File Number:____________

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

JENNIFER BASQUE

APPLICANT
(Respondent)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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1. MEMORANDUM OF ARGUMENT

Part I Statement of facts and overview of Applicant's position

A. Overview

1. It is the Applicant's position that the Supreme Court of Canada should grant leave to appeal, in order to allow it to determine the applicability of this Court's decision in *R. v. Lacasse*[1] to mandatory minimum driving prohibition orders. In *Lacasse,* 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. Never at issue, however, was the possibility that the remaining time to be served under a driving prohibition falling below a statutorily mandated minimum.

2. In the within matter, the Court of Appeal of New Brunswick, in a split decision[2], came to a decision that the full mandatory minimum driving prohibitions under s. 259(1) of the *Criminal Code*[3] must commence on 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*.

3. 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.

4. The discrete issue in the within matter is whether this credit can reduce the prohibition that commences on sentencing to less than the applicable minimum. That issue was not addressed in *Lacasse.*

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[1] *R. v. Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 (hereinafter referred to as "*Lacasse*").
[2] *R. v. Basque*, 2021 NBCA 50, [2021] N.B.J. No. 288 (hereinafter referred to as "*Basque*").
[3] *Criminal Code*, R.S.C., c. C-46 (hereinafter referred to as the "*Criminal Code*").

5. It is our position that, without a doubt, an offender must be prohibited from driving for not less than the applicable minimum period; however, we posit that an interpretive analysis that permits credit for bail-related driving prohibition, can reduce the prohibition that commences on sentencing to less than the applicable minimum, so long as the total driving prohibition exceeds the mandatory minimum.

B. Statement of Facts

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

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

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

9. The Applicant's intentions were to make an application for a curative discharge. The sentencing date was adjourned for this purpose.

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

11. At sentencing, the sentencing judge took account of the fact that the Applicant 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.

12. 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*[4], 2000 SCC 18, a proper interpretation of s. 259(1) required credit be given for the Applicant's bail-related driving prohibition, even though it reduced the net remaining time of the driving prohibition to be served after sentencing to below the applicable one-year minimum.

13. 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 and is now subject to the within Leave application.

Part II Statement of the questions in issue

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

15. 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?

16. The Supreme Court of Canada's direction on the issue in *Lacasse* dealt with a discretionary order on sentence and is silent on its applicability to mandatory minimum prohibition orders.

17. There appears to be different interpretations from different provinces on the issue.

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[4] *R. v. Wust*, 2000 SCC 33, [2000] 1 SCR 455 (hereinafter referred to as "*Wust*").

Part III Statement of argument

18. 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".

19. 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".

20. The applicability of the sections continue under the new impaired driving related provisions and any case law derived from the within matter will continue to have jurisprudential value moving forward.

21. The predecessors to the current driving prohibition penalties for impaired driving were enacted in 1985. Despite a provision not being added to the *Criminal Code* 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*[5], as well as *R. v. Pellicore*[6], [1997] O.J. No. 226 (C.A.) (QL), *R. v. Williams*[7], 2009 NBPC 16, 346 N.B.R. (2d) 164, and *Bilodeau v. R.*[8], 2013 QCCA 980, [2013] J.Q. no 5712.

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[5] *R. v. Sharma*, [1992] 1 S.C.R. 814, [1992] SCJ No 26 (hereinafter referred to as "*Sharma*").
[6] *R. v. Pellicore*, [1997] O.J. No. 226 (ONCA) (hereinafter referred to as "*Pellicore*").
[7] *R. v. Williams*, 2009 NBPC 16, [2009] N.B.J. No. 86 (hereinafter referred to as "*Williams*").
[8] *R. v. Bilodeau*, 2013 QCCA 980, [2013] JQ no 5712 (hereinafter referred to as "*Bilodeau*").

22. The comments Lamer C.J.C., as he then was, made in *Sharma* featured prominently in the reasons of Wagner J. in *Lacasse*. Lamer C.J.C. 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.[9]

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

> 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[10].

24. 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

[9] *Sharma, supra* note 5 page 815.
[10] *Pellicore, supra* note 6 para 1.

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.[11]

25. *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 her analysis and the seven-year driving 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[12].

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[11] Williams, *supra* note 7 para 31.
[12] Bilodeau, *supra* note 8, para 75.

26. 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) 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.
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> 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)[13].

27. The key point to be taken from *Lacasse* is that the Court accepted that a driving prohibition before trial is not divorced from the sentence imposed after trial (and conviction).

28. Agreeing with Wagner 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.
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> 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[14].

29. All of these decisions reflect a relatively sparse commentary and body of case law, before *Lacasse*, regarding the use of presentence driving prohibitions on sentence.

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[13] *Lacasse*, *supra* note 1 para 111 to 114.
[14] *Lacasse*, *supra* note 1 para 176 and 177.

30. 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:

> 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[15].

