Action No.: N/A
E-File No.: ECQ17SUTERR
Appeal No.: 1503-0323A

IN THE COURT OF APPEAL OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

HER MAJESTY THE QUEEN

v.

RICHARD ALAN SUTER

Accused

P R O C E E D I N G S

Edmonton, Alberta
June 21, 2016

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1 Proceedings taken in the Court of Appeal of Alberta, Law Courts, Edmonton, Alberta
2 ---
3 June 21, 2016 Morning Session
4
5 The Honourable Court of Appeal of Alberta
6 Mr. Justice Watson
7 The Honourable Court of Appeal of Alberta
8 Madam Justice Bielby
9 The Honourable Court of Appeal of Alberta
10 Madam Justice Schutz
11
12 J.B. Dartana For the Crown
13 D. Bottos For the Accused
14 W.J. van Engen For the Accused
15 (Student-at-Law)
16 F.M. Mansour For the Accused
17 (Student-at-Law)
18 M. Pawlikowski Court Clerk
19 ---
20
21 **Discussion**
22
23 MADAM JUSTICE SCHUTZ: All right. The next matter on the list is the
24 Suter matter. Counsel, if you can come forward, please.
25
26 MR. BOTTOS: My Ladies, My Lord, if I could ask your
27 indulgence for a moment before we get started? My name is Bottos, initial D. I'm asking
28 the Court's permission to allow my two students-at-law who've helped me in this matter
29 sit at counsel table with me during these proceedings? They are Mr. Wil van Engen and
30 Mr. Fady Mansour.
31
32 MADAM JUSTICE SCHUTZ: Good morning. Any objection, Crown?
33
34 MS. DARTANA: No.
35
36 MADAM JUSTICE SCHUTZ: Please come forward, gentlemen.
37
38 MR. BOTTOS: Thank you.
39
40 MADAM JUSTICE SCHUTZ: Mr. Bottos, is Mr. Suter in the courtroom?
41

1 MR. BOTTOS: Yes, he is. He is present in the front row of the
2 gallery with his wife and some friends.
3
4 MADAM JUSTICE SCHUTZ: Thank you.
5
6 MR. BOTTOS: Does the Panel wish Mr. Suter to sit in the
7 prisoner's box?
8
9 MADAM JUSTICE SHUTZ: I don't think that's necessary.
10
11 MR. BOTTOS: Thank you.
12
13 MADAM JUSTICE SCHUTZ: All right. So it's the Crown appeal and a
14 cross-appeal by Mr. Suter. Please proceed, ma'am.
15
16 MS. DARTANA: Good morning, My Ladies, My Lord. Joanne
17 Dartana appearing for the appellant, the Crown appellant this morning. Before I begin, I
18 just want to clarify the procedure that this panel wishes me to follow. There are two
19 appeals, and there is some considerable overlap between issues. What I propose to do is to
20 argue both appeals at the same time, if that's agreeable with the Court. What I do ask is
21 whether or not we do get extra time because there are the two appeals?
22
23 MADAM JUSTICE SCHUTZ: Mr. Bottos, we had discussed this as well, and
24 what is your view on your reply to the Crown's appeal being rolled up into your
25 appellant's appeal?
26
27 MR. BOTTOS: Yes. I agree with my friend. I think that's a
28 very good idea, and I'm fine with going overtime, of course, depending on the number of
29 questions we receive. Yes, I'm -- I agree with my friend.
30
31 MADAM JUSTICE SCHUTZ: All right. Both of you are very experienced
32 counsel. We leave it in your capable hands.
33
34 The panel has had the opportunity to review the rather voluminous materials filed by each
35 side, but we in no way wish to discourage you from making full submissions before us.
36
37 MS. DARTANA: Thank you very much, Ma'am.
38
39 MADAM JUSTICE SCHUTZ: But if you would kindly elevate your voice so
40 that the people at the very back wall can hear you. I'm getting nods, yes, we need to
41 speak up. And, as you know, these are not microphones, they're recording devices.

1
2 MS. DARTANA: Yes. Certainly. Thank you.
3
4 MADAM JUSTICE SCHUTZ: Thank you. Madam Clerk, please make sure
5 counsel have water.
6
7 THE COURT CLERK: Yes, Ma'am.
8
9 MADAM JUSTICE SCHUTZ: Go ahead.
10
11 **Submissions by Ms. Dartana**
12
13 MS. DARTANA: This case is first and foremost about the tragic
14 death of Geo Mounsef, a 2 1/2 year old boy who was killed by Mr. Suter on May 19th,
15 2013, when Mr. Suter drove his car onto a curb and onto a patio of Ric's Grill restaurant,
16 through the glass barrier, which was separating the patio from the parking lot, right at the
17 table where the Mounsef family were sitting. We know that Mr. Suter drove directly at
18 Geo and dragged him underneath the vehicle for some distance, until he hit a wall. The
19 little boy was pinned against the wall for about 30 seconds, until Mr. Suter either reversed
20 his vehicle or bystanders pushed the vehicle back. Geo died as a result of the injuries that
21 he suffered from the collision.
22
23 As well, George Mounsef, Geo's father, and Sage Morin, Geo's mother, were also injured,
24 as well as Natasha Prasad, who was the server at their table that evening.
25
26 Despite knowing that he had killed the little boy, Mr. Suter refused to provide a sample,
27 and in this way, he deprived the police of the most accurate and reliable evidence of his
28 level of impairment.
29
30 As a result of this offence, the Mounsef family, their extended family, as well as friends,
31 have had to endure incredible pain and suffering over the last three years, pain which I'm
32 sure many of us can't even begin to imagine. But whatever happens as a result of this
33 appeal, we know that it will never bring Geo back. But this case is not only about a
34 family tragedy. It's also about the need for general deterrence and denunciation and
35 sending the right message to the community, and in this way, this case has broader
36 implications on the administration of justice.
37
38 Specifically, the extremely lenient sentence of four months imprisonment in this case, if
39 left alone, sends the wrong message to the public, that it's better to refuse than to provide
40 a sample, especially where there's a collision resulting in bodily harm or death. This
41 decision encourages other people to not comply with the law, and it's contrary to the clear

1 intent of Parliament in creating the new offence of refusal where there's a death, which is
2 to eliminate any incentive to refuse.
3
4 Now, Mr. Suter did get incorrect legal advice from the Legal Aid lawyer that he spoke to
5 that evening. However, the Crown submits that this is not mitigating because being
6 mistaken at law is only mitigating if you actually believe that you're abiding by the law
7 because of the mistake. Here Mr. Suter knew it was a crime to refuse and deliberately
8 chose to refuse regardless.
9
10 MADAM JUSTICE BIELBY: And how would he know that, Ms. Dartana? He
11 received the poor advice from the lawyer he called at the police station, and I know the
12 two police officers who made the demand, either together or at separate times during the
13 evening, told him it was an offence not to provide a breath sample, but the trial judge or
14 the sentencing judge, as I read it, said that Mr. Suter was entitled to reliable legal advice
15 that he had received. So am I wrong in that, or if I'm not, why do you say he knew that
16 he -- it was an offence?
17
18 MS. DARTANA: Well, as you pointed out, he knew it was a
19 crime to refuse because two police officers told him that it was a crime to refuse. His
20 lawyer testified that it was a -- he told him as well.
21
22 Now, I appreciate that Mr. Suter himself testified that the lawyer didn't tell him that,
23 but --
24
25 MADAM JUSTICE BIELBY: And that evidence was accepted by the judge;
26 was it not?
27
28 MS. DARTANA: No. I disagree with that. The evidence was not
29 explicitly accepted or rejected. The sentencing judge didn't deal with that critical issue
30 whatsoever in his reasons. He didn't accept the lawyer's evidence or reject it, nor did he
31 accept or reject the respondent's evidence in this respect. He said nothing at all about
32 whether or not Mr. Suter knew it was a crime to refuse, and even when he was
33 summarizing Mr. Suter's evidence regarding his conversation, he never mentioned it.
34
35 And, in fact, despite there being an inconsistency in the lawyer's evidence versus the
36 respondent's evidence, the sentencing judge seemed to have misapprehended the evidence
37 of the lawyer. And if I can refer you to his reasons at paragraph 38 and 39 --
38
39 MADAM JUSTICE SCHUTZ: We have in the appeal record the F numbering
40 system.
41

1 MS. DARTANA: Yes. It's F-24.
2
3 MADAM JUSTICE SCHUTZ: Thank you.
4
5 MS. DARTANA: Paragraph 38. This is under the heading of legal
6 advice. So:
7
8 Mr. Suter testified regarding his conversation with a lawyer to
9 whom he spoke before refusing to provide a sample. He did not
10 know the lawyer. He described that the lawyer seemed to be in a
11 rush, that the lawyer asked few, if any, questions, and the lawyer
12 did almost all of the talking. He testified that the lawyer was
13 speaking in legal jargon, like he was thinking out loud, and he had
14 a hard time understanding what the lawyer was saying. He,
15 therefore, specifically asked the lawyer whether or not he should
16 provide a sample, and the lawyer told him that he should not. He
17 wanted to make sure that he understood the lawyers advice and
18 asked him again and again received the same response.
19
20 And then at paragraph 39, he says:
21
22 Mr. Suter's account of that call struck the Court as quite
23 improbable until the Court later heard from the lawyer. The lawyer
24 testified in this hearing. He confirmed what Mr. Suter described,
25 with one exception. He denied expressly telling Mr. Suter not to
26 blow. Instead, according to the lawyer, he basically told him not to
27 blow. The lawyer agreed that, after Mr. Suter told him that he was
28 being arrested for impaired driving causing death, they had a
29 conversation for about seven minutes. He agreed that he did most
30 of the talking. He agreed that he did not ask about how much, if
31 anything, Mr. Suter had to drink. He recounted on the stand what
32 he believes he may have said to Mr. Suter, as he admittedly
33 attempted to steer Mr. Suter away from blowing. Having heard the
34 lawyer, the Court accepts Mr. Suter's testimony that he found
35 what the lawyer was saying to be full of jargon and hard to
36 follow.
37
38 So if you look at those two paragraphs, he's obviously summarizing all of Mr. Suter's
39 evidence regarding his conversation with the lawyer, and that -- you can see that from the
40 words in paragraph 38 where he says -- you know, he describes how he didn't know the
41 lawyer, the lawyer did most of the talking. The lawyer asked him few questions. He was

speaking in legal jargon. And when he describes the respondent's evidence, he then says at paragraph 39 that the lawyer confirmed what Mr. Suter said, with one exception.

Now, that is not correct, because the lawyer testified as well that he did not -- did actually tell Mr. Suter that it was a crime to refuse. So the lawyer's evidence differed in two respects, not just one. So the sentencing judge seemed to have completely missed this point, and that, in my respectful submission, is a misapprehension of evidence that taints the rest of his reasons.

Now, the respondent argues that we know that the sentencing judge accepted all of the evidence of the respondent with respect to his conversation with the lawyer, and, with respect, Crown disagrees with that. If you look at paragraph 76, which is the paragraph that my friend points to as evidence that the sentencing judge actually accepted all of the respondent's evidence, you can see that paragraph 76, he was only referring to the legal advice as to whether or not to blow or not or whether or not the lawyer indirectly steered him away from blowing.

So if you look at 76, the Court says:

> However, the evidence has moved the Court from its starting position. The Court finds, on a balance, that as tragic as the consequences have been, this collision was an accident caused by a non-impaired driving error. As earlier outlined, the Court also finds that Mr. Suter's refusal to the lawful demand was the result of hopefully rare, ill-informed, and bad legal advice.

Then he says:

> If the advice had stopped with a misguided presentation of legal options, even if aimed at steering the suspect away from blowing, the mitigating effect of the advice would be significantly less.

So he's specifically talking about whether or not the lawyer expressly told him not to blow or whether he indirectly steered him away from blowing. That's the advice that he's speaking of.

In the next sentence he says:

> In this case, however, the Court has accepted the testimony of Mr. Suter as to what the lawyer said and finds that the refusal was based on the lawyer expressly telling him not to provide a sample.

1 This does not absolve Mr. Suter, as a mistake of law is not a
2 defence, but it fundamentally changes Mr. Suter's moral
3 culpability.
4
5 Then he says at paragraph 77:
6
7 People must be able to rely on legal advice given when exercising
8 their constitutional right to counsel.
9
10 So, in my respectful submission, if you look at paragraph 76, that is not evidence the
11 sentencing judge accepted all of the respondent's evidence as to the conversation with the
12 lawyer. He was specifically referring only to whether or not the lawyer told him expressly
13 not to blow or whether he indirectly steered him away from blowing.
14
15 So Mr. Suter's mistake of law, therefore, did not reduce his moral blameworthiness
16 whatsoever, and the sentencing judge erred in treating it as a mitigating factor.
17
18 So with respect to the Crown's appeal, the Crown submits that the sentencing judge erred
19 in considering two things to be mitigating factors. One is the finding of the lack of
20 impairment, and, two, the erroneous legal advice, and this is -- and what I mean by
21 erroneous legal advice is that he expressly told him not to blow. That's what the
22 sentencing judge found.
23
24 The sentencing judge found that these two factors were significant mitigating factors and
25 justified a considerable reduction in the sentence. The Crown submits that, as a result of
26 these errors, the sentence was demonstrably unfit, and it was not proportionate to the
27 gravity of the offence and the moral blameworthiness of the offender.
28
29 So in terms of what I intend to argue, I intend first to discuss the lack of impairment and
30 how that's not to be considered a mitigating factor. And, secondly, I intend to argue the
31 erroneous legal advice and how that too should not be considered a mitigating factor. I
32 will then respond to the accused's arguments in his own appeal.
33
34 So with respect to the finding of a lack of impairment, although there was considerable
35 evidence of Mr. Suter being impaired, evidence which I have gone into in some detail in
36 the Crown's first factum, the sentencing judge did find him to be not impaired.
37
38 MADAM JUSTICE BIELBY: And am I correct in understanding,
39 Ms. Dartana, that the Crown is not challenging his findings of fact either in regard to the
40 lack of impairment or in regard to the nature of the legal advice he received, but, rather,
41 his argument that even accepting those are correct, they shouldn't be mitigating?

