File Number: 37247

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

RICHARD ALAN SUTER

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE RESPONDENT

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case sadly involves the tragic death of Geo Mounsef, a greatly loved two and a half year old boy - son of George Mounsef and Sage Morin. The Mounsef family was sitting on the patio of a restaurant behind a glass partition. The Appellant, having consumed alcohol, drove up to the restaurant and accelerated his SUV over the curb, right through the glass partition and onto the patio. He drove directly over the little boy, dragged him underneath the vehicle and pinned him against the wall of the restaurant for about 30 seconds. Geo died a short while later from multiple blunt force injuries. The Appellant also injured George Mounsef and Sage Morin, as well as one of the servers at the restaurant. Geo's five-month-old baby brother, who was strapped in his portable car seat at the time of the collision, was also struck but escaped injury.

2. Many witnesses believed the Appellant was impaired by alcohol because they observed numerous indicia of impairment. Police officers who attended the scene formed reasonable and probable grounds that the Appellant's ability to operate a motor vehicle was impaired by alcohol and demanded that he provide a breath sample. Two police officers told him it was an offence to refuse to provide a breath sample. As well, a *Brydges* lawyer told him he would be charged if he refused to blow, although the lawyer incorrectly advised as to the applicable maximum penalties. The Sentencing Judge found that the lawyer explicitly told the Appellant not to blow. Despite knowing he had killed the little boy and knowing or being willfully blind about whether he would be committing a crime, the Appellant refused to provide a breath sample. Not once throughout the investigation did he offer to do so, not even on a qualified basis, such as offering to provide a breath sample after speaking to a lawyer.

3. The Appellant was charged with impaired driving causing death, three counts of impaired driving causing bodily harm, and refusing to provide a breath sample knowing that his operation of a motor vehicle caused a collision that resulted in death. After a preliminary inquiry, the Appellant pled guilty to refusing to provide a breath sample knowing he had caused a collision resulting in death. The remaining counts were withdrawn.

4. Notwithstanding the significant evidence of impairment, the Sentencing Judge found that the Appellant had proven on a balance of probabilities that he was not impaired, and that the collision was caused by a "non-impaired driving error". After finding that the usual range of four

to six years imprisonment for impaired driving causing death was applicable, he reduced the sentence to four months imprisonment plus a 30 month driving prohibition. He justified the drastic reduction on the basis that the Appellant was not impaired at the time of the collision and had refused as a result of erroneous legal advice. He also considered it mitigating to "a more limited extent" that the Appellant had suffered a violent vigilante attack and public vitriol as a result of this incident.

5. The Alberta Court of Appeal allowed a Crown appeal from sentence and increased the sentence to 26 months imprisonment less the four months already served. The Court of Appeal found that the Sentencing Judge erred in treating the erroneous legal advice as mitigating because the Appellant did not honestly believe he was acting lawfully. The Court of Appeal also found the Sentencing Judge erred in failing to consider the Appellant's distracted driving as aggravating, but agreed the lack of impairment was mitigating.

6. The Appellant also appealed his sentence and argued for a non-custodial sentence and a 12 month driving prohibition. The Court of Appeal found no merit to his arguments and dismissed his appeal.

7. The Court of Appeal correctly concluded that a mistake of law does not mitigate an offender's sentence unless he or she honestly believed they were abiding by the law. The Court of Appeal found the Sentencing Judge erred in principle by failing to consider whether the Appellant held such a belief, noting he did not expressly or implicitly find the Appellant honestly believed he was following the law when he refused to provide a breath sample. They also held the Sentencing Judge *could* not have found that the Appellant held such an honest belief.

8. The Court of Appeal correctly identified other circumstances of the collision as aggravating. Since the offence pursuant to s. 255(3.2) of the *Criminal Code* requires the accused to have "caused" the accident, the Court properly considered factual causation in the context of the collision.

9. The Court of Appeal properly allowed the Crown appeal and increased the sentence to 26 months imprisonment. Given the egregious circumstances, a 26 month sentence was restrained and very lenient. The sentence could have been greater. The Court of Appeal committed no errors that would justify a sentence lower than 26 months. The appeal should be dismissed.

Statement of Facts

10. The Appellant's recitation of the facts is incomplete. The Respondent relies upon the following additional facts:

11. After the Appellant pled guilty, the Court held a sentencing hearing to resolve several factual disputes. An Agreed Statement of Facts was filed at the sentencing hearing, with attached appendices and a transcript of the preliminary hearing. The Court also reviewed video evidence, expert reports, and heard *viva voce* expert testimony along with evidence from the Appellant and his wife. The Court read "very passionate and articulate" victim impact statements from about 25 relatives and friends. The following facts are taken from all of these sources.

12. On May 19, 2013, at 7:37 p.m., George Mounsef, his girlfriend Sage Morin, and their two young children, Geo and Quentin, were sitting on the patio of Ric's Grill restaurant. The patio extended onto what would otherwise be a sidewalk and is separated from the parking lot by a glass partition.[1]

13. Just before 7:37 p.m., the Appellant, who was with his wife, drove his SUV partially into a handicapped parking stall that was facing Ric's Grill patio, and stopped momentarily a few yards back from the glass partition. Soon thereafter he placed his foot on the accelerator and accelerated the vehicle rapidly through the handicapped parking stall, over the curb, through the glass barrier, and straight onto the Mounsef family table.[2]

14. The Appellant drove directly over Geo Mounsef, dragging him under the vehicle and pinning him against the outer restaurant wall. Geo remained trapped under the SUV for about 30 seconds, at which time the vehicle was either reversed by the Appellant several feet, or was pushed back by others at the scene.[3] A medical doctor who happened to be a patron of the restaurant observed the boy lying in a pool of blood around his head and described him as looking "squashed".[4] Geo died a short while later as a result of multiple blunt force trauma injuries.[5]

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[1] ***R v Suter***, 2015 ABPC 269, para 9, ["Provincial Court Decision"] (Tab 1 of Appellant's Record ("A.R.")).
[2] Provincial Court Decision, para 11 (Tab 1 of A.R.); Agreed Statement of Facts ["ASF"], para 30, (Tab 22 of A.R.).
[3] Provincial Court Decision, para 16 (Tab 1 of A.R.); ASF, para 31 (Tab 22 of A.R.).
[4] *Evidence of Dr. Lucille LaLonde*, ASF, paras 125, 126 (Tab 22 of A.R.).
[5] ASF, para 32 (Tab 22 of A.R.).

15. The SUV struck other members of the Mounsef family as well as Natasha Prasad, a server who had been standing by their table.[6] Sage Morin was thrown out of her chair a few feet away. She suffered a swollen wrist, regular aches and pains associated with being hit by a car, and had glass embedded throughout her body that caused her long-lasting discomfort to the bottom of her feet.[7] George Mounsef was knocked out of his chair and onto the ground. He suffered a cracked rib, lacerations to his leg, foot, and arm, and neck and back pain.[8] Natasha Prasad was hit by a table and knocked to the ground. She suffered an inflamed knee cap and tendon tears on the right knee as a result.[9] Quentin Mounsef was in his portable car seat at the time. The collision caused his car seat to flip over, but fortunately he was not injured.[10]

16. The Sentencing Judge accepted the testimony of the Appellant and his wife regarding the cause of the SUV suddenly lurching forward. The Appellant and Mrs. Suter had been married for many years but in the days before, there were tensions between them. Sometime during the afternoon, tensions had eased. They had gone out for dinner at Chili's Restaurant to try to further repair their relationship. However, their interactions became tense again when the Appellant insisted on leaving and going elsewhere after their food was served cold. Although the Appellant was not rude to the servers about it, Mrs. Suter was angry about his reaction.[11] Both the Appellant and his wife estimated the drive to Ric's Grill to take seven to ten minutes.[12] During the entire drive they argued.[13] The Sentencing Judge found that the Appellant started to pull into the parking stall next to Ric's Grill but stopped momentarily because it was a handicap stall. Before backing up, while they were arguing, Mrs. Suter said something like, "Maybe we should just get a divorce." She noticed they were inching forward and screamed something like, "We're moving" or "the car's moving forward." The Appellant was not aware that his foot was not on the brake when the vehicle was rolling forward. The Appellant pressed on the pedal but his foot had come off the brake and was on the gas. The vehicle lurched forward and, consistent with

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[6] Provincial Court Decision, para 12 (Tab 1 of A.R.).
[7] *Evidence of Sage Morin*, ASF, paras. 35 and 36 (Tab 22 of A.R.).
[8] *Evidence of George Mounsef*, ASF, paras. 48 and 49 (Tab 22 of A.R.).
[9] *Evidence of Natasha Prasad*, ASF, paras. 84 and 90 (Tab 22 of A.R.).
[10] *Evidence of George Mounsef*, ASF, paras. 50, 51 (Tab 22 of A.R.); *Evidence of Dr. Lucille Lalonde*, ASF, para.128 (Tab 22 of A.R.).
[11] Provincial Court Decision, paras 13 and 14 (Tab 1 of A.R.).
[12] *Evidence of the Appellant*, p. 142/18 (Tab 2 of R.R.); *Evidence of Gayska Suter*, p. 287/19 (Tab 3 of R.R.).
[13] *Evidence of the Appellant*, p. 142/24 (Tab 2 of R.R.); *Evidence of Gayska Suter*, p. 287/21-27 (Tab 3 of R.R.).

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.[14]

17. The Appellant when arrested by police, spoke to a *Brydges* lawyer over the phone, and then refused to provide a sample of his breath. At the time he refused, he knew he had killed Geo Mounsef.[15] He was charged with refusing to provide a breath sample after causing a collision resulting in death pursuant to s. 255(3.2) of the *Criminal Code*[16] and impaired driving causing death and bodily harm. He subsequently provided a statement to the police.

18. The main disagreements with respect to the facts were in respect to: 1) whether the Appellant was impaired by alcohol; and 2) what legal advice the Appellant received from the *Brydges* lawyer.

Evidence regarding impairment

19. All civilian witnesses on scene who testified, (eleven in total) believed the Appellant was impaired by alcohol, other than a cardiologist who examined the Appellant at the scene who offered no opinion on the Appellant's sobriety but saw him stagger and need support when being held up by police. Many witnesses observed numerous indicia of impairment such as the smell of alcohol,[17] glossy eyes,[18] bloodshot eyes,[19] redness in the face,[20] incoherent speech,[21] mumbling,[22] the Appellant trying to say something but "there wasn't any words or coherent sentences coming out,"[23] "… a strong wind could probably push him over…"[24], when pushed non-forcefully the

[14] Provincial Court Decision, para 15 (Tab 1 of A.R.).
[15] *Evidence of Constable Croxford*, ASF, paras 228-229 (Tab 22 of A.R.).
[16] S. 255(3.2) of the *Criminal Code*.
[17] *Evidence of George Mounsef*, ASF, para 62 (Tab 22 of A.R.); *Evidence of Bruce Tolton*, ASF, paras 145, 146 (Tab 22 of A.R.).
[18] *Evidence of Jarrett Armstrong*, ASF para 111 (Tab 22 of A.R.).
[19] *Evidence of Curtis Clement*, ASF para 73 (Tab 22 of A.R.); Transcript of Preliminary Hearing ["PH"] 60/14-17, (Tab 8 of Respondent's Record ("R.R.").
[20] *Evidence of Sage Morin*, ASF, para 45 (Tab 22 of A.R.); PH 38/10-24 (Tab 9 of R.R.).
[21] *Evidence of Curtis Clement*, ASF, paras 73, 76 (Tab 22 of A.R.); PH 60/14-17, 30-34 (Tab 8 of R.R.).
[22] *Evidence of Curtis Clement*, ASF, para 77 (Tab 22 of A.R.); PH 61/1-3 (Tab 8 of R.R.).
[23] *Evidence of Lindsay Defosse* ASF, para 100 (Tab 22 of A.R.); PH 109/16-17 (Tab 10 of R.R.).
[24] *Evidence of Sage Morin*, ASF, para. 41 (Tab 22 of A.R.); PH 35/12 (Tab 9 of R.R.).

