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PART I: OVERVIEW AND STATEMENT OF FACTS

(1) Overview

1. This case raises critical questions about what can legitimately be considered as "relevant aggravating or mitigating circumstances relating to the offence or the offender", in accordance with section 718.2(a) of the *Criminal Code,* and the pertinence of an offender's suffering serious vigilante violence as a measurable collateral consequence of the offending.

2. The circumstances underlying the appeal are unquestionably tragic. After a guilty plea and a week long sentence hearing, the Honourable L.G. Anderson, Assistant Chief Judge of the Provincial Court of Alberta, sentenced the Appellant, Richard Alan Suter, (DOB: July 9, 1950), to a period of four months imprisonment and a 30 month driving prohibition for the offence of failing to provide a breath sample after an accident that resulted in the death of a young boy and injuries to three other individuals. In reaching this decision, Anderson ACJ concluded that "as tragic as the consequences have been, this collision was an accident caused by a non-impaired driving error." He also found that Mr. Suter's refusal to comply with a legal breath sample demand "was the result of hopefully rare, ill-informed and bad legal advice [in which his lawyer] expressly [told] him not to provide a sample." Finally, he concluded that the sentence should be mitigated, "to a more limited extent", because of violent vigilante actions suffered by Mr. Suter and his wife that were the result of public vitriol arising from the accident.

3. The Court of Appeal of Alberta overturned the decision and substituted a sentence of 26 months incarceration, focusing on three alleged errors made by Anderson ACJ. The Court began by disqualifying two facts relied upon as mitigating the seriousness of the offending. First, it suggested that the Appellant's decision to follow erroneous legal advice could not constitute a mitigating factor because it did not affect his perception about the legality of the act committed. In addition, the Court concluded that the vigilante violence suffered by the Appellant had no value in computing the appropriate sentence because it did not “emanate from state misconduct”. Finally, the Court concluded that Anderson ACJ had failed to consider an important aggravating fact: Mr. Suter's choice to drive unimpaired by alcohol, but while "his ability to drive was impaired by his own anger and poor health... while distracted by a serious, emotional argument."

4. The Appellant submits that the Court of Appeal erred in its treatment of all of these points. Decisions of a sentencing judge are afforded considerable deference on appeal, and are not to be interfered with absent an error in principle. Ultimately, there was no legal justification for overturning the sentencing judge's decision.

5. First, the Court of Appeal's decision on mistake of law wrongly concluded that Anderson ACJ had no basis for finding that the Appellant had an honest belief in the lawfulness of his actions. Not only did the Appellant testify to such a belief, a close examination of the reasons for sentence reveals that this was a core part of the sentencing judge's findings on mistake of law. The Court of Appeal's approach is legally flawed as well. It treats mistake of law too narrowly, misunderstanding the role played by such mistakes in measuring an offender's degree of responsibility for a criminal act. By focusing exclusively upon the *nature* of the mistake, this approach negates completely the degree to which the actions of others – including an offender's own counsel – can lead an offender to act in an illegal manner. Ultimately, in sentencing an offender who acted under a mistake of law, the question is not whether the mistake related exclusively to the legality of one's act, but rather whether in all the circumstances the mistake had the effect of reducing the offender's moral blameworthiness, especially as compared to similarly situated offenders who did not make such a mistake.

6. The Court of Appeal's conclusion that violence suffered by an offender as a consequence of offending is only relevant when it "emanate[s] from state misconduct" is equally problematic. The jurisprudence clearly recognizes that *all* of the negative collateral consequences suffered by an offender are pertinent in measuring the overall fairness of a sentence.

7. The Court of Appeal's final reason for increasing Mr. Suter's punishment stems from its decision to treat Mr. Suter's "distracted driving" as a relevant aggravating circumstance for the offence of failing to provide a breath sample, which is contrary to law. None of the facts cited by the Court of Appeal affected Mr. Suter's culpability for failing to provide a breath sample in any way, and his conduct did not amount to a crime. Further, the Crown at sentencing never raised Mr. Suter's manner of driving short of impairment as an aggravating factor. Consequently, Mr. Suter never received notice that this accusation was being made, and was therefore denied the opportunity to refute it. The end result is that the Appellant was effectively punished for an offence for which he was not convicted, contrary to s 725 of the *Criminal Code*.

8. Finally, to the extent that the Court of Appeal was correct in suggesting that Mr. Suter's decision to drive in the circumstances could constitute an aggravating factor, or that the vigilante justice he suffered could not be considered at all, it was improper to rely upon these points as reasons to sentence Mr. Suter more harshly. The Crown failed to raise either issue at the sentence hearing or on appeal, and the Court of Appeal's decision to investigate them of its own motion without proper notice to the Appellant did not comply with the dictates of this Court in ***R v Mian***.[1] For these reasons, the original decision of the sentencing judge should be restored.

(2) Procedural History

9. On June 5, 2015, the Appellant pleaded guilty to a single offence: that on May 19, 2013, he refused to provide a breath sample knowing that his operation of a motor vehicle had caused the death of another person, contrary to s 255(3.2) of the *Criminal Code*. The Crown withdrew four other charges – impaired driving causing death and impaired driving causing bodily harm (x 3) – at the conclusion of the sentence hearing.[2] A five-day sentence hearing was held in October 2015. Mr. Suter sought a non-custodial or intermittent sentence while the Crown asked for three years imprisonment. On December 17, 2015, Anderson ACJ delivered written reasons imposing a sentence of four months imprisonment and a 30 month driving prohibition.[3]

10. Anderson ACJ found in the Appellant's favour in respect of the only two contested issues at the sentencing hearing, namely that: (1) Mr. Suter was not impaired by alcohol when he caused the accident;[4] and (2) Mr. Suter refused to provide a breath sample due to faulty legal advice received while exercising his s 10(b) *Charter* right.[5] He also found in mitigation, but "to a more limited extent", that Mr. Suter had suffered "extreme vitriol, public scorn and threats" and had been the victim of a disturbing incident of vigilante justice directly emanating from the charges against him.[6] The Crown *conceded* that this factor was properly mitigating on sentencing.[7] Anderson ACJ noted a host of other factors, including the guilty plea, deep remorse, and the fact that Mr. Suter had been a productive member of society before retiring, with no prior criminal

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[1] *R v Mian*, [2014] 2 SCR 689, 2014 SCC 54.
[2] Sentencing Transcript Vol 2, 427/29 (Tab 21 of Appellant's Record "A.R.").
[3] *R v Suter*, 2015 ABPC 269 ["Provincial Court Decision"] (Tab 1 of A.R.).
[4] Provincial Court Decision at para 76 (Tab 1 of A.R.).
[5] Provincial Court Decision (Tab 1 of A.R.).
[6] Provincial Court Decision at para 81 (Tab 1 of A.R.).
[7] Sentencing Transcript Vol. 2, 391/26-392/14 (Tab 23 of A.R.).

record. Ultimately, Anderson ACJ reduced what he thought would otherwise be a fit sentence matching that of an impaired driver having caused death to one of four months in prison.[8]

11. The Crown appealed the sentence to the Court of Appeal of Alberta, and Mr. Suter cross-appealed. The Alberta Court of Appeal left undisturbed the finding that Mr. Suter was not impaired, but nevertheless increased the sentence to 26 months imprisonment.[9] Contrary to the finding of Anderson ACJ, the Court of Appeal concluded that Mr. Suter's refusal had not been based on a mistake of law at all, but had been made for strategic reasons.[10] Furthermore, notwithstanding the Crown's concession at the sentence hearing, as well as the fact that the issue had never been discussed on appeal[11], the Court found that there should be no mitigation for the episode of vigilante justice because it did not "emanate from state misconduct.''[12]

12. Finally, the Court of Appeal found a new aggravating factor: that Mr. Suter had chosen to drive his motor vehicle notwithstanding a serious history of problem drinking, recent health problems and while engaged in an argument with his wife.[13] This factor was not raised by the Crown at sentencing, or on appeal, but by the Court itself during the appeal hearing.[14]

(3) Facts

13. On Sunday, May 19, 2013 at approximately 6:30 p.m., Mr. Suter, then aged 62, and his wife of 42 years, Gayska Suter, went for dinner at a Chili's restaurant in south Edmonton.[15] They each ordered an alcoholic drink and had the better portion of these drinks while awaiting their meal. After a wait of approximately 45 minutes, the food arrived cold, and Mr. Suter brought the matter to the manager's attention. The manager agreed to cover the bill, and the couple left the restaurant. Both the server who waited on Mr. Suter and the manager had approximately five

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[8] Provincial Court Decision at paras 77-81, 84-86 (Tab 1 of A.R.).
[9] *R v Suter*, 2016 ABCA 235 ["Court of Appeal Decision"] (Tab 2 of A.R.).
[10] Court of Appeal Decision at para 79 (Tab 2 of A.R.).
[11] Transcript of argument before the Court of Appeal, June 21, 2016 ("Appeal Argument Transcript"). (Tab 9 of A.R.).
[12] Court of Appeal Decision at para 106 (Tab 2 of A.R.).
[13] Court of Appeal Decision at paras 82-100 (Tab 2 of A.R.).
[14] Appeal Argument Transcript, 45/35-48/9 (Tab 9 of A.R.).
[15] Agreed Statement of Facts, paras 1-5 (Tab 22 of A.R.).

years experience in the restaurant industry dealing with both sober and intoxicated patrons.[16] They both testified that Mr. Suter appeared to be sober.[17]

14. After leaving Chili's, Mr. Suter drove the couple to a second restaurant, Ric's Grill, located approximately 10 minutes away. Mr. Suter testified that the mood was tense between the couple because Mrs. Suter grew more and more upset with Mr. Suter for refusing to stay at Chili's.[18] On arrival at approximately 7:40 p.m., Mr. Suter pulled his vehicle into a strip mall parking lot servicing Ric's Grill.[19] Anderson ACJ found:

> Mr. Suter started to pull into a parking stall... but stopped short because it was a handicap stall. [B]efore backing up, they were arguing and Mrs. Suter said something like, "Maybe we should just get a divorce"... She also noticed that they were inching forward and screamed something like, "We're moving!"... Mr. Suter reacted by pressing on the pedal but his foot had come off the brake and was on the gas. The vehicle lurched forward and, consistent with believing that his foot was on the brake he obviously pressed harder because the vehicle never stopped accelerating. The vehicle hit the wall within seconds.
>
> The vehicle remained against the wall with Geo pinned by the vehicle for about 30 seconds. Mr. Suter recalls the vehicle stalling, having to put it into park before starting it and, amidst screaming, being told that there was a child under the vehicle. He then backed up slowly.[20]

15. After Mr. Suter opened his door he was pulled out and thrown to the ground, hit and kicked.[21] When the police arrived Mr. Suter was arrested for impaired driving causing bodily harm. He was then advised of his *Charter* rights and brought to a police station.[22]

16. Two year old Geo Mounsef died as a result of the collision shortly afterwards. Mr. Suter was advised of the death at the police station and told the charge would be upgraded accordingly. Mr. Suter tried to call a lawyer he knew, but could not reach him. He was then provided with a cell phone by the arresting officer who reached a lawyer from Legal Aid Alberta who had been

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[16] Agreed Statement of Facts, paras 9 and 21 (Tab 22 of A.R.).
[17] Provincial Court Decision at para 37 (Tab 1 of A.R.).
[18] Sentencing Transcript Vol. 1, 135/20-21 (Tab 11 of A.R.).
[19] Agreed Statement of Facts, paras 1-5 (Tab 22 of A.R.).
[20] Provincial Court Decision at paras 15-16 (Tab 1 of A.R.).
[21] Provincial Court Decision at para 29 (Tab 1 of A.R.).
[22] Provincial Court Decision at para 18 (Tab 1 of A.R.).

hired to take calls and provide *Brydges* advice to detainees that weekend.[23] Mr. Suter spoke with the lawyer for approximately seven minutes.[24] Anderson ACJ found at paragraphs 38 and 39:

> Mr. Suter testified regarding his conversation with the lawyer to whom he spoke before refusing to provide a breath sample... He described that the lawyer seemed to be in a rush, that the lawyer asked him few, if any, questions and the lawyer did almost all of 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.
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> Mr. Suter's account of that call struck the Court as quite improbable until the Court later heard from the lawyer. The lawyer... confirmed what Mr. Suter described with one exception. He denied expressly telling Mr. Suter not to blow. Instead... 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 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.

