



**SUPREME COURT OF CANADA**

**CITATION:** R. v. J.D., 2022 SCC  
15

**APPEAL HEARD AND JUDGMENT  
RENDERED:** November 10, 2021  
**REASONS FOR JUDGMENT:** April  
22, 2022  
**DOCKET:** 39370

**BETWEEN:**

**Her Majesty The Queen**  
Appellant

and

**J.D.**  
Respondent

- and -

**Attorney General of Ontario**  
Intervener

**OFFICIAL ENGLISH TRANSLATION**

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

**REASONS FOR  
JUDGMENT:** Côté J. (Wagner C.J. and Moldaver, Karakatsanis, Brown,  
Rowe, Martin, Kasirer and Jamal JJ. concurring)  
(paras. 1 to 50)

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**Her Majesty The Queen**

*Appellant*

v.

**J.D.**

*Respondent*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: R. v. J.D.**

**2022 SCC 15**

File No.: 39370.

Hearing and judgment: November 10, 2021.

Reasons delivered: April 22, 2022.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Trial — Continuation of proceedings before another judge  
— Evidence — Admissibility — Legal framework governing admissibility in evidence*

*in trial that is commenced again, as evidence on merits, of transcripts of testimony from first trial that have been filed with consent of parties — Criminal Code, R.S.C. 1985, c. C-46, s. 669.2(3).*

In 2012, the accused was charged with 18 counts of sexual offences committed between 1974 and 1993 that involved victims who were minors, including his daughter and his son. The hearing of the prosecution's evidence began in March 2016 before a first judge of the Court of Québec. The daughter of the accused gave her testimony, both in chief and in cross-examination. Then the accused suffered an attack and the case was postponed for a later date. During the period of the stay of proceedings, the judge fell ill. More than a year later, he was replaced and a new trial was scheduled to be held before another judge.

Under s. 669.2(3) of the *Criminal Code*, if a trial commences again before a new judge sitting alone and no adjudication was made or verdict rendered, the new judge must commence the trial again as if no evidence on the merits had been taken. In this case, counsel for the parties, by common agreement, filed the transcript of the testimony of the daughter of the accused in the record, and it was admitted by the new judge as evidence on the merits. Three other complainants then testified for the prosecution, and the judge found the accused guilty on 9 of the 18 counts. But the Court of Appeal concluded that the new judge should not have accepted that the testimony of the daughter of the accused be filed without ensuring that the consent of the accused was voluntary, informed and unequivocal and that the filing of the testimony in

question would not undermine the fairness of the trial. It therefore ordered a new trial on the counts concerning the daughter of the accused (counts 1 and 2), but also on those relating to his son (counts 9 to 13), because one of the acts alleged against the accused concerned an incident involving both his daughter and his son.

*Held:* The appeal should be allowed and the convictions and the sentences on counts 1, 2 and 9 to 13 restored.

Section 669.2(3) of the *Criminal Code* does not bar a transcript of testimony given at a first trial from being filed as evidence on the merits in a second trial. There is no reason to require, as the Court of Appeal did, an inquiry that is not provided for by law where the parties have consented to the filing of the transcript. Such an inquiry would completely alter the judge's role, minimize the judge's ability to assess the transcript of prior testimony and run counter to the presumption of the competence of counsel. Absent evidence to the contrary, waiver of a procedural right by counsel for an accused is presumed to be intentional.

The grammatical and ordinary sense of the words of s. 669.2 is clear and Parliament's intention is evident. Where a trial is by judge alone, the new judge must commence the trial again as if no evidence on the merits had been taken and may not require the parties, or one of them, to file evidence from the first trial. But because the section concerns jurisdiction and not evidence, it does not preclude the application of the usual rules with respect to the presentation of evidence. At the outset of the second trial, both the prosecution and the defence are free to proceed as they see fit as regards

the presentation of their evidence; they may elect to proceed by filing transcripts of prior testimony. This choice is a tactical decision that resembles other decisions of the same nature in which the judge need not intervene. For the transcript of testimony given at the first trial to be admitted in the second trial as evidence on the merits, all that is needed is that the transcript be duly filed and that the parties consent to its being filed.

However, s. 669.2 does not eliminate the judge's residual discretion. As the gatekeeper for trial fairness, the judge retains at all times the power to inquire on his or her own initiative even where doing so is required neither by statute nor at common law. Where there are indications suggesting that the consent of the accused might be vitiated, the court should exercise its residual discretion and investigate further in order to ensure that the consent of the accused to the procedure is voluntary and informed. Section 669.2 does not eliminate the judge's power not to allow a transcript to be filed if he or she finds that the prejudicial effect of filing it would undermine the fairness of the trial. A judge who finds that trial fairness is undermined must intervene.