Appellant fell over "like a sack of potatoes".[25] Several witnesses described his pants being down and his buttocks showing.[26]

20. Numerous witnesses observed the Appellant stumble around,[27] weave back and forth,[28] not walk a straight line,[29] not stand upright,[30] wobble all over,[31] be unsteady on his feet,[32]"standing limp" meaning "without strong posture" and a "bag of garbage had more fight he was so limp".[33] The Appellant remained lying on the ground in the fetal position until the police arrived.[34] However, based on evidence from three witnesses, in addition to the Appellant and his wife, the Sentencing judge concluded the Appellant did not get out of his vehicle or walk on his own steam but was pulled out and thrown to the ground and never got up after that. This led the Sentencing Judge to reject the evidence from the many witnesses who believed the Appellant was impaired because of the way he walked.[35]

21. The Sentencing Judge accepted evidence from other witnesses as well as from the Appellant and his wife that he was assaulted outside his vehicle by bystanders. He found that the Appellant's dishevelled state was the result of manhandling outside the vehicle and had not been his state of dress before the collision.[36] However, despite the Appellant later testifying to having suffered a number of fairly minor injuries, some of which were observed by police and

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[25] *Evidence of Jarett Armstrong*, ASF, para 109 (Tab 22 of A.R.); PH 116/4-6 (Tab 11 of R.R.).
[26] *Evidence of Curtis Clement*, ASF, para 75 (Tab 22 of A.R.); PH 60/14-28 (Tab 8 of R.R.).
[27] *Evidence of Thomas Gunderson*, ASF, para 115 (Tab 22 of A.R.); PH 130/36-131/3 (Tab 12 of R.R.); *Evidence of George Mounsef*, ASF, para 62 (Tab 22 of A.R.).
[28] *Evidence of Thomas Gunderson*, ASF, paras 115, 117 (Tab 22 of A.R.); PH 130/36-131/3, 135/1-41; 140/30 (Tab 12 of R.R.).
[29] *Evidence of Sage Morin*, ASF para 40 (Tab 22 of A.R.); PH 37/30-15 (Tab 9 of R.R.); *Evidence of Thomas Gunderson*, ASF, para 116 (Tab 22 of A.R.).
[30] *Evidence of Sage Morin*, ASF para 39 (Tab 22 of A.R.); PH 30/1-2 (Tab 9 of R.R.).
[31] *Evidence of Sage Morin*, ASF para 30 (Tab 22 of A.R.); PH, 30/1-2 (Tab 9 of R.R.); *Evidence of Lindsay Defosse*, ASF, para 100 (Tab 22 of A.R.).
[32] *Evidence of Jarett Armstrong*, ASF, para 108 (Tab 22 of A.R.); *Evidence of Natasha Prasad*, ASF, para 85 (Tab 22 of A.R.); PH 82/34-83/3 (Tab 13 of R.R.).
[33] *Evidence of Curtis Clement*, ASF, para 71 (Tab 22 of A.R.); PH 74/33 (Tab 8 of R.R.).
[34] *Evidence of Thomas Gunderson*, ASF, paras 115, 116 (Tab 22 of A.R.); PH 130/36-131/3 (Tab 12 of R.R.).
[35] Provincial Court Decision, paras 29-31 (Tab 1 of A.R.).
[36] Provincial Court Decision, paras 22, 23, 25, 26, 27, 29 30 (Tab 1 of A.R.).

photographed several days later, *at the scene* he was found to have no injuries when examined by a doctor. Significantly, he also declined medical treatment.[37]

22. All police witnesses described the Appellant as impaired by alcohol. Upon arrival, they saw him lying in a fetal position. His speech was heavily slurred, his eyes were glossy and his eye movement was slow, and there was a moderate odour of alcohol emanating from his breath. Two officers had to assist him to get up on his feet, he had great difficulty walking as he was unsteady on his feet and staggering, "swayed quite heavily", had to be supported while walking, had to be assisted with sitting on a curb because he was very unstable, the police were worried he was going to fall and hurt himself, and he sounded like his tongue was frozen and had marbles in his mouth.[38] The qualified breath technician reached a similar conclusion based upon the Appellant's difficulty to remember what he had to eat and drink that day and what prescriptions he was on, the moderate smell of alcohol from his breath, his bloodshot eyes, and difficulty with his ability to use the telephone and search through the phonebook.[39]

23. The only two witnesses (other than the Appellant and his wife) who testified the Appellant was sober were witnesses not at the scene of the collision. These were the employees of Chili's Restaurant who had observed the Appellant for about 50 seconds to two minutes while he was sitting down and talking. Neither of them saw him walking or standing up. At the time they gave their statements to the police, they were aware the police were interested in the Appellant's level of intoxication because a little boy had died in a collision caused by the Appellant. Both also knew from having worked in the restaurant industry for five years that it was against the law to serve alcohol to intoxicated people.[40]

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[37] *Evidence of the Appellant*, p 146/15-26; 159/30-160/3, 166/11-38 (Tab 2 of R.R.); *Evidence of Dr. Lucille Lalonde*, ASF, para 130 (Tab 22 of A.R.); *Evidence of Constable Croxford*, ASF, para 177 (Tab 22 of A.R.); PH 310/34 (Tab 14 of R.R.); *Evidence of Constable Letourneau*, ASF, para 260 (Tab 22 of A.R.).

[38] *Evidence of Constable Croxford*, ASF, paras 170–178 (Tab 22 of A.R.), PH 309/41, 310/34-41 (Tab 14 of R.R.); *Evidence of Constable Letourneau*, ASF, paras 254-258 (Tab 22 of A.R.), PH 411/25-412/2 (Tab 15 of R.R.).

[39] *Evidence of Constable Price*, ASF, paras 245, 248 (Tab 22 of A.R.), PH 392/20-27 (Tab 16 of R.R.).

[40] *Evidence of Lacy Hunt*, ASF, paras 7-9, 11 (Tab 22 of A.R.), PH 452/3, 447/16, 448/11-22, 449/34-39 (Tab 17 of R.R.); *Evidence of Dustin Homa*, ASF, paras 18-19, 21 (Tab 22 of A.R.); PH 231/1-8, 36-41, 238/8, 229/35-230/41 (Tab 18 of R.R.).

24. Notwithstanding the overwhelming evidence of impairment observed by civilian and police witnesses, the Sentencing Judge concluded that the evidence pointed away from impairment.[41] He accepted evidence called by the defence to explain away the symptoms of impairment. An expert testified that symptoms of alcohol impairment such as slurred speech, flushed face, difficulty walking properly or walking without support, would also be consistent with symptoms of trauma and stress after an accident.[42] The Appellant himself attributed symptoms of impairment to: a significant limp and sway to his gait from a previous car accident, effects of having been assaulted by bystanders at the scene, consequences of having been dragged across the pavement (to explain why his pants were partially down), improper footwear, advanced carpal tunnel syndrome in his wrists, and shock.[43]

25. The Sentencing Judge accepted evidence from the Appellant and his wife that in the hours before the collision, the Appellant consumed two ounces of alcohol, each about one hour apart. He also consumed two thirds of a pint of beer at Chili's approximately an hour before the collision. The Sentencing Judge further accepted expert evidence that if the Appellant had consumed that amount of alcohol, he would not have been impaired or over 80.[44]

The Appellant's Prior History of Drinking

26. The Crown called a toxicologist to explain that some people who are impaired may not show indicia of impairment. This expert also testified that experienced drinkers with high tolerances to alcohol may not exhibit outward symptomology.[45]

27. The Appellant testified he had been drinking alcohol for over 40 years, and on occasion, drank heavily. In the early part of May 2013, a couple of weeks before the incident, he had been drinking heavier than normal, at least two or three drinks a day. Both he and his wife were concerned about his drinking. He resolved to drink less or stop drinking because he thought he was drinking too much.[46] His wife testified his drinking had increased since his retirement in

[41] Provincial Court Decision, para 82 (Tab 1 of A.R.).
[42] Provincial Court Decision, para 33 (Tab 1 of A.R.).
[43] *Evidence of the Appellant*, pp 120/20-21, 147/39-41, 189/24-26, 145/25-146/11, 189/25-26, 146/28-37, 189/28-30 (Tab 2 of R.R.).
[44] Provincial Court Decision, paras 35-37 (Tab 1 of A.R.).
[45] *Evidence of Verna Mendes*, pp 34/9-35/30 (Tab 5 of R.R.).
[46] *Evidence of the Appellant*, pp 179/19-29, 124/6-10 (Tab 2 of R.R.); *Evidence of Gayska Suter*, p 305/21-23 (Tab 3 of R.R.).

2009. She was getting fed up with his lifestyle that included drinking.[47] A doctor called by the Appellant agreed the Appellant had a pre-existing alcohol problem based upon the history provided by the Appellant, and advised him to cut back on his drinking.[48]

28. Two weeks before the collision, the Appellant had experienced hallucinations, causing Mrs. Suter to contact emergency services. The police arrived and escorted him to the hospital for observation. The Appellant stopped drinking for two weeks, but then started again two days prior to the collision. [49]

29. On that day, two days before the collision, the Appellant fell, after consuming three beers and playing a game of golf. He hit his head on a building and suffered a cut near his eye. Although both the Appellant and his wife testified he had a tendency to fall as a result of a car accident injury he had suffered many years before, the Appellant failed to disclose this incident immediately to Mrs. Suter, and she became upset when she found out about it.[50]

What Legal Advice the Appellant Received

30. There were two issues with respect to the evidence concerning the legal advice received by the Appellant: 1) whether the *Brydges* lawyer told the Appellant explicitly not to blow; 2) whether the lawyer told the Appellant it was an offence to refuse.

i The Lawyer's Testimony

31. The Appellant was arrested by police and spoke to a *Brydges* lawyer over the phone. The lawyer testified he used plain language, and twice very clearly told the Appellant that refusing to provide a breath sample was a criminal offence. However, he steered the Appellant away from blowing as he was not aware of the offence created in 2008 of refusing to provide a breath sample after causing a collision resulting in death pursuant to s. 255(3.2) of the *Criminal Code* with a maximum penalty of life imprisonment. He advised the Appellant if he refused, he would be charged with (simple) refusal and face a maximum penalty of five years, whereas if he blew and blew over the legal limit, he would be charged with impaired driving causing death and driving over 80 causing death and face a maximum penalty of life imprisonment. He told him it

