



**SUPREME COURT OF CANADA**

**CITATION:** R. v. C.P., 2021 SCC  
19

**APPEAL HEARD:** November 10,  
2020

**JUDGMENT RENDERED:** May 7,  
2021

**DOCKET:** 38546

**BETWEEN:**

**C.P.**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Attorney General of Canada, Criminal Lawyers' Association (Ontario), Justice for  
Children and Youth and British Columbia Civil Liberties Association**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 120)

Abella J. (Karakatsanis and Martin JJ. concurring)

**CONCURRING REASONS:**  
(paras. 121 to 164)

Wagner C.J. (Moldaver, Brown and Rowe JJ. concurring)

**CONCURRING REASONS:** Kasirer J.  
(paras. 165 to 216)

**DISSENTING REASONS:** Côté J.  
(paras. 217 to 304)

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R. v. C.P.

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*Appellant*

v.

**Her Majesty The Queen**

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**Attorney General of Canada,  
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**Indexed as: R. v. C.P.**

**2021 SCC 19**

File No.: 38546.

2020: November 10; 2021: May 7.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin  
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law — Appeals — Unreasonable verdict — Accused young person convicted of sexual assault by judge sitting alone — Accused appealing conviction on basis that verdict was unreasonable — Conviction affirmed by majority of Court of Appeal — Whether verdict unreasonable.*

*Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Right to equality — Young persons — Appeals to Supreme Court of Canada — Accused young person convicted of sexual assault — Majority of Court of Appeal affirming conviction but one judge dissenting — Young person filing appeal as of right to Supreme Court under s. 691(1)(a) of Criminal Code — Section 37(10) of Youth Criminal Justice Act stating that no appeal lies to Supreme Court unless young person is granted leave to appeal — Whether s. 37(10) of Youth Criminal Justice Act infringes young person's right to equality and right not to be deprived of liberty except in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15 — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 37(10).*

When P was 15, he went to a party at a beach to celebrate a friend's birthday with a group of young people. The complainant, D, was 14. They had both been drinking. Sexual intercourse took place. P was charged with sexually assaulting D. The Crown's position at trial was that P had sex with D when he knew she was too drunk to be capable of consenting. P's defence was that D consented to having sex with him before there were any signs that she was too drunk to consent. One of D's friends, G, came to the party later than the rest of the group. She saw D lying on the ground and

went to her right away. D had been vomiting, could not get up, and was incapable of communicating. There was no dispute that D was intoxicated to the point of incapacity when G found her. The question was how soon after the sexual activity took place did G see D. The trial judge rejected P's evidence in chief that he spoke with G before G attended to D, but accepted P's evidence that he heard G arrive at the party right after he finished having sex with D, and his admission in cross-examination that G went directly to D when she arrived, which aligned with G's evidence. The trial judge concluded that D was in an incapacitated state at the time of intercourse and therefore incapable of consenting at that time. The trial judge was satisfied beyond a reasonable doubt that P knew or was reckless or wilfully blind to the fact that D was so intoxicated that she could not have consented to sexual activity. She found P guilty of sexual assault.

P appealed to the Court of Appeal, arguing that the verdict was unreasonable. The majority dismissed the appeal, but one judge would have allowed the appeal, set aside the conviction and entered an acquittal. P filed a notice of appeal as of right to the Court pursuant to s. 691(1)(a) of the *Criminal Code*. The Crown filed a motion to quash the appeal, based on the fact that under s. 37(10) of the *Youth Criminal Justice Act* ("YCJA"), young persons have no automatic right of appeal to the Court. While s. 37(1) of the YCJA incorporates the appeal routes for indictable offences under the *Criminal Code* into the youth justice system, s. 37(10) denies young persons the automatic rights to appeal to the Court available to adults, including those set out in s. 691(1)(a) of the *Criminal Code*. Leave is therefore required even when the court

of appeal affirms a conviction for an indictable offence and there is a dissent on a question of law at the court of appeal. P argued that s. 37(10) of the *YCJA* is contrary to ss. 7 and 15 of the *Charter*. The Court adjourned the Crown's motion to quash without prejudice to P's right to seek leave to appeal, including on the question of the constitutionality of s. 37(10) of the *YCJA*. The Court granted leave to appeal.

*Held* (Côté J. dissenting): The appeal should be dismissed.

(1) *Unreasonableness of the Verdict*

*Per Abella, Karakatsanis and Martin JJ.:* The verdict was reasonable. The trial judge's reasons for finding P guilty of sexual assault are model trial reasons: rigorous and thoughtfully explained. There is no basis for finding the verdict to be unreasonable.

A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached illogically or irrationally. This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge. The inquiry is narrowly targeted at fundamental flaws in the reasoning process which means that the verdict was not reached judicially or in accordance with the rule of law.

Here, the reasoning that led the trial judge to conclude that G discovered D in her incapacitated state right after the intercourse was both logical and rational. The trial judge rejected P's evidence that he spoke with G before she attended to D because it was internally inconsistent with his own evidence on cross-examination, externally contradicted by the evidence of G, and because P was intoxicated, particularly in comparison to G, whose memory was not suspect. The trial judge provided sound reasons for what she believed and what she did not, explaining why she found that some of P's evidence did not suffer from the same flaws that led her to reject other aspects of his testimony. The verdict was clearly one that a properly instructed judge acting judicially, could reasonably have rendered. The trial judge was well aware that the time of intercourse could not be ascertained in absolute terms, and that what mattered was the relative time of G's arrival in relation to the sexual activity. The combination of G's evidence and P's evidence satisfied the trial judge that G went to D as soon as she arrived, and that, on P's own evidence, G's arrival at the party was right after intercourse had taken place. This entitled the trial judge logically to conclude that the totally incapacitated condition G found D in when she arrived was the condition she was in during the sexual activity.

*Per* **Wagner** C.J. and Moldaver, Brown and Rowe JJ.: There is agreement with Abella J. that the verdict was reasonable.

*Per* **Kasirer** J.: There is agreement with Abella J. that the verdict was reasonable.

*Per Côté J. (dissenting):* P's conviction for sexual assault is unreasonable.

First, the trial judge's finding of D's incapacity to consent to sexual intercourse was reached illogically. The trial judge was well aware that the timing of the intercourse was the central issue of the case. The combination of the evidence of P and D's friend, G, was crucial to the trial judge's finding of incapacity. G's evidence alone was insufficient to support a finding of incapacity at the time of the intercourse and additional evidence was necessary to narrow the gap between the time of the intercourse and the time when G went to see D. It was only P's evidence that could address the timing of the intercourse in relation to G's arrival and her observation of D. The trial judge bridged that gap by rejecting the evidence that P spoke with G before she tended to D for three reasons: (1) P contradicted himself; (2) G was more reliable and credible; and (3) P's evidence was unreliable because he was intoxicated at this point in the evening. It was open to the trial judge to reject certain portions of P's evidence due to internal and external contradictions provided that the trial judge had a logical and reasonable basis for doing so. However, here, the source of the trial judge's illogical reasoning stems from her third reason. It was illogical for the trial judge to find, on the one hand, that P could not testify reliably about what had happened after the intercourse because he had been too intoxicated at that point in the night, while also finding, on the other hand, that P could nevertheless testify reliably about the fact that he had heard when G had arrived at the party. These findings are irreconcilable. If P was too intoxicated at that time to be subsequently able to testify reliably about the conversation, his testimony about having heard G arriving was also necessarily unreliable. These two events would have occurred at the same point in time, that is, at

a time when, in the trial judge's view, P had been too drunk for his subsequent testimony to be reliable. The trial judge found that P had been too drunk at that time to subsequently remember some things yet not too drunk to subsequently remember other things that would have happened at the same time. The trial judge gave no reason to explain this inconsistency on a crucial piece of evidence. Without P's evidence that he heard G arriving after the intercourse, it was impossible to convict P of sexual assault. This logical flaw would suffice to order a new trial.

Second, the evidence available to the trial judge is not capable of supporting the finding of D's incapacity to consent and a verdict of acquittal should be entered instead of ordering a new trial. The trial judge should have accorded far less weight to P's evidence about the timing of the intercourse in relation to G's arrival than she did in her reasons. The trial judge attached significant weight to P's evidence that he had heard about G arriving shortly after the intercourse. It constituted the centerpiece of her reasons. This was, however, incompatible with her repeated findings to the effect that P had been quite intoxicated and was thus an unreliable witness. Once the reliability of P's testimony is approached coherently with the trial judge's repeated findings to the effect that he had been quite intoxicated and that his memory of the crucial events was unreliable, it is simply impossible to pinpoint, even roughly, the time when the intercourse occurred on the basis of the rest of the circumstantial evidence. A reconstruction of the timeline indicates that the intercourse may have occurred at any time during a window of roughly two hours. As a result, the evidence did not permit the time of the intercourse to be determined beyond a reasonable doubt.

The trial judge could not reasonably conclude that D's being incapable of consenting at the time of the intercourse was the only reasonable finding available on the evidence. Without the finding of incapacity, there was no case against P, because neither D nor any other witness had testified that D had not consented as a matter of fact. Consequently, the evidence is not capable of supporting the verdict that P is guilty of sexual assault, and an acquittal should be entered in its place.

(2) *Constitutionality of Section 37(10) of the Youth Criminal Justice Act*

*Per Wagner C.J. and Moldaver, Brown and Rowe JJ.:* Section 37(10) of the *YCJA* is consistent with ss. 7 and 15 of the *Charter*.

Two elements must be established in order to show a violation of s. 7 of the *Charter*: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice. Here, the requirements of the first step are satisfied, as a limit on young persons' right to appeal to the Court engages residual liberty interests under s. 7. The outcome hinges on whether this deprivation is in accordance with the proposed new principle of fundamental justice that young persons are entitled to enhanced procedural protections in the criminal justice system. For a principle of justice to be "fundamental" within the meaning of s. 7: (i) it must be a legal principle; (ii) there must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate;

and (iii) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

If this proposed new principle entails a comparative assessment of procedural rights of young persons and those of adults, then it yields neither a meaningful standard nor one upon which any consensus is conceivable. If it is construed as a freestanding principle, the s. 7 argument depends on whether s. 37(10) deprives young persons of a liberty interest without adequate procedural safeguards. Denying young persons an automatic right to a hearing in the Court where a court of appeal affirms a conviction for an indictable offence, but a judge of that court dissents on a question of law, cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system because there is no constitutional right to an appeal, let alone an automatic one at the apex of the judicial system. The principles of fundamental justice could not require an automatic hearing in the Court in such narrow circumstances as this would have the effect of constitutionalizing the application of s. 691(1)(a) of the *Criminal Code* to young persons, thereby implying that Parliament would be under a positive obligation to enact such a provision if one did not already exist. Automatic appeals for young persons are not a foundational requirement for the dispensation of justice. The absence of an automatic appeal does not increase the likelihood of wrongful convictions or other miscarriages of justice. The dearth of evidence that there is an actual problem with the way the Court has been exercising its discretion to grant leave belies the conclusion that s. 37(10) denies young persons adequate procedural safeguards. The modern youth

justice system provides young persons with enhanced procedural protections commensurate with their unique circumstances and inherent vulnerability in the justice system. Accordingly, s. 37(10) of the *YCJA* is consistent with s. 7 of the *Charter*.

With respect to s. 15 of the *Charter*, the question is whether s. 37(10) of the *YCJA* deprives young persons of a procedural benefit that is available to adults under s. 691(1)(a) of the *Criminal Code*. A law or a government action will contravene the guarantee in s. 15: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage. Section 37(10) of the *YCJA* creates a distinction based on age. The issue is whether it draws a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. Understanding the distinct legislative scheme underlying s. 37(10) is crucial to the assessment of the actual impact of the provision on young persons.

The *YCJA* is designed to balance multiple interests including promptness and enhanced procedural protection, which are both core tenets of the youth criminal justice system. While young persons are uniquely vulnerable to miscarriages of justice, they are also uniquely vulnerable to harms resulting from protracted legal proceedings. A contextual understanding of the place of young persons in the procedural scheme of the *YCJA* must therefore account for both of these interests: a structurally prolonged appellate review can be more prejudicial to them. Section 37(10) does not perpetuate

any disadvantage but, rather, appropriately balances the overlapping interests of young persons in prompt resolution and in appellate review. Above all, the leave requirement in s. 37(10) applies equally to the Crown and confers the corollary procedural benefit for young persons of being protected from an as of right appeal by the Crown pursuant to s. 693(1)(a) of the *Criminal Code*, a safeguard that is not afforded to adults.

The benefits of the provision must also be considered in conjunction with the absence of evidence that the Court's leave process perpetuates a tangible disadvantage for young persons. The final bulwark against a miscarriage of justice is not a right to an automatic appeal, but the right of appeal itself. The vulnerability of young persons in the criminal justice system is not exacerbated simply because a provision of the *YCJA* fails to offer the maximum imaginable procedural benefit available to adults. In choosing to deny young persons an automatic right to appeal to the Court, Parliament did not discriminate against them, but responded to the reality of their lives by balancing the benefits of appellate review against the harms inherent in that process, in keeping with the dictum that there should not be unnecessary delay in the final disposition of criminal proceedings.

*Per Kasirer J.:* Section 37(10) of the *YCJA* is constitutionally valid. There is agreement with the Chief Justice that s. 37(10) is consistent with s. 7 of the *Charter*. There is also agreement with Abella J. that s. 37(10) constitutes a limit on s. 15(1) *Charter* rights; however, the limit to the equality right of young persons prescribed by

s. 37(10), when read in conjunction with s. 691(1)(a) of the *Criminal Code*, is justified in a free and democratic society under s. 1 of the *Charter*.

The burden is on the party seeking to rely on the impugned provision to establish that the limit on s. 15(1) is justified under s. 1 of the *Charter*. That party must demonstrate a pressing and substantial objective for the limit and that the means chosen to advance this objective do not disproportionately limit the s. 15(1) right. Proportionality demands that the limit be rationally connected to the stated pressing and substantial objective, that it be minimally impairing, and that its benefits outweigh its negative effects. The relationship between s. 15(1) and s. 1 requires careful attention. The focus of the inquiry must be on the seriousness of the discrimination and its relationship with the underlying values in a free and democratic society. A limit on s. 15(1) rights based on a person's age has been viewed in some contexts as less serious and thus more easily justified. The analysis must be attentive to the context of the legislative objectives at issue. The pressing and substantial objective must be scrutinized so that state conduct resulting in the most odious forms of discrimination is not excused. This does not preclude limits that promote other values and principles.

As the constitutional question before the Court is particularized to the s. 691(1)(a) appeal route, it is this narrow instance of *prima facie* age discrimination that the Crown must justify. Section 37(10) of the *YCJA* has a pressing and substantial objective of promoting timeliness, early rehabilitation and reintegration in youth criminal matters, which the youth criminal justice system is designed, in part, to

promote. Providing for appeals by leave instead of by right favours early resolution of matters involving youth. Timeliness reinforces the connection between the actions and consequences, reduces psychological impact, avoids a sense of potential unfairness, and advances societal interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible.

Section 37(10) is rationally connected to the pressing and substantial objective of timeliness, early rehabilitation, and reintegration. By requiring leave in those circumstances where there would otherwise be appeals as of right, s. 37(10) serves the goal of timeliness as the leave requirement may be a disincentive to bringing an unmeritorious appeal. Moreover, leave applications are generally decided more quickly than appeals. While the appeal process may be longer on average for those young persons who are successful in their leave applications to the Court as compared to a scenario in which there was no leave requirement, this does not preclude a finding that s. 37(10) is rationally connected to the legislative objective, since it is designed to bring a rapid conclusion to those cases where there is no reason to hear the appeal which raises a question of law that is without merit.

Turning to minimal impairment, Parliament's imposition of a leave requirement in s. 37(10) does not go too far to achieve its objective of timeliness, early rehabilitation, and reintegration in youth criminal matters. While imposing a leave requirement on an otherwise meritorious appeal could raise a potential for miscarriage of justice that is not present in the case of adults who have an appeal as of right, the

Court exercises its leave power in a manner that allows it to hear appeals in cases raising a potential miscarriage of justice. In criminal matters, the concept of public importance, the most important criterion for determining the success or failure of a leave application, is best understood as being engaged not only by jurisprudentially important legal issues that qualify as issues of public importance on that basis, but also by those that raise serious questions of law about the safety of the verdict in criminal matters. The issue of a wrongful conviction transcends the particular defendant and engages the integrity of our system of justice as a whole. The Court has the institutional capacity to identify possible miscarriages of justice through the leave to appeal process. Not only does it have the ability to exercise its power to grant leave mindful of *Charter* rights and the fundamental principles of justice, but it has a responsibility to do so. It follows that the leave process provides an effective safeguard for young persons in those cases where a similarly situated adult would have an appeal as of right under s. 691(1)(a).

Finally, the benefit in s. 37(10) of the timely conclusion of youth criminal matters outweighs the negative effect of the discriminatory impact of imposing a leave requirement for young persons in circumstances where adults can appeal as of right. In enacting s. 37(10) of the *YCJA*, Parliament did not choose to take away a young person's access to the Court, it only added a leave requirement. When deciding the leave application, the Court will have the benefit of the reasons offered in the dissent below on the question of law, the argument in support of leave and the required supporting materials. Most importantly, the criteria for granting leave as relevant to youth criminal matters means that when the liberty of the young person is at stake, a

*prima facie* meritorious appeal on the question of law would meet the public importance standard even if the matter does not transcend in jurisprudential importance the interest of the parties. Any enhanced risk of miscarriage of justice as a result of having to seek leave to appeal in these circumstances is minimized by the leave to appeal process. Imposing a leave requirement in service of the broader goals of youth criminal justice is consistent with the place of equality in a free and democratic society.

*Per Abella, Karakatsanis and Martin JJ.:* The limitation in s. 37(10) of the *YCJA* constitutes a *prima facie* breach of s. 15 of the *Charter* that cannot be justified under s. 1 of the *Charter*, making s. 37(10) unconstitutional.

To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Substantive equality requires attention to the full context of the claimant group's situation and to the impact of the limitation on that situation. But context must not be confused with justification. Neither stage of the s. 15(1) test permits the objectives of the legislation to infuse the analysis into whether the limitation itself is a distinction that has the effect of perpetuating, reinforcing, or exacerbating the disadvantage of the claimant group. Only at the s. 1 justificatory stage are the statutory objectives relevant, and then only to the extent that they justify the limitation.

Here, the parties acknowledge that the first step of the s. 15(1) test is satisfied because there is a distinction between the appeal rights to the Court available to adults and young people on the basis of age. The second step, determining whether depriving young people of the automatic rights to appeal that adults have reinforces, perpetuates or exacerbates their disadvantage, requires consideration of what benefit an automatic right to appeal to the Court provides.

The principal object of an appeal as of right to the Court in a criminal case is to rectify legal errors in the trial of serious offences. A dissent on a question of law in a provincial court of appeal, including an unreasonable conviction, or one that cannot be supported by the evidence, automatically triggers a right of appeal to the Court in order to guard against miscarriages of justice. Robust procedural protections against wrongful convictions are crucial. The history of wrongful convictions such as those of Steven Truscott, David Milgaard and Donald Marshall Jr. are evidence of the unconscionable consequences of their absence.

This is an access to justice issue of fundamental importance to young people seeking to prevent wrongful convictions. The automatic appeal right available to adults under s. 691(1)(a) of the *Criminal Code* is premised on the understanding that a dissent on a question of law at the court of appeal raises a legitimate question as to the validity of the conviction, necessitating final review by the Court regardless of whether the case would otherwise meet the Court's standard for leave to appeal. Likewise, s. 691(2)(b) is an expression of the basic concept that it is essential to a fair

criminal justice system that anyone convicted of an indictable offence is entitled to at least one appeal from the initial finding of guilt, whether that finding is first entered at trial or on appeal. These automatic appeal rights provide an automatic additional layer of judicial scrutiny and they offer a significant procedural safeguard.

Section 37(10) of the *YCJA* deprives young people of a significant procedural safeguard against wrongful convictions for adults, despite evidence that young people are more vulnerable to them than adults. Moreover, by virtue of its effect on s. 691(2) of the *Criminal Code*, s. 37(10) deprives young people who are found guilty for the first time by a court of appeal of the right to have their case reviewed at all. This deprivation demonstrably perpetuates young people's disadvantage within the criminal justice system. It is a holdover from an antiquated and paternalistic model of youth justice. It would be untenable to suggest that young persons are less worthy of protection from miscarriages of justice than adults. The very philosophy and purpose of the *YCJA*, with its emphasis on providing substantial procedural protections for young persons, argues for procedures to prevent the ultimate disadvantage, namely, a wrongful conviction. While the Court strives to detect any sign that a miscarriage of justice may have occurred at the leave to appeal stage, an application for leave to appeal does not involve a screening for error in the level of depth that characterizes an appeal on the merits. The objective of timeliness is not a justification for denying access to a procedural protection that has historically served to guard against miscarriages of justice. There is no justification for a speedy resolution if the resolution is based on an unfair trial. There is therefore a *prima facie* breach of s. 15.

Turning to s. 1 of the *Charter*, even accepting that granting the Court the discretion to decide when criminal cases involving young persons merit a second level of appellate review is a pressing and substantial objective for s. 37(10)'s deprivation of an automatic right of appeal, it fails at the final stage of the proportionality analysis because any benefits of the denial are far outweighed by the deleterious effects. Promoting timeliness, early rehabilitation and reintegration are salutary goals, but s. 37(10)'s actual contribution to achieving them is minimal. The most that will be saved is a few months in those cases where leave is denied. On the other hand, requiring a young accused person to go through the leave to appeal process before they are entitled to a hearing has the effect of prolonging the process, since if leave is granted, the appeal will not be heard for several more months. This means that s. 37(10) exposes young people to a greater risk of miscarriages of justice in aid of the possibility of saving a few months of time. Denying young people the automatic full scrutiny of an appeal and accepting a less rigorous appeal process makes justice the servant of expedition for young people, rather than the other way around. The objectives of timeliness, rehabilitation and reintegration are meaningless if wrongful findings of guilt are tolerated in the service of speed. The *YCJA* is not intended to promote swift *injustice*. The profoundly harmful impact of fast-tracking rehabilitation and reintegration over the right to have the basic procedural appeal protection from miscarriages of justice as adults far outweighs the benefit of the potential shaving of a few months off the appeal process.

