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— Milligan's Criminal Law Advisor—*By Jeffrey Milligan* (Formerly The David Rose Criminal Law Advisor, and Neuberger Rose Criminal Law Advisor)

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1. — The Manitoba Court of Appeal explains what use a sentencing judge may make of an untried and outstanding charge

The Manitoba Court of Appeal recently shed light on what effect, if any, untried outstanding or pending charges have on sentence.

A woman pleaded guilty to a charge of theft over $5,000.00. She stole over $50,000.00 from her employer, over a period of just greater than three years, making efforts to conceal the theft. She received a conditional sentence for a conviction in 2009 for a breach of trust and when she committed the offence before the court, there was an outstanding, but untried, charge of theft from a different employer.

Her counsel asked the court to impose a conditional sentence, but the court declined to do so and imposed a

12-month jail sentence followed by a period of probation. The accused appealed and her counsel argued that the sentencing judge improperly used the outstanding charge as an aggravating factor.

The Manitoba Court of Appeal held that evidence of an untried and outstanding offence is "most certainly" a relevant factor in deciding whether a conditional sentence is an appropriate disposition because the sentencing judge is required to assess whether there is a risk of re-offending: see *R. c. Angelillo*, 2006 CarswellQue 10370, [2006] 2 S.C.R. 728 at para. 17, 36, and *R. v. Edwards*, 2001 CarswellOnt 2284, 147 O.A.C. 363 (Ont. C.A.) at para. 63.

As Chartier CJM observed at para. 10:

> The sentencing judge's principal concern was that the accused's new pending charge raised a red flag regarding her ability to not reoffend. Clearly, the untried related charge did shed light upon the accused's character and background in that it demonstrated a noticeable lack of understanding into the harm done by her actions and why it should not be repeated. This lack of insight, evidenced by her prior related misconduct, as well as her inability to remain otherwise free of charges while pending on this charge, gave the sentencing judge no confidence that she would abide by any of the conditions he might impose. He rejected the accused's request for a conditional sentence because he concluded there was a real risk that she would reoffend.

The trial judge, they held, did not use the outstanding charge to impose a greater punishment, but only, as Chartier CJM put it at para. 11, " . . . to remove the conditional sentence as a viable sentencing option". It was not used, as the trial judge noted in his reasons, as an aggravating circumstance which went to the *quantum* of sentence.

The Manitoba Court of Appeal upheld the sentence.

R. v. Roopchand, 2016 CarswellMan 457, 2016 MBCA 105

2. — The Ontario Court of Appeal affirms that the threshold for a "reasonable suspicion" that there is alcohol in a driver's body is low

Section 254(2) of the *Criminal Code* provides that where an officer has "reasonable grounds to suspect" (or, as it was once, called, a "reasonable suspicion") that a driver has "alcohol . . . in their body", the officer may make an approved screening device demand to the driver to determine if there are grounds for breathalyzer testing.

As we saw from *R. v. Kading*, 2016 ONCJ 212, 2016 CarswellOnt 5811 (Ont. C.J.) in the issue of July 2016, the threshold for a "reasonable suspicion" that there is alcohol in a driver's body is low. The Ontario Court of Appeal recently affirmed this proposition in allowing a Crown appeal against an acquittal of a charge of over 80 mgs.

The respondent was stopped at a RIDE spot check. The officer smelled alcohol on his breath and asked the driver about drinking. The respondent replied that he had had his last drink some 10 hours earlier, but he did not know how much he had drunk or what he had had to drink. In cross-examination, the officer acknowledged that the respondent showed no signs of impairment. The officer also had training as a breath technician and acknowledged that he knew the following:

- if someone has a "drink", the alcohol would be eliminated in 4 to 5 hours; and

- even when an odour of alcohol is detected, alcohol consumed 10 hours earlier "may have been eliminated" and one could not "say with any certainty" that there is still alcohol in the person's body.

Because, on the record before the court, it was quite possible that, even if the driver were telling the truth, he may well have eliminated all the alcohol he had drunk, the trial judge held that the officer did not have reasonable grounds to suspect that the driver had alcohol in his body and held that his rights under s. 8 of the *Charter* had been violated. The breath tests taken at the police station were excluded and the charge was dismissed. The summary conviction appeal court judge upheld the finding of a s. 8 breach and the acquittal.

