



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Samaniego,  
2022 SCC 9

**APPEAL HEARD:** November 5,  
2021

**JUDGMENT RENDERED:** March  
25, 2022

**DOCKET:** 39440

**BETWEEN:**

**Victor Samaniego**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Criminal Lawyers' Association (Ontario)**  
Intervener

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

**REASONS FOR** Moldaver J. (Wagner C.J. and Karakatsanis, Martin, Kasirer  
**JUDGMENT:** and Jamal JJ. concurring)  
(paras. 1 to 79)

**JOINT DISSENTING** Côté and Rowe JJ. (Brown J. concurring)  
**REASONS:**  
(paras. 80 to 185)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

---

**Victor Samaniego**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Criminal Lawyers' Association (Ontario)**

*Intervener*

**Indexed as: R. v. Samaniego**

**2022 SCC 9**

File No.: 39440.

2021: November 5; 2022: March 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law — Trial — Evidence — Admissibility — Cross-examination  
— Intervention by trial judge — Scope of trial management power — Curtailment of  
four lines of questioning by trial judge during cross-examination of Crown witness by*

*accused's counsel — Whether trial judge's rulings were proper exercise of trial management power — Whether trial judge erred in curtailing cross-examination — If so, whether curative proviso applies — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).*

In August 2015, the accused and his co-accused went to a nightclub. The security guard allowed the co-accused into the club, as the two were good friends. However, the security guard denied the accused entrance because the accused had threatened him at the club on a prior occasion. Later in the evening, the police were called about a gun at the club. They arrested the accused and co-accused for possession of a loaded restricted firearm. The accused was eventually convicted of the charge by a jury.

At the accused's trial, the Crown relied heavily on the security guard's testimony in support of its position that both accused had the gun in their possession at some point in the evening. The security guard testified that: the accused became angry at him when he barred him from entering the club, threatened him and showed him a gun in his waistband; the co-accused came out of the club and defused the situation by taking the gun away from the accused; and then the co-accused went back into the club, came out, dropped the gun in front of the security guard and picked it back up.

The accused's defence was that his co-accused had sole possession of the gun. He sought to impeach the security guard's credibility, arguing that the security

guard implicated him to protect his co-accused, who was the security guard's good friend.

In the course of the cross-examination of the security guard by the accused's counsel designed to undermine the security guard's credibility, the trial judge made a number of rulings curtailing lines of questioning. Four of these rulings formed part of the accused's appeal from conviction to the Court of Appeal and form the basis of the accused's appeal before the Court. They pertained to the following lines of questioning: (1) whether there was a cocaine transaction between the co-accused and the security guard; (2) whether the security guard was scared at any time during the incident; (3) whether the security guard refused to identify the two accused; and (4) who dropped the gun and who picked it up. The majority of the Court of Appeal dismissed the appeal, finding that the rulings were an exercise of the trial judge's trial management power and revealed no error. The dissenting judge, however, found evidentiary errors in all four rulings and would have ordered a new trial.

*Held* (Côté, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

*Per* Wagner C.J. and **Moldaver**, Karakatsanis, Martin, Kasirer and Jamal JJ.: Three of the impugned rulings were free from error. The fourth ruling was erroneous in part; however, the curative proviso applies, as it occasioned no substantial wrong or miscarriage of justice.

The trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion. This power has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently. Trial judges may intervene to manage the conduct of trials in many ways, including restricting cross-examination that is unduly repetitive, rambling, argumentative, misleading, or irrelevant. Excessive trial delay can also be mitigated by proper trial management. The trial management power is an essential and versatile tool; it must, however, be exercised carefully. Parties should generally be allowed to present their cases as they see fit. The trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency. Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Sometimes, however, trial management decisions will overlap with the rules of evidence. As such, it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents.

The first impugned ruling involved both an initial evidentiary ruling — that there was no good faith basis for the line of questioning regarding the cocaine transaction — and a subsequent trial management decision — rejecting the accused’s counsel’s renewed attempts to pursue this questioning. The trial judge correctly assessed whether there was a good faith basis for the line of questioning based on the accused’s counsel’s articulated purpose — on which the trial judge was entitled to rely.

The accused's counsel repeatedly said that she wanted to ask about cocaine to demonstrate that the co-accused went to the club to sell cocaine to, or buy cocaine from, the security guard. While trial judges may inquire into counsel's proposed purpose, as a general rule, it is not their function to guess at or suggest more appropriate purposes than those proffered by counsel. Nor is it the function of appellate judges to assume the role of trial counsel, formulating questions that counsel could have asked, identifying the legal basis for them, and making arguments that counsel could have made to show that they were permissible. The trial judge found that the drug deal hypothesis was completely speculative and without any basis after reviewing the surveillance video. This finding is tantamount to finding that no reasonable inference could be drawn and, therefore, that there was no good faith basis to ask the questions. When the accused's counsel revived her attempts to ask about the cocaine later on in the cross-examination, the trial judge reasonably curtailed the irrelevant questioning that would not have furthered any issue at trial.

Regarding the second ruling, the judge's trial management decision to curtail and clarify the accused's counsel's misleading suggestion was reasonable and is owed deference. It was misleading to suggest that the security guard was not scared on the day of the incident and only reference a passage of the police statement which supported this suggestion, knowing that elsewhere in the statement, he told the police he was scared. While not an irrelevant line of questioning, it would have been a needless waste of court time to allow the accused's counsel to pursue it, only to learn later that the questions were misleading and could only serve to distract or confuse the

jury. It was not an error for the trial judge to provide a corrective instruction to the jury, advising of the existence of another passage in the police statement where the security guard said he was scared before he formally adopted that passage for three reasons. First, directly after the instruction, the accused's counsel had the security guard adopt the passage of his police statement where he said he was scared. Second, all parties agreed that the security guard's police statement contained a passage where he said that he was scared. Adopting the passage was an evidentiary formality in the circumstances. Third, the accused's counsel did not raise any objection to the trial judge providing a corrective instruction.

The trial judge's third ruling was an appropriate exercise of her trial management power to prevent the accused's counsel from pursuing a misleading line of questioning that was not relevant to the resolution of any live issues in the case. The accused was entitled to a fair trial, not an endless one. The trial judge was entitled to rely on the accused's counsel's articulated purpose for her questions, which was to suggest that the security guard refused to identify the two accused at the preliminary inquiry. This suggestion was simply not true. The security guard's comment about not recalling whether the two persons in the surveillance video were the two accused must be taken in context. At the preliminary inquiry, he identified the two accused as those involved in the incident, both before and after the impugned comment. He also identified the two accused as the persons in the surveillance video near the beginning of his examination-in-chief.



The trial judge's fourth ruling had two aspects. The first was a proper trial management ruling targeting misleading questioning designed to show that the security guard had not told the same story at trial as he did at the preliminary inquiry about who dropped and picked up the gun. He did tell the same story — both times in accordance with his police statement. While it was true that he offered a contrary story at the preliminary inquiry before adopting his police statement as past recollection recorded, the accused's counsel was not seeking to expose the inconsistent versions given at the preliminary inquiry. Rather, her suggestion implied that he said only one thing at the preliminary inquiry and the opposite at trial. This was simply not true. The second, and problematic, aspect of the trial judge's ruling was her further restriction of any cross-examination about the security guard's preliminary inquiry testimony prior to his adoption of his police statement. This was an incorrect evidentiary ruling. Trial judges are not bound by evidentiary rulings made at the preliminary inquiry. More importantly, the security guard's adoption of his police statement as true did not erase his different initial version of events. There was an inconsistency that the accused's counsel could probe, had she sought to do so.

The curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* allows a court of appeal to dismiss an appeal from conviction where no substantial wrong or miscarriage of justice has occurred. The proviso can only rarely apply in cases where cross-examination has been improperly curtailed. This is one of those rare cases; the second aspect of the trial judge's fourth ruling was not a fatal error. The accused's counsel was able to vigorously challenge the security guard's credibility and repeatedly

emphasize the primary defence theory that he was lying to protect the co-accused. Furthermore, there was no indication that the accused's counsel wanted to ask the questions improperly barred by the trial judge. Even if she did want to pursue that line of questioning, this would likely have undermined — rather than supported — the primary theory advanced by the accused. In the context of the trial, the trial judge's technical error was harmless and would not have affected the outcome. There was no substantial wrong or miscarriage of justice.

*Per Côté, Brown and Rowe JJ.* (dissenting): The appeal should be allowed, the conviction set aside, and a new trial ordered. The trial judge's exclusion of the security guard's prior inconsistent statement made at the preliminary inquiry about who dropped and picked up the gun was an erroneous evidentiary ruling, not a trial management decision. This error cannot be saved by the curative proviso.

Trial judges have the authority to control the proceeding over which they preside. They should control, direct, and administer the trial in an effective and efficient way. Among other powers, trial management authority allows trial judges to place reasonable limits on oral submissions, direct written submissions, defer rulings, decline to hear frivolous motions after hearing from the parties, and, exceptionally, direct the order in which evidence is called. These powers allow trial judges to control the court's process by managing how parties present their case, not the evidence they can tender to build their case. Trial management powers can never be used to exclude relevant and material evidence. Rulings on the admissibility of real or oral evidence, including

rulings on permissible lines of cross-examination, are evidentiary decisions. The propriety of those rulings is governed by the rules of evidence, not the court's trial management authority.

Separating trial management powers from the rules of evidence does not lead to inefficiency and confusion. The rules of evidence are sensitive to trial efficiency concerns. The law of evidence allows courts to weigh the benefits of admitting oral or real evidence against the costs to trial efficiency. Courts should exclude technically admissible evidence when the costs to the trial process outweigh the benefits. This is reflected in established exclusionary rules, such as the collateral facts rule that prohibits calling evidence solely to contradict a witness on a collateral fact, as well as the trial judge's general discretionary power to exclude evidence when its probative value is outweighed by its prejudicial effects. Evidence is prejudicial when, among other concerns, it would unduly undermine the efficiency of the trial by consuming an inordinate amount of time which is not commensurate with its value. Limits on cross-examination can and should be understood as applications of these ordinary rules of evidence and, in particular, the trial judge's residual power to exclude overly prejudicial evidence. A trial judge should prevent counsel from asking irrelevant questions because those questions have no probative value. Similarly, courts should stop repetitious or misleading questioning because the probative value of repeated or misleading questions is minimal while their prejudicial effects to the trial process are significant. Such interventions are evidentiary rulings, not trial management decisions.

Relying on trial management authority when making evidentiary rulings undermines trial predictability and consistency, and the accused's right to make full answer and defence. With respect to trial predictability and consistency, the rules of evidence dictate how parties can establish the facts needed to build their case. In a predictable manner, it lets parties know what information they can present to support their case, how they can tender this information, and what use they can make of this information once admitted. Parties are entitled to present all relevant and material evidence to the trier of fact, absent a clear ground for exclusion. Relying on trial management authority to make evidentiary determinations could create a two-tiered system where some litigants would need to build their case under established evidentiary rules while others would need to build it under the trial judge's more loosely defined and opaque trial management discretion. This would make litigation less predictable, accessible, and fair. It would also stifle development of the law.

As for the accused's right to make full answer and defence, the rules of evidence provide special protection to accused persons by giving them a wide right to call evidence. Unlike in the case of Crown-led evidence, there is no evidentiary discretion to exclude technically admissible defence evidence simply because its probative value is outweighed by its prejudicial effects. Instead, defence-led evidence should be excluded only when its probative value is substantially outweighed by the prejudice it could cause. The rules of evidence protect an accused's right to make full answer and defence by ensuring that trial judges do not too readily exclude defence evidence, even when that evidence has minimal probative value or some serious

prejudicial effects. Trial management powers do not direct trial judges to be similarly cautious. Relying on trial management authority to curtail a line of cross-examination in the name of trial efficiency, for example, could prevent defence counsel from eliciting relevant and material evidence even when the prejudicial effects of the questions do not substantially outweigh their probative value.

In the present case, the law of evidence provided the trial judge with a number of options to deal with the arguably misleading question posed by the accused's counsel. If she thought the question was misleading because it was missing necessary context, she could have asked the accused's counsel to rephrase the question and draw the security guard's attention to the fact that he had also subsequently adopted his police statement at the preliminary inquiry. The trial judge could have also simply allowed the question, leaving it for the Crown to raise the security guard's prior consistent police statement in reply. Either way, the jury could then assess whether the inconsistency was the result of the security guard's genuine memory loss or whether it was illustrative of the security guard testifying falsely at the preliminary inquiry to protect his friend. Alternatively, if the trial judge thought that the accused's counsel was baselessly misrepresenting the facts and misleading the jury, she could have restricted that line of questioning under her overarching exclusionary power if the question's probative value was substantially outweighed by its prejudicial effects. Instead of taking any of these steps, the trial judge prevented the accused's counsel from asking any questions on the specifics about what the security guard said at the preliminary inquiry before he adopted his police statement. This was an erroneous

evidentiary decision. The security guard's initial preliminary inquiry testimony was plainly inconsistent with his trial testimony. It was therefore relevant and material to a central issue at trial — the security guard's credibility. It was also not subject to any exclusionary rule. The fact that the security guard's police statement was admitted through a hearsay exception at the preliminary inquiry did not erase the earlier inconsistent testimony. Finally, the prejudicial effects of the evidence did not substantially outweigh its probative value. The probative value of this evidence was extremely high and touched on the central issue at trial, whereas the prejudicial effects were minimal at best. The accused was deprived of the right to pursue a highly relevant line of cross-examination.

The curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* cannot save the trial judge's error. There are two situations in which the curative proviso is appropriate: (1) where the error is so harmless or trivial that it could not have had any impact on the verdict; or (2) where the evidence is so overwhelming that the trier of fact would have inevitably convicted. Neither branch is applicable in the instant case. First, the trial judge's error was not harmless. The accused was entitled to fully explore the security guard's prior inconsistent statement about who dropped and picked up the gun without constraint and use this inconsistency to challenge the security guard's credibility. He was also entitled to use this inconsistency to support the main defence theory that the security guard was willing to lie to protect his friend, the co-accused. The accused was erroneously denied any opportunity to do this. Further, the trial judge ensured that the only question that the accused's counsel asked about this inconsistency

played no role in the jury's deliberation by instructing the jury to completely disregard this testimonial inconsistency. The unfairness flowing from the trial judge's ruling was not minimized by the fact that the accused could explore other inconsistencies in the security guard's testimony and generally allude to the security guard's motive to lie. An effective cross-examination often involves a coordinated series of attacks that, cumulatively, undermine the witness's credibility. Second, the evidence was far from overwhelming — the only evidence linking the accused to possession of the gun was the testimony of one witness who had a motive to lie and whose testimony at trial about who he saw drop the gun was, at times, manifestly inconsistent with his testimony at the preliminary inquiry.

### **Cases Cited**

By Moldaver J.

**Distinguished:** *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193; **considered:** *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; **referred to:** *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397; *R. v. Polanco*, 2018 ONCA 444; *R. v. Ivall*, 2018 ONCA 1026, 370 C.C.C. (3d) 179; *R. v. Snow* (2004), 73 O.R. (3d) 40; *R. v. Felderhof* (2003), 68 O.R. (3d) 481; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Sekhon*, 2014 SCC

15, [2014] 1 S.C.R. 272; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Ajise*, 2018 SCC 51, [2018] 3 S.C.R. 301, aff'g 2018 ONCA 494, 361 C.C.C. (3d) 384; *R. v. Cole*, 2021 ONCA 759; *R. v. Hudson*, 2020 ONCA 507, 391 C.C.C. (3d) 208; *R. v. Harrer*, [1995] 3 S.C.R. 562.

By Côté and Rowe JJ. (dissenting)

*Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v. Khanna*, 2016 ONCA 39; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397; *R. v. Potter*, 2020 NSCA 9, 385 C.C.C. (3d) 1; *R. v. Felderhof* (2003), 68 O.R. (3d) 481; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514; *R. v. Spackman*, 2012 ONCA 905, 295 C.C.C. (3d) 177; *R. v. Nield*, 2019 BCCA 27, 372 C.C.C. (3d) 375; *R. v. Murray*, 2017 ONCA 393, 138 O.R. (3d) 500; *R. v. C.F.*, 2017 ONCA 480, 349 C.C.C. (3d) 521; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139; *R. v. Hall*, 2018 ONCA 185, 139 O.R. (3d) 561; *R. v. Podolski*, 2018 BCCA 96, 360 C.C.C. (3d) 1; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193; *R. v. Polanco*, 2018 ONCA 444; *R. v. Evans*, 2019 ONCA 715, 147 O.R. (3d) 577; *R. v. Mitchell*, 2008 ONCA 757; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Clarke* (1998), 18 C.R. (5th) 219;



*R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Duong*, 2007 ONCA 68, 84 O.R. (3d) 515; *R. v. C. (K.)*, 2015 ONCA 39, 17 C.R. (7th) 181; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726; *R. v. Perkins*, 2016 ONCA 588, 352 O.A.C. 149; *R. v. Raghunauth* (2005), 203 O.A.C. 54; *R. v. L.K.W.* (1999), 126 O.A.C. 39.

### **Statutes and Regulations Cited**

*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 10(1).

*Canadian Charter of Rights and Freedoms*, ss. 7, 11(d).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 95(1), 686(1)(b)(iii), 691(1)(a).

### **Authors Cited**

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. Toronto: LexisNexis, 2018.

*McWilliams' Canadian Criminal Evidence*, vols. 2 and 3, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Thomson Reuters, 2022 (loose-leaf updated February 2022, release 1).

Paciocco, David M., Palma Paciocco and Lee Stuesser. *The Law of Evidence*, 8th ed. Toronto: Irwin Law, 2020.

Salhany, Roger E. *Canadian Criminal Procedure*, vol. 1, 6th ed. Toronto: Thomson Reuters, 2021 (loose-leaf updated December 2021, release 5).

Wright, Cecil A. "The Law of Evidence: Present and Future" (1942), 20 *Can. Bar Rev.* 714.

APPEAL from a judgment of the Ontario Court of Appeal (Benotto, Paciocco and Thorburn JJ.A.), 2020 ONCA 439, 151 O.R. (3d) 449, 390 C.C.C. (3d) 151, [2020] O.J. No. 2952 (QL), 2020 CarswellOnt 9146 (WL Can.), affirming the conviction of the accused for possession of a loaded restricted firearm. Appeal dismissed, Côté, Brown and Rowe JJ. dissenting.

*Chris Rudnicki and Karen Lau-Po-Hung*, for the appellant.

*Craig Harper and Jacob Millns*, for the respondent.

*Louis P. Strezos and Michelle Biddulph*, for the intervener.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Martin, Kasirer and Jamal JJ. was delivered by

MOLDAVER J. —

## I. Introduction

[1] Managing a criminal trial is a demanding task. This trial was no exception. It devolved into a nine-day, highly contested jury trial over a seemingly straightforward issue: whether Mr. Samaniego and/or his co-accused, Mr. Serrano, had possession of a handgun. The experienced trial judge had her hands full keeping the proceedings on track. Without her patience and her overriding concern that all parties be treated fairly, it almost certainly would have resulted in a mistrial. Cut-throat defences led to bickering among the parties; time estimates were honoured more in the breach than in the observance; and the jury was repeatedly required to leave the courtroom while the trial judge dealt with case management and evidentiary issues, many of which were attributable to the manner in which the main Crown witness was cross-examined by Mr. Samaniego's trial counsel ("trial counsel").

[2] This appeal centres on that cross-examination. It was neither a model of brevity nor clarity. On the contrary, it went on at great length and drew numerous objections from both Crown counsel and Mr. Serrano's counsel for being repetitive, unfocused, and misleading. To make matters worse, when the trial judge tried to clarify the purpose and relevance of trial counsel's questions, she was often met with unclear and unhelpful responses.

[3] In the course of trial counsel's cross-examination, over her objection, the trial judge made a number of rulings curtailing lines of questioning. Four of these rulings form the basis of this appeal. The jury eventually convicted Mr. Samaniego of possession of a loaded restricted firearm, contrary to s. 95(1) of the *Criminal Code*,

R.S.C. 1985, c. C-46. On his appeal from conviction to the Court of Appeal for Ontario, a majority of the court found no error in the four rulings and dismissed Mr. Samaniego's appeal (2020 ONCA 439, 151 O.R. (3d) 449). The crux of the disagreement between the majority and the minority centred on whether the impugned rulings were discretionary, falling within the trial judge's exercise of her trial management power, or whether they constituted erroneous evidentiary rulings that warranted a new trial. The majority found that the rulings were an exercise of the judge's trial management power and revealed no error. The dissenting judge found evidentiary errors in all four rulings and would have ordered a new trial. He stressed that the trial management power could not override proper evidentiary considerations and justify improper evidentiary rulings. Mr. Samaniego now appeals to this Court as of right.

[4] For reasons that follow, I would dismiss Mr. Samaniego's appeal. Under their trial management power, trial judges are permitted to control their courtroom and streamline the functioning of the trial. Exercises of trial management will generally not overlap with evidentiary rulings, but sometimes they do. This does not mean that erroneous evidentiary rulings can be justified under the guise of trial management. They cannot.

[5] In this case, some of the impugned rulings involved trial management decisions, while others involved a mixture of evidentiary determinations and trial management decisions. As I will explain, I am satisfied that three of the impugned

rulings were free from error. The fourth ruling was erroneous in part; in my view, however, it occasioned no substantial wrong or miscarriage of justice.

## II. Background

### A. *The Offence*

[6] As part of an agreed statement of facts, the parties acknowledge that on August 17, 2015, Mr. Samaniego and his co-accused, Mr. Serrano, went to a Toronto nightclub called Las Brisas. The security guard greeted Mr. Serrano at the door and allowed him into the club; the two were good friends. The guard denied Mr. Samaniego entrance because Mr. Samaniego had threatened him at the club on a prior occasion. The parties further agree that, later in the evening, the guard's friend called the police about a gun at the club. When the police arrived, they saw Mr. Serrano and Mr. Samaniego walking away and observed Mr. Serrano discard a gun. They arrested both men for possession of a loaded restricted firearm.

[7] The parties' stories differ on what happened at the club before the police arrived. Surveillance video at the club showed the two accused and the security guard, but not the gun. Identity was admitted. The main issue at trial was whether one or both of the accused had possession of the gun.

[8] The Crown's position was that both men had the gun in their possession at some point that evening. In support of its position, Crown counsel relied heavily on the

security guard's testimony. The guard testified that Mr. Samaniego became angry at him when he allowed Mr. Serrano into the club, but barred Mr. Samaniego from entering. Mr. Samaniego threatened him with a finger/thumb motion that looked like a gun and showed him a gun in his waistband. Mr. Serrano came out of the club and defused the situation by taking the gun away from Mr. Samaniego. Mr. Serrano went back into the club, came out, dropped the gun in front of the guard and picked it back up. The guard then asked a friend, who was close by, to call the police. Mr. Serrano and Mr. Samaniego left the club and were arrested a short time later.

[9] The two accused ran cut-throat defences. Mr. Serrano maintained that he had no knowledge of Mr. Samaniego bringing a gun to the club. It was never his intention to possess it; he only took it to protect the security guard from Mr. Samaniego. Moreover, he argued that there was no evidence that he knew the gun was real, restricted, or loaded.

[10] Mr. Samaniego's defence was that Mr. Serrano had sole possession of the gun; he never touched it. In support of his position, he sought to impeach the security guard's credibility, arguing that the guard implicated him to protect Mr. Serrano, the guard's "good friend". He did so by covering up for Mr. Serrano, withholding information from the police and falsely portraying Mr. Serrano in the best possible light.

B. *Mr. Samaniego's Cross-Examination of the Security Guard*

[11] Trial counsel's cross-examination of the security guard lasted approximately a day and a half, spanning over 150 pages of transcript. Time estimates were repeatedly exceeded. On the first day of her cross-examination, she questioned the guard for approximately 2 hours and advised that she would need 45 minutes the next morning. An hour into her cross-examination the following morning, the judge reminded her of her timeline. Counsel advised that she needed another 30 minutes at most. That estimate proved to be grossly inaccurate; the remainder of her cross-examination took up the entire day.

[12] As the record reveals, the cross-examination was often repetitive, wandering, and misleading. Some questions were difficult to understand, particularly for the security guard who required the assistance of an interpreter. The purpose and relevance of many lines of inquiry were difficult to discern. The judge had to excuse the jury five times to discuss issues arising from the cross-examination. Many of these discussions were lengthy and covered ground that had already been dealt with.

[13] The potential for prejudice caused by both accused running cut-throat defences added another dimension of difficulty for the judge. Some of trial counsel's lines of inquiry were highly prejudicial to Mr. Serrano. It was essential that the judge closely monitor the risk this prejudice posed, bearing in mind her obligation to ensure that both accused received a fair trial.

[14] In sum, the trial judge had her hands full trying to ensure trial fairness, minimize jury disruption, and rein in a cross-examination that was lengthy, disjointed,

and confusing. That she was able to keep the trial on the rails in the circumstances is a credit to her patience and the care she exhibited throughout to protect the interests of the parties, the witnesses, and the members of the jury.

### III. Issues

[15] There are four issues:

- A. Jurisdiction: Does Mr. Samaniego's appeal to this Court raise a question of law?
- B. What is the scope of the trial management power?
- C. Did the trial judge err by curtailing cross-examination in any of the four rulings?
- D. If so, can the curative proviso be applied to sustain Mr. Samaniego's conviction?

### IV. Analysis

- A. *Jurisdiction: Mr. Samaniego Appeals on a Question of Law*



[16] Mr. Samaniego appeals to this Court under s. 691(1)(a) of the *Criminal Code*. That provision allows an accused to appeal as of right on a question of law from a dissenting judgment at the court of appeal.

[17] The Crown submits that Mr. Samaniego's appeal is barred because the disagreement at the Court of Appeal does not raise a question of law; rather, the disagreement between the majority and dissenting judge is largely factual, hinging on differing interpretations of trial counsel's purpose for engaging in certain areas of cross-examination. This does not, in the Crown's view, raise a question of law. A judge's choice to intervene in cross-examination is a question of mixed fact and law (*Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at p. 238). Mr. Samaniego characterizes the disagreement at the Court of Appeal differently. He maintains that it raises a question of law regarding the rules of evidence and their application.

[18] I agree with Mr. Samaniego's characterization of the disagreement. While the subject of the appeal was the trial judge's intervention in cross-examination, this was not the crux of the Court of Appeal's disagreement. The court disagreed on the characterization of the judge's interventions and the evidentiary principles that govern them. That raises a question of law (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23).