*Per Côté J.:* It is not necessary to answer the constitutional questions pertaining to the validity of s. 37(10) of the *YCJA* because they are moot. The constitutional analysis of the denial of an automatic right of appeal to the Court would have no impact on the underlying criminal appeal in this case, as the Court granted leave to appeal.

### **Cases Cited**

By Abella J.

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*Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

By Wagner C.J.

**Referred to:** *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Lyons*, [1987] 2 S.C.R. 309; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *R. v. R.L.* (1986), 26 C.C.C. (3d) 417; *R. v. K.G.* (1986), 31 C.C.C. (3d) 81; *R. v. B. (S.)* (1989), 50 C.C.C. (3d) 34; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. M. (J.S.)*, 2005 BCCA 417, 200 C.C.C. (3d) 400; *R. v. D.F.G.* (1986), 29 C.C.C. (3d) 451; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99; *R. v. K.J.M.*, 2019 SCC 55; *Krishnapillai v. Canada (C.A.)*, 2001 FCA 378, [2002]

3 F.C. 74; *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426.

By Kasirer J.

**Referred to:** *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Ontario (Attorney General) v. G*, 2020 SCC 38; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522; *Québec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. K.J.M.*, 2019 SCC 55; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206; *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By Côté J. (dissenting)

*R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *R. v. Barton*, 2019 SCC 33; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152; *R. v. Mathieu* (1994), 90 C.C.C. (3d) 415, aff'd [1995] 4 S.C.R. 46; *R. v. Cedeno*, 2005 ONCJ 91, 27 C.R. (6th) 251; *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000.

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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Nordheimer JJ.A.), 2019 ONCA 85, 373 C.C.C. (3d) 244, [2019] O.J. No. 644 (QL), 2019 CarswellOnt 1642 (WL Can.), affirming a decision of Crosbie J., 2017 ONCJ 277, [2017] O.J. No. 2221 (QL), 2017 CarswellOnt 6476 (WL Can.). Appeal dismissed, Côté J. dissenting.

*Matthew R. Gourlay*, for the appellant.

*Grace Choi and Holly Loubert*, for the respondent.

*John Provart*, for the intervener the Attorney General of Canada.

*Michelle M. Biddulph*, for the intervener the Criminal Lawyers' Association (Ontario).

*Jane Stewart*, for the intervener Justice for Children and Youth.

*Alison M. Latimer*, for the intervener the British Columbia Civil Liberties Association.

The judgment of Abella, Karakatsanis and Martin JJ. was delivered by

ABELLA J. —

[1] This is an appeal by a young person from a finding of guilt of sexual assault on the ground that the verdict was unreasonable. It is also a challenge to the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, which denies young persons rights of appeal available to all adults convicted of indictable offences, namely an automatic right to appeal to the Supreme Court of Canada when there is a dissent in the court of appeal on a question of law or when the court of appeal enters a finding of guilt on a Crown appeal from an acquittal at trial. These rights of

appeal serve as a substantial safeguard against miscarriages of justice. Under the *YCJA*, they are not available to young persons in the criminal justice system.

[2] The constitutional issue turns on whether this deprivation violates the rights of young people under the *Canadian Charter of Rights and Freedoms*, and, if so, whether it can be justified. The argument was based both on ss. 15 and 7 of the *Charter*, but in view of my conclusion under s. 15, it is unnecessary to address the s. 7 issue. The essence of the s. 15 argument is that the deprivation perpetuates and reinforces young people's disadvantage in criminal proceedings and there is therefore a breach of s. 15(1) of the *Charter*.

[3] The Crown's position can be distilled into two main propositions:

- The *YCJA* is ameliorative legislation that provides young people other protections, making this particular safeguard against wrongful convictions for indictable offences unnecessary.
- Appeals prolong the process, and young people need a speedy resolution to criminal proceedings. Under the *YCJA*, timeliness is a key objective so that young persons found guilty can be quickly rehabilitated and reintegrated into society.

[4] The answer to these propositions can be summarized as follows and leads me to conclude, respectfully, that the limitation in s. 37(10) constitutes a *prima facie* breach of s. 15 that cannot be justified under s. 1:

- The fact that the overall purpose of the legislation is ameliorative is of no relevance in determining whether a particular limitation represents a *prima facie* breach of s. 15. It may factor contextually into the justificatory analysis in s. 1, but what is at issue at the breach stage is the impact of the limitation on the claimant group, not the purpose of the legislation as a whole. The crucial fact remains that the *YCJA* does not provide any analogous procedural substitute for a guaranteed right to appeal to this Court.
- The objective of timeliness is not a justification for denying access to a procedural protection that has historically served to guard against miscarriages of justice. There is no justification for a speedy resolution if the resolution is based on an unfair trial.

[5] As to the appeal from the finding of guilt, I agree with the majority in the Court of Appeal that the verdict was reasonable and would dismiss the appeal.

Prior Proceedings

[6] When C.P. was 15, he went to a party at a beach to celebrate a friend's birthday with a group of young people. The complainant, R.D., was 14. They had both been drinking. Sexual intercourse took place.

[7] C.P. was charged with sexually assaulting R.D. He was tried before Crosbie J. sitting as a youth justice court judge under the *YCJA*.

[8] The Crown's position at trial was that C.P. had sex with R.D. when he knew she was too drunk to be capable of consenting. C.P.'s defence was that R.D. consented to having sex with him before there were any signs that she was too drunk to consent. He said he thought she was "fine" when they had intercourse.

[9] Crosbie J., in thorough and thoughtful reasons, addressed whether R.D. was too intoxicated to consent and whether C.P. had an honest but mistaken belief in R.D.'s consent (2017 ONCJ 277).

[10] R.D. did not testify. Her videotaped statement to the police was admitted at trial. She did not remember the sexual activity.

[11] One of R.D.'s friends, E.G., gave a videotaped statement to the police that was admitted at trial. She said that she came to the party with a friend later than the rest of the group. The very first thing she saw was R.D. lying on the ground. She went to her right away. She found R.D. extremely intoxicated. She had been vomiting, could not get up, and was incapable of communicating. In her oral evidence, E.G. reiterated

that she immediately went to R.D. when she arrived at the party. E.G.'s evidence on this point was not challenged.

[12] The trial judge found that E.G. was a "credible and reliable witness" with "no animus towards C.P."

[13] C.P.'s evidence was that R.D. consented to sexual intercourse. He testified that he and R.D. arrived at the party with a group of friends. They sat on a mattress by a bonfire, where they talked and kissed. R.D. walked away from the bonfire by herself and sat by some rocks away from the group. C.P. talked to another friend for about five minutes, then returned to R.D. C.P. testified that he and R.D. started kissing, and that at one point she said "Fuck me". He said he was surprised at first, but he believed her and thought she was able to give consent. He did not use protection.

[14] C.P. said that after ejaculating, he stood up and heard E.G. and another young person arrive. He said he went to talk to them for 10 or 15 minutes before returning to R.D. On cross-examination, however, C.P. admitted that E.G. went "directly to [R.D.]" when she arrived.

[15] The trial judge did not believe certain critical aspects of C.P.'s evidence, including that R.D. was "fine" during intercourse and that she asked him for sex. On these points, she found that C.P. was "evasive and rattled" and "trying to downplay the impact of his drunken state on his ability to remember what happened and on his actions that evening". C.P.'s demeanour, based on his tone, manner and language, suggested

to her that he was guessing about certain answers, and that at other times, he “desperately wanted it to be the case that something had happened, but in fact, it had not”. She was aware, however, that C.P. was

remembering an event from a year ago. C.P. is also only 16 years old and I suspect, was nervous when testifying, especially under the skilled cross-examination of counsel. I am, by no means, criticizing his evidence in its entirety. What I have set out above are the many reasons upon which I rejected his evidence on certain, key points. [para. 114]

[16] Crosbie J. rejected C.P.’s evidence in chief that he spoke with E.G. for 10 to 15 minutes before E.G. attended to R.D., but she accepted his evidence that he heard E.G. arrive at the party right after he finished having sex with R.D., and his admission in cross-examination that E.G. went directly to R.D. when she arrived, which aligned with E.G.’s evidence.

[17] There is no dispute that R.D. was intoxicated to the point of incapacity when E.G. found her. The question, therefore, was how soon after the sexual activity took place did E.G. see R.D. Based on C.P.’s evidence that he heard E.G. arrive right after the intercourse and the evidence from E.G. and C.P. that E.G. went directly to R.D. when she arrived, the trial judge concluded that R.D. was in an incapacitated state at the time of intercourse:

This evidence . . . leads me to conclude beyond a reasonable doubt that R.D. was extremely intoxicated at the time C.P. admitted to being with her and admitted to having sex with her. E.G. found R.D. having already vomited. She was found unconscious and generally unresponsive — all

within a very, very short period of time from when C.P., on his own evidence, had just ejaculated inside her. [para. 95]

[18] This led Crosbie J. to conclude beyond a reasonable doubt that R.D. was incapable of consenting at the time of intercourse.

[19] Having found that R.D. was too intoxicated to consent at the time of sexual activity, Crosbie J. turned to whether C.P. had an honest but mistaken belief in communicated consent. She made three key findings. First, she expressly found that “[R.D.] did not ask C.P. to ‘fuck me’”. Second, she concluded that there was “no room to doubt [C.P.’s] knowledge of how drunk” R.D. was when sexual intercourse took place:

. . . within a very short period of time of the sexual activity, R.D. was falling asleep, had vomit on her, did not appear to be comprehending what E.G. [her friend] was saying and was unable to meaningfully respond. In his testimony, C.P. put himself with R.D. during this time period. There is simply no room to doubt his knowledge of how drunk R.D. really was at the relevant time. [para. 120]

[20] Finally, she found that, despite his knowledge of her intoxicated state, C.P. failed to take steps to ascertain whether R.D. was consenting, instead choosing to “forg[e] ahead, knowing there existed a danger or risk that [R.D.] was too drunk”. While he knew there was “a need for some inquiry”, he “did not wish to pursue the truth — he preferred to remain ignorant”.

[21] As a result, the trial judge was satisfied, “beyond a reasonable doubt that C.P. knew or was reckless or wilfully blind to the fact that R.D. was so intoxicated that she could not have consented to sexual activity”.

[22] She found C.P. guilty of sexual assault.

[23] C.P. appealed to the Court of Appeal for Ontario, arguing that the verdict was unreasonable. MacPherson J.A., writing for the majority, dismissed C.P.’s appeal (2019 ONCA 85, 373 C.C.C. (3d) 244). He found that “the trial judge’s careful and comprehensive reasons led to an entirely reasonable verdict”. In his view, the trial judge did not commit any errors in her treatment of C.P.’s evidence or of the applicable law. Her finding, based on the evidence, that E.G. went directly to R.D. when she arrived at the party and that C.P. had heard her arrive as soon as he ejaculated and stood up, reasonably led to the conclusion both that R.D. was incapable of consenting and that C.P. knew she was unable to consent. The trial judge explained the bases for her negative assessment of C.P.’s credibility clearly, and why she expressly rejected key aspects of his evidence, such as his evidence that R.D. was “fine” during intercourse and that she had asked him for sex.

[24] Writing in dissent, Nordheimer J.A. would have allowed the appeal, set aside the conviction and entered an acquittal on the basis that “proof of the offence beyond a reasonable doubt was not an available verdict” on a “fair and balanced review of the evidence as a whole”. In his view, the trial judge erred in relying on C.P.’s evidence that he heard E.G. arrive at the beach after he ejaculated, while rejecting all

other aspects of his evidence. As C.P.'s evidence regarding the relative timing of his ejaculation and E.G.'s arrival was the "missing link" that tied the sexual activity to R.D.'s incapacitated state, it was incumbent on the trial judge to explain her rationale for relying on this single piece of evidence. He also found that there were significant problems with E.G.'s evidence about the time of her arrival.

[25] C.P. filed a notice of appeal pursuant to s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides an automatic appeal as of right to an accused who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal with a dissent on a question of law. The Crown filed a motion to quash, based on the fact that under s. 37(10) of the *YCJA* young persons have no automatic right of appeal. Leave is therefore required even when there is a dissent on a question of law at the court of appeal (*R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012; *R. v. K.J.M.*, 2019 SCC 55, at para. 35).

[26] C.P. filed a notice of constitutional question and argued that s. 37(10) of the *YCJA* was contrary to ss. 7 and 15 of the *Charter*.

[27] This Court adjourned the Crown's motion to quash without prejudice to C.P.'s right to seek leave to appeal, including on the question of the constitutionality of s. 37(10) of the *YCJA*. The Court granted leave to appeal both the verdict and the constitutional issue.

## Analysis on Finding of Guilt

[28] When a verdict is reached by a judge sitting alone and explained in reasons for judgment, there are two bases on which a court of appeal may find the verdict unreasonable. First, a verdict is unreasonable if it is not one that a “properly instructed jury acting judicially, could reasonably have rendered” (*R. v. Biniaris*, [2000] 1 S.C.R. 381, at para. 36, quoting *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185). In *Biniaris*, Arbour J. clarified that this standard, despite being expressed in terms of a verdict reached by a jury, also applies to the decisions of a judge sitting without a jury. She explained, however, that review for unreasonableness on appeal is “somewhat easier when the judgment under attack is that of a single judge”, since judges give reasons whereby

the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. [para. 37]

[29] Arbour J.’s comments in *Biniaris* led to the adoption, in *R. v. Beaudry*, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, [2011] 3 S.C.R. 3, of a narrowly expanded, second avenue of review for unreasonableness. A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached “illogically or irrationally” (*Beaudry*, at paras. 96-97, per Fish J. (dissenting in the result); *Sinclair*, at paras. 4 and 15-17, per Fish J. (dissenting in the result), and at para. 44, per LeBel J.). This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in

support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge (*Sinclair*, at paras. 4, 16 and 19-21; *R. v. R.P.*, [2012] 1 S.C.R. 746, at para. 9).

[30] The *Beaudry* and *Sinclair* inquiry into illogical or irrational findings or inferences is not an invitation for reviewing judges to substitute their preferred findings of fact for those made by the trial judge (*Beaudry*, at para. 98). As MacPherson J.A. noted in the Court of Appeal, the “fact that an appeal court judge would have had a doubt when the trial judge did not is insufficient to justify the conclusion that the trial judgment was unreasonable” (para. 67, quoting *R. v. A.G.*, [2000] 1 S.C.R. 439, at para. 29). Nor is it an invitation to unjustifiably interfere with a trial judge’s credibility assessments. A court of appeal reviewing credibility assessments in order to determine whether the verdict is reasonable cannot interfere with those assessments unless they cannot be supported on any reasonable view of the evidence (*R.P.*, at para. 10; *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). The inquiry into the logic or rationality of a judge’s essential findings under *Beaudry* and *Sinclair* is narrowly targeted at “fundamental flaws in the reasoning process” which means that the verdict was not reached judicially or in accordance with the rule of law (*Sinclair*, at paras. 4, 26 and 77).

[31] Relying on *Beaudry* and *Sinclair*, C.P. argued that it was illogical for the trial judge to find that E.G. discovered R.D. in a state of incapacity very shortly after the intercourse. Building on the reasons of Nordheimer J.A. in dissent, C.P. submitted

that the fundamental flaw in the trial judge's reasoning was that she accepted his evidence that E.G. arrived right after the intercourse, but rejected his evidence on all other material points. Relying on the traditional *Biniaris* standard, C.P. also argued that the verdict was not one that a properly instructed trier of fact could reasonably have rendered based on the available evidence, because the evidence could not establish the timing of the intercourse with any precision.

[32] In my respectful view, the reasoning that led the trial judge to conclude that E.G. discovered R.D. in her incapacitated state right after the intercourse was both logical and rational.

[33] C.P. argued that the trial judge's "selective reliance" on his evidence regarding E.G.'s arrival was illogical because her reason for rejecting other parts of his evidence was that he was too drunk to be relied upon. In particular, C.P. argued that the judge could not logically reject his evidence, based on his drunkenness, that he spoke with E.G. for 10 or 15 minutes before she went to R.D., while accepting his evidence, in the same sequence of events, that E.G. arrived right after the intercourse.

[34] This argument misapprehends the trial judge's reasons. She rejected C.P.'s evidence that he spoke with E.G. before she attended to R.D. because it was internally inconsistent with his own evidence on cross-examination, externally contradicted by the evidence of E.G., *and* because C.P. was intoxicated, particularly in comparison to E.G., whose memory was "not suspect". More broadly, C.P.'s intoxication *and* his dishonesty about his intoxication were among numerous factors relevant to the trial

judge's assessment of C.P.'s credibility. At no point did the judge find that C.P. was so drunk that his memory was categorically unreliable. The effect of intoxication on a witness's testimony is not all or nothing.

[35] It is a well-established principle that a judge or jury may “believe some, none, or all of the testimony of any witness, including that of an accused” (*R. v. J.H.S.*, [2008] 2 S.C.R. 152, at para. 10). Here, the trial judge rejected certain key points in C.P.'s evidence but believed his evidence that he heard E.G. arrive right after intercourse. She provided sound reasons for what she believed and what she did not, explaining why she found that some of his evidence did not suffer from the same flaws that led her to reject other aspects of his testimony.

[36] The verdict was also clearly one that “a properly instructed [judge or] jury acting judicially, could reasonably have rendered” (*Biniaris*, at para. 36, quoting *Yebe*, at p. 185). There was evidence to support the trial judge's finding that E.G. discovered R.D. in an incapacitated state shortly after the intercourse occurred. Crosbie J. was well aware that the time of intercourse could not be ascertained in absolute terms. She understood that “there was a lack of clarity with respect to the timing of the sexual activity”. The Crown witnesses were only able to “make a guess” about when the group arrived at the beach, and none of the Crown witnesses could “pinpoint the time” the intercourse happened. But what mattered, as the Court of Appeal majority explained, was not the precise time, but the “*relative* time of [E.G.'s] arrival in relation to the sexual activity” (para. 56 (emphasis added)).

[37] The combination of E.G.'s evidence and C.P.'s evidence satisfied the trial judge that E.G. went to R.D. as soon as she arrived, and that, on C.P.'s own evidence, her arrival at the party was right after intercourse had taken place. This entitled the trial judge logically to conclude that the totally incapacitated condition E.G. found the victim in when she arrived was the condition she was in *during* the sexual activity.

[38] For these reasons, I agree with the majority in the Court of Appeal that there is no basis for finding the verdict to be unreasonable. Crosbie J.'s reasons for finding C.P. guilty of sexual assault are model trial reasons: rigorous and thoughtfully explained.

[39] I would therefore dismiss the appeal.

#### The Constitutionality of Section 37(10) of the YCJA

[40] There remains the issue of the constitutionality of s. 37(10) of the YCJA, which deprives young persons of the automatic rights of appeal to this Court in s. 691 of the *Criminal Code*.

[41] On March 11, 2019, C.P. filed a notice of appeal pursuant to s. 691(1)(a) of the *Criminal Code*, which grants an automatic right of appeal to persons convicted of an indictable offence when there is a dissent on a question of law in the court of appeal.

[42] In response, the Crown filed a motion to quash pursuant to s. 44 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, which says:

**44** The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith.

[43] It based its motion on the requirement, under s. 37(10) of the *YCJA*, that a young person obtain leave before they can appeal to this Court. In response to the Crown's motion to quash, C.P. filed a notice of constitutional question pursuant to r. 33(2) of the *Rules of the Supreme Court of Canada*, SOR/2002-156. After receiving written submissions, the Court adjourned the Crown's motion to quash "without prejudice to C.P.'s right to serve and file an application for leave to appeal" (*Bulletin of Proceedings*, November 15, 2019, at p. 36). The Court's order stated that C.P. could "raise as a ground for leave to appeal any constitutional issue in respect of s. 37(10) of the *Youth Criminal Justice Act*" (p. 36).

[44] C.P. filed an application for leave to appeal in which he raised two grounds: the reasonableness of his verdict and the constitutionality of s. 37(10) of the *YCJA*.

[45] The Crown filed a response to the leave application, submitting that this Court did not have jurisdiction to hear the constitutional issue because there was no final order or judgment with respect to the constitutionality of s. 37(10) for C.P. to appeal from. Secondly, while acknowledging that this Court has discretion to consider new constitutional issues raised for the first time before it, the Crown submitted that

this discretion should only be exercised when there is a meaningful nexus between the constitutional issue and the judgment or order under appeal.

[46] This Court granted leave to appeal. The Attorney General of Canada intervened on the constitutional question.

[47] At the hearing, the Crown again asserted its position that the Court had no jurisdiction to decide the constitutional issue, but it did not press the point since all parties were present and prepared to argue the constitutional question.

[48] This Court's decision in *Guindon v. Canada*, [2015] 3 S.C.R. 3, governs. In *Guindon*, the majority held that once an appeal is before the Court, the decision about

[w]hether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.

...

... The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties. [paras. 20 and 23]

[49] In this case, there is no prejudice to the parties. All Attorneys General were given notice of the constitutional question and the Attorney General of Canada exercised its right to intervene. As in *Guindon*, no party "suggested that any additional

evidence is required, let alone requested permission to supplement the record” (para. 35).

[50] But of particular relevance is the fact that it is clearly in the interests of the administration of justice for this Court to exercise its discretion to hear and decide the issue, since it is one which could only come before this Court for the first time on an appeal from a court of appeal. Declining to hear C.P.’s constitutional argument would mean leaving an access-to-justice issue of fundamental importance to young persons in jurisdictional limbo.