[47] *Evidence of Gayska Suter*, p 308/34-38 (Tab 3 of R.R.).
[48] *Evidence of Dr. Edward Gross*, p 253/16-254/25 (Tab 6 of R.R.).
[49] *Evidence of the Appellant*, pp 125/20-127/14; 128/35-129/2 (Tab 2 of R.R.); *Evidence of Gayska Suter*, pp 265/30-266/36 (Tab 3 of R.R.).
[50] *Evidence of the Appellant*, p 129/2-130/30 (Tab 2 of R.R.); *Evidence of Gayska Suter*, p 267/1-269/2 (Tab 3 of R.R.).

would be easier for the police to prove driving over 80 causing death and impaired driving causing death if he blew over 80, than it would be for the police to prove impaired driving causing death if he did not blow. If he refused he would be charged with refusal, but over 80 causing death and impaired driving causing death were more serious charges than refusal. He was satisfied the Appellant understood his advice. Had he known about the new offence he would have given different advice to blow. He warned the Appellant not to speak to the police.[51]

ii. The Appellant's Testimony

32. The Appellant testified the lawyer spoke too fast in legal jargon that he did not really understand. Twice the lawyer told him not to blow. The Appellant sought and received clarification on this point only. There was no discussion about the potential punishment or sentences he could receive for refusing to blow or any adverse inference that could be brought against him if he refused to blow.[52] In cross-examination, when asked four times whether the lawyer told him that refusing to provide a breath sample was a criminal offence, the Appellant's answers were: "No,"[53] "Not that I recall,"[54]"No, at to – to my – to my mind, no, he did not,"[55] and "No, not to my knowledge."[56] . The Appellant agreed the words "refusing to provide a breath sample is a criminal offence" were not difficult to understand.[57] The Appellant confirmed the lawyer clearly told him not to speak to police.[58]

33. Although the Appellant could not recall whether the lawyer told him it was a crime to refuse to provide a sample, the Appellant signed an agreed statement of facts in which he agreed that two police officers advised him. The first police officer read a breath demand at 7:56 p.m., telling the Appellant "You will be charged under the provisions of the *Criminal Code* if you do not comply."[59] The Appellant answered "I think I should talk to my lawyer."[60] The police officer explained the meaning of refusal as well meant as what it meant if he did blow. The Appellant was asked again if he would comply. He responded: "I don't know what to say". The officer

[51] *Evidence of Jason McKen*, pp 206/10-214/29 (Tab 4 of R.R.).
[52] *Evidence of the Appellant*, p. 152-7-154/10; 196/19-197/32 (Tab 2 of R.R.).
[53] *Evidence of the Appellant*, p. 196/35-37 (Tab 2 of R.R.).
[54] *Evidence of the Appellant*, p. 197/6-8 (Tab 2 of R.R.).
[55] *Evidence of the Appellant*, p. 197/16-21 (Tab 2 of R.R.).
[56] *Evidence of the Appellant*, p. 197/28-29 (Tab 2 of R.R.).
[57] *Evidence of the Appellant*, p. 197/16-18 (Tab 2 of R.R.).
[58] *Evidence of the Appellant*, p. 154/17; 197/34-36 (Tab 2 of R.R.).
[59] *Evidence of Constable Croxford*, ASF, para. 196 (Tab 22 of A.R.).
[60] *Evidence of Constable Croxford*, ASF, para. 197 (Tab 22 of A.R.).

explained to him that it's either refusal to blow or that he will blow to which the Appellant answered "I don't know, I don't know what to say". He then said "I guess I'll talk to my lawyer." The officer explained her standard practice to explain the refusal "just means that you will be charged with refusal if you don't – if you don't blow. If you do blow it gives you the opportunity to show if you've been drinking or not. I say it's the same penalty. The courts look at refusal just as if you blew over."[61] The officer felt that the Appellant understood.[62] The Appellant re-read the demand at 9:51 p.m. The Appellant refused to provide a breath sample.[63]

34. The second police officer was the breath technician. After overhearing the second breath demand and the Appellant's refusal, the breath technician explained to the Appellant that this was his opportunity to provide a sample of breath and that he would be charged with refusal to provide a breath sample if he chose not to provide samples. When the Intoxilyzer was ready, the officer again offered the Appellant an opportunity to provide samples. The Appellant said he would not provide a sample.[64]

35. The Appellant admitted in his testimony that the police told him refusal was a crime.[65] He justified his refusal by surmising that the lawyer would not be telling him to do something illegal. He explained he believed "it was within my rights not to blow *I guess*".[66]

36. When asked in direct examination why he chose not to blow when the lawyer was telling him not to blow but the police were telling him to blow or he would be charged, the Appellant answered:

> "…because two reasons – lawyers are supposed to be your friend… And I didn't really trust the police at that point. Their attitude towards me had been pretty abrupt, pretty gruff…. I just thought the lawyers are there for a reason and you're supposed to listen to them. So that's what I did."[67]

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[61] *Evidence of Constable Croxford*, ASF, paras 198, 230 (Tab 22 of A.R.); PH 314/10-315/6, 315/19-28 (Tab 14 of R.R.).
[62] *Evidence of Constable Croxford*, ASF, para 199 (Tab 22 of A.R.); PH 315/7-24 (Tab 14 of R.R.).
[63] *Evidence of Constable Croxford*, ASF, paras 227, 228 (Tab 22 of A.R.).
[64] *Evidence of Constable Price*, ASF, paras 240-243 (Tab 22 of A.R.); *Evidence of the Appellant*, p 153/19-20 (Tab 2 of R.R.).
[65] *Evidence of the Appellant*, p 152/20-30 (Tab 2 of R.R.).
[66] *Evidence of the Appellant*, p. 152/20-24; 153/8-10 (Tab 2 of R.R.).
[67] *Evidence of the Appellant*, p 152/36-40 (Tab 2 of R.R.).

When further asked in direct "And when they said they would be charging you with refusal what did you think of that?" he responded:

> "I said I – by this point I'm just going, I don't know. You know. *They can work it out after.* You know. After. *They'll work it out after.* Because how can – how can it be one way and not the other. So I just had to side with somebody and I sided with the lawyer."[68] (emphasis added)

When asked what he meant by "work it out after", the Appellant said:

> "I – I'm not sure what I meant by that. That - that was – that was in my notes that – like I – I was so confused by this point. The lawyer had baffled me with – with legal jargon. I'd never been in a situation like that. I'm in a state of shock. I'm – just been beaten up. I don't know what it meant. I just – *I just didn't want to hear any more about it*." (emphasis added) [69]

37. The Appellant agreed in cross-examination that he never offered to provide a breath sample.[70] When asked by the Crown whether he felt totally sober, he responded, "I was absolutely – I was sober. I was sober."[71] The Crown then asked: "Wouldn't you agree that under those circumstances someone would be begging to provide a breath sample to prove their innocence?" The Appellant answered:

> "I think that is the nature of shock sometimes. I think that I – I – I realized that I had hurt some people very badly, okay, and I – and I watch too much TV I guess because you always get a lawyer and you always wait for their advice before you offer anything… And I would, sir, have been delighted had I been advised to blow."[72]

38. The Crown further asked, "…despite the fact you knew you were sober, you knew you'd hurt someone, and had the opportunity to provide a breath sample, you never… said I'll provide one or I want to provide one?" The Appellant answered "No I didn't." The Crown then asked: "And you never said, I want to provide one but I better check with a lawyer first?" The Appellant stated" I don't remember saying that, no."[73]

39. While the Appellant claimed he refused because his lawyer told him to, he admitted he ignored the same lawyer's advice not to talk to the police when he voluntarily provided a

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[68] *Evidence of the Appellant*, p 153/1-6 (Tab 2 of R.R.).
[69] *Evidence of the Appellant*, p 153/12-17 (Tab 2 of R.R.).
[70] *Evidence of the Appellant*, p 190/16-17 (Tab 2 of R.R.).
[71] *Evidence of the Appellant*, p 190/23-24 (Tab 2 of R.R.).
[72] *Evidence of the Appellant*, p 190/41-191/8 (Tab 2 of R.R.).
[73] *Evidence of the Appellant*, p 191/25-32 (Tab 2 of R.R.).

statement to Detective Bowen after being placed in the cell. [74] When asked about it, he stated: "The lawyer had said don't say anything. And for some reason at that point I was just – it was late, I felt like I had to talk to somebody and I just – so I talked to him."[75] When asked by the Crown, "So you didn't feel compelled by his legal advice, did you?", he responded:

> "Well, I've – yeah, but it was quite a bit later in the evening. I was tired, I was exhausted, I was shaken. And this guy had a nice manner to him. He was not in uniform. He – he appealed to me. I let my guard down I guess is what I did and I – and I did talk to him. *Against the advice of my lawyer.*" (emphasis added) [76]

Sentencing Judge's Reasons

40. The Court imposed a four month gaol term and a 30 month driving prohibition. The Sentencing Judge found the evidence pointed away from actual impairment and the Appellant refused to provide breath samples because of flawed legal advice.

41. The Sentencing Judge noted that all but one person (the cardiologist) at the scene expressed the opinion that the Appellant was impaired. Nonetheless, he rejected the evidence of numerous witnesses, preferring the evidence of a few who described him being pulled from the vehicle and thrown to the ground. He found all witnesses to be honest. [77]

42. The Sentencing Judge explained away the evidence of impairment given by the police officers, finding it was consistent with trauma or shock from the collision, as well as assault.[78]

43. The Sentencing Judge accepted the Appellant and his wife's evidence concerning the amount of alcohol consumed, noting independent confirmation of the beer purchase through a receipt. The Sentencing Judge did not respond to the Crown's argument that the credibility of the Chili's employees should have been assessed with proper appreciation to their concerns about potential civil liability. Instead, he found that "neither of them had any reason to be enamoured with Mr. Suter."[79]

44. With respect to the legal advice, the Sentencing Judge made the following findings: 1) he accepted the Appellant's testimony that he found what the lawyer was saying to be full of legal

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[74] *Evidence of the Appellant*, p 197/34-198/1 (Tab 2 of R.R.).
[75] *Evidence of the Appellant*, p 154/15-19 (Tab 2 of R.R.).
[76] *Evidence of the Appellant*, p 198/4-7 (Tab 2 of R.R.).
[77] Provincial Court Decision, paras 25-31 (Tab 1 of A.R.).
[78] Provincial Court Decision, paras 32-34 (Tab 1 of A.R.).
[79] Provincial Court Decision, paras 35-37 (Tab 1 of A.R.).

jargon and hard to follow; 2) he accepted the Appellant's testimony that the lawyer told him explicitly not to blow; 3) the lawyer had confirmed all of the Appellant's evidence with the exception of whether he told him explicitly not to blow.[80]

45. The Sentencing Judge did not address whether the lawyer told the Appellant it was an offence to refuse to blow, despite the lawyer's evidence having been unchallenged on this point. The lawyer testified he had explicitly told the Appellant it was a crime to refuse. The Appellant professed no memory of, and did not deny having received this advice.