B. *Scope of the Trial Management Power*

[19] Before examining the impugned rulings, it is necessary to discuss the content and scope of the trial management power.

[20] The trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion. While this Court has not provided explicit guidance on the nature and scope of the power, it has implicitly endorsed the concept (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26).

[21] The power has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently (*R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397, at para. 47; *R. v. Polanco*, 2018 ONCA 444, at para. 22 (CanLII)).

[22] Judges may intervene to manage the conduct of trials in many ways, including restricting cross-examination that is unduly repetitive, rambling, argumentative, misleading, or irrelevant (*R. v. Ivall*, 2018 ONCA 1026, 370 C.C.C. (3d) 179, at paras. 167-68; *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.), at para. 25). The trial management power is an essential and versatile tool; it must, however, be exercised carefully (*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 38). Parties should generally be allowed to present their cases as they see fit (*Polanco*, at para. 29).

[23] Managing the conduct of trials to ensure timely justice is particularly important, considering this Court's decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 139. Excessive trial delay can be mitigated by proper trial management.

[24] Ensuring efficiency does not mean sacrificing the rules of evidence. Mr. Samaniego submits that trial management decisions and evidentiary rulings must always remain separate to ensure that erroneous evidentiary rulings are not glossed over under the guise of trial management on appellate review. While I disagree that trial management and evidentiary rulings must *always* remain separate, I agree that trial management does not provide a safe haven for erroneous evidentiary rulings.

[25] Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Extrinsic evidentiary errors are held to a more stringent standard of review than trial management decisions. The trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency.

[26] Sometimes trial management decisions will overlap with the rules of evidence. For example, where counsel tries to revive a line of inquiry that the trial judge has previously barred in an evidentiary ruling, the rules of evidence and trial management overlap. Drawing on the previous evidentiary ruling — that the line of questioning is barred by an evidentiary rule — the judge exercises their trial

management power to curtail irrelevant and repetitive questioning. As this example illustrates, it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents. Trial management decisions, as the one in this example, engage the judge's discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44).

C. *The Impugned Trial Rulings*

[27] Mr. Samaniego submits that the trial judge improperly curtailed four lines of questioning during his counsel's cross-examination of the security guard: (1) whether there was a cocaine transaction between Mr. Serrano and the security guard; (2) whether the security guard was "scared" at any time during the incident; (3) whether the security guard "refused" to identify the two accused; and (4) who dropped the gun and who picked it up. He does not raise ineffective assistance of counsel. The Crown submits that the judge properly curtailed all four lines of questioning as an exercise of her trial management power.

[28] As I will explain, the trial judge did not err in curtailing the first three impugned lines of questioning. This Court only divides on the fourth ruling set out in the preceding paragraph, namely who dropped the gun and who picked it up. On that ruling, while I am satisfied that the curtailment of questioning was erroneous in part, I conclude that the error was harmless and occasioned no substantial wrong or miscarriage of justice. Accordingly, I would dismiss the appeal.

(1) Whether There Was a Cocaine Transaction Between Mr. Serrano and the Security Guard

(a) *Background and Ruling*

[29] Trial counsel attempted to pursue a line of questioning intended to suggest that Mr. Serrano went to the club that night either to sell cocaine to, or buy cocaine from, the security guard. She asked the guard if he took cocaine that day. He said no. She asked if he saw Mr. Serrano taking cocaine. He said no. Trial counsel then suggested to the guard that Mr. Serrano had cocaine on him when he was arrested: “Surprise[d] to learn that . . . he had some cocaine on him when he was arrested?” (A.R., vol. II, at p. 85). The guard replied that he did not understand.

[30] Both the Crown and Mr. Serrano’s counsel objected to this line of questioning. The judge excused the jury and conducted a *voir dire*. The Crown submitted that the questioning was improper. While acknowledging that Mr. Serrano was initially charged with possession of cocaine, the Crown did not seek a committal on that charge at the preliminary inquiry. Mr. Serrano’s counsel expressed concern that the issue of cocaine possession was raised at all, given that the parties had agreed to stay away from it, as it amounted to bad character evidence.

[31] Trial counsel indicated that she was unaware that the cocaine issue was off limits, even though she knew that the charges against Mr. Serrano had been withdrawn. Her position was that Mr. Serrano went to the club to sell cocaine to, or buy cocaine

from, the security guard. She relied on the fact that cocaine was found on Mr. Serrano when he was arrested. She further pointed to a split-second clip in the surveillance video where the guard and Mr. Serrano touched hands, suggesting that this was a drug deal.

[32] The trial judge watched the surveillance video clip twice and concluded that there was no foundation for trial counsel's suggestion that there was a cocaine transaction between Mr. Serrano and the guard. The momentary touching of hands did not support an inference that any substance was exchanged, much less cocaine. She concluded that this line of questioning was irrelevant to the charges and "completely speculative".

[33] Later in the cross-examination during another *voir dire*, trial counsel again maintained that she should be able to ask about the cocaine because it was in the disclosure material. The judge found that this information formed no part of the case. It had not been established and trial counsel had given no indication in the pre-trial form that she was going to be relying on discreditable conduct. The judge did not allow further cross-examination on this point.

(b) *The Trial Judge Did Not Err in Curtailing This Line of Questioning*

[34] This ruling involved both an initial evidentiary ruling — that there was no good faith basis for the line of questioning — and a subsequent trial management decision — rejecting trial counsel's renewed attempts to pursue this questioning.

[35] The trial judge's initial evidentiary ruling discloses no error. She correctly assessed whether there was a good faith basis for the questions based on trial counsel's articulated purpose. Trial judges should not have to go behind counsel's articulated purpose when making a ruling. While judges may inquire into counsel's proposed purpose, as a general rule, it is not their function to guess at or suggest more appropriate purposes than those proffered by counsel. In some cases, the purpose of a line of questioning may be apparent from the context, even where it has not been explicitly articulated. However, to ensure a fair trial, trial judges must be careful not to be seen as making arguments for a represented accused or the Crown. This is particularly important in a case like this, where the co-accused were running cut-throat defences.

[36] Nor is it the function of appellate judges to assume the role of trial counsel, formulating questions that counsel could have asked, identifying the legal basis for them, and making arguments that counsel could have made to show that they were permissible. Regrettably, the learned dissenting judge in the Court of Appeal did not heed this admonition. With respect, his reasons bear little relationship to the questions trial counsel sought to ask or the purposes articulated by her for asking them.

[37] Returning to the issue at hand, trial counsel repeatedly said that she wanted to ask about cocaine to demonstrate that Mr. Serrano went to the club to sell cocaine to, or buy cocaine from, the security guard. The trial judge was entitled to rely on the purpose articulated by counsel for the proposed line of questioning. Even though the judge did not explicitly use the words "good faith", her findings demonstrate that she

answered the correct question: Was there a reasonable inference available on the facts that there was a cocaine transaction between Mr. Serrano and the guard? The judge found that the drug deal hypothesis was “completely speculative” and without any basis after reviewing the surveillance video. This finding is tantamount to finding that no reasonable inference could be drawn and, therefore, that there was no good faith basis to ask the questions (*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 48).

[38] When trial counsel revived her attempts to ask about the cocaine later on in the cross-examination, the trial judge reasonably exercised her trial management power to curtail irrelevant questioning that would not have furthered any issue at trial (*Ivall*, at para. 168). Her decision is owed deference and does not warrant intervention.

(2) Whether the Security Guard Was “Scared” at Any Time During the Incident

(a) *Background and Ruling*

[39] Trial counsel asked the security guard a series of questions, apparently designed to establish that he was lying about being “scared” at the club that night. She began by having him read out a portion of his police statement where, in response to being asked how he felt when Mr. Serrano dropped the gun beside him, he replied: “I was not scared, but surprised” (A.R., vol. II, at p. 82). Trial counsel then asked the guard to confirm that he said he was not scared. The guard agreed that he was not scared



at that moment. Shortly thereafter, trial counsel suggested to him that he was not scared at all on the day of the incident. The guard agreed.

[40] Later on during a *voir dire*, Mr. Serrano's counsel objected to trial counsel's portrayal of the security guard's evidence about not being scared during the incident. Specifically, Mr. Serrano's counsel argued that it was unfair for trial counsel to maintain that the guard was not scared that day, based on an isolated portion of his police statement, where elsewhere in the statement, he said he was scared. Trial counsel agreed that there was another passage in the statement where the guard said he was scared.

[41] The judge found that it was unfair to excerpt parts of the police statement in a misleading way. She decided that the easiest way to deal with this problem was to provide a corrective instruction to the jury immediately, rather than take the security guard back to the confusing statement. She instructed the jury that, in addition to the passage trial counsel highlighted where the guard said he was not scared for his safety, there was another passage in his police statement where he said he was scared. Trial counsel did not object or express any disagreement with this instruction.

[42] Immediately following the corrective instruction, trial counsel asked the security guard if he agreed that there was a passage in his police statement where he said he was not scared and another passage where he said he was scared. The guard agreed.

(b) *The Trial Judge Did Not Err in Curtailing This Line of Questioning*

[43] The judge's trial management decision to curtail and clarify trial counsel's misleading suggestion was reasonable and is owed deference. It was misleading to suggest that the security guard was not scared that day and only reference a passage of the police statement which supported this suggestion, knowing that elsewhere in the statement, he told the police he was scared. While not an irrelevant line of questioning, it would have been a needless waste of court time to allow trial counsel to pursue it, only to learn later that the questions were misleading and could only serve to distract or confuse the jury. The judge reasonably exercised her trial management power to stop this misleading questioning and correct it with an instruction to the jury.

[44] Mr. Samaniego suggests that it was wrong for the judge to provide the corrective instruction before the security guard formally adopted the passage in his police statement where he said he was scared. I disagree. There was no error for three reasons.

[45] First, directly after the instruction, trial counsel had the security guard adopt the passage of his police statement where he said he was scared. This momentary delay caused no prejudice to Mr. Samaniego.

[46] Second, all parties agreed that the security guard's police statement contained a passage where he said that he was scared. Adopting the passage was an evidentiary formality in the circumstances.

[47] Third, trial counsel did not raise any objection to the judge providing a corrective instruction. This may have been a tactical choice because further highlighting the guard's prior consistent statement would have undermined Mr. Samaniego's overarching theory: that the guard was lying. While not determinative, lack of objection to the judge's instruction is informative as to the materiality of an alleged error (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 38).

[48] Mr. Samaniego suffered no unfairness from the judge drawing attention to a passage of the security guard's police statement that he had not yet explicitly adopted. The judge was reasonably responding to misleading questioning by trial counsel. Any minor prejudice was fleeting because the guard adopted the passage from his statement immediately after the corrective instruction.

(3) Whether the Security Guard "Refused" to Identify the Two Accused

(a) *Background and Ruling*

[49] At trial, trial counsel attempted to confront the security guard with a line from his preliminary inquiry testimony, in which, according to counsel, he was "refusing" to identify the two accused. The trial judge did not allow the questions.

[50] On the first of several days of examination-in-chief at the preliminary inquiry, the security guard testified about his interactions with the two accused. The

proceeding was adjourned in the middle of his examination-in-chief. Over four months later, the preliminary inquiry resumed and the Crown continued its examination-in-chief by reminding the guard that he had testified months earlier about his interactions with the two accused. The guard agreed. The Crown then showed him a surveillance video of the night in question.

[51] At the outset of the renewed questioning, the guard had difficulty identifying the persons in the video as the two accused. Crown counsel indicated that he had spoken with both defence counsel and it was agreed that the video showed the guard interacting with the two accused. The guard replied: “I do understand what you say, but the thing is that I’m not sure — I don’t recall really whether those are the same people” (R.R., vol. I, at p. 40). The Crown indicated again that there was no issue that the two people in the video were the two accused. The rest of the video was played and the guard answered questions in which he identified the two accused in the video. Trial counsel did not cross-examine him at the preliminary inquiry on any source of confusion regarding identification.

[52] At trial, however, she sought to cross-examine the guard on his evidence from the preliminary inquiry in which he testified that he could not recall whether the two accused were the persons in the video. In a *voir dire* to determine the propriety of a proposed line of questioning, she told the trial judge that she intended to ask the security guard about this aspect of his testimony because it demonstrated that he did not want to identify the two accused. The judge reiterated that identity was admitted.

She ruled that trial counsel could not pluck a line from the preliminary inquiry testimony that was not relevant to an issue at trial, nor pursued as an issue at the preliminary inquiry.

[53] Later on during the *voir dire*, trial counsel tried to revive this line of questioning, maintaining that at the preliminary inquiry, the security guard was “refusing to identify” the two accused in the video (A.R., vol. II, at p. 190). Again, the judge reiterated that identification of the two accused was not an issue and that trial counsel had not pursued it as an issue at the preliminary inquiry.

(b) *The Trial Judge Did Not Err in Curtailing This Line of Questioning*

[54] The trial judge appropriately prevented trial counsel from pursuing this misleading line of questioning. The judge was entitled to rely on trial counsel’s articulated purpose for her questions. Trial counsel’s purpose was to suggest that the security guard refused to identify the two accused at the preliminary inquiry. This was simply not true. The guard’s comment about not recalling whether the two persons in the video were the two accused must be taken in context. At the preliminary inquiry, the guard identified the two accused as those involved in the incident, both before and after the impugned comment. To suggest he refused to identify the accused was misleading.