[51] The procedural history in this matter provides further support for the Court’s jurisdiction to decide the constitutional issue. It is beyond dispute that it would have been necessary for the Court to determine the validity of s. 37(10) in order to properly dispose of the Crown’s motion to quash C.P.’s initial notice of appeal as of right. By adjourning that motion and permitting C.P. to raise the constitutional question in his application for leave to appeal, the Court retained the jurisdiction to decide the question, which it had acquired as a result of the motion to quash, on the appeal proper.

[52] Turning then to the merits of the constitutional question, namely, whether s. 37(10) of the *YCJA* is a breach of ss. 15 or 7 of the *Charter*.

[53] Section 691 of the *Criminal Code* sets out the appeal routes to this Court for indictable offences. It gives an accused the benefit of automatic rights to appeal to

this Court in specific circumstances. Section 691(1)(a)<sup>1</sup> gives a person whose conviction for an indictable offence is upheld at the court of appeal an automatic right to appeal to this Court on any question of law on which a judge at the court of appeal dissents. Additionally, s. 691(2)<sup>2</sup> gives a person whose acquittal is overturned at the court of appeal an automatic right to appeal to this Court on any question of law on which a judge of the court of appeal dissents, or on any question of law if the court of appeal enters a verdict of guilty against that person.

[54] Section 37(1)<sup>3</sup> of the *YCJA* incorporates the appeal routes for indictable offences under the *Criminal Code* into the youth justice system. But s. 37(10) of the *YCJA* denies young persons the automatic rights to appeal to this Court set out in ss. 691(1)(a) and 691(2) of the *Criminal Code*, and instead requires them to seek leave before they can appeal. Section 37(10) states:

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<sup>1</sup> **691 (1)** A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada:

- (a) on any question of law on which a judge of the court of appeal dissents

<sup>2</sup>(2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

- (a) on any question of law on which a judge of the court of appeal dissents;

- (b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person . . .

<sup>3</sup> **37 (1)** An appeal in respect of an indictable offence or an offence that the Attorney General elects to proceed with as an indictable offence lies under this Act in accordance with Part XXI (appeals — indictable offences) of the *Criminal Code*, which Part applies with any modifications that the circumstances require.

(10) No appeal lies under subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada.

[55] That brings us to whether this provision violates s. 15 of the *Charter*.

Section 15(1) states:

**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[56] This Court recently reaffirmed the test for identifying breaches of s. 15(1) in *Fraser v. Canada (Attorney General)*, 2020 SCC 28. To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law:

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. [para. 27]

[57] Substantive equality requires attention to the full context of the claimant group's situation and to the impact of the limitation on that situation (*Fraser*, at para. 42). But context must not be confused with justification. Neither stage of the test for determining whether there is a breach of s. 15 under our jurisprudence permits the objectives of the legislation to infuse the analysis into whether the limitation itself is a distinction that has the effect of perpetuating, reinforcing, or exacerbating the

disadvantage of the claimant group. Only at the s. 1 justificatory stage are the statutory objectives relevant, and then only to the extent that they justify the limitation (*Fraser*, at para. 79).

[58] The parties acknowledge that the first step of the s. 15(1) test is satisfied because there is a distinction between the appeal rights to this Court available to adults and young people on the basis of age. As a result, the dispute in this appeal revolves around whether the second step of the test has been met. Does depriving young people of the automatic rights to appeal that adults have reinforce, perpetuate or exacerbate their disadvantage? If it does, a *prima facie* breach of s. 15 is made out.

[59] Determining this constitutional issue requires us to first consider what benefit an automatic right to appeal to this Court provides. An appeal as of right to this Court when a judge of the court of appeal dissents on a question of law in a criminal case has existed since this Court was established in 1875 (*Supreme and Exchequer Court Act*, S.C. 1875, c. 11, s. 49). The right was transferred to the *Criminal Code* in 1892 (see *Criminal Code*, 1892, S.C. 1892, c. 29, s. 750). Professor Peter H. Russell explains that the “principal object” of an appeal as of right to this Court in a criminal case is to rectify legal errors in the trial of serious offences. Disagreement between members of the provincial court of appeal is considered sufficient evidence of the possibility of such an error, providing grounds for this Court’s review (“The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform” (1968), 6 *Osgoode Hall L.J.* 1, at pp. 13-14).

[60] In *Biniaris*, Arbour J. echoed this view in her discussion of why a dissent on a question of law, including an unreasonable conviction, or one that cannot be supported by the evidence, automatically triggers a right of appeal to this Court:

Criminal appeals on questions of law are based in part on the desire to ensure that criminal convictions are the product of error-free trials. Error-free trials are desirable as such, but even more so as a safeguard against wrongful convictions. [para. 26]

No one before us challenged the merits of this proposition, namely, that the purpose of these automatic appeal rights is to guard against miscarriages of justice. The *Criminal Code* provisions themselves reflect Parliament’s acknowledgment that a dissent on a question of law in a court of appeal, or a conviction entered for the first time on appeal, demands automatic review.

[61] The importance of preventing wrongful convictions cannot be overstated. As this Court held in *United States v. Burns*, [2001] 1 S.C.R. 283, “[t]he avoidance of conviction and punishment of the innocent has long been in the forefront of ‘the basic tenets of our legal system’. It is reflected in the presumption of innocence under s. 11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals” (para. 95). Robust procedural protections against wrongful convictions are crucial. The history of wrongful convictions such as those of Steven Truscott, David Milgaard and Donald Marshall Jr. are evidence of the unconscionable consequences of their absence. The

very existence of wrongful convictions shows that the risk of miscarriages of justice is far from theoretical.

[62] The automatic appeal right under s. 691(1)(a) — available to any adult convicted of an indictable offence if a judge on a court of appeal has doubts about the validity of the conviction — is a significant safeguard against wrongful convictions and miscarriages of justice. It is premised on the common sense understanding that a dissent on a question of law at the court of appeal raises a legitimate question as to the validity of the conviction, necessitating final review by this Court regardless of whether or not the case would otherwise meet the Court’s standard for leave to appeal.

[63] Where a court of appeal sets aside an acquittal and enters a guilty verdict for the first time on appeal, s. 691(2)(b) likewise provides a critical check on the safety of the verdict. When s. 691(2)(b) is triggered, the right of appeal to this Court is the accused person’s *first* right of appeal. Without it, an offender acquitted at trial and then convicted by the court of appeal is left without a guarantee that his conviction will be reviewed by any court.

[64] Section 691(2)(b) operates when a court of appeal substitutes a finding of guilt for an acquittal entered at trial. When s. 691(2)(b) is triggered and a judge on the court of appeal dissents, the premise underlying s. 691(1)(a) continues to hold true. The dissent against the court of appeal’s decision to substitute a finding of guilt raises doubt as to the validity of that decision.

[65] Even when the decision to substitute a guilty finding is unanimous, however, s. 691(2)(b) serves, for adults, as an important check against miscarriages of justice. The purpose of the provision is plain. The reviewability of criminal convictions has “been an integral part of our criminal law system at least since the enactment of the *Criminal Code*” in 1892 (*R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 42). Appeals are an “integral part of the criminal justice system in Canada”, which “protect against wrongful convictions and enhance the fairness of the process” (*R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641, at para. 16). Accordingly, the *Criminal Code* provides for “virtually unfettered” first level appeals from findings of guilt (*R. (R.)*, at para. 19). Section 691(2)(b) is an expression of the basic concept that it is essential to a fair criminal justice system that anyone convicted of an indictable offence is entitled to at least one appeal from the initial finding of guilt, whether that finding is first entered at trial or on appeal. In this section, Parliament has determined that the availability of an appeal with leave does not provide a sufficient guarantee of first level review for adult offenders.

[66] These automatic appeal rights, are, of course, no guarantee against miscarriages of justice, but at the very least, in providing an automatic additional layer of judicial scrutiny, they offer a significant procedural safeguard. The question then is whether denying this procedural safeguard to young people violates s. 15 of the *Charter*.

[67] Having considered the substance of the benefit provided by an automatic appeal to this Court, some historical context about the youth justice system is now required.

[68] Young people have been subject to a separate criminal justice system since 1908. The philosophy of this system has evolved over time. A review of the system's history shows a shift from a paternalistic model that limited young people's procedural rights, towards a due process model that recognizes young people as rights-bearing individuals who require enhanced procedural protections to accommodate their vulnerability. The evolution of rights of appeal within the youth justice system has followed a similar trajectory. Crucially, however, young people's access to this Court has lagged behind.

[69] Canada's first separate youth justice system was established under the *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40. The *Juvenile Delinquents Act* was animated by a welfare-oriented philosophy, with the court acting as *parens patriae*. Its purpose was expressed as follows:

**31.** . . . That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but *as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.*

[70] In furtherance of the *Juvenile Delinquents Act*'s underlying philosophy, young people's legal rights were deliberately limited. The "treatment-based philosophy

underlying the legislation necessitated a system based on both procedural and dispositional paternalism because the emphasis in the [*Juvenile Delinquents Act*] was on helping the juvenile delinquent as quickly as possible” (Janet Bolton, et al., “The *Young Offenders Act*: Principles and Policy — The First Decade in Review” (1993), 38 *McGill L.J.* 939, at p. 947).

[71] Consequently, under the *Juvenile Delinquents Act*, young people were afforded few procedural protections. A first level of appeal was only available by special leave, if a judge of the Superior Court was of the view that “in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that such leave be granted” (*Juvenile Delinquents Act, 1929*, S.C. 1929, c. 46, s. 37(1) and (2)). The restriction on appeals was justified by the view that the expeditious resolution of young people’s criminal cases should be prioritized over due process rights (see Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 466; see also Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), at pp. 154-55 (“*Juvenile Delinquency in Canada*”)).

[72] By the 1960s, the *Juvenile Delinquents Act* had attracted attention for failing to provide adequate legal rights to young people. The limitation on appeals was subject to specific criticism. The Department of Justice Report entitled *Juvenile Delinquency in Canada* argued that the existing system for accessing appeals was

“unduly restrictive” and recommended that the young person and the Crown be given direct access to the court of appeal on questions of law (pp. 154-55).

[73] The *Juvenile Delinquents Act* was replaced in 1984 by the *Young Offenders Act*, R.S.C. 1985, c. Y-1, marking a significant shift in Canada’s philosophical approach to youth justice. The enactment of the *Charter* in 1982 provided the impetus for Parliament to expand the legal protections given to young people facing criminal charges (see Nicholas Bala, “Changing Professional Culture and Reducing Use of Courts and Custody For Youth: *The Youth Criminal Justice Act* and Bill C-10” (2015), 78 *Sask. L. Rev.* 127, at p. 131).

[74] One of the *Young Offenders Act*’s guiding themes was that young people should be afforded the same rights to due process and fair and equal treatment as adults (see *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, at p. 779, per L’Heureux-Dubé J. (dissenting), citing the Solicitor General’s Office report, *The Young Offenders Act: Highlights* (1981), at p. 4). Its Declaration of Principle, articulated in s. 3, announced that “young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms*” (see s. 3(1)(e)), giving young people a substantial suite of procedural protections for the first time. These rights included rights of appeal, which acknowledged that unless there is a valid conviction in accordance with correct legal principles, there is no “offender” to hold accountable (Bala and Anand, at p. 466).

[75] Section 27(1)<sup>4</sup> of the *Young Offenders Act* incorporated the provisions respecting appeals for indictable offences in the *Criminal Code* into the youth justice system. This would have included automatic rights to appeal to this Court, but s. 27(5)<sup>5</sup> stipulated that a young person was required to obtain leave before an appeal to this Court could be heard:

(5) No appeal lies pursuant to subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment of the court of appeal is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

[76] In a case involving statutory interpretation, this Court said in *obiter* that this limitation reflected “[t]he policy favouring the early resolution of the adjudicative stage in order to facilitate commencement of rehabilitation” (*C. (T.L.)*, at p. 1016). In this way, it aligned with the *parens patriae* approach to youth justice that prevailed under the predecessor legislation, the *Juvenile Delinquents Act*.

[77] The *Young Offenders Act* was replaced in 2003 by the current legislation, the *Youth Criminal Justice Act*. Like the *Young Offenders Act*, the *YCJA*’s Declaration of Principle recognizes that “young persons have rights and freedoms in their own right” (s. 3(1)(d)(i)). But the *YCJA*’s Declaration of Principle goes further. It states that the criminal justice system for young persons must emphasize “*enhanced procedural*

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<sup>4</sup> rep. & sub. c. 24 (2nd supp.), s. 20.

<sup>5</sup> rep. & sub. c. 24 (2nd supp.), s. 20.

*protection* to ensure that young persons are treated fairly and that their rights . . . are protected” (s. 3(1)(b)(iii)). In accordance with this principle, the *YCJA* affords young people a wide range of supplementary rights and procedural protections (see *K.J.M.*, at para. 142, per Abella and Brown JJ.).

[78] Subsections 27(1) and (5) of the *Young Offenders Act* were replaced without substantive changes by subsections 37(1) and (10) of the *YCJA*. In other words, despite its emphasis on providing young people with procedural protection, access to this Court by way of appeal remained limited under the *YCJA* as it had been under the *Young Offenders Act*. C.P. argues that the deprivation of this procedural benefit perpetuates young people’s unique disadvantage within the criminal justice system.

[79] This Court has repeatedly recognized that young people are distinctively vulnerable in the criminal justice context. In *R. v. D.B.*, [2008] 2 S.C.R. 3, this Court held that the *YCJA*’s presumptive offence regime, which listed a set of offences to which an adult sentence presumptively applied, violated s. 7 of the *Charter*. The Court explained that Canada has a separate youth justice system for a reason, namely, that “because of their age, young people have heightened vulnerability” (para. 41). Further, the Court held that:

A young person should receive, at the very least, *the same procedural benefit afforded to a convicted adult on sentencing*, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7. [Emphasis added; para. 82.]

[80] *D.B.* constitutionalized the special status of young people in the criminal justice system in light of their distinctive vulnerability. It also recognized, in the context of sentencing, that procedural rules that benefit adults must apply equally in youth proceedings.

[81] That same year, in *R. v. L.T.H.*, [2008] 2 S.C.R. 739, Fish J. emphasized the importance of the enhanced procedural protections that govern the admissibility of statements made by young people to authority figures. He explained that these protections are justified on the basis that the “procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults” (para. 3). In particular, Fish J. found that young people are vulnerable because they “generally do not understand their legal rights as well as adults, are less likely to assert those rights in the face of a confrontation with a person in authority and are more susceptible to the pressures of interrogation” (para. 24).

[82] One year later, in *R. v. S.J.L.*, [2009] 1 S.C.R. 426, this Court held that if a young person and an adult are alleged to have committed an offence in tandem, they must be tried separately. Deschamps J. held that the creation of the youth justice system “was based on recognition of the presumption of diminished moral blameworthiness of young persons and on their heightened vulnerability in dealing with the justice system” (para. 64). A joint trial would “be inconsistent with the governing principle of the

*YCJA*, which maintains a justice *system* for young people that is separate from the system for adults” (para. 56 (emphasis in original)).

[83] In response to these cases, Parliament amended the *YCJA* in 2012<sup>6</sup> and updated its Declaration of Principle at s. 3(1)(b). The emphasis on enhanced procedural protection for young people was preserved at s. 3(1)(b)(iii).

[84] Professors Nicholas Bala and Sanjeev Anand explain the relationship between young people’s vulnerability and their concomitant need for enhanced procedural protection compellingly:

The underlying rationale for giving greater legal protections to young persons than to adults — like the rationale for the limited accountability of adolescents — is their intellectual, social, and psychological immaturity. Adolescents are less likely to appreciate the significance of the legal process and the legal consequences of the decisions they are required to make. They generally do not fully understand and appreciate their rights and are likely unable to exercise them fully without assistance. Adolescents are also likely to have greater difficulty in formulating realistic plans and advocating for their views in the youth justice system. They may also be more vulnerable to pressure from the police and other agents of the state.  
[p. 164]

[85] In short, the enhanced procedural protections afforded to young people in the youth justice system are not gratuitous benefits. They are directly responsive to the vulnerability and concomitant disadvantage that inheres in young people because of their age. Sometimes young people will be entitled to the same procedural protections

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<sup>6</sup> See 2012, c. 1, s. 168(2).

as adults, and sometimes different protections will be required. The *YCJA* does not and need not strive for line by line parity with the *Criminal Code* and none of our *YCJA* jurisprudence advances this hyperbolic proposition. The question before us is not whether young people should be entitled to *all* procedural rights afforded to adults; it is about s. 37(10) of the *YCJA*, and whether s. 15(1) of the *Charter* entitles young people to the automatic rights of appeal available to adults. The answer to this question depends on whether the deprivation of the rights to appeal to this Court reinforces, perpetuates or exacerbates young people's disadvantage within the criminal justice system.

[86] Clearly it does. It deprives young people of what is acknowledged to be a significant safeguard against wrongful convictions for adults, despite the evidence that young people are more vulnerable to them than adults. A recent report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions identifies young people as a population that is at risk of wrongful convictions, explaining:

Ample research now suggests that young persons are also more vulnerable to wrongful convictions, as compared to adults, for a variety of age-related reasons. The nature of the young developing brain is considered a key factor. In essence, youthful brains are wired differently, and those underdeveloped brains result in young persons being poor decision-makers, in contrast to adults. Experts across disciplines point to a trilogy of judgments by the United States Supreme Court, including *Roper v Simmons* where the Court acknowledged the scientific evidence that young persons are less mature, less able to assess risks and long-term consequences of their conduct, more vulnerable to external pressures and more compliant to authority. As a result, the traits that make young persons different from adults cognitively, socially and emotionally, may also make

them particularly susceptible to the recognized systemic factors that contribute to wrongful convictions.

*(Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada, 2018 (online), at p. 243.)*

[87] Research from the United States also develops the contours of the unique vulnerability of young people, including that they are more suggestible and compliant than adults during police questioning and are less likely to understand their legal rights. These traits are significant risk factors for wrongful findings of guilt (Emily West and Vanessa Meterko, “Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years” (2016), 79 *Alb. L. Rev.* 717, at pp. 728, 759-60, 763 and 783; Saul M. Kassin, et al., “Police-Induced Confessions: Risk Factors and Recommendations” (2010), 34 *Law & Hum. Behav.* 3). The research also demonstrates that the risk of wrongful findings of guilt is increased when young people are denied the due process protections afforded to adults (Steven A. Drizin and Greg Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions?” (2007), 34 *N. Ky. L. Rev.* 257, at p. 260; Joshua A. Tepfer, Laura H. Nirider and Lynda M. Tricarico, “Arresting Development: Convictions of Innocent Youth” (2010), 62 *Rutgers L. Rev.* 887).

[88] *D.B.* explained the unique disadvantages of young people in the criminal justice system: their “heightened vulnerability, less maturity and a reduced capacity for moral judgment” (para. 41). Moreover, it is important to stress that the vulnerability experienced by young people in general is amplified for those young people who are

indigenous or members of racial minorities. The unfortunate reality, as this Court recently pointed out in *R. v. Le*, 2019 SCC 34, is that “being frequently targeted, stopped, and subjected to pointed and familiar questions” by police is a “common and shared experience” for racialized youth (para. 97). These young people disproportionately interact with the criminal justice system for a complex variety of reasons, which include both direct and systemic racial discrimination within the system (Bala and Anand, at pp. 58-59; Robin T. Fitzgerald and Peter J. Carrington, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” (2011), 53 *C.J.C.C.J.* 449, at pp. 450-54 and 473; Carla Cesaroni, Chris Grol and Kaitlin Fredericks, “Overrepresentation of Indigenous youth in Canada’s Criminal Justice System: Perspectives of Indigenous young people” (2019), 52 *Austl. & N.Z. J. Crim.* 111, at p. 112; Nate Jackson, “Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence” (2015), 52 *Alta. L. Rev.* 927, at pp. 929-32).

[89] This is not a new phenomenon, either in the public’s or in the judiciary’s consciousness. Since *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), courts have acknowledged the wide range of ways the criminal justice system can disproportionately affect accused persons in these groups (*R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, [2012] 1 S.C.R. 433). If being indigenous or a racial minority can have a disparately negative impact on *adult* accused persons, the double jeopardy vulnerability of being both a young accused *and* a member of a racial minority follows

regrettably and inexorably (see Robert Mason, Library of Parliament, *Wrongful Convictions in Canada*, Background Paper 77-E, September 23, 2020, at p. 10).

[90] All this confirms that young people are particularly vulnerable to wrongful convictions in the criminal justice system, and are in any event no less vulnerable to them than are adults. Yet s. 37(10) of the *YCJA* deprives young people of the benefit of an automatic right to appeal to this Court when a judge on the court of appeal has identified a risk of legal error, a benefit that has long been available to adult accused people. Moreover, by virtue of its effect on s. 691(2) of the *Criminal Code*, s. 37(10) of the *YCJA* deprives young people who are found guilty for the first time by a court of appeal of the right to have their case reviewed *at all*. This deprivation demonstrably perpetuates young people's disadvantage within the criminal justice system. It is a holdover from an antiquated and paternalistic model of youth justice and deprives young people of a procedural safeguard designed to reduce the risk of miscarriages of justice.

[91] It would be untenable to suggest that young persons are less worthy of protection from miscarriages of justice than adults. As *D.B.* pointed out, the very philosophy and purpose of the *YCJA*, with its emphasis on providing substantial procedural protections for young persons, argues for procedures to prevent the ultimate disadvantage, namely, a wrongful conviction.

[92] The Crown argues that the leave to appeal process is an adequate substitute for an automatic right of appeal. But the process in the regular application for leave to

appeal stage is by its very nature less intensive than the scrupulous search for legal error conducted during a hearing on the merits. As the Crown acknowledges in its factum, “[t]he leave process is designed to be more streamlined than the appeal process” (para. 56). While this Court strives to detect any sign that a miscarriage of justice may have occurred at the leave to appeal stage, the fact remains that an application for leave to appeal does not involve a screening for error in the level of depth that characterizes an appeal on the merits. Leave to appeal decisions are made without an oral hearing or the benefit of the full record on which to assess any legal infirmities.