46. With respect to the offence of refusal, the Sentencing Judge understood that the gravamen of the offence is a legal decision to withhold evidence, and the mischief caused is the obstruction of the state's ability to obtain reliable evidence about impairment. He noted that Parliament's intent in creating the offences of refusal following a collision resulting in bodily harm or death, which have the same maximum penalties as impaired driving causing bodily harm or death, was to remove the current incentive for a person involved in such a collision to refuse to provide a breath sample. He rejected defence's argument that in order for a sentence under s. 255(3.2) of the *Code* to be comparable to a sentence for impaired driving causing death, the Crown must independently prove the aggravating factor of impairment beyond a reasonable doubt.[81]

47. He agreed with the Crown that the same sentencing range for impaired driving causing death should be applied to refusal following a collision resulting in death, as was done in the case of *R v Kresko*.[82] Having reached that conclusion he went on to reinstate the incentive by deciding that proof on balance that an accused was not impaired is mitigating. He did so on the basis that it substantially answered the principal wrong at which s. 255(3.2) is aimed. The incentive to provide a sample is preserved as long as the onus rests on the accused to establish the absence of impairment. This is because proof even to a standard of probability will invariably be more difficult than providing a sample in the first place. An accused will not often meet that onus.[83]

48. The Court stated that if it were imposing a sentence for impaired driving causing death in the Appellant's circumstances, the sentence suggested by the Crown would be too low. However,

[80] Provincial Court Decision, paras 38-41 (Tab 1 of A.R.).
[81] Provincial Court Decision, paras 52-56, 63 (Tab 1 of A.R.).
[82] Provincial Court Decision, paras 58, 65 (Tab 1 of A.R.).
[83] Provincial Court Decision, para 70 (Tab 1 of A.R.).

as the accident was caused by a non-impaired driving error and the Appellant's refusal was the result of ill-informed and bad legal advice, the starting point was lowered. The mitigating effect of the bad advice would have been significantly less had the advice stopped with a misguided presentation of legal options that was aimed at steering the Appellant away from blowing. The Court found, however, that the refusal was based on the express advice of the lawyer not to provide a sample. While this did not absolve the Appellant as mistake of law is not a defence, it did reduce the Appellant's moral culpability. The Sentencing Judge commented that "People must be able to rely on legal advice when exercising their constitutional right to counsel."[84]

49. The Sentencing Judge found other mitigating factors in the guilty plea; no criminal record; strong community support; and, a productive history with employment virtually all of his adult life before retirement. The Court also took into account, "to a more limited extent", the extreme vitriol, public scorn and threats that had been generated in this matter as well as the violent vigilante actions against both the Appellant and his wife.[85]

50. All of the factors operated to significantly reduce the sentence. However, the seriousness of the offence warranted a custodial sentence. Even though the evidence pointed away from impairment, the Court and the public were deprived of the evidence that would have been the most definitive regarding impairment. The gravity of the offence coupled with the objectives of denunciation and general deterrence required a sentence greater than an intermittent jail sentence.[86]

51. The Court imposed a sentence of four months imprisonment in addition to any pre-sentence custody as well as a 30 month driving prohibition to commence on his release from custody.[87]

The Court of Appeal's Decision

52. The Court of Appeal granted the Crown's application for leave to appeal, allowed the appeal, and set aside the sentence of four months incarceration, replacing it with 26 months imprisonment. No changes were made to any of the ancillary orders, including the 30-month driving prohibition.

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[84] Provincial Court Decision, paras 75-77 (Tab 1 of A.R.).
[85] Provincial Court Decision, paras 78-81 (Tab 1 of A.R.).
[86] Provincial Court Decision, paras 82-83 (Tab 1 of A.R.).
[87] Provincial Court Decision, paras 84, 86 (Tab 1 of A.R.).

53. The Court identified five issues: 1) Should the sentencing range for impaired driving causing death also apply to the offence of failing to provide a breath sample after causing an accident resulting in death? 2) Should a finding that a driver was not impaired by alcohol at the time of causing an accident leading to death be considered to have a mitigating effect in sentencing? 3) Did the finding that Mr. Suter refused to provide a breath sample in reliance on the flawed legal advice provided to him by the *Brydges* lawyer constitute a mistake of law and thus a proper mitigating factor in sentencing? 4) Should Mr. Suter's decision to drive, in the circumstances known to him, have been treated as an aggravating factor in his sentencing? 5) What is a proportional sentence?

Should the sentencing range for impaired driving causing death also apply to the offence of failing to provide a breath sample after causing an accident resulting in death?

54. The Court of Appeal accepted the Sentencing Judge's conclusion that the range of sentence for refusing to provide a breath sample causing an accident leading to death is the same as that for impaired causing death, while noting that different mitigating circumstances may arise given the differences between the offences. In particular, a finding that a driver was not impaired by alcohol could never be made in relation to the offence of impaired causing death, but could properly be mitigating to the offence of refusal causing an accident resulting in death.[88]

55. Although impaired driving causing death and refusing to provide a breath sample after causing an accident leading to death are different offences, they share the common components that neither can occur absent a death arising from the driving of an accused, and at a minimum the police have reasonable and probable grounds for making a breath demand. Both sections are designed, therefore, to deter impaired driving.[89]

56. Sentencing guidance may be gleaned from sentencing cases on impaired driving causing death or bodily harm. The Sentencing Judge did not err in applying the sentencing range for impaired driving causing death.

[88] ***R v Suter***, 2016 ABCA 235, para 6 ["Court of Appeal Decision"] (Tab 2 of A.R.).
[89] Court of Appeal Decision, para 32 (Tab 2 of A.R.).

Should a finding that a driver was not impaired by alcohol at the time of causing an accident leading to death be considered to have a mitigating effect in sentencing?

57. The Sentencing Judge did not err in principle in considering all relevant facts in relation to the circumstances of the offence. Those factors logically include the finding that he was not impaired.[90]

58. As s. 255(3.2) remains subject to the codified sentencing provisions, the Sentencing Judge made no error in concluding that the absence of impairment was mitigating. In other words, it could have been worse, and proven impairment would have been aggravating.[91]

59. There is no obligation for the Crown to prove impairment on s. 255(3.2). But if the evidence happens to establish impairment, then it is likely aggravating. The reverse is also true. Presence or absence of impairment is relevant to proportionality and it is not an error to consider relevant facts in that way.[92]

60. It remains to be seen whether treating lack of impairment as mitigating will open floodgates. The treating of the lack of impairment as mitigating will still operate to discourage drivers to refuse as it is unlikely accused persons will be able to establish they were not impaired. Further, because s. 255(3.2) requires a causative link between the manner of driving and the death, the circumstances surrounding the accused's driving must always be considered. Practically speaking, this means that causes other than impairment for the collision may be aggravating. The expectation of receiving a similar sentence will serve practically to discourage accused from attempting to establish lack of impairment.[93]

The Sentencing Judge improperly relied upon the flawed legal advice as mitigating.

61. The Court of Appeal concluded that the Appellant's reliance on flawed legal advice is not mitigating of sentence because reliance on honest belief that it was not an offence to refuse is a mandatory prerequisite to mistake of law. Here the evidence did not establish directly or through reasonable inference that the Appellant held such a belief. The Court noted that the Sentencing Judge did not expressly find the evidence had established each prerequisite for a mistake of law –

[90] Court of Appeal Decision, para 59 (Tab 2 of A.R.).
[91] Court of Appeal Decision, para 54 (Tab 2 of A.R.).
[92] Court of Appeal Decision, para 57 (Tab 2 of A.R.).
[93] Court of Appeal Decision, paras 55-56 (Tab 2 of A.R.).

in particular, noting that the Sentencing Judge did not, and *could* not have found that the accused had an honest belief that he was abiding by the law.[94]

62. The Court explained that good reasons exist for requiring an honest belief in the legality of an illegal act before mistake of law mitigates a sentence. The offender who honestly believes he or she is acting legally is less culpable. The same would not be true for an offender who did not know whether his actions were illegal, but sought strategic advantage.[95]

63. The Court of Appeal also cautioned that an offender could not advance after the fact assertions about a private, unrecorded conversation, as a basis for mitigation of sentence. Nor should it be mitigating that the failure to understand legal advice was due to intoxication, stress or other circumstances.[96]

64. The Appellant did not testify that he believed refusal was legal, and the evidence did not demonstrate he had an honest belief.[97] Nor did the Sentencing Judge reject the evidence of the *Brydges* lawyer that he specifically told the Appellant that refusal was illegal. While the lawyer advised him not to provide a sample, that advice did not offset or contradict information that it was an offence to refuse. Any error in advice did not suggest it was lawful to refuse. The error related to potential penalty, not initial illegality.[98]

The Appellant's decision to drive in the circumstances known to him should have been treated by the Sentencing Judge as aggravating.

65. During the appeal hearing, the Court of Appeal questioned counsel as to whether the Sentencing Judge should have treated the Appellant's driving as aggravating. Both counsel were given an opportunity to make submissions and respond to the submissions of each other. Neither sought an adjournment.[99]After hearing submissions, the Court of Appeal concluded that the Sentencing Judge erred in failing to consider the Appellant's driving as aggravating.

66. The Court of Appeal concluded that the Appellant operated his vehicle while "seriously distracted." The Appellant drove after drinking, in the context of an acknowledged alcohol problem, into a busy parking lot in close proximity to some major health problems including a

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[94] Court of Appeal Decision, para 64 (Tab 2 of A.R.).
[95] Court of Appeal Decision, para 68 (Tab 2 of A.R.).
[96] Court of Appeal Decision, para 69 (Tab 2 of A.R.).
[97] Court of Appeal Decision, paras 71-81 (Tab 2 of A.R.).
[98] Court of Appeal Decision, paras 77-79 (Tab 2 of A.R.).
[99] Court of Appeal Decision, para 82 (Tab 2 of A.R.).

head injury.[100] The Appellant chose to drive and not pull over, while angry and upset and arguing with his wife.[101] Had he not made this choice, the error which took the young boy's life may not have occurred.[102]

67. The Court of Appeal found the distracted driving error did not have the same moral blameworthiness as driving impaired, but it can equally result in grave consequences. The Appellant's degree of responsibility was high.[103]

68. The offence that the Appellant pled guilty to does not involve just a refusal to provide a breath sample. It is a failure to do so after knowingly having caused a death. Causing the collision is also a required element of the offence, and the responsibility for causing the collision must also be examined in sentencing. Section 255(3.2) cannot be interpreted so no moral culpability attaches to the facts of the accident and the resulting death. In addition, moral culpability for failing to provide a breath sample in the context of a reasonable belief the driver committed an offence as a result of consuming alcohol must also be considered. The moral culpability is not just reflected in the failure to provide evidence, but by the failure to provide that evidence in the face of such a reasonable belief. Both aspects must be taken into account on sentencing. [104]

What is a proportional sentence?

69. In considering what a proportional sentence should be, the Court of Appeal took note of vigilante violence but stated these facts do not emanate from state misconduct and do not change what would otherwise be a proportional sentence. They stated that "Society must not be intimidated into overreactions in sentencing because of the outrage".[105]

70. The Court held that a proportional sentence would be one of 36 months but for the application of the principle of restraint which applies at the appellate level and in particular to Crown appeals. A sentence of 26 months imprisonment was substituted.[106]

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[100] Court of Appeal Decision, para 7 (Tab 2 of A.R.).
[101] Court of Appeal Decision, para 89 (Tab 2 of A.R.).
[102] Court of Appeal Decision, para 91 (Tab 2 of A.R.).
[103] Court of Appeal Decision, para 92 (Tab 2 of A.R.).
[104] Court of Appeal Decision, paras 94-101 (Tab 2 of A.R.).
[105] Court of Appeal Decision, para 106 (Tab 2 of A.R.).
[106] Court of Appeal Decision, para 110 (Tab 2 of A.R.).