17. Mr. Suter testified that he followed the lawyer's advice not to blow, and his refusal was recorded at 9:51 p.m.[25] The only additional advice that Mr. Suter understood was that he should not speak to the police.[26] Mr. Suter admitted that he ended up not following that advice when a detective asked him for an interview at 12:19 a.m., on May 20th. He explained that he spoke with the detective because he "let his guard down," and the detective, unlike the arresting officers, "had a nice manner."[27] During the 33 minute interview Mr. Suter provided details of the matter and also expressed his deep remorse for having killed the child.[28]

After a review of the evidence, Anderson ACJ held at paragraph 76:

> … The Court finds, on 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

[23] Sentencing Transcript Vol. 1 203/13 – 204/27 (Tab 13 of A.R.).
[24] Agreed Statement of Facts at paras 224-226 (Tab 22 of A.R.).
[25] Sentencing Transcript Vol. 1, 152/13-41 (Tab 11 of A.R.).
[26] Sentencing Transcript Vol. 1, 154/16 and 198/3-11 (Tab 11, 12 of A.R.).
[27] Sentencing Transcript Vol. 1, 152/38; 198/3-7 (Tab 11, 12 of A.R.).
[28] Sentencing Transcript Vol. 1, 156/11 – 158/28 (Tab 11 of A.R.).

> rare, ill-informed and bad legal advice. If the advice had stopped with a mis-guided presentation of legal options, even if aimed at steering the suspect away from blowing, the mitigating effect of the advice would be significantly less. 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. This does not absolve Mr. Suter, as a mistake of law, is not a defence but it fundamentally changes Mr. Suter's moral culpability. [Emphasis added]

18. On the question of vigilante violence,[29] Anderson ACJ accepted that on the evening of January 22, 2015, Mr. Suter was abducted from his home by three men in a vehicle, wearing only a bathrobe and boots. He was placed in handcuffs and a canvas bag was put over his head. When he asked what the matter was about, the men referred to the killing of a child as the reason. Mr. Suter was driven to a secluded area, ordered out of the vehicle and told to kneel in the snow. Thereafter, his left thumb was severed with a sharp instrument and he was beaten into unconsciousness.[30] The thumb was never recovered. Anderson ACJ held that the "extreme vitriol, public scorn and threats" suffered by Mr. Suter, and the "vigilante violence against both Mr. Suter and Mrs. Suter" would be weighed as mitigating factors to "a more limited extent."[31]

PART II: STATEMENT OF ISSUES

19. The decision of the Court of Appeal of Alberta is appealed on the following grounds:

> GROUND I - Did the Court of Appeal err in finding that the mistake of law made by the Appellant was incapable of operating as a mitigating factor in the circumstances?
>
> GROUND II: Did the Court of Appeal err in deciding that actions committed by the Appellant unrelated to the criminal offending qualify as a relevant aggravating circumstance as this term is defined under section 718.2(a) of the *Criminal Code*?
>
> GROUND III: Was the sentencing judge properly entitled to consider the severe injuries and public vitriol suffered by the Appellant as a victim of vigilante justice as a collateral consequence relevant to determining the fitness of his sentence?
>
> GROUND IV: Did the Court of Appeal err in raising new grounds of appeal favouring the Crown without adequate notice to the Appellant?

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[29] Provincial Court Decision at para 2 (Tab 1 of A.R.). Steven Vollrath was convicted and sentenced to twelve years' imprisonment: *R v Vollrath*, 2016 ABPC 258, [2016] AJ No 1168.

[30] Sentencing Transcript Vol. 1, 167/10-168/13 (Tab 11 of A.R.).

[31] Provincial Court Decision at para 81 (Tab 1 of A.R.).

PART III: STATEMENT OF ARGUMENT

GROUND I - Did the Court of Appeal err in finding that the mistake of law made by the offender was incapable of operating as a mitigating factor in the circumstances?

(a) The Sentencinfg Judge Properly Concluded that the Appellant Had an Honest Mistaken Belief in the Legality of his Actions

20. Both the sentencing judge and the Alberta Court of Appeal concluded that the Appellant's decision not to provide a breath sample in this case was the result of "hopefully rare, ill-informed and bad legal advice", in which the lawyer provided by Alberta's Legal Aid system "expressly [told] him not to provide a sample."[32] The Court of Appeal nonetheless held that this did not qualify as a mitigating circumstance because the Appellant did not meet a requirement of the mistake of law 'doctrine', specifically the need for "... an honest belief in the legality of an illegal act before finding mistake of law to operate in mitigation of sentence."[33]

21. At its core, the Court of Appeal's decision to set aside the Appellant's sentence and impose a much harsher punishment was premised on one critical conclusion: that Anderson ACJ "did not expressly find or infer that Mr. Suter had an honest belief that it was not a criminal offence to refuse or provide a breath sample in his circumstances."[34] This assertion does not withstand close analysis. Read in their totality, the reasons for sentence actually lead to the opposite conclusion: Anderson ACJ *must* have found that the Appellant had an honest mistaken belief in consent **("HMB")** about being able to lawfully refuse. The Court of Appeal's ruling to the contrary is premised on a highly selective reading of the sentencing judgment, an inappropriately low level of deference to the findings made, and a skewed viewpoint of the relevant facts premised upon an incorrect legal understanding of what is needed to possess an "honest but mistaken belief" in the legality of one's actions.

22. Essentially, the Court of Appeal concluded that although the sentencing judge clearly found the Appellant had refused to provide a breath sample while under a mistake of law, there was no explicit finding that this mistake was premised upon an honest belief in legality. In its view, the only reasonable interpretation of the sentencing decision was that the Appellant's

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[32] Provincial Court Decision at para 76 (Tab 1 of A.R.), Court of Appeal Judgment at para 63 (Tab 2 of A.R.).
[33] Court of Appeal Decision at paras 64 and 68 (Tab 2 of A.R.).
[34] Court of Appeal Decision at para 72 (Tab 2 of A.R.).

mistake went exclusively to the punishment he would receive for his choice. As the Court put it later in the decision, "a reason existed for Mr. Suter to choose not to provide a breath sample... That reason was strategic, and related to the possibility of obtaining a lower sentence."[35]

23. This approach is premised on a number of distinct errors. To begin with, it is not based on *anything actually stated by the sentencing judge*. Nothing indicates that Anderson ACJ believed the Appellant *was* acting for strategic purposes. The Court of Appeal approached the matter incorrectly, assuming that Anderson ACJ erred without evidence of this fact. Trial judges are presumed to know the law,[36] and it is wrong to parse through their reasons in an effort to pull out ambiguities and fill them with unlikely meaning. As Abella J noted in ***R v O'Brien***:[37]

> A trial judge has an obligation to demonstrate through his or her reasons how the result was arrived at. This does not create a requirement to itemize every conceivable issue, argument or thought process. Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts. As Binnie J. noted in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55, trial judges should not be held to some "abstract standard of perfection".

Ironically, the Court of Appeal has recognized the importance of this fact in other cases. In ***R v Chad***, using language apposite to this appeal, the Court noted that "a sentencing judge's failure to mention a specific fact or principle in his sentencing reasons does not permit this Court to conclude that he failed to consider that fact or principle, particularly where the Crown directed sentencing submissions on those very factors."[38]

24. Minor ambiguities or omissions in a trial level decision do not justify appellate intervention.[39] Instead, reviewing courts are supposed to presume that decisions were made on a lawful basis unless there is *good reason* to assume the contrary or the conclusion cannot be supported by the evidence. As Brown J pointed out recently in ***Nelson (City) v Mowatt***,[40] "[a]bsent palpable and overriding error — that is, absent an error that is "plainly seen" and has affected the result — an appellate court may not upset a fact-finder's findings of fact".

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[35] Court of Appeal Decision at para 79 (Tab 2 of A.R.).
[36] *R v Burns*, [1994] 1 SCR 656, 29 CR (4th) 113 at para 18; *R v Youvarajah*, 2013 SCC 41, [2013] 2 SCR 720 at para 47.
[37] *R v O'Brien*, 2011 SCC 29, [2011] 2 SCR 485 at para 17.
[38] *R v Chad*, 2009 ABCA 48, 457 AR 135 at para 16.
[39] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 22-23.
[40] *Nelson v Mowatt*, 2017 SCC 8, [2017] SCJ No 8 (QL), at para 38.

25. In this case, there is no error in the sentencing judge's reasons that can be "plainly seen" to have affected the result. On the contrary, there is very good reason to believe Anderson ACJ understood the importance of establishing Mr. Suter's honest belief in the legality of his refusal. His decision refers to a number of relevant authorities on mistake of law, including ***R v Pontes***,[41] which the sentencing judge researched of his own accord. Moreover, in the culminating portion of his decision, Anderson ACJ held at para 76:

> 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. 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. 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. This does not absolve Mr. Suter, as a mistake of law, is not a defence but it fundamentally changes Mr. Suter's moral culpability. [Emphasis added]

26. This critical paragraph is worthy of close examination. It begins with the sentencing judge recognizing that the *Brydges* lawyer made two distinct errors, not one: (1) a misguided presentation of punishment options; and (2) an express direction not to provide a sample. Anderson ACJ carefully distinguished between these two pieces of advice, recognizing that a mistake based exclusively on the erroneous presentation of punishment options would *not* warrant a substantial mitigation of sentence. But Anderson ACJ expressly found that this error was *not* the basis for the Appellant's actions because the Appellant *never understood this advice*. The lawyer's advice was "confusing" and "obfuscating",[42] and the Appellant "had a hard time understanding what the lawyer was saying [and] specifically asked... whether or not he should provide a breath sample and the lawyer told him he should not."[43] These were not just Mr. Suter's words. The sentencing judge made a finding of fact that the legal 'advice' was delivered poorly, in that it was "full of jargon and hard to follow."[44]

27. It follows that the discussion of punishment possibilities was not the source of the mistake of law deserving of mitigation, as Anderson ACJ distinctly noted. Rather, the mistake arose from the second error: the lawyer's express statement not to provide a sample. According to Anderson

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[41] *R v Pontes*, [1995] 3 SCR 44 at para 76, 41 CR (4th) 201.
[42] Provincial Court Decision at para 41 (Tab 1 of A.R.).
[43] Provincial Court Decision at para 38 (Tab 1 of A.R.).
[44] Provincial Court Decision at para 39 (Tab 1 of A.R.).