[93] The Crown also argues that this Court could alleviate the disadvantageous impact of s. 37(10) by applying a lower standard to leave to appeal decisions involving youth justice. It is worth noting that the Crown’s argument on discretion was used, unsuccessfully, to justify the sentencing provisions that were deemed unconstitutional in *D.B.* Those provisions left the ultimate issue of whether to impose an adult sentence on a young person in the discretion of the sentencing judge. The Court found, however, that the existence of discretion did not make them any less infringing of young people’s s. 7 right to liberty. The same reasoning applies here. Even though this Court could theoretically exercise its discretion in a way that reduces the unconstitutional effects of s. 37(10), this does not render an unconstitutional provision constitutional.

[94] Nor am I persuaded by the Crown’s argument that there is no disadvantage because there are many other procedural benefits available to young people in the

*YCJA*. This evokes Sopinka J.'s *obiter* statement in 1994 in *C. (T.L.)* that it is "difficult to accept that a young offender can select one aspect of the [adult] scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied to adults" (pp. 1017-18). It is important to remember not only that these comments were made in *obiter*, but that the issue in that case was one of statutory interpretation, not constitutional validity.

[95] Moreover, the case was about the rule against multiple convictions for a single criminal act, not an unsafe verdict. There is no basis for assuming that in those circumstances, Sopinka J. would have turned his mind to the role of appeal rights in preventing miscarriages of justice. Most significantly, his comments were made well before this Court's decisions in *D.B.*, *L.T.H.* and *S.J.L.*, all of which underscore the importance of providing procedural protection to young people in recognition of their vulnerability. Despite the range of procedural protections afforded to young people by the *YCJA*, the fact remains that s. 37(10) of the *YCJA* provides young people with less robust rights of appellate review than adults on the basis of their age, in a context where they are already uniquely vulnerable. The existence of other procedural safeguards provides no legal comfort to a young person subjected to a dubious finding of guilt.

[96] And my colleague's assertion that the objective of timeliness in the *YCJA* should form part of the context at the s. 15 stage, confuses context with justification. Timeliness was in fact advanced by the Crown as a justification for the limitation under s. 1. This is where it belongs (*Andrews v. Law Society of British Columbia*, [1989] 1

S.C.R. 143, at p. 178; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at para. 331; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at para. 16; *Fraser*, at para. 42). It has no place in determining whether there is a *prima facie* breach of s. 15(1). *Fraser* emphasized this point:

The perpetuation of disadvantage . . . does not become less serious under s. 15(1) simply because it was relevant to a legitimate state objective. . . . The test for a *prima facie* breach of s. 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to s. 1 . . . . [Emphasis in original; para. 79.]

[97] The fact that timeliness is one of the objectives of the limitation or of the *YCJA* is irrelevant to whether depriving young people of a significant safeguard against miscarriages of justice perpetuates their disadvantage. It amounts to telling them that as long as they are processed through the system quickly, they should be grateful for not having to go through an added layer of protection from miscarriages of justice.

[98] My colleague's reliance on *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, to suggest that young accused people's interest in timeliness must be balanced against their interest in procedural protection as a part of a "contextual" s. 15(1) analysis is misplaced. *Withler* was specifically concerned with "how an analysis under s. 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of government benefits" (para. 25). Against that background, we held that the "multiplicity of interests" balanced by the impugned law will "colour the discrimination analysis", as it is necessary to take "into account the universe of potential beneficiaries" (paras. 3 and 38). *Withler* does not support the proposition that

a legislative provision that perpetuates a claimant group's disadvantage will pass s. 15(1) scrutiny as long as a "contextual" inquiry shows that the broader legislative scheme is intended to promote that group's other interests in different ways.

[99] Parliament has determined that where the judges of a court of appeal are divided on whether an adult's conviction for an indictable offence is legally sustainable, or where they overturn an acquittal in favour of a guilty verdict, the accused person should have an automatic right to appeal to this Court to ensure that the trial was a fair one and that no miscarriage of justice occurred. The absence of that protection for young persons is the denial of a procedural benefit that perpetuates and reinforces their inherent vulnerability in the criminal justice system. There is therefore a *prima facie* breach of s. 15.

[100] Turning to s. 1, the Crown submits that the pressing and substantial objective for s. 37(10)'s deprivation of an automatic right of appeal is

to grant the Supreme Court of Canada the discretion to decide when criminal cases involving young persons merit a second level of appellate review. There is a societal interest in vesting with the Supreme Court the decision-making power to decide when a young person's criminal case merits further review and when there would be minimal or no utility to further prolonging the appellate process in the light of the primacy of the *YCJA* principles of timeliness, rehabilitation and reintegration. [R.F., at para. 55]

[101] Even accepting that quick decision-making by this Court is an important goal for limiting appeal rights for young people, it fails at the final stage of the

proportionality analysis because any benefits of the denial are far outweighed by the deleterious effects. This is an access to justice issue of fundamental importance to young people seeking to prevent wrongful convictions.

[102] I accept that promoting timeliness, early rehabilitation and reintegration are salutary goals, but s. 37(10)'s actual contribution to achieving them is minimal. The most that will be saved is a few months in those cases where leave is denied. On the other hand, requiring a young accused person to go through the leave to appeal process before they are entitled to a hearing has the effect of prolonging the process, not abbreviating it in cases when leave is granted, since if leave is granted, the appeal will not be heard for several more months. If, however, an appeal is immediately scheduled because there is an automatic right of appeal, the process of fulsome scrutiny for error will get underway months earlier. That means that s. 37(10) exposes young people to a greater risk of miscarriages of justice in aid of the possibility of saving a few months of time.

[103] It is also important to point out the critical difference between the capacity for scrutiny in an application for leave to appeal and in an actual appeal. Leave decisions are made by this Court without the benefit of a full hearing. Without these assessment tools, the Court is screening for miscarriages of justice with one hand tied behind its back. That is why Parliament decided that heightened scrutiny is automatically required *for adults* when the criteria under s. 691 of the *Criminal Code* are satisfied.

[104] Denying young people the automatic full scrutiny of an appeal and accepting a less rigorous appeal process makes justice the servant of expedition for young people, rather than the other way around. There is no doubt that expedition is important for young people, but not at the expense of procedural protections designed to minimize the risk of miscarriages of justice.

[105] Preventing miscarriages of justice is at the core of every layer of scrutiny in the criminal justice system for every accused person. A wrongful finding of guilt under the *YCJA* is no less a miscarriage of justice than a wrongful conviction for adults under the *Criminal Code*.

[106] Yet s. 37(10) not only denies access to an automatic appeal for young people when there is a dissent, it even denies it when the Attorney General has filed a notice of intention to seek an adult sentence thereby depriving them of a right guaranteed to an adult even when the state wants to treat them like one.

[107] The counter argument, that the benefit of the denial of an automatic right of appeal facilitates the prioritization of immediate rehabilitation and reintegration, reflects the paternalism that prevailed under the previous *Juvenile Delinquents Act*. It suggests that young people do not need the procedural protection of an automatic appeal available to adults because starting on their rehabilitative journey is more important than ensuring that the convictions that launched them into that journey are the result of fair trials.

[108] This is an argument that justifies an increased risk of wrongful findings of guilt as an acceptable cost of doing business within the youth justice system, based on timeliness and early rehabilitation and reintegration. But timeliness, rehabilitation and reintegration are not legitimate objectives if the underlying finding of guilt resulted from an unfair trial. The objectives of timeliness, rehabilitation and reintegration are based on an assumption that the finding of guilt is not based on a miscarriage of justice. They are meaningless if wrongful findings of guilt are tolerated in the service of speed. The *YCJA* is not intended to promote swift *injustice*. There is no need for rehabilitation or reintegration if the young person should not have been found guilty in the first place.

[109] The profoundly harmful impact of fast-tracking rehabilitation and reintegration over the right to have the basic procedural appeal protection from miscarriages of justice as adults far outweighs the benefit of the potential shaving of a few months off the appeal process.

[110] Finally, an argument raised at the hearing that this Court should not find a breach of s. 15 because it could provide the precedential basis for findings of other s. 15 breaches in the *YCJA* calls for a response. The proposition is, with respect, problematic not only jurisprudentially, but conceptually.

[111] The underlying jurisprudential problem with the suggestion is that it relies on an approach to s. 15 that this Court has never applied — equality as sameness — in order to warn that finding a breach in this case could lead, by logical extension, to increased access to procedural protections like jury trials and preliminary inquiries for

young people. In this Court's very first equality case, *Andrews*, the Court rejected a "sameness", or formal theory of equality, adopting substantive equality instead, an approach that recognizes, respects, and accommodates difference (pp. 164-65, 168 and 171). The rejection of "identical treatment" under s. 15 was confirmed in, among others, *R. v. Kapp*, [2008] 2 S.C.R. 483, at paras. 14-16 and 27-28, *Withler*, at paras. 2 and 39-66, and most recently in *Fraser*, at paras. 40-41 and 47. Instead, this Court looks to whether the specific limitation before the Court is a distinction that has the *effect* of reinforcing, perpetuating or exacerbating the claimant's disadvantage.

[112] There is also a conceptual problem with what amounts to an argument that there should be no finding of a *prima facie* breach of s. 15 in this case because it could potentially lead to finding other s. 15 breaches. This adds a troubling factor to our *Charter* analysis. The idea that the Court should decline to find that a limiting distinction has the effect of perpetuating disadvantage for the claimant group if it would encourage other rights claimants to come forward, undermines the whole of the s. 15 analysis. The burden at the breach stage is on the claimant to satisfy this Court's two-part test. We do not ask claimants to anticipate what other claims their success may inspire, the potential consequences of those claims, or to justify why they should succeed anyway.

[113] Nor, in fact, has this kind of "slippery slope" argument ever played an analytical role in determining whether or not a *Charter* right has been breached. To inject it now, as a potential barrier to s. 15 claims, or any other *Charter* claim, would

hold the Court hostage to the fear of unknown consequences. By engaging in this type of argument, judges risk giving “short shrift” to the case before the court and deciding future claims without the factual foundation and legal arguments necessary for a proper assessment (Lorraine Eisenstat Weinrib, “The Body and the Body Politic: Assisted Suicide under the *Canadian Charter of Rights and Freedoms*” (1994), 39 *McGill L.J.* 618, at pp. 636-37; see also Frederick Schauer, “Slippery Slopes” (1985), 99 *Harv. L. Rev.* 361).

[114] The purpose of the as-of-right appeal denied by s. 37(10) is straightforward — to ensure the safety of a verdict in circumstances where that verdict is called into question by a judge on the court of appeal, or when a guilty verdict is entered for the first time on appeal. The concern that a claim could be advanced for jury trials and preliminary inquiries if a young person wins an automatic appeal right in this case, ignores the significant differences between the procedures, differences best explored in a case where the issue is before the court and the parties have had the chance to argue the merits.

[115] In this case, there is a direct link between the denial of a procedural protection available to adults, and youth vulnerability to miscarriages of justice. The denial has the effect of perpetuating that vulnerability. In examining whether a provision perpetuates a disadvantage under s. 15, it is far from obvious that there is anything like the same link with jury trials and preliminary inquiries that engages the risk of a miscarriage of justice. There is only one purpose of the procedural benefit

denied here, namely to ensure the safety of a verdict in circumstances where that verdict is called into question by a judge on the court of appeal. This is simply not comparable to the multi-faceted complexity of jury trials. The attempt to speculatively analogize them emblemizes the fallacy of the slippery slope.

[116] Ultimately, in my respectful view, this type of argument seems to me to be fundamentally incompatible with the purpose of the *Charter*. The *Charter* was intended to impose a set of justiciable constraints and obligations on government that are enforceable by individuals and groups (see Jacob Weinrib, “The Modern Constitutional State: A Defence” (2014), 40 *Queen’s L.J.* 165). As this Court explained in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, “[c]itizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge” (para. 56). Implicit in this statement is the proposition that the Court must rule on the case that is actually before it, not a hypothetical future claim.

[117] The only question before us is whether s. 37(10) of the *YCJA* violates the *Charter*. In my respectful view, it does.

[118] For all the foregoing reasons, the *prima facie* breach of s. 15 cannot be justified, making s. 37(10) of the *YCJA* unconstitutional.

[119] Given this conclusion, it is unnecessary to address C.P.’s submission that s. 37(10) of the *YCJA* also breaches his s. 7 *Charter* right as a violation of the suggested

principle of fundamental justice that young persons are entitled to enhanced procedural protections in the criminal justice system.

[120] This constitutional issue does not affect C.P.'s appeal from the finding of guilt. I would dismiss the appeal.

The reasons of Wagner C.J. and Moldaver, Brown and Rowe JJ. were delivered by

THE CHIEF JUSTICE —

I. Introduction

[121] This appeal raises two distinct issues. The first concerns the reasonableness of a finding of guilt on a charge of sexual assault. The appellant, C.P., maintains that the verdict was reached illogically and was not reasonably available on the evidence. For the same reasons as my colleague Abella J., I would dismiss the appeal from the finding of guilt. The trial judge's reasons were rigorous and cogent, and there is no basis for finding that the verdict was unreasonable.

[122] The second issue is the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("YCJA"), which requires young offenders to seek leave before they can appeal to this Court. In the appellant's view, this provision infringes ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, because it deprives

young persons of a procedural benefit that is available to adults under s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, namely an automatic right of appeal where an appellate court affirms a conviction for an indictable offence, but one judge of that court dissents on a question of law.

[123] I agree with the conclusion of my colleague Abella J. on the preliminary matter of jurisdiction. However, for the reasons that follow, I would dismiss the constitutional challenge.

## II. Constitutionality of Section 37(10) of the YCJA

### A. *Analysis With Respect to Section 7*

[124] Section 7 of the *Charter* guarantees that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[125] Two elements must be established in order to show a violation of s. 7: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 37).

[126] In this appeal, the requirements of the first step are readily satisfied, as a limit on young persons' right to appeal to this Court engages residual liberty interests that are cognizable under s. 7 (*R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 645; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 40). Both parties acknowledge this. The outcome thus hinges on whether this deprivation is in accordance with the principles of fundamental justice.

[127] The appellant asks this Court to recognize a new principle of fundamental justice — that young persons are entitled to “enhanced procedural protections” in the criminal justice system. A cornerstone of his argument is this Court’s decision in *D.B.* in which Abella J., writing for the majority, recognized “a *presumption* of diminished moral blameworthiness or culpability” for young persons as a principle of fundamental justice and held that, accordingly, “[a] young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing” (paras. 41 and 82 (emphasis in original)). The appellant argues that *D.B.* constitutionalized the special status of young persons in the criminal justice system and established enhanced procedural protection as a guiding principle in the youth justice jurisprudence. In his opinion, the time has come for the Court to constitutionalize the latter principle under s. 7.

[128] The appellant submits that the principle of enhanced procedural protection satisfies the three criteria reiterated by Abella J. in *D.B.*, namely that for a principle of justice to be “fundamental” within the meaning of s. 7: (i) it must be a legal principle;

(ii) there must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and (iii) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person (para. 46).

[129] But it is somewhat unclear from the appellant's submissions if this principle of enhanced procedural protection entails a comparative assessment of procedural rights of young persons and those of adults, or if it is a freestanding standard that applies independently to young persons in light of their unique circumstances irrespective of what is available to adults. At times, the appellant seems to interpret the principle as requiring that procedural protections afforded to young persons be greater than, or at least equal to, those that are provided to adults throughout the criminal justice system. According to this approach, s. 7 guarantees that young persons will not be deprived of any significant procedure available to adults without good reason.

[130] If the content of the principle is indeed strictly contingent on a comparative assessment, one that fluctuates depending on the procedural benefits Parliament sees fit to extend to or withhold from adults at a given time, then it yields neither a meaningful standard nor one upon which any consensus is conceivable. To the extent that the concern is solely how young persons are treated *in comparison* to adults, the argument appears better suited to a s. 15 *Charter* analysis, not to one that engages principles of fundamental justice under s. 7.

[131] But the appellant, who is aware of these difficulties, also suggests that enhanced procedural protection can be a freestanding principle, which means that any procedural safeguard for young persons must account for their unique status in the criminal justice system. He submits that, rather than requiring procedures *identical* to those accorded to adults,

the principle of “enhanced procedural protection” allows for a reasoned evaluation of legislative choices against the assumption that young people must enjoy special consideration in the justice system. It does *not* mean that for every procedure “X” adopted for adults, Parliament must accord “X + 1” or even “X” to young people. Differences in procedure — even ones that appear to confer less elaborate rights on young people — can be fully consistent with this principle provided that, when viewed in context, the procedure in question vindicates rather than derogates from the interests of the young accused. [Emphasis in original.]

(A.F., at para. 71.)

[132] The difficulty with this freestanding interpretation of the principle, then, is that it quite simply offers nothing new. There is already a well-established principle of fundamental justice that *all* accused must be accorded *adequate* procedural safeguards against wrongful convictions or other miscarriages of justice in the criminal process (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 5). As for the requirements that afford adequate procedural protection, they “are not immutable”, but “vary according to the context in which they are invoked”, which means that “certain procedural protections might be constitutionally mandated in one context but not in another” (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361; see also *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 32; *Idziak v. Canada (Minister of Justice)*, [1992] 3

S.C.R. 631, at pp. 656-57). In other words, the adequacy of procedural protections will necessarily be sensitive to the unique circumstances of young persons that have been identified by this Court, including their diminished moral culpability and their need for enhanced procedural protection in the criminal justice system (*D.B.*, at para. 41). If enhanced procedural protection is construed as a freestanding principle, the appellant's s. 7 argument, worded differently, depends on whether s. 37(10) deprives young persons of a liberty interest without *adequate* procedural safeguards.

[133] In my view, denying young persons an automatic right to a hearing in this Court where a court of appeal judge has dissented on a question of law cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system. This Court has steadfastly affirmed in various contexts that “there is no constitutional right to an appeal”, let alone an automatic one at the apex of the judicial system, including in circumstances that unequivocally engaged liberty interests and principles of fundamental justice that are cognizable under s. 7 (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 136, citing *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; see also *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 739). Fundamental justice does not entail “the most favourable procedures that could possibly be imagined” (*Lyons*, at p. 362). Although I do not foreclose the theoretical possibility that s. 7 would ever provide a right of appeal in some other context — an issue which need not be decided here — I cannot see how the principles of fundamental justice could require something as specific as an automatic hearing in this Court in the

narrow circumstances in which a court of appeal affirms a conviction for an indictable offence, but a judge of that court dissents on a question of law.

[134] Such a requirement would have the effect of constitutionalizing the application of s. 691(1)(a) of the *Criminal Code* to young persons, thereby implying that Parliament would be under a positive obligation to enact such a provision if one did not already exist. This conclusion would appear all the more anomalous in light of the fact that a leave requirement for criminal cases in this Court is the rule, not an exception. There is of course no automatic statutory right to appeal to this Court in a summary conviction case even when an appellate court has set aside an acquittal and entered a conviction for the first time, just as there is no right to appeal on a question of fact even when a judge of the court of appeal has dissented. What is more, the summary conviction procedure, which is the default procedure for young persons (s. 142 of the *YCJA*) and in which the avenues of appeal available to an accused are generally more limited, has consistently been held to be constitutional (*R. v. R.L.* (1986), 26 C.C.C. (3d) 417 (Ont. C.A.); *R. v. K.G.* (1986), 31 C.C.C. (3d) 81 (Alta. C.A.); *R. v. B. (S.)* (1989), 50 C.C.C. (3d) 34 (Sask. C.A.)). In other words, automatic appeals for young persons are not — in the words this Court used in rejecting a similar request to entrench the “best interests of the child” as a principle of fundamental justice — a “foundational requirement for the dispensation of justice” (*Canadian Foundation for Children*, at paras. 10-12).

[135] A contextual assessment of the adequacy of procedural protections should also be sensitive to the unique costs of a prolonged appellate process in the youth justice system — for the young accused, but also for victims, who themselves are often young persons (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 154, citing National Council of Welfare, *Justice and the Poor* (2000)). The governing principles of timely intervention and prompt action stated in s. 3(1)(b)(iv) and s. 3(1)(b)(v) of the *YCJA*, which I will discuss in greater detail in my analysis with respect to s. 15, also colour the s. 7 analysis. The principles of fundamental justice “reflect a spectrum of interests, from the rights of the accused to broader societal concerns”, and while the fairness of a procedure will be assessed primarily from the point of view of the accused, “it must as well be looked at from the point of view of fairness in the eyes of the community and the complainant” (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 198).

[136] It also bears emphasizing at this juncture that the threat of wrongful conviction which my colleague Abella J. seeks to address is, on the record before us, entirely theoretical. The appellant has provided no evidence that the absence of an automatic appeal in any way increases the likelihood of wrongful convictions or other miscarriages of justice for young persons tried for indictable offences. Nor is there any evidence before us suggesting that the Court’s leave process affords inadequate procedural protection. In other words, it has not been shown that there is an actual problem with the way the Court has been exercising its discretion to grant leave, let alone one that warrants a finding of a constitutional violation.

[137] On the contrary, the leave process in this Court is rigorous. While it is true that leave applications are not subject to the same in-depth screening for errors as is the case in an appeal on the merits, the Court has a wide discretion to consider factors that might suggest a possibility of error, including the fact that a judge dissented on a question of law or a conviction entered for the first time on appeal. There is no basis to believe that a serious argument pointing to a miscarriage of justice would not meet the public interest standard for leave to appeal to the Court. As former Justice Iacobucci observed, “even where there has been no dissent or reversal of an acquittal at the Court of Appeal, leave to appeal in criminal cases often is granted given that criminal cases are frequently considered to raise issues of public importance because they involve the liberty of the subject” (F. Iacobucci, “The Supreme Court of Canada: Its History, Powers and Responsibilities” (2002), 4 *J. App. Prac. & Process* 27, at pp. 34-35). The Supreme Court would and does exercise its leave requirement in accordance with the principles of fundamental justice.