PART II – QUESTIONS IN ISSUE

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?

Response: The Court of Appeal properly found the Appellant's reliance upon flawed legal advice was not a mitigating factor in this case.

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?

Response: The Court of Appeal correctly identified other circumstances of the collision as aggravating.

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?

Response: The Court of Appeal did not err in its consideration of these factors.

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

Response: The Court of Appeal did not raise any new grounds of appeal without adequate notice to the Appellant.

PART III - ARGUMENT

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?

71. Ignorance of the law or mistake of law based upon erroneous legal advice is not a defence to a charge.[107] It can, however, mitigate sentence.[108] The key is that the accused must have believed his actions were lawful for mistake of law to be made out. It is evident from the cases on mistake of law that an honest belief in the legality of one's actions is the very essence of mistake of law.[109] Only an honest belief that one's conduct is lawful truly reduces moral

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[107] S 19 of the *Criminal Code*; ***R v Pontes***, [1995] 3 SCR 44, paras 33-35***; R v Stucky***, 2009 ONCA 151, para 109; ***R v Kotch***, 1990 ABCA 348, para. 17; ***R v Whelan***, 2002 NCLA 69, paras 9-17.

[108] ***R v MacDonald***, 2014 SCC 3, para 61; ***Pontes***, *ibid*, para 87.

[109] ***R v Feng***, 2011 ABCA 172, para 8; ***MacDonald***, *ibid*, para 53; ***R v Everton***, 1980 CarswellMan 362 (CA), para 4 **[Tab 2]**; ***R v Barrow***, 2001 CarswellOnt 2010 (CA), para 47;

blameworthiness, and is capable of mitigating sentence. On the other hand, where an accused receives poor legal advice but knew, suspected, or was uncertain as to whether she was acting unlawfully, her sentence should not be reduced because her moral culpability would not be diminished.[110] The Court Martial Appeal Court of Canada affirmed this principle in ***R v Liwyj*** in stating that "*an honest belief by an offender that his action or behaviour is not unlawful* does not negate his or her criminal responsibility but may certainly lower it".[111] This principle was also affirmed in ***R v Baxter***,[112] in which the Alberta Court of Appeal held that an accused's *belief that his actions were legal* was highly relevant to sentencing. In the case at bar, the Court of Appeal was correct in stating that an honest belief in the legality of one's conduct is essential for a mistake of law to mitigate sentence.

72. The Court of Appeal properly noted that while the Sentencing Judge found Mr. Suter to have been acting under mistake of law, he erred by failing to expressly consider the prerequisites of mistake of law and by failing to find each of the requirements of mistake of law had been established. Specifically, the Sentencing Judge *did not* expressly find or infer that the Appellant had the required honest but mistaken belief in the lawfulness of his conduct. In addition, the Court of Appeal correctly found the Sentencing Judge *could not* have found that the Appellant honestly believed he was acting lawfully.

The Sentencing Judge did not expressly or implicitly find that the Appellant honestly believed he would not be committing an offence by refusing to provide a breath sample.

73. The Sentencing Judge ignored and did not address the essential question of whether the Appellant believed he was abiding by the law. Nowhere in his reasons did the Sentencing Judge make a finding as to whether or not the Appellant believed it was an offence to refuse to provide a breath sample. He did not mention it in his summary of the legal advice evidence at paragraphs 38 to 42. Nor did he mention it in the only two paragraphs in his reasons dealing with the Appellant's reliance upon flawed legal advice (paragraphs 76 and 77):

> 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

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leave to appeal refused ***R v Barrow***, 2002 CarswellOnt 236, SCC, Jan. 31, 2002 **[Tab 1];** ***R v Scheper***, 1986 CarswellQue 257 (CA), para 11 **[Tab 3];** ***R v Liwyj***, 2010 CMAC 6, para 55**.**

[110] ***Pearlman v R***, 2005 CarswellQue 21 (Sup.Ct), para 32**.**

[111] ***Liwyj***, *supra*, note 109, para 55.

[112] ***R v Baxter***, 1982 ABCA 187, paras 1, 3.

> 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.
>
> People must be able to rely on legal advice given when exercising their constitutional right to counsel.

74. In paragraphs 76 and 77, the Sentencing Judge discussed only the issue of whether the lawyer indirectly steered the Appellant away from blowing, or whether the lawyer explicitly told the Appellant not to blow. The Sentencing Judge did not decide whether the Appellant knew he was committing an offence by refusing to provide a breath sample. One cannot reasonably infer that the Sentencing Judge found the Appellant honestly believed he was acting lawfully on the basis that he found the Appellant's refusal was based on the lawyer telling him expressly not to blow. As correctly noted by the Court of Appeal, advice not to blow is not inconsistent with information that refusing to blow is an offence.

75. Furthermore, the Sentencing Judge's comment at paragraph 76 that "the Court has accepted the testimony of Mr. Suter as to what the lawyer said" must be viewed in the limited context of the issue he was dealing with in that paragraph, which is whether the Appellant was expressly told not to blow as opposed to having been indirectly steered away from blowing. The Sentencing Judge did not state he had accepted *all* of the Appellant's testimony over the lawyer's testimony regarding the legal advice.

76. Had the Sentencing Judge addressed whether the Appellant believed that refusal was legal, he would have had to reconcile the Appellant's belief with the *Brydges* lawyer's evidence that he had twice advised the Appellant it was an offence to refuse. The Sentencing Judge clearly did not do so. In fact, nowhere in his reasons did he accept, reject, or address in any way, the lawyer's evidence that he advised the Appellant it was a crime to refuse. This is notwithstanding the Appellant professed having no memory of having received this advice, thus not contradicting the lawyer's evidence. When the Appellant was asked whether the lawyer gave him this advice, he answered: "no, "*not that I recall*", "no…*to my mind*, no, he did not" and "no, *not to my knowledge*." The Sentencing Judge failed to address the key issue of whether the Appellant had an honest belief he was not violating the law, even though it was raised during counsel's

submissions,[113] was squarely before him, and needed to be resolved for a mistake of law to mitigate sentence.

77. The only findings regarding legal advice made by the Sentencing Judge were: 1) the Appellant found the lawyer hard to follow because he spoke in legal jargon;[114] 2) the lawyer probably told the Appellant explicitly not to blow; and 3) the lawyer confirmed the Appellant's evidence with the exception of whether or not he told him explicitly not to blow. None of these findings resolve the different question of whether the Appellant knew it was a crime to refuse to provide a breath sample. The fact the Sentencing Judge accepted the Appellant's evidence that the lawyer spoke in legal jargon, does not mean he found the Appellant did not understand the lawyer's advice about refusing to provide a breath sample being an offence. The Sentencing Judge did not specify what the "legal jargon" was, or what advice was not understood by the Appellant. The Appellant admitted the words "refusing to provide a breath sample is a criminal offence"[115] were not difficult to understand, thus it is reasonable to infer that this advice was not part of the "legal jargon".

78. Although a trial judge need not advert to every piece of evidence or every argument made, it is an error of law for a judge to fail to resolve critical issues or inconsistencies that are determinative of the main issues at hand.[116] The Sentencing Judge failed to deal with the critical issue of the Appellant's knowledge about whether it is a crime to refuse. This issue was determinative of whether the Appellant could rely on mistake of law as a mitigating factor.

The evidence did not support an honest belief on the part of the Appellant that his conduct was lawful.

79. The Court of Appeal correctly found the Sentencing Judge *could* not have determined the Appellant honestly believed his conduct was legal. The only reasonable inference from the evidence is that the Appellant not only suspected he would be violating the law by refusing to provide a breath sample, but *knew* he would be committing a crime. According to the agreed

[113] Submissions by Mr. Wiberg on Sentence, p 390/6-391/12 (Tab 7 of R.R.).

[114] Contrary to the Appellant's assertion, the Sentencing Judge did not find that the lawyer's advice *was* legal jargon but accepted that *the Appellant found it to be* legal jargon.

[115] These were the words put to the Appellant by the Crown in cross-examination – *Evidence of the Appellant,* p. 197/16-18 (Tab 1 of R.R.).

[116] ***R v REM***, 2008 SCC 51, para 57; ***R v Sheppard***, 2002 SCC 26, para 46.

statement of facts, the Appellant was told by two police officers that refusing to provide a breath sample was a criminal offence. He also testified a police officer told him it was an offence to refuse to blow. In addition, the *Brydges* lawyer testified he had twice advised the Appellant it was a crime to refuse to comply with a breath demand. The Appellant admitted in cross he did not think the words "refusing to provide a breath sample is a criminal offence" were difficult to understand. *Significantly, the Appellant did not testify that the lawyer positively told him it* ***was*** *lawful to refuse to comply with a breath demand*. The evidence demonstrates the Appellant exercised his free will and intentionally chose not to blow. He was not a naïve, unsophisticated, immature or intellectually challenged person who blindly followed his lawyer's instructions. He was an intelligent and educated man who, before retiring, worked as a professional at the management level.[117] *Importantly, he disregarded his lawyer's advice not to speak to police by giving the police a statement.* He was selective about what advice to follow and what advice to ignore. It defies belief to think that a man in his circumstances would have no idea that refusing to provide a breath sample was a crime.

80. Any misapprehension on the part of the Appellant that he was acting lawfully could only have been the result of his own wilful blindness, and therefore would not have been an honestly held belief. Wilful blindness constitutes full *mens rea* equivalent to knowledge and precludes honest but mistaken belief.[118] The Appellant deliberately failed to inquire into whether refusing to provide a breath sample was an offence, in circumstances which cried out for an inquiry. By the time the Appellant spoke to the *Brydges* lawyer, he had been told by the police it was a crime to refuse. He was on notice that refusing to provide a breath sample was an offence. The Appellant did not disagree the lawyer told him it was a crime to refuse as he claimed no memory. Furthermore, the lawyer did not tell the Appellant it was legal for him to refuse to provide a breath sample. Contrary to the Appellant's assertion, the Appellant did not testify he believed he would not be violating the law. At most he testified he did not think the lawyer would be telling him to do something illegal, and stated he thought he was within his rights not to blow, "*I guess*". When the lawyer told him not to blow, he did not ask why the lawyer was telling him to do something the police said would be an offence. Instead, he drew a mistaken inference based solely on the advice not to blow. This assumption was in direct conflict with the lawyer's evidence that he advised the Appellant he would be charged if he refused to provide a sample,

[117] *Evidence of the Appellant*, p. 115/25-117/34 (Tab 2 of R.R.).
[118] ***R v Briscoe***, 2010 SCC 13, paras 21-24; ***R v Sansregret***, [1985] 1 SCR 570, paras 21-22.

evidence that the Sentencing Judge had not rejected. The assumption also conflicted with the repeated police advice that refusal was a crime. The Appellant's wilful blindness suggests there was a strategic reason behind his refusal, namely, the possibility of obtaining a lower sentence.