[55] Furthermore, if there was any concern that the security guard was refusing to identify the two accused, this concern was dispelled at trial. The guard identified the

two accused as the persons in the surveillance video near the beginning of his examination-in-chief. There was no issue that the guard could not, or would not, identify the accused as the two persons in the video.

[56] The judge reasonably exercised her trial management power to curtail this misleading and irrelevant line of questioning. Her decision is owed deference. The questions were not relevant to the resolution of any live issues in the case. Rather, they were misleading, wasteful of court time, and disruptive to the jury. Mr. Samaniego was entitled to a fair trial, not an endless one (*Ivall*, at para. 168).

(4) Who Dropped the Gun and Who Picked It Up

(a) *Background and Ruling*

[57] Shortly after the incident at the club, the security guard told the police in a recorded statement that Mr. Serrano dropped the gun in front of him at the club and picked it back up. At the preliminary inquiry, the guard initially testified that he was unsure who dropped the gun and picked it up. The Crown tried to refresh his memory by asking him to read his police statement. He testified that he still did not remember.

[58] The Crown then asked the guard to reread a portion of his police statement. The security guard testified that he could not really remember what happened because it was a long time ago, but he confirmed that his memory was fresher when he gave his police statement. In the face of this response, the Crown sought and received

permission from the preliminary inquiry judge to have his statement on this point entered into evidence as past recollection recorded — a method of refreshing the memory of a witness who does not have a present recollection of an event by having them adopt a document that reliably recorded their memory at or around the time of the event (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at pp. 539-40).

[59] At trial, the security guard testified in accordance with his police statement: that Mr. Serrano dropped the gun and picked it up. Trial counsel confronted the guard with the contrary evidence he had initially given at the preliminary inquiry and asked: “. . . why did you not tell what you’re telling us today or yesterday?” (A.R., vol. II, at p. 177).

[60] Crown counsel objected. She submitted that this was not a fair question because the security guard had adopted his police statement at the preliminary inquiry as past recollection recorded due to a genuine memory lapse. It was misleading for trial counsel to suggest that he was lying by not giving the same version of events at trial as he did at the preliminary inquiry. The Crown suggested that trial counsel “can put to the witness that his memory was fading on some aspects at the preliminary inquiry and ask him why he remembers those portions today, but not to say he was lying at the preliminary inquiry” (p. 184).

[61] The judge agreed that trial counsel could challenge the security guard on the contents of his police statement and on his failing memory. She could not, however,

question him about his first version of events before adopting his police statement as past recollection recorded. The trial judge decided that, since the preliminary inquiry judge ruled that the guard's police statement was his evidence on that point, she could not go "back behind that ruling" (p. 184).

(b) *The Trial Judge Erred in Curtailing This Line of Questioning*

[62] The trial judge's ruling had two aspects. The first was an unproblematic trial management ruling targeting misleading questioning that would have confused the jury and needlessly prolonged the trial. The judge reasonably ruled that trial counsel could not pursue a line of questioning designed to show that the security guard had not told the same story at trial as he did at the preliminary inquiry. This was a misleading suggestion because the guard *did* tell the same story at trial and at the preliminary inquiry — both times in accordance with his police statement. While it was true that he offered a contrary story at the preliminary inquiry before adopting his police statement, trial counsel was not seeking to expose the inconsistent versions given at the preliminary inquiry. Rather, her suggestion implied that he said only one thing at the preliminary inquiry and the opposite at trial. This was simply not true.

[63] The trial judge was entitled to rely on trial counsel's framing of her proposed line of questioning. She did so and reasonably concluded that it was misleading to suggest that the security guard lied at trial and/or the preliminary inquiry by not telling the same story. That was a misleading characterization of the facts. As such, she was entitled to exercise her trial management power to curtail the proposed



questions that, while not irrelevant, unfairly characterized the facts to the point that asking them would have been more distracting than informative (*John*, at para. 60). She did, however, allow trial counsel leeway to reframe her questions to ask the guard about his failing memory. This aspect of her ruling reveals no error.

[64] The second, and more problematic, aspect of the trial judge's ruling was her further restriction of any cross-examination about the security guard's preliminary inquiry testimony prior to his adoption of his police statement. This was an evidentiary ruling, reviewable on a correctness standard. It was incorrect for the judge to tell trial counsel she could not go "behind" the preliminary inquiry judge's ruling on past recollection recorded. Trial judges are not bound by evidentiary rulings made at the preliminary inquiry. More importantly, the guard's adoption of his police statement as true did not erase his different initial version of events. With respect, the trial judge erred in holding that there was no inconsistency trial counsel could probe, had she sought to do so. The remaining question is whether this error was fatal. In my view, it was not.

#### D. *The Curative Proviso Applies*

[65] The curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* allows a court of appeal to dismiss an appeal from conviction where "no substantial wrong or miscarriage of justice has occurred". The Crown may rely on the curative proviso where the error is harmless or trivial or where the evidence is so overwhelming that a conviction was inevitable (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at

para. 53). No one suggests that the evidence in this case was overwhelming; accordingly, our sole concern is whether the error was harmless or trivial, such that there is no reasonable possibility that the verdict would have been different had it not been made (*R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 85; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28).

[66] The Crown raised the curative proviso for the first time in oral submissions. Even though it was not raised in its factum, this does not necessarily bar its application. Appellate courts may apply the curative proviso if the Crown has implicitly raised it by arguing, in essence, that no substantial wrong or miscarriage of justice occurred or that the evidence of guilt is so overwhelming such that the verdict would have been the same (*R. v. Ajise*, 2018 SCC 51, [2018] 3 S.C.R. 301, at para. 1, aff'g 2018 ONCA 494, 361 C.C.C. (3d) 384, at para. 32; *R. v. Cole*, 2021 ONCA 759, at paras. 155-58 (CanLII); *R. v. Hudson*, 2020 ONCA 507, 391 C.C.C. (3d) 208, at para. 49). Though it would have been preferable had the Crown raised the proviso in its factum, I am satisfied that the content of its factum and the invocation of the proviso in oral argument allows this Court to consider it. There is no prejudice to Mr. Samaniego. Experienced appellate counsel representing him made submissions on the proviso in his main argument and again in reply. He did not submit that we should bar the Crown from raising it. In any event, even if he had, I would have granted leave to the Crown to do so in the interests of justice.

[67] In support of its position, the Crown submits that the incorrect curtailment of one line of questioning, designed to impeach the security guard's credibility, would not have impacted the result. Trial counsel was able to effectively challenge the guard's faulty memory on the point in issue — who dropped the gun and who picked it up — and used this to cast doubt on the overall credibility and reliability of the guard's evidence.

[68] Mr. Samaniego, on the other hand, submits that any improper curtailment of cross-examination in a case where credibility is the central issue should result in a new trial. Being prevented from pursuing a valuable line of inquiry to further his pivotal theory that the security guard was lying constitutes reversible error. With respect, I would not give effect to his submissions for three reasons.

[69] First, both in cross-examination and her closing address, trial counsel brought home to the jury, in no uncertain terms, the primary theory of Mr. Samaniego's defence, namely that the security guard was lying to protect his good friend, Mr. Serrano. Trial counsel vigorously and repeatedly attacked the guard's credibility in cross-examination. In total, she spent one and a half days challenging his credibility on virtually every facet of his evidence. On three occasions, she put the primary theory of Mr. Samaniego's defence directly to him. In the context of this lengthy cross-examination, one further opportunity to attack the guard's credibility would, in my view, have been all but inconsequential in advancing the primary theory of Mr. Samaniego's defence. There was no mystery about it; even Mr. Serrano's counsel

and the Crown drew the jury's attention to it in their closing addresses. If the jury knew nothing else, they knew that Mr. Samaniego's defence hinged on undermining the credibility of the security guard by showing that he and Mr. Serrano were good friends and the guard was lying about Mr. Samaniego's involvement to protect Mr. Serrano.

[70] The jury's evident knowledge of the primary theory of Mr. Samaniego's defence distinguishes this case from *Lyttle*, where the trial judge prohibited defence counsel from advancing their primary theory aimed at undermining the credibility of a key witness. Indeed, the judge threatened a mistrial if defence counsel ignored his ruling. On appeal to this Court, the line of questioning that Mr. Lyttle's defence counsel sought to pursue was found to be proper. As such, the trial judge's ruling effectively deprived Mr. Lyttle from presenting the primary theory of his defence to the jury. In those circumstances, it goes without saying that the proviso could not reasonably apply. That is a far cry from this case. Here, Mr. Samaniego was able to advance the primary theory of his defence without hindrance.

[71] Let me be clear. There is no categorical rule that any improper interference with cross-examination bars application of the proviso. I need look no further than this Court's recent decision in *R.V.* Writing for a majority of the Court, Karakatsanis J. applied the proviso, despite finding that defence counsel's cross-examination was improperly curtailed on a point that was highly relevant, and indeed critical, to defence counsel's attack on the complainant's credibility (paras. 7 and 98). As is the case here, Karakatsanis J. found that enough cross-examination was permitted — and occurred —

which “allowed the defence to test the evidence with sufficient rigour” (para. 9). In both this case and *R.V.*, the triers of fact were well aware of the critical defence theory based on the questions defence counsel were allowed to ask (para. 98).

[72] Second, on the facts of this case, any possible prejudice arising from this single misstep by the trial judge would have been minimal. Had trial counsel been able to probe the security guard on his inconsistent accounts at the preliminary inquiry, in my view, this would not have furthered Mr. Samaniego’s primary theory; on the contrary, it would have worked against it.

[73] At every step of the way, the security guard’s account of who dropped and picked up the gun served to incriminate Mr. Serrano, not vindicate him. Beginning with the police interrogation, had the guard wanted to protect Mr. Serrano, surely he would not have told the police that it was Mr. Serrano who dropped the gun in front of him and picked it up. Putting the gun in Mr. Serrano’s hand incriminated him. At the preliminary inquiry, the guard retreated from his initial testimony that he could not remember who dropped and picked up the gun; in its place, he adopted his police statement that it was Mr. Serrano who did so. Again, this did not help Mr. Serrano, it incriminated him. And finally at trial, the guard testified in accordance with his police statement — again incriminating Mr. Serrano. Viewed in this light, it is fanciful to think that Mr. Samaniego’s primary theory would have been furthered had trial counsel been allowed to probe the discrepancy about who dropped the gun and who picked it up.

[74] Finally, it is speculative to suggest that trial counsel would have even asked the security guard about why he gave two versions of events at the preliminary inquiry. At no point during the lengthy *voir dire* did trial counsel indicate that she wanted to ask this question. She repeatedly told the judge that her proposed questioning concerned the security guard's failing memory between the preliminary inquiry and trial — questioning that the trial judge allowed. She focused on the fact that the guard adopted his police statement as past recollection recorded at the preliminary inquiry because he could not remember who dropped and picked up the gun, whereas at trial, he could remember. The trial judge allowed this questioning so long as trial counsel stayed away from the guard's version of the events before the past recollection recorded ruling. In doing so, the judge was entitled to rely on trial counsel's articulation of the purpose for the questions, without fear of being second-guessed on appeal.

[75] While the judge should not have curtailed cross-examination on the security guard's version of events before the past recollection recorded ruling, there is no indication that trial counsel intended to ask such questions. It is speculative, at best, to suggest that she would likely have pursued this line of questioning when she made no attempt to do so at any point in her cross-examination.

[76] Mr. Samaniego was entitled to a fair trial, not a perfect trial (*R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45). My colleagues refrain from deciding whether the trial judge erred in the other three impugned rulings. Instead, they focus on one mistake, arising out of one ruling, on one area of cross-examination — and maintain that

Mr. Samaniego did not receive a fair trial. While one error may be enough in some circumstances to render a trial unfair, I am not persuaded that the single error here was enough. Viewed properly in the context of the trial as a whole, the jury had what they needed to infer that the guard may not have been telling the truth about who dropped the gun and who picked it up.

[77] My colleagues and I agree that an accused's right to cross-examination is a fundamental part of full answer and defence, but that this right is not unlimited (*Côté* and *Rowe JJ.*'s reasons, at para. 183). We also agree that the curative proviso can only rarely apply in cases where cross-examination has been improperly curtailed (para. 170; *R.V.*, at para. 86). But we part company as to whether this is one of those rare cases where the error was harmless and the proviso can apply. In my view, for the reasons I have provided in paras. 69-75, it is.

[78] Overall, I am satisfied that the judge's technical error caused no substantial wrong or miscarriage of justice. It is difficult to see how the prejudice alleged by Mr. Samaniego materialized. Trial counsel was able to vigorously challenge the security guard's credibility and repeatedly emphasize the primary defence theory that he was lying to protect Mr. Serrano. Furthermore, there was no indication that she wanted to ask the questions improperly barred by the trial judge. Even if she did want to pursue the line of questioning barred by the judge, this would likely have undermined — rather than supported — the primary theory advanced by Mr. Samaniego. In the

context of this trial, the trial judge's error was harmless and would not have affected the outcome. There was no miscarriage of justice.

## V. Disposition

[79] I would dismiss Mr. Samaniego's appeal and affirm his conviction.

The reasons of Côté, Brown and Rowe JJ. were delivered by

CÔTÉ AND ROWE JJ. —

### I. Introduction

[80] Trial judges have the authority to control the proceedings over which they preside. Through the exercise of their "trial management" powers, courts can promote efficient adjudication by controlling how parties present their case. But these trial management powers end where the law of evidence begins. Rulings on the admissibility of real or oral evidence, including rulings on permissible lines of cross-examination, are evidentiary decisions. The propriety of those rulings is governed by the rules of evidence, not the court's trial management authority.