The Ontario Court of Appeal gave leave to appeal, allowed the appeal and ordered a new trial.

Following *R. v. Chehil*, 2013 CarswellNS 693, [2013] 3 S.C.R. 220 and *R. v. Lindsay*, 1999 CarswellOnt 796, 40 M.V.R. (3d) 225 (Ont. C.A.) (Ont.C.A.), Justice Simmons, who wrote for a unanimous court, affirmed that "reasonable grounds to suspect" was a low threshold, which, as she put it at para. 27, " . . . involves possibilities, not probabilities".

As Simmons J.A. observed at para. 28:

> The absence of the indicia of impairment even when combined with the fact that the respondent claimed to have consumed his last drink 10 hours earlier did not negate the *possibility* that the respondent had alcohol in his system, which was raised by the presence of an odour of alcohol on his breath and his admission of consumption.

Even if the officer believed the respondent about when he had his last drink, it did not negate the possibility that he still had alcohol in his body. Neither the respondent nor the officer knew how much the respondent had to drink, and even if the respondent were telling the truth, there *may* have been alcohol that had not been eliminated. This is exactly what the officer's evidence was — that the alcohol drunk 10 hours earlier "may have been eliminated".

R. v. Schouten, 2016 CarswellOnt 18095, 2016 ONCA 872

3. — The Ontario Court of Appeal enters an acquittal where circumstantial evidence fell short of establishing that the appellant had constructive possession of methamphetamine found in a house where he was sleeping

A man was convicted of possession of methamphetamine for the purpose of trafficking, possession of marihuana for the purpose of trafficking and three counts of breaching a probation order and he appealed the convictions to the Ontario Court of Appeal.

The issue was whether there was sufficient evidence for the judge to find that he was in constructive possession of methamphetamine found above a light fixture in a bedroom where the appellant was sleeping.

The investigation began with surveillance on a house owned by a James Rodney. During the surveillance, the police saw two short-term visits to the house that the police thought were drug-related. The police obtained a search warrant and executed it.

When they entered the house, they found seven people in the house. The appellant was found in a bedroom in the basement, asleep on a bed. Two women were sitting or sleeping in chairs in the same bedroom. Another man and a woman were in a common area in the basement.

The appellant was searched and police found, in his pocket, a glass pipe typically used to smoke methamphetamine. The appellant's wallet was found on a table, together with a letter to him from Ontario Works, in the bedroom where he was sleeping. (His address in the letter was not the address where he was found sleeping.) There were glass pipes for smoking methamphetamine in a dresser in the bedroom and a small bag

with marihuana in it was lying on the floor next to a television stand in the bedroom. There were men's clothes in the closet but there was no evidence that they belonged to the appellant.

The police also found a recessed light fixture in the same closet. When they removed it, they found a bag containing three smaller bags, each contained some eight grams of methamphetamine. There were no fingerprints on any of the bags.

The trial judge found that the glass pipe on the appellant's person strongly supported the inference that the appellant was both using and dealing in methamphetamine. Further, the "lived-in look" of the bedroom, including the coats and shirts hung in the closet, and the wallet and the letter left on a table near the bed supported the inference that he occupied the bedroom.

As Fish J. observed in *R. v. Morelli*, [2010] 1 S.C.R. 253, 2010 CarswellSask 150 at para. 17:

> *Constructive* possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person". (*Criminal Code*, s. 4(3)(a). Constructive possession is thus complete where the accused (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

Justice MacPherson, writing for a unanimous court, noted, at para. 17, that the case against the appellant was "entirely circumstantial". No one said that the appellant put the drugs in the ceiling behind the light fixture or directed that they be stored there or knew that they were there. Where the case is entirely circumstantial, the court must be must be guided by *R. v. Villaroman*, 2016 SCC 33, 2016 CarswellAlta 1411, in which Cromwell J. said, at para. 55:

> Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

The Ontario Court of Appeal held that it was not reasonable for the trial judge to have found, on the record, that the Crown had met this test.

The appellant was never seen entering or leaving the house where the drugs were found. There were seven people in the house, five of whom were in the basement. No scales, cell phones or debt lists were found in the bedroom occupied by the appellant; but a set of scales was found in the area of the house occupied by Mr Rodney.