81. The Appellant's wilful blindness continued after receiving preliminary legal advice. He did not offer to provide a breath sample even after the police charged him. Surely if he initially doubted that he could be charged with refusal, that doubt would have disappeared. Nor did the Appellant ask to speak to the lawyer again or to another lawyer to clarify any possible uncertainty arising from the lawyer's advice telling him not to blow. When asked in direct examination what he thought when the police told him they would be charging him with refusal, he stated he thought "*they can work it out after… they'll work it out after*".[119] When asked what he meant by that, the Appellant stated he was not really sure, but also stated "*I just didn't want to hear any more about it*."[120] The Appellant did not want to be fixed with the knowledge that it was a crime to refuse but instead wanted to remain uncertain. This is a classic case of wilful blindness. The Appellant should not be permitted to derive a benefit from his wilful blindness.

82. In his factum, the Appellant offers an explanation for his refusal after being charged by drawing a distinction between being "charged" and "acting unlawfully." He argues that belief that one is acting lawfully is not inconsistent with knowing one would be "charged". As explained by the Court of Appeal however, the mitigation offered by a mistake of law, for policy reasons, is extremely limited. It applies to situations where an individual honestly believes he is *presently* complying with the law. It does not apply to an individual who believes he will be absolved after a future trial. For example, if a person believes he is being arrested unlawfully and resists arrest, and his arrest is thereafter determined to be lawful, he would not be able to have his sentence reduced simply because he believed at the time of the offence that he would ultimately be acquitted. If this were the law, anyone could ask for a sentence reduction by testifying that at the time of the commission of the offence, he or she believed they would eventually be acquitted, even if they knew they would be charged. To operate in mitigation of sentence, the requirement of "honestly" must constrain the analysis.

83. The Court of Appeal correctly noted an offender should not be able to argue that their misunderstanding or inability to fully understand legal advice due to intoxication, stress or other

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[119] *Evidence of the Appellant*, p 153/1-6 (Tab 2 of R.R.).
[120] *Evidence of the Appellant*, p 153/12-17 (Tab 2 of R.R.).

considerations ought to mitigate sentence. This would open the door to arguing mistake of law on the basis of having misunderstood preliminary legal advice for an infinite number of reasons. Because the *Charter* protects the privacy of legal advice, the state is not in a position to monitor the advice received. Nor can police ask if an accused understood the legal advice given. It is therefore incumbent on the accused to inform the police at the time of receiving unclear legal advice that he could not understand the advice, if that was the case. The Appellant did not do so, and now attempts to argue after the fact that his failure to understand legal advice should be mitigating.

84. While the jurisprudence does not seem to be uniformly clear that a mistake of law must be reasonable,[121] it seems logical that the more unreasonable a belief is, the less likely it will be honestly held. The Appellant's example of an accused's belief that it is lawful to kill on Tuesdays is a good example of a belief that is likely not honestly held because it is so unreasonable. In this respect it is useful to compare mistake of law based on erroneous legal advice to mistake of law based on officially induced error. Where an offence is committed on the basis of officially induced error for which the remedy would be a stay, this Court has held that an accused's belief in reliance upon such error must be reasonable.[122] In the circumstances of this case, the Appellant cannot be said to have acted reasonably upon the *Brydges* lawyer's advice.

85. To conclude, the Court of Appeal was correct in concluding that the Sentencing Judge erred in principle in finding that the Appellant's reliance upon deficient legal advice amounted to a mistake of law that mitigated his sentence.

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

The substantive legal elements required to be proven under s.255 (3.2) Criminal Code must guide relevant sentencing principles.

86. To obtain a conviction under s.255(3.2) of the *Criminal Code* the prosecution must prove beyond a reasonable doubt that at the time of committing an offence under s.254(5) the accused knew or ought to have known that his operation of his motor vehicle **caused an accident** resulting in the death of another person. The failure to prove some causative link between the

[121] In ***Liwyj***, *supra*, note 109, para 42, the Court refers to reasonableness in discussing mistake of law. In other cases dealing with mistake of law, the courts have not stated it must be reasonable.

[122] ***Lévis (Ville) c Tétreault,*** 2006 SCC 12, para 26; ***R v Jorgensen,*** [1995] 4 SCR 55, para 37.

driving and the accident resulting in death necessitates a partial acquittal as a trial judge could only convict of refusal.

87. Following conviction, to determine a proportionate sentence, a sentencing judge must consider the "how and why" of the accused's driving. The causation requirement necessitates such a consideration. Put simply, the driving matters. For example, an accused who is struck by another driver who failed to heed a red traffic light has a full defence to a charge under s.255(3.2) as he did not cause the accident. The driver who ignored the red light and collided with the accused factually caused the accident.

88. Under s. 255(3.2), the Crown need only prove factual causation meaning "but for" the driving of the accused, the accident and resulting death would not have occurred.[123] By contrast, under s. 249(2) of the *Criminal Code*, the Crown must prove both factual and legal causation to successfully prosecute an accused for dangerous driving causing death while street racing. Factual causation, the "but for," is satisfied by proving the racing resulted in death. Legal causation is satisfied by proving the dangerous driving actions of the accused were a substantial contributing cause to the death.[124] Similarly, in a prosecution for impaired causing death the Crown must, in addition to proof of factual causation, prove that the impairment of the driver was a significant contributing cause to the death.[125]

89. To obtain a conviction under s.255 (3.2), the Crown additionally must prove that the Appellant refused to provide breath samples in the face of a valid police demand. The officer must have reasonable grounds to believe that the accused had committed an offence under s.253 of the *Criminal Code* within the last three hours. The officer's belief on reasonable grounds that an accused is impaired in the operation of a motor vehicle does not constitute proof of impairment. The Crown must instead prove impairment beyond a reasonable doubt.

The Court of Appeal did not interfere with the Sentencing Judge's factual findings nor did the Court of Appeal misapprehend evidence.

90. The Sentencing Judge found the Appellant and his wife to be credible witnesses notwithstanding extensive cross-examination.[126] The Sentencing Judge accepted the Appellant's

[123] ***R v Maybin,*** 2012 SCC 24, para 15.
[124] ***R v O'Leary,*** 2017 ONCA 71, paras 31-35.
[125] ***R v Rhyason,*** 2006 ABCA 367, para 30.
[126] Provincial Court Decision, para 37 (Tab 1 of A.R.).

evidence that the collision was an accident caused by a non-impaired driving error.[127] As the Sentencing Judge did not describe the driving error, the Court of Appeal examined the evidence more closely. The Court of Appeal concluded, based upon evidence given by the Appellant and his wife, that the Appellant operated his motor vehicle while seriously distracted by an angry argument[128] *in the context of* the Appellant's awareness that he had been suffering from recent health and drinking problems.[129] These findings are reasonably supported by the evidence.

91. The Sentencing Judge found that as the Appellant and his wife drove to Ric's Grill that Mrs. Suter was not happy and only got angrier as they drove the short distance.[130] During the entire drive of seven to ten minutes there was argument between them,[131] culminating in Mrs. Suter threatening divorce. In response, the Appellant pressed his foot on the accelerator and accelerated the vehicle rapidly through the handicapped parking stall, over the curb, through the glass barrier, and directly into the Mounsef family table.[132]

92. The Appellant admitted that the talking of his wife distracted him, and that he was unable to handle driving and listening at the same time.[133] The Appellant was unaware that his foot was not on the brake and suggested it maybe was slightly on the gas pedal.[134] His wife warned they were moving forward. The Appellant did nothing. She warned a second time, and the Appellant speculated that he put his foot on the accelerator. He admitted to bad judgment.[135] Viewed in context, the Court of Appeal descriptors such as "seriously distracted", "angry" and "serious animated argument" seems appropriate. The Court of Appeal found no driving errors prior to the fatal collision, but observed that the Appellant chose to continue to drive while in a serious argument, and chose to turn into a busy parking lot adjacent to a number of outdoor diners, with fatal consequences.[136]

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[127] Provincial Court Decision, para 76 (Tab 1 of A.R.).
[128] Court of Appeal Decision, para 7 (Tab 2 of A.R.).
[129] Court of Appeal Decision, paras 7, 89-90 (Tab 2 of A.R.).
[130] Provincial Court Decision, para 14 (Tab 1 of A.R.).
[131] *Evidence of the Appellant*, p 142/24-27 (Tab 2 of R.R.); *Evidence of Gayska Suter*, p 287/21-27 (Tab 3 of R.R.).
[132] ASF (Tab 22 of A.R.).
[133] *Evidence of the Appellant*, p 183/23-33 (Tab 2 of R.R.).
[134] *Evidence of the Appellant*, p 183/41-184/2 (Tab 2 of R.R.).
[135] *Evidence of the Appellant*, p 184/4-185/4 (Tab 2 of R.R.).
[136] Court of Appeal Decision, paras 90-91 (Tab 2 of A.R.).

93. The Court of Appeal considered the Appellant's recent health difficulties in the context of his driving and the distraction posed by his ongoing argument with his wife. The Court inferred the recent hallucinations suffered by the Appellant were associated with his alcohol difficulties. The evidence warranted the inference made by the Court of Appeal.

94. Mrs. Suter testified about the hallucinations her husband suffered two weeks before the fatal driving error that resulted in Geo's death. She indicated that her husband had been very anxious, paranoid, depressed and sleepless and that he was "stressed to the max". Although he had not been drinking, the Appellant was talking in the bedroom and "making crazy sounds". When she checked on the Appellant, he was hallucinating that he saw two police officers in the bedroom. Mrs. Suter contacted emergency services, and the police arrived to take him to hospital. Mrs. Suter indicated that the psychiatrist informed them that he could not assist because the Appellant drank alcohol. She further testified that when her husband came home from hospital, he resolved to drink less and to become healthier. According to Mrs. Suter, her husband did online research to determine if he was suffering from a drinking problem. He did not drink for ten days.[137]

95. Mr. Suter did not recall hallucinating, but did recall alarming his wife. He could not recall seeing a physician upon his overnight hospitalization. After his release, the Appellant did not drink for two weeks. He resolved to have a healthier lifestyle and indicated that he was more active.[138]

96. The evidence supported the Court of Appeal's finding that the Appellant had ongoing problems with alcohol.[139] Most telling, a doctor called by the Appellant agreed the Appellant had a pre-existing alcohol condition.

97. The Appellant suffered a head injury as well, two days before the collision.[140] After consuming three beers, the Appellant fell and hit his head on a building and suffered a cut near his eye. According to the Appellant, the injury was severe enough that he decided to take a taxi as he "rocked [his] head pretty good".[141]

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[137] *Evidence of Gayska Suter*, p 265/24-266/33 (Tab 3 of R.R.).
[138] *Evidence of the Appellant*, p 125/18-127/20 (Tab 2 of R.R.).
[139] See para 27 of this Factum.
[140] See para 29 of this Factum.
[141] *Evidence of the Appellant*, p 130/4-13 (Tab 2 of R.R.).

The Court of Appeal properly considered the aggravating circumstances.