[81] As this case demonstrates, an overly broad and haphazard approach to trial management powers undermines trial predictability and consistency, and an accused's



right to make full answer and defence. Most litigation is a truth-seeking exercise. Cases typically turn on a dispute about the facts, not on disagreements about what the law requires. The rules of evidence outline how parties can establish the facts needed to build their case. In a predictable manner, it lets parties know what information they can present to support their case, how they can tender this information, and what use they can make of this information once admitted. These rules cannot be ignored because a trial judge is presiding over a difficult or complex case. Excluding relevant and material evidence under the guise of a trial judge's trial management powers creates legal uncertainty and undermines an accused's right to make full answer and defence. That is what occurred here.

[82] The appellant, Victor Samaniego, and his co-accused, Jose Patricio Serrano, were charged with possession of a loaded restricted firearm. The only issue at trial was who had possession of the gun outside of a nightclub. Mr. Samaniego and Mr. Serrano each ran a "cut-throat" defence, accusing the other of bringing the gun to the nightclub.

[83] The only evidence linking Mr. Samaniego to possession of the gun was the testimony of the nightclub's security guard. His credibility was the most important issue at trial.

[84] At trial, the trial judge made four impugned rulings during Mr. Samaniego's cross-examination of the security guard. For the purposes of this appeal, it is sufficient to consider only one of these rulings: the trial judge's exclusion

of a prior inconsistent statement by the security guard made at the preliminary inquiry about who dropped and picked up the gun. At the preliminary inquiry, the security guard initially testified that he did not see who dropped and picked up the gun outside of the nightclub. At trial, he testified that Mr. Serrano dropped and picked up the gun. Mr. Samaniego sought to impugn the security guard's credibility with this inconsistency, but the trial judge prevented him from doing so. We do not discuss the other three impugned rulings, as it is unnecessary to do so.

[85] Mr. Samaniego and Mr. Serrano were both convicted. On appeal, Mr. Samaniego challenged the four mid-trial rulings, including the ruling above. A majority of the Court of Appeal dismissed the appeal. They labelled all of the trial judge's rulings as harmless "trial management" decisions. The dissenting judge disagreed. In his view, the impugned rulings were incorrect evidentiary decisions, not trial management decisions. Since these rulings deprived Mr. Samaniego of highly probative evidence, a new trial was necessary.

[86] We would allow the appeal. In our view, the trial management powers cannot be used to exclude relevant, material, and otherwise admissible evidence. The trial judge's ruling improperly prevented Mr. Samaniego from pursuing a highly relevant and material line of questioning. It was therefore an erroneous evidentiary ruling, not a trial management decision. Contrary to the trial judge's reasons, the fact that the security guard's police statement was admitted for the truth of its contents did

not erase the security guard's initial inconsistent preliminary inquiry testimony. The trial judge erred by concluding otherwise.

[87] This error cannot be saved by the curative proviso. The error was significant. The Crown's case against Mr. Samaniego turned entirely on the security guard's credibility. Any inconsistency in the security guard's testimony was therefore highly relevant to Mr. Samaniego's defence. But an inconsistency going to the heart of the indictment — who had possession of the gun — was the most important type of testimonial inconsistency that defence counsel could hope to explore. This is especially so given the facts of this case, as the security guard's initial unwillingness to incriminate his friend, Mr. Serrano, at the preliminary inquiry until he was confronted with a contradictory police statement buttressed Mr. Samaniego's central defence theory: that the security guard was willing to testify falsely in order to protect Mr. Serrano.

[88] The significant harm flowing from this error was not diminished by the fact that Mr. Samaniego could impugn the security guard's credibility in other ways. An effective cross-examination often involves a coordinated series of attacks that, cumulatively, undermine the witness's credibility. The right to make full answer and defence therefore entitles an accused to explore all inconsistencies and lines of credibility attack, within evidentiary limits. Mr. Samaniego was unfairly deprived of this right. The curative proviso is therefore inapplicable.

[89] It follows that we would set aside Mr. Samaniego's conviction and order a new trial.

## II. Background

[90] Mr. Samaniego was charged with possession of a loaded restricted firearm, contrary to s. 95(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. He was jointly tried with Mr. Serrano, who was charged with the same offence. The trial took place with a jury and both men were convicted. The key issue at trial was whether one or both of the co-accused possessed the gun outside of a nightclub in Toronto.

[91] The events in question took place on August 17, 2015. Police were called and informed about a gun outside of a nightclub. When police arrived and approached Mr. Samaniego and Mr. Serrano, Mr. Serrano was in possession of the gun. Police observed Mr. Serrano throwing the gun away, but it was recovered shortly thereafter.

[92] The Crown's theory at trial was that Mr. Samaniego and Mr. Serrano went to the nightclub together, with Mr. Samaniego initially in possession of the gun. The Crown relied heavily on the testimony of the security guard at the nightclub. The security guard testified that he denied Mr. Samaniego entry due to a previous incident between the two and that, in response, Mr. Samaniego threatened him and lifted his shirt to reveal a gun in his waistband. The security guard testified that Mr. Serrano then took possession of the gun from Mr. Samaniego. Mr. Serrano subsequently dropped the gun and picked it up, at which point the police were called.

[93] Mr. Samaniego and Mr. Serrano each ran a “cut-throat” defence, accusing the other of having brought the gun to the nightclub. Mr. Serrano’s position was that he took the gun away from Mr. Samaniego after the altercation with the security guard. Mr. Samaniego’s position was that he never had possession of the gun and that he did not even know about it until Mr. Serrano dropped it. Mr. Samaniego testified at the trial, while Mr. Serrano did not testify.

[94] The security guard’s testimony was crucial to the Crown’s case against Mr. Samaniego as well as Mr. Serrano’s defence. While the Crown tendered three surveillance clips that captured some of the events in question, none depicted Mr. Samaniego in possession of the gun. The security guard’s testimony was the only evidence at trial directly linking Mr. Samaniego to the gun.

[95] Mr. Samaniego’s defence therefore centred on undermining the security guard’s credibility. A key line of attack was Mr. Serrano and the security guard’s close personal relationship. Whereas the security guard and Mr. Samaniego had a history of animosity, the security guard and Mr. Serrano had been good friends for 10 years. Mr. Samaniego thus sought to establish that the security guard was giving biased and inaccurate testimony in order to protect his friend. Mr. Samaniego’s counsel also relied on the security guard’s police statement and his preliminary inquiry testimony, highlighting purported inconsistencies with his testimony at trial in order to undermine his credibility.

[96] Throughout the trial, the trial judge made a number of rulings that circumscribed defence counsel's ability to challenge the credibility of the security guard on cross-examination. For the purposes of this appeal, it is sufficient to consider only one of these rulings: the trial judge's exclusion of a prior inconsistent statement by the security guard made at the preliminary inquiry about who dropped and picked up the gun.

A. *Exclusion of the Preliminary Inquiry Testimony About Who Had the Gun*

[97] At the preliminary inquiry, the security guard initially testified that he did not see who dropped the gun or who picked it up afterward. In his examination-in-chief, the Crown asked where the gun fell from. The security guard answered: "I did not see it exactly. Both of them were there. Like, so, I don't know" (R.R., vol. I, at p. 20).

[98] The security guard maintained this position the following day at the preliminary inquiry, even after being furnished with his police statement. When the Crown resumed questioning about who picked up the gun after it fell, the security guard reiterated that he "didn't see exactly who was the one holding the gun. Or rather, had the — the gun" (p. 24). The Crown asked whether he observed either of the two individuals do anything with the gun after it fell. He answered: "No. No, I didn't see anything. I don't know what they did with it. I — I don't know" (p. 24). The Crown asked specifically whether anything in his police statement refreshed his memory about the details of what happened after the gun fell. He answered: "No, it's the same thing. I — I did not see exactly where it came from or what happened. I mean, I do not know

what happened with the gun once it was picked up. I don't know" (pp. 24-25). Again, the Crown asked who picked up the gun. He answered: "I don't know exactly because the one who was threaten[ing] me, this is the one I have a problem with. This is the one I was focussing on" (p. 25).

[99] This testimony was inconsistent with the security guard's police statement, which was taken shortly after the incident. That statement indicated that Mr. Serrano dropped and picked up the gun. The security guard's statement described two men who came to the nightclub: one who was wearing a baseball hat and the other who was not allowed to come in because the security guard had previously had an incident with him. The security guard's police statement stated that the "guy with [the] baseball hat dropped the gun on the floor. He looked at me, picked up the gun and walk[ed] south of Rivalda Rd.": p. 3. There is no dispute that Mr. Serrano was the man wearing a baseball hat.

[100] In light of the contradiction between the security guard's police statement and his preliminary inquiry testimony, the Crown successfully brought an application to have the security guard's police statement — in which he said Mr. Serrano dropped and picked up the gun — admitted at the preliminary inquiry pursuant to the "past recollection recorded" exception to the hearsay rule.

[101] At trial, the security guard testified consistently with his police statement and said that Mr. Serrano dropped and picked up the gun. When Mr. Samaniego's counsel sought to cross-examine the security guard on his initial inconsistent

preliminary inquiry testimony, the Crown and Mr. Serrano's counsel objected. During the subsequent *voir dire*, the trial judge was alerted to the inconsistency between the security guard's preliminary inquiry evidence and his trial evidence. The trial judge agreed that there was an inconsistency. The jury and witness were recalled and Mr. Samaniego's counsel resumed her questioning of the security guard. She asked the security guard about his initial preliminary inquiry evidence. After reading out portions of his preliminary inquiry testimony, Mr. Samaniego's counsel asked the security guard: "So, sir, my question to you, why did you not tell what you're telling us today or yesterday?" (R.R., vol. III, at p. 55).

[102] The Crown again objected, asserting that the question was unfair because the witness had subsequently adopted his police statement at the preliminary inquiry. The jury and witness were excused again for another *voir dire*. The trial judge inquired further about the preliminary inquiry judge's ruling, learning that the preliminary inquiry judge determined that the security guard had a genuine memory loss and admitted the police statement on this point for the truth of its contents. The trial judge then reasoned that this line of cross-examination was unfair, as there was no inconsistency with his preliminary inquiry testimony and his trial testimony (because the security guard eventually adopted his police statement during his preliminary inquiry testimony). She ruled that defence counsel could not put the prior inconsistent statement to the witness.



[103] Defence counsel protested the ruling. She maintained that she was entitled to challenge the security guard on his purported lack of memory. She also explained, in response to further questions from the trial judge, that the line of questioning was relevant because it suggested that the security guard initially refused to give incriminating testimony against Mr. Serrano. Specifically, defence counsel explained that the security guard's initial testimony at the preliminary inquiry showed that he "refused to identify the — who the person who dropped the gun but now he's able to recall directly": R.R., vol. III, at pp. 74-75. Nevertheless, the trial judge refused to allow defence counsel to pursue this line of questioning on the grounds that it would undercut the preliminary inquiry judge's ruling. She reiterated that this issue had already been addressed by the preliminary inquiry judge and held that while Mr. Samaniego's counsel could ask about the security guard's memory loss generally, counsel could not "go to the specifics of what [the security guard] said before that application was made": p. 75.

[104] The jury was then recalled and given a mid-trial jury instruction to disregard any inconsistency between the security guard's preliminary inquiry and trial testimony. The trial judge explained that the security guard needed to have his memory refreshed at the preliminary inquiry and that he adopted his police statement. She charged the jury that, because the police statement was adopted as the security guard's evidence at the preliminary inquiry, "any reference made by [Mr. Samaniego's counsel] today to the preliminary inquiry evidence about [the security guard's] uncertainty about who he saw holding the gun, must be completely disregarded by you

and must have no part in your consideration or deliberation about this case”: pp. 83-84 (emphasis added). This was repeated in the charge to the jury at the end of trial.

[105] The jury convicted both Mr. Samaniego and Mr. Serrano.

[106] Mr. Samaniego appealed his conviction to the Court of Appeal for Ontario. The trial judge’s ruling preventing him from cross-examining the security guard on this inconsistency formed one of his main grounds of appeal. For the purposes of this appeal, we will refer to this issue as the “Inconsistent Possession Testimony”.

III. Decision Below (2020 ONCA 439, 151 O.R. (3d) 449)

A. *Benotto J.A. (Thorburn J.A. Concurring)*

[107] A majority of the Court of Appeal dismissed the appeal. In their view, all the impugned mid-trial rulings were discretionary trial management decisions and entitled to deference. Since none of these decisions “deprive[d] the appellant of material evidence necessary for his defence”, there was no need for a new trial: para. 1.

[108] The majority found no issue with the trial judge’s Inconsistent Possession Testimony ruling for three reasons. First, defence counsel framed her questions as going to memory, rather than an attack on the security guard’s credibility. Second, the police statement formed part of the security guard’s testimony at the preliminary inquiry. Therefore, the security guard “gave the same testimony at trial as he did at the

preliminary inquiry”: para. 41. Third, this ruling did not result in any trial unfairness. Mr. Samaniego could explore other inconsistencies in the security guard’s testimony. He could also explore the suggestion that the security guard’s testimony was tailored to assist Mr. Serrano at other points in the trial.