In this case, the new judge did not unilaterally require the parties to file the transcripts from the first trial. The transcript of the testimony of the daughter of the accused was duly filed and the parties consented to its being filed. There were no indications that might have led the new judge to question the consent of the accused. The second trial of the accused was therefore fair.

### **Cases Cited**

**Considered:** *Gauthier v. R.*, 2020 QCCA 751; *Jetté v. R.*, 2020 QCCA 750; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. A.A.*, 2012 ONSC 3270; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *Dallaire v. R.*, 2021 QCCA 785; *Park v. The Queen*, [1981] 2 S.C.R. 64; *R. v. White* (1997), 32 O.R. (3d) 722; *R. v. Verma*, 2016 BCCA 220, 336 C.C.C. (3d) 441; *Matheson v. The Queen*, [1981] 2 S.C.R. 214; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Leblanc*, 2010 QCCA 1891, 78 C.R. (6th) 359; *Guenette v. R.*, 2002 CanLII 7883; *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284; *M.R. v. R.*, 2018 QCCA 1983, 53 C.R. (7th) 182; *Jarrah v. R.*, 2017 QCCA 1869; *R. v. Breton*, 2018 ONCA 753, 366 C.C.C. (3d) 281; *R. v. Hawkins*, [1996] 3 S.C.R. 1043.

### **Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 606(1.1), Part XX, 669.2 [am. 1994, c. 44, s. 65].

### **Authors Cited**

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Hamilton and Moore JJ.A.), 2020 QCCA 1108, [2020] AZ-51705644, [2020] J.Q. n° 5677 (QL),

2020 CarswellQue 9016 (WL Can.), setting aside in part a decision of Chevalier J.C.Q.,  
2017 QCCQ 19515, [2017] AZ-51514590, [2017] J.Q. n° 22699 (QL), 2017  
CarswellQue 12862 (WL Can.). Appeal allowed.

*Nicolas Abran and Isabelle Bouchard*, for the appellant.

*Martin Binet*, for the respondent.

*James V. Palangio and Nicolas de Montigny*, for the intervener.

English version of the reasons for judgment of the Court delivered by

CÔTÉ J. —

## I. Introduction

[1] This appeal affords this Court a first opportunity to interpret s. 669.2(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, which lays down the rules that apply if a trial judge dies or is unable to continue when no adjudication has been made or verdict rendered. The key issue concerns the rules of evidence in a trial commenced again before a new judge sitting alone. The parties are asking this Court to rule on the legal framework governing the admissibility in evidence in a trial that is commenced again,



as evidence on the merits, of transcripts of testimony from a first trial that have been filed by mutual consent.

[2] Section 669.2(3) provides that the judge before whom the proceedings are continued must, if the trial was before a judge alone and no adjudication was made or verdict rendered, commence the trial again as if no evidence on the merits had been taken. However, s. 669.2 says nothing about whether evidence adduced before the first judge may be adduced as evidence on the merits in the trial that is commenced again.

[3] Although it is common ground that such evidence can be filed at the trial that is commenced again, the parties disagree on the test to be applied when the prosecution and the accused consent to the filing of a transcript of testimony heard by the judge before whom the trial first commenced. The Quebec Court of Appeal, relying on the rule that testimony is conventionally given orally at trial, proposed a two-part inquiry. First, the court must — even if the accused is represented by counsel — determine whether the consent of the accused is voluntary, informed and unequivocal. Second, the court must ensure that the filing of the evidence will not undermine the fairness of the trial. The appellant, Her Majesty the Queen, has appealed to this Court, arguing that the Court of Appeal erred by requiring an inquiry that is not provided for by law.

[4] With all due respect, I conclude that the Court of Appeal erred in its interpretation and application of s. 669.2. There is no reason to require an inquiry that is not provided for by law where the parties have consented to the filing, in a trial that

was commenced again, of a transcript of testimony given at a first trial. Such an inquiry would completely alter the judge's role, minimize the judge's ability to assess the transcript of prior testimony and run counter to the presumption of the competence of counsel.

[5] At the end of the hearing before us, this Court allowed the appeal and restored the convictions and the sentences on counts 1, 2 and 9 to 13, with reasons to follow. These are the reasons.

## II. Background

[6] The respondent, J.D., was charged in 2012 with 18 counts of sexual offences involving victims who were minors that were committed between 1974 and 1993. Two of the complainants were his children C.D. and S.D., while the other two were his nephew and niece.