1
2 MS. DARTANA: That's correct.
3
4 MADAM JUSTICE BIELBY: Thank you.
5
6 MS. DARTANA: As the trial Crown stated in his submissions,
7 even from the start, whether or not an accused is impaired or not is completely irrelevant
8 to the sentencing on a refusal, and the Crown on appeal takes the same position, that it is
9 irrelevant. The reason it's irrelevant is because of the intent of Parliament in creating the
10 new offence of refusal where there's a death, which is to eliminate any incentive to
11 refuse. The intent of Parliament I don't think is being disputed by the respondent. It's
12 clear from the legislative records that I provided. The sentencing judge also agreed that
13 that was the intent of Parliament.
14
15 So we know that the maximum penalties are now the same for refusal where there's a
16 death and impaired driving causing death, and we know what the intent of Parliament
17 was, but to truly eradicate any incentive to refuse, the Courts must in practice also view
18 the moral blameworthiness to be the same or equivalent. Otherwise, there will always be
19 an incentive to refuse.
20
21 So this is so even though a refusal where there's a death is a different offence from
22 impaired driving causing death and has different elements to the offence. A refusal is
23 more akin to an obstruction of justice because the accused obstructs a gathering of the
24 evidence with respect to his impairment. So although obstruction of justice is generally
25 seen as serious, in this case, a refusal is an even more serious type of obstruction of
26 justice because, in this case, the accused prevents the police from gathering the most
27 accurate evidence of impairment. And by committing the offence, the accused leaves the
28 state to prove impairment by inherently less reliable means, such as driving pattern or
29 other visible indicia of impairment.
30
31 At first blush, the refusal offence also may seem similar to a failing to remain at the scene
32 of an accident offence because both of these offences don't necessarily require that the
33 driving be criminal. However, the Crown submits that the refusal offence is much
34 different from the failing to remain because there is the requirement for a lawful breath
35 demand, which is based on reasonable and probable grounds to believe that an accused's
36 ability to operate a motor vehicle was impaired by alcohol or drug. And so there has to be
37 that connection to alcohol consumption with a refusal, whereas with a leaving the scene,
38 you can have completely non-criminal driving that's unconnected to alcohol consumption
39 and be found guilty of that offence. So for this reason, it makes sense to equate a refusal
40 offence to an impaired driving offence.
41

1 Now, my friend argues that impaired driving is the true evil and a refusal is simply the
2 means to detect the true evil of impaired driving. However -- and I don't disagree with
3 him, but, however, if you are going to treat refusal as less serious in terms of moral
4 blameworthiness for that reason, then, again, you have the incentive to refuse. You're
5 giving people the motivation to refuse, if that's the way the Courts are going to view the
6 refusal offence. So even if --
7
8 MADAM JUSTICE BIELBY: But just to -- if I can interrupt on that, your
9 friend argues that it's -- and the sentencing judge himself said, this is a rare case, it's
10 going to be a rare case where somebody refuses to provide a breath sample after receiving
11 a lawful demand where they're not, in fact, impaired. So will that really create an
12 incentive in many cases? Because I'm sure the overwhelming number of people who
13 receive a demand to blow have been -- have been drinking and they're concerned about
14 being shown to be over 0.08. And so it would be an exceptional case where there would
15 be another reason for refusing to blow. That would hardly ever happen.
16
17 And so how does that impact on the taking away the incentive argument that you're
18 making?
19
20 MS. DARTANA: This is not a very unique case, because the type
21 of evidence that the respondent adduced in this case is evidence that most people can also
22 adduce. So, for instance, he testified as to his alcohol consumption, which is something
23 that everybody can do and everyone used to do when we had evidence to the contrary. He
24 called his wife to testify about how much alcohol he consumed. He called an expert to
25 say that, based on the amount of alcohol he says he consumed, he would not have been
26 over 80 or impaired, and, again, that sounds a lot like the evidence to the contrary defence
27 that we used to have.
28
29 He also called an expert to say that the indicia of impairment that were observed by the
30 numerous witnesses at the scene and the police officers could be explained away as
31 symptoms of trauma and shock from the collision. So, in my respectful submission,
32 anytime that you have a collision, this type of argument will be available to the accused.
33
34 As for the erroneous legal advice, I say that that is also not necessarily unique. Now, it is
35 different that the lawyer actually testified and said, yes, I indirectly steered him away
36 from blowing, I was wrong, I didn't know about the new offence of refusal where there's
37 a death. That situation is likely not going to occur. However, the respondent testified that
38 he didn't understand what the lawyer was telling him. He was speaking in legal jargon.
39 He was talking too fast. He wasn't asking any questions. Well, that certainly is a situation
40 that can recur because we heard evidence -- or we read evidence about how many calls
41 these Brydges lawyers tend to get in an evening, so that's not something that is

1 necessarily unique.
2
3 Also, an accused can very well testify that, as he -- as Mr. Suter did in this case, well, I
4 didn't understand -- I misunderstood what he said, I thought he told me to blow. And then
5 it will be a matter of credibility and whether or not the sentencing judge accepts that. My
6 point is that there is a door for people to argue the same things that Mr. Suter argued, not
7 exactly the same things, but a lot of the same things. And once you give people the
8 opportunity to receive a lesser sentence because of, you know, evidence that they weren't
9 impaired, evidence which is necessarily going to be inherently less reliable than evidence
10 from breath test results from an approved instrument, once you give them that door, then
11 there's always going to be an incentive for people to refuse. Why not? Why not take the
12 chance, refuse, then argue it later? Argue, you know, that I wasn't impaired, argue that I
13 maybe misunderstood what legal advice. So in that respect, this case is a bad precedent
14 and will motivate people to refuse.
15
16 So even if on a gut level it seems that a refusal offence is less serious and it's not fair to
17 treat somebody who refuses the same way, for policy reasons, we have to treat the moral
18 blameworthiness the same. Otherwise, there will always be an incentive to refuse. So
19 because of this, we have to apply the same sentencing range for impaired driving causing
20 death.
21
22 And I've provided the case of *Kresko,* which stands for this proposition. I provided the
23 trial case in my authorities. The respondent provided the sentencing case at tab 4 of his
24 authorities. This is a case from a lower Court from Ontario, so it isn't binding, but it is
25 persuasive, and the reasoning contained in there is persuasive, and it is based on
26 Parliament's intent.
27
28 So the sentencing judge seemed to have understood that this is where we start. We have
29 to start with the sentencing range for impaired driving causing death. What he did then
30 was he then used evidence of Mr. Suter's non-impairment to reduce the sentence, and
31 once he did this, again, he opened the door to people being motivated to refuse and
32 arguing the same thing. What he did was consider the evidence called by the accused as
33 to his non-impairment, which is, as I said, evidence from himself, which, in my respectful
34 submission, is self-serving as to the amount of alcohol that was consumed; evidence from
35 his wife as to the amount of alcohol that he consumed; evidence from the server and the
36 manager from Chili's restaurant, which is the restaurant Mr. Suter and his wife attended
37 prior to this collision. These two witnesses are the only two witnesses who actually
38 testified that they thought Mr. Suter was sober, other than the accused and his wife.
39
40 MADAM JUSTICE BIELBY: And the physician who examined him on the
41 scene.

1
2 MS. DARTANA: I'm sorry?
3
4 MADAM JUSTICE BIELBY: The specialist physician who examined him on
5 the scene also said she thought he wasn't impaired.
6
7 MS. DARTANA: Well, she didn't actually say he was impaired --
8
9 MADAM JUSTICE BIELBY: Wasn't impaired.
10
11 MS. DARTANA: Right, but I don't believe, and I could be
12 wrong, that she actually said he was sober. She also said some other things that would
13 indicate that he was impaired, although she didn't say that, just in terms of his stumbling
14 and walking around. But with respect to the server or the manager at Chili's, they
15 observed Mr. Suter only while he was sitting down, and they observed him for about 50
16 seconds to 2 minutes.
17
18 Now, importantly, what they also testified to is that, because they worked in the restaurant
19 industry and they had worked there for about five years, they knew that there was a law
20 against serving alcohol to drunk people. Therefore, in my respectful submission, you can
21 infer from that that it was in their best interest to testify that Mr. Suter was sober.
22
23 Mr. Suter also adduced expert evidence, as I indicated, that, based on his alcohol
24 consumption, he would not have been over 80 or impaired, and he also called the expert
25 to say that the indicia of impairment observed could have been symptoms of trauma or
26 shock from the collision. And in this way, he explained away many of the indicia of
27 impairment that was -- that were observed by the many, many witnesses at the scene.
28
29 So the sentencing judge considered this evidence, which is inherently less reliable than the
30 blood/alcohol content readings that would have been obtained from an approved
31 instrument, and considered it to be mitigating and substantially reduced the sentence. And,
32 as I indicated, this -- if this decision were allowed to stand, there would be an ability for
33 other accused to make very similar arguments.
34
35 The sentencing judge erred in treating the absence of evidence of impairment as a
36 mitigating factor because what he's essentially doing is he's using the consequence of the
37 commission of the refusal offence as a mitigating factor. So the accused benefits from
38 having committed the refusal because that's considered -- the consequence of committing
39 a refusal offence is that you deprive the state of the evidence of impairment that is most
40 accurately reliable, and then you use that to mitigate his sentence. Well, that's, in my
41 respectful submission, an error.

1
2 And I've provided the case of *Kang* from the Saskatchewan Court of Appeal at tab 17 of
3 my authorities for that proposition. So I alluded to this before, but if we allow people to
4 refuse and adduce this kind of evidence, we're going backwards. We are going back to
5 the days when the defence of evidence to the contrary was permitted, and we know that
6 Parliament has done away with that defence as a result of amendments that they made to
7 the evidence to the contrary provisions. And these provisions were upheld as
8 constitutional by the Supreme Court in the case of *St-Onge*. So this decision is a huge
9 step backwards from this move.
10
11 Now, although it's not a defence in the sense that he can be acquitted of refusal, he can
12 substantially mitigate his sentence by refusing and then adducing evidence to the contrary,
13 like evidence such as accused's evidence of alcohol consumption, expert evidence based
14 upon that evidence to say that he was not impaired or over 80. And that is something that
15 Parliament has decided is not -- no longer permitted, because they have stated that results
16 from an approved instrument are so reliable that the only way that you can challenge that
17 now is to show that the machine wasn't functioning properly or was not being operated
18 properly.
19
20 Now, the respondent proposes a sentencing methodology which, in my respectful
21 submission, does nothing to get rid of the incentive to refuse. Basically, according to the
22 methodology that he proposes, the accused can refuse and then force the Crown to prove
23 impairment beyond a reasonable doubt in order to get the same sentencing range of
24 impaired driving causing death, and the Crown has to use less reliable means. And if the
25 Crown can't do this, then the accused gets a lesser sentence. And, again if the accused is
26 allowed to do this, it will be an incentive to refuse.
27
28 Now, the sentencing judge was aware of the need to eliminate any incentive to refuse.
29 However, he thought that by forcing the accused to prove his sobriety on a balance of
30 probabilities that that would solve the problem and would eliminate any incentive to
31 refuse, because, in his view, it's harder to prove sobriety on a balance of probabilities
32 than it is to provide a sample. With respect to the sentencing judge, this is illogical. It is
33 much easier to prove sobriety in the absence of blood/alcohol content readings than it is in
34 the face of scientifically accurate results from an approved instrument, and this is
35 especially so after the amendments to the evidence to the contrary provisions.
36
37 In addition, where there is an accident, it's easier to disprove impairment because, as I
38 said, the impairment symptoms can easily be explained away as symptoms of trauma and
39 shock.
40
41 So to conclude with respect to the finding of lack of impairment, whether an accused is

1 impaired or not impaired is completely irrelevant to sentencing on a refusal. It shouldn't
2 reduce the range for sentencing for impaired causing death, and then to allow people to
3 refuse and then argue that they were not impaired is to create an incentive to refuse. We
4 absolutely cannot allow this. Otherwise, many people, especially people who have been
5 involved in serious collisions, will be motivated to refuse in the future.
6
7 Now, with respect to the erroneous legal advice, I did already talk somewhat about it, but
8 I want to go into a bit more detail about that. The sentencing judge found that the
9 respondent refused to blow because of the advice given by the Legal Aid lawyer. He
10 treated him as, in my respectful submission, an ignorant, naive person who was led into
11 doing something that he would not have done but for the legal advice, and the sentencing
12 judge found that his mistake of law was mitigating.
13
14 The Crown submits that he erred because a mistake of law is only mitigating where the
15 accused thought he was abiding by the law, and the sentencing judge also
16 mischaracterized the respondent as having blindly followed legal instructions instead of
17 having made a deliberate choice to refuse.
18
19 So with respect to the first point, that a mistake of law is only mitigating where an
20 accused thought he was abiding by the law, the case law says that a mistake of law is
21 only mitigating where an accused believed he was complying with the law, and I've
22 provided some cases in my authorities. In this case, he did not know -- or he did know
23 that he would be committing a crime, and, therefore, it's not mitigating. And, as I said,
24 this is an important issue that the sentencing judge completely failed to deal with or
25 resolve. And this is despite the trial Crown having pointed out that the respondent knew it
26 was a crime to refuse. He pointed it out many, many times.
27
28 The sentencing judge didn't mention it at all when he was summarizing the respondent's
29 evidence with the evidence of the conversation with the lawyer. Didn't say anything about
30 the two police officers having told him that it was a crime to refuse; also didn't mention
31 the respondent's comment in cross-examination when he was asked, well, is it hard to
32 understand the phrase, it's a crime to refuse? And he said, no.
33
34 The sentencing judge did not resolve the inconsistency between the lawyer's evidence and
35 the respondent's evidence in that respect, and, as I indicated, he misapprehended the
36 evidence.
37
38 Now, it's true that a sentencing judge is not required to refer to every piece of evidence
39 or every argument. However, if the judge fails to resolve critical issues that are
40 determinative of the main issues at hand, then that's an error in principle, and it's a
41 serious error.