The methamphetamine was not in plain view; it was hidden in a closet. There was no evidence linking the clothes in that closet to the appellant. As MacPherson J.A. put it at para. 24, the "lived-in look" of the bedroom does not mean that it was the appellant who lived there. The pipe in the appellant's pocket supports the inference that he smoked methamphetamine but not that he trafficked in it.

The Court of Appeal found *R. v. Escoffery*, 1996 CarswellOnt 935, *(*sub nom. *R. v. Grey)* 89 O.A.C. 394 (Ont. C.A.) to be helpful. In that case, the drugs were hidden and there was no direct evidence that the appellant had knowledge of them, other persons frequented the apartment where the drugs were found, the appellant was not a permanent occupant and the apartment was rented by a co-accused. Laskin J.A. held in *Escoffery* that the finding of the trial judge that the appellant was in constructive possession of the drugs was unreasonable.

Writing for the court, MacPherson J.A. found that the circumstantial evidence did not establish that the appellant had knowledge of the drugs hidden in the light fixture and he entered acquittals on all charges.

R. v. Biggs, 2016 CarswellOnt 18793, 2016 ONCA 910

***4. — Following the ratio in* R. v. Pino*, 2016 ONCA 389, 2016 CarswellOnt 8004, a judge of the Ontario Court of Justice excludes breathalyzer tests taken* prior to *a breach of s. 9 of the* Charter**

It has long been established that holding a defendant at the police station for too long after the breath tests have been completed may be a breach of his or her rights under s. 9 of the *Charter* (arbitrary detention): see, for example, *R. v. Iseler*, 2004 CarswellOnt 4319, 190 C.C.C. (3d) 11 (Ont. C.A.). Even where courts found that the police "overheld" a defendant, they have been reluctant to stay proceedings (on the strength of *Iseler*, *supra*, and other authorities) and — because the breach did not precede the discovery of the incriminating evidence — they have been unwilling to exclude the results of the breath tests under s. 24(2).

As we saw in the June 2016 issue, the Ontario Court of Appeal held in *R. v. Pino*, 2016 ONCA 389, 2016 CarswellOnt 8004 that a *Charter* breach need necessarily not precede the discovery of oppugned evidence for a court to exclude the evidence under s. 24(2) of the *Charter*. As Laskin J.A. held, evidence may be "obtained in a manner that infringed or denied any rights or freedoms" guaranteed by the *Charter* where the discovery of the evidence and the breach are "part of the same transaction or course of conduct" and where the connection between the discovery of the evidence and the breach is "temporal, causal or contextual", provided that that connection is "not to tenuous". The Court of Appeal in that case excluded evidence of drugs where one of the breaches took place *after* the drugs were found.

Justice Hawke of the Ontario Court of Justice recently decided that, in view of the ratio in *Pino*, *supra*, she had the power to exclude the results of breath tests taken *before* the "overholding" of a defendant. Her decision is very well reasoned and persuasive.

In that case, a young woman, with no criminal record, was stopped for a sobriety check and, after failing a screening test, was taken to a police station for breath tests. The lowest result of the breathalyzer tests was 135 mgs of alcohol per 100 mL of blood.

She was not released shortly after the testing was completed, as she should have been. She was, to quote Hawke J. at para. 9, " . . . arbitrarily detained and imprisoned . . . " for slightly in excess of six hours by the Peel Regional Police. She held, at paras. 21-2, that the breach and the discovery of the evidence were "part of the same transaction" and that there were also contextual and temporal connections between the evidence and the *Charter* breach. The seriousness of the breach was amplified by the judge's findings of fact — for example, as she put it at para. 24, "negative credibility findings . . . made on certain points" for two of the officers who testified for the Crown; that the applicant demonstrated no signs of impairment; that she was extremely co-operative throughout the investigation; that "overholding" was prevalent in Peel Region, etc.

Relying on the reasoning in *Pino*, *supra*, she excluded the breath results and acquitted the defendant.