[7] The hearing of the prosecution's evidence began on March 29, 2016 before Judge Valmont Beaulieu of the Court of Québec. C.D., the daughter of the accused, gave her testimony, both in chief and in cross-examination, on March 29 and 30. On March 30, 2016, the respondent suffered an attack, and the case was postponed for a later date. During the period of the stay of proceedings, Judge Beaulieu fell ill.

[8] The case would be postponed several times until, more than a year later, in April 2017, the Court of Québec informed the parties that Judge Beaulieu would be

replaced under s. 669.2 of the *Criminal Code*. A new trial was scheduled to begin on September 18, 2017 before Judge Paul Chevalier.

[9] Only C.D. had been heard by the first trial judge. On June 16, 2017, the coordinating judge for the district sent a letter to counsel for the parties that noted their consent to having the transcript of C.D.'s testimony given to the new judge. As a result, counsel for the parties, by common agreement, filed the transcript of C.D.'s testimony in the record. At the opening of the second trial, on September 18, 2017, counsel for the defence reiterated his consent and the transcript of C.D.'s testimony was admitted by Judge Chevalier as evidence on the merits.

### III. Judicial History

#### A. *Court of Québec, 2017 QCCQ 19515 (Judge Chevalier)*

[10] In addition to the transcript filed in lieu of testimony of C.D., three other complainants, including S.D., the respondent's son, testified for the prosecution and described in detail the assaults they had allegedly experienced during their childhood. The assaults recounted by S.D. were corroborated in part by the testimony of C.D., the transcript of which had been filed in the record.

[11] After analyzing the whole of the facts for each complainant, Judge Chevalier found the respondent guilty on 9 of the 18 counts, ordered a conditional stay

of proceedings on 2 of the counts and acquitted him on 7 other counts, 6 concerning C.D and the only one concerning J.J.D., another of the respondent's children.

B. *Quebec Court of Appeal, 2020 QCCA 1108 (Dutil, Hamilton and Moore JJA.)*

[12] In the Court of Appeal, five issues with regard to the convictions were stated. Only one of them is relevant to the appeal in this Court: Did the trial judge err in allowing the testimony of C.D., given before another judge, to be filed in the record?

[13] Hamilton J.A., writing for a unanimous court, stressed that the rule stated in s. 669.2(3) of the *Criminal Code* requires the new judge to commence the trial again in its entirety. The Court of Appeal relied on *Gauthier v. R.*, 2020 QCCA 751, and *Jetté v. R.*, 2020 QCCA 750, in which it had ordered new trials in contexts similar to the one in the case at bar. In *Gauthier* and *Jetté*, the Court of Appeal had held that the accused may consent to the filing of evidence that was adduced before the first judge. However, the new judge must not accept that the testimony be filed in the record unless satisfied that the consent of the accused is voluntary, informed and unequivocal. The new judge must also be satisfied that filing the evidence that was adduced before the first judge will not undermine the fairness of the trial.

[14] The Court of Appeal concluded that [TRANSLATION] “the trial judge should not have accepted that [C.D.]’s testimony be filed without ensuring that the consent of the [accused] was voluntary, informed and unequivocal and that the filing of [C.D.]’s testimony would not undermine the fairness of the trial” (para. 36 (CanLII)). If he was

not satisfied in this regard, he should not have allowed the evidence in question to be filed as evidence on the merits and should have commenced the trial again in its entirety. In the Court of Appeal's view, even though the evidence adduced before the first judge was limited to C.D.'s testimony, it was important evidence in a case in which credibility was key.

[15] The Court of Appeal ordered a new trial on the counts concerning C.D. (counts 1 and 2), but also on those relating to S.D. (counts 9 to 13), because one of the acts alleged against the respondent concerned an incident involving both C.D. and S.D. C.D.'s testimony was a factor relevant to the assessment of the credibility of the respondent and of S.D., because C.D. had contradicted the respondent and corroborated S.D.'s testimony. [TRANSLATION] "It would therefore be dangerous to affirm the convictions relating to [S.D.] if the trial judge did not hear [C.D.]'s testimony" (para. 41). As a result, a motion to set aside the sentences on counts 1 and 2 with respect to C.D. and on counts 9 to 13 with respect to S.D. was also granted.

[16] As for the other two complainants, the incidents in question did not involve C.D., and her testimony was immaterial other than on secondary points. The Court of Appeal affirmed the convictions on counts 14 and 17 in relation to those two complainants. It also affirmed the sentences on these counts.