1
2 Here, the issue of whether or not the respondent knew it was a crime to refuse was
3 critical to whether or not he could rely on a mistake of law to mitigate his sentence, and
4 his failure to deal with this seriously erodes the conclusion that the erroneous legal advice
5 was mitigating in this case.
6
7 Now, just because the sentencing judge failed to make a finding on this does not mean
8 that this Court is left with a factual gap. In my respectful submission, this Court can,
9 based on the evidence before it, make a finding that the respondent knew that it was a
10 crime to refuse. As I said, he was told by two police officers, and this is in the Agreed
11 Statement of Facts that he signed. He was told twice by his lawyer. And you can also
12 consider the fact that he was an intelligent, as indicated by the evidence that he gave at
13 the sentencing hearing -- he was mature, and he was university educated, and he was a
14 professional when he worked, and he was even a manager when he worked. So you can
15 consider all of those factors, and you can consider the fact that he told the Court that he
16 didn't think that it was hard to understand those words, refusing is a crime.
17
18 Now, because he knew it was a crime to refuse, his moral blameworthiness is much
19 different from cases where the accused did not know that they were committing a crime.
20 For example, if you look at the *Feng* case that I've provided in tab 33 of my authorities,
21 in that case, the accused --
22
23 MADAM JUSTICE SCHUTZ: Just a moment.
24
25 MS. DARTANA: I'm sorry. In that case, the accused was
26 convicted of having sexual intercourse with a 14-year-old girl, but before he actually
27 committed the offence, he looked up the age of consent in the library, because he wasn't
28 sure. Now, at the time that he looked it up, it was 14, and this was in April of 2008. So
29 poor Mr. Feng, unbeknownst to him, a month later, the age of consent actually changes to
30 16, and so he had sexual intercourse after the age of consent changed to 16, and he was,
31 therefore, committing an offence. And so he was convicted of that, but this Court held
32 that his mistake of law was a mitigating factor and upheld a sentence of 17 months
33 imprisonment. So in that case, he didn't know that he was committing an offence.
34
35 Also, if you look at the *Campbell* case, which I've provided at tab 34 of my authorities,
36 in that case, the accused believed that it wasn't against the law to dance nude in public
37 and was found guilty of that offence. Her belief was based on a judge's decision that she
38 had misread, and in that case the Court found that her mistake of law was a mitigating
39 factor and granted her an absolute discharge.
40
41 Similarly, if you look at the *Liwyj* case, which is at tab 31 of my authorities, in that case

1 the accused was convicted of disobeying a superior orders -- superior officer's order,
2 contrary to the *National Defence Act.* He refused to do certain repairs that he believed
3 were unsafe. He was convicted, but the Court held that his moral blameworthiness was
4 reduced because he honestly believed his behaviour was lawful.
5
6 Mr. Suter's case, on the other hand, is more similar to the case that I provided at tab 32,
7 which is the *Pearlman* case, and in that case the accused sold satellite receivers and
8 decoders, contrary to the *Radio Communications Act.* There was some uncertainty in the
9 law in this area before the Supreme Court resolved the issue. The accused in this case
10 actually sought legal advice, but, despite that, the Court held that they knew they were
11 acting dishonestly and decided out of sheer greed to carry on their illegal activity. And the
12 Court held that their attitude from far from an honest mistake of law in reliance upon
13 legal advice.
14
15 Now, this goes back to Your Ladyship's question about, well, what -- how do we know
16 that he didn't know it was a crime to refuse? What if he didn't know it was a crime to
17 refuse? The Crown's response is that surely at the point where he's being charged, he
18 must have known at that point that it was a crime. Now, refusal is different from other
19 offences in that way, because you actually get told beforehand, now, it's a crime to refuse,
20 and then you get the opportunity to blow or refuse. And so this is unlike situations where
21 an accused has already committed an offence and then he gets charged. In a refusal case,
22 the accused actually has an opportunity to change his mind, and we have seen cases
23 where the Courts have acquitted accuseds of refusal if they've changed their mind quickly
24 enough.
25
26 In this case, there is no evidence whatsoever that the respondent offered to blow at the
27 point when the police charged him. Now, even assuming that at that point he knew it was
28 a crime, the argument may be that he may not have thought that he would be convicted,
29 so he knew it was a crime, but he didn't believe that he would be convicted.
30
31 In this respect, what's really interesting are the words that he used to describe what he
32 was thinking when police started to charge him, and he was answering my friend's
33 questions in direct examination, and what he said is interesting. He said, "they would
34 work it out after". When asked what that meant, he said he didn't know, and he was --
35 you know, he was not in a good state to answer that question. He just didn't know.
36
37 The Crown submits that it's reasonable to infer that what he meant was that he would not
38 be convicted, in other words, that the lawyers would get him off. Now, even the
39 respondent in his factum concedes that that's possible that that's what he could have
40 meant, and I refer to paragraph 54 of his factum, where he says:
41

1 > The reference to working it out after is, at most, an
2 > acknowledgement that the respondent believed he would be
3 > charged on the basis of what the police were telling him, not that
4 > he would be ultimately convicted.
5
6 What does that say about moral blameworthiness? The Crown submits that the moral
7 blameworthiness is far different where he knew it was a crime. He did it anyway, and he
8 did it because he did not believe that he would be found guilty of the crime. This is far
9 more morally blameworthy than someone who did not believe he was committing a crime
10 in the first place. It's only reasonable to infer from this that the respondent was acting in
11 his best interest. Therefore, the mistake of law did not reduce his moral blameworthiness
12 whatsoever.
13
14 And it's interesting that what actually happened in this case is very similar to what the
15 respondent might have predicted, which is he got charged, and instead of beating the
16 charge completely, he managed to get a very light sentence.
17
18 The sentencing judge also found that the respondent basically, in my respectful
19 submission, blindly followed the legal advice from the lawyer. The Crown submits that
20 the respondent exercised his free will and intentionally chose not to blow, and this is
21 because he was very selective about what advice that he chose to follow. He specifically
22 disregarded his lawyer's other advice not to speak to police. He gave the police a
23 statement. So on the one hand, he's saying, well, I refused because my lawyer told me to
24 do so. On the other hand, well, I gave the police a statement even though my lawyer told
25 me specifically not to. The sentencing judge doesn't even address this inconsistency in his
26 reasons.
27
28 Now, the respondent argues that the Crown is challenging a finding of fact with respect to
29 this fact. The Crown submits that the sentencing judge never found this as a fact, so he
30 never accepted this evidence. So we are not suggesting a finding of fact that's necessarily
31 contrary to what he found because he never found this as a fact.
32
33 The Crown submits that we have here a respondent who is not naive, he is not
34 unsophisticated, not immature, or not intellectually challenged, someone who trusted his
35 lawyer uncritically. The respondent knew what he was doing and was acting in his own
36 best interest. So, again, the erroneous legal advice in this case did not reduce his moral
37 blameworthiness, and the sentencing judge erred in treating it as a mitigating factor.
38
39 Now, I just want to -- before I conclude, I just want to say that the two issues that I've
40 discussed with respect to the lack of impairment and the erroneous legal advice ought to
41 be treated as separate issues. The Court must not conflate these two issues. They are

1 separate. They are independent. There is no reason why if you decide that you do not
2 accept the Crown's arguments on one that you necessarily have to not accept the Crown's
3 argument on the other.
4
5 To conclude the submissions on the Crown's appeal, the errors in this case clearly had a
6 significant impact on the sentence. Although there were other mitigating factors, these
7 ones were considered by the sentencing judge to be the most significant, and that's why
8 he spent a great deal of his analysis on these two factors. And this is evident from his
9 comment that it would be contrary to the fundamental principle of proportionality to
10 equate the moral blameworthiness of a sober person who follows bad legal advice in
11 refusing to comply with a police demand with the moral culpability of a person who gets
12 drunk and kills someone. So the Crown submits that these significant errors resulted in a
13 demonstrably unfit sentence of four months, and that is not proportionate to the gravity of
14 the offence and the moral blameworthiness of the offender.
15
16 With respect to the arguments in response to the accused's appeal --
17
18 MADAM JUSTICE BIELBY: Just before we get to that, I just want some
19 clarification. I read somewhere, and I couldn't find it later, that at sentencing the Crown
20 suggested that a three-year sentence be imposed. And I read in your materials that you're
21 suggesting a three to four-year sentence be substituted for the one imposed; is that
22 correct?
23
24 MS. DARTANA: That was my mistake. I had intended to suggest
25 the same sentence that was being suggested by the trial Crown. I do not intend to resile
26 from the trial Crown's position, so that was a mistake.
27
28 MADAM JUSTICE BIELBY: And that was three years.
29
30 MS. DARTANA: That was three years.
31
32 MADAM JUSTICE BIELBY: Thank you.
33
34 MS. DARTANA: So this is what the Crown is suggesting is
35 appropriate, after considering all of the factors that are properly characterized as
36 mitigating factors.
37
38 MADAM JUSTICE BIELBY: Thank you.
39
40 MS. DARTANA: So with respect to the accused's appeal, the
41 accused appealed 24 days after the Crown filed its notice of appeal. The respondent is

1 now seeking no gaol, even though, at sentencing, with the same lawyer, he agreed that an
2 intermittent time -- intermittent sentence might be appropriate if a fine of probation was
3 not sufficient. The respondent is also seeking a 12-month driving prohibition, even though
4 he didn't make any submissions as to driving prohibition at sentencing. He's essentially
5 seeking a sentence for refusal simpliciter, where there's no collision and no death or
6 bodily harm. He argues that his presumption of innocence is violated because the
7 sentencing judge applied the same sentencing range for impaired driving causing death.
8
9 The Crown submits that there is no violation of the presumption of innocence. Just
10 because a sentencing judge -- or just because this Court -- I urge this Court to equate the
11 moral blameworthiness of a refusal offence where there's a death to impaired driving
12 causing death doesn't mean that he found him guilty of impaired driving causing death,
13 because as he pointed out in his factum, the refusal offence has different elements to the
14 offence.
15
16 And I go back to what may now sound somewhat ad nauseam, but, again, moral
17 blameworthiness has to be the same. Otherwise, there will be an incentive to refuse.
18
19 With respect to his argument that deterrence is only effective if it's communicated to the
20 accused, so the accused didn't get the message that the penalties are the same for
21 impaired driving causing death and refusal where there's a death. And I just would like to
22 point out that, in the evidence, the police actually did tell him that the penalty would be
23 the same. It was communicated.
24
25 Constable Croxford was asked what she said, and she said she didn't remember exactly
26 the words, but she said her standard practice is to say that, if you refuse, then you'd be --
27 then you will be charged with refusal. If you blow, that gives you the opportunity to show
28 that you've been drinking or not. She says it's the same penalty. The Courts look at
29 refusal just as if you blew over.
30
31 Now, I appreciate that that is information coming from the police as opposed to his
32 lawyer, but I merely point that out because there was information given to the respondent
33 that the penalties are the same. But with respect to the argument that, you know,
34 deterrence is only effective if it's communicated to the respondent, the Crown submits
35 that this misunderstands the concept of general deterrence. General deterrence is a
36 message sent to the community as to what will happen if you refuse, and the message
37 that's being sent by this decision, if left alone, is that it's better to refuse, take your
38 chances.
39
40 With respect to the vigilantism, the respondent seems to be asking this Court to reweigh
41 the weight to be given to that factor, and I just would like to point out that the respondent

1 didn't say -- sorry. The sentencing judge didn't actually say that less weight than the
2 mitigating factors of the lack of impairment and the erroneous legal advice should be
3 given. He didn't compare it to those two mitigating factors. What he said was it should be
4 given mitigating weight to a more limited extent. And he said that after he discussed the
5 other mitigating factors of the guilty plea, the no criminal record, the family support, the
6 fact that he was employed. Then he said the vigilantism and the public scorn ought to be
7 given mitigating weight to a more limited extent.
8
9 So with respect, the respondent is tempting to ask this Court to give that factor more
10 weight, and the Crown submits that you can't do that unless there's an error shown. And
11 *Lacasse,* the recent case from the Supreme Court of Canada, is authority for that
12 proposition, that you can't reweigh mitigating and aggravating factors unless there's an
13 error that impacted the sentence.
14
15 With respect to the driving prohibition, again, the respondent seems to be asking for a
16 driving prohibition that would be appropriate for a refusal simpliciter where there was no
17 death or bodily harm or collision. And, again, the respondent suggests that -- sorry. The
18 Crown submits that there is no error that was committed by the sentencing judge with
19 respect to the driving prohibition. Plus, I believe that he's suspended anyway as a result of
20 the *Traffic Safety Act.* I believe that the suspension is five years.
21
22 With respect to his submissions that, you know, the respondent shouldn't be
23 re-incarcerated because he's already served his sentence -- and he points to some cases
24 where the Court, this Court, has declined to re-incarcerate. There's two cases that he
25 provided. The Crown submits that there are many, many cases from this Court where this
26 Court had no hesitation whatsoever to re-incarcerate, and there's no reason why, if you
27 accept the Crown's argument that this respondent should not be re-incarcerated, to say
28 that he's already served his sentence and, therefore, don't re-incarcerate, would make it
29 very difficult for any -- for the Crown to ever appeal any short sentence.
30
31 So with respect to these arguments and, as well, the Crown's appeal, the -- again, the
32 erroneous legal advice is not a mitigating factor. The moral blameworthiness has to be
33 treated the same regardless of impairment or lack of impairment. Otherwise, there will
34 always be an incentive to refuse.
35
36 And, in conclusion, the Crown asks that you grant the Crown leave to appeal, allow the
37 appeal, and increase the sentence to three years' imprisonment and that you not change
38 the driving prohibition.
39
40 And just in closing, I just want to make one more point. That is with respect to the
41 vigilantism and the attack on Mr. Suter which was, of course, a horrific attack. That -- the