ACJ, it was this statement alone that caused the Appellant to refuse and act under a mistake of law that "fundamentally changes [his] moral culpability". The only possible mistake of law that could arise from a statement of this type, distinguished from a discussion of penalty options, is with respect to the legal right to refuse. That is, the Appellant drew a mistaken inference that he had a legal right not to provide a breath sample.

28. The conclusion that the Appellant possessed an HMB in the lawful right to refuse is also supported by evidence at the sentence hearing. The Court of Appeal recognized one statement to this effect, noting Mr. Suter testified, "... I just didn't think the lawyer would be telling me to - not to do something that would be illegal. Like I thought I was within my rights not to blow."[45] But the Appellant said much more than this. He testified that he did not trust the police when they told him that he would be charged if he refused to provide a sample, adding that "I thought the lawyers are there for a reason and you're supposed to listen to them."[46] On cross-examination, he replied to a question about his thought process by asking "why would [the lawyer] tell me to do something that was illegal?"[47] He noted that "[t]he lawyer baffled me with legal jargon"[48] and "I don't know that law."[49] Finally, the Appellant was cross-examined extensively about whether his refusal was strategic and he maintained repeatedly that it was not.[50] Anderson ACJ's remarks throughout showed that he found the Appellant to be a credible witness.

29. There was clearly sufficient proof available to ground the conclusion that the Appellant had an HMB in the lawfulness of his actions. Although the *Brydges* lawyer testified in cross-examination that he told Mr. Suter that it was an offence to refuse to provide a sample, a review of the lawyer's testimony in-chief shows that all he told the Appellant was that he would be *charged* if he failed to provide a sample.[51] The fact that Anderson ACJ chose to accept the Appellant's recollection of the call over that of the *Brydges* lawyer, where they conflicted, fell within his mandate as fact finder. When all the evidence and reasons for sentence are considered,

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[45] Court of Appeal Decision at para 74 (Tab 2 of A.R.).
[46] Sentencing Transcript, Vol. 1, 152/36-48 (Tab 11 of A.R.).
[47] Sentencing Transcript, Vol. 1, 197/3-9 (Tab 12 of A.R.).
[48] Sentencing Transcript, Vol. 1, 153/15 (Tab 11 of A.R.).
[49] Sentencing Transcript, Vol. 1, 153/37 (Tab 11 of A.R.).
[50] Sentencing Transcript, Vol. 1, 152/20- 29; 187/3- 29; 196/32- 197/28 (Tab 11, 12 of A.R.).
[51] Court of Appeal Decision at para 68 (Tab 2 of A.R.).

the logical conclusion is that Anderson ACJ *did* find Mr. Suter to have an HMB in his ability to refuse rather than an HMB about which consequences were preferable, notwithstanding legality.

30. The Court of Appeal's erroneous conclusion to the contrary can be explained by the troubling manner in which it approached the doctrine of mistake of law and its purported relationship to the sentencing process, which contravenes well-established principles on the subject. Of particular note are the Court's statements to the effect that:

- An offender may not "advance after the fact assertions about what he or she understood unrecorded legal advice to mean at the time;"[52]
- The law does not permit those "who receive advice from *Brydges* lawyers to later argue that their inability to fully understand the advice due to intoxication, stress or other considerations" mitigates culpability, because this would create a "subjective and self-aimed calculus;"[53]
- A mistake of law could only mitigate if the accused "was expressly told by a lawyer that it was not a criminal offence to refuse to provide a breath sample after having caused a collision leading to a death, and who had no reason to question or disbelieve that advice."[54]

31. None of these propositions are correct, and together they deprive an offender of the possibility of raising mistake of law altogether, compromising the right to make full answer and defence under s 7 of the *Charter*. The suggestion that an accused cannot advance "after the fact assertions about... unrecorded legal advice" is misguided, for this would make it impossible to support the basis of a mistaken understanding with respect to confidential communication. It is also not grounded in the facts of this case, where the Appellant's view of the confusing nature of the *Brydges* lawyer's instructions *was confirmed by the lawyer's testimony*.[55]

32. The remaining statements demonstrate an equally grave misunderstanding of how mistakes of law should be considered in sentencing, where the focus *must* be on the offender's subjective perception.[56] As Chabot J. noted in ***R v Pearlman***,[57] a mistake of law is considered a

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[52] Court of Appeal Decision at para 68 (Tab 2 of A.R.).
[53] Court of Appeal Decision at para 68 (Tab 2 of A.R.).
[54] Court of Appeal Decision at paras 71 and 74 (Tab 2 of A.R.).
[55] Sentencing Transcript, Vol 1, 206/10- 207/11 (Tab 13 of A.R.).
[56] *R v MacDonald*, 2014 NSCA 102, (2014), 16 CR (7th) 159; *R v Zheng*, [2015] OJ No. 7182 (CJ); *R v Campbell et al*, [1972] AJ No 55 at para 50 (Alta Dist Ct) (QL).

mitigating factor because "[h]onest action is not treated as severely as deliberate disregard of the law." Objective reasonableness *enhances* the mitigating force of the mistake, but its absence is not disentitling.[58] It follows that reliance upon a mistake of law in sentencing does not depend upon receiving a particular type of express statement from a lawyer. Nor is it necessary for the mistake to arise only where there is "no reason to question or disbelieve that advice". Misunderstandings about legal advice have the potential to mitigate so long as the detainee has a subjective belief in the legality of his or her action.

33. The Court of Appeal's approach tainted its review of the sentencing judge's reasons. Given the claimed need for recorded legal advice, express statements from a lawyer regarding legality, perfect clarity of thought and "no reason to question or disbelieve the advice", it is difficult to see how even an explicit finding from Anderson ACJ would have stood up on review.

34. This flawed approach to the sentencing judge's findings manifested in other ways. At paragraph 79, the Court of Appeal held that "it was not available to the sentencing judge to have drawn an inference that the Appellant was under the mistaken belief that his refusal was lawful, as it *was not the only reasonable explanation* for his decision not to provide a breath sample". This excerpt wrongly suggests that Anderson ACJ was not permitted to conclude that the Appellant had an HMB *so long as another reasonable explanation was possible*. This is not the test by which factual findings are measured on appellate review. On the contrary, an appellate court "may not interfere with the findings of fact made and the factual inferences drawn ... unless they are clearly wrong, *unsupported by the evidence or otherwise unreasonable*."[59]

35. Finally, the Court of Appeal's factual finding should not be adopted in any event as it ignores both the nature of the hurried consultation that took place and the understandable confusion felt by Mr. Suter in the circumstances. At best, even if one were to accept the testimony provided by the *Brydges* lawyer, the Appellant knew he would be *charged* with an offence if he failed to provide a sample. An arrestee may reasonably believe that he is acting lawfully while also believing he will be charged. It often takes a trial to resolve that conflict.

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[57] *R v Pearlman* [2005] QJ No 15 at para 31 (Que SC). See also *R v Liwyj*, 2010 CMAC 6 at para 55; 415 NR 143.
[58] *R v World Media Brokers Inc*., [1999] OJ No 598 at para 9 (Prov Div), affirmed (2003), 174 CCC (3d) 375, [2003] OJ No 1737 (Ont CA).
[59] *R v Clark*, 2005 SCC 2, [2005] 1 SCR 6 at para 9 [Emphasis added].

(b) Mistake of Law as a Mitigating Factor Informs the Measurement of an Offender's Degree of Responsibility for the Offending

36. Though there is good reason to believe that the sentencing judge approached this case on the basis of the Appellant possessing an HMB in the legality of his action, the original sentencing decision should be reinstated even if this Court were to agree that Mr. Suter was *unclear* about whether his decision to refuse was lawful. Contrary to the position adopted by the Court of Appeal, it was legally permissible and appropriate for the sentencing judge to consider the HMB advanced by the Appellant in the circumstances in deciding upon an appropriate sentence.

37. It is well-established that an offence is committed pursuant to a mistake of law when it is based on knowledge that is the product of incorrect legal advice.[60] Owing to s 19 of the *Code*, this is almost never a matter affecting a person's guilt, but it is a factor that a judge may take into consideration on sentence. The Court of Appeal has now added a caveat, suggesting that for a mistake of law to be mitigating, it must first withstand a strict threshold inquiry. In particular, "an offender who did not know whether an action was legal... has no basis for demonstrating reduced culpability."[61] The Court of Appeal expressly construed this belief in legality as a "prerequisite",[62] and the impact of this construction is significant: under this approach, even serious mistakes of law are irrelevant to an offender's punishment so long as the offender was even the slightest bit unclear about the lawfulness of the ultimate act taken as a consequence.

38. This approach wrongly treats mistake of law as an independent doctrine with its own set of requirements and prerequisites rather than what it actually is: one part of the search for a proportionate sentence under s 718.1 of the *Code*, the ultimate objective of any sentencing court.[63] This inquiry requires an assessment of the gravity of the offence and the offender's degree of responsibility. The latter term broadly evaluates "the moral blameworthiness of the offender",[64] assessing *all* aspects of the offender's mental state, including, but not limited to, his or her *mens rea* for committing the offence, mental capacity and motive for committing the

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[60] *R v Whelan*, 2002 NLCA 69, (2002), 170 CCC (3d) 51; *R v Stucky*, 2009 ONCA 151, (2009), 240 CCC (3d) 141.
[61] Court of Appeal Decision at para 68 (Tab 2 of A.R.).
[62] Court of Appeal Decision at para 64 (Tab 2 of A.R.).
[63] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 51.
[64] *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 at para 12.

crime.[65] Obviously this includes mistakes of law, for such mistakes help explain why the crime was committed. As the Manitoba Court of Appeal suggested in ***R v Foianesi***," [a]lthough ignorance of the law is no excuse and provides no defence as to guilt, it can be used to gauge [an offender's] level of moral blameworthiness when considering the fundamental principle of proportionality."[66]

39. Given the different factual scenarios that can arise and the fact that, as this Court noted in ***R v M(CA)***,[67] "sentencing is an inherently individualized process", the assessment regarding an offender's moral blameworthiness should not establish categorical barriers to any relevant aspect of the inquiry, including the treatment of mistakes of law. As Berger JA noted in ***R v SJB***:[68]

> …[m]oral blameworthiness does not lend itself to hard and fast categories. Moral blameworthiness cannot be assessed according to a grid. The issue is far more nuanced and complex, engaging as it does a multiplicity of inter-related subjective and objective factors that do not fit into pre-ordained simple categories.

This approach is consistent with the wording of s 718.1, which asks judges to assess an offender's "degree" of responsibility, a term that by definition eschews fixed designations. As a consequence, where a mistake of law is concerned, the focus should be on whether the mistake has caused the offender to act in a manner that mitigates his or her overall blameworthiness. The question should be exploratory rather than dichotomous. Instead of asking "did the offender knowingly or with uncertainty break the law, regardless of any mistake", as the Court of Appeal suggests, a wider spectrum of moral accountability should be contemplated by considering whether the offender knowingly or with uncertainty broke the law for any reason that lessens his or her overall degree of responsibility for the offending.