R. v. Lorenzo, 2016 CarswellOnt 16614, 2016 ONCJ 634

***5. — Declining to follow the ratio in* Pino*, supra, a judge of the Ontario Court of Justice declines to exclude breathalyzer tests taken* prior to *a breach of s. 9 of the* Charter**

Lorenzo, *supra*, was not followed by Justice Hawke's brother judge, Justice Blacklock, in an "overholding" case decided in Peel Region not long after *Lorenzo*, *supra*, was decided. His reasons are also very well written and persuasive.

Justice Blacklock found that the Peel Regional Police breached Mr Carreau's rights under s. 9 of the *Charter* by "overholding" him after his breath tests were completed.

He was stopped for speeding and failed a screening test. He had "no clear indicia of impairment" until a Sgt Burton considered him for release after the breathalyzer tests were completed. After the "fail", he was taken to a police station and his blood-alcohol concentration was found to be at least 123 mgs of alcohol per 100 mL of blood. Because he did not understand the release documents and had no one to pick him up, Sgt Burton decided to hold him and re-assess him after an hour. He was released some four hours later.

Justice Blacklock found that the defendant had been arbitrarily detained because he had been detained for, as he put it at para. 37, "approaching three hours", during which the police did not make " . . . any concerted effort to determine his level of sobriety".

Blacklock J. found that this did not warrant a stay of proceedings because it was not "the clearest of cases" and he declined to follow *Lorenzo*, *supra*, and exclude the breath results.

The Ontario Court of Appeal in *Iseler*, *supra*, and *R. v. Sapusak*, 1998 CarswellOnt 4091 (Ont. C.A.) declined to exclude breathalyzer results for "overholding". As Blacklock J. put it at para. 47, in both cases, the appellate courts found "no causal or temporal connection between the obtaining of the samples and the overholding". In his attempt to reconcile binding appellate case law, he could not conclude that the breath samples were "obtained in a manner" that infringed s. 9 and he declined to exclude them.

R. v. Carreau, 2016 ONCJ 700, 2016 CarswellOnt 19170

6. — A majority in the Alberta Court of Appeal decides that maintenance records for breathalyzer instruments are "third party" disclosure and that defence counsel will rarely be able to obtain their production because they are not "likely relevant"

The Supreme Court of Canada in *R. c. St-Onge Lamoureux*, [2012] 3 S.C.R. 187, 2012 CarswellQue 10777 read down s. 258(1)(c) of the *Criminal Code* such that s. 258(1)(c) creates a presumption that the results of breath tests taken in compliance with the provisions of the *Criminal Code* are "conclusive proof" of the accused's blood-alcohol concentration. That presumption can be rebutted by evidence "tending to show . . . that the approved instrument was malfunctioning or was operated improperly".

Passages from the judgment of Deschamps J. in *Ste-Onge Lamoureaux*, *supra*, arguably gave support to the proposition that defence counsel should be entitled to copies of maintenance records for the breathalyzer instruments that measured their clients' blood-alcohol concentration. The following quotations illustrate the point:

> [41] . . . the new provisions do not make it impossible to disprove the test results. Rather, Parliament has recognized that the results will be reliable only if the instruments are . . . maintained properly, and that there might be deficiencies in the maintenance of the instruments . . . .
>
> [48] The prosecution gains a clear, albeit limited, advantage from the requirement, since evidence to the contrary is limited to the real issue: whether the test results are reliable. The evidence is to be tendered relates directly to an instrument that is under the prosecution's control. The prosecution must of course disclose certain information concerning the maintenance and operation of the instrument, but is free to establish procedures for tracking how such instruments are maintained and operated. Moreover, the prosecution has control over the people who maintain and operate the instruments.
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> [72] . . . the expert evidence accepted by the courts over the past few years has established that approved instruments are very reliable, provided the instruments are . . . maintained properly.

> [78] Although Parliament now requires evidence tending to establish a deficiency in the functioning or operation of the instrument, this does not mean that there are limits on the evidence that can reasonably be used by the accused to raise a doubt in this regard. The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence. If the prosecution denies such a request, the accused can invoke the rules on non-disclosure and the remedies for non-disclosure. (see *R. v. O'Connor*, [1995] 4 S.C.R. 411). In short, the accused might rely, for example, on a maintenance log that shows the instrument was not maintained properly or on admissions by the technician that there had been erratic results, or he or she might argue that health problems had affected the functioning of the instrument . . . .