B. *Paciocco J.A. (Dissenting)*

[109] Paciocco J.A. would have allowed the appeal, set aside the conviction, and ordered a new trial. He disagreed with the majority’s characterization of the impugned rulings as trial management decisions. In his view, the impugned rulings were all evidentiary rulings governed by the law of evidence. As the impugned rulings were legally incorrect and deprived Mr. Samaniego of probative evidence that could undermine the security guard’s credibility, a new trial was necessary.

[110] On the Inconsistent Possession Testimony ruling, Paciocco J.A. concluded that the trial judge erred by preventing defence counsel from exploring this inconsistency. The inconsistency in the security guard’s testimony was plain. The security guard testified at the preliminary inquiry that he did not see who had the gun. At trial, he said that Mr. Serrano was the one who dropped and picked it up. This inconsistency was not erased by the subsequent adoption of the police statement at the preliminary inquiry. The trial judge was not bound by the preliminary inquiry judge’s evidentiary ruling and she erred by resting her decision on this basis.

[111] Paciocco J.A. also disagreed with the majority's conclusion that defence counsel framed her questions as going solely to memory. Although it could have been better expressed, defence counsel was clearly trying to establish that the security guard's initial preliminary inquiry testimony was a deliberate choice to protect Mr. Serrano, not a situation of genuine memory loss. This was evident from defence counsel's explanation of the relevance of the questioning, where she said it showed that the security guard initially "refused to identify" who dropped the gun. This was also clear from defence counsel's overall trial strategy: establish that the security guard was testifying falsely to assist his friend, Mr. Serrano.

#### IV. Parties' Submissions

##### A. *Appellant, Mr. Samaniego*

[112] Mr. Samaniego submits that the trial judge made incorrect evidentiary rulings that deprived him of the ability to mount a full defence. The majority of the Court of Appeal improperly saved these rulings by concluding that they were trial management decisions and entitled to appellate deference. These were evidentiary rulings. Their propriety needed to be assessed against the law of evidence.

[113] The trial judge made two errors in her ruling on the Inconsistent Possession Testimony. First, she incorrectly concluded that the security guard's initial inconsistent statement was erased by his subsequent adoption of the police statement. Second, she

incorrectly concluded that she was bound by the preliminary inquiry judge's evidentiary ruling.

[114] The Court of Appeal erred by saving this ruling on the grounds that no unfairness resulted from this decision. While the trial judge allowed defence counsel to ask the security guard about his lack of memory in general terms, that was not enough for an effective cross-examination. An effective cross-examination needs to refer to specific inconsistencies, not general questions.

B. *Intervener, the Criminal Lawyers' Association (Ontario)*

[115] The Criminal Lawyers' Association (Ontario) ("CLAO") intervenes and asks this Court to provide guidance on the scope of a trial judge's trial management powers. The CLAO is concerned with what it sees as a growing trend, exemplified by the Court of Appeal's majority reasons, to expand trial management powers and blend them with a trial judge's power to make evidentiary rulings. It asks that this Court hold that trial management powers end where the rules of evidence begin.

C. *Respondent, the Crown*

[116] The Crown submits that the trial judge's impugned rulings were all properly grounded in the "undisputed authority of the trial judge to manage the trial" and curtail improper cross-examination: R.F., at para. 25. There were no errors in her reasons. The rulings were based on the record as it was unfolding and on the

submissions made by defence counsel, which both the majority and the dissenting judge found confusing and unfocused. The rulings need to be assessed with this context in mind.

[117] There was no error in the trial judge's Inconsistent Possession Testimony ruling. Defence counsel did not clearly articulate that she was trying to highlight inconsistencies in the security guard's testimony with the line of questioning. The trial judge simply intervened to clarify the record after defence counsel inaccurately summarized the evidence at the preliminary inquiry. The trial judge was entitled to intervene on this basis.

[118] The Crown also rejects the CLAO's position that trial management powers and evidentiary rulings are separate and distinct concepts. These powers often overlap. For example, trial judges can limit vexatious, abusive, repetitive, misleading, or overly lengthy cross-examination through their trial management powers. These rulings, however, inevitably curtail cross-examination on evidence that would otherwise be admissible. It is therefore impractical to create silos between these two powers. The Crown asks this Court to affirm the current state of the law, which it reads as recognizing some inevitable overlap between trial management powers and evidentiary rulings.

[119] Finally, the Crown submits that this Court does not have jurisdiction to hear this appeal. To engage this Court's jurisdiction under s. 691(1)(a) of the *Criminal Code*, there must be a disagreement on a "question of law" between the majority and a

dissenting judge at a court of appeal that impacted the disposition of the appeal. The dispute between the majority and the dissenting judge at the Court of Appeal in this case does not raise a question of law. Their disagreement revolves around their respective assessment of the factual record underpinning the trial judge's rulings.

V. Issues on Appeal

[120] The following issues must be considered in this appeal:

- A. Does this appeal raise a question of law such that this Court has jurisdiction to hear the matter?
- B. Did the majority of the Court of Appeal err in finding that the trial judge's Inconsistent Possession Testimony ruling was a proper exercise of her trial management powers and subject to deference?
- C. Did the majority of the Court of Appeal err in finding that the impugned ruling did not impact trial fairness, such that a new trial is warranted?

VI. Analysis

- A. *Issue 1: This Court Has Jurisdiction to Hear the Appeal*

[121] This Court has jurisdiction to hear this appeal. The Crown argues that the propriety of judicial interventions in a cross-examination does not raise a question of law alone, and therefore this Court does not have jurisdiction: *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at pp. 238-39; *R. v. Khanna*, 2016 ONCA 39, at para. 9 (CanLII).

[122] We would reject this submission. In *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, this Court adopted a generous approach to jurisdiction, holding that the application of a legal standard to the facts of the case raises a question of law: para. 23; see also *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20. It is of no moment that the issue may be characterized as not being a “question of law alone”.

[123] The case currently before this Court clearly raises issues about the application of legal standards: the overarching dispute in this appeal is whether the trial judge properly applied the standard for the admissibility of evidence and the standard for intervening in the cross-examination of a Crown witness. This Court has jurisdiction.

B. *Issue 2: The Trial Judge’s Inconsistent Possession Testimony Ruling Was Not a Trial Management Decision*

(1) Trial Management Powers and the Law of Evidence Must Be Kept Separate and Distinct

[124] As this case illustrates, there is uncertainty about whether a trial judge can exclude relevant and material evidence through their trial management powers. The



majority of the Court of Appeal held that each of the impugned trial rulings were “trial management decisions within the discretion of the trial judge” and entitled to appellate deference: para. 1. The dissenting judge disagreed, labelling the rulings as evidentiary decisions. Accordingly, this appeal calls for discussion on the scope of a trial judge’s trial management powers, and its relationship to the law of evidence.

[125] Trial judges have the authority to control the proceeding over which they preside. They should control, direct, and administer the trial in an effective and efficient way: *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397, at para. 47; *R. v. Potter*, 2020 NSCA 9, 385 C.C.C. (3d) 1, at para. 748. Among other powers, trial management authority allows trial judges to place reasonable limits on oral submissions, direct written submissions, defer rulings, decline to hear frivolous motions after hearing from the parties, and, exceptionally, direct the order in which evidence is called: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 57; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at paras. 38-39; *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40, at para. 110. Appellate courts should defer to proper trial management decisions: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 139.

[126] Trial management authority should not, however, be used to exclude relevant, material, and otherwise admissible evidence. Some provincial appellate courts have already recognized that excluding evidence under the guise of trial management powers would be an “unusual exercise” of those powers: *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, at para. 33; *R. v. Spackman*, 2012 ONCA 905, 295 C.C.C. (3d)

177, at para. 104; see also *R. v. Nield*, 2019 BCCA 27, 372 C.C.C. (3d) 375, at para. 74. We would go a step further. In our view, trial management powers can never be used to exclude relevant and material evidence. Rulings on the admissibility of real or oral evidence, including rulings on permissible lines of cross-examination, are evidentiary decisions. The propriety of those rulings is governed by the rules of evidence, not the court's trial management authority.

[127] This conclusion is supported by the leading authority on trial management powers, *Felderhof*. *Felderhof* involved a complex prosecution for violations under the *Securities Act*, R.S.O. 1990, c. S.5. After 70 days of trial, counsel for the Ontario Securities Commission ("OSC") applied to halt the prosecution and have the trial begin anew before another trial judge. Among other issues, the OSC argued that the trial judge erred by directing that the OSC, contrary to its wishes, call its next witness rather than proceed with an omnibus motion on the admissibility of various documents. The trial judge reasoned that hearing from the witness before ruling on the documents would be a more efficient use of court time. On appeal from the order dismissing its application, the OSC argued that the trial judge had no authority to override its right to present its case as it sought fit, absent an abuse of process or breach of the *Canadian Charter of Rights and Freedoms*.

[128] Writing for a unanimous court, Rosenberg J.A. found no error in the trial judge's order. He held that the power to issue this direction was grounded in the trial court's inherent jurisdiction to control its own process. It was in this context that

Rosenberg J.A. defined the scope of a trial judge's "trial management" powers as follows:

I think something should be said about the trial management power. It is neither necessary nor possible to exhaustively define its content or its limits. But it at least includes the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, to direct the manner in which a *voir dire* is conducted, especially whether to do so on the basis of testimony or in some other form, and exceptionally to direct the order in which evidence is called. The latter power is one that must be exercised sparingly because the trial judge does not know counsel's brief. However, a judge would not commit jurisdictional error in exercising that power unless the effect of the ruling was to unfairly or irreparably damage the prosecution. That did not occur here. [para. 57]

[129] Rosenberg J.A. also found no error in the trial judge's order directing the OSC to prepare and disclose a list of documents it intended to present to a witness. Again, this order was authorized by the trial judge's trial management authority and the need to operate the trial efficiently.

[130] We endorse the approach taken in *Felderhof*. That decision correctly reflects the fact that trial management powers were never intended to intrude on the rules of evidence. The trial management powers identified in *Felderhof* allow trial judges to control the court's process by managing how parties *present* their case, not the evidence they can tender to *build* their case. The trial judge's decision to postpone ruling on the admissibility of documents until after the OSC called its next witness, for example, did not prevent the OSC from using those impugned documents to build its case; it simply deferred the admissibility issue to later in the trial and changed the order

in which the OSC presented its case. Indeed, none of the trial management decisions in *Felderhof* impacted the substantive content of the OSC's case.

[131] Before concluding, we wish to emphasize that this conclusion does not mean that trial management decisions are inconsequential and should be made haphazardly. How parties present their case may be just as important as the substance of their case. Accordingly, these powers should be exercised cautiously: *Felderhof*, at para. 38. Trial judges should generally confine themselves to their own responsibilities, leaving counsel and the jury to their respective functions: *R. v. Murray*, 2017 ONCA 393, 138 O.R. (3d) 500, at para. 39. If trial management decisions render a trial unfair, a new trial will be necessary, even when there are no conflicts with the rules of evidence: *Felderhof*, at paras. 38 and 56; *Potter*, at para. 787; *Murray*, at paras. 96 and 105; *John*, at paras. 50-51.

(2) The Rules of Evidence Are Sensitive to Trial Efficiency Concerns

[132] The Crown argued that separating trial management powers from the rules of evidence in the way outlined above would lead to inefficiency and confusion. In its view, it is impossible to create “silos” between trial management powers and the rules of evidence, particularly in the context of cross-examination. The Crown submits that substantive limits on cross-examination can be justified on both evidentiary and trial management grounds because “[s]ome limitations will be based solely on evidentiary issues such as relevance” while others “will be based on efficiency to encourage focus”: *R.R.F.*, at para. 3.

[133] We disagree. This argument is premised on the incorrect assumption that the law of evidence is blind to trial efficiency concerns. The law of evidence allows courts to weigh the benefits of admitting oral or real evidence against the costs to trial efficiency. Courts should exclude technically admissible evidence when the costs to the trial process outweigh the benefits. This is reflected in established exclusionary rules, as well as the general discretionary power to exclude evidence when its probative value is outweighed by its prejudicial effects.

[134] The collateral facts rule, for example, is an established exclusionary rule that prohibits calling evidence solely to contradict a witness on a collateral fact: *R. v. C.F.*, 2017 ONCA 480, 349 C.C.C. (3d) 521, at para. 58. This rule is designed to promote judicial efficiency: D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 4. In most cases, collateral facts are relevant and material, but not very probative of the ultimate issues at trial. Courts thus prevent parties from pursuing collateral facts because the benefit of pursuing the collateral facts to the trial's truth-seeking function is outweighed by the negative effects to the trial process. But when the benefits of the collateral facts outweigh the negative impact on the trial process, exceptions to this general exclusionary rule apply. The established exceptions to the collateral facts rule — such as proof of bias — recognize that when the probative value of a collateral fact outweighs its prejudicial effects to trial efficiency, parties should be allowed to pursue the issue: p. 604.

[135] More generally, trial judges have a residual discretion to exclude technically admissible evidence when the evidence's probative value is outweighed by its prejudicial effects. Evidence is prejudicial when, among other concerns, it would unduly undermine the efficiency of the trial by consuming "an inordinate amount of time which is not commensurate with its value": *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 21; see also *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 37 and 83; *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139, at paras. 60-61; *R. v. Hall*, 2018 ONCA 185, 139 O.R. (3d) 561, at para. 59; *R. v. Podolski*, 2018 BCCA 96, 360 C.C.C. (3d) 1, at paras. 382-89.