#### IV. Issue

[17] This appeal concerns only the counts with respect to C.D. and S.D. and raises only one question: Did the Court of Appeal err in its interpretation and application of s. 669.2 of the *Criminal Code* by requiring a test that is not provided for by law for assessing the validity of the accused's consent to the filing, in a second trial, of a transcript of testimony previously given at a first trial?

#### V. Analysis

[18] The Court of Appeal acknowledged that s. 669.2(3) of the *Criminal Code* does not preclude the application of the usual rules of evidence: [TRANSLATION] “despite subsection 669.2(3) *Cr.C.*, the accused may consent to the filing of evidence that was adduced before the first judge” (para. 33). It nonetheless held that the judge at the second trial must conduct a two-part inquiry. First, that judge must ask whether the consent given by the accused to the filing in evidence of a transcript in lieu of testimony was voluntary, informed and unequivocal. Second, the judge must ensure that admitting prior testimony in evidence will not undermine the fairness of the trial.

[19] The inquiry required by the Court of Appeal exceeds the scope of the jurisdictional function of s. 669.2. With respect, I find that the Court of Appeal erred by imposing a test that is not provided for by law. Absent evidence to the contrary, waiver of a procedural right by counsel for an accused is presumed to be intentional.

#### A. *Section 669.2 of the Criminal Code*

[20] To answer the question raised by this appeal, a statutory interpretation exercise is required. Section 669.2 reads as follows:

**Continuation of proceedings**

**669.2 (1)** Subject to this section, where an accused or a defendant is being tried by

- (a) a judge or provincial court judge,
- (b) a justice or other person who is, or is a member of, a summary conviction court, or
- (c) a court composed of a judge and jury,

as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.

**Where adjudication is made**

(2) Where a verdict was rendered by a jury or an adjudication was made by a judge, provincial court judge, justice or other person before whom the trial was commenced, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, impose the punishment or make the order that is authorized by law in the circumstances.

**If no adjudication made**

(3) Subject to subsections (4) and (5), if the trial was commenced but no adjudication was made or verdict rendered, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, commence the trial again as if no evidence on the merits had been taken.

**If no adjudication made — jury trials**

(4) If a trial that is before a court composed of a judge and a jury was commenced but no adjudication was made or verdict rendered, the judge before whom the proceedings are continued may, without further election

by an accused, continue the trial or commence the trial again as if no evidence on the merits had been taken.

### **Where trial continued**

(5) Where a trial is continued under paragraph (4)(a) [*sic*], any evidence that was adduced before a judge referred to in paragraph (1)(c) is deemed to have been adduced before the judge before whom the trial is continued but, where the prosecutor and the accused so agree, any part of that evidence may be adduced again before the judge before whom the trial is continued.

[21] Statutory interpretation involves reading the words of a provision “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[22] The grammatical and ordinary sense of the words of s. 669.2 is clear. Subsections (3) and (4) are in no way ambiguous. The rule of s. 669.2(3), applicable to a trial by judge alone, is strict: the new judge “shall . . . commence the trial again as if no evidence on the merits had been taken”. In the case of a trial by judge and jury, the rule of s. 669.2(4) is much more flexible: the new judge “may . . . continue the trial or commence the trial again as if no evidence on the merits had been taken”.

[23] The purpose of this section is to preserve trial fairness. A new judge presiding a jury trial may continue the trial or commence the trial again, whereas a new judge sitting alone is required to commence the trial again. In the first case, the trial



can continue without undermining trial fairness, because the “trier of facts”, the jury, is not replaced. The situation is different, however, in the case of a trial by judge alone. Because such a judge is both the judge of the law and the trier of facts, the trial cannot simply be resumed at the same place before a new judge (*Gauthier*, at para. 55). On the contrary, to require the parties to continue the trial would amount to a breach of procedural fairness.

[24]           Until the coming into force of a statutory amendment on February 15, 1995, the former s. 669.2 required that the trial be commenced again regardless of whether the trial was by judge alone or by judge and jury. It seems clear from this amendment that Parliament wanted to distinguish the two modes of trial. Parliament’s intention is evident: where a trial is by judge alone and must be commenced again before a new judge, that judge may not require the parties, or one of them, to file evidence from the first trial. The trial must absolutely be commenced again.

[25]           This section, which is included in Part XX of the *Criminal Code*, is found in a division entitled “Jurisdiction”. This means that s. 669.2(3) does not preclude the application of the usual rules with respect to the presentation of evidence: it concerns *jurisdiction*, not evidence.

