criminal Code*.
[84] *Basque* NBCA at para 24.

Court of Appeal may stay the driving prohibition and impose driving-related conditions upon the offender (for example, a condition to not drive *except* for the purpose of driving to and from work).[85] Where such conditions are placed on an offender, the *Criminal Code* states that such restrictive conditions pending appeal "shall not" operate to decrease the driving prohibition should it be reinstated after the completion of the appellate process.[86] In other words, Parliament has specifically prohibited any form of credit from being given where a Court of Appeal suspends a driving prohibition pending appeal and places an appellant on restrictive driving conditions. These provisions must now be contrasted with other credit-based provisions applicable to appellate proceedings.

49. An offender who receives a conditional sentence order may apply to have it suspended pending appeal.[87] If the Court of Appeal decides to suspend the conditional sentence order, the Court may nonetheless impose restrictive conditions upon the offender pending the determination of their appeal.[88] For example, the Court may suspend the appellant's requirement to be on house arrest but subject them to a strict curfew. Where this occurs, the *Criminal Code* states that the panel hearing the appeal "shall" consider the terms and period of the conditions imposed upon the appellant in deciding whether to vary the offender's ultimate conditional sentence order.[89] The purpose of this provision is to ensure that an offender's restrictions, while their conditional sentence order is suspended, is properly considered by the Court of Appeal when determining whether to vary the offender's sentence.[90]

50. The foregoing dichotomy reveals the following: on one hand, restrictive conditions on an appellant's ability to drive while their driving prohibition is suspended must not be used to reduce the appellant's driving prohibition should it be reinstated by the Court of Appeal. On the other hand, conditions placed on an appellant whose conditional sentence order has been

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[85] Section 261(1) of the *Criminal Code* (now-repealed and replaced with the nearly identical section 320.25(1) of the *Criminal Code*).
[86] Section 261(3) of the *Criminal Code* (now-repealed and replaced with the nearly identical section 320.25(3) of the *Criminal Code*.
[87] Section 683(5) of the *Criminal Code*.
[88] Section 683(5.1) of the *Criminal Code*.
[89] Section 683(7) of the *Criminal Code*.
[90] *R v Kuzyk (C)* 2015 MBCA 85 at para 16

suspended shall be considered when determining whether to vary the conditional sentence order on appeal.

51. The glaring difference between the appellate treatment of these restrictions sheds light on Parliament's view of driving prohibitions. It supports the notion that Parliament has never intended for credit to be given to a pre-trial driving prohibition to the extent that such credit would undercut the mandatory minimum floor it created.

52. In addition to the above, when enacting the new impaired driving legislation (which was not in force at the time of the Appellant's offence), Parliament legislated a provision which holds that a driving prohibition "takes effect on the day that it is made."[91] In effect, Parliament reinforced the application of section 719(1) of the *Criminal Code* in order to ensure that driving prohibitions be imposed on a go-forward basis. This is telling.

b. The "Presumption of Knowledge" reveals that Parliament has never intended for credit to be given below a mandatory minimum driving prohibition

53. Professor Ruth Sullivan, citing and relying upon myriad decisions from this Court, describes Parliament's "Presumption of Knowledge" in the statutory interpretation context as follows:[92]

> The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes. The legislature is also presumed to have knowledge of practical affairs. […] In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.
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> [Emphasis added – Footnotes omitted]

54. The presumption of knowledge permits this Court to infer that when Parliament enacted mandatory minimum driving prohibitions, it knew that some offenders would nonetheless

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[91] Section 320.24(5.1) of the *Criminal Code*.
[92] Ruth Sullivan, *The Construction of Statutes,* 7th edition (Markham: LexisNexis Canada, June 2022) at pages 205-206.

spend time on a bail related pre-trial driving prohibition prior to receiving the go-forward mandatory minimum sentence. Despite this knowledge, Parliament did not enact any statutory equivalent to section 719(3) which would permit for credit to be given for a pre-trial driving prohibition below the mandatory minimum.

55. Moreover, Parliament repealed the mandatory minimum driving prohibition found in section 259(1)(a) and replaced it with the nearly identical mandatory minimum found in section 320.24(2)(a). When Parliament did so, it is presumed to have been aware of the numerous Provincial administrative driving suspension schemes in place in various Provinces and Territories across Canada, each of which take effect upon an accused being charged.[93]

56. Accordingly, when Parliament enacted the new mandatory minimum driving prohibitions, Parliament is presumed to have known that most offenders would serve some form of a pre-trial driving prohibition prior to sentencing. Notwithstanding its presumed knowledge of this fact, Parliament nonetheless decided not to legislate a statutory equivalent to section 719(3) for pre-trial driving prohibitions. To the contrary, it enacted a provision to clarify that a driving prohibition "takes effect on the day that it is made."[94]

iii. The "Strict Construction" Rule and "*Charter* Values" Rule do Not Apply

57. Where an ambiguity exists in penal legislation, the legislation must be read in favour of the accused (known as the "strict construction" rule).[95] Similarly, where legislation is ambiguous, the legislation must be read in a manner consistent with the *Charter* (known as the "*Charter* values" rule).[96]

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[93] See, for example, section 88.1 *Traffic Safety Act*, RSA 2000, c T-6; section 48.3 *Highway Traffic Act*, RSO 1990, c. H.8; section 310.01 *Motor Vehicle Act*, RSNB 1973, c. M-17; section 202.4 *Highway Safety Code*, CQLR c C-24.2; sections 215.41-215.43 *Motor Vehicle Act* RSBC 1996, c 318; section 60.1-60.2 *Highway Traffic Act*, RSNL 1990 c H-3; section 279A *Motor Vehicle Act*, RSNS 1989, c 293.