1 sentencing judge said that the Crown -- he agreed with the Crown's proposed sentencing
2 range initially with respect to impaired driving causing death. He agreed that four to six
3 years imprisonment was the correct starting point. The Crown then asked for three years
4 after taking into account mitigating factors. And it's significant that the sentencing judge
5 actually said, that's too low. What the Crown was asking for was too low, three years.
6
7 So, in my respectful submission, aside from the whole issue of, you know, lack of
8 impairment and erroneous legal advice, the judge would not have reduced the sentence
9 from four to six years to three years based on the other factors, including the vigilante
10 attack. So that's the limited weight that he gave to those factors. In my respectful
11 submission, he did not err in doing so, because it does not -- it's something that you can
12 consider, but it's not a mitigating factor in that it doesn't actually reduce moral
13 blameworthiness. It's something that the Court can consider, but it should be given very
14 limited weight, as the sentencing judge would have done.
15
16 Subject to any questions from this panel, those would be my respectful submissions.
17
18 MADAM JUSTICE SCHUTZ: Mr. Bottos, are you ready to go, or do you --
19 would you like a break?
20
21 MR. BOTTOS: I don't need a break, but if the panel or if
22 anyone --
23
24 MADAM JUSTICE SCHUTZ: Madam Clerk, how are you doing?
25
26 THE COURT CLERK: Fine. Thank you.
27
28 MADAM JUSTICE SCHUTZ: Do you have any extra pads of paper down
29 there? Do you have any extra pads of paper?
30
31 THE COURT CLERK: Yes.
32
33 MADAM JUSTICE SCHUTZ: Go ahead, sir.
34
35 **Submissions by Mr. Bottos**
36
37 MR. BOTTOS: My Ladies, My Lord, if it pleases the Court, I
38 intend to address the following areas in the time allotted: firstly, why the Crown's
39 position with -- offends the principle of proportionality; secondly, why sobriety must be a
40 relevant factor in the sentencing of an offender who has refused to provide a breath
41 sample; thirdly, that Mr. Suter was indeed operating under a mistake of law when he

1 refused to provide a breath sample upon demand.
2
3 MADAM JUSTICE SCHUTZ: Mr. Bottos, just let me ask, can the gallery hear
4 Mr. Bottos? Is everyone able to hear? If you can elevate your voice just slightly, sir.
5
6 MR. BOTTOS: Very good. Thank you, My Lady.
7
8 MADAM JUSTICE SCHUTZ: Thank you. Thank you very much.
9
10 MR. BOTTOS: Fourthly, how the objective of deterrence was
11 largely met because of the public scorn and ridicule and more so the vigilante justice that
12 was visited upon Mr. Suter in January of 2015. And then, lastly, I propose to discuss
13 briefly the methodology that we have provided at paragraphs 101 to 114 of our factum
14 concerning how this Court should decide the moral culpability of an offender of this
15 section on a case-by-case basis.
16
17 Set in the context of a mistake of law case in 1972, Mr. Justice Kerans of this Court but
18 then of the Alberta District Court said in the case of *Campbell and Mlynarchuk:*
19
20 The principle that ignorance of the law should not be a defence in
21 criminal matters is not justified because it is fair, it is justified
22 because it is necessary, even though it will sometimes produce
23 anomalous results.
24
25 He went on to say, however, that because the offender in that case was operating under a
26 mistake of law, this would mitigate her sentence because it is at the sentencing stage,
27 "where the scales of justice are balanced". Indeed, in all sentencing cases, not just mistake
28 of law cases, the scales of justice are balanced because our Courts adhere, without
29 hesitation, to the principle of proportionality.
30
31 In the case at bar, the learned sentencing judge went a long way toward balancing the
32 scales of justice between society's interests and Mr. Suter's, because he acknowledged at
33 paragraph 66, which my friend has already quoted to you:
34
35 It would be contrary to the fundamental principle of
36 proportionality to equate the moral blameworthiness of a sober
37 person who follows bad legal advice in refusing to comply with a
38 police demand on the one hand with the moral culpability of the
39 person who gets drunk and kills someone on the other.
40
41 But yet, and with the greatest of respect, the learned sentencing judge did fall into error to

1 the prejudice of Mr. Suter in holding that he should begin with a presumption that the
2 offender for this offence should receive the same punishment as one who would actually
3 drive drunk and kill someone.
4
5 And there are numerous instances, in fact four different passages, where the learned
6 sentencing judge does provide evidence of a presumption of guilt on the offence of
7 impaired driving causing death, which required Mr. Suter to rebut that presumption of
8 guilt of an offence that he did not plead guilty of. I will just list those for you, and they
9 are -- they are at F-28 and following, and I'll just give you the paragraph numbers:
10 paragraph 65, 67, and twice at paragraph 70. And I'll just read into the record one. At
11 paragraph 70, the learned sentencing judge stated:
12
13 > On the other hand, if an accused is able to satisfy a Court by
14 > evidence that the fatal collision was not the result of impairment,
15 > this does two things: First, it substantially answers the principle
16 > wrong which the section is aimed; second, the incentive to provide
17 > a sample in the first place is preserved as long as the onus rests on
18 > the accused to establish the absence of impairment because proof
19 > even to the standard of probability will invariably be more difficult
20 > than providing a sample in the first place. Meeting that onus will
21 > not likely be common.
22
23 So with the greatest of respect, the learned sentencing judge presumed an offence that
24 Mr. Suter was not guilty of: impaired driving causing death, and placed an evidentiary
25 onus -- a persuasive onus, I should say, on Mr. Suter to rebut that presumption. However,
26 at least he gave him that chance. And, in fact, Mr. Suter rebutted the presumption.
27 Mr. Suter marshalled considerable evidence. I'm -- it was cross-examined upon by the
28 Crown, but several pieces of evidence clearly show that Mr. Suter would not have been
29 impaired in the death of Geo Mounsef and the injuries to three others.
30
31 Contrast that, with the greatest of respect, with the Crown's position at this appeal and on
32 sentencing that, for the sake of uniformity and for the sake of the adherence to deterrence
33 above all, a refuser should face an irrebuttable presumption that he was impaired or that
34 he should remain in the same range as that of the impaired drive who has caused death,
35 notwithstanding the truth. Regardless of the actual sobriety of an offender for a refusal, it
36 matters not. A driver who refuses has sealed his own fate and would never -- will always
37 be prevented from arguing the merits that he was not impaired. That is not something that
38 we deny a person on trial for impaired driving. How can we deny that for an offender
39 who has not been proven impaired but has refused, and in this case so -- as the learned
40 sentencing judge, based on the erroneous legal advice of the Brydges lawyer?
41

1 The Crown's position, with the greatest of respect, offends the only governing principle
2 that there is in sentencing. As our Court of Appeal has said, this Honourable Court has
3 said in *Arcand* at paragraphs 47:
4
5 Proportionality. The principle of proportionality is the only
6 governing principle in sentencing.
7
8 Of course there are secondary principles, and there are objectives beyond that, but that is
9 the governing principle. In fact, the Crown, on appeal, both in its original factum and its
10 response factum, not once, not even once, addressed the principle of proportionality or
11 how its blind adherence to the policy of deterrence can square with the overarching
12 principle of sentencing. Instead, the Crown's position is this: The objective of deterrence
13 is not just the main thing, it's the only thing, and we should ignore all of the case law
14 from this Court and from the Supreme Court, and, in fact, we should even ignore Section
15 718 of the *Criminal Code* altogether because Parliament has chosen to pass Section
16 255(3.2), which means that, because Parliament wants to deter offenders against refusing,
17 that we should not balance the scales at all. We should simply throw the guy in gaol just
18 as if he were an impaired driver who's caused death, notwithstanding the evidence,
19 notwithstanding findings of fact.
20
21 The paramount purpose of a trial court is to find the truth. That's what courts do, and they
22 must do all of the time. In the face of judicial findings of fact, do we really want to say it
23 matters not and to effect Parliament's will that we should so dramatically impose such a
24 harsh sentence notwithstanding any true factors in the case?
25
26 MR. JUSTICE WATSON: Mr. Bottos, your -- are you going to move off
27 this point? I'm not going to get you off this point.
28
29 MR. BOTTOS: I'm sorry.
30
31 MR. JUSTICE WATSON: I have a question about this, okay. My question
32 is this: If, in fact, the sentencing judge was incorrect in law, as you say, to make an onus
33 of proof reference here, he may be -- by the way, he may be talking about an analytical,
34 not a factual onus, but, anyway, he seems to say -- the reason he seems to use in this
35 paragraph -- it says:
36
37 The incentive to provide a sample in the first place is preserved as
38 long as the onus rests on the accused to establish the absence of
39 impairment.
40
41 Now, he's presumably talking about the onus which the *Criminal Code* does recognize,

1 which is reasonable excuse, I guess, or something like that. Who knows? But if the
2 objective of this provision of the Code, especially as amended by Parliament in 2008, is
3 to get people to produce evidence, even evidence that might be against themselves, how
4 would the -- that objective of Parliament be met by allowing an offender who is in
5 detention to make a call as to whether or not evidence should be supplied or not and that
6 call being based on, what is my predicament and should I make a determination of the
7 pros and cons of my predicament before deciding whether to blow or not? Do you follow
8 what I'm saying? I'm wondering why this particular onus actually helps -- I mean
9 removing this onus actually helps the argument for the accused?
10
11 MR. BOTTOS: Well, My Lord, the reason I suggest that onus
12 is unfair and is actually unlawful in the way that the --
13
14 MR. JUSTICE WATSON: And I must say I'm partially agreeing with
15 that. I just -- but how would removing that onus from the judgment of the trial judge here
16 help the accused's position? Because, as I say, the accused's position in his evidence
17 including remarks like, this is what I thought my rights were.
18
19 MR. BOTTOS: Yes.
20
21 MR. JUSTICE WATSON: It's quite apparent from the evidence -- and I
22 didn't see the trial judge coming to grips with this, is that the accused knew he was
23 withholding evidence. That's the essence of the offence. He knew he was withholding
24 evidence. It doesn't matter whether he thought it was lawful or not. He knew he was
25 withholding evidence, and that knowledge is then coupled with, as you're suggesting,
26 mistake of law about whether he was obliged to do so or not.
27
28 MR. BOTTOS: Yes.
29
30 MR. JUSTICE WATSON: It seems to me that, and I'm speaking only for
31 myself, it's completely irrelevant whether he was under a mistake of law as to whether he
32 was obliged to or not if the essence of the offence is he knew he was withholding
33 evidence.
34
35 MR. BOTTOS: Well, Sir, with the greatest of respect, I don't
36 know if a non-lawyer knows the essence of withholding evidence at that point in time. All
37 he's told is he's being required to provide a sample by the police, and then under the --
38 his rights under the Charter, he is entitled to speak to counsel about --
39
40 MR. JUSTICE WATSON: Fair enough.
41

1 MR. BOTTOS: -- what he can and cannot do. Evidence --
2 withholding of evidence, Sir, with the greatest of respect, I think you place too much
3 knowledge into the average citizen in terms of the overall ramifications of --
4
5 MR. JUSTICE WATSON: See, this -- that's a way of putting your finger
6 on something else which is I think important, and that is that there is some merit in what
7 you're saying relative to comparing this case to the ordinary refusal, because that's
8 exactly what every single case does. This is not unique in a sense, because every single
9 offender who's apprehended under this has a motive for not blowing. Now, that motive
10 may be error of law. That motive may be withholding evidence. That motive may be that
11 they're intoxicated and they don't even understand the demand. There could be all sorts of
12 reasons.
13
14 MR. BOTTOS: Yes, Sir.
15
16 MR. JUSTICE WATSON: But the point, it seems to me, that Parliament is
17 addressing -- and, as I say, I'm not sure the trial judge came to grips with this, is that a
18 choice made by a person in these circumstances who's already been arrested, who knows
19 somebody has been very, very seriously hurt or killed -- he's in gaol. Police have told him
20 he's got certain obligations. They haven't -- nobody's suggested they told him incorrectly.
21 Indeed, even the trial judge said he had no right -- or he quoted his own language about
22 it. And if that's the case, why would mistake of law have anything to do with this?
23
24 The only mistake he has is whether he's obliged to provide evidence, not whether he
25 should, that he's making a judgment, is what I'm saying, and he's -- that's the problem
26 that Parliament is worried about.
27
28 MR. BOTTOS: Well --
29
30 MR. JUSTICE WATSON: We don't want people in these circumstances to
31 make a decision whether the Crown or the government is entitled to evidence against me
32 or not. That's been taken away, and the Constitution says that's taken away okay.
33
34 MR. BOTTOS: My Lord, when a person is in custody, it is
35 uneven playing field, as we know. The police are saying one thing, and all he has is the
36 lifeline of calling counsel during the Brydges call. That is all he has --
37
38 MR. JUSTICE WATSON: Right.
39
40 MR. BOTTOS: -- together with whatever background and
41 intelligence he has, and people -- and we know this. People don't really know the minutia