98. The Court of Appeal noted the offence the Appellant pled guilty to required more than the failure to provide a breath sample. The failure to provide a sample must occur after knowingly causing a collision resulting in death. As the Court of Appeal explained, "causing the collision which caused death is a required element of the offence; the offence does not occur unless it had that result. All aspects of personal responsibility for causing that collision are directly related to the sentence to be imposed. Therefore, an examination of personal responsibility cannot properly be limited to the refusal to provide a breath sample portion of the offence while ignoring the other elements of its commission".[142]

99. As the Court of Appeal stated, "the fact that the accused caused the accident and that the accident resulted in death are directly relevant to moral culpability". Section 255(3.2) cannot be interpreted such that no sentencing consequence in terms of moral culpability derives from the circumstances of the collision and the resulting death.[143] As the Court of Appeal observed, "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".[144]

100. The Appellant's manner of driving, the cause of the accident, as a substantive element of the offence is properly considered to arrive at a proportionate sentence. As the Court of Appeal stated, "there is always a cause for such an accident, even if that cause does not arise from the driver's impairment by alcohol. That cause may arise from a decision to operate a vehicle in other circumstances which the driver knew or should have known create (sic) unacceptable risk to the public. Therefore, that cause may in itself be aggravating of sentence even where it does not include impairment by alcohol." [145]

101. Viewed properly, the Court of Appeal did not "arbitrarily without proper regard to principle, simply by referring to disreputable conduct committed by the offender"[146] increase the Appellant's sentence for the simple reason that the cause of the collision constituted a substantive element of the offence. Sensibly, a sentencing judge must consider the substantive

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[142] Court of Appeal Decision, para 93 (emphasis mine) (Tab 2 of A.R.).
[143] Court of Appeal Decision, para 94 (Tab 2 of A.R.).
[144] Court of Appeal Decision, para 96 (Tab 2 of A.R.).
[145] Court of Appeal Decision, para 56 (Tab 2 of A.R.).
[146] Appellant's Factum, para 58.

elements of the offence charged to determine the gravity of the offence and the degree of responsibility of the offender as required under s.718.1 of the *Criminal Code.* It is with this understanding that the Court of Appeal recognized that "use of the terms aggravating or mitigating may not fit exactly".[147] Whatever the terminology, a valid consideration is not rendered invalid by the use of variant language.

Section 725 of the Criminal Code is inapplicable to the circumstances of this case.

102. The Appellant argues that s. 718.2(a) must be limited by s. 725, to ensure that the offender is punished exclusively for conduct that resulted directly in a conviction.[148] The Respondent agrees, but this concession does not advance his argument here. The Court of Appeal properly considered the Appellant's culpability by considering not only his refusal but also the cause of his driving error and resulting death. In order to convict, the prosecution must prove both the refusal with knowledge of death and that the Appellant caused the accident resulting death. The cause of the accident, because of driving error, is an element of the offence and does not merely constitute a circumstance that could constitute the basis for a separate charge.

103. Since both aspects must be proven, both aspects are also directly relevant to the Appellant's moral culpability. *Larche,* as cited by the Appellant is inapplicable on the facts.[149]

104. This Court's decision in *Larche* makes it clear that s. 725(1)(c) provides an exception to the rule that offenders are punished only in relation to crimes for which they have been charged and convicted. This section permits a court to consider any fact that forms part of the circumstances of the offence even if it could constitute the basis for a separate charge.[150] The purpose of s. 725(1)(c) is to increase punishment on the basis of an uncharged offence(s).[151]

105. In *Larche* the sentencing judge noted three facts under s. 725(1)(c) in relation to uncharged offences ("notes") that formed the "substratum of the indictment."[152] The accused was originally charged with conspiracy to produce, possess, and traffic in cannabis, and to possess

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[147] Court of Appeal Decision, para 58 (Tab 2 of A.R.).
[148] Appellant's Factum, para 59.
[149] ***R v Larche,*** 2006 SCC 56.
[150] ***Larche,*** *ibid,* paras 27-28.
[151] ***Larche,*** *ibid,* para 44.
[152] ***Larche,*** para 13 – The third note did not satisfy requirements as it was alleged an offence in the U.S. outside of the territorial jurisdiction of the court.

the proceeds; and, committing drug-related offences under the direction of a criminal organization for profit.[153] The two valid "notes" made by the sentencing judge under s. 725(1)(c) added offences that Larche exported marihuana and was in possession of currency derived from the sale of marihuana on behalf of a criminal organization.[154] The "notes" related, as required, to unindicted offenses arising out of the same circumstances as provided for in s.725(1)(c). This Court found that the notes met the twin requirements of a requisite nexus or connexity to the charged offence and that the facts could constitute the basis for a separate charge.[155]

106. The Appellant, unlike Mr. Larche, was sentenced for a single offence – an offence under s. 255(3.2) of the *Criminal Code.* This section necessitated that the Court of Appeal consider the cause of the fatal accident. In doing so, the Court of Appeal was not considering or attempting to consider facts that could constitute the basis for a separate charge.[156] Instead, the Court considered the facts constituting the very offence for which the Sentencing Judge passed sentence.

The individualized nature of sentencing required the Court of Appeal to consider the conduct of the accused.

107. Alternatively, it was also open to the Court of Appeal to properly consider the Appellant's distracted driving and associated health problems to craft an appropriate sentence, not to punish him for the distracted driving *per se*, but to determine what a fit sentence would be "based on his character, conduct and attitude".[157] The Appellant cannot invoke the presumption of innocence to exclude consideration of character evidence since it was rebutted by his conviction.[158] The individualized process of sentencing requires a sentencing judge to take into account the circumstances of the offence *and* the specific circumstances of an offender. The

[153] ***Larche,*** *supra*, note 109, para 7.
[154] ***Larche,*** *supra*, note 109, para 13.
[155] ***Larche,*** *supra*, note 109, paras 48-62.
[156] ***R v Edwards,*** 2001 CarswellOnt 2284, para 35 – Justice Rosenberg provides as an example, the proper consideration of a court taking into account at the time of sentencing an offender for dangerous driving causing death, the aggravating factor that the offender's blood alcohol exceed .08.
[157] ***R v Ross,*** 2010 BCCA 314, para 13; ***Edwards,*** *ibid*, paras 39-43; ***R c Angelillo,*** 2006 SCC 55, paras 26-33.
[158] ***Angelillo,*** *ibid*, para 30.

sentencing judge must consider facts extrinsic to the offence to assess the "circumstances, character and reputation of the accused [that] is before the court".[159] To assess a proportionate sentence, therefore, the Court of Appeal properly considered the Appellant's conduct and attitude in choosing to drive in the circumstances, which caused the accident, and led to the police breath demand.[160] The Court of Appeal properly considered as aggravating the Appellant's choice to continue driving while aware of his own anger and poor health, in addition to the distracting elements of the emotional argument he was having with his spouse.[161]

The Court of Appeal erred by finding the Appellant's lack of impairment to be a mitigating factor on sentence.

108. The Court of Appeal correctly agreed under s.255 (3.2) that proof a driver was impaired by alcohol would likely be aggravating and would result in an increase in sentence[162] even though proof of impairment is not an essential element of the offence.[163] However, the Court of Appeal wrongly concluded that proof of non-impairment by alcohol, on balance, by an accused in the operation of his motor vehicle would be mitigating.[164]

109. Proportionality, the notion that a sentence should reflect the seriousness of a crime as a reflection of moral blameworthiness is the only governing sentencing principle in the *Criminal Code*. Two things measure it: the gravity of the offence and the offender's degree of responsibility.[165]

110. The Court of Appeal erred in two fundamental ways. First, the Court erred by failing to appreciate that the gravamen of the s. 255(3.2) offence is the refusal by an accused to provide the most scientifically reliable evidence of his impairment. The *ex post facto* proof, on balance, by an accused that he was not impaired on the bases of less scientifically reliable evidence does not lessen the gravity of the offence or his degree of responsibility. The gravamen of the offence is akin to obstructing justice, and the offer of subjective evidence of non-impairment does not diminish the gravity of the offence or its blameworthiness. To hold that such proof is mitigating is to reward directly the obstructive behaviour.

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[159] ***Angelillo,*** *supra*, note 157, para 22.
[160] Court of Appeal Decision (Tab 2 of A.R.)
[161] Court of Appeal Decision, para 107 (Tab 2 of A.R.)
[162] Court of Appeal Decision, para 57 (Tab 2 of A.R.)
[163] Court of Appeal Decision, para 58 (Tab 2 of A.R.)
[164] Court of Appeal Decision, para 58 (Tab 2 of A.R.)
[165] ***R v Arcand,*** 2010 ABCA 363, paras 46-47; ***R v Nasogaluak,*** 2010 SCC 6, paras 39-46.

111. Second, the Court of Appeal wrongly viewed proof, on balance, of non-impairment as mitigating. This approach incorrectly assumes that the absence of an aggravating factor is mitigating. Here it is not - but is simply neutral.[166]

112. The Court of Appeal agreed with the Sentencing Judge that the purposes of the two offences, impaired causing death and s. 255(3.2) are the same: to deter impaired driving,[167] and agreed that sentencing guidance can be found by looking at sentencing cases for impaired driving causing death.[168] The Court held that the conclusion that the sentencing range is the same "does not turn on the existence of impairment by alcohol".[169]

113. As noted, the Court of Appeal proceeded to assess wrongly the gravity of the Appellant's offence and his moral blameworthiness. The Court of Appeal justified its conclusion, in part, on the basis that it doubted the treatment of the lack of impairment as mitigating in s. 255(3.2) cases would open the floodgates. This approach by the Court of Appeal fundamentally misconstrues the proper approach to sentencing. Proportionality is not measured by reference to "floodgates". The sentence is either proportionate or it is not.

114. Second, the Court of Appeal justified its conclusion on the basis that otherwise blameworthy driving which causes the fatal collision will disincline an accused from attempting to establish lack of impairment. This is because the resulting sentence might not be much lower than if the cause had been alcohol impairment.[170] This statement by the Court of Appeal demonstrates a fundamental misunderstanding of the approach to sentencing under s. 255(3.2). The Court of Appeal conflates two discrete sentencing situations. The proof of aggravated non-impaired driving errors that cause a collision have nothing either logically or legally to do with whether or not proof of non-impairment may be considered as mitigating in sentence.

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[166] ***R v Varsallona,*** 2010 ABCA 314, para 7; ***R v Anderson,*** 2017 MBCA 31, para 26; ***R v Alcantara,*** 2017 ABCA 56, para 70; ***R v Mastrop,*** 2013 BCCA 494, paras 53-55; ***R v King,*** 2013 ABCA 3, para 33.
[167] Court of Appeal Decision, paras 25, 32 (Tab 2 of A.R.).
[168] Court of Appeal Decision, para 35 (Tab 2 of A.R.).
[169] Court of Appeal Decision, para 34 (Tab 2 of A.R.).
[170] Court of Appeal Decision, para 56 (Tab 2 of A.R.).

The finding of lack of impairment is not a mitigating factor.

115. Drinking and driving is a scourge in society that causes numerous deaths and injuries every year. Society's abhorrence for these offences is reflected in the recent upward trend in the length of sentences imposed for these offences.[171]

116. To combat the problem of drunk drivers, a peace officer can demand a sample of breath upon reasonable grounds to believe that a driver is impaired by alcohol. This provides the most accurate evidence of a person's blood alcohol level ("BAC") and is therefore the most objectively reliable evidence of an accused's level of intoxication.