40. An individualized approach to mistake is also consistent with the way in which these mistakes are addressed when the offender does possess an honest belief in the legality of the action being undertaken. Mistakes of this kind are not automatically mitigating. Instead, a court must examine the mistake in light of all the circumstances to determine whether it has some impact on moral culpability. Consider a hypothetical offender who wishes to kill someone,

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[65] *R v Arcand*, 2010 ABCA 363, (2010), 264 CCC (3d) 134 at para 58.
[66] *R v Foianesi*, 2011 MBCA 33, 277 CCC (3d) 366 at para 26 (Man CA). See also *R v Hamilton*, (2004), 186 CCC (3d) 129, [2004] OJ No 3252 (CA) at para 91.
[67] *R v M(CA)*, [1996] 1 SCR 500 at para 92.
[68] *R v SJB*, 2013 ABCA 153, (2013), 544 AR 342 at para 19.

honestly believing it is lawful to kill on Tuesdays. This amounts to a mistake of law and it also satisfies the Court of Appeal's "prerequisite" for the doctrine, but it would not mitigate the offender's punishment, as it does not affect moral blameworthiness in any meaningful way.[69]

(c) A Flexible Approach Allows an Offender's Degree of Responsibility to be Measured Appropriately

41. The narrow approach to mistake of law has another major shortcoming: it focuses exclusively on what an offender was thinking when the mistake was made, artificially confining the analysis of relevant facts and potentially obscuring other important aspects of a person's moral culpability. This case demonstrates how this can occur, as the Appellant's liability did not result from a mistake brought on by a personal philosophy or general desire to be uncooperative.[70] Instead, it stemmed directly from being misled by poor legal advice. In other words, the *responsibility* for the offending was not the Appellant's alone, as "he was expressly told to refuse to comply with the demand".[71] However the lawyer's role is characterized, his participation in the offence cannot be ignored in assessing the Appellant's degree of responsibility, in the same way in which a sentencing court assesses whether an offender has a lower moral culpability when he or she is induced to commit an offence.[72] As Clayton Ruby has written, the law has always drawn "... a distinction between the instigator of an offence and those individuals who are led into folly, often by a negative peer group."[73] If it is mitigating for an individual to be led into the commission of a crime by a negative peer group, it must also be mitigating for an individual to be lead into the commission of a crime by relying on *Brydges* advice provided to him while exercising his *Charter*-protected right to counsel.

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[69] *R v Bridgeman*, 2011 ONCJ 117, [2011] OJ No 1215 at para 48; *R v Klundert*, CR-01-6026-SE, September 20, 2010 (Ont CJ), per Patterson J, varied on other grounds *R v Klundert*, 2011 ONCA 646, 285 OAC 153; *R v Klundert*, 2011 ONCJ 274.

[70] In cross-examination, Mr. Suter noted that "I would sir, have been delighted had I been advised to blow." Sentencing Transcript, Vol. 1, 191/8 (Tab 12 of A.R).

[71] Provincial Court Decision at para 41 (Tab 1 of A.R.).

[72] *R v Wiberg* (1997), 158 Sask R 6, [1997] SJ No 744 at para 5 (CA); *R v Vandenbosch*, 2007 MBCA 113, [2007] 11 WWR 639 at para 75; *R v Monchka*, [2000] OJ No 1069, 2000 CanLII 4070 (ONCA) at para 2; *R v Debigare*, 2014 SKCA 2, [2014] SJ No 6.

[73] Clayton Ruby, *Sentencing*, 7th ed. (Markham, ON: LexisNexis, 2008), para 5.219.

42. A person operating under a seriously distorted view of the legal consequences of their actions can be deserving of a mitigated sentence in the right circumstances, which can be demonstrated by examining the conduct of three similarly situated offenders and considering whether they have varying degrees of responsibility for the offending in question.

43. Consider three offenders convicted of refusal, claiming mistake of law. The first offender is advised to comply with the demand, but refuses as he feels the law is unconscionable. The second individual does not even attempt to ascertain what the law is. The third makes best efforts to understand his legal obligations and is wrongly advised to refuse by the very person entrusted to protect his *Charter* interests.[74] The third individual possesses the lowest moral culpability, as his mistake of law was reasonable and made after diligently obtaining and following legal advice.

44. The Appellant's reduced degree of responsibility is especially evident when the facts of his offending are considered in context, as the Court of Appeal's ruling completely ignores the impact that this poor and confusing legal advice had on Mr. Suter's decision-making process during a life-altering exchange of just seven minutes. It also indirectly compromises the *Charter* right to counsel protected by s 10(b) by asking detained persons to bear the brunt of serious mistakes made by the lawyers tasked with giving them time-sensitive and crucial advice. Like many detainees in police custody who face the prospect of being charged, Mr. Suter was in an extremely frightening and vulnerable position, and he had never been arrested before. He was told he had a right to counsel and decided to exercise it, believing it was in his interest to take this advice seriously. Had the Appellant been provided with the proper advice – to provide a sample – he would have complied, as he testified.[75] He would therefore have avoided criminal liability altogether since it was an established fact that he was not impaired.

45. Finally, a flexible approach to mistake of law is consistent with the treatment of s 19 of the *Code*, which excludes consideration of legal mistakes in the assessment of liability, except in extremely limited circumstances. The range of potential mistakes that can be excluded from consideration at the culpability stage, given the number of criminal offences in which such mistakes are possible, is virtually infinite. The unrelenting nature of s 19 is based on the notion

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[74] *R v Brydges*, [1990] 1 SCR 190, [1990] SCJ No 8 (QL); *R v Bartle*, [1994] 3 SCR 173, [1994] SCJ No 74 (QL).
[75] Sentencing Transcript, Vol. 1, 191/8 (Tab 12 of A.R.).

that mistakes of law, even where based on a lawyer's advice, cannot absolve a person of a crime, as it would cause havoc for the criminal justice system to allow individualistic notions of legality to trump a need for certainty where liability is concerned. But this approach needs to be complemented by a second principle: the recognition that mistakes of law *will* be assessed during the punishment phase. Ashworth has pointed out that "... there is a range of possible defences to criminal liability - insanity, duress, mistake of fact, and to some extent mistake of law and intoxication. English law confines each of these defences narrowly, and *does so partly because effect can be given at the sentencing stage to variations in culpability*."[76] Similarly, as Kerans J said in ***R v Campbell et al***,[77] it is in sentencing "where the scales of justice are balanced".

(d) The Court of Appeal Provided No Compelling Rationale for Disallowing Consideration of these Sorts of Mistakes

46. The Court of Appeal failed to provide a single authority in support of the proposition that mistakes of law can only be mitigating where there is an honest belief in the legality of the act undertaken. The cases cited by the Court of Appeal describe the concept in more open-ended fashion, along the lines of ***R v MacDonald***, to the effect that "in ordinary circumstances, [the accused's] mistake of law would be a mitigating factor to be considered in fashioning a sentence that is proportionate to his crime." [78] While it is true that in each of these cases the offender claimed an HMB in the legality of his or her action, none had to consider the legal scenario in play here. In this regard, an existing fact should not be confused with a required condition.

47. The Court of Appeal provided two unconvincing reasons for rejecting a flexible approach. First, the Court asserted that "an offender who did not know whether or not an action was legal but was told by counsel that certain strategic advantages would arise if he refused to engage in that action has no basis for demonstrating reduced culpability".[79] Whether correct or not, this is not an accurate portrayal of this case. As the Court of Appeal noted, the Appellant may have drawn "a flawed assumption from the legal advice received",[80] and been uncertain about the legality of his action. Nonetheless, designating his actions as "strategic" distorts what actually

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[76] Andrew Ashworth, *Sentencing and Criminal Justice*, 5th ed (Cambridge: Cambridge University Press, 2010) at 149 [Emphasis added].
[77] *R v Campbell et al*, *supra* note 56 at para 47 (Alta Dist Ct) (QL).
[78] *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37 at para 61.
[79] Court of Appeal Decision at para 68 (Tab 2 of A.R.).
[80] Court of Appeal Decision at para 74 (Tab 2 of A.R.).

occurred, as it implies a careful weighing of different options with a clear understanding of the benefits and consequences. Anderson ACJ accepted Mr. Suter's testimony that the lawyer was "hard to follow", as well as his reasons for not providing a sample. This testimony was not about making a strategic choice, but about not being sure about what he was legally required to do, and specifically deciding to trust the advice being provided by his legal counsel. Rather than labeling acts, it is more sensible to examine whether factors that warrant mitigation are present, including a high level of uncertainty, efforts made to know the law, and good reasons for the mistake. Ultimately, mitigation is about *recognizing* what led a person to make a particular decision. A person who makes an uncertain but understandable choice can be regarded as less blameworthy than someone who makes the same choice without caring about legality one way or another.

48. Additionally, the Court of Appeal relied upon s 19 of the *Criminal Code* as being supportive of its approach, noting that the clause "... does not suggest that a reduced version of [mistake of law] is available depending on how sincerely it is held."[81] While this is undoubtedly true, it does not support the decision to eliminate consideration of certain types of mistakes during sentencing. Section 19 operates exclusively with respect to liability, and does not negate the possibility of raising a sincere mistaken belief in law as a mitigating factor on sentence.[82]

49. In conclusion**,** a flexible approach to mistake that assesses an offender's overall responsibility adheres more closely to the fundamental principle of proportionality. It can be nuanced depending upon the mistake and the impact it had. Individuals who commit crimes after having made reasonable inquiries are far more deserving of leniency than offenders who hold unreasonable beliefs after disregarding the advice of others who stress that a law is being broken. Anderson ACJ was entitled to consider the Appellant's mistake as a mitigating circumstance. Absent an error in principle, there was no basis to intervene with the original sentence decision.[83]

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[81] Court of Appeal Decision at para 70 (Tab 2 of A.R.).
[82] *R v Pontes*, [1995] 3 SCR 44, 41 CR (4th) 201.
[83] *R v Shropshire*, [1995] 4 SCR 227, 129 DLR (4th) 657 at para 46; *R v Lacasse*, *supra* note 64 at paras 39-43.

GROUND II: Did the Court of Appeal err in deciding that actions committed by the Appellant unrelated to the criminal offending qualified as a relevant aggravating circumstance as this term is defined under section 718.2(a) of the *Criminal Code*?