[136] Contrary to the Crown's position, limits on cross-examination can and should be understood as applications of these ordinary rules of evidence and, in particular, the trial judge's residual power to exclude overly prejudicial evidence: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 44 and 50; *Nield*, at para. 73. The Crown is correct that some courts have labelled a trial judge's ability to curtail cross-examination as an instance of a trial judge's trial management powers. For example, interventions to prevent irrelevant, repetitive, or misleading cross-examination have been labelled by some courts as trial management decisions: see *John*, at para. 52; *R. v. Polanco*, 2018 ONCA 444, at para. 22 (CanLII); *R. v. Evans*, 2019 ONCA 715, 147 O.R. (3d) 577, at para. 104.

[137] But we disagree with these cases and would overturn them on this point. It is more appropriate to label such interventions as evidentiary rulings. A trial judge

should prevent counsel from asking irrelevant questions because those questions have no probative value. Similarly, courts should stop repetitious or misleading questioning because the probative value of repeated or misleading questions is minimal while their prejudicial effects to the trial process are significant: see *R. v. Mitchell*, 2008 ONCA 757, at paras. 7 and 19 (CanLII); *Candir*, at paras. 60-63; *Podolski*, at paras. 382-89.

[138] In sum, when considering the admissibility of real or oral evidence, trial judges can and should consider trial efficiency concerns. There is no need to rely on trial management authority when weighing the benefits of evidence against the need for trial expediency.

[139] But there are significant risks with relying on trial management authority when making evidentiary rulings. We focus on two below, namely the risks to (1) trial predictability and consistency, and (2) the accused's right to make full answer and defence.

(a) *The Rules of Evidence Promote Predictability and Consistency*

[140] Most litigation is a truth-seeking exercise. Cases typically turn on a dispute about the facts, not on disagreements about what the law requires. As such, the rules governing how parties can establish the facts to support their case are often just as important as the substantive legal principles governing the dispute.

[141] The rules of evidence dictate how parties can establish the facts needed to build their case. In a predictable manner, it lets parties know what information they can present to support their case, how they can tender this information, and what use they can make of this information once admitted: see *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 25.

[142] Parties are entitled to present all relevant and material evidence to the trier of fact, absent a clear ground for exclusion: *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at para. 68; C. A. Wright, “The Law of Evidence: Present and Future” (1942), 20 *Can. Bar Rev.* 714, at p. 715; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed. 2018), at §1.1. A decision that restricts the trier of fact from considering relevant and material evidence in the absence of a clear ground of policy or law justifying exclusion jeopardizes the accused’s constitutional right to make full answer and defence. It also undercuts society’s interest in getting at the truth: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 609; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 47-48.

[143] When the admissibility of oral or real evidence is at issue, trial judges should turn their minds to the rules of evidence, not their trial management authority. Relying on trial management authority to make evidentiary determinations could create a two-tiered system: some litigants would need to build their case under established evidentiary rules while others would need to build it under the trial judge’s more loosely defined and opaque trial management discretion. This would make litigation



less predictable, accessible, and fair. It would also stifle development of the law. If appropriate rulings cannot be made under the current rules of evidence, those rules should be modified, not ignored.

(b) *The Rules of Evidence Protect an Accused Person's Right to Make Full Answer and Defence*

[144] The rules of evidence provide special protection to accused persons. Accused persons have a wide right to call evidence: *R. v. Clarke* (1998), 18 C.R. (5th) 219 (Ont. C.A.), at p. 231. Unlike in the case of Crown-led evidence, there is no evidentiary discretion to exclude technically admissible defence evidence simply because its probative value is outweighed by its prejudicial effects. Instead, defence-led evidence should be excluded only when its probative value is *substantially* outweighed by the prejudice it could cause: *Seaboyer*, at pp. 611-12; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 76. This more demanding standard for the exclusion of defence-led evidence is founded in the fundamental tenet of our justice system that it is generally better to produce an inaccurate acquittal than a wrongful conviction.

[145] An accused person's wide right to call evidence includes a wide right to cross-examine the Crown's witnesses, especially when credibility is the central issue at trial: *Lyttle*, at paras. 69-70; *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 663-65. A trial judge should only intervene in a defence-led cross-examination when the prejudice from the accused's questioning substantially outweighs the value of the evidence: *Nield*, at para. 73.

[146] If a trial judge curtails defence-led evidence under the guise of their trial management powers, these safeguards may be ignored. The rules of evidence outlined above protect an accused's right to make full answer and defence by ensuring that trial judges do not too readily exclude defence evidence, even when that evidence has minimal probative value or some serious prejudicial effects. Trial management powers do not direct trial judges to be similarly cautious. Relying on trial management authority to curtail a line of cross-examination in the name of trial efficiency, for example, could prevent defence counsel from eliciting relevant and material evidence even when the prejudicial effects of the questions do not *substantially* outweigh their probative value.

[147] This would jeopardize the accused's right to make full answer and defence and increase the chance for wrongful convictions. But this risk can be minimized by ensuring that judges consistently turn their minds to the rules of evidence when asked to determine the admissibility of real or oral evidence, rather than their trial management authority.

[148] Given the trial judge's proximity to the evidence and awareness of the dynamics at trial, the trial judge's considered weighing of probative value and prejudicial effect is entitled to deference on appeal: *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 31. However, whether the trial judge applied the proper legal test to decide an evidentiary issue is reviewable on a standard of correctness: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence*

(5th ed. (loose-leaf)), vol. 3, at §37:31; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; *R. v. Duong*, 2007 ONCA 68, 84 O.R. (3d) 515, at para. 54; *R. v. C. (K.)*, 2015 ONCA 39, 17 C.R. (7th) 181, at para. 36.

(3) The Exclusion of Evidence Relating to Who Had Possession of the Gun Was an Erroneous Evidentiary Ruling

[149] The majority of the Court of Appeal held that the trial judge's exclusion of the security guard's preliminary inquiry testimony about who dropped and picked up the gun was a proper exercise of the trial judge's trial management powers and entitled to deference. This was an error. By preventing Mr. Samaniego's counsel from cross-examining the security guard on his inconsistent testimony, the trial judge excluded *prima facie* relevant, material, and otherwise admissible evidence. This was an evidentiary decision and its propriety must be assessed through the law of evidence. As we explain below, this error is sufficient to warrant a new trial. It is therefore unnecessary to comment further on the other three impugned rulings.

[150] We do not dispute that the initial question posed by Mr. Samaniego's counsel was poorly phrased. After reading out the relevant portion of the preliminary inquiry transcript, Mr. Samaniego's counsel asked the security guard: ". . . why did you not tell what you're telling us today or yesterday?" As the majority of the Court of Appeal points out, the trial judge saw this as a potentially misleading question, since the security guard ultimately adopted his police statement at the preliminary inquiry.

[151] The law of evidence provided the trial judge with a number of options to deal with this arguably misleading question. If she thought the question was misleading because it was missing necessary context, she could have asked Mr. Samaniego's counsel to rephrase the question and draw the security guard's attention to the fact that he had also subsequently adopted his police statement at the preliminary inquiry: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 10(1); Lederman, Bryant and Fuerst, at §16.186. The trial judge could have also simply allowed the question, leaving it for the Crown to raise the security guard's prior consistent police statement in reply: see Hill, Tanovich and Strezos, vol. 2, at §21:91; *Murray*, at paras. 152-54. Either way, the jury could then assess whether the inconsistency was the result of the security guard's genuine memory loss or whether it was illustrative of the security guard testifying falsely at the preliminary inquiry to protect his friend.

[152] Alternatively, if the trial judge thought that defence counsel was baselessly misrepresenting the facts and misleading the jury, she could have restricted that line of questioning under her overarching exclusionary power if the question's probative value was substantially outweighed by its prejudicial effects. Contrary to our colleague's assertion, this would be an evidentiary ruling, not a trial management decision.

[153] The trial judge took none of these steps. She did not determine that the question's probative value was substantially outweighed by its prejudicial effects, nor was there any basis for doing so. Instead, she thought the question was misleading because it was missing some necessary context: the fact that the security guard made a

consistent statement in his police statement. But instead of following the correct evidentiary procedures noted above to deal with this, the trial judge prevented Mr. Samaniego's counsel from asking any questions on the specifics about what the security guard said at the preliminary inquiry before he adopted his police statement. The trial judge then instructed the jury that any reference to the security guard's preliminary inquiry testimony related to his uncertainty about who he saw holding the gun was to be disregarded and play no basis in their deliberations.

[154] This was not a trial management decision. It did not impact how Mr. Samaniego could present his case; it directly impacted the substance of Mr. Samaniego's defence and his ability to build his defence. It prevented Mr. Samaniego's counsel from adducing oral evidence — that is, testimony from the security guard at trial — that could have undermined the security guard's credibility. It was therefore an evidentiary decision. Its propriety must be assessed through the law of evidence.

[155] There was no sound evidentiary basis justifying the exclusion of this evidence. This evidence was relevant and material. The security guard's initial preliminary inquiry testimony was plainly inconsistent with his trial testimony, as the trial judge herself acknowledged. It was therefore relevant and material to a central issue at trial — the security guard's credibility. To reiterate, the security guard's testimony was the only evidence at trial that linked Mr. Samaniego to the gun. Establishing that the security guard gave inconsistent testimony on the direct issue

underlying the charge — who had possession of the gun — could have been highly damaging to the security guard’s credibility. It could have also supported Mr. Samaniego’s central defence at trial: that the security guard was biased and willing to give misleading testimony to assist his friend, Mr. Serrano.

[156] The impugned evidence was also not subject to any exclusionary rule. The fact that the security guard’s police statement was admitted through a hearsay exception at the preliminary inquiry did not erase the earlier inconsistent testimony. The trial judge seems to have misunderstood the effect of the preliminary inquiry ruling. The preliminary inquiry ruling did not bind the trial judge: *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 48; R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), vol. 1, at §5:5. Nor did it erase the evidence. As Paciocco J.A. correctly points out in dissent, “[l]ater evidence does not eradicate earlier evidence”: para. 125. The trial judge erred in holding otherwise.

[157] Finally, the prejudicial effects of the evidence did not substantially outweigh its probative value: *Seaboyer*, at pp. 611-12. As noted above, the probative value of this evidence was extremely high and touched on the central issue at trial. The prejudicial effects, on the other hand, were minimal at best. Indeed, neither the trial judge nor the Crown purported to rely on this basis for the exclusion, as there were clearly no grounds for doing so.

[158] This erroneous evidentiary decision deprived Mr. Samaniego of the right to pursue a highly relevant line of cross-examination. It also usurped the role of the

jury. The trial judge may have viewed the inconsistent testimony as an instance of genuine memory loss. But that was not her call to make. The jury, not the trial judge, was entitled to determine whether the inconsistency was the result of genuine memory loss or an instance of the security guard testifying falsely to protect his friend.

C. *Issue 3: The Curative Proviso Cannot Save This Error*

[159] Section 686(1)(b)(iii) of the *Criminal Code*, known as the curative proviso, permits an appellate court to dismiss an appeal, despite an error of law, when there is “no substantial wrong or miscarriage of justice”.

[160] At the Court of Appeal, the Crown did not raise the application of the curative proviso. The Crown also did not raise the application of the curative proviso in its factum before this Court. It was only in response to a question during oral argument in this Court that the Crown submitted that the curative proviso could be applied if a legal error is found. While we agree that this issue is properly before this Court, in our view, the curative proviso is clearly inapplicable.

[161] The jurisprudence on the application of the curative proviso is clear. The curative proviso can only be applied where there is no “reasonable possibility that the verdict would have been different had the error . . . not been made”: *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617. There are two situations in which the curative proviso is appropriate: (1) where the error is so harmless or trivial that it could not have had any impact on the verdict; or (2) where the evidence is so overwhelming that the trier of

fact would have inevitably convicted (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 29-31).

[162] Regardless of which branch of the curative proviso is argued, the Crown bears the burden of showing its application is appropriate: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34. This is a heavy burden, reflecting the limited role of an appellate court and the need to safeguard the criminal justice process from the risk of wrongful convictions: see *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 28; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 110 and 127, per Brown and Rowe JJ., dissenting. Where the error of law is the exclusion of exculpatory evidence, any reasonable effect that the excluded evidence could have had on the trier of fact should enure to the benefit of the accused: *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at p. 329.

[163] The first branch of the curative proviso has appropriately been applied in cases where it is possible to trace the effect of the error on the verdict. Generally, an error may be characterized as harmless if it is insignificant to the determination of guilt or if it benefits the accused: *Khan*, at para. 30. As this Court stated in *Van*, “[t]he overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made”: para. 35.



[164] The second branch of the curative proviso can be appropriately applied when the Crown can demonstrate that the evidence was so overwhelming such that, despite the error, a trier of fact would have inevitably convicted: *Khan*, at para. 31. Under the second branch, “[t]he standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case ‘beyond a reasonable doubt’ at trial”: *Trochym*, at para. 82.