[94] Section 320.24(5.1) of the *Criminal Code* (Not in force at the time of the Appellant's offence).

[95] *Marcotte v Canada (Deputy A.G.)* [1976] 1 SCR 108 at 115; *McIntosh* at paras 38-39.

[96] *Bell ExpressVu* at paras 28 and 62; see also *J.J.* at para 18.

58. The Appellant implicitly argues that these principles should play into this Court's statutory interpretation analysis. Notably, this Court in *Wust* relied on both of these principles when settling the ambiguities at play in that case.[97] This Court has been clear, however, that these two principles of statutory interpretation only receive application where there is *a real ambiguity* in the legislation.[98]

59. A "real ambiguity" arises when the impugned provision is "reasonably capable of more than one meaning".[99] In the case of section 259(1)(a), there is no "real" ambiguity. When section 259(1)(a) is read in conjunction with sections 718.3(3) and 719(1), it cannot be said that the provision is "reasonably capable of more than one meaning." To the contrary, the statutory pathway carved out by these provisions is well-paved, unobstructed, and unambiguous. Accordingly, the "strict construction rule" as well as the "*Charter* values" rule do not assist the Appellant. Put simply, in the absence of the potential for dual meanings, a court cannot apply a rule that asks the more favourable meaning be chosen.[100]

iv. Although Unfair Results May Derive from the Strict Application of Section 259(1)(a), That Alone is not Sufficient to Overturn Parliament's Clear Intent

60. The Crown, without hesitation, acknowledges and concedes that the most pressing concern present in its interpretation of section 259(1)(a) is the potential for "absurd" and unjust results. The potential for such results is central to the Appellant's argument on appeal, just as it was central to Justice French's dissent at the Court of Appeal. While it is an important consideration, it is not fatal to the Crown's position.

61. An "absurd" or unjust result is not itself sufficient to displace the clear wording of section 259(1)(a). While mandatory minimums may sometimes be seen as unfair, it is not for courts to dismantle them and call them absurd.[101]

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[97] *Wust* at para 34.
[98] *Bell ExpressVu* at paras 28 and 62; *Marcotte* at 115; *McIntosh* paras 38-39; see also *Clark* at para 19.
[99] *Bell ExpressVu* at para 29.
[100] *R v Tannhauser* 2020 BCCA 155 at para 30.
[101] *Basque* NBCA at para 31.

62. Where a plain reading of a legislative provision gives rise to an "absurd result", it gives the Court good reason to scrutinize the provision in order to make it "abundantly certain" that it is not susceptible to some other meaning.[102] That is because, where a provision is ambiguous and susceptible to two differing interpretations, a court will almost invariably adopt the one that is consonant with the principles of justice and good sense, not the one that perpetuates an injustice.[103] This is the case even if the alternate interpretation aligns more closely with the literal reading of the words employed by Parliament.[104]

63. However, an alternate interpretation that is more consistent with the principles of justice may only be adopted where the provisions at issue are ambiguous and subject to multiple reasonable meanings.[105] As observed, the provisions at issue in this appeal contain no ambiguity and are not subject to multiple reasonable meanings. On this point, it is apt to outline the following portions of Chief Justice Lamer's majority judgment in *McIntosh*:[106]

> There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. […]
>
> […]
>
> […] I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.
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> [Emphasis added – Citations omitted]

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[102] *McIntosh* at para 28, citing Justice LaForest in *New Brunswick v Estabrooks Pontiac Buick Ltd.* (1982), 1982 CanLII 3042 (NBCA) at p. 210.
[103] *McIntosh* at para 35; on a similar point, see *J.J.* at para18.
[104] *McIntosh* at para 35.
[105] *McIntosh* at paras 28 and 36; *Tannhauser* at para 27.
[106] *McIntosh* at paras 28 and 34.

64. Bearing the above in mind, courts are not at liberty to reframe statutes to suit their own individual notions of what is just or reasonable.[107] For that reason, absent a constitutional challenge, where no ambiguity is present in a statutory provision, then the clear words attached to it must be given effect, even if it leads to unfair, unjust or absurd result.[108]

65. Notably, in *Wust*, this Court was at liberty to adopt an interpretation that was consonant with the principles of justice *because* there was ambiguity in the anatomy of the *Criminal Code*: the *Code* was silent on the relationship between section 719(3) and the applicable custodial mandatory minimum. This appeal is markedly different. There is no internal conflict in the *Criminal Code*. Nor is there any ambiguity. This appeal therefore falls under the umbrella of the analysis conducted in *McIntosh*, not the one conducted in *Wust*.