1 of the law, and, in fact, they jettison whatever they understand could be the law whenever
2 they do speak to a lawyer in a professional setting and seeking legal advice. For example,
3 people are always -- always look at me funny when I say, you really have no obligation
4 to say anything to the police. You have an absolute right to silence. Most people don't
5 really appreciate that until you drive it into their head during the Brydges call, for
6 example. Why? Because people have a general notion of the law.
7
8 But when they -- when there is a crystallizing moment and they call counsel in a
9 professional way and in a constitutionally valid way, encouraged way, on a Brydges call,
10 they are entitled -- as the learned sentencing judge said, they are entitled to rely on that
11 advice. They're not thinking about does this create evidence, am I depriving evidence.
12 Mr. Suter said -- and this was accepted. He said twice to this lawyer who was giving him
13 advice and the -- and at paragraph 41 of the judgment, it says the lawyer's advice was
14 confusing and was obfuscated.
15
16 And so Mr. Suter said twice, you're telling me not to blow; is that right? Yes, I'm telling
17 you not to blow. That's the -- that's really all of what a person would be thinking.
18
19 MR. JUSTICE WATSON: It's a fairly sophisticated question, actually, by
20 a person in detention asking a lawyer. See, the --
21
22 MR. BOTTOS: But --
23
24 MR. JUSTICE WATSON: See, the problem is --
25
26 MR. BOTTOS: But this was at the end of some verbiage from
27 the lawyer who is doing all of the talking.
28
29 MR. JUSTICE WATSON: And I have to say, we have to give credit to
30 Judge Anderson, who is a very senior judge, and experienced. The lawyer's talk was
31 jargon. I mean, we got that, but see --
32
33 MR. BOTTOS: Exactly.
34
35 MR. JUSTICE WATSON: Going back to the point I was intending to --
36 and to be fair to you, I have to -- I think I have to show you this. The Crown's argument
37 about the fact that he also waived the right to silence is not irrelevant in this context,
38 because it helps to demonstrate, it seems to me anyway, just for myself, that he was okay
39 with giving some kinds of evidence to them. He was -- despite what the lawyer said who
40 told him to keep his mouth shut, he was quite fine with that because he didn't think it
41 would hurt him. And yet he withheld this evidence, this important evidence, because he

1 asked the lawyer, I don't have to blow, I don't have to blow.
2
3 Now, an intelligent man making those kind of decisions, it seems to me, wasn't Judge
4 Anderson required to come to grips with the -- his conduct as a whole in dealing with the
5 police and --
6
7 MR. BOTTOS: Well, you may not like my answer, Sir, but --
8
9 MR. JUSTICE WATSON: So but -- yeah.
10
11 MR. BOTTOS: My answer is that a judge, in giving reasons,
12 does not have to cover off every argument made by counsel, especially the lame
13 ones. And that, in my respectful submission, is not a strong argument, because Mr. Suter
14 gave a very valid and humane answer to that question in cross-examination, because it
15 was put to him, hey, you're following the advice of not blowing but you're not following
16 the advice of talking to the police. And Mr. Suter said, you know what, it was
17 two-and-a-half hours later, I was tired. This man came along who was a detective, wasn't
18 dressed in street clothes, was not the -- one of the three police officers who had been
19 looking like -- looking at him like a monster. And he said, I let my guard down. I didn't
20 follow the advice, but this man was a presentable --
21
22 MR. JUSTICE WATSON: Yes. He said (INDISCERNIBLE) was a nice
23 guy or something.
24
25 MR. BOTTOS: Yeah. So he -- and he let his guard down and
26 talked at that time, but that was two-and-a-half hours later, when all of the -- well, not all
27 of the stress, but much of the stress of the situation had subsided, if you will. And so it's
28 perfectly -- it's perfectly reasonable for somebody to follow the immediate advice of a
29 lawyer immediately after getting off the phone and then hours later forgetting that advice.
30 And, you know, we see this all the time when it comes to confessions. They're -- you
31 know, the lawyer gets -- or sorry. The detainee or arrestee gets off the phone on a murder
32 charge, hangs up the phone, goes back into the interview room. I'm not going to talk, I'm
33 not going to talk, I'm not going to to talk. Three hours later, he's talking, and he's talking
34 and talking, and it happens all the time.
35
36 So I respectfully submit, Sir, that that argument by Crown at sentencing didn't require an
37 answer because it was not a very strong argument.
38
39 So I can move on, Sir, if --
40
41 MR. JUSTICE WATSON: Sure.

1
2 MR. BOTTOS: If you would -- thank you. Now, my friend has
3 criticized myself for seeking to have Mr. Suter have received a non-custodial sentence, but
4 if I might explain for one moment. I argued at the sentencing hearing that he deserved a
5 fine or -- and probation. And if I am -- if I am wrong, an intermittent sentence. However,
6 that was said before knowing what the trial judge was going to find, what findings of fact
7 he would make, what would count as mitigation and what would not. After seeing the
8 learned sentencing judge's findings of fact and rulings, it became -- it became clear that
9 Mr. Suter ran the table when it came to all of the evidence in this case. Every point of
10 contention, Mr. Suter's evidence was accepted. Every point -- or almost every point of
11 law, the defence or Mr. Suter's point was accepted. Not every, but most of them. He was
12 found to be proven sober, operating under a mistake of law paid heavily at the hands of
13 vigilante justice, as well as public scorn and ridicule. And, in addition, no prior record and
14 previously of good character.
15
16 So the question then became to Mr. Suter on appeal, then why gaol at all? And the reason
17 we say the learned sentencing judge erred is because he did place an onus of proof on
18 Mr. Suter, saying we're going to start with the proposition that you're in the three or four
19 or five-year range, and we're going to make you prove on a balance of probabilities that
20 you were not impaired, and we're -- and that caused -- if you're starting so high, it causes
21 you, notwithstanding all of your efforts, to claw back as best you can. It ended up with a
22 four-month gaol sentence. But if this Court accepts that His Honour started at the wrong
23 end, then it should be that Mr. Suter did not deserve a gaol sentence at all.
24
25 Now, the Crown's first and main argument is that the refuser, for policy reasons, should
26 be sentenced to the same range as the impaired driver who kills, and it's not relevant that
27 the refuser was, in fact, sober. I submit that there are three reasons why evidence or
28 actually accepted findings of fact of sobriety should be considered relevant. I hesitate to
29 use the term mitigating, because it's only mitigating if you start with a proposition that he
30 had to prove it. I suggest that impairment would be an aggravating factor, but, in any
31 event, the sobriety of the offender for a refusal is relevant.
32
33 Firstly, as my friend I think has agreed now, refusal offences are not the true evil.
34 Impaired driving is. Breath tests exist to determine if a driver is actually impaired or not.
35 So we have to deter non-compliance by criminalizing that. We understand that. But let's
36 make no mistake. One creates the carnage, and the other is a necessary tool to help
37 prevent the carnage or better capture and convict those who have caused the carnage.
38
39 So when the driver can prove, on a balance of probabilities, that he was actually sober, he
40 has effectively shown that he was not guilty of the true evil that the test was designed to
41 determine. Although he is guilty of a criminal offence by having deprived society of the

1 most definitive evidence, he has largely mitigated that deprivation by having provided
2 remedial evidence of sobriety. And the truth, therefore, should matter.
3
4 In that vein also, let us not denigrate viva voce evidence. We put people in gaol all the
5 time, every day on trials based on viva voce evidence. When oaths are taken and the fact
6 finder believes somebody, one person over another, et cetera, there are criminal
7 consequences and long-term imprisonment consequences just on viva voce evidence alone.
8 Most of the time we do not have definitive machines that arbitrate whether somebody is
9 guilty or not, and I understand that this is a deprivation of the very best evidence, but let
10 us not fully sweep away what a person may be able to prove by remedial efforts once he
11 has lost that opportunity to provide the sample in the immediate -- contemporaneously
12 with the offence.
13
14 Secondly, a finding of sobriety affects the gravity of the offence of refusal and the degree
15 of responsibility of the offender, especially illustrated in this case. As this Court has said
16 in *Arcand,* at paragraph 60, the requirement for a Court to consider aggravating and
17 mitigating factors, go directly to either both the gravity of the offence and the degree of
18 responsibility of the offender." In other words, the aggravating and mitigating factors
19 reflect the two fundamental components of proportionality.
20
21 Firstly, in relation to the gravity of the offence, the harm to society is greater when there
22 is no explanation for a refusal or whether the offender has been shown to be likely
23 impaired and likely refused to cheat the administration of justice. However, where an
24 offender is provided evidence demonstrating that he or she was likely sober and the
25 evidentiary gap is largely filled, he has shown that his actions were not nearly as grave as
26 initially thought. That is, he was not truly impaired and thus not guilty of the true evil.
27
28 Secondly, in relation to the degree of responsibility of the offender, an offender who
29 refuses while intoxicated in an attempt to cheat the administration of justice is far more
30 culpable than someone who, like Mr. Suter, refused while sober, but on the good faith
31 advice of a lawyer's Brydges advice. Wilful violation to prevent confirmation of a crime
32 is aggravating, but the opposite must also be true. Good faith reliance on legal advice
33 causing one to believe that it was not unlawful in the circumstances not to blow must also
34 be mitigating.
35
36 The third reason I provide -- or propose is this: The offence of refusal is an offence for
37 not following the demand to provide conscripted evidence, not following the demand to
38 provide evidence against oneself. That goes against the general rules of the right to silence
39 and the rules against self-incrimination. We make exceptions, of course, in this case. So it
40 would be antithetical, in my respectful submission, to prohibit the accused to provide, or
41 at least attempt to provide, remedial evidence that he was not indeed guilty of the true

1 evil in the circumstances. It's not as perfect. It's not as good as the machine's saying what
2 his readings would have been, but at the end of the day, we have to take into account his
3 viva voce evidence, which was unshaken and corroborated not by just his wife, but by
4 other factors.
5
6 The police, upon investigation, found no alcohol inside of his vehicle. Why is that
7 important? Because ten minutes earlier, Mr. Suter and his wife left a previous restaurant,
8 Chili's restaurant. It was a ten-minute drive, leaving at about 7:30 at Chili's. They had
9 spent an hour there at Chili's restaurant. During that hour, they had -- they attempted to
10 have dinner, and Mr. Suter ordered a pint of beer and finished about two-thirds of it, I
11 believe his testimony was. But the food was coming late, and when it finally arrived, it
12 was cold.
13
14 He had dealt with two people there, two arm's length witnesses that were called at the
15 preliminary inquiry, which the Crown put into the Agreed Statement of Facts with the
16 defence. The first was Lacey Hunt, who was the server, and she dealt with him for one to
17 two minutes. And she testified in direct answer to the Crown's question at the prelim,
18 which was put into the Agreed Statement of Facts:
19
20 Q Were you able to form an opinion as to whether he was drunk
21 or sober?
22 A Yes. He was sober.
23
24 She saw no signs of intoxication, no slurred speech, no confusion, no poor balance or
25 anything.
26
27 Then, more importantly, because Mr. Suter is complaining about the late and cold food,
28 he deals with the manager of the restaurant, Mr. Dustin Homa, who's -- and that man said
29 he spoke to Mr. Suter for 50 seconds to 1 minute about this late food, et cetera, and he
30 basically agreed to rip up the bill for Mr. Suter. And he said:
31
32 He seemed grumpy, but he did not appear to have signs of
33 intoxication.
34
35 He had five years' experience in the industry and saw a lot of drunk people and a lot of
36 sober people, and he could distinguish between the two.
37
38 My friend says, well, of course they're going to say that because there's host liability.
39 Well, the Crown at preliminary -- sorry. The Crown at sentencing, if it did not want to
40 put that evidence in, if it did not believe that to be fair or true or credible evidence, it
41 could have not put that in the Agreed Statement of Facts and made these people get called

1 at the sentencing hearing, but they adopted, and the Crown accepted that evidence as
2 being given under oath. And when they gave that evidence under oath, it was for the
3 Crown at the preliminary inquiry. It was not for the defence.
4
5 So to say now, well, they may have been lying because they're afraid of liability, that's
6 just not fair given the stance that the Crown took at trial -- at the sentencing hearing.
7
8 And, furthermore, these people, these two, they dealt with the accused for one to two
9 minutes, as my friend has indicated. That was a lot longer than the 11 other witnesses
10 who were part of the pandemonium immediately after the crash. They saw Mr. Suter on
11 the ground or, if standing up, being thrown to the ground, and then having the boots put
12 to him literally. How -- and they only saw him on -- standing up for moments, not
13 seconds -- not more than a few seconds. And then he's down on the ground in the fetal
14 position cowering for the next five minutes while the police are coming.
15
16 So who's in a better position to judge Mr. Suter's impairment? The two back at the
17 restaurant who are arm's length and not emotional or the several people who thought he
18 was drunk even before he got out of the vehicle, and that was a finding of fact by the trial
19 judge, was they were pounding on his hood, calling him a drunk even before he stepped
20 out of the vehicle. And then he didn't have a chance to show whether he was drunk or
21 sober because he was immediately grabbed by the scruff of the shirt, thrown to the
22 ground, slapped, punched, and kicked.
23
24 So after getting your bell rung, of course you may show some signs of impairment, and
25 that's what the police went with and immediately arrested him after I think two sentences
26 where they noted slurred speech and his pants pulled down. He didn't get into the car
27 with his pants pulled down. They were dragged off of him based on the dragging and the
28 beating that he took.
29
30 The Crown -- the inherent unfairness of the Crown's position is shown at paragraph 15 of
31 its factum where it says, what would we do with the people who refuse approved
32 screening devices demands? And, as we know, to fail -- or a lawful demand under an
33 approved screening device is a police officer merely has to have reasonable suspicion that
34 alcohol is in the driver's body, and that constitutes the lawful grounds for the demand.
35 And the Crown says, what we are we to do with those people? We're not going to be able
36 to throw them in gaol either because, here, they only have the smell of alcohol and
37 coupled with perhaps the admission that they had alcohol recently.
38
39 So the Crown's argument is the sky is falling down because we can't incarcerate those
40 people for three or four years if we're allowing them to actually, subsequent to the fact,
41 come and prove that they were actually sober. That, to me, in my respectful submission,