[165] The two branches of the curative proviso are distinct. The assessment of whether an error is harmless is done without reference to the strength of other evidence at trial: *Van*, at para. 35. In *Sarrazin*, this Court explicitly rejected the argument that an error could be characterized as harmless if the Crown could show that, although the error was prejudicial to the accused, it was highly unlikely to have affected the result. *Sarrazin* has not been overruled and the comments of Binnie J. remain apposite:

It seems to me that there is a significant difference between an error of law that can be confidently dismissed as “harmless”, and an assessment that while the error is prejudicial, it is not (in the after-the-fact view of the appellate court) *so* prejudicial as to have affected the outcome. Such delicate assessments are foreign to the purpose of the curative proviso which is to avoid a retrial that would be superfluous and unnecessary but to set high the Crown’s burden of establishing those prerequisites. The same can be said for the other branch of the curative proviso. As a result, the burden of the Crown to demonstrate an “overwhelming” case or a “harmless” error of law should not be relaxed. [Emphasis in original; para. 28.]

[166] Neither branch of the proviso is applicable here. With respect to the first branch, the error was not harmless. The right to cross-examine a Crown witness without

significant and unwarranted constraint is an essential element of the right to make full answer and defence, guaranteed by both the common law and the *Charter* under ss. 7 and 11(d): *Lyttle*, at paras. 2 and 41; *Osolin*, at pp. 663-65; *Seaboyer*, at p. 608; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 24. Commensurate with its importance, the right of cross-examination must be jealously protected and broadly construed: *Lyttle*, at paras. 43-44.

[167] In this case, the trial judge's interference with defence counsel's cross-examination was both significant and unwarranted. Without any evidentiary basis on which to limit the scope of the cross-examination, the trial judge precluded Mr. Samaniego's counsel from probing the security guard on the inconsistency between his preliminary inquiry testimony and his testimony at trial. While the trial judge permitted Mr. Samaniego's counsel to ask the security guard about his "memory in general terms", that was not enough: *R.R.*, vol. III, at p. 62. Mr. Samaniego's counsel was entitled to explore the specifics of this particular inconsistency. Counsel was also entitled to use this inconsistency as part of her overall challenge to the security guard's credibility. An effective cross-examination often involves a coordinated series of attacks that, cumulatively, undermine the witness's credibility. The right to make full answer and defence therefore entitles an accused to explore all inconsistencies and lines of credibility attack, within the evidentiary limits outlined above.

[168] The significance of this error was compounded by the fact that the inconsistency went to the heart of the indictment: who had possession of the gun. It is

important to again stress that the only evidence at trial that linked Mr. Samaniego to possession of the gun was the testimony of the security guard. Although there is no absolute bar against applying the curative proviso to cases turning primarily on credibility, the Crown's burden is especially high in those cases. An appellate court must exercise extra caution before applying the curative proviso in such circumstances: *R. v. Perkins*, 2016 ONCA 588, 352 O.A.C. 149, at para. 32; *R. v. Raghunauth* (2005), 203 O.A.C. 54, at para. 9; *R. v. L.K.W.* (1999), 126 O.A.C. 39, at para. 97.

[169] In *Lyttle*, this Court held that unwarranted interference with an accused's cross-examination of a principal Crown witness could not be classified as a harmless error when the credibility of the Crown witness was a central issue at trial. At paras. 69-70, Major and Fish JJ. approvingly quoted two court of appeal decisions that underscored why the curative proviso was inapplicable in the circumstances. This passage remains applicable to the circumstances in this appeal:

In *R. v. Anandmalik* (1984), 6 O.A.C. 143, at p. 144, the Ontario Court of Appeal recognized that the importance of cross-examination becomes even more critical when credibility is the central issue in the trial:

In a case where the guilt or innocence of the [accused] largely turned on credibility, it was a serious error to limit the [accused] of his substantial right to fully cross-examine the principal Crown witness. It would not be appropriate in the circumstances to invoke or apply the curative provisions of s. 613(1)(b)(iii) [now s. 686(1)(b)(iii)].

The Manitoba Court of Appeal echoed these sentiments in *R. v. Wallick* (1990), 69 Man. R. (2d) 310, at p. 311:

Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the

fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed. [Text in brackets in original.]

[170] Our colleague suggests that this Court’s application of the curative proviso in *R.V.* justifies its application here. We disagree. While *R.V.* demonstrates that there is no categorical rule preventing the application of the proviso when a trial judge erroneously interferes with cross-examination, *R.V.* also stresses that “[b]ecause it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged had cross-examination been permitted, a failure to allow relevant cross-examination will almost always be grounds for a new trial”: para. 86 (emphasis added). Our colleague’s approach effectively reads this direction out of *R.V.* The use of the proviso in *R.V.* should be seen as extraordinary and only justified on the unique facts of that case. In particular, three features distinguish it from this one.

[171] First, in *R.V.*, the proposed cross-examination was highly constrained by s. 276 of the *Criminal Code* because it explored the complainant’s sexual history. This line of cross-examination therefore would have been “tightly controlled” in any event: para. 88. The same was not true for Mr. Samaniego’s cross-examination. He was entitled to fully explore the security guard’s prior inconsistent statement about who dropped and picked up the gun without constraint.

[172] Second, while *R.V.* was improperly constrained in his cross-examination, he was ultimately allowed to explore all the substantive points he wanted to pursue on cross-examination. The majority therefore concluded that “the scope of permissible

cross-examination would not have been any broader than the questioning that actually occurred”: para. 96 (emphasis added). At this Court, “counsel for R.V. candidly admitted that nothing prevented the defence from further probing the complainant’s testimony about when she began seeing her boyfriend or her motive to lie”: para. 98 (emphasis added). Mr. Samaniego, on the other hand, was denied *altogether* any opportunity to probe the inconsistency in the security guard’s testimony. The trial judge also ensured that the only question Mr. Samaniego’s counsel asked played no role in the jury’s deliberation by instructing the jury to “completely disregar[d]” the testimonial inconsistency.

[173] Third, the proposed cross-examination in *R.V.* had less probative value than Mr. Samaniego’s. In *R.V.*, the cross-examination was only intended to show that the complainant was lying about the sexual assault to cover up an unexpected pregnancy with her boyfriend (or another partner). If the trier of fact rejected that defence theory, the cross-examination had no further value. In this case, however, the cross-examination’s relevancy was twofold. It supported the main defence theory (that the security guard was willing to lie to protect Mr. Serrano) *and* it independently undermined the security guard’s credibility by providing a clear example of prior inconsistent testimony. Accordingly, unlike in *R.V.*, Mr. Samaniego’s cross-examination had relevancy even if the trier of fact rejected the defence’s theory of the case, as the jury could have used this inconsistency to conclude that the security guard was an unreliable witness.

[174] *R.V.* is therefore distinguishable. If the trier of fact had any reasonable doubt about the veracity of the security guard's testimony that Mr. Samaniego was at some point in possession of the gun, Mr. Samaniego was entitled to an acquittal. Any inconsistency in the security guard's testimony was therefore highly relevant to the trial. An inconsistency going to who had the gun, however, was the most important type of testimonial inconsistency that defence counsel could hope to explore. This is especially so given the facts of this case, as the security guard's initial unwillingness to incriminate his friend at the preliminary inquiry until he was confronted with a contradictory police statement buttressed Mr. Samaniego's central defence theory.

[175] Contrary to our colleague's assertions, the security guard's account of who dropped and picked up the gun did not serve to incriminate Mr. Serrano at "every step of the way": majority reasons, at para. 73. Despite being "good friends" with Mr. Serrano for 10 years, the security guard did not identify Mr. Serrano by name in the police statement, instead referring to him only as the "second guy with [the] baseball hat": *R.R.*, vol. I, at p. 3. This vague description of Mr. Serrano continued throughout the preliminary inquiry. Further, after the police statement was admitted and identity was conceded, the security guard's testimony consistently painted Mr. Serrano in a favourable light. At trial, the security guard testified that Mr. Serrano was a friend who de-escalated a dangerous situation caused by Mr. Samaniego bringing the gun to the nightclub. For example, the security guard agreed with Mr. Serrano's counsel that before he picked up the gun, Mr. Serrano looked at him in a non-aggressive and non-intimidating way, conveying to him that everything was going to be okay. We

therefore cannot agree with the assertion that the trial judge's error was insignificant because the security guard was plainly willing to incriminate Mr. Serrano at every step.

[176] Although the majority at the Court of Appeal did not discuss the potential application of the curative proviso, they held that, even if the trial judge did err in restricting cross-examination on the security guard's preliminary inquiry testimony about who dropped and picked up the gun, the trial was not rendered unfair. The majority at the Court of Appeal emphasized that there was no unfairness because (1) Mr. Samaniego's counsel framed her questions as going to memory and the refusal of the security guard to identify who dropped the gun, (2) the trial judge was concerned about the suggestion that the security guard's testimony at the preliminary inquiry did not include the police statement, and (3) Mr. Samaniego's counsel fully explored various inconsistencies in the security guard's evidence and the suggestion that his testimony was tailored to benefit the co-accused. With respect, none of these factors, on their own or in combination, would justify the application of the curative proviso in these circumstances.

[177] First, as Paciocco J.A. correctly highlighted in dissent, it is clear that Mr. Samaniego's counsel was challenging the credibility of the security guard. This is evident from the defence's theory of the case — the security guard was lying to protect his friend. It is also evident from the initial question that drew the objection, in which Mr. Samaniego's counsel asked the security guard: "... why did you not tell what you're telling us today or yesterday?" Finally, it is evident from counsel's response to

the trial judge's questions, where she explained that the question was relevant because it showed that the security guard "refused to identify the — who the person who dropped the gun but now he's able to recall directly". Mr. Samaniego's counsel only framed her challenge in terms of memory after the trial judge ruled that "[t]he decision was made at the preliminary inquiry that he couldn't remember. . . . [Y]ou can't go back to what preceded this *voir dire* ruling": R.R., vol. III, at pp. 60-61. Accordingly, this error cannot be characterized as harmless due to the way defence counsel framed the question. The prior inconsistent testimony was clearly being proffered to undermine the credibility of the security guard.

[178] Second, as explained above, the trial judge's concern that the initial question to the security guard was unfair did not justify or mitigate the significant curtailment of Mr. Samaniego's cross-examination of the key Crown witness. The trial judge had a number of options to deal with what she viewed as a potentially misleading question, none of which required preventing defence counsel from entirely pursuing this line of questioning.

[179] Third, the notion that this error was harmless because Mr. Samaniego was able to effectively put his theory of the case to the jury fundamentally misunderstands and degrades the constitutionally protected right to make full answer and defence. The right to full answer and defence entails more than simply the right to put one's position before the jury — it entails the right to marshal all relevant and material evidence not subject to an exclusionary rule and whose probative value is not substantially



outweighed by its prejudicial effect. In *Seaboyer*, McLachlin J. explained: “The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution” (p. 608 (emphasis added)).

[180] The unfairness flowing from the trial judge’s erroneous ruling was also not minimized by the fact that Mr. Samaniego could explore other inconsistencies in the security guard’s testimony and generally allude to the security guard’s motive to lie. As Paciocco J.A. noted, “[t]here is a world of difference between establishing a relationship that could bias a witness and presenting evidence capable of satisfying jurors that the witness may have given biased testimony in the same proceedings in favour of his friend”: para. 99.

[181] Finally, the potential impact of the trial judge’s error was compounded by her mid-trial charge to the jury, which was repeated in the final charge to the jury. The trial judge instructed the jury that “any reference” to the alleged inconsistency must be “completely disregarded” and “must have no part in your consideration or deliberation about this case”. Accordingly, not only did the trial judge unduly preclude defence counsel from cross-examining the security guard on the prior inconsistent statement, her charge also negated any potential impact that the earlier cross-examination on this issue could have had in undermining the security guard’s credibility.

[182] In sum, the trial judge's error cannot be characterized as harmless. Our colleague emphasizes that our reasons focus only on one issue. Indeed, we do not believe it is necessary to address the other impugned rulings in light of the seriousness and central importance to trial fairness of the legal error that we have highlighted.

[183] In our view, our colleague's reliance on *R.V.* is misguided. It warrants repetition that cross-examination is central to the truth-seeking function, which is why this Court stressed in *R.V.* that "a failure to allow relevant cross-examination will almost always be grounds for a new trial". Given this general rule, the application of the curative proviso in *R.V.* must be seen as extraordinary and only justified on the unique circumstances of that case. To the extent that the curative proviso can be applied more generally where cross-examination has been curtailed contrary to the rules of evidence, this is a matter of considerable concern. While the right to cross-examination is not unlimited, any such limitations should be confined to carefully defined circumstances where there is a sufficient countervailing consideration to justify the limitation. Only in rare and exceptional circumstances can unwarranted interference with cross-examination be appropriately categorized as a harmless error. In the circumstances of this case, the error cannot be said to be harmless.

[184] Similarly, the trial judge's error cannot be justified under the second branch of the curative proviso. The evidence was far from overwhelming — the only evidence linking Mr. Samaniego to possession of the gun was the testimony of one witness who had a motive to lie and whose testimony at trial about who he saw drop the gun was, at

times, manifestly inconsistent with his testimony at the preliminary inquiry. In light of the foregoing, the application of the curative proviso is inappropriate in the circumstances of this case.

## VII. Conclusion

[185] For the foregoing reasons, we would allow the appeal, set aside the conviction, and order a new trial.

*Appeal dismissed, CÔTÉ, BROWN and ROWE JJ. dissenting.*

*Solicitors for the appellant: Rusonik, O'Connor, Robbins, Ross & Angelini, Toronto.*

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

*Solicitors for the intervener: Louis P. Strezos & Associate, Toronto; Greenspan Humphrey Weinstein, Toronto.*