In *R. v. Jackson*, 2015 ONCA 832, 2015 CarswellOnt 18194 (summarized in the January 2016 issue), the Ontario Court of Appeal held that defence counsel were not entitled to maintenance records as "first party" *Stinchcombe* disclosure; rather, these records are "third party" records that "fall beyond the boundaries of the fruits of the investigation" and their production is governed by the *O'Connor* regime, which is more stringent than the *Stinchcombe* rules. In an "*O'Connor*" application, defence counsel must first establish that the records are "likely relevant" and, if this threshold is met, a judge then reviews the records to determine whether, or to what extent, the records will be produced.

The Alberta Court of Appeal, in two related appeals that were heard and decided together, recently dealt with whether the Crown is obliged to disclose maintenance records for breathalyzer instruments.

The majority judgment, written by Slatter J.A., held, as did the Ontario Court of Appeal in *Jackson*, *supra*, that maintenance records are "third party" records and counsel must seek their production through the *O'Connor* regime. The majority also suggested, even more forcefully than the court in *Jackson*, that the bar that the defence must clear to satisfy a court to order their production will be very, very high.

Approved instruments have many internal controls which are designed to detect errors in the way the instrument is working. If the instrument is not working properly, the internal controls will let the operator know this and might even shut down the instrument. The majority held that it was "highly unlikely" that approved instruments will malfunction without triggering any internal controls designed to detect errors and shut down the instrument.

The Crown called an expert toxicologist, Ms. Kerry Blake, whose evidence was uncontradicted. She deposed that while maintenance records " . . . should be kept they cannot be used to determine whether an error has or will occur on any given test or at any given time" and went on to conclude: "As a forensic scientist, I can form no conclusions concerning the proper operation of an instrument based on maintenance records": para. 18. At paras. 18 and 19 of his judgment, Slatter J.A. summed up her evidence as follows:

> [18] . . . . the only way to detect if any instrument was malfunctioning at any particular time is to examine the records made at the time-of-test. If the instrument did not report a "fail" and the printed results of the test are regular, the instrument was working. The fact that it might have malfunctioned the day before the test, or the day after that test, does not take away from the fact that it was operating properly at the time of this particular test.
>
> [19] It would follow from Ms. Blake's evidence that the historical maintenance records of a breathalyzer instrument are "clearly irrelevant". All that the accused needs to make full answer and defence are the time-of-test results. Any malfunction of the instrument during the test will be disclosed on those records, or to put it another way, the chance of there being any malfunctioning that is undetected is so negligible as to be speculative.

Maintenance logs, he decided, were not the "fruits of the investigation" and are only disclosable under the

O'Connor regime. (This requires, as a threshold, that the defence establish their "likely relevance".) As Slatter J.A. pointed out, this is suggested by Deschamps J. in *Ste-Onge Lamoreux*, *supra*, at para. 78 (quoted above).

"Time-of-test" records are, by contrast, "first party" disclosure and ought to be disclosed by the Crown as *Stinchcombe* disclosure.

Because, as he put it at para. 75, " . . . the chances of an undetected malfunction are extremely remote . . . ", Justice Slatter observed that the defence will "rarely" be able to persuade a court that historical maintenance are "likely relevant". To quote from para. 70 of the majority judgment:

> As a matter of evidence in these appeals, and as a matter of logic generally, historical maintenance records will rarely if ever be actually relevant to making full answer and defence in a particular prosecution, and therefore the accused will rarely be able to show "likely relevance" of those records. Merely arguing that there are likely maintenance records, and that the instruments likely underwent maintenance from time to time, is not sufficient to show that there is sufficient probative, relevant evidence in those historical records to justify disclosure.

In a very well reasoned dissent, Madam Justice Rowbotham quoted at length from *Ste-Onge Lamoureaux*, *supra*, and held, at para. 105, that it " . . . opened the door to the disclosure of some maintenance records". She held that some of the maintenance records become "first party" disclosure because the instrument is reliable only if properly maintained. Thus, she held that the Crown is obliged to provide, as *Stinchcombe* disclosure, the maintenance log of the approved instrument.