(a) The Circumstances Deemed to be Aggravating Were Not Proven Beyond a Reasonable Doubt to Have Contributed to the Accident

50. In deciding to increase the Appellant's sentence, the Court of Appeal found that the offending was subject to an aggravating factor: Mr. Suter's "distracted driving" in the circumstances. This conclusion was premised on the fact that the Appellant:

- was two weeks removed from health problems which included hallucinations requiring a call for police assistance;[84]
- had suffered a head injury two days prior;
- "was angry and seriously distracted"; and,
- had experienced problems with alcohol in the relatively recent past, and had been drinking (though not to the extent of impairment) at the time of the collision.[85]

In light of these circumstances, according to the Court of Appeal, Mr. Suter "knew or should have known [that he] created an unacceptable risk to the public."[86]

51. It is important to note that all of these factual findings came from the Court of Appeal's interpretation of the evidence provided under oath by Mr. Suter and his wife. The Crown never argued at sentencing, nor initially on appeal, that these alleged acts of distracted driving were aggravating factors. The Crown's theory at sentencing was that Mr. Suter was impaired by alcohol or, in the alternative, that his sobriety was not a mitigating factor on sentence.[87]

52. The findings also reveal serious misapprehensions of the evidence, as there was no basis to conclude that, in their proper context, *any* of these factors contributed to the accident, much less the offence of refusing. The sentencing judge, who was in the best position to assess the competing facts, was unequivocal: "as tragic as the consequences may have been, this collision was an accident caused by a non-impaired *driving error*."[88] It was not an accident caused by health problems, alcohol or anger. The Court of Appeal re-weighed the evidence in a manner that

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[84] Court of Appeal Decision at paras 7 and 84 (Tab 2 of A.R.).
[85] Court of Appeal Decision at para 7 and paras 89-91 (Tab 2 of A.R.).
[86] Court of Appeal Decision at para 56 (Tab 2 of A.R.).
[87] Sentencing Transcript, Vol. 2, 371/10-22 (Tab 20 of A.R.).
[88] Provincial Court Decision at para 76 (Tab 1 of A.R.).

was detrimental to the Appellant, which was improper. As this Court stated in ***Nelson v Mowatt***, "the possibility of alternative findings based on different ascriptions of weight is... not unusual and presents no basis for overturning the findings of a fact-finder. It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence."[89]

53. The focus on the Appellant's single episode of hallucinations is a good example of the Court of Appeal's problematic approach to the facts. The Court of Appeal erroneously linked this episode to alcohol consumption, noting that Mr. Suter's "problems with alcohol.... resulted in the police having to be called due to his hallucinations, with a resulting hospitalization", even though the Appellant specifically testified that his episode had been brought on by stress, and that prior to experiencing hallucinations, he "didn't drink anything all day.[90]" His testimony was confirmed by Mrs. Suter.[91] Moreover, the Appellant's testimony about the accident revealed no indication of hallucination or impediment relating to the head injury. On the contrary, he specifically testified that he did not feel light-headed or have any concern about driving.[92] Again, this evidence was confirmed by Mrs. Suter.[93] Furthermore, the Crown tendered no medical evidence that would permit an inference that Mr. Suter's health played any role whatsoever in the accident.

54. The Court of Appeal's approach to the Appellant's mental state just prior to the accident reveals similar shortcomings. The Court determined that the Appellant drove while "seriously distracted", "angry" and "engaging in a serious animated argument with his wife."[94] These conclusions represent a misapprehension of the evidence. To be sure, Mr. Suter spoke of a "tense" mood in the car, reluctantly agreeing in cross-examination to the suggestion that his wife had been "nagging" at him during the drive to Ric's Grill.[95] He also conceded to having been distracted by his wife's talking,[96] but, placed in context, this referred only to the final moment before the accident, after he had successfully driven for ten minutes and had his vehicle stopped

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[89] *Nelson v Mowatt*, *supra* note 40 at para 38.
[90] Sentencing Transcript, Vol. 1, 126/7-8 (Tab 11 of A.R.).
[91] Sentencing Transcript, Vol. 2, 265/30-34 (Tab 17 of A.R.).
[92] Sentencing Transcript, Vol. 1, 137/23-24; 182/11-22 (Tab 11, 12 of A.R.).
[93] Sentencing Transcript, Vol. 2, 273/9-16; 285/34-35 (Tab 17, 18 of A.R.).
[94] Court of Appeal Decision at paras 90-91 (Tab 2 of A.R.).
[95] Sentencing Transcript, Vol. 1, 142/29 (mood was tense); 176/7-25 (nagging) (Tab 11, 12 of A.R.).
[96] Sentencing Transcript, Vol. 1, 183/29-33 (Tab 12 of A.R.).

while looking for a place to park. There was *no* evidence that any of this affected him while he drove to Ric's Grill. It was only at the last moment that his wife threatened divorce, which shocked Mr. Suter and caused him to momentarily take his foot off of the brake pedal. Mrs. Suter *then* screamed "Rick we're moving!"[97] which caused him to hammer what he thought were the brakes, but tragically turned out to be the gas pedal. The Court of Appeal noted that "had he chosen not to drive or had pulled over once he and his wife began to argue, his "non-impaired driving error... would not have occurred,"[98] ignoring the fact that the accident occurred *after Mr. Suter was already stopped and in the process of parking his vehicle*, and as a result of an *unforeseeable and upsetting* threat.

55. The final circumstances relied upon by the Court of Appeal – that the Appellant experienced problems with alcohol in the relatively recent past and had been drinking at the time of the collision – are problematic for different reasons. The first aspect distorts the impact of the Appellant's "problems with alcohol" in a manner that was unwarranted, implying a degree of severe, ongoing alcoholism that is not supported by the evidence. There is no question that at the time of the accident the Appellant was trying to reduce his alcohol consumption, but this was part of an effort to improve his overall health, "lose some weight and get in better shape"[99], and not out of any concern about inebriation generally or because it was affecting his ability to drive. This focus on health was confirmed by Mrs. Suter's testimony.[100]

56. It is certainly true that the Appellant consumed a legal amount of alcohol before the accident, but it is difficult to see how this constitutes an aggravating circumstance capable of warranting increased punishment. After all, s 255(3.2) merely requires grounds for the belief that alcohol has been consumed.[101] Basic proof of an essential element of an offence cannot constitute an aggravating circumstance.[102] Furthermore, both the sentencing judge and the Court of Appeal

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[97] Sentencing Transcript, Vol. 2, 288/6-30 (Tab 18 of A.R.).
[98] Court of Appeal Decision at para 91 (Tab 2 of A.R.).
[99] Sentencing Transcript, Vol. 1, 126/26-31; 179/31-32 (Tab 11, 12 of A.R.).
[100] Sentencing Transcript, Vol. 2, 266/12-30; 308/34-38 (Tab 17, 19 of A.R.).
[101] The demand would be illegal if there were not at least reasonable grounds to suspect that alcohol has been consumed.

[102] *R v Tasew*, 2011 ABCA 241, (2011), 282 CCC (3d) 260 at para 69; *R v Harper*, 2016 MBCA 64, (2016), 338 CCC (3d) 453 at para 57.

concluded that the Appellant was not impaired by alcohol at the time of the accident. The Court of Appeal's decision effectively posits that someone with a history of drinking who drives after having consumed *any* alcohol should expect to be punished more harshly for a refusal offence, even if driving well below the legal limit.

(b) The Features Deemed to Be Aggravating Did Not Meet the Requirements of Sections 718.2 and 725 of the Criminal Code

57. Even assuming a proper factual foundation, the Court of Appeal's approach to sentencing in this case was improper. In effect, the Court of Appeal punished the Appellant for the act of driving while distracted, even though this offence was not alleged, charged, tried or proven, and it would not amount to a crime if it had been. The Appellant was convicted only of the offence of failing to provide a breath sample while knowing that his vehicle had caused a person's death. In the absence of a clear nexus between the Appellant's manner of driving and the offence of failing to provide a breath sample, his manner of driving could not be construed as a *relevant* aggravating circumstance of the offence. Moreover, the driving was not a fact that shed any useful light on the Appellant's character, reputation, or risk of re-offending for the purpose of determining an appropriate sentence. This argument rests on the five points discussed below.

(i) A court's ability to rely upon disreputable acts proven at trial as aggravating circumstances under section 718.2(a) is constrained by section 725 of the Code

58. It is critically important to maintain clear limits in deciding what can constitute relevant aggravating circumstances, as without such limits it is too easy for courts to increase a punishment arbitrarily without proper regard to principle, simply by referring to disreputable conduct committed by the offender.[103] The *Code*'s sentencing regime prevents this through a carefully constructed framework. First, s 718.2(a) does not operate in a vacuum. Though the provision allows a court to consider any "relevant... circumstances of an offence or the offender", the phrase is not unrestrained. Instead, the circumstances that may be considered are limited – most notably by the principle of proportionality in s 718.1. This Court approved of this approach

[103] See Allan Manson et al., *Sentencing and Penal Policy in Canada* (Emond: Toronto, 2016) at 100.

in ***R v Larche***,[104] noting that the wording of s 718.2(a) "... does not require the court to apply it without regard to the other principles of sentencing set out in the *Code*."

59. Second, of particular importance to the understanding of s 718.2(a) in this factual context is s 725, which limits the courts' ability to rely upon an offender's disreputable conduct as a 'relevant aggravating circumstance' in sentencing. This section operates in combination with sections 718.1 and 718.2(a), ensuring that an offender is punished *exclusively* for conduct that resulted directly in a conviction, unless its special requirements are met. As Rosenberg JA noted in ***R v Edwards***,[105] both s 718.1 and s 725 direct courts to establish a clear connection between aggravating facts and the particular offence for which a conviction has been entered, as "the degree of responsibility of the offender [in s 718.1] *must mean responsibility for "the offence", not some other untried offences*, absent resort to s 725."

60. While the *Code* does permit evidence about the offender's background, character and other offending to be *admitted* notwithstanding s 725, this must be done with extreme care. As noted in ***R v Angelillo***:[106]

> The court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused for that other offence, and considering them to establish the offender's character and reputation or risk of re-offending for the purpose of determining the appropriate sentence for the offence of which he or she has been convicted.[107] [Emphasis Added]

Or, as recently described in ***R v Roopchand***,[108] this evidence is admissible only "when its purpose is limited to shedding light upon some aspect of the accused's character and background which is relevant to the objectives of sentencing being considered by the judge."

61. This type of use is simply not applicable here. To begin with, the Court of Appeal specifically used Mr. Suter's manner of driving to *punish* – not to understand his character with

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[104] *R v Larche*, 2006 SCC 56, [2006] 2 SCR 762 at para 35.
[105] *R v Edwards*, (2001), 54 OR (3d) 737 at para 44 (Ont CA)[Emphasis added].
[106] *R v Angelillo*, 2006 SCC 55, [2006] 2 SCR 728. See also *Edwards*, *ibid* at paras 40-41; Allan Manson et al., *supra* note 103 at 100.
[107] *Ibid* at para 32.
[108] *R v Roopchand*, 2016 MBCA 105, [2016] MJ No 306 at para 7.

respect to the offending under s 255(3.2).[109] His driving was not pertinent to denouncing his failure to provide a breath sample, deter him or others from refusing to provide one in future, separating him from society or promoting his sense of responsibility. As the Court of Appeal of Ontario noted in ***R v Edwards***, evidence of such conduct may *not* be used:

> ... for the purpose of increasing the punishment that would otherwise be appropriate for the offence [as doing so] would offend the provisions of ss. 718.1 (proportionality) and 725 (taking other offences into account)... Absent compliance with section 725, an offender can only be sentenced for crimes that have been properly charged and proved at a trial of those offences."[110]

62. Section 718.2(a) is not a "back door" through which a court may punish an offender for conduct that did not result in a conviction. As LeBel JA noted in ***R v Pelletier***:[111]

> While the accused's character may be shown, and his previous criminal record established, the sentencing process must not become the occasion for indirectly punishing the accused for offences which have not been established by the normal means of proof and procedure, or that one did not wish to bring.