117. Without a collision, an accused who refuses to comply with a breath demand is normally charged with refusing to provide a sample pursuant to s. 254(5) of the *Criminal Code*.[172] The penalty for refusing is the same as that for impaired driving and driving with a BAC of over 80 ("over 80").[173]

118. Before 2008, if the driving caused death or bodily harm, there was an incentive to refuse. This is because the maximum penalty for refusal was dramatically less than for impaired driving causing death or bodily harm. Refusal is punishable by a maximum of five years imprisonment.[174] Impaired causing death[175] or bodily harm[176] had maximum penalties of life imprisonment (for death) or ten years (for bodily harm). A refusal means there is no evidence of an accused's BAC, which makes proof of impaired causing death or bodily harm problematically difficult. The Crown is then compelled to resort to non-scientific evidence such as physical signs of impairment and driving pattern. The motivation to refuse is obvious as it obstructs the ability of the state to obtain the best evidence of impairment.

119. Parliament, recognizing the difficulty on July 2, 2008, sought to eliminate the incentive by creating ss. 255(3.2) and (2.2) of the *Criminal Code.*[177] The new refusal offences made it illegal to refuse to provide breath samples where an accused caused an accident resulting in death or bodily harm. Parliament stipulated the same maximum penalty of life imprisonment as

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[171] ***R v Junkert,*** 2010 ONCA 549.
[172] S 254(5) of the *Criminal Code.*
[173] S 255(1) of the *Criminal Code.*
[174] S 255(1)(b) of the *Criminal Code.*
[175] S 255(3) of the *Criminal Code.*
[176] S 255(2) of the *Criminal Code.*
[177] S 255(3.2) of the *Criminal Code* and s 255(2.2) of the *Criminal Code.*

the offences of impaired causing death and impaired causing bodily harm. At the same time, Parliament enacted the offences of over 80 causing death or bodily harm with the same maximum penalties.[178]

120. Parliament sought to remove the incentive to refuse to provide a breath sample by making the driver subject to the same penalties that an impaired driver who caused death would receive.[179] It is clear the maximum penalties are now the same, but sentencing judges must also view the gravity of the offence and the moral blameworthiness of the offender to be the same. The Court of Appeal's treatment of the Appellant's proof of non-impairment creates an incentive to refuse. In essence, the Court rewards the Appellant for his obstructive refusal to provide scientifically reliable evidence by treating the less scientific proof (on balance) of observational non-impairment as mitigating. This inappropriately assesses moral blameworthiness.

121. The Court of Appeal's treatment of *R v Kresko,*[180] further illuminates the error made by the Court. The Court of Appeal sought to distinguish the case on the basis that it was not of assistance on the issue of whether mitigation should be given to proven non-impairment because that finding was not made.[181] The *Kresko* decision viewed properly, however, holds that the gravamen of the s. 255(3.2) offence is obstructing justice, or preventing the state from obtaining the best evidence of impairment. It is possible for a sober person to be convicted of the offence as culpability is made out once a lawful demand is made and the accused knowing that he has caused death or bodily harm refuses without lawful excuse. Moral blameworthiness is measured by the unlawful refusal to provide scientifically accurate evidence, and not by proof of non-impairment.

122. The Court of Appeal's decision creates an incentive to refuse. By finding the evidence of non-impairment mitigating, the Appellant is rewarded for his refusal to blow. The Appellant eliminated the scientifically certain Intoxilyzer evidence and compelled the Sentencing Judge to rely upon subjective and competing observational evidence – less reliable evidence that he was not impaired. As the Appellant benefits greatly from his obstructive behaviour, he has not been

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[178] S 255(3.1) of the *Criminal Code* and s 255(2.1) of the *Criminal Code.*
[179] Court of Appeal Decision, para 43 (Tab 2 of A.R.).
[180] ***R v Kresko,*** 2013 ONSC 1631.
[181] In ***Kresko***, there was a finding of an absence of evidence of impairment, not a finding of non-impairment.

appropriately sentenced in a manner that recognizes the true gravity of his offence and blameworthiness.

123. The Appellant managed to obtain a lenient initial sentence by conceptually using a defence similar to the "evidence to the contrary" defence or the "Carter" defence, removed by Parliamentary amendments that had been declared constitutional by this Court in *R c St. Onge-Lamoureux.*[182] Before the amendments, the defence permitted the accused to rebut scientifically reliable evidence from an approved breath-testing instrument, with testimony about how much alcohol he had consumed, combined with expert evidence saying he would not have been over 80 at the time of driving. In the case of a refusal, an accused should not be permitted to rely upon evidence of his consumption to mitigate sentence. The reward permitted by the Sentencing Judge by allowing such evidence did not respect proportionality.

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?

124. The Sentencing Judge considered the vigilante violence and public vitriol suffered by the Appellant as mitigating but to "*a more limited extent*", as compared with the significant mitigating factors of the finding of lack of impairment and erroneous legal advice. The Appellant had been kidnapped by a number of people long after these events and had his thumb cut off. According to the Appellant, one of his assailants at the time of the attack attributed their actions to the Appellant's responsibility for Geo's death. In addition, the Appellant's wife was attacked in a shopping mall in a separate incident. The Sentencing Judge concluded that both incidents were connected to the killing of Geo.

125. In his own appeal from sentence, the Appellant tried to re-argue the mitigating weight of the vigilante violence. The Court of Appeal properly found that the vigilante violence did not emanate from state misconduct and therefore did not change what would otherwise be a proportional sentence.

126. Contrary to the Appellant's suggestion, vigilante violence committed outside of state control is very different from collateral consequences such as immigration consequences, loss of professional status, ruin and humiliation, ostracism from the community and family, and financial difficulties. Unlike collateral consequences, vigilante violence is not a foreseeable

[182] ***R c St. Onge-Lamoreux,*** 2012 SCC 57.

consequence that flows naturally from the fact of the conviction itself.[183] Instead, it is criminality that is extra-judicial and is designed to interfere with the administration of justice. As aptly stated by the Court of Appeal: "Society must not be intimidated into over-reactions in sentencing because of public outrage."

127. It would be dangerous for our criminal justice system to respond to vigilante violence in *any way* (other than to punish those who commit it), because giving perpetrators the ability to impact the justice system could encourage further vigilante violence. *Simply put, vigilante justice cannot be allowed to have any legitimate role in our justice system.* The rationale for refusing to allow vigilantism to play a role in our criminal justice system is similar to the rationale for why governments refuse to negotiate with terrorists – allowing terrorists to have any effect on government action by negotiating with them would be to encourage further terrorism.

128. Lastly, if we allow vigilantism to have a role in sentencing, it would open the door to other accused encouraging or even orchestrating a "vigilante" attack upon themselves in order to obtain a reduced sentence. Allowing people to have control over the justice system this way would be contrary to the public interest.

129. Even if this Court were to find that vigilantism is a relevant collateral consequence that the Sentencing Judge was permitted to take into account, this Court in *R v Pham* has stated that consideration of collateral consequences cannot result in an unfit sentence.[184] To uphold a four month sentence in this case based on vigilantism would be to endorse an unfit sentence. Further, it must be remembered that the Sentencing Judge originally gave this factor limited weight. The weighing or balancing of relevant factors must be treated with deference unless the Sentencing Judge exercised his or her discretion unreasonably.[185] The Appellant has not shown any unreasonableness in the exercise of the Sentencing Judge's discretion on this issue. At most, the vigilantism and public vitriol deserves the limited weight originally deemed appropriate by the Sentencing Judge. The impact on the result in this case would be negligible.

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[183] See ***R v Pham***, [2013] 1 SCR 739; ***R v Bunn***, [2000] 1 SCR 183.
[184] ***Pham,*** *ibid*, para 14.
[185] ***R v Lacasse***, 2015 SCC 64, para 49, 78; ***Nasogaluak***, *supra*, note 165, para 46.

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

130. The issue of the mitigating weight that ought to be given to the vigilante violence is not a "new issue" as contemplated by this Court in *R v Mian* .[186] The Appellant himself raised it in his own appeal from sentence when he attempted to re-argue the mitigating weight of the vigilante violence by suggesting that "deterrence has largely been served in the present case due to the extrajudicial sanctions that befell Mr. Suter."[187] The issue is not legally and factually distinct from the ground of appeal raised by the Appellant. Accordingly, *Mian* does not apply.

131. The issue of whether other circumstances of the collision were aggravating is also not a "new issue" as per *Mian*. While the parties did not raise this *specific* issue in their facta, it arose from the Crown's argument that the Sentencing Judge erred in finding the lack of impairment to be mitigating. The Sentencing Judge found that the evidence pointed away from impairment and the collision was caused by a non-impaired driving error. As the Sentencing Judge did not describe what that driving error was, the Court of Appeal was entitled to examine the evidence more closely and conclude, based on the record before it, that the driving was done while seriously distracted, in the context of health and drinking problems.

132. Even if this Court were to find that this *is* a new issue, it was properly raised by the Court of Appeal. The Sentencing Judge's error in failing to consider other circumstances of the collision would realistically have affected the result. Had the Court of Appeal not raised this error, there would have been a risk of an injustice in that the important question of what caused the collision, if not impairment, would have been left unanswered. Without considering the surrounding circumstances of the collision, the Appellant would have been sentenced as if his moral blameworthiness for causing the accident was minimal when it was not. The sentence would not have been proportionate.

133. Lastly, the Court of Appeal gave proper notice and invited the parties to file additional submissions, as required by *Mian*. Bielby J.A. acknowledged she was raising an issue not dealt with by the parties or the Sentencing Judge. [188] Her comment to defence counsel that "…*you may need some time to consider it*, and you certainly don't have to respond" was an invitation to

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[186] ***R v Mian***, 2014 SCC 54 .
[187] Appellant's factum filed in the Court of Appeal (as Respondent) para 83 (Tab 1 of R.R.).
[188] Transcript of Court of Appeal Hearing June 21, 2016, p 45(108)/41-46(109)/3 (Tab 9 of A.R.).

provide further oral or written submissions if deemed necessary. Specifically, her comment "and you certainly don't have to respond" is nothing more than an affirmation of the obvious – that the parties can decide for themselves whether they wish to make submissions. This is evident from her subsequent comment: "Of course the Crown will be given an opportunity to make any comments on that in her reply, *if she chooses to do so*."[189] Both counsel were then given and took the opportunity to make oral submissions and to reply to the submissions of the other. Neither party requested an adjournment to provide further submissions either orally or in writing. Even if the Appellant felt he had been taken by surprise at the hearing, he could have requested an opportunity to provide written submissions after the hearing, but did not do so. The Appellant's real complaint is that he did not realize the significance of this issue, despite the Court of Appeal having signaled its importance by the very fact of raising it and inviting further submissions, and despite the Crown's position that the Court was entitled to consider other circumstances of the collision. This is not a reason to allow this ground of appeal. The Court of Appeal properly followed the *Mian* procedure in this case.

PART IV – SUBMISSIONS ON COST

134. As this is a criminal case, the Respondent is not seeking costs.

PART V – ORDER SOUGHT

135. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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[189] Transcript of Court of Appeal Hearing June 21, 2016, p 47(110)/15-16 (Tab 9 of A.R.).

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

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