[138] In my view, the dearth of evidence of a problem in this regard belies the conclusion that s. 37(10) denies young persons adequate procedural safeguards as was the case under past youth justice legislation, which did indeed provide for paternalistic practices and left young persons vulnerable to miscarriages of justice. On the contrary, our modern youth justice system has long left those problematic practices behind, providing young persons with enhanced procedural protections commensurate with their unique circumstances and inherent vulnerability in the justice system.

[139] For these reasons, I conclude that s. 37(10) of the *YCJA* is consistent with s. 7 of the *Charter* even in a case in which a court of appeal judge has dissented on a question of law. Nonetheless, I would not foreclose the theoretical possibility that s. 7 may guarantee an appeal as of right where a court of appeal has entered a conviction for the first time, but this is an issue which need not be decided on the facts of this case.

B. *Analysis With Respect to Section 15*

[140] The appellant also maintains that s. 37(10) of the *YCJA* discriminates against young persons on the basis of age by denying them an important procedural benefit that is granted to adults in similar circumstances. Section 15(1) of the *Charter* sets out the following guarantee:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[141] A law or a government action will contravene this guarantee: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage (*Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[142] The parties agree that s. 37(10) of the *YCJA* creates a distinction based on age. The issue is whether it draws a *discriminatory* distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. In this respect, it should also be borne in mind that age-based distinctions are generally a "common and necessary way of ordering our society" and are "not strongly associated with discrimination and arbitrary denial of privilege" (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 31).

[143] This is not the first time that an equality argument has been raised in this Court with respect to the relatively limited avenues of appeal that are available to young persons in the criminal justice system. In *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, the Court considered the statutory interpretation of s. 27(5) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, a functionally equivalent provision of the precursor to the *YCJA*. In that case, Sopinka J. noted that, in light of "[t]he policy favouring the early resolution of the adjudicative stage", "there is no anomaly" in the fact "that a young person found guilty of an offence should enjoy more restricted rights of appeal than an adult who is convicted of an offence" (pp. 1015-16). Although he did not definitively rule out an equality challenge, Sopinka J. found it "difficult to accept that a young offender can select one aspect of the scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied to adults" (p. 1017).

[144] While *C. (T.L.)* was not formally dispositive of the issue, part of its underlying rationale remains relevant to the instant case. Sopinka J.'s *obiter* remarks caution against artificially cherry-picking individual features from a multifaceted legislative scheme in order to reveal inequities between fundamentally distinct systems. The Court of Appeal for British Columbia has made similar comments warning "against artificially isolating a single provision from a comprehensive criminal justice regime intended to benefit youth and thereby finding a constitutional violation" and stating that "it is improper to single out a particular subsection", because each subsection "is so much a detail of the over-all comprehensive scheme that it cannot be, and should not be, considered separately" (*R. v. M. (J.S.)*, 2005 BCCA 417, 200 C.C.C. (3d) 400, at para. 31; *R. v. D.F.G.* (1986), 29 C.C.C. (3d) 451, at pp. 453-54).

[145] In other words, it is the actual impact of the provision in its full context that should govern the analysis, and s. 37(10) should not be divorced from its entire legislative context. An approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the *YCJA* would indeed be contrary to the contextual approach mandated in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 73, 76 and 79. The analysis instead requires a "contextual understanding of a claimant's place within a legislative scheme and society at large"; the court must ask "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme" (paras. 65 and 67). Understanding the distinct legislative scheme underlying s. 37(10) is crucial to the assessment of the *actual* impact of the law on

young persons (see P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 469).

[146] In this case, the appeal options set out in s. 37 of the *YCJA* form part of a comprehensive scheme designed to implement the Declaration of Principle made in s. 3 together with the restorative and rehabilitative concepts outlined in the preamble to the *YCJA*. Section 3(1)(b) in particular provides:

**(b)** the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

**(i)** rehabilitation and reintegration,

**(ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

**(iii)** enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

**(iv)** timely intervention that reinforces the link between the offending behaviour and its consequences, and

**(v)** the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[147] It is evident that the *YCJA* is designed to balance multiple interests. First, as Fish J. noted in *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, “[i]n keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections” which they alone enjoy (para. 41). These wide-

ranging procedural safeguards were aptly summarized by Abella and Brown JJ. in *R. v. K.J.M.*, 2019 SCC 55, at para. 142 (dissenting, though not on this point):

Such enhanced procedural rights in the *YCJA* include: extrajudicial measures (ss. 4 to 12); notice to parents (s. 26); the possibility of compelling parents to attend court (s. 27); an enhanced right to counsel (ss. 10(2)(d), 25 and 32); specific obligations for youth justice court judges to ensure that young persons are treated fairly (s. 32); reducing the possibility of bail (s. 29); creating the option of releasing young persons who would otherwise be denied bail (s. 31); *de novo* bail reviews (s. 33); the right of young persons to be separated from adults in temporary detention (s. 30); enhanced procedural safeguards surrounding the admissibility of statements made by young persons to authorities (s. 146); and a distinct sentencing regime (ss. 38 to 82).

[148] Second, the long-recognized need for enhanced timeliness and promptness in the resolution of youth cases, a principle that has been a leitmotif of this Court's jurisprudence as well as of Canada's international obligations, is codified in s. 3(1)(b)(iv) and s. 3(1)(b)(v) of the *YCJA*. Internationally, the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which is named in the *YCJA*'s preamble, guarantees the right of young persons to have criminal proceedings against them determined without delay (art. 40(2)(b)(iii)). Likewise, Rule 20.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33 (November 29, 1985), provides that cases involving young persons "shall from the outset be handled expeditiously, without any unnecessary delay". It is significant that s. 3(1)(b)(iv) and s. 3(1)(b)(v) had no equivalent in the former *Young Offenders Act* (Bala and Anand, at p. 441).

[149] In a similar vein, the Court, in determining how presumptive ceilings with respect to unreasonable delays apply in youth cases, recognized in *K.J.M.* that the interest in timeliness in such cases requires a more holistic approach, one that is multifaceted rather than being focused only on rehabilitation. It identified five main reasons why timeliness has special significance for young persons:

**Reinforcing the connection between actions and consequences.** First, because young persons have “a different perception of time and less well-developed memories than adults”, their ability to appreciate the connection between actions and consequences is impaired. . . .

**Reducing psychological impact.** Second, bearing in mind that any time spent awaiting trial occupies a greater proportion of a young person’s life than an adult’s, and that young persons perceive time differently than adults do, delay may have a greater psychological impact on a young person. . . .

**Preserving the right to make full answer and defence.** Third, memories tend to fade faster for young persons than for adults. The increased rapidity with which a young person’s memory fades may make it more difficult for him or her to recall past events, which may in turn impair his or her ability to make full answer and defence, a right which is protected by s. 7 of the *Charter* . . . .

**Avoiding potential unfairness.** Fourth, . . . [w]here a prolonged delay separates the offending conduct from the corresponding punishment, the young person may experience a sense of unfairness, as his or her thoughts and behaviours may well have changed considerably since the offending conduct took place. Therefore, to avoid punishing young persons for “who they used to be”, delay should be minimized.

**Advancing societal interests.** Fifth, trying young persons in a timely manner advances societal interests. Society has an interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible. [Citations omitted; paras. 51-55.]

[150] Also of significance is the role of timeliness in relation to the psychological state of victims, themselves often children, as illustrated in the instant case. This flows from the rule regarding “special considerations” in s. 3(1)(d)(ii) of the *YCJA* to the effect that “victims . . . should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system”.

[151] Thus, promptness and enhanced procedural protection are both core tenets of the youth criminal justice system (see S. Davis-Barron, *Youth and the Law in Canada* (2nd ed. 2015), at p. 177). In creating a separate youth system with distinct procedures, Parliament has acknowledged that, while young persons are uniquely vulnerable to miscarriages of justice, they are also uniquely vulnerable to harms resulting from protracted legal proceedings. These unique vulnerabilities are two sides of the same coin, and will at times even overlap. As Abella and Brown JJ. noted in *K.J.M.*, “timeliness as a procedural safeguard takes on heightened significance for young persons” in the context of a trial, not least because delays could also affect their ability to make full answer and defence (para. 151 (underlining added)).

[152] I am of the opinion that a contextual understanding of the place of young persons in the procedural scheme of the *YCJA* must also account both for their interest in prompt resolution and for the general prejudice of interacting with the criminal justice system, given that “the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (*Withler*, at para. 38).

[153] I hasten to emphasize, however, that in considering the relevance of timeliness to the question whether s. 37(10) perpetuates a disadvantage faced by young persons, I am not seeking to justify any such disadvantage on the basis that it is relevant to a legitimate state objective or on the basis of the ameliorative effect of the *YCJA* as a whole — such concerns are properly left to the inquiry under s. 1 of the *Charter*, and then only to the extent that they can specifically justify the impugned limitation (*Fraser*, at para. 69). Rather, I am simply giving full effect to the contextual analysis mandated by this Court’s approach to substantive equality (*Fraser*, at para. 42). The inquiry under s. 15(1) of the *Charter* into the perpetuation of a disadvantage requires attention to “the full context of the claimant group’s situation” and to “the actual impact of the law on that situation” (*Withler*, at para. 43; see also *Taypotat*, at para. 17). The result of this contextual inquiry may in turn be to reveal that differential treatment is discriminatory because it perpetuates disadvantage, that it is neutral, or “that differential treatment is required in order to ameliorate the actual situation of the claimant group” (*Withler*, at para. 39). This Court must, therefore, in assessing the actual impact of a leave requirement, have regard to the full context of the situation of young persons, which, I find, includes the fact that a structurally prolonged appellate review can be more prejudicial to them.

[154] With respect, Abella J.’s analysis on s. 37(10) does the opposite, as it deviates from the contextual approach mandated by substantive equality. In my view, considered in context, s. 37(10) does not perpetuate any disadvantage but, rather, appropriately balances the overlapping interests of young persons in prompt resolution

and in appellate review, given the common sense understanding that there will be an inherent and inevitable trade-off between these interests.

[155] Above all, it should be borne in mind that s. 37(10) applies equally to the Crown. Viewed in context, a leave requirement confers the corollary procedural benefit for young persons of being protected from an as of right appeal by the Crown pursuant to s. 693(1)(a) of the *Criminal Code*, a safeguard that is not afforded to adults. Where a young person is acquitted by the court of appeal but one judge of that court dissents on a question of law, s. 37(10) acts as a bulwark against protracted delays, and the benefit of finality and closure conferred by the provision is far from trivial, not just for the accused, but also for the complainants, who may themselves be young persons. The claim that this provision offers only “the possibility of saving a few months” loses sight of this crucial contextual aspect (Abella J.’s reasons, at para. 102). In other words, this claim disregards the fact that invalidating s. 37(10) would also equip the Crown with an automatic appeal against a young person who has been acquitted. In my view, to dismiss the young person’s interest in timeliness as an argument that is relevant only to the justification inquiry under s. 1 would be to bypass the contextual assessment that is needed in order to grasp the actual impact of the provision.

[156] It is true that, in a case in which leave is ultimately granted, s. 37(10) will have prolonged the process slightly for a young person whose conviction led to a dissent in the court of appeal. But this negates neither the promptness achieved where leave is denied nor the structural disincentive flowing from a leave requirement and its

impact on timeliness in the youth criminal justice system as a whole. As well, leave applications can be heard more quickly than appeals and are likely to be expedited where young offenders are involved. Considered in the context of the *YCJA* as a whole, s. 37(10) legitimately fosters promptness and timeliness.

[157] These benefits of the provision must also be considered in conjunction with the absence of evidence that this Court's leave process perpetuates a tangible disadvantage for young persons. Put plainly, Abella J.'s contention that "young people's access to this Court has lagged behind" is not borne out by any evidence in the record before us (para. 68). Neither the appellant nor my colleague could point to a single case in which this Court denied leave to a young person where a judge of a court of appeal had dissented. I would add that young persons are not *denied* access to this Court, given that "[t]he right to apply for leave is itself a right of access to the [c]ourt" (*Krishnapillai v. Canada (C.A.)*, 2001 FCA 378, [2002] 3 F.C. 74, at para. 24, quoting *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317 (F.C.A.), at p. 318). The final bulwark against a miscarriage of justice is not, strictly speaking, a right to an *automatic* appeal, but the right of appeal itself, whether by leave or as of right; moreover, "continuous re-litigation is not a guarantee of factual accuracy" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 41). Where a young person brings an application for leave to appeal against an affirmed conviction after a judge of the court of appeal dissents on a question of law, this Court is uniquely suited in such circumstances to consider all relevant factors, including arguments pointing to a miscarriage of justice. Given the particular costs for

young persons of an automatic oral hearing and an in-depth review of the record by a full panel, such a proceeding will not serve their interests in every case. This is especially true in light of the dictum that “[s]ometimes the opportunity for more opinions does not serve the ends of justice” (*Kourtessis*, at p. 70).

[158] Needless to say, no member of this Court would tolerate having a dubious conviction rest undisturbed simply to ensure a prompt resolution. And I am of the opinion that nothing in a leave requirement implies that wrongful convictions are somehow more tolerable in the youth justice system. This Court is not to rely on a dissent as a blanket proxy for merit in all cases, although that might be a convenient metric in the adult system. Rather, s. 37(10) allows it to take an individualized and sensitive approach which can also account for the harm of protracted appellate review in the youth justice system.

[159] A decontextualized analysis fails to capture these essential features, and effectively equates equal treatment with identical treatment, which is an approach this Court has consistently rejected (*Canadian Foundation for Children*, at para. 51). The vulnerability of young persons in the criminal justice system is not exacerbated simply because a provision of the *YCJA* fails to offer the maximum imaginable procedural benefit available to adults. This is all the more true of a benefit that is unrelated, or has at best a dubious link, to their actual vulnerability and their unique needs.

[160] In my view, the leave requirement under s. 37(10) is one of several legitimate ways in which the youth justice system can provide different procedural

avenues than the ones available to adults without degrading young persons' equal worth or reinforcing their disadvantage. Another is that young offenders are not entitled to a jury trial in every case in which an adult can elect trial by jury. Nor do they enjoy the same right to a preliminary hearing, which has historically been narrower for young persons than for adults. And yet, in deciding whether direct indictments were available to the Crown under the *YCJA*, the Court has previously acknowledged that Parliament's decision to restrict preliminary hearings for youth can actually be construed as a benefit:

Furthermore, it could even be said that there will be cases in which a direct indictment will advance the objectives and principles of the *YCJA*. To preclude prosecutors from ever using it might place those objectives and principles in jeopardy. For example, the reason related to the psychological state of witnesses is especially significant in light of the special rule set out in s. 3(1)(d)(ii) of the *YCJA* that “victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system”. Similarly, it is recognized that the preliminary inquiry lengthens the judicial process, which has a greater impact on accused young persons, “given [their] perception of time”, and given that holding a preliminary inquiry could conflict with the objectives of promptness and speed provided for in s. 3(1)(b)(v) of the *YCJA*. [Emphasis in original; text in brackets in original.]

(*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 40; it should be noted that the case preceded amendments to the *Criminal Code* which restricted preliminary inquiries to offences punishable by 14 years or more.)

[161] My colleague Abella J. and I agree that it is trite to say that the *Charter*'s guarantee of equality requires neither a sameness or formal equality nor line-by-line parity with the *Criminal Code*, but rather a search for substantive equality. Young persons have different needs and vulnerabilities than adults, which is precisely why

Canada’s youth justice system “stands separate” from that of adults (*K.J.M.*, at para. 49; *R.C.*, at para. 41). In my view, a leave requirement corresponds to that reality.

[162] In choosing to deny young persons an automatic right to appeal to this Court, Parliament did not discriminate against them, but responded to the reality of their lives by balancing the benefits of appellate review against the harms inherent in that process, in keeping with the dictum that “there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character” (*Kourtessis*, at p. 70). The fact that one specific feature of the youth system does not mirror a feature of the adult system is not a basis for a finding of discrimination.

### III. Conclusion

[163] Accordingly, s. 37(10) of the *YCJA* is consistent with ss. 7 and 15 of the *Charter*, and there is no need to proceed to an analysis under s. 1.

[164] I would dismiss the appeal.

The following are the reasons delivered by

KASIRER J. —

#### I. Overview

[165] I have had the advantage of reading the reasons prepared by my colleagues the Chief Justice and Abella and Côté JJ. With respect for other views, I have come to the conclusion, like the Chief Justice, that s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”), is constitutionally valid. I also conclude the guilty verdict rendered against the appellant, C.P., was not unreasonable and the appeal should be dismissed on this basis.

[166] To be most plain on the various matters before the Court, I agree with Abella J.’s reasons, and with those of the majority of the Court of Appeal, that the guilty verdict rendered against the appellant, C.P., was not unreasonable. In respect of the second issue bearing on the constitutionality of s. 37(10) of the *YCJA*, I agree with Abella J. that this Court has jurisdiction to decide the constitutional questions. I also share the Chief Justice’s view that s. 37(10) is consistent with s. 7 of the *Canadian Charter of Rights and Freedoms*. Like him, I would leave the matter of whether s. 7 requires a first right to appeal from a conviction entered by a court of appeal — a question not before this Court — to another day.

[167] My reasons differ from those of my colleagues on whether s. 37(10) of the *YCJA* infringes the equality guarantee in s. 15(1) of the *Charter*. Our differences bear, in particular, on the application of s. 1 of the *Charter* to the requirement that a young person seek leave to appeal to this Court where a court of appeal affirms a conviction on an indictable offence but there is a dissent on a question of law. Like Abella J., and based in particular on the judgments of this Court in *Fraser v. Canada (Attorney*

*General*), 2020 SCC 28, and *Ontario (Attorney General) v. G*, 2020 SCC 38, I conclude that s. 37(10) of the *YCJA* does constitute a limit on s. 15(1) *Charter* rights. But in my respectful opinion the Crown has shown here that the limit to the equality right of young persons prescribed by s. 37(10) of the *YCJA*, when read in conjunction with s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, is justified in a free and democratic society. In the result, I would conclude that s. 37(10) is constitutionally valid.

[168] I hasten to say that I agree with many of the observations made by the Chief Justice in respect of the importance of timeliness to the rule in s. 37(10) of the *YCJA* and many of his remarks regarding the safeguards against a miscarriage of justice that are afforded to young persons who seek leave to appeal to this Court in a criminal matter. I agree too with his view that the Court's leave process is sufficiently flexible to guard against the injustice brought by the leave requirement alleged by C.P. The Chief Justice sees these considerations of timeliness and the safeguards as relevant features of the context for the determination of whether s. 15(1) has been limited; instead, as I shall endeavour to explain, I understand them as pertinent to the demonstration that the limit on s. 15(1) rights is justified under s. 1 of the *Charter*, which is a task that falls to the state. I conclude that s. 37(10) of the *YCJA* is constitutionally compliant, but I propose to come to that conclusion using some of the Chief Justice's arguments on this different path.

[169] It is best to acknowledge, from the outset, that the burden of showing the limit on s. 15(1) rights is justified that falls to the Crown under s. 1 is a heavy one. It is

best to recognize, too, that the benefit of timeliness to youth rehabilitation and reintegration into society afforded by s. 37(10) represents, at least in terms of time saved in the justice system, a relatively modest advantage over an appeal as of right. Furthermore, it is plain that if the risk of a miscarriage of justice brought by the leave requirement in s. 37(10) were a real one, that risk would likely outweigh the modest advantage of timeliness under the s. 1 analysis. I share Abella J.'s view — I am inclined to think that all members of this Court would share her view — that swift injustice for a young person would be no justice at all. There is no virtue in timely rehabilitation of an innocent young person. Section 37(10) would be a failed project if it championed rehabilitation over unsafe verdicts.

[170] But in my respectful view, s. 37(10) does not, practically speaking, expose a young person to a real risk of swift injustice and, notwithstanding the *prima facie* s. 15(1) breach for age discrimination, it is nevertheless constitutionally valid. However modest, the timeliness advantage outweighs any true risk of a miscarriage of justice for young persons associated with the added leave requirement. There is no trivializing the risks of miscarriages of justice in the criminal law but, to my mind, the Crown has demonstrated that any additional risk of a juridical error pointed to by C.P. is more theoretical than real. Where a young person seeks leave to appeal against a conviction on a question of law on which there was a dissent below, and the proposed appeal has a reasonable prospect of success, there is every reason to believe that leave would be granted. Avoiding the risk of a miscarriage of justice — even if the question of law was a matter of interest only to the parties — would in my view be a matter of public

importance warranting leave to appeal under the applicable provisions in the *Supreme Court Act*, R.S.C. 1985, c. S-26, and the *Criminal Code*.

[171] It was argued here, in particular, that the danger of miscarriage of justice is heightened when a young person must seek leave to appeal where, in the court of appeal, the dissent bears on an unreasonable verdict as the relevant question of law. I disagree. When the leave process discloses an arguable case pointing to a possible miscarriage of justice on this basis, the matter would be elevated to one meeting the requisite standard of public importance. This is because all of society has a stake in the particular young person's liberty interest even if the question of law in issue is not jurisprudentially significant. Where the proposed appeal has a reasonable prospect of success — disclosed by the reasons of the dissenting judge, the application for leave, or the record filed in support thereof — leave would be granted because the public importance criterion will have been met. The notion that leave would be denied in such circumstances — that, for reasons of dispatch, leave would be denied to a reasonably arguable appeal from a young person's conviction supported by a dissent below — is to suggest that this Court would act in a manner contrary to the principles of fundamental justice, which is untenable. Importantly, given the generous interpretation of leave criteria relevant in these circumstances, this Court is able to identify such cases on a leave application and distinguish them from those which should not go forward to the merits.