R. v. Vallentgoed, 2016 CarswellAlta 2195, 2016 ABCA 358

7. — The Supreme Court of Canada provides guidance for trial judges who are considering departing from joint submissions on sentence

It has long been established that the judges should generally give effect to "joint submissions" on sentence made by defence counsel and Crown counsel. Appellate authorities, however, have differed as to what test sentencing judges should consider if they contemplate departing from a joint submission.

This has been recently settled by the Supreme Court of Canada.

The appellant, who had a long-standing mental health disorder, attended a drop-in centre in Vancouver which provided assistance to people suffering from mental health and addiction problems. He became involved in a confrontation with a volunteer there and punched him. The volunteer fell, hit his head on the pavement, and died.

After his arrest, he was taken to a mental health facility. He breached his bail after he was discharged and was held in custody for some 11 months until his sentencing hearing.

After a few days of trial, he pleaded guilty to manslaughter. The Crown and his lawyer made a joint submission on sentence, proposing a further 18 months jail with no period of probation to follow. The trial judge held that the sentence proposed was not fit and he concluded that the appropriate sentence was two years less a day, having regard to the pre-sentence custody that the appellant had already served, and he added a three-year probation order.

Justice Moldaver, writing for a unanimous court, held that the trial judge erred in declining to follow the joint submission.

Trial judges should not depart from a joint submission unless it would "bring the administration of justice into

disrepute or is otherwise not in the public interest". In other words, joint submissions should be followed unless they are so markedly out of line with the expectations of reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolutions of criminal charges, that they would believe the proper functioning of the justice system had broken down. This is a stringent test — and for good reason. As Moldaver J. noted, at para. 40:

> To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.

Justice Moldaver went on to provide guidance for judges on the approach they should follow when they are troubled by a joint submission.

First, they should approach the joint submission on an "as-is" basis. If the parties have not asked for a particular order, the trial judge should assume that it was considered and excluded from the joint submission. This does not, however, relieve the judge from imposing whatever mandatory order or orders that are required by the *Criminal Code*, even if counsel omit to ask for it or them.

Second, trial judges should apply the public interest test when they are contemplating "jumping" or "undercutting" a joint submission.

Third, when faced with a contentious joint submission, the judge should inquire about the circumstances that led to the agreement — what benefits were obtained by the Crown or concessions made by the accused. For example, if the joint submission was arrived at because the accused promised to assist the Crown or the police or because of an evidentiary weakness in the Crown's case, "a very lenient sentence might", as Moldaver J. put it at para. 53, "not be contrary to the public interest". Counsel should provide the court with a full account of the circumstances of the offender and the offence and the joint submission without a specific request from the judge. That the judge may not lightly disregard joint submissions imposes a corollary obligation on counsel to "amply justify their position on the facts of the case as presented in open court", as the *Martin Committee Report* put it at p. 329. Where it is not possible to put the main considerations underlying a joint submission on the record because of safety or privacy concerns, counsel must, to quote Moldaver J. at para. 56, " . . . find alternative means of communicating these considerations to the trial judge" so that he or she is adequately apprised of the relevant considerations and that a record is created for appeal, if necessary.

Fourth, if the trial judge is not satisfied with the sentence suggested by counsel, he or she should advise counsel of his or her concerns and invite their submissions on those concerns.

Fifth, if the judge's concerns are not alleviated, the judge may allow the accused to apply to withdraw the guilty plea. These may be appropriate where counsel have made an error as to the legality of the sentence, for example, in proposing a conditional sentence where it is not available at law.

Finally, judges who remain unsatisfied by counsel's submission should, as Justice Moldaver put it at para. 60, provide "clear and cogent reasons for departing from the joint submission".

The trial judge employed the wrong test in deciding whether to accept the joint submission and, at all events, the trial judge's deviation from the recommended custodial sentence was "little more than tinkering", as Moldaver J. wrote at para. 63.

R. v. Anthony-Cook, 2016 SCC 43, 2016 CarswellBC 2929

Note: Much of the summary of *Lorenzo*, *supra*, is taken from "Making *Charter* arguments", a paper I wrote for a

continuing legal education progamme on drinking and driving that was offered by the Law Society of Upper Canada at Osgoode Hall, Toronto, on 10 December 2016.