63. Section 725 simultaneously protects the prosecution and the offender. It recognizes the "common-sense proposition that conduct does not always fit neatly into the offences as described in the *Criminal Code*... and encourages the prosecution to lay only those charges that most nearly describe the conduct."[112] At the same time, it protects the offender from "double jeopardy", by ensuring that no other proceedings may be taken with respect to offences disclosed by facts that are part of the circumstances of the offence unless the conviction for the predicate offence is set aside.[113] But s 725 has another important protective function as well: by prohibiting the prosecution from combining responsibility for multiple acts into punishment for a single act, it ensures that an accused person is given proper notice about what he or she is liable to be punished for when an indictment is laid. As the Quebec Court of Appeal stated in ***R v Pearson***[114], and endorsed by this Court in ***R v Larche***,[115] "[g]iven the right of every accused person to be presumed innocent, it cannot be that [section 725] permits the court to consider facts not *strictly*

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[109] Court of Appeal Decision paras 92 and 100 (Tab 2 of A.R.).
[110] *Edwards*, *supra* note 104.
[111] *R v Pelletier* (1989), 52 CCC (3d) 340 at 346 (Qué CA).
[112] *Edwards*, *supra* note 105 at para 35.
[113] *Ibid*.
[114] *R v Pearson*, (2001), 42 CR (5th) 386; [2001] RJQ 69 at para 25.
[115] *Larche*, *supra* note 104 at para 40.

within the framework of the offence for which the accused is to be punished unless the accused has been tried for [the other] offence." Referring directly to this extract in *Larche*,[116] Fish J went on to add that:

> This position flows from a legitimate concern that an accused's conviction or plea of guilt on one charge could be hijacked for the purpose of punishing that accused for unanticipated allegations of wrongdoing. An indictment must be sufficiently precise factually for the accused to grasp the reproached circumstances or "transaction", and sufficiently precise legally to permit the accused to know which charge he or she must answer among the various charges that might characterize the act…[Emphasis added].

64. In effect, section 725 helps ensure that an accused person knows the case he or she must meet before pleading guilty or going to trial, reinforcing key ***Charter*** rights in the process. Section 11(a) of the ***Charter*** makes clear that an accused person is entitled to be informed of the *specific* offence with which he is charged. Moreover, as McLachlin CJ noted in ***Charkaoui v Canada (Citizenship and Immigration)***,[117] "... fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet." When an offender pleads guilty to a particular crime, or decides to defend charges, it is critical that the scope of potential jeopardy is clearly identified.

65. For all of these reasons, a court is simply not permitted to combine multiple bad acts into aggravating features of a single offence. To do so, "undermines the basic tenet of our system that, *absent compliance with section 725*, an offender can only be sentenced for crimes that have been properly charged and proved at a trial of those offences."[118] It follows that the Court of Appeal was only entitled to punish the Appellant for his manner of driving if: (a) this fact was *not* a separate act requiring compliance with section 725; or (b) the requirements of section 725 were satisfied. As shall be demonstrated, neither was the case here.

(ii) Section 725 is applicable where the acts relied upon do not relate directly to an element of the offence for which moral culpability is enhanced

66. A critical question in this case is whether the Appellant's manner of driving constituted an intrinsic part of the failure to provide a breath sample charge or needed to be addressed in

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[116] *Larche*, *supra* note 104 at para 41 [Emphasis added].
[117] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 61. See also *R v SGG*, [1997] 2 SCR 716; 148 DLR (4th) 423 at para 42.
[118] *Edwards*, *supra* note 105 at para 61 [Emphasis added].

compliance with s 725 of the *Code*. While the jurisprudence provides no *clear* definition of when bad acts committed by an offender can be treated as an aggravating circumstance of an offence, as opposed to requiring resort to s 725, a close examination of the case law allows the appropriate principles to be extracted.

67. The most significant guidance is provided by ***Larche***, which imposed two fairly clear limits. First, Fish J screened out facts that are too far removed to warrant consideration as an aggravating circumstance under any provision, noting that "facts... that have occurred in various locations or at different times cannot properly be said to form part of the transaction covered by the charge for which the offender is to be sentenced."[119] Second, the Court included *within* the scope of s 725(1)(c), "... facts [that] bear so close a connection to the offence charged that they form part of the circumstances surrounding its commission".[120]

68. What remains must be the small number of facts that can be considered as aggravating *without* resort to s 725(1)(c). Though ***Larche*** did not define these precisely, as it was not necessary to do so, they must involve something *more* than just facts that are closely connected by time and place to the offence for which a conviction is imposed. An analysis of the jurisprudence applying s 725 reinforces how the courts must resist construing one allegedly wrongful act as simply being an "aggravating feature" of another, confirming that to qualify as an aggravating circumstance of the convicted offence, there must be a *direct* connection between the act in question and an element of the offence that bears upon either the gravity of the offence or the degree of responsibility of the offender. If this cannot be established, the facts in question are only punishable through resort to s 725, or via a separate criminal charge.

69. An excellent example of this point is ***R v Blok-Andersen***,[121] where the accused was convicted of committing an offence (drug trafficking) for the benefit of, at the direction of, or in association with a criminal organization, contrary to s 467.12. During sentencing, the Crown specifically requested that the trial judge treat as aggravating the fact that the accused was the directing mind of the organization during the time period of the offence, notwithstanding that he

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[119] *Larche*, *supra* note 104 at para 55.
[120] *Ibid*.
[121] *R v Blok-Andersen*, 2016 NLCA 9, (2016), 27 CR (7th) 166. See also *R c O'Keefe*, 2016 QCCA 1541; *R c Desnoyers*, 2012 QCCA 2105.

was never charged with instructing others to commit an offence under section 467.13, a more serious offence. Advocating an approach reminiscent of that taken by the Court of Appeal in this case, the Crown argued that s 725 had no relevance, "as the question of leadership of and membership in the organization *is simply a part of the factual context for the charge under section 467.12*".[122] The Newfoundland and Labrador Court of Appeal disagreed, holding that "[w]here the Crown chooses to charge one offence, in this case, acting for the benefit of an organization, the incorporation of facts proving another of the three [criminal organization] offences engages the operation of section 725**(**1)(c).”[123]

70. The decision conforms precisely to the approach suggested above. Regardless of how morally culpable it might be, leading the criminal organization was not an element of the offence for which the offender was convicted and did not assist in resolving his culpability of acting "for the benefit of, at the direction of, or in association with a criminal organization". Despite being intricately connected to the offence for which he was convicted, the facts in question constituted a separate offence. Similarly, in ***R v Cardinal***,[124] the offender pleaded guilty to two crimes. In deciding that resort to s 725 was essential to rely upon aggravated features raised by the Crown, reliance was placed on the fact that the "other facts closely intertwined... *do not constitute essential legal elements of the two crimes and therefore are in no way needed to justify [the offender's] two pleas*." Since they did not impact directly upon an essential element of an offence for which the offender was convicted, reliance upon s 725 was mandatory.

71. The same approach is applied in the jurisprudence resolving cases where resort to section 725 has been found *not* to be required. In ***R c Scardocchio***,[125] the offender was found guilty of conspiracy to traffic and conspiracy to possess marijuana for the purpose of export, as well as committing those acts for or under the direction of a criminal organization. During sentencing, it was established that the conspiracy actually resulted in the export of large quantities of marijuana. The offender contended on appeal that the judge had erred in relying upon the fact of export because he had not been convicted of this offence, and s 725 had not been complied with.

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[122] *Ibid* at para 30 [Emphasis added].
[123] *Ibid* at para 31.
[124] *R v Cardinal*, 2011 ABPC 146. See similarly *R v Fredriksson*, 2015 ABPC 81; *R v RC*, 2016 ONCJ 605.
[125] *R c Scardocchio*, 2010 QCCA 2362.

The Court of Appeal disagreed, recognizing that completion of the export was directly relevant to the moral culpability for the conspiracy to possess for the purposes of export, as the offences were virtually identical in scope. As such, resort to s 725 was not required.[126]

72. In ***R v Ross***,[127] the accused was convicted of 24 counts of importing restricted firearms. As part of the case against him, evidence was tendered of two instances from the previous month where the offender had imported firearms of this type, once where he was stopped at an export check at the U.S. border and warned about his conduct. The offender argued that this conduct could only be considered under s 725, but the trial judge disagreed, noting that "the previous transactions are relevant factors to consider in determining a fit sentence... The evidence is relevant to show the accused's continuing course of conduct which affects his moral culpability with respect to the offences of which he has now been convicted.[128]" The decision was upheld on appeal, where the Court of Appeal for British Columbia noted that "the fact that he was warned that he was under investigation and continued to commit these offences is very telling of his moral blameworthiness and prospects for rehabilitation.[129]"

73. ***Ross*** demonstrates how related "offending" can constitute an aggravating circumstance, but *only* where the act committed bears directly on the responsibility for the offence for which a conviction has been entered. In ***Ross***, the evidence of prior related offending was directly relevant to understanding the offender's motivation for the offences for which he was convicted, and especially how he proceeded in spite of a clear warning from law enforcement not to continue.

74. Ultimately, the jurisprudence reveals that reliance upon s 718.2(a) as a means of punishing an offender for aggravating circumstances of an offence is *tightly confined* to ensure that the accused received the protection intended by s 725. Unless the facts are directly connected to an element of the offence and provide insight into the offender's degree of responsibility for the offending having regard to the nature of the offence, they must be considered *separately*. The facts relied upon by the Court of Appeal in this case do not come close to qualifying as being a part of s 255(3.2), the only offence for which the Appellant was convicted.

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[126] *Ibid* at para 8.
[127] *R v Ross*, 2008 BCSC 854 affirmed 2010 BCCA 314, (2010), 289 BCAC 86.
[128] *Ibid* at para 14 [BCSC].
[129] *Ibid* at para 13 [BCCA].

(iii) Section 725 was the only way of using the Appellant's driving as an aggravating feature

75. Driving while distracted is *not* a component of failing to provide a breath sample knowing that a person has died as a result of an accident, but merely a predicate circumstance. The offence of failing to provide a breath sample is committed a considerable time after the driving is completed and is not premised on the manner in which one drove. Section 255(3.2) imposes no culpability whatsoever for the act of driving, and can be committed even if a person operates his or her vehicle in a perfectly legal and responsible manner. As this case demonstrates, it can be committed in the absence of impairment. The focus of the offence is the *refusal to comply*, and it includes an augmented penalty structure because it requires a specifically culpable mental state that is not present in s 254(5). That impaired and refusal offences are distinct is further proven by the fact that an offender cannot plead *res judicata* when charged with failure to provide a breath sample and convicted for impaired driving arising from the same incident.[130]

76. As the Court of Appeal recognized, the offence's purpose "is to deter impaired driving... indirectly by removing the incentive created by the fact that a refusal to provide a breath sample carried a significantly lower maximum penalty than the offence of impaired driving causing death".[131] In other words, it deters impaired drivers and ensures compliance with the breath sample scheme. *Nothing* about the offence is intended to punish distracted drivers who may be driving in a less than optimal manner. As Doherty JA noted in describing the differences between impaired driving and dangerous driving in ***R v Ramage***:[132]

> An impaired driving charge focuses on an accused's ability to operate a motor vehicle or, more specifically, on whether that ability was impaired by the consumption of alcohol or some other drug. A dangerous driving charge focuses on the manner in which the accused drove and, in particular, whether it presented a danger to the public... Both impaired driving and dangerous driving address road safety, a pressing societal concern. They do so, however, by focussing on different dangers posed to road safety. Impaired driving looks to the driver's ability to operate the vehicle, while dangerous driving looks to the manner in which the driver actually operated the vehicle.