[172] Imposing a leave requirement for young persons in the limited circumstances in which an appeal as of right to this Court is available to adults under the *Criminal Code* is thus a proportionate measure open to Parliament in pursuit of the objective of timeliness, early rehabilitation, and reintegration of young people in criminal matters. This Court is institutionally equipped to identify and grant leave, based on the leave application including the evidence filed, which allows it to guard against potential miscarriages of justice in circumstances where young persons would otherwise have had an appeal as of right pursuant to s. 691(1)(a) of the *Criminal Code*. Where there is no reasonable prospect of success for the proposed appeal, the leave requirement can bring an end to cases that manifestly do not raise this potential injustice in a timely manner, before proceeding to a full hearing. In that light, it was open to Parliament, as the Crown argues, to enact s. 37(10) of the *YCJA*, as a rule that brings an advantage of timeliness to young persons in a manner that outweighs any negative effects brought by the requirement of leave. For the reasons that follow, I conclude the limit on the guarantee against age discrimination is justified.

## II. The Applicable Legal Principles

[173] The burden is on the party seeking to rely on the impugned provision to establish that the limit on s. 15(1) is justified under s. 1 of the *Charter* (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-37). The law is well settled here: that party must demonstrate a pressing and substantial objective for the limit and that the means chosen to advance this objective do not disproportionately limit the s. 15(1) right.

Proportionality demands that the limit be rationally connected to the stated pressing and substantial objective, that it be minimally impairing, and that its benefits outweigh its negative effects (*Ontario v. G*, at para. 71).

[174] The right to equality, like all *Charter* rights, must sometimes give way to legitimate societal objectives. I am mindful, however, that the relationship between s. 15(1) and s. 1 requires careful attention. As one scholar has observed, there is something of a “normative mismatch” between these two provisions of the *Charter*, in that “section 15 could be seen as an attempt to protect from the ‘tyranny of the majority’, . . . and section 1 brings back the idea that the needs of the whole might, on balance, justify discrimination” (S. Lawrence, “Equality and Anti-discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 815, at p. 829).

[175] Wilson J. explained in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that the burden resting on the state to justify a limit on s. 15(1) rights is rightly an onerous one (p. 154). I agree with Professor S. Martin, writing before she was a judge, that “a strong understanding of the interrelationship of equality, freedom and democracy under the *Charter* will provide the basis to distinguish between infringements which are reasonable and demonstrably justified” and those which are not (“Balancing Individual Rights To Equality And Social Goals” (2001), 80 *Can. Bar Rev.* 299, at p. 364). The focus of the inquiry must be “on the seriousness of the

discrimination and its relationship with the underlying values in a free and democratic society” (pp. 366-67; see also p. 365).

[176] On this latter point, I note that a limit on s. 15(1) rights based on a person’s age has been viewed in some contexts as less serious and thus more easily justified. As Professor P. W. Hogg wrote, a “minority defined by age is much less likely to suffer from the prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess” (*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at p. 55-66). Moreover, it is notable that this Court has found limits on s. 15(1) rights on the basis of age to be more susceptible to justification based on legitimate state objectives (see, e.g., *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 297 and following; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 520-31; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, at pp. 463-64; see also, relatedly, *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 110).

[177] The justification analysis must be attentive to the context of the legislative objectives at issue (see, e.g., C. D. Brecht, “The Right to Equality and *Oakes*: Time for Change” (2009), 27 *N.J.C.L.* 59, at p. 73). The state must not only identify a pressing and substantial objective (*Fraser*, at paras. 125-29), but that objective must also be scrutinized so that state conduct resulting in the most odious forms of discrimination is not excused. As Iacobucci J., dissenting, put it in *Egan v. Canada*, [1995] 2 S.C.R. 513,

“a constitutionally impermissible purpose will not save a law under s. 1” (para. 210; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 115-16). When considering whether the objective is pressing and substantial, for example, an avowed purpose of “injuring or degrading” a group would be plainly illegitimate (V. C. Jackson, “Proportionality and Equality”, in V. C. Jackson and M. Tushnet, eds., *Proportionality: New Frontiers, New Challenges* (2017), 171, at p. 175).

[178] This does not, however, preclude limits that “promote other values and principles” (*M. v. H.*, [1999] 2 S.C.R. 3, at para. 107 (emphasis in original); D. Proulx, “Droit à l’égalité”, in *JurisClasseur Québec — Collection droit public — Droit constitutionnel* (loose-leaf), vol. 2, by S. Beaulac and J.-F. Gaudreault-DesBiens, eds., fasc. 9, at Nos. 6 and 47). At the rational connection stage, the key question is whether the *prima facie* discrimination at issue furthers the legitimate legislative objectives (see *Egan*, at paras. 191-98, per Iacobucci J., dissenting; *M. v. H.*, at paras. 109-16; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 44; *Ontario v. G.*, at para. 73).

[179] If these hurdles can be overcome, a margin of appreciation is afforded to legislatures in selecting the means to achieve their objectives (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 439-40, per McLachlin C.J., concurring, and at paras. 401-5, per Deschamps J., dissenting in part; *Centrale*, at paras. 45-50). The means must fall within a range of reasonable alternatives open to a legislature to achieve its objectives so as to be minimally impairing (*RJR-MacDonald*

*Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 93-94). Finally, the benefits of the legislative objectives must, of course, outweigh their negative effects (*Centrale*, at paras. 51-54).

### III. The Limit on Section 15(1) Is Justified Under Section 1

[180] Mindful of these principles, I turn to the constitutional question at issue. The notice of constitutional question summarizes C.P.'s specific concern with s. 37(10) of the *YCJA* as it relates to s. 15(1) of the *Charter*, and connects it to s. 691(1)(a) of the *Criminal Code*:

Does s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by impermissibly discriminating against young people to the extent that it purports to deny a young person whose conviction was upheld by a majority of the court of appeal the procedural benefit of an appeal as of right to the Supreme Court of Canada pursuant to s. 691(1)(a) of the *Criminal Code*, where such benefit is granted to an identically situated adult offender?

[181] For indictable appeals in youth matters, the *YCJA* incorporates the *Criminal Code* appeal provisions (*YCJA*, s. 37(1)). Like an adult, a young person convicted of an indictable offence and whose conviction is unanimously affirmed by the court of appeal has an appeal to this Court with leave on any question of law (*Criminal Code*, s. 691(1)(b)). However, because s. 37(10) of the *YCJA* provides that the judgment of a court of appeal in a youth criminal matter cannot be appealed to this

Court except with leave, young persons, unlike adults, do not have an automatic right to appeal to this Court where a conviction on an indictable offence is affirmed at the court of appeal and there is a dissent on a question of law (*Criminal Code*, s. 691(1)(a)). The constitutional question before this Court is particularized to this s. 691(1)(a) appeal route. It is this narrow instance of *prima facie* age discrimination that the Crown must therefore justify.

[182] While the constitutional issue is being argued for the first time before this Court, it bears noting that the question pertains to proceedings unique to this forum and, as the Crown noted in its argument in support of the constitutionality of s. 37(10), engages its particular institutional knowledge of the leave process (R.F., at para. 38). Indeed, when, as in this case, an enactment that limits the right to equality relating to the criminal justice system is scrutinized under s. 1, judges' "knowledge and understanding" of the workings of the courts may provide them with a "higher degree of certainty" than in some other settings when measuring whether the limit is justified in a free and democratic society (*McKinney*, at p. 305). I also note the Attorney General of Canada intervened in this case and made submissions on s. 1 of the *Charter* with a view to justifying a provision enacted by Parliament.

A. *Pressing and Substantial Objective*

[183] C.P. does not accept that s. 37(10) of the *YCJA* has a pressing and substantial objective (A.F., at para. 92; transcript, at p. 41). I must respectfully disagree.

[184] According to the statutory Declaration of Principle in s. 3 of the *YCJA*, the youth criminal justice system is designed, in part, to promote timeliness, early rehabilitation, and reintegration in youth criminal matters. Section 3(1)(b) of the *YCJA* provides that the criminal justice system for young persons must emphasize “(i) rehabilitation and reintegration, . . . (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time”.

[185] While the case did not concern issues of constitutionality, in *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, Sopinka J. recognized that the policy favouring early resolution and rehabilitation was served by an analogous appeal provision under the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (p. 1016; R.F., at paras. 16 and 27; I.F., AGC, at para. 12). Likewise, in the case of s. 37(10) of the *YCJA*, I agree with the Attorney General of Canada that “providing for appeals by leave instead of by right favours early resolution of matters involving youth to allow for commencement of the rehabilitation stage” (para. 54).

[186] Timeliness has special significance for young persons. Youth justice scholars have observed in this context that young people perceive time differently and have less well developed memories than adults (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 144). Timeliness reinforces the connection between the actions and consequences, reduces psychological impact, avoids a sense of potential

unfairness, and advances societal interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible (*R. v. K.J.M.*, 2019 SCC 55, at paras. 51-52 and 54-55). It has consequently been said that “[t]he effectiveness of the juvenile justice process depends at least in part on its timeliness” (J. A. Butts, G. R. Cusick and B. Adam, *Delays in Youth Justice* (2009), at p. 8; see also Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), at p. 154).

[187] In light of the above, I have no difficulty concluding that promoting timeliness, early rehabilitation, and reintegration in youth criminal matters is a pressing and substantial objective.

#### B. *Rational Connection*

[188] A reasonable inference that s. 37(10) of the *YCJA* will help to bring about the pressing and substantial objective is sufficient to establish a rational connection (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 143).

[189] C.P. says s. 37(10) of the *YCJA* is not connected to the pressing and substantial objective of timeliness, early rehabilitation, and reintegration. The total time to process and decide a leave application, he says, is not materially shorter than the

time to hear and decide an as of right appeal and, if leave is granted, the total time is longer than an as of right appeal.

[190] I disagree. Section 37(10) of the *YCJA* is rationally connected to the relevant objective. By requiring leave in those circumstances where there would otherwise be appeals as of right, this provision serves the goal of timeliness. The leave requirement may well serve as a disincentive to bringing an unmeritorious appeal. Moreover, leave applications are generally decided more quickly than appeals. On average, this Court renders leave decisions in approximately four months (Supreme Court of Canada, *2020 Year in Review* (2021), at p. 34). Conversely, it takes cases at this Court an average of eight months to be heard after leave is granted or a notice of appeal as of right is filed. Should the appeal be taken on reserve, further time will elapse prior to the time judgment is rendered. As the Attorney General of Canada argues, the leave to appeal process can bring an early end to the proceedings of applicants whose potential appeals are without merit (para. 55). Such applications for leave will be dismissed, rather than proceeding to a full appeal. In this way, and while it should be acknowledged the time saved is not always substantial, s. 37(10) of the *YCJA* is rationally connected to the goal of promoting timeliness, early rehabilitation, and reintegration. When C.P. argues that s. 37(10) “does vanishingly little” (A.F., at para. 90) to advance the objective of early resolution of the adjudicative process for young people in order to facilitate rehabilitation, he is not denying a rational connection but proposing an argument that is best left to the final step of the proportionality analysis.

[191] I do recognize the appeal process may be longer on average for those young persons who are successful in their leave applications to this Court, as compared to a scenario in which there was no leave requirement.

[192] The comparison proposed by C.P. is, however, a difficult one to make. When the Court grants leave, it does so on the unstated presumption that the proposed appeal is an arguable one or the question of law requires the guidance of the Court. No such presumption obtains in respect of an appeal as of right. I note further that when leave is granted, an appellant is not necessarily confined to arguing the narrow question of law identified by the dissent in the court below as in an appeal as of right. Unless this Court restricts the issues that will be heard, leave to appeal is generally understood to be granted at large (*R. v. Keegstra*, [1995] 2 S.C.R. 381, at para. 28). This makes the comparison difficult.

[193] But, in any event, C.P.'s observation, as it relates to appeals in which the Court sees some *prima facie* merit at the leave stage, does not preclude a finding that s. 37(10) of the *YCJA* is rationally connected to the legislative objective. Section 37(10) of the *YCJA* is designed to bring a rapid conclusion to those cases where there is no reason to hear the appeal which raises a question of law that is without merit. This is broadly analogous to the power courts of appeal have to dismiss summarily an appeal as of right on a question of law that is frivolous without a full hearing on the merits (*Criminal Code*, s. 685(1)). Section 37(10) of the *YCJA* therefore furthers the

legislative goal of timeliness, early rehabilitation, and reintegration in youth criminal matters.

C. *Minimal Impairment*

[194] The question at this step of the analysis is whether s. 37(10) of the *YCJA* falls within a range of reasonable alternatives open to Parliament to achieve its objective. This margin of appreciation afforded to legislatures, as McLachlin C.J. explained in *Quebec v. A*, is particularly important where the measure seeks to balance legitimate competing social values (para. 439). In that case, the provincial legislature sought to balance equal treatment of property rights and support obligations in conjugal relationships against individual freedom to choose whether or not to marry or enter into a civil union. McLachlin C.J. explained that the question the Court must ask is whether “the law goes too far *in relation to the goal the legislature seeks to achieve*” (para. 442 (emphasis in original)). Likewise, in this case, Parliament set out to balance the various social objectives identified in the Declaration of Principle in designing a system of youth criminal justice (*YCJA*, s. 3). The question is whether Parliament’s imposition of a leave requirement in s. 37(10) goes too far to achieve its objective of timeliness, early rehabilitation, and reintegration in youth criminal matters.

[195] C.P. says s. 37(10) of the *YCJA* is not minimally impairing because the leave to appeal process is no substitute for an appeal as of right. I acknowledge that imposing a leave requirement on an otherwise meritorious appeal could raise a potential for miscarriage of justice that is not present in the case of adults who have an appeal as

of right. Youth must first convince this Court to grant leave before their appeal is heard on the merits, even though they are at least as susceptible to wrongful conviction. However, in my view, the leave to appeal process serves as an effective bulwark against miscarriages of justice and is sufficient to fulfill the requirement of minimal impairment.

[196] This Court exercises its leave power in a manner that allows it to hear appeals in cases raising a potential miscarriage of justice. I acknowledge the observations that, as a general matter, leave to appeal is granted exceptionally (M. Vauclair and T. Desjardins, *Traité général de preuve et de procédure pénales* (27th ed. 2020), at para. 341), and that “[t]he single most important criterion determining the success or failure of a leave application is the public importance of the issues it raises” (E. Meehan, et al., *Supreme Court of Canada Manual: Practice and Advocacy* (loose-leaf), at p. 3-3). But commentators have also long recognized that the concept of “public importance” does not necessarily mean that the issue raised in the application has a far-reaching impact on the law in criminal matters, as the Crown observes (R.F., at para. 39). Sopinka J., speaking extra-judicially, noted that in criminal matters the public importance criterion is “not applied as strictly. If an applicant has not had a fair trial or was possibly wrongfully convicted, we may grant leave even in the absence of an ‘earth-shaking’ issue of law” (Meehan, at pp. 3-4 to 3-4.1, quoting an address by Sopinka J. given on April 10, 1997). This principle was corroborated by Iacobucci J., writing extra-judicially, who stated that “even where there has been no dissent or reversal of an acquittal at the Court of Appeal, leave to appeal in criminal

cases often is granted given that criminal cases are frequently considered to raise issues of public importance because they involve the liberty of the subject” (F. Iacobucci, “The Supreme Court of Canada: Its History, Powers and Responsibilities” (2002), 4 *J. App. Prac. & Process* 27, at pp. 34-35).

[197] There is only one circumstance we are called upon to consider by the constitutional question in this appeal: when a young person who is convicted of an indictable offence, and whose conviction is affirmed by the court of appeal, seeks to appeal to this Court. Like an adult, the young person has a right of appeal on any question of law on which a judge of the court of appeal dissents. Unlike an adult, by reason of s. 37(10), the young person’s right of appeal requires leave.

[198] C.P. says this constitutes a limit on his s. 15(1) right to equality that cannot be justified under s. 1. He argues — and in this he is joined by the intervener Criminal Lawyers’ Association (Ontario) (“CLA”) — that when that question of law upon which the dissent rests is an unreasonable verdict, the added requirement of leave creates a serious risk that leave will be denied because the question of law will not be seen as one of “public importance”.

[199] The CLA says that “a test of ‘public importance’ implies that the legal issues at stake in the case must transcend the particular dispute between the two parties” (I.F., at para. 12). The CLA submits that an unreasonable verdict, while a question of law, does not typically raise a question that transcends the parties’ particular dispute. Generally speaking, an appeal based on a dissent that has identified a verdict as

unreasonable does not raise a novel or unsettled point of law that requires direction from this Court. As a result, submits the intervener, “an unreasonable conviction, will, largely, not be reviewed by this Court and errors upon which provincial Courts of Appeal cannot agree will not be corrected. Wrongful convictions will result” (para. 2).

[200] I disagree. This risk of wrongful convictions decreed by C.P. and the CLA rests on a flawed understanding of the leave process.

[201] In my view, the public importance criterion is best understood in this context as one that is engaged not only by jurisprudentially important legal issues that qualify as issues of public importance on that basis, but also by those that raise serious questions of law about the safety of the verdict in criminal matters. The issue of a wrongful conviction transcends the particular defendant and engages the integrity of our system of justice as a whole, thereby raising issues of public importance for the purposes of granting leave to appeal.

[202] By way of example, I note that in *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206, the defendant sought leave to this Court on the ground that the guilty verdict was unreasonable (para. 1). Cromwell J., writing for the panel of three judges, found it was in the interests of justice to order the release of certain exhibits for the purpose of this leave application, due to the possible significance of this evidence to the unreasonable verdict issue (para. 9). Ultimately, leave to appeal was granted, fresh evidence related to the released exhibits was admitted and the appeal was allowed on that basis (*R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at paras. 74-75 and 78). These

proceedings suggest strongly that this Court is alive to issues of unreasonable verdicts at the leave to appeal stage even if those issues do not necessarily demonstrate a broad legal importance that transcends the interests of the parties beyond the possibility of a wrongful conviction. This Court is unquestionably concerned with the possibility of miscarriages of justice (see, e.g., *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 26) and can be expected to exercise its power to grant leave accordingly.

[203] I note as well that in *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641, Doherty J.A. discussed leave to appeal to a provincial court of appeal from a decision upholding a conviction on a summary offence and, in doing so, analogized to this Court's ability to grant leave to appeal for indictable offences (para. 20). Notably, he explained that the interests of justice require granting leave where there is a "strong likelihood" an error of law by the lower court caused the conviction to be sustained (para. 34). In the same way, I am of the view that this Court has the power to grant leave in youth criminal matters when the application for leave to appeal raises the risk that a miscarriage of justice will occur if the appeal is not heard and where the proposed appeal has a reasonable prospect of success.

[204] Indeed, as a guardian of rights under the *Charter* (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169), this Court has not only an ability to exercise its power to grant leave mindful of those rights and the fundamental principles of justice, but, in my view, has a responsibility to do so.

[205] I also note that this Court has the institutional capacity to identify possible miscarriages of justice through the leave to appeal process. In an application for leave, the applicant must file not only the lower court decisions and argument, but also any relevant excerpts of the transcripts or evidence, including exhibits, on which it intends to rely (*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 25(1)). These materials must be filed with the Court electronically, in addition to printed versions (r. 26(1)), and, pursuant to the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, January 27, 2021 (online), electronically filed material must be searchable. The overall result is that the evidentiary record relevant, for example, to advancing an argument based on an unreasonable verdict may be filed at the leave stage.

[206] Further, I recall that the as of right appeal from which C.P. would have benefited had he been an adult is restricted to instances where there is a dissent in the court of appeal on a question of law. The grounds for such dissent will be explicitly recorded in the formal judgment pursuant to s. 677 of the *Criminal Code*. In these circumstances, this Court's attention is not only drawn to the dissent, but to the question of law that meant the dissenting judge would have arrived at a different outcome. In deciding whether a proposed appeal meets the criteria for granting leave, this Court will naturally consider, as a practical matter, the presence of a dissent in the court below as one sign that the appeal may well have a reasonable prospect of success. In some measure, one might be inclined to say that the very fact of the dissent is something of a red flag; it serves as a signal to the possible seriousness of the appeal for which leave

is sought. In fact, a study of leave decisions between 1993 and 1995 noted that a “dissenting vote in the lower appellate court also catches the eye of the Court; dissents are significantly and positively related to leave decisions” (R. B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (2004), at p. 70; see also p. 10). It follows that the leave process provides an effective safeguard for young persons in those cases where a similarly situated adult would have an appeal as of right under s. 691(1)(a).

[207] For these reasons, I conclude that Parliament’s decision to impose a leave requirement in these circumstances in pursuit of the goal of timeliness, early rehabilitation, and reintegration in youth criminal justice matters is one that minimally impairs the s. 15(1) right.

#### D. *Overall Proportionality*

[208] The final question is whether the Crown has met its burden to show that the benefits of s. 37(10) of the *YCJA* outweigh its negative effects. This case requires the Court to balance the benefits of the timely conclusion of youth criminal matters against the discriminatory impact of imposing a leave requirement in circumstances where adults can appeal as of right.

[209] Section 37(10) of the *YCJA* addresses the heightened degree of prejudice associated with structurally drawn-out appellate review. As Doherty J.A. noted in *R. (R.)*, “[p]rolonged appellate proceedings detract from the timeliness and finality of

criminal verdicts. Dispositions in criminal matters made in the detached, rarefied climate of the appeal court, years after the relevant events, by a court with virtually no connection to the place or people affected by the allegation are not the ideal way to resolve criminal cases” (para. 16). Timeliness is an especially important goal in youth criminal justice with demonstrable and long-recognized benefits (*K.J.M.*, at paras. 51-52 and 54-55) and s. 37(10) of the *YCJA* confers those benefits by allowing this Court to filter out appeals that are without merit at the leave stage. As I noted above, the leave process is, on average, completed sooner than the hearing of an appeal as of right.

[210] This benefit must be weighed against the negative effects caused by the *prima facie* discrimination. In this case, this is the fact that young persons whose conviction for an indictable offence is affirmed by a court of appeal, but with a dissent on a question of law, must seek leave to appeal to this Court.