1 shows the inherent unfairness and the -- well, I think my friend even admitted today, it
2 sounds kind of unfair, but for the sake of general deterrence, we have to make an example
3 of Mr. Suter.
4
5 As My Lady Bielby pointed out, this was, and the trial judge found, a unique set of
6 circumstances. This type of situation will not come along very often at all, and I feel like
7 saying, mark my words. You're not going to come across a person lacking moral
8 culpability as much as Mr. Suter for years to come, because not only was he thought to be
9 impaired because of the beating he took, but he actually received unlawful and erroneous
10 legal advice, and that lawyer came -- to the merits of that lawyer, came to court and
11 testified to that fact. That is a very unique circumstance, and, as Judge Anderson said, this
12 case is unique in several respects.
13
14 So I wish to move on, then, if I may, to mistake of law and why I respectfully submit
15 Mr. Suter was indeed operating under a mistake of law. The Crown's position is that he
16 was not operating under a true mistake of law because the judge made no explicit factual
17 findings with respect to whether Mr. Suter knew it was a crime not to provide a sample
18 and, secondly, the findings of fact cannot be inferred from the decision because the
19 sentencing judge, she says, actually misunderstood the law of mistake of law and that he
20 was misled by the defence tendering a case called *Whitehouse.*
21
22 And I respectfully submit that my friend is not correct on either -- on the essence of her
23 argument. Although the sentencing judge made no express findings on the record whether
24 Mr. Suter knew it was illegal to refuse, it can be inferred from the record and from the
25 ultimate findings of fact and rulings that the trial judge made with respect to findings with
26 respect to mistake of law. And as this Court has recently said in a case called *Awer,*
27 A-W-E-R, in paragraph 83 of *Awer,* and we have that in our authorities -- this is Justice
28 Berger, and I believe My Lord Watson was on this panel. And turning down Mr. Awer's
29 appeal saying:
30
31 > Mr. Awer essentially argues that the trial judge erred because she
32 > did not specifically recite in her reasons each possible innocent
33 > inference before rejecting it. However, that is not the standard to
34 > which reasons are held. Trial judges need not set out every finding
35 > or conclusion in the process of arriving at their verdict, nor do
36 > they need to answer each and every argument of counsel, so long
37 > as the findings linking the evidence to the verdict can be logically
38 > discerned.
39
40 And citing the other authorities, including the Supreme Court.
41

So I just want to spend a few minutes on that linking between the evidence and his ruling. Here there was a clear link and that the learned trial made the proper findings of fact and conclusions. Firstly, Mr. Suter's evidence was found to be credible on every point of contention throughout the matter. And, for examples, you will find them at paragraphs 23, 37, and 39 of the judge's ruling. But, more importantly, on the topic of what Mr. Suter understood -- more importantly, what he was -- he was accepted on evidence as to what he said or what was said to him by the lawyer. And that's captured at paragraphs 39 and 76.

Secondly, Mr. Suter was believed when he said that the lawyer's advice was full of jargon and hard to follow. That's paragraph 39. The learned sentencing judge even referred to the lawyer's advice as "confusing" and "obfuscating", both at paragraphs 41.

Thirdly, Mr. Suter maintained in examination in chief and cross repeatedly that the lawyer did not say that it was a criminal offence not to blow. So this is -- my friend is asserting a fact that Mr. Suter denied and denied and denied.

Fourthly, Mr. Suter was, on a balance of probabilities, found by the trial judge to have been told explicitly twice not to provide a sample, and that's paragraphs 39 to 41. Also, Mr. Suter testified:

> I just did not think that the lawyer would be telling me to do something that would be illegal. Like, I know it was within my rights not to blow, I guess.

And that's captured in the transcript at page 152, lines 20 to 24.

Sixth, Mr. Suter also testified that, notwithstanding the police's warning that it was an offence not to blow, that he chose to follow the lawyer's advice for two reasons: Number one:

> I just thought the lawyers are there for a reason and you're supposed to listen to them.

Number two:

> I didn't really trust the police at that point. Their attitudes were "pretty gruff".

And later on, he described them as looking at him like he was a monster. And he said, and "I couldn't blame them."

So when the learned sentencing judge concluded at paragraph 76 that the Court has accepted the testimony of Mr. Suter as to what the lawyer said and found that his refusal was based on ill-informed and bad legal advice to not provide a sample and that this constituted a mistake of law, the only reasonable inference is that, unless he does -- unless the trial judge or sentencing judge did not know the trite law of mistake of law, that the learned sentencing judge did, in fact, find that Mr. Suter did not know it was unlawful to refuse. And, furthermore, if the trial judge -- or sentencing judge knew that the law of mistake -- if the learned sentencing judge knew the law of mistake, then his conclusion that Mr. Suter was actually operating under a mistake of law means that he found Mr. Suter to have been actually committing an offence by way of mistake of law. That is to say, if we anchor the fact that Judge Anderson knew mistake-of-law law and then he concludes at the end of that paragraph 76 that, in fact, Mr. Suter was, in fact, operating under a mistake of law, then that fills the evidentiary gap to show that the learned sentencing judge made that finding of fact, just not as explicitly as my friend would have wanted.

Now, before I get to another topic, I wish to stop and address what my friend has said in court this morning and as well at paragraph 50 of her factum with respect to how the -- she suggests that the learned sentencing judge missed a material fact because the lawyer disagreed with two aspects of Suter's evidence and not just one.

And for that, I beg the Court's indulgence that we have to actually read paragraphs 38 and 39. And 38 is at F-24, My Lady, bottom of F-24, under -- starting with the legal advice. If you read 38, it -- he says:

> Mr. Suter testified regarding his conversation with the lawyer to whom he spoke before refusing to provide a breath sample. He did not know the lawyer. He described the lawyer seemed to be rushed, that the lawyer asked him few, if any questions, and the lawyer did almost all the talking. He testified that the lawyer was speaking in legal jargon, like he was thinking out loud and he had a hard time understanding what the lawyer was saying. He, therefore, specifically asked the lawyer whether or not he should provide a breath sample, and the lawyer told him that he should not. He wanted to make sure that he understood the lawyer's advice and asked him again and again received the same response.

Paragragh 39:

> Mr. Suter's account of that call struck the Court as quite improbable until the Court heard from the lawyer. The lawyer testified in this hearing. He confirmed what Mr. Suter described, with one exception.

Now, remember, described, and what is Suter really describing? He's describing a rushed lawyer who's talking in legal jargon, who's confusing him, and he's finally getting to the point, do I blow or don't I blow? Don't blow. Are you sure? Yeah, don't blow. That's what he's described.

So the sentencing judge continues:

> He denied expressly telling Mr. Suter not to blow. Instead, according to the lawyer, he "basically told him not to blow." The lawyer agreed that after Mr. Suter told him that he was being arrested for impaired driving causing death, they had a conversation for about seven minutes. He agreed that he did most of the talking. He agreed that he did not ask about how much, if anything, Mr. Suter had to drink. He recounted on the stand what he believes he may have said to Mr. Suter as he admittedly attempted to steer Mr. Suter away from the blowing.
>
> Having heard the lawyer, the Court accepts Mr. Suter's testimony that he found what the lawyer was saying to be full of jargon and hard to follow.

What we notice there, though, is this: Nowhere in paragraph 38, which is what he recounts of Suter's testimony, nowhere in there does he refer to the fact that Suter is saying the lawyer did not tell me not to blow -- sorry. Nowhere in there is Suter recounted in paragraph 38 as saying the lawyer never told me that it was a crime not to blow. Rather, what Suter was saying and what the trial judge accepted was, whatever the lawyer was saying, Suter didn't get it because it was full of jargon and confusing and hard to follow. The only thing that Suter got out of the seven-minute conversation was, don't blow and don't blow again.

Now, we know that the trial -- the sentencing judge was not referring to the totality of Suter's evidence because one thing that he doesn't mention -- one other thing that he doesn't mention in Mr. Suter's evidence at paragraph 38 is that Mr. Suter also said on the witness stand that he does recall or did recall that the lawyer told him not to speak. That was also part of the evidence that Suter gave, and that was not only covered in chief, said in -- confirmed in cross, and also that the Brydges lawyer told him that as well.

1
2 So the learned sentencing judge at paragraph 38 is not trying to do a checklist of every
3 single thing that the two men were agreeing on. He was focussing in on the one very
4 important factor of whether he was told to blow or not to blow, because if you read the
5 following paragraphs at 40 and 41, the trial judge goes on to reconcile the two men's
6 evidence on whether it was explicit or implicit that he should not blow. And the learned
7 sentencing judge goes on to say at paragraph 41:
8
9 > The Court has no difficulty accepting that Mr. Suter would have
10 > asked for clarification because that would be logical after the
11 > confusing explanation. Faced with the option of giving a direct
12 > answer to a direct question or trying to continue with an
13 > obfuscating explanation, the Court finds the lawyer probably opted
14 > for the direct answer as Mr. Suter described. In any event,
15 > Mr. Suter clearly got the intended message.
16
17 Now, I don't use the word obfuscating very often, so I looked it up, and one dictionary
18 says obfuscate means:
19
20 > Render obscure, unclear, or unintelligible.
21
22 Definition two:
23
24 > To bewilder.
25
26 So the upshot is the learned sentencing judge was not comparing everything the two men
27 said. He was focussing in on whether this advice was given and how expressly or
28 implicitly it was given. The rest of it was sort of like blah, blah, blah, because it's not
29 sinking in to Mr. Suter. Why? Because it was full of legal jargon, hard to follow, and
30 confusing.
31
32 So we're not -- we don't -- we are not taking the position that the lawyer was not telling
33 the truth. We're just taking the position that, whatever the lawyer said, he didn't get
34 through to Mr. Suter because Mr. Suter was not seeing the forest for the tress. He was not
35 getting all of what the lawyer was saying. It's like getting full and frank legal advice at
36 the speed of an auctioneer. You're just not going to let it sink in.
37
38 So when my friend says, aha, Judge Anderson forgot to mention that he failed or he --
39 they disagreed on two points, Judge Anderson was not focussing on all of the totality of
40 the competing testimony, and that is why he did not misapprehend evidence.
41

1 I apologize. I didn't realize the time. I -- if I could just finish on mistake of law, and
2 subject to the Court's approval, add a few minutes, but I don't wish to press my time.
3
4 MADAM JUSTICE SCHUTZ: We are fine with you carrying on, sir.
5
6 MR. BOTTOS: Thank you, My Lady.
7
8 MADAM JUSTICE SCHUTZ: As I said at the beginning, we don't want to
9 preclude either of you from making full submissions.
10
11 MR. BOTTOS: Thank you very much.
12
13 At paragraph 76, the answer is definitive. The learned sentencing judge said:
14
15 In this case, however, the Court has accepted the testimony of
16 Mr. Suter as to what the lawyer said and finds the refusal was
17 based on the lawyer expressly telling him not to provide a breath
18 sample.
19
20 And then in the next breath, he says:
21
22 This does not absolve Mr. Suter, as a mistake of law is not a
23 defence, but it fundamentally changes Mr. Suter's moral
24 culpability.
25
26 What he's really saying there is -- and you can read his judgment and all of the cases. We
27 spent a lot of time submitting cases and argument on mistake of law on behalf of the
28 defence, and if you -- and my friend is not -- perhaps not aware of this. There was a
29 41-page written submissions filed by the defence at the sentencing hearing, 41 pages with
30 books of authorities, et cetera. Large, large portions of which were related specifically to
31 the point of mistake of law.
32
33 The -- furthermore, the learned sentencing judge, in his reasons for judgment, at the
34 footnotes, it shows that he did his own research on mistake of law, and he -- and he found
35 two more cases that also informed him as to what mistake of law is. And they are *R. v.*
36 *Leo,* L-E-O, a decision of Justice Fradsham of the Provincial Court, who actually cites
37 and quotes the *Campbell and Mlynarchuk* decision of Justice Kerans that I referred to
38 earlier, and a Supreme Court case called *Pontes,* P-O-N-T-E-S.
39
40 Clearly, if the judge read his own research in addition to counsel's authorities, he was
41 alive to mistake of law, and if we take him at his word when he said, I have considered

1 and absorbed the five volumes of authorities, and then attaches to his own judgment two
2 more authorities, Judge Anderson being a senior judge, would know mistake of law. And
3 the Crown would have this Court accept that Judge Anderson thinks that mistake of law is
4 something less than believing that what you're doing is lawful. It doesn't make a great
5 deal of sense.
6
7 And so assuming that the Court would not overturn his reasons because he somehow
8 failed to prove himself knowledgeable of trite law, I suggest respectfully that the totality
9 of his reasons show quite clearly that he believed Mr. Suter did not know, after having
10 spoken to the lawyer, that it was no longer a crime to refuse. And as Mr. Suter said, I
11 didn't think the lawyer would be telling me something illegal to do.
12
13 Now, some of us lawyers, judges -- and I think my friend is saying, well, look at
14 Mr. Suter, a professional man, university educated, previous good character, of course he
15 would know the law, of course he would know that it's unlawful to refuse. No, we can't
16 presume that. And when there is the constitutionally endorsed fact that 10(b) of your
17 counsel -- right to counsel must be given every time a person is arrested, and especially
18 given when he's about to make a breath -- provide a breath sample, it comes with the
19 endorsements of the Courts and the Constitution to say, you're entitled to rely on that
20 advice. And that's what Judge Anderson found, and it was, therefore, a true mistake of
21 law.
22
23 And in answer, My Lord, to your earlier question, the overall ramifications of that, that is
24 probably not something that enters into the mind of your average arrestee when he's been
25 told he can rely on a lawyer's advice at that point.
26
27 MR. JUSTICE WATSON: Well, actually could I ask you a question about
28 that, because in paragraph 76 of the reasons, the sentencing judge also -- there's another
29 difficult aspect of that paragraph. He says if the --
30
31 If the advice had stopped with a misguided presentation of legal
32 options, even if aimed at steering the suspect away from blowing,
33 the mitigating effect of the advice would be significantly less.
34
35 Now, what do you think he meant by that?
36
37 MR. BOTTOS: Well, he did not accept the lawyer's testimony
38 at the end of the day, because he's speaking in that sentence at a -- in a hypothetical --
39
40 MR. JUSTICE WATSON: I don't mean on a factual level. What do you
41 think he meant as a legal point? What was he saying there?