77. In an attempt to bring the Appellant's driving within the scope of s 255(3.2), the Court stated that "[s]ection 255(3.2) is not to be interpreted in such a way that no moral aspect attaches to the facts of the accident and resulting death, or to mean that the accident and death are relevant

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[130] *R v Schilbe* (1976), 30 CCC (2d) 113 (Ont CA); *R v Blizzard*, 2013 NBPC 27.
[131] Court of Appeal Decision at para 94 (Tab 2 of A.R.).
[132] *R v Ramage*, 2010 ONCA 488, (2010), 257 CCC (3d) 261 at para 64.

only to the extent that they occurred."[133] The Court added that the moral culpability had to reflect upon the accident, noting that "if the moral culpability arising from the commission of this offence did not include a reflection of accident and death, the simple offence of failing to provide a breath sample, absent accident or death, found in s 254(5) would have been sufficient.[134]"

78. Both comments misunderstand how an offender's degree of responsibility is measured for this offence. One's culpability is not higher because a death has been caused by negligence or otherwise, because such negligence is almost always a part of serious motor vehicle accidents resulting in injury or death. To find greater moral culpability in that case would be to criminalize negligent driving by use of the refusal offence. Rather, the true gravamen of s 255(3.2) is the intentional refusal to provide one's breath or blood knowing that one's actions have caused a death, when there exists a reasonable belief of impaired driving, or a reasonable suspicion that there is alcohol in the driver's body. It is this knowledge of a police officer's belief – rather than the pattern of driving – that imposes a higher degree of moral responsibility to comply and that normally provides good reason for imposing a significant penalty. Of course, where the driving *is* criminally culpable in its own right, the Crown is free to lay an additional charge or attempt to resort to s 725.

(iv) Section 725 cannot be applied to increase punishment in this case

79. Although s 725 establishes the exclusive procedure by which a court may punish an offender for crimes for which he or she has not been charged, it has clear limitations. In this case, though it is submitted that s 725 was the only way by which the Appellant could have been punished for his acts of driving, its requirements were not satisfied.

80. First, s 725(1)(c) requires proof that aggravating facts "could constitute the basis for a separate charge", which must mean a *criminal* charge. This conclusion flows logically from this Court's decision in ***Larche***, which held that s 725(1)(c) could not be relied upon by judges to "punish for crimes entirely committed abroad and thus to arrogate unto themselves an extraterritorial jurisdiction not vested in them by Parliament."[135] If extra-territorial offending cannot be punished, how can non-criminal offending? Section 725(2), which requires that "no

[133] Court of Appeal Decision at para 94 (Tab 2 of A.R.).
[134] *Ibid*.
[135] *Ibid*.

further proceedings... be taken with respect to any offence described" by a judge utilizing section 725(1)(c) supports this approach as well. The Ontario Court of Appeal has also recognized this fact, refusing to apply s 725 in ***R v CK***,[136] noting that "... absent a finding that the behavior towards [a Crown witness] *was criminal, that conduct should not have been treated as an aggravating factor*." Even if the Appellant's actions constituted reckless or distracted driving contrary to Alberta law, the Court of Appeal had no jurisdiction to punish for this. Since Mr. Suter was charged with a criminal offence, he could not be sentenced for a provincial offence.[137]

81. Second, the Appellant did not receive proper notice of the allegations, as s 725 requires. The Appellant pleaded guilty on the premise that he was admitting to having refused to provide a breath sample. There was no indication that this plea encompassed an allegation of distracted driving, and had that "offence" been alleged, additional evidence –including expert evidence – could certainly have been called to refute it.[138] The Crown's case on sentencing was premised exclusively on establishing that Mr. Suter was impaired by alcohol, rather than angry or distracted, and *all* of the facts cited as being aggravating were tendered by the defence. In effect, to use Fish J's words from ***Larche***, Mr. Suter's "plea of guilt on one charge [was] hijacked for the purpose of punishing that accused for unanticipated allegations of wrongdoing."[139]

(v) The application of section 725 is discretionary, and the trial judge did not err in failing to consider these acts as being aggravating

82. Two other points explain why reliance on s 725 would have been inappropriate in this case. First, even assuming that the application of s 725 was possible, it cannot justify the increased sentence imposed by the Court of Appeal. The maximum punishment for the offence of careless or distracted driving in Alberta is a $2000 fine and 6 months imprisonment, and the limitation period for laying these provincial offences expired six months after the event.[140] There is simply no support for using either of these notional offences to impose a penalty

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[136] *R v CK*, 2015 ONCA 747, (2015), 382 OAC 47 at para 53 [Emphasis added].
[137] It is not possible to combine provincial and criminal charges: *R v Sciascia*, 2016 ONCA 411.
[138] *R v Truong*, 2013 ABCA 373, (2013), 304 CCC (3d) 303 at para 8.
[139] *Larche*, *supra* note 104 at para 41. See similarly *R v Gavin*, 2009 QCCA 1, [2009] QJ No. 2 at paras 32-33.
[140] *Provincial Offences Procedure Act*, RSA 2000, c P-34, s 4 (limitation period), 7(1)(punishment). See also *Traffic Safety Act*, RSA 2000, c T-6, ss 115(1) to 115(4).

"approach[ing] the moral culpability of having chosen to drive... while... impaired by alcohol,"[141] as the Court of Appeal suggested. In a manner not dissimilar to what occurred in ***R v McDonnell***,[142] the Court of Appeal "... has effectively created an offence, at least for the purposes of sentencing."

83. Additionally, the Court of Appeal concluded that Anderson ACJ made an "error in principle" in failing to consider the Appellant's "choice to drive while distracted in the context of his health and pre-existing alcohol problems". Even if s 725 were to permit punishment for these non-criminal acts, it cannot be said that the sentencing judge erred in principle, as the application of the section is discretionary – not mandatory.[143] The Crown's theory was premised on the fact that Mr. Suter was impaired, not distracted or careless. At no point were the factors relied upon by the Court of Appeal ever raised by the Crown. In the absence of a Crown request to consider such factors, and proof beyond a reasonable doubt of their influence, the sentencing judge could not be said to have erred in exercising the discretion *not* to rely upon s 725 in the circumstances.

84. The Court of Appeal's decision ignores and dangerously undermines the protections enshrined in s 725 of the *Code* and the need for punishment to be proportionate, effectively holding that notwithstanding proof of a lack of impairment by alcohol or drugs, the offender who acts in a panicked or even careless manner and refuses to provide a breath sample is as culpable as a driver impaired by alcohol who causes death.[144] This ignores the reality that most accidents that attract no criminal liability whatsoever are the result of some level of negligence or distraction. Ultimately, the Court of Appeal punished Mr. Suter for his manner of driving and *not* for his failure to provide a breath sample – the only crime for which he was convicted.

GROUND III: Was the sentencing judge properly entitled to consider the severe injuries and public vitriol suffered by the Appellant and his wife as victims of vigilante justice as a collateral consequence relevant to determining the fitness of his sentence?

85. At sentencing the Crown *conceded*, and Anderson ACJ agreed, that it was possible to "tak[e] into account, to a more limited extent, the extreme vitriol, public scorn and threats... as

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[141] Court of Appeal Decision at para 100 (Tab 2 of A.R.).
[142] *R v McDonnell*, [1997] 1 SCR 948, 145 DLR (4th) 577 at para 33.
[143] *Larche*, *supra* note 104 at para 32. See also *Blok-Andersen*, *supra* note 118 at paras 32-33.
[144] Court of Appeal Decision at para 99 (Tab 2 of A.R.).

well as the violent vigilante actions against both Mr. and Mrs. Suter."[145] The Crown did not appeal this conclusion, and it was never discussed during oral argument on appeal. The Court of Appeal nonetheless discounted the impact of the vigilante violence on Mr. Suter's sentence exclusively on the basis that it did not "emanate from state misconduct."[146]

86. This conclusion does not accord with the well-established proposition that a collateral consequence of a conviction is a relevant matter to consider in resolving the overall impact and fairness of a particular sentence upon the offender. As this Court noted in ***R v Pham***,[147] suffering such consequences is not "strictly speaking, [an] aggravating or mitigating facto[r], since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender". Nonetheless, "they may be taken into account in sentence as personal circumstances of the offender... and their relevance flows from the application of the principles of individualization and parity.[148]"

87. The focus on parity allows judges to consider the overall punishment suffered by a person for an offence, including an assessment of important collateral consequences that have been endured or may be endured after sentence is imposed. As Healy J (now Healy JA) suggested in ***R v Stanberry***,[149] "collateral consequences ... magnify the severity of the sentence and for this reason they must be taken into account". In ***R v Bell***,[150] Bryk J similarly noted in taking into account the offender's loss of employment as a reason to reduce an otherwise fit sentence that "it is not unusual for a court to take into consideration factors which would otherwise render a sentence harsher than was intended. Considerations such as poor health, age, or the threat of deportation frequently persuade courts to vary sentences so as to avoid those results."

88. Though ***Pham*** spoke of the collateral consequences of a *sentence*, this was clearly intended as inclusive, rather than exclusive, as is evident when the decision is examined in full. The Court referred with approval to an excerpt from a text authored by Professor Manson, which

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[145] Provincial Court Decision at para 81 (Tab 1 of A.R.).
[146] Court of Appeal Decision at para 106 (Tab 2 of A.R.).
[147] *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 at para 11.
[148] *Ibid*.
[149] *R v Stanberry*, 2015 QCCQ 1097, (2015), 18 CR (7th) 87 at para 20.
[150] *R v Bell*, 2013 MBQB 80 at para 88.

notes that courts often consider "physical, emotional, social or financial consequences" that are suffered "as a result of the commission of an offence."[151]

89. This position is also supported by ***R v Bunn***,[152] where this Court accepted that the ruin and humiliation brought down by the accused upon himself and his family, together with the loss of his professional status – all matters that were a result of the offending, and not the sentence – were relevant in assessing the need for denunciation and deterrence. It follows that the sentencing judge has the ability to rely on such factors so long as the broader principles of sentencing are respected. As Wagner J noted in ***Pham***:

> The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.[153]

90. The relevant collateral consequences of a conviction are not restricted to effects that are caused by the state, as the Court of Appeal suggests. The consequences suffered by the accused in ***Bunn*** – which were not state imposed – offer one leading example to the contrary, and this decision does not stand alone. The doctrine has been extended to include a range of impacts, including: public embarrassment and humiliation suffered by the offender,[154] and other relevant emotional, social[155] and financial consequences.[156] In ***R v Stanberry***,[157] Healy J (now Healy JA) noted that "[t]here is no list of collateral consequences that may be taken into consideration and there is no calculus to determine what they are worth in the determination of a fit sentence... [The primary restraint is that] collateral consequences, when taken into account, do not allow a sentencing judge to impose a disproportionate sentence."