31. In *Wust*, Arbour J went on to confirm the position previously taken by the Ontario Court of Appeal in *R v McDonald*[16] (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 (at para 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 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)[17]

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[15] *Wust*, *supra* note 4, para 22.
[16] *R v McDonald* , [1998] OJ No 2990 , (1998), 40 OR (3d) 641 (ONCA).
[17] *Wust*, *supra* note 4, para 34.

32. 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. As recapped by Arbour J in *Wust*, Rosenberg JA discussed a number of principles applicable to the interpretation of penal statutes and specifically:

> 1. Where a penal statute is ambiguous, this ambiguity must be resolved in favour of the accused;
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> 2. Courts should attempt to avoid finding a conflict between two pieces of legislation;
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> 3. If a statute is ambiguous and capable of two meetings, such that one is consonant with justice and good sense, whereas the other gives rise to an absurdity, the former should be preferred;
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> 4. Where applicable, reference should be made to other provisions in the same statute; and
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> 5. Where a statute is capable of more than one interpretation, courts should avoid an interpretation that would conflict with Charter values[18].

33. Ultimately, Arbour J in *Wust* indicated that imposing a mandatory minimum sentence regardless of time served, "would be offensive both to rationality and justice[19]".

34. With *Lacasse* and *Wust* as the basis for the Applicant's argument, we recognize that the case law on the issue is divided. Courts across Canada have been divided on the issue of granting credit for driving prohibitions and/or suspensions before trial and whether such credit can reduce the sentence below the mandatory minimum.

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[18] *Wust*, *supra* note 4, para 34.
[19] *Wust*, *supra* note 4, para 33

35. Cases like *R. v. Sohal*[20], 2019 ABCA 293 and *R. v. Froese*[21], 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.

36. 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.

37. In cases like *R v Rezek*[22], 2008, 67 MVR (5th) 236 (OntCJ), 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.

38. Likewise, in *R v Bryden*[23], 2007 NBQB 316, 54 MVR (5th) 274, 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.

39. The Applicant submits however that those cases have been superseded in 2015 by the Supreme Court of Canada in *Lacasse.*

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[20] *R. v. Sohal*, 2019 ABCA 29, [2019] AJ No 995.
[21] *R. v. Froese*, 2020 MBQB 11, [2020] MJ No 16.
[22] *R v Rezek*, [2008] O.J. No. 709, 67 MVR (5th) 236 (ONCJ).
[23] *R v Bryden*, 2007 NBQB 316, 54 MVR (5th) 274.

40. This issue was directly addressed in *R v Bland*[24], 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*[25] 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[26]" (at para 13).

41. 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.
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> 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

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[24] *R. v. Bland*, 2016 YKSC 61, [2016] YJ No 150 (hereinafter referred to as "*Bland*").
[25] *R. v. Pham*, 2013 ONCJ 635, [2013] OJ No 5387 (hereinafter referred to as "*Pham*").
[26] *Pham*, *ibid*, para 13.

> resolved in favour of offenders in a manner consistent with the *Charter*.
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> 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 by Paciocco J in *Pham*, such as equity, rationality, fairness, justice and common sense[27].

42. 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[28].

43. 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.

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[27] *Bland*, *supra* note 24, para: 21 to 23.
[28] *Bland*, *supra* note 24, para 17.

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 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[29].

44. Similarly, in *R. v. Edwards*[30], 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:

> 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).
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> 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:
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> 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.
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> 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

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[29] *Bland,* *supra* note 24, para: 18 to 20.
[30] *R. v. Edwards*, 2016 NJ 165, [2016] N.J. No. 165 (hereinafter referred to as "*Edwards*").

> 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.
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> …
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> 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)[31].

45. In the case at bar, 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

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

opposed to a mandatory one. The principles of statutory interpretation applied to both situations remain the same. To do otherwise would result in absurdity.

46. 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.

47. 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 Applicant. 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 sentencing issue must be resolved in favour of the accused and tailored to her individual circumstances[32] . 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[33].

48. In sum, 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.

49. 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

[32] *Wust* at paras 22 and 34
[33] *Pham* at para 13.

provision itself. It prevents the provision from having the desired effect, for example, of sanctioning the Applicant 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.

50. 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 J. He concluded, agreeing with Lamer C.J.C. in *Sharma*, that "whether the driving prohibition is imposed before or after sentencing, its effect is the same[34]" (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 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).

51. In sum, as French J.A. dissenting in the within matter 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 being in play[35].

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[34] Lacasse, *supra* note 1 para 113.
[35] Basque, *supra* note 2 para 121.

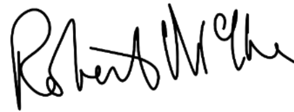
Part IV Submissions in support of order sought concerning costs

52. The Applicant makes no submissions on costs.

Part V Order or orders sought

53. It is respectfully submitted that the Court make an order granting leave to appeal the judgment of the Court of Appeal of New Brunswick.

RESPECTFULLY SUBMITTED this 21st day of December 2021.



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Part VII Legislation

LEGISLATION	SECTION
Criminal Code, R.S.C., c. C-46	253(1), 259(1), 259(2), 515, 719(3) to (3.3)