1
2 MR. BOTTOS: I'm sorry.
3
4 MR. JUSTICE WATSON: Yeah. Sorry. I understand what you're about to
5 say. Sorry to interrupt you there. That was impolite on my part.
6
7 MR. BOTTOS: Oh, no. That's fine, Sir.
8
9 MR. JUSTICE WATSON: Yeah, but --
10
11 MR. BOTTOS: I just want to understand your question again,
12 please.
13
14 MR. JUSTICE WATSON: Yeah. Well, like I say, I -- because you're
15 basically saying that mistake of fact -- sorry, mistake of law has the -- has the kind of
16 impact that obviously the sentencing judge knows. And he did, however, put a caveat, as
17 it were, on his own decision in a sense by saying, well, if the advice had stopped with a
18 misguided impression of legal options, et cetera, the mitigating effect would be
19 significantly less. Is -- does one translate that sentence into meaning something like, if it
20 was an legal option situation and then Mr. Suter had picked an option that suited him the
21 best, it would not be mitigating at all or not be very mitigating, or what do you suppose
22 he's meaning there?
23
24 MR. BOTTOS: I think he's -- well, since you put it that way, I
25 would -- I would suggest that he's speaking in the hypothetical, and he's saying that it
26 would -- it would be less innocent if it was a choice between options on a strategic
27 basis. That's what I think he is saying. He is -- but he's speaking hypothetically, and I
28 agree with your description. He's putting a caveat on what he's about -- or what he's
29 about to then say because his next sentence is, in this case, however, the Court has
30 accepted the testimony of Mr. Suter as to what the lawyer said. So --
31
32 MR. JUSTICE WATSON: So, in other words, though, he's -- doesn't it
33 seem though, when you read that together, that what he's kind of saying is that I'm not
34 sure what Mr. Suter was thinking, but I do know what the lawyer's thinking?
35
36 MR. BOTTOS: Well, in fact, it --
37
38 MR. JUSTICE WATSON: And if that's the case, then how could that be
39 mitigating either?
40
41 MR. BOTTOS: Well, because, as I was trying to suggest, if you

1 are receiving legal advice through the voice of an auctioneer and it's coming at you full
2 blast and repetitively and unintelligibly in terms of sinking in and all you come away with
3 is, I'm confused, I don't know what he's talking about, I just need to know what to do
4 here, then --
5
6 MR. JUSTICE WATSON: Because the lawyers will work it out after.
7
8 MR. BOTTOS: Well, that's a different point, but if I could just
9 finish there, Sir, he's just getting the essence of what the lawyer's advice is. And he also
10 said, remember, he was thinking out loud, and that's accepted by the sentencing judge at
11 paragraph 38. This lawyer is thinking out loud, so probably that thinking out loud is, well,
12 if you do this, this happens, if you do that, that happens, but Mr. Suter was not capturing
13 the essence of this thinking out loud. He was not coming away with this with any truly
14 informed advice as to what the law now is in that moment in time.
15
16 And I compare this yet again to a lawyer's advice on a Brydges call to say, you're not
17 required to say anything, don't say anything. How is that any different than a detainee
18 being told, don't blow? It's the same thing. You're -- he's not thinking I'm depriving
19 them of my evidence. He's thinking, lawyer's got my best interests at heart, not these two
20 police officers. I'm following him, I'm not following them. That's all the detainee is
21 thinking in the reality of a human experience in that situation.
22
23 Now, the other point about -- I'm sorry. It's escaping me. On the tip of my tongue. You
24 had just raised a point that my friend indicated about --
25
26 MR. JUSTICE WATSON: Well, the, you know, part of this -- there's two
27 aspects to that. One is that your argument, I understand, but there may be a finding of fact
28 that can be inferred in this. But the lawyer, according to the Crown anyway, you disagree,
29 told him it's illegal not to blow, and he said -- he says, well, I wasn't paying attention to
30 that or I didn't hear that. And so it goes back -- the sum and substance of this paragraph
31 sentencing seems to be the -- Mr. Suter made a choice to withhold evidence or not. And
32 that's really sort of crucial to the --
33
34 MR. BOTTOS: Okay. First of all, Sir, I respectfully disagree
35 with the upshot being that Mr. Suter did know that the lawyer was telling him it's
36 unlawful to refuse, because there -- Suter didn't say that in his testimony.
37
38 MR. JUSTICE WATSON: All right.
39
40 MR. BOTTOS: The judge accepted his testimony, and really
41 the --

1
2 MR. JUSTICE WATSON: Well, actually, what he said was he didn't
3 remember him saying that. As I recall his evidence, Mr. Suter's evidence was he did not
4 recall the lawyer mentioning that to him.
5
6 MR. BOTTOS: Sure, but he also said his advice was confusing
7 and full of jargon.
8
9 MR. JUSTICE WATSON: Fair enough.
10
11 MR. BOTTOS: Okay.
12
13 MR. JUSTICE WATSON: Right.
14
15 MR. BOTTOS: So all I'm saying is, Sir, that Suter's -- the
16 essence of Mr. Suter's understanding when he hung up the phone was, don't blow, and,
17 also, don't talk. Okay.
18
19 MR. JUSTICE WATSON: And he -- well, he didn't bother with the
20 second one.
21
22 MR. BOTTOS: Two-and-a-half hours later.
23
24 MR. JUSTICE WATSON: Okay.
25
26 MR. BOTTOS: And for reasons I suggested earlier. The --
27 sorry. The other point that my friend raised that you had just mentioned about the work it
28 out after, yes.
29
30 MR. JUSTICE WATSON: Yeah. Work it out after.
31
32 MR. BOTTOS: Okay. Is that an admission that you're guilty
33 and that the --
34
35 MR. JUSTICE WATSON: No. It's --
36
37 MR. BOTTOS: -- greasy lawyer will work it out later, or is it
38 not the fact that --
39
40 MR. JUSTICE WATSON: No, no. It's a -- at best -- at best, it would be
41 something like that he's aware that there's a forensic involvement here because he's in

1 gaol and everything, and, therefore, the lawyers have to figure out what to do.
2
3 MR. BOTTOS: Right.
4
5 MR. JUSTICE WATSON: That's a -- I agree.
6
7 MR. BOTTOS: Right. Just because a police officer is charging
8 you with a crime doesn't mean that you're going to be convicted or guilty of that crime.
9 So to work it out later -- and lawyers work it out later all of the time. And, by the way,
10 sometimes that presumption of innocence does operate in court, and it's worked out
11 because you were never guilty to begin with. So I'm glad that Your Lordship appreciates
12 my point.
13
14 So I will -- I'm way over time, but I wish to simply say this in terms of the defence's
15 point of view, Mr. Suter's point of view, on the prohibition from driving. Again, although
16 it was not stated in oral argument at appeal -- or at sentence, in part of our written
17 submissions, we suggested that Mr. Suter should receive a one-year driving prohibition,
18 not anything higher than that. Why? Because a driving prohibition is part of a sentence,
19 just like incarceration is. And our respectful submission is that Mr. Suter had already been
20 prohibited from driving by the bail judge and by operation of the administrative license
21 suspension for two-and-a-half years -- in fact, just over two-and-a-half years between the
22 time of his arrest and the time of his overall sentence.
23
24 MR. JUSTICE WATSON: Is that *Traffic Safety Act* five-year term back up
25 to the beginning?
26
27 MR. BOTTOS: Well, in fact, that's the point of contention. At
28 the time that Mr. Suter refused, if you look at the *Traffic Safety Act* -- and there was a
29 one-year driving prohibition -- sorry, suspension. There is a -- there was in 2013 a
30 one-year driving suspension for a refusal, which they didn't have a special animal of
31 255(3.2). In fact, it was non-existent in the *TSA*. And then, in December of 2014, My
32 Lord, so six months prior to Mr. Suter's actual guilty plea, which was in June 2015, the
33 *TSA* changed, and they added a five-year driving suspension for 255(3.2), which is this
34 offence.
35
36 MR. JUSTICE WATSON: So you're saying that that doesn't apply to your
37 case, though?
38
39 MR. BOTTOS: Well, in fact --
40
41 MR. JUSTICE WATSON: Because that would be retrospective application

1 of punishment.
2
3 MR. BOTTOS: Well, that's the -- that's the tricky thing now,
4 Sir. We're looking into that, and because a driving suspension is not punishment --
5
6 MR. JUSTICE WATSON: Yeah.
7
8 MR. BOTTOS: -- it's not retrospective punishment, and so we
9 are grappling with that for Mr. Suter as well in front of a different tribunal. In any event,
10 Sir --
11
12 MR. JUSTICE WATSON: To a certain extent, you're asking this Court to
13 adjust this to give you the opportunity to make it not a moot point?
14
15 MR. BOTTOS: Yes.
16
17 MR. JUSTICE WATSON: Okay.
18
19 MR. BOTTOS: Number one. Number two, my friend says,
20 well, he's suspended for five years now anyway. Well, even if that suspension is upheld,
21 the essence is, Sir, that after the end of his prohibition, which means after the end of the
22 current 30-month prohibition, he's entitled to seek, through the driver's control board, an
23 interlock device. So it makes an appreciable difference to Mr. Suter that he should be
24 permitted to apply at least for an interlock device but not have to wait another 30 months
25 from December 17th. We are asking that the two-and-a-half years that he was not driving
26 added to a one-year suspension should be sufficient in the circumstances and not another
27 30 months.
28
29 And I'm not sure if the Court is interested in asking me anything about the methodology
30 that we are proposing, but the methodology that we are proposing for a proper analysis is
31 captured starting at paragraph 101 of our factum. And I say this with the greatest of
32 respect. This Court of Appeal will be the first Court of Appeal in the country, that I know
33 of, that will be addressing how to properly sentence an offender for an exclusive offence
34 of refusal after death, and the methodology you provide will be sought after and reviewed
35 by other courts throughout the country. And a full and considered methodology should
36 be -- well, is called for, and I'm sure this panel may be interested in providing.
37
38 But we have to then respect Section 718, the principles -- or the principle of
39 proportionality, number one. We have to protect after all, at the end of the day, the
40 presumption of innocence, number two, and we have to carry that presumption of
41 innocence into the sentencing process, as the case of 1982 *Gardner* has taught us. And

1 then Chief -- or sorry. Justice Dixon, as he then was, said in 1982 that a guilty plea for an
2 offence covers only the material elements or essential elements of the offence, and
3 anything beyond that that the Crown wishes to seek in aggravation must be proven
4 beyond a reasonable doubt, unless they're agreed to be Agreed Statement of Facts.
5
6 So our methodology is not as my friend has said today, that the Crown would still have to
7 prove impairment. Remember, he's not guilty of impairment, impaired driving causing
8 death, or anything. In fact, he was not guilty of that. So what can aggravate the sentence,
9 though, is a methodology similar to what this Court used in *Laberge* in the manslaughter
10 cases. If -- in *Laberge,* you'll recall that Chief Justice Fraser coined a -- or devised a test
11 to rise or lower the scales of culpability for manslaughter on two axes: objective foresight
12 of bodily harm or death and subjective unto the accused's foresight of bodily harm or
13 death. And the higher the objective and the higher the subjective, the higher the
14 culpability.
15
16 Okay. From that, we thought that proper methodology, a responsible one, would be to
17 review the two key -- the two keys of what happens in a refusal case. The first one is, just
18 how strong were the grounds to show that the offender was likely impaired, not that he
19 was actually impaired, but how strong were the grounds to show that he was likely
20 impaired? And if the Crown can prove beyond a reasonable doubt that he was likely
21 impaired, it seeks -- or it calls for an aggravated sentence. If the Crown can prove beyond
22 a reasonable doubt that the indicia sought or seen by observers was exclusively related to
23 alcohol ingestion, that raises the moral culpability.
24
25 In those cases, however, where there is an accident, then the accused could properly claim
26 that he displayed signs of impairment not because he was impaired, but because of the
27 results of the accident or the trauma to the head, et cetera. Then he has to raise that on a
28 evidentiary burden to show that there's an air of reality to pointing towards something
29 else other than impairment by alcohol that caused the indicia.
30
31 And but you make the Crown prove beyond a reasonable doubt the likelihood of
32 impairment, the likelihood that the indicia were related to impairment, without jettisoning
33 the presumption of innocence.
34
35 The other thing is this: The -- on the other scale, My Ladies and My Lord, is the motive
36 or the wilfulness behind the refusal. In this case we suggest it's very clear. Mr. Suter, in a
37 very unique circumstance, refused based on good faith belief and the lawyer's advice, and
38 the lawyer showed up and confirmed it. That's going to be rare.
39
40 Secondly, there's already a permissive inference that when one refuses, he's doing so to
41 cheat the system. That's an inference that you can build into your methodology. That is to