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[151] Allan Manson, *The Law of Sentencing* (Irwin, 2001) at 136-37 [Emphasis added].
[152] *R v Bunn*, 2000 SCC 9 at para 23, [2000] 1 SCR 183. See also *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.
[153] *R v Pham*, *supra* note 146 at para 14.
[154] *R v Bunn*, *supra* note 152 at para 23.
[155] *R v Ellis*, 2013 ONCA 739, per Laskin J.A., dissenting (loss of position in public life); *R v Stanberry*, *supra* note 148; *R v McDonald*, 2016 NUCA 4 (separation from children and home).
[156] *R v Bell*, *supra* note 149 (loss of employment); *R v Lennox*, 2013 BCPC 273 (loss of income owing to notoriety).
[157] *R v Stanberry*, *supra* note 148 at para 21.

91. Taking into account the fact that an offender has been subjected to painful vigilante justice fits in comfortably with these principles. In ***Re Moses Japonia Mamarika v R***, the Federal Court of Australia adopted this approach, reducing a manslaughter sentence significantly because "the trial judge had failed to pay sufficient regard to the traditional tribal punishment meted out to the appellant immediately after the killing."[158] In that case, the offender had been attacked by a gang of men and brutally stabbed with spears.

92. Finally, in addition to ensuring that Mr. Suter's sentence is fair when compared to others who committed a similar gravity offence, there is another important reason for taking his extra-judicial suffering into account in sentencing: to help discourage the type of action that took place in this case. Vigilantism represents an affront to the rule of law and the administration of justice, as acts of this kind take the decision-making and punishment process out of the hands of objective judges and put them into the hands of the mob. It can also result in the targeting of innocent people. Canadian sentencing courts have understandably taken a hard stance against vigilantes when they are sentenced.[159]

93. A sentencing policy permitting judges to assess the fact that an offender has been subjected to vigilante justice would serve an essential communicative function – sending a strong message to the public that unbridled vengeance will not be tolerated. As Lamer CJ wrote in ***R v CAM***, "in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instils the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*."[160] In reviewing Mr. Suter's sentence, it is important to vindicate society's collective interest in ensuring that all members of society follow the law. After all, as Wagner J noted in ***R v Pham***, "the fundamental purpose of sentencing... is to contribute to respect for the law and the maintenance of a just, peaceful and *safe society*".[161] To accomplish this goal, the courts must expressly disassociate themselves from all forms of vigilante justice at every opportunity.

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[158] *Re Moses Japonia Mamarika v R*, [1982] FCA 94, (1982) 63 FLR 202.
[159] *R v Fattah*, 2009 ABCA 229, (2009) 460 AR 262 at para 14; *R v Hanson*, 2016 ONSC 3583, [2016] OJ No 2871; *R v Vollrath*, 2016 ABPC 258, [2016] AJ No 1168.
[160] *R v C.A.M.*,[1996] 1 SCR 500, 1996 CanLII 230 at para 81 (SCC).
[161] *Pham*, *supra* note 146, at para 10 [Emphasis added].

94. The sentencing judge considered the effects of the vigilante violence on Mr. Suter, as he was entitled to do, and made specific note of its limited impact, consistent with the jurisprudence. His finding with respect to its impact on the overall sentence should not have been disturbed.

GROUND IV: Did the Court of Appeal err in raising new grounds of appeal favouring the Crown without adequate notice to the Appellant?

95. Regardless of their substantive merit, two of the grounds evaluated above require special attention from this Court due to the manner in which they arose. Without proper notice, the Court of Appeal of its own motion overturned the sentence imposed at first instance by determining that Mr. Suter's manner of driving should be treated as an aggravating circumstance,[162] and his having suffered vigilante violence should *not* be recognized as a mitigating circumstance.[163] In so doing, the Court of Appeal ignored the legal requirements for raising new grounds of appeal. Owing to this important breach of procedural fairness these factors cannot provide a reason for altering the sentence originally imposed by the sentencing judge.

96. This Court's recent decision in ***R v Mian*** established limits upon an appellate court's ability to invite submissions on an issue neither party has raised, or otherwise exercise its discretion to consider a new issue. Where an appellate court wishes to invoke new issues that were not initiated by the parties, three questions must be considered: (1) is the issue "new"? (2) if so, should the new issue be assessed at all? and (3) how must it be raised to ensure fairness?

97. The Court of Appeal failed to comply with the ***Mian*** requirements. First, the issues were unquestionably "new", in that they were "legally and factually distinct from the grounds of appeal raised by the parties and cannot reasonably be said to stem from the issues as framed by the parties."[164] The Crown's grounds of appeal, as well as its factum, made no mention of distracted driving or vigilante violence. Moreover, they cannot constitute "components of an existing issue", because there was no need to consider either point in order to resolve whether the errors raised by the Crown improperly affected sentencing. The entirety of the Crown appeal was premised on two disputed points about matters the sentencing judge had found to be *mitigating*: (1) the

[162] Court of Appeal Decision at para 100 (Tab 2 of A.R.).
[163] Court of Appeal Decision at para 106 (Tab 2 of A.R.).
[164] Court of Appeal Decision at para. 30 (Tab 2 of A.R.).

absence of impairment; and (2) the mistake of law. Nonetheless, the Court of Appeal chose to raise the issue of distracted driving, which it construed as an *aggravating* circumstance.

98. The decision to reverse the sentencing judge's position on vigilante justice is particularly alarming because the Crown *conceded* at trial that this was a mitigating factor,[165] and did not alter its position on appeal. The first notice of any possible indication to the contrary came when the Court of Appeal released its judgment on appeal. It was precisely the type of matter that "require[d] the parties be given notice of the issue in order to make informed submissions".[166]

99. Second, the new issues should not have been raised as doing so is only required in "rare circumstances... when failing to do so would risk an injustice."[167] It is important that courts respect the strategic choices made by parties in framing the issues, and assuming the Court of Appeal was correct in finding an error with respect to the points that had been raised by the Crown, it was possible to sentence Mr. Suter on the existing record without raising a new aggravating circumstance or disregarding a factor accepted by the Crown to be mitigating. It is critical that "courts [n]ot be seen to go in search of a wrong to right."[168]

100. The Court of Appeal also neglected to consider whether there was a sufficient basis in the record to resolve the issue, especially as it relied upon Mr. Suter's head injury, history of alcohol consumption and single episode of hallucinations to be important aspects of what purportedly aggravated his responsibility. But there was no evidence to establish that any of these matters contributed to the cause of the accident, and they were not canvassed at the sentence hearing. Relying upon these facts in the circumstances ignored the warning of this Court in ***Performance Industries Ltd. v Sylvan Golf & Tennis Club Ltd***,[169] to the effect that:

> There is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited.

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[165] Sentencing Transcript, Vol. 2, 391/14-392/14 (Tab 20 of A.R.).
[166] *Mian*, *supra* note 1 at para 35.
[167] *Ibid* at para 41.
[168] *Ibid* at para. 42. See also, *R v Martin*, 2016 QCCA 489 at para 4.
[169] *Performance Industries Ltd. v Sylvan Golf & Tennis Club Ltd*, 2002 SCC 19, [2002] 1 SCR 678 at para 32. See also *R v ERC*, 2016 MBCA 74, [2016] MJ No 207 at para 19.

101. Finally, even assuming the new issues could have been raised, this was not accomplished in a manner that was fair to Mr. Suter. This is clearest with respect to the point on vigilante justice, which was not mentioned in the Crown's grounds of appeal or its factum and was not raised by the Court of Appeal prior to or during the appeal hearing. No opportunity was ever provided to the parties to provide submissions on this point.

102. The distracted driving issue was first brought to the attention of the parties during questioning as the appeal hearing came to a close, just after defence counsel finished oral submissions as respondent.[170] In its reasons for judgment, the Court of Appeal acknowledged that the issue had been raised by the panel, noting that neither counsel sought an adjournment to provide further submissions,[171] but omitting the fact that in raising the issue, Bielby JA implied its trivial significance, suggesting to defence counsel that "you certainly don't have to respond" to the question.[172] Furthermore, there was no invitation to provide submissions in written or oral form at a later date. Counsel did respond briefly by explaining why the Appellant's manner of driving should not have an effect on sentence, centering his comments on the fact that the question from Bielby JA misconstrued the evidence, and that the only source of the Appellant's distraction, being his wife's comment suggesting a divorce, should not be considered an aggravating factor in any event.[173] The Crown in response suggested that she "had thought about that as well", and made extremely cursory submissions to the effect that "you can consider that there is some kind of culpability... in the sense that this is not normal driving."[174] Nonetheless, counsel had no way of knowing that this single and discreet question could have led to the Court ruling that the Appellant's moral culpability by being impaired by distraction would "approach the moral culpability" of a driver impaired by alcohol.[175]

103. In proceeding in this manner, the Court of Appeal erred by failing to indicate the *significance* of the issue in a way that allowed the parties to make proper submissions that included some discussion of the legal support, or lack thereof, for the proposition being made. In

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[170] Appeal Argument Transcript, June 21, 2016, 45/37 (Tab 9 of A.R.).
[171] Court of Appeal Decision at para 82 (Tab 2 of A.R.).
[172] Appeal Argument Transcript, 46/2 (Tab 9 of A.R.).
[173] Appeal Argument Transcript, 46/16-47/13 (Tab 9 of A.R.).
[174] Appeal Argument Transcript, June 21, 2016, 47/35-48/9 (Tab 9 of A.R.).
[175] Court of Appeal Decision at para 99 (Tab 2 of A.R.).

Mian, this Court held that an appellate court must "make the parties aware that it has discerned a potential issue and ensure that they are *sufficiently informed so they may prepare and respond.*"[176] Notice must "contain enough information to allow the parties to respond to the new issue" and the adequacy of that notice will be based on the circumstances, namely the "complexity of the issue and the obviousness of the issue on the face of the record."[177] The *audi alteram partem* principle requires this to be *informed* notice. If the panel had determined after the oral hearing that the issue was significant, it should have requested further submissions as contemplated in ***Mian***.[178] This was never done and it resulted in prejudice to Mr. Suter.

PART IV: COSTS

104. The Appellant does not seek costs, and makes no submissions as to costs.

PART V: NATURE OF THE ORDER REQUESTED

105. The Appellant respectfully requests that this Appeal be allowed, that the decision of the Court of Appeal of Alberta be set aside, and that the original sentence of four months imprisonment and a 30 month driving prohibition be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Edmonton, Alberta this ____ day of April 2017.

SIGNED BY:

_____

DINO BOTTOS
Counsel for the Appellant

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[176] *Mian*, *supra* note 1 at para 54 [Emphasis added].
[177] *Ibid* at para 60.
[178] *Ibid* at para 55. See also *R v Laliberté*, 2015 QCCA 1633 at para 115.

PART VI: TABLE OF AUTHORITIES

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