F. *This Appeal is Just as Much About the Separation of Powers as it is About Statutory Interpretation*

66. The principle that an unambiguous provision be given its intended effect despite the potential for unfairness is tightly tied to the heart of our democratic system. Absent a constitutional challenge, it would fundamentally offend our democratic composition if a court were at liberty to alter the meaning of an unambiguous legislative provision simply because it disagreed with the outcome brought about by the strict application of that provision. In particular, it would offend and undermine the separation of powers, as well as Parliamentary Sovereignty, the

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[107] *McIntosh* at para 28.

[108] *McIntosh* at paras 18, 28 and 34; *Canada North Group Inc.* at para 251 (Justices Rowe, Brown and Abella, in dissent, but not on this point). Justice Moldaver, in dissent at para 254, indicated he was in "substantial agreement" with Justices Rowe, Brown and Abella; *McColl* at para 14; *Clark* at paras 18-20; *National Frontier Insurance Co.* at para 15; *Huggins* at para 17; *Bedwell* at para 31.

former having been recognized as "the backbone of our constitutional system",[109] and the latter being labelled a cornerstone of our Constitution[110] and of our democracy.[111]

67. Parliament chooses the appropriate response to social issues by making policy decisions and enacting legislation. In this case, Parliament enacted mandatory minimum driving prohibitions in response to the serious societal issue of impaired driving. Courts, on the other hand, interpret and apply the law, all while acting as judicial arbiters and ensuring that legislation respects constitutional norms.[112] These are two distinct roles and institutional capacities,[113] and it is of vital importance to our democracy that each party not overstep their bounds; they must show deference for each other's role.[114]

68. As Justice Rowe recently noted in *Chouhan*, subject to constitutional considerations, Parliamentary Sovereignty means that Parliament has "the right to make or unmake any law" and that "no person or body" has the right to override or set aside the legislation of Parliament.[115] Subject to constitutional limits, Parliament can legislate as it so chooses.[116]

69. In a similar vein, portions of this Court's judgment in *Bissonnette*[117] have important analytical applicability to this appeal. Specifically, in *Bissonnette*, Chief Justice Wagner stressed that the Court must exercise great caution when determining whether to "read in", "read down" or "sever" words from an unconstitutional provision. When applying one of these remedial

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[109] *R v Chouhan* 2021 SCC 26 at para 129 (Justice Rowe, concurring), citing *Cooper v Canada (Human Rights Commission* [1996] 3 SCR 854 at para 3.
[110] *Chouhan* at para 138 (Justice Rowe, concurring).
[111] *Chouhan* at para 141 (Justice Rowe, concurring).
[112] *Chouhan* at para 130; *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 136; *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at p. 389; *Ontario v Criminal Lawyers' Association* 2013 SCC 43 at para 28.
[113] *Criminal Lawyers' Association* at para 29; *Chouhan* at para 130.
[114] *New Brunswick Broadcasting Co.* at p. 839; *Chouhan* at para 130.
[115] *Reference re Pan-Canadian Securities Regulation* 2018 SCC 48 at para 54; *Chouhan* at paras 138-139 (Justice Rowe, concurring). This principle, of course, is not absolute and is, in fact, qualified by the *Charter* in that Courts may strike down legislation where it offends the *Charter*.
[116] *Chouhan* at para 140.
[117] *R v Bissonnette* 2022 SCC 23.

techniques, the Court must ensure that it stays as faithful as possible to Parliament's intent.[118] For that reason, these remedial techniques may only be used "in the clearest of cases."[119] If it is unclear whether to apply such a remedy, the Court will instead strike down the provision entirely because making modifications to the provision would constitute an inappropriate intrusion into the legislative sphere.[120]

70. *Bissonnette* and Justice Rowe's judgment in *Chouhan* reiterate this Court's sincere and respectful concern for Parliament's intent when it enacts legislation. In turn, it reveals the inextricable relationship between the principles of statutory interpretation and the cornerstone principles of Parliamentary Sovereignty and the separation of powers. The application of this close relationship has a telling impact on the outcome of this appeal. It serves to solidify the notion that, absent a successful constitutional challenge, clear and unambiguous legislative provisions must be given their intended effect, even if unfair results arise.[121]

PART IV: SUBMISSION ON COSTS

71. The Crown does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

72. The Crown requests that the appeal be dismissed.

PART VI: CASE SENSITIVITY

73. There are no sealing or confidentiality orders, publication bans or restrictions on public access to information in the file that would have an impact on the Court's reasons.

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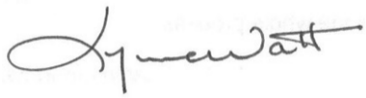
[118] *Bissonnette* at para 128; see also *Ferguson* at paras 50-51.
[119] *Bissonnette* at para 127.
[120] *Bissonnette* at para 128.
[121] *McIntosh* at paras 28 and 34.

All of which is respectfully submitted,

Dated this 26th day of July at the City of Fredericton, in the Province of New Brunswick.



for:

For: **Patrick McGuinty**

Counsel for the Respondent,
Her Majesty the Queen

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