1 say, when a person refuses and there's no other explanation provided, there is already an
2 inference that we all draw that you're doing -- you're refusing only to hide something.
3 But in the rare case, the 1 out of 10,000, there might be something else that caused him to
4 refuse. And in this case, it was the legal advice.
5
6 Now, I'm just going over that quickly, and I don't want to take any more of your time,
7 but we provided that methodology in good faith to provide a method that stays true to the
8 principle of proportionality and *Gardener* and the law rather than saying there's just got to
9 be a blind adherence to denunciation and deterrence.
10
11 And, finally, on that point, as we've said in our factum, deterrence was largely met by the
12 vigilante justice that was imparted on Mr. Suter in January 2015, and there's case law that
13 shows, such as *Bun* and other -- a decision from our Court of Appeal on *Heatherington,*
14 who was an alderperson or a mayor down south, who received a higher conditional
15 sentence from the sentencing judge, and it was lowered because of the public humiliation
16 of this lady.
17
18 Well, don't have just public humiliation, and if the Court reviews the astounding and
19 harmful comments that were being made of Mr. Suter, and ironically for the offence that
20 he was actually not found guilty of, impaired, if you look at that, you see a direct
21 connection between those dots and what happened to his -- to what happened to him and
22 his wife and the rest of his life on January 22nd, 2015. That does discount -- or that does
23 require a lesser weighted sentence on denunciation and deterrence. He's already been --
24 sorry. The public would already be deterred because people -- right thinking members of
25 society would say, look what happened to him for the refusal. And he's not safe ever in
26 his life.
27
28 And the other thing is, should we -- should we deter people from following legal advice
29 in a Brydges call when that's been constitutionally endorsed? That doesn't make sense
30 either. This sentence for Mr. Suter, the way he committed this crime and given his
31 responsibility, show that his moral culpability was much, much less than your prototypical
32 offender. And, therefore, the sentence in terms of the custodial sentence, should now be
33 undisturbed. But we respectfully ask that you lower his driving prohibition.
34
35 Thank you.
36
37 MADAM JUSTICE BIELBY: I have a question.
38
39 MR. BOTTOS: Certainly.
40
41 MADAM JUSTICE BIELBY: This is something that wasn't raised in the

1 judgment under appeal and isn't raised in either factum, so you may need some time to
2 consider it, and you certainly don't have to respond. But reading this all over, I started
3 thinking about why this accident happened, why the collision occurred. What were the
4 circumstances that led to the non-impaired driving error described by the sentencing
5 judge? And they were that Mr. Suter, who admitted in examination on the stand that he
6 had been worried about drinking in the recent past -- his physician had told him to stop
7 drinking or gave him some advice about drinking -- nonetheless, chose to drive after
8 having had something to drink that day, although not enough to make him impaired, in a
9 circumstance where he was arguing with his wife strenuously enough that it caused him to
10 make the driving error that led to him driving the van into a wall. He drove while he was
11 distracted by this argument. That's his explanation for the accident.
12
13 How do we, or should we, consider that as a factor contributing to the proper sentence
14 here?
15
16 MR. BOTTOS: Yes. Let me put it this way. Arguing with one's
17 spouse in a car is not uncommon, even after a drink or two. If we are to consider that in
18 aggravation, then a lot of people should be pulling over and having timeouts on our
19 roadways every day and every night. The essence of his testimony, and also this was
20 confirmed by his wife's testimony, was she was upset with him for wanting to leave the
21 first restaurant by failing to forgive the wait staff and by leaving instead of just basically
22 sucking it up and staying at the first restaurant.
23
24 MADAM JUSTICE BIELBY: But that was on top of an argument they had
25 earlier that afternoon about his being away from home a lot and --
26
27 MR. BOTTOS: Sure.
28
29 MADAM JUSTICE BIELBY: -- her unhappiness with that.
30
31 MR. BOTTOS: Sure.
32
33 MADAM JUSTIE BIELBY: So there was a bigger circumstance than just
34 the one argument that left him "grumpy".
35
36 MR. BOTTOS: Yes. And I say this respectfully, but this is a
37 couple in their 60s who've had their -- had their troubles. They were trying to work it out,
38 have a good day, have a good Sunday, and go for dinner. Then, of course, some of the
39 old issues between them rear their heads, and instead of having a pleasant evening,
40 Mr. Suter has yet again blown it by wanting to leave this restaurant. So that's the start of
41 the argument, the final argument, and Mrs. Suter is saying to him over this ten-minute

1 drive about how unhappy she was.
2
3 And then the final remarks were, after he's actually pulled into the parking lot and he's
4 looking for a place to say -- stay, stop and park, that she says, you know, I just want a
5 divorce. And it's at that moment that he got distracted, lost the sense that he -- his car
6 was now moving, because he had taken his foot off the brake. And now it's moving
7 forward, but slowly. And then the -- I believe the evidence is, Rick, we're moving. And
8 he notices at that moment he -- that they're moving, and he goes to stomp on the brake,
9 presses the gas.
10
11 So I respectfully submit that arguments in cars between spouses happen all of the time,
12 and I have to say that, was it distracted driving? Sure. But should it be aggravating? No.
13 And, secondly, if it were only a careless driving offence, we wouldn't be here right now.
14
15 MADAM JUSTICE BIELBY: Of course, the Crown will be given an
16 opportunity to make any comments on that in her reply, if she chooses to do so.
17
18 MADAM JUSTICE SCHUTZ: Anything else?
19
20 MR. BOTTOS: Just, finally, my friend started her submissions
21 with the fact that a sweet little boy died, but no victim was hurt as a result of criminal
22 conduct. Mr. Suter's crime was -- began and ended after causing the non-impaired driving
23 death, and we can't backdate that and say his criminal conduct caused the child's death.
24 Thank you.
25
26 MADAM JUSTICE SCHUTZ: Thank you. Ma'am, I am watching the clock
27 now. The Court staff will need a break fairly soon.
28
29 MS. DARTANA: Yes. I won't be long, Ma'am.
30
31 MADAM JUSTICE SCHUTZ: Okay. Thank you very much.
32
33 **Submissions by Ms. Dartana**
34
35 MS. DARTANA: Just in answer to Your Ladyship's question, I
36 have thought about that as well. I thought about how one could possibly cause that kind
37 of an accident based on the explanation given that I thought my foot was on the brake
38 when it was actually on the accelerator. Now, I think that we all sometimes have done
39 that where, you know, you're in reverse and you're parked at a light and you think you're
40 in forward but you're in reverse, and all of a sudden, oops. You know, you put on the
41 brake and you realize you're actually going backwards. That's kind of normal, but this --

1 in this case, we're talking about somebody who goes onto a curb, onto a patio, through a
2 glass barrier going some distance and hitting a wall, and that's the kind of mistake that
3 we're talking about.
4
5 So although the sentencing judge did say it was a non-impaired driving error, and that's
6 not a finding of fact that the Crown can challenge, I think that you can consider that there
7 is some kind of culpability in the driving in the sense that this is not normal driving. This
8 is not a normal, average mistake. And perhaps -- perhaps he was angry at the comment
9 that Ms. Suter made to him.
10
11 With respect to Your Lordship's comment about, you know, the respondent knew that he
12 was depriving the state of the evidence of impairment, I think it would be contrary to
13 common sense not to -- not to think that. I mean, if he was simply just an ignorant, naive
14 person who had no idea that by refusing to provide a sample, he was depriving the state
15 of the ability to measure his alcohol level, I mean, I think that that's -- that would be
16 contrary to common sense. I would submit that that is highly unlikely.
17
18 With respect to the sentencing judge having the case law before him on mistake of law,
19 we didn't provide the written submissions, but there were some cases provided to him, but
20 the one case that he was provided that was contrary to the position that the Crown is
21 taking, the position being that mistake of law is only mitigating if you thought that you
22 were abiding by the law and you didn't know that you were committing an offence, there
23 is one case that actually was given to him that's contrary to that principle. And that is the
24 case of *Whitehouse,* and that's provided at tab 8 of the respondent's authorities. And that
25 dealt with a false advertising case where the accused had consulted a lawyer. And even
26 though he consulted a lawyer, the Court still found that it was mitigating that he had
27 consulted a lawyer even though he wasn't sure whether or not what he was doing was
28 legal. So that's contrary to the case law that I've provided, and I would submit that that is
29 inconsistent with the case law and is wrong, because the principle is wrong, but this was
30 given to the sentencing judge.
31
32 And so the other thing is that there was no argument in the submissions of counsel on
33 mistake of law, not much in respect of that particular point. So although he had some
34 cases before him, the case law wasn't clear on that point, and, therefore, he did not
35 necessarily know that a mistake of law is only mitigating if an accused thought that he
36 was not -- that he was abiding by the law.
37
38 And the only other thing I wanted to say is that, with Madam Justice Bielby's question
39 about Lucille Lalonde and whether or not -- her evidence was that she thought that
40 Mr. Suter was sober. And if I can just refer you briefly to the Crown's extracts of key
41 evidence at page A-21, and that deals with the evidence of Lucille Lalonde. And if you

1 look at paragraph 133 of the Agreed Statement of Facts, on cross-examination, Lucille
2 Lalonde testified that it took some -- quite some time for the ambulance and the police to
3 arrive. He never tried to get up off the asphalt. I thought that was very strange. He clearly
4 looked to have no serious injuries, and yet he made no attempt to stand.
5
6 Then at paragraph 134, it says:
7
8 When police arrived, Richard Suter was assisted in getting to his
9 feet.
10
11 And then at 135:
12
13 Lucille Lalonde saw Richard Suter stagger at that point, and police
14 were holding him up and supporting him.
15
16 And if you look at her actual evidence in the preliminary inquiry transcript, at page 193,
17 she -- and this is A-193 or the page 158 of the preliminary inquiry transcript. She was
18 asked what happened when the police arrived.
19
20 A They asked him to stand, and they -- he did get to his feet with
21 assistance. He staggered. He lost his footwear. He couldn't get
22 it back on, and the police held him up and supported him.
23
24 The question was asked then:
25
26 Q Were you in a position to make any other opinions as to
27 whether he was sober or drunk?
28
29 And she said:
30
31 I was never close enough at any point to smell his breath. I
32 thought his behaviour was odd.
33
34 So what I take from that is that she didn't actually say he was sober, but she also didn't
35 say that he was impaired, but she gave some evidence of him staggering, which would
36 indicate that that could be --
37
38 MADAM JUSTICE SCHUTZ: You're saying she didn't actually express an
39 opinion on his sobriety?
40
41 MS. DARTANA: Correct. That's correct.

1
2 MADAM JUSTICE SCHUTZ: I saw your friend look a little startled, so I'm
3 going to allow him two minutes.
4
5 **Submissions by Mr. Bottos**
6
7 MR. BOTTOS: Thank you. I'll just be brief. My friend did not
8 finish reading paragraph 133, when she said that Lucille Lalonde thought that it was very
9 strange that he didn't get up off the asphalt, because the last sentence is:
10
11 She did not see anyone have any physical contact with him or
12 strike him.
13
14 Meaning she didn't see that he had taken a beating and was on the ground for a pretty
15 good reason, and she didn't -- she wasn't aware of other factors such as a man standing
16 over him saying, stay down and stay away from the drunk. So not every witness knows
17 everything.
18
19 And, finally, my friend is, with the greatest of respect, incorrect about *Whitehouse*. If you
20 read *Whitehouse* -- and it's an older case, but the last paragraph of *Whitehouse,* it shows
21 quite clearly that the sentencing judge in *Whitehouse* said, even though you consulted with
22 a lawyer, you still had an obligation to know what you were doing is lawful. The
23 inference is he consulted with a lawyer and still thought what he was about to do in this
24 advertising was lawful. Not that he consulted with a lawyer and knew that it was unlawful
25 and then he proceeded anyway. That's not what the trial judge said in *Whitehouse*. He
26 said the opposite, which means it is a mistake of fact case, but you have to read it very
27 carefully.
28
29 Thank you.
30
31 MADAM JUSTICE SCHUTZ: Thank you, Counsel. Thank you, Counsel. It's
32 unanimous, the decision of this Court, to reserve entirely on this very important matter.
33 We all recognize the seriousness of the case. We also recognize that it's an extremely sad
34 and difficult case for everyone, and including this Court. So bear with us. We will do our
35 best to get this out as quickly as possible, but we must do our job.
36
37 ---
38 PROCEEDINGS ADJOURNED
39 ---
40
41

1 **Certificate of Record**
2
3 I, M. Pawlikowski, certify that this recording is the record made of the evidence in the
4 proceedings, in the Appeal Court, held in courtroom number 514, at Edmonton, Alberta,
5 on the 21st day of June, 2016, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.
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Certificate of Transcript

I, Brandy Coyes, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in the transcript.

Digitally Certified: 2017-03-27 13:24:01
Brandy Coyes, Transcriber
Order No. 30886-17-1

Pages:	54
Lines:	2263
Characters:	102717

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Detailed Transcript Statistics	
Order No. 30886-17-1	
Page Statistics	
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ToC Pages:	1
Transcript Pages:	52
Total Pages:	54
Line Statistics	
Title Page Lines:	50
ToC Lines:	8
Transcript Lines:	2205
Total Lines:	2263
Visible Character Count Statistics	
Title Page Characters:	470
ToC Characters:	171
Transcript Characters:	102076
Total Billable Characters:	102717
Multi-Take Adjustment: (-) Duplicated Title Page Characters	102247