[211] I acknowledge that the appeal as of right to this Court has been described as “very meaningful” (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-53*, No. 1, 2nd Sess., 33rd Parl., October 5, 1987, at p. 17 (Robert Kaplan)). It is no doubt true that this Court retains jurisdiction as a so-called “court of error” on some questions of law in criminal matters. But, when compared carefully to the right of appeal with leave, the different role of the appeal as of right should not be overstated. As the Crown underscores, s. 37(10) of the *YCJA* does not deny a young person the possibility of an appeal to this Court (R.F., at

para. 38). It affords young persons the ability to seek leave to appeal on the basis of the process I have described above. Even where leave is required, this Court is alerted to the fact that a dissent by a court of appeal judge raises doubt, in the mind of that judge, about the safety of the verdict and is able to measure the seriousness of the argument that there has been a miscarriage of justice. The leave process allows this Court to identify and grant leave in those cases where there is a reasonable prospect that an appeal may correct a miscarriage of justice.

[212] To summarize on this point, I recall that Parliament, in enacting s. 37(10) of the *YCJA*, did not choose to take away a young person's access to this Court, it only added a leave requirement. When deciding the leave application, this Court will have the benefit of the reasons offered in the dissent below on the question of law on appeal, as isolated by s. 677 of the *Criminal Code*. The Court will have the argument in support of leave and the required supporting materials, including evidence at trial, that will allow the Court to measure whether the question of law raises a meritorious appeal. Most importantly, and contrary to what C.P. and some of the interveners have argued before us, the criteria for granting leave as relevant to youth criminal matters means that when the liberty of the young person is at stake, a *prima facie* meritorious appeal on the question of law — including an unreasonable verdict argument — would meet the public importance standard even if the matter does not, on its face, transcend in jurisprudential importance the interest of the parties. Where, in such cases, the leave application discloses a reasonable prospect of success, this Court can grant leave.

[213] For the reasons outlined above, I am confident that the leave process provides a safeguard for youth in circumstances where an adult would have an appeal as of right. It was open to Parliament to seek a legislative path that places greater weight on the negative effect of longer appellate proceedings that have no utility while simultaneously maintaining access for meritorious appeals through the leave process.

[214] For these reasons, I conclude that the benefits in terms of timeliness outweigh the negative effects of the *prima facie* discrimination at issue. Any enhanced risk of miscarriage of justice as a result of having to seek leave to appeal in the circumstances raised in the notice of constitutional question is minimized by the leave to appeal process. Imposing a leave requirement in service of the broader goals of youth criminal justice is consistent with the place of equality in a free and democratic society.

#### IV. Conclusion

[215] I would dismiss the appeal.

[216] In answer to the constitutional questions raised here, I conclude that s. 37(10) of the *YCJA* does not infringe s. 7 of the *Charter*. It amounts to a limit of s. 15(1) of the *Charter*, but one that is justified by s. 1. Accordingly, I would conclude that s. 37(10) of the *YCJA* is constitutionally valid.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[217] This is an appeal from a verdict of guilty of sexual assault entered by Crosbie J. of the Ontario Court of Justice. The appellant, C.P., was 15 years old at the time of the events and was therefore tried pursuant to the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

[218] It was not in dispute that C.P. had had sexual intercourse with the complainant, R.D., who was 14 years old at the time, at a beach party where both had been drinking alcohol. Because R.D. had no memory of the intercourse, she was unable to provide direct evidence that she had not consented. The central question in this case was thus whether R.D. had been too intoxicated to consent when the intercourse took place, and not whether she did or did not in fact consent. Pinpointing the time of the sexual activity was key to answering this question. If it had occurred *early in the evening* when R.D. was only beginning to experience some of the effects of the alcohol she was drinking, a capacity to consent could be inferred. However, if the intercourse had occurred *later in the evening* when R.D. was severely intoxicated, it would be open to the trial judge to infer that R.D. was incapable of consenting.

[219] The trial judge (2017 ONCJ 277) found that the intercourse had occurred later in the evening. She therefore concluded beyond a reasonable doubt that R.D. had

been too intoxicated to be capable of consenting at the time of the intercourse and that C.P. had had knowledge of her incapacity.

[220] A majority of the Court of Appeal for Ontario (2019 ONCA 85, 373 C.C.C. (3d) 244) upheld C.P.'s conviction. Nordheimer J.A., dissenting, would have entered an acquittal. C.P. is asking this Court to set aside his conviction and to enter a verdict of acquittal. In the alternative, he asks us to order a new trial. I agree with C.P. that the verdict is unreasonable.

[221] C.P. also submits that s. 37(10) of the *YCJA*, which deprives young persons of the automatic right of appeal that is available to adults where there is a dissent on a question of law in a court of appeal, violates ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and that the violations are not justified under s. 1 of the *Charter*. Given that leave has been granted in this case, and given the conclusion I reach on the merits of the appeal, I decline to take a position on the *Charter* arguments. However, I feel a need to reiterate the importance of a dissent on a question of law. More particularly, in matters involving young persons, I am of the view that such a dissent, especially a powerful one like that of Nordheimer J.A. in this case, clearly indicates that an appeal has some merit and that the conviction must be reviewed.

[222] For the following reasons, I would allow the appeal, set aside the conviction and enter an acquittal.

## II. Context

[223] On April 23, 2016, a number of teenagers met outside a liquor store (“LCBO”) in Toronto to “shoulder tap”, that is, to ask adults to go into the store and buy alcohol for them. The group of teenagers had planned to take alcohol to a nearby beach to celebrate the birthday of a certain T. Among them were R.D. and C.P.

[224] R.D. and C.P. had known each other for about two months. They became friends by frequently spending time together with other teenagers after school and on weekends at a coffee shop.

[225] It is not clear exactly when the group was at the LCBO. C.P. testified that he had arrived around 8:30 or 9:00 p.m. and was there for about 30 to 45 minutes, whereas R.D. said they had been at the LCBO at about 9:00 or 10:00 p.m. In any event, it is not in dispute that the LCBO closed at 10:00 p.m. and that the group would thus not have left later than that.

[226] After obtaining bottles of vodka for their party, the group of teenagers made their way to the beach. C.P. and R.D. walked together to a streetcar that went in that direction. They sat close to each other in the streetcar and talked. On the way to the beach, the teenagers were drinking straight from the bottles and passing them around.

[227] To get to the beach, they had to walk through a parking lot and then down a steep hill. When they arrived at the beach, a group of older youths, who were already

there, had started a bonfire. The older group agreed to let the new arrivals join them. According to her friend G.G., R.D. was not drunk when they arrived at the beach.

[228] Once again, it is not clear exactly when the group got to the beach, although the evidence places the time of arrival somewhere between 10:00 and 11:00 p.m. R.D. told the police that the group had arrived during that period, and G.G. testified that they had arrived around 10:30 p.m. C.P.'s account of the duration of the trip from the LCBO to the beach, which the trial judge did not reject, points to the same period.

[229] C.P. and R.D. sat down together on a mattress by the fire. They talked and drank together. After 15 to 20 minutes, they started French kissing on the mattress. Their kissing was interrupted, however, when some people from the older group decided to throw the mattress into the fire.

[230] Having been forced to move, R.D. went to sit by some rocks about 5 to 10 feet away from the fire and C.P. went to talk with one of his friends for 5 minutes.

[231] R.D. did not testify at trial and was never cross-examined. Instead, the Crown filed a videotaped statement R.D. had made to the police and a transcript of that statement. In her statement, R.D. had told the police that her memory was blurry, but that she remembered kissing C.P. on the mattress until it was thrown into the fire and sitting by the rocks.

[232] C.P. testified that he had decided to leave his friend and join R.D. by the rocks because he wanted to continue kissing her. According to C.P., they began again where they had left off. Despite her allegedly blurry memory, R.D. did remember lying on the sand by the rocks covered with a blanket and kissing C.P.

[233] C.P. added that while they were kissing by the rocks, he started touching her crotch through her clothes. He testified that R.D. had then asked him to “Fuck me, [C.]”. C.P. admitted that this had taken him by surprise, but that he had no reason to doubt that she wanted to have intercourse with him. Given the earlier kissing, this may have appeared as the natural culmination of what was happening between them.

[234] C.P. testified that after R.D. had said “Fuck me, [C.]”, he helped her pull down her pants and they had sexual intercourse. He did not use a condom, because he did not have any. He stated that R.D. had been conscious throughout the intercourse and that she did not appear to be too intoxicated to consent. R.D. told the police that she did not remember having had intercourse, but recalled pulling up her pants afterwards.

[235] Significantly, although there were about a dozen people around the fire, that is, within 5 to 10 feet of the place where the intercourse occurred, the Crown did not call a single witness who had witnessed it and could tell the court whether R.D. had been passed out or had simply been tipsy. This is surprising, given that it took place only 5 to 10 feet away and thus must not have occurred unnoticed. In fact, there were

a number of people who discussed that “event” among themselves that evening, and on social media the next morning.

[236] C.P. testified that after they had finished, he stood up while R.D. pulled up her pants. As I mentioned above, although R.D. said that she did not remember having had intercourse with C.P., she did recall pulling up her pants.

[237] It is not in dispute that E.G. arrived at the party after the intercourse and found R.D. asleep with vomit on her, and that, on being awakened, R.D. had trouble talking and kept saying that she was cold. What is in dispute, however, is the timing of E.G.’s arrival in relation to the intercourse.

[238] On the one hand, C.P. testified that when he had stood up after having intercourse, he heard that his friends J. and E.G. were arriving at the beach and decided to go talk to them, which he did for 10 to 15 minutes. C.P., J. and E.G. then walked over to see R.D. and found her vomiting. In response to a leading question asked by the Crown in cross-examination, C.P. agreed, however, that E.G. had gone “directly” over to R.D.

[239] On the other hand, E.G., who had had little to drink that evening, testified at trial that she had arrived at the beach after the rest of the group and went *directly* over to R.D. upon arriving. But this testimony is inconsistent with E.G.’s statement to the police that she drank some of the vodka that had been left and then stayed with R.D. for the rest of the evening. If she stayed with R.D. throughout the evening, there is no

time when she could have drunk vodka other than between her arrival at the beach and her observation of R.D. lying asleep, which has the effect of widening the gap between the time of the intercourse and the time when she went to see R.D.

[240] E.G. also said that C.P. was very drunk when she arrived. According to her testimony, C.P. was having difficulty walking, and kept repeating himself and making random comments.

[241] G.G. who was also at the beach that evening, confirmed that C.P. was quite intoxicated that evening. She also testified that when she left the party around 12:30 a.m., E.G. had not yet arrived. G.G. added that R.D. had started throwing up just before she left.

[242] At either 1:24 or 1:49 a.m., R.D. had a telephone conversation with L.L., another teenager who was not at the party. L.L. testified that R.D. was slurring her words over the phone. She also kept apologizing, but he did not know the reason why. At the time, L.L. and R.D. had been seeing each other romantically, but they were not in a formal relationship.

[243] Later on, the mothers of three of the girls arrived at the beach to take them home. R.D. was helped up the hill to the parking lot. While the mothers were assembling the teenagers in the parking lot, R.D. and C.P. were seen hugging each other: R.D. had her hands around C.P.'s waist and her head was resting on his shoulder. R.D. then got into the vehicle of E.G.'s mother.

[244] E.G.'s mother did not take R.D. home. It had instead been decided that she would be taken to G.G.'s house. G.G.'s mother gave R.D. toast and water and offered her a bed. R.D.'s mother was then informed that her daughter was staying at G.G.'s house.

[245] The next morning, R.D.'s mother picked her up at G.G.'s house and took her home. R.D. went back to sleep. After waking up, she read a text message from one of her friends, who told her that a picture of her sleeping under a blanket on the beach, with the caption "[s]he fucked [C.] then passed out", was being sent around. Humiliated, R.D. said to her friend, "I wanna die [*sic*]". L.L., the boy R.D. was seeing at the time, also got the message. Clearly upset, he forwarded the picture to R.D. and said "U fucked [C.]. Thats why im done [*sic*]". R.D. answered "I don't remember that tho [*sic*]".

[246] Alarmed by the situation, R.D. called her mother to her bed and told her about the rumour. R.D.'s mother provided double hearsay evidence<sup>7</sup> to the effect that her daughter R.D. had told her that some of her friends were saying that C.P. had had sex with her *while* she was passed out on the beach; at least, that is how R.D.'s mother interpreted the situation. It is noteworthy, however, that none of the text messages R.D. received that morning mentioned that C.P. had had sex with her *while* she was passed out. Rather, the message indicated that she had had sex with C.P. and *then* passed out.

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<sup>7</sup> Although the hearsay evidence was admissible because the defence did not object to it, it should nonetheless be of lower probative value.

[247] R.D.'s mother decided to take her daughter to the hospital to be examined. The medical staff swabbed R.D. and found DNA that was later confirmed to match that of C.P. R.D. initially refused to report the incident to the police. However, her mother managed to convince her to do so by saying, among other things, that not to report it would amount to condoning the fact that C.P. had had sex with her while she was passed out, although R.D. could not confirm that it had in fact occurred *while* she was passed out and the text messages were actually to the opposite effect. When making her statement to the police later in the day after she went to the hospital, she was asked whether she had wanted to have sex with C.P., and her answer was "I don't remember it so, I don't, I don't think so".

### III. Decisions of the Courts Below

#### A. *Ontario Court of Justice, 2017 ONCJ 277 (Crosbie J.)*

[248] The trial judge noted that it was not in dispute that C.P. had had sexual intercourse with R.D. Because R.D.'s lack of memory meant that she could not testify that she had not communicated consent, the Crown's case rested on the theory that her intoxication had made her incapable of consenting in any event. The Crown therefore had to prove the following elements beyond a reasonable doubt: (1) R.D. was too intoxicated to consent; (2) C.P. knew that R.D. could not have consented; and (3) C.P. did not have an honest but mistaken belief in consent. The trial judge concluded that all these elements were established beyond a reasonable doubt, and convicted C.P. of sexual assault.

(1) Actus Reus — R.D.'s Incapacity to Consent

[249] The trial judge properly recognized that the timing of the sexual intercourse during the evening was crucial to the determination of whether R.D. had been too intoxicated to consent:

Had the sexual activity occurred closer in time to when the group first arrived — when R.D. was drinking but not yet feeling significant effects of her alcohol consumption — the Crown may well have had more difficulty establishing that R.D. lacked the capacity to consent. The further in time, however, to the point when R.D. was asleep, motionless, incomprehensible, and vomiting, the more likely it is that the Crown would be able to establish that R.D. lacked the minimal capacity to consent. [Emphasis added; para. 90 (CanLII).]

In other words, the question was *how long* after the intercourse R.D. was discovered by her friends in a state of extreme intoxication. If the Crown was unable to determine beyond a reasonable doubt that it had taken place shortly before E.G. saw R.D., a finding of guilt would be unavailable.

[250] Although the trial judge fully understood the importance of the timing, she acknowledged that the evidence was insufficient for her to determine approximately when the intercourse had occurred during the evening:

As the trial unfolded, it seemed there was a lack of clarity with respect to the timing of the sexual activity. As noted in the review of the evidence, the Crown witnesses were only able to make a guess about when the group arrived at the beach. E.G. and G.G. did not witness any sexual activity and therefore could not help pinpoint the time it happened. R.D. had fragments

of memory but certainly was not able to specify the timing of the incident.  
[Emphasis added; para. 90.]

[251] Ultimately, the trial judge found that the intercourse had occurred shortly before E.G. arrived at the beach. She based this finding on “[t]he combination of E.G.’s and C.P.’s evidence” (para. 90).

[252] First, the trial judge noted that E.G. had testified that she went over to R.D. “instantly” upon arriving.

[253] Second, the trial judge opined that E.G.’s testimony was corroborated by that of C.P. In his examination-in-chief, C.P. said that after the intercourse, he stood up and heard “that [J.] and E.G. . . . had arrived” (para. 92). He added that he then went to where they were and had a 10- to 15-minute conversation with them before they went to see R.D. But the trial judge was of the view that C.P. had then confirmed, during his cross-examination, “that E.G. went right over to R.D. when she arrived” (para. 92 (emphasis added)).

[254] To be able to rely on C.P.’s testimony as corroboration of E.G.’s evidence, the trial judge had to reject C.P.’s evidence that he had had a 10- to 15-minute conversation with E.G. before she went over to R.D. The trial judge did so, and she based this conclusion on, among other things, her view (1) that C.P. had contradicted himself under cross-examination, (2) that E.G.’s evidence was more believable and (3) that C.P.’s testimony was unreliable because he had been too intoxicated at that point

in the evening. This enabled the trial judge to isolate the answer C.P. had given in cross-examination and to use it to bolster E.G.'s testimony.

[255] Having found that the intercourse occurred shortly before E.G.'s arrival, the trial judge concluded that R.D. must have been incapacitated when it took place owing to her level of intoxication. Indeed, the trial judge had noted that E.G. had found R.D. "unconscious, vomit-laden and generally unresponsive" upon her arrival (para. 100).

(2) *Mens Rea — C.P.'s Knowledge That R.D. Was Too Intoxicated to Consent*

[256] The trial judge "concluded beyond a reasonable doubt that C.P. knew or was reckless or wilfully blind to the fact that R.D. was so intoxicated that she could not have consented to sexual activity" (para. 117). In her view, R.D.'s impairment was evident to G.G., E.G. and C.P.

[257] The trial judge also found as a fact that R.D. did not say "Fuck me, [C.]" First, she viewed C.P.'s evidence as neither credible nor reliable. Second, she had doubts about the plausibility of that communicated consent. Because their relationship was a "platonic" one, it was unlikely that their kissing would naturally have led to R.D. asking C.P. to have sex with her on a beach where there were people nearby (para. 126). In any event, the trial judge was of the opinion that even if R.D. had done so, "she was too intoxicated to have given voluntary consent to sexual activity" (para. 121).

(3) Defence of Honest but Mistaken Belief in Consent

[258] Lastly, the trial judge rejected C.P.'s defence of honest but mistaken belief in consent. She concluded that even if R.D. had said "Fuck me, [C.]", C.P. would not have been entitled to rely on that communicated consent. Without deciding conclusively, the trial judge stated that C.P. was legally barred from relying on the defence either because of his intoxication or because his mind was clear enough for him to be well aware of R.D.'s incapacity and of the need to take reasonable steps to ascertain the voluntariness of her consent.

B. *Court of Appeal for Ontario, 2019 ONCA 85, 373 C.C.C. (3d) 244*

(1) Dissent (Nordheimer J.A.)

[259] Nordheimer J.A., dissenting, found that the trial judge's verdict was unreasonable. In his view, her finding that R.D. had been incapable of consenting was "incompatible with the whole of the evidence, especially the uncontradicted evidence" (C.A. reasons, at para. 15). Nordheimer J.A. disagreed with the trial judge's finding that the intercourse had occurred *later in time* during the evening.

[260] First, Nordheimer J.A. concluded that the trial judge had erred in law by failing to explain why she was isolating a single piece of C.P.'s evidence and rejecting all the rest. He noted that there was only one piece of evidence that could place the intercourse close in time to E.G.'s arrival. It consisted in a single answer given by C.P.

in cross-examination in response to an ambiguous suggestion made by the Crown that E.G. had gone “directly” to R.D. upon her arrival. This single piece of evidence was crucial to the trial judge’s chain of reasoning. Without it, there was no other evidence that could connect the time of the intercourse with that of E.G.’s arrival. The only evidence E.G. could provide was that R.D. had been asleep when she arrived, but she could not say whether she had arrived shortly after or long after the intercourse, because she had not been there when it happened. Nordheimer J.A. stated that, although it is open to a trier of fact to accept only some of a witness’s evidence, the trial judge had to provide an explanation for her crucial decision to reject all of C.P.’s evidence but this single answer. Her not doing so constituted an error of law.

[261] Second, Nordheimer J.A. was of the opinion that the totality of the evidence demonstrated that “there was a larger gap in time between the sexual activity and E.G.’s arrival than the trial judge allowed for” (para. 31 (emphasis added)). E.G.’s statement that she had upon arriving found R.D. asleep could not therefore be relied on to establish that R.D. was incapacitated during the intercourse. It is quite possible that R.D.’s state changed from being capable to being incapable during that gap between the intercourse and E.G.’s arrival.

[262] Having found that the trial judge’s finding on the *actus reus* was unreasonable, Nordheimer J.A. did not address the reasonableness of the decision to reject C.P.’s defence of honest but mistaken belief in consent. He would have set aside the conviction and entered an acquittal.

(2) Majority (MacPherson J.A. With Feldman J.A. Concurring)

[263] MacPherson J.A., writing for the majority, concluded that the verdict was reasonable. He disagreed with Nordheimer J.A.'s reasoning.

[264] First, MacPherson J.A. was of the view that the trial judge had not erred in law by failing to explain her reasons for accepting only part of C.P.'s evidence and rejecting the rest. He stated that the trial judge had explained why she found that C.P. was not credible and why she rejected his evidence on certain key points, such as its veracity on the question of the 10- to 15-minute conversation. It was therefore open to the trial judge to accept only some of C.P.'s evidence.

[265] Second, MacPherson J.A. disagreed that the trial judge's finding that the sexual activity had occurred immediately before E.G. arrived at the beach was incompatible with the rest of the evidence. In his view, what mattered was not "the exact time of E.G.'s arrival and observation of the complainant" (para. 56). Rather, what was critical to the trial judge's finding of incapacity was the relative time of E.G.'s arrival in relation to the intercourse. C.P. had testified that the gap in time between the intercourse and E.G.'s arrival was relatively narrow. Ten or fifteen minutes would not have made a difference.

IV. Issue

[266] On the merits of C.P.'s appeal, the only question is whether the conviction of C.P. for sexual assault is reasonable.

## V. Analysis

[267] C.P. asks this Court to set aside his conviction and to enter a verdict of acquittal. In the alternative, he asks us to order a new trial. C.P. raises three grounds of appeal. In my view, the verdict of guilty is unreasonable for two reasons.

[268] First, there is a logical flaw in the trial judge's reasoning that corrupts an evidentiary finding that is crucial to the outcome of the case. The trial judge made two irreconcilable findings. On the one hand, she relied on C.P.'s recollection of events contemporaneous with the intercourse in order to convict him. But, on the other hand, she found that C.P. had been too intoxicated at that point in the evening to be subsequently capable of testifying reliably about what had happened. This first reason alone would suffice for this Court to order a new trial.

[269] Second, I am also of the view that the evidence is not capable of supporting the finding of incapacity to consent and that the Court should therefore enter a verdict of acquittal instead of ordering a new trial. An approach to the reliability of C.P.'s testimony that is consistent with the trial judge's repeated findings to the effect that C.P. was quite intoxicated and that his memory of the crucial events was unreliable leads to the conclusion that the balance of the circumstantial evidence simply does not make it possible to pinpoint the time when the intercourse occurred. This means that

the intercourse may have occurred at any time within an approximately two-hour window during which R.D.'s state changed from not being drunk to being unconscious.

A. *Whether the Finding of Incapacity Was Reached Illogically*

[270] C.P.'s first ground of appeal is that the trial judge's reasoning is illogical within the meaning of *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3. Illogicality may occur in "various ways" (*Sinclair*, at para. 19). In the case at bar, C.P. argues that the trial judge made two irreconcilable findings of fact. On the one hand, she rejected C.P.'s evidence that he had had a 10- to 15-minute conversation with E.G. when she arrived at the beach and before E.G. went over to R.D., because he had been quite intoxicated *at that point in the evening*. But, on the other hand, the trial judge accepted another part of his evidence about what had happened *at that point in the evening*, that is, his testimony that he had heard "that [J.] and E.G. . . . had arrived" shortly after the intercourse. C.P. submits that if he had been too inebriated at that time to be subsequently able to testify reliably about the conversation, he would logically also be unable to testify reliably that E.G. had arrived shortly after the intercourse. Those two things would have occurred at the same time, a time when he was, in the trial judge's view, too drunk to subsequently remember what had happened. C.P. points out that the trial judge failed to provide an explanation for this "selective reliance" (A.F., para. 120). I agree that the trial judge's finding of incapacity was reached illogically.

[271] As I mentioned above, the trial judge was well aware that the timing of the intercourse was the central issue of this case. The defence did not dispute E.G.'s testimony that she had found R.D. virtually passed out with vomit on her. If the intercourse had occurred very shortly before E.G.'s arrival, an inference of incapacity would be more plausible than it would if the intercourse had occurred long before that time. According to G.G., R.D. was not drunk when the group arrived at the beach, but she became more and more drunk as time passed until she began throwing up around 12:30 a.m. If the intercourse had occurred early in the evening, at a time when R.D. was either sober or, if drunk, not incapacitated, an inference of incapacity would therefore be too tenuous for C.P. to be found guilty beyond a reasonable doubt. It is important to note that R.D. being intoxicated early in the evening would not mean that she was necessarily incapable of consenting. It was only when she reached the stage at which she became impaired to the point that she no longer had an operating mind — if that did in fact happen — that her consent would have become vitiated at law (see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 66; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55-57; *R. v. Barton*, 2019 SCC 33, at para. 88).

[272] The trial judge was of the view that the question of the timing of the intercourse was answered by the “combination of E.G.'s and C.P.'s evidence” (para. 90). The combination of their evidence was indeed crucial to her finding of incapacity. E.G. testified that she had gone over to R.D. instantly and found her to be extremely intoxicated (para. 91). However, because E.G. was not at the beach when the intercourse occurred, her evidence alone could not serve to pinpoint the time of the

intercourse in relation to the time when she saw that R.D. was asleep. Even if it is assumed that E.G. went over to R.D. instantly upon her arrival, that does not establish whether she observed R.D. within minutes after the intercourse or an hour later. Put simply, E.G.'s evidence alone was insufficient to support a finding of incapacity at the time of the intercourse. Whatever the case may be, additional evidence was necessary in order to narrow the gap between the time of the intercourse and the time when she went to see R.D. In this instance, only C.P.'s evidence could address the timing of the intercourse in relation to E.G.'s arrival and her observation of R.D.

[273] C.P. testified that after the intercourse, he had stood up and heard at the same time "that [J.] and E.G. . . . had arrived". This statement by C.P. helped narrow the gap between the time of the intercourse and the time when E.G. went to see R.D. The combination of this statement with E.G.'s testimony that she had gone over to R.D. instantly made the two events contemporaneous, if not almost concomitant. However, C.P. added that he had had a 10- to 15-minute conversation with E.G. before she tended to R.D., which meant that there was a gap of 10 to 15 minutes between the events in question. According to C.P., R.D.'s state changed from being capable to being incapable during that time.

[274] The trial judge bridged that 10- to 15-minute gap by rejecting the evidence that "[C.P.] spoke with E.G. before she tended to R.D." for three reasons (para. 93). So far, there is nothing illogical in the trial judge's reasoning. It is well established that it is open to a trier of fact to accept only some of a witness's testimony (*R. v. J.H.S.*, 2008

SCC 30, [2008] 2 S.C.R. 152, at para. 10; *R. v. Mathieu* (1994), 90 C.C.C. (3d) 415 (Que. C.A.), at p. 430, per Fish J.A., aff'd [1995] 4 S.C.R. 46). It was therefore open to the trial judge to reject C.P.'s evidence about the conversation and accept only his evidence that he had heard E.G. arriving shortly after the intercourse, provided that she had a logical and reasonable basis for doing so.

[275] Where the trial judge's reasoning becomes illogical, however, is in the three reasons she gave for rejecting C.P.'s evidence about the conversation:

- a) Internal contradiction: C.P. contradicted himself when he said, in his examination-in-chief, that he had had a conversation with E.G. *before* she went to see R.D., but then indicated, in a single answer to a leading question asked by the Crown in cross-examination, that E.G. had gone *directly* over to R.D. upon arriving.
- b) External contradiction: The trial judge preferred E.G.'s version that she had not had a conversation with C.P. upon arriving, because she found E.G. more reliable and credible than C.P.
- c) Unreliability caused by intoxication: C.P.'s evidence was unreliable because "he was [too] intoxicated at this point" in the evening (paras. 91-94).

The source of the illogicality stems from this third reason.

[276] What is illogical is not the trial judge's treatment of the existence or inexistence of the conversation, that is, her acceptance of a single answer from C.P.'s cross-examination that E.G. went directly over to R.D. and her rejection of the rest of his evidence relating to the issue of the conversation. Nordheimer J.A. concluded that the trial judge's relying on this single answer without giving any explanation constituted an error of law (C.A. reasons, at paras. 23-26). However, I am of the view that the trial judge did in fact give reasons for relying on this single answer and rejecting the evidence that the conversation took place. She rejected C.P.'s testimony about the conversation because alcohol had impacted his reliability, because he had contradicted himself and because she believed another witness instead of him.

[277] Rather, what was illogical was for the trial judge to find, on the one hand, that C.P. could not testify reliably about what had happened after the intercourse because he had been too intoxicated at that point in the night, while also finding, on the other hand, that C.P. could nevertheless testify reliably about the fact that he had heard "that [J.] and E.G. . . . had arrived". These findings are irreconcilable. If C.P. was too intoxicated at that time to be subsequently able to testify reliably about the conversation, his testimony about having heard E.G. arriving was also necessarily unreliable. These two events would have occurred at the same point in time, that is, at a time when, in the trial judge's view, C.P. had been too drunk for his subsequent testimony to be reliable.

[278] The Crown counter-argues that the trial judge's findings are in fact compatible. In the Crown's view, it was open to the trial judge to rely on her credibility findings in order to reject most of C.P.'s testimony and accept only some of his evidence. She made detailed adverse credibility findings at paras. 107-14. The Crown adds that the other two reasons the trial judge gave — the internal and external contradictions — were sufficient to justify her rejection of C.P.'s evidence about the conversation and her acceptance of his evidence that E.G.'s arrival was contemporaneous with the intercourse.

[279] I agree with the Crown that those are two valid reasons for doing so. But that is beside the point. Again, the problem is not that the trial judge irrationally rejected the evidence about the conversation. Rejecting an internally contradictory testimony or believing another more credible and reliable witness is logical. Rather, the problem is that she made two irreconcilable findings. She found that C.P. had been too drunk at that time to subsequently remember some things yet not too drunk to subsequently remember other things that would have happened at the same time.

[280] In other words, if the trial judge had said that she was rejecting C.P.'s testimony about the conversation for only two reasons — the internal and external contradictions — and had not mentioned C.P.'s being intoxicated as an additional reason, her reasons would have been logical. But by adding this third reason, she introduced illogicality into her reasoning.

[281] The trial judge gave no reasons to explain this inconsistency on a crucial piece of evidence. Without C.P.'s evidence that he had heard E.G. arriving after the intercourse, it was impossible to convict him. The trial judge explained why she rejected the evidence about the conversation, not why she cherry-picked "a sort of island of acuity" from "a sea of oblivion" (*R. v. Cedeno*, 2005 ONCJ 91, 27 C.R. (6th) 251, at para. 20).

[282] If I may borrow Stratas J.A.'s words from *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286, at para. 46, and adapt them to the context of the case at bar, a logical flaw that corrupts an evidentiary finding that is crucial to the outcome of the case — the finding of incapacity here — does not merely pull at leaves and branches and leave the tree standing, but causes the entire tree to fall. Because the finding of incapacity has fallen to the ground, the verdict of guilty is unreasonable and the conviction cannot stand.

[283] Where a logical flaw in a trial judge's reasoning renders a verdict unreasonable within the meaning of *Beaudry* and *Sinclair*, a new trial must be ordered (*Sinclair*, at para. 23). If, however, the verdict is at the same time unavailable on the record, an appellate court must enter a verdict of acquittal instead of ordering a new trial (para. 23). Whether a verdict of acquittal should be entered or a new trial ordered in this case will therefore depend on my answer on C.P.'s second ground of appeal.

B. *Whether the Finding of Incapacity Was Reasonably Available on the Evidence*

[284] C.P.'s second ground of appeal is that the evidence available to the trial judge was capable of supporting neither her finding of incapacity nor, as a result, the verdict of guilty (*R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381). As I mentioned above, if this second ground should succeed, the result will be an acquittal instead of a new trial. Where, as in the instant case, the Crown's case is based on circumstantial evidence, the appeal court must determine "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" (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55). In contrast with the ground of unreasonableness under *Beaudry* and *Sinclair*, which is concerned with "fundamental flaws in the reasoning process that led to [the trial judge's verdict]" (*Sinclair*, at para. 4, quoting para. 77 (text in brackets in original); see also *Beaudry*), this second ground of appeal is concerned with the weight of the evidence in the record. It "requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence" (*Villaroman*, at para. 55; see also *Biniaris*, at para. 36).

[285] In this case, I am of the view that the trial judge could not reasonably conclude that R.D.'s being incapable of consenting at the time of the intercourse was the only reasonable finding available on the evidence. Without the finding of incapacity, there was no case against C.P., because neither R.D. nor any other witness had testified that R.D. had not consented as a matter of fact. Consequently, the evidence is not capable of supporting the verdict of guilty, and a verdict of acquittal should be entered in its place.

[286] The starting point of the re-examination of the evidence is the weight attached to C.P.'s testimony. In my opinion, the trial judge should have accorded far less weight to C.P.'s evidence about the timing of the intercourse in relation to E.G.'s arrival than she did in her reasons. The trial judge attached significant weight to C.P.'s evidence that he had heard E.G. arriving shortly after the intercourse. It constituted the centrepiece of her reasons. This was, however, incompatible with her repeated findings to the effect that C.P. had been quite intoxicated and was thus an unreliable witness.

[287] After getting vodka from the LCBO, C.P. began drinking early in the night while the group was walking to the streetcar on the way to the beach. He continued drinking on the streetcar. Once they arrived at the beach, he drank even more vodka around the bonfire. According to E.G. and G.G., all this alcohol made C.P. very drunk. E.G. said that C.P. could not speak coherently or walk properly. G.G. added that C.P. was stumbling. C.P. himself confirmed that he had drunk so much that his friend J. told him to sit down because he could barely walk.

[288] The trial judge made several adverse findings against C.P. based on the evidence of his level of intoxication. First, she rejected his evidence that he had had a conversation with E.G. upon her arrival, because he had been too intoxicated at that point in the night for his testimony to be reliable. Second, the trial judge noted that C.P.'s level of intoxication could explain "his lack of recollection about certain details" (para. 110). She added that, "if [C.P.] was as drunk as witnesses suggest, it would be understandable for him to have gaps in his memory" (para. 114). Third, the trial judge

concluded that, because of s. 273.2(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, C.P.'s level of intoxication barred him legally from relying on the defence of honest but mistaken belief in consent.

[289] In addition to C.P.'s unreliability based on his level of intoxication, the rest of the evidence relating to the timeline of the evening's events further undermined the probative value of his evidence. The evidence did not permit the time of the intercourse to be determined beyond a reasonable doubt. A reconstruction of the timeline indicates that the intercourse may have occurred at any time during a window of roughly two hours.

[290] First, R.D. and G.G. stated that the group had arrived at the beach sometime between 10:00 and 11:00 p.m. This approximate time of arrival is consistent with the balance of the evidence. The group must have left the LCBO sometime before it closed at 10:00 p.m. According to C.P.'s uncontradicted testimony, they then walked for 15 to 30 minutes, rode the streetcar for about 15 minutes, walked to the beach for 10 minutes and then discussed whether they would join the older group or start their own bonfire — these were all narrative details the trial judge did not reject.

[291] Second, 15 or 20 minutes after C.P. and R.D. sat down together on the mattress, they started kissing until it was thrown into the fire. Shortly thereafter, C.P. joined R.D. by the rocks and had intercourse with her. I agree with Nordheimer J.A. that, on the strength of judicial experience, the sexual activity occurred in all likelihood

before R.D. had gotten vomit on her (C.A. reasons, at para. 31). In any event, the Crown did not argue the contrary.

[292] Third, according to G.G.'s testimony, R.D. started throwing up sometime around 12:30 a.m. No witness other than G.G. saw when R.D. started throwing up. C.P. testified that he had not been there, and E.G. arrived after that. G.G. left the party very shortly afterwards, at 12:30 a.m. She was certain that she had left around that time, because she had looked at her phone before leaving. Contrary to other witnesses who were only guessing about the timing of certain events, G.G.'s evidence in this respect was unambiguous.

[293] Fourth, E.G. arrived at the beach sometime after 12:30 a.m. G.G.'s testimony makes this timing limpid. Indeed, G.G. was adamant that when she left at 12:30 a.m., she had not yet seen E.G. In contrast, E.G. admitted that she was unable to affirm with certainty when she arrived. It follows that E.G. necessarily arrived sometime after 12:30 a.m.

[294] Fifth, following an undetermined period of time after her arrival, E.G. went over to R.D. and found her asleep with vomit on her. Whether E.G. went directly over to R.D. upon arriving or had a 10- to 15-minute conversation with C.P. first, as he testified, should not have been given the weight the trial judge gave it. There was in fact ample evidence arising from E.G.'s testimony to support a conclusion that going over to R.D. was not the very first thing she did upon arriving. The first piece of evidence was the fact that E.G. told the police that, when she arrived, she had drunk

some vodka that was left. As Nordheimer J.A. noted, E.G. going over to R.D. instantly is inconsistent with her statement that she drank some vodka, because she also said that she had stayed with R.D. for her entire time at the beach until they all left. If she stayed with R.D. constantly after going to see her, she must have drunk the vodka before doing so. The second piece of evidence was E.G.'s statement that she had heard a rumour that C.P. and R.D. had had intercourse earlier in the evening. Her statement implies that when she arrived, she had a conversation with some of the young people around the fire about the intercourse before going over to R.D. This is what she said:

. . . I'm not really too sure who was saying it but a few people were like, oh like, [R.D.] and [C.P.] like, had sex earlier today, tonight and I was like when? And they were like oh like, before you and [G.] showed up. . . .

(A.R., vol. II, at p. 30)

[295] This timeline shows that there was roughly a two-hour window between (1) the group's arrival at the beach between 10:00 and 11:00 p.m. and (2) E.G.'s observation of R.D. sometime after 12:30 a.m. The evidence as a whole cannot reasonably be interpreted in such a way that R.D.'s being incapable of consenting is the only reasonable conclusion. The trial judge should have acquitted C.P. Once the reliability of C.P.'s testimony is approached coherently with the trial judge's repeated findings to the effect that he had been quite intoxicated and that his memory of the crucial events was unreliable, it is simply impossible to pinpoint, even roughly, the time when the intercourse occurred on the basis of the rest of the circumstantial evidence. In fact, the available circumstantial evidence indicates that the intercourse

may have occurred at any time in the two-hour window. R.D.'s level of intoxication changed considerably during that time from not being drunk, according to G.G., upon arriving at the beach to being passed out later on. The trial judge herself acknowledged that, without C.P.'s evidence, the rest of the circumstantial evidence could not on its own pinpoint the time of the intercourse in that window:

As the trial unfolded, it seemed there was a lack of clarity with respect to the timing of the sexual activity. As noted in the review of the evidence, the Crown witnesses were only able to make a guess about when the group arrived at the beach. E.G. and G.G. did not witness any sexual activity and therefore could not help pinpoint the time it happened. R.D. had fragments of memory but certainly was not able to specify the timing of the incident. . . . The combination of E.G.'s and C.P.'s evidence, however, has answered the question of when during the evening the sexual activity took place. [Emphasis added; para. 90.]

[296] Furthermore, there is other evidence that, although not necessary to a finding that the verdict was unreasonable, should have reinforced the existence of a reasonable doubt in the trial judge's mind.

[297] Although the intercourse occurred at a distance of only 5 to 10 feet from the fire pit where a dozen or so young people were assembled, the Crown did not call a single witness who had seen it happen. The Crown called E.G., who had arrived after it occurred, and G.G., who also had not seen it happen. Yet there were obviously some people who had witnessed the intercourse, as can be seen from the messages exchanged on social media the next morning in which teenagers shared the information that R.D. and C.P. had had sex together. Also, there were some who told E.G., after her arrival,

that R.D. and C.P. had had intercourse earlier in the night, which makes clear that their sexual activity had not gone unnoticed.

[298] The phone conversation between R.D. and L.L. that occurred after 1:00 a.m. should also have reinforced the existence of a reasonable doubt. During that conversation, R.D. kept apologizing to L.L., whom she was seeing romantically. When considered together with the rest of the evidence, it tends to indicate that R.D. was aware of and sorry for what had happened. In the same vein, the fact that R.D. remembered kissing C.P. by the rocks and pulling up her pants after the intercourse were further signs that she had been aware of what was happening, which constitutes fertile ground for a reasonable doubt.

[299] Finally, the Crown's case appears to have been constructed on a narrative informed by rumours and double hearsay. As I noted above, R.D.'s mother may not have forced her daughter to report to the police, but she convinced her to do so on the premise that R.D. had been assaulted *while* being passed out. It is this narrative based on the rumour R.D. heard from her friends that appears to have informed the case built by the police and the prosecution. Obviously, this alone does not mean that the Crown's case could not stand, but a trial judge drawing on his or her judicial experience should have approached the theory of the case with an extra layer of caution.

[300] In conclusion, without the crucial finding of incapacity, the Crown could not prove its case, because there was no evidence of absence of consent. The verdict is unreasonable, and the trial judge should have acquitted C.P.

C. *Whether the Trial Judge Erred in Rejecting the Defence of Honest but Mistaken Belief in Consent*

[301] C.P.'s third ground of appeal is that the trial judge erred in law by rejecting his defence of honest but mistaken belief in communicated consent. He argues that she should have considered his youth in assessing the circumstances known to him for purposes of the quasi-objective standard for determining whether an accused can rely on that defence. In C.P.'s view, the principle of diminished moral blameworthiness imposes the application of a lower standard. Although everyone is presumed to know the law, it is absurd to propose that an intoxicated teenager is presumed to know the intricacies of the jurisprudence pertaining to what constitutes valid consent. Therefore, the trial judge should have considered C.P.'s limited understanding of criminal law principles in analyzing his defence.

[302] Despite the question being a matter of doctrinal interest, I do not believe that it should be answered in this case. Doing so would have no impact on the outcome of this appeal. C.P. asks us to rule on this legal issue in order to provide guidance to the court below should a new trial be ordered. Because I have concluded that a verdict of acquittal should be entered, such guidance is not necessary. In any event, even if I had concluded that a new trial should be ordered, the answer to this question would have had no impact on the outcome of the appeal. The question would be purely theoretical. C.P. does not challenge the trial judge's finding that R.D. did not say "Fuck me, [C.]" — this alleged communicated consent constituted the condition precedent to his defence. Nor does he challenge the trial judge's finding that his level of intoxication

barred him legally from relying on the defence — this is another hurdle that made this defence unavailable to him. In brief, the error of law, if any, would be of no consequence. Lastly, it seems that C.P. is raising this issue for the first time in his appeal to this Court.

## VI. Conclusion

[303] As mentioned above, I am of the opinion that it is not necessary to answer the constitutional questions pertaining to the validity of s. 37(10) of the *YCJA*, because they are now moot. Given that this Court has granted leave to appeal, the constitutional analysis of the denial of an automatic right of appeal to this Court would have no impact on the underlying criminal appeal in this case. Therefore, I decline to take a position on those questions.

[304] For the foregoing reasons, I would allow the appeal, set aside the conviction and enter an acquittal.

*Appeal dismissed, CÔTÉ J. dissenting.*

*Solicitors for the appellant: Henein Hutchison, Toronto.*

*Solicitor for the respondent: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Weinstein, Toronto.*

*Solicitor for the intervener Justice for Children and Youth: Justice for Children and Youth, Toronto.*

*Solicitor for the intervener the British Columbia Civil Liberties Association: Alison M. Latimer, Vancouver.*