[26]           At the outset of the second trial, both the prosecution and the defence are free to proceed as they see fit as regards the presentation of their evidence. The parties may take the conventional approach, the one based on the view that “[t]he law has . . . favoured the evidence of witnesses who give evidence in court because they can be

observed” (*R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 19). But the parties may also elect — usually without having to justify their decision — to proceed by filing transcripts of prior testimony. Indeed, the Court of Appeal recognized this in saying that [TRANSLATION] “the accused may consent to the filing of evidence that was adduced before the first judge” (para. 33; see also *Gauthier*, at para. 57; *R. v. A.A.*, 2012 ONSC 3270, at paras. 77-78 (CanLII)).

[27] Yet the Court of Appeal required that the new judge conduct a real inquiry. With respect, I am of the view that it erred by requiring a test that is not provided for by law, as is clear from an analysis of the scheme of the *Criminal Code*. When Parliament intends to require that a judge conduct an inquiry, it does so explicitly. For example, s. 606(1.1) of the *Criminal Code* specifically sets out the factors the court must verify before accepting a guilty plea. It is because of the finality of a guilty plea and its extremely serious consequences — the accused forgoes a trial as well as the presentation of the prosecution’s case against him or her — that the judge must ensure the plea is voluntary, unequivocal and informed (*R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at paras. 2-3; *Dallaire v. R.*, 2021 QCCA 785, at para. 17 (CanLII)).

[28] But there is no justification for transposing such an inquiry to a context like the one in the instant case. Electing to file a transcript of testimony from a previous trial does not have the same implications. Although proceeding in this way is not the conventional approach, it is in no way exceptional. This is a tactical decision that resembles other decisions of the same nature, such as choosing to cross-examine a

witness, consent to certain admissions or waive a *voir dire* (*Park v. The Queen*, [1981] 2 S.C.R. 64, at pp. 73-75; *R. v. White* (1997), 32 O.R. (3d) 722 (C.A.), at p. 751). All such decisions can of course have major repercussions on the outcome of a trial, but they do not require preventive intervention by the court. For example, in analogous circumstances, the British Columbia Court of Appeal stated that “[w]here both Crown and defence counsel agree that hearsay evidence is admissible, the judge is not required to embark on an independent inquiry to determine whether their positions are legally sound” (*R. v. Verma*, 2016 BCCA 220, 336 C.C.C. (3d) 441, at para. 38 (emphasis added)).

[29] In sum, this statutory interpretation exercise shows how straightforward the provision is. The only function of s. 669.2(3) is to require a judge sitting alone to commence the trial again. Once the judge has done so, the parties have control over the presentation of their own evidence. Therefore, for the transcript of testimony given at the first trial to be admitted in the second trial as evidence on the merits, all that is needed is that the transcript be duly filed and that the parties consent to its being filed (*Matheson v. The Queen*, [1981] 2 S.C.R. 214, at pp. 217-18).

[30] Given that the parties have control over their own evidence, the judge must, absent either circumstances in which the legislation — or the common law — requires an inquiry or any indication to the contrary, presume that the professional experience and judgment of counsel have guided him or her in conducting the case in such a way

as to protect the client's fundamental interests (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 27; *White*, at p. 751).

[31] Calling evidence necessarily involves making tactical decisions in which the judge need not intervene. Not only does the judge need not do so, but he or she should in fact refrain from intervening. This Court recently noted the deference owed to counsel in regard to tactical decisions made in the best interests of the client:

. . . our adversarial system does accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the litigants, they should generally refrain from interfering with the conduct of the litigation itself. In *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37, this Court explained why judges should be very cautious before interfering with tactical decisions:

In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel . . . . [C]ounsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. . . . [Emphasis in original deleted.]

(*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 59)

[32] However, s. 669.2 does not eliminate the judge's residual discretion (see, by analogy, *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 75). As the gatekeeper for trial fairness, the judge retains at all times the power to inquire on his or her own initiative even where doing so is required neither by statute nor at common law. Where there are indications suggesting that the consent of the accused might be

vitiated, the court should exercise its residual discretion and investigate further in order to ensure that the consent of the accused to the procedure is voluntary and informed (*Gauthier; Jetté*).

[33] *Gauthier* is of some interest in this regard. In that case, the defence had announced — after all the evidence had been called and all that remained was to render the verdict — that the accused could not afford to have the trial commence again in its entirety owing to a lack of financial resources. In this way, the accused was consenting to all the transcripts from the first trial being filed as evidence on the merits before the judge charged with commencing the trial again and rendering judgment. The Court of Appeal, having indications before it that suggested that the consent of the accused had not been voluntary and informed, ordered a new trial. Because the trial judge had not inquired further into the consent of the accused, the fairness of the trial had been undermined. This leads to the inference that had there been no such indications, an inquiry would probably not have been necessary.

[34] Before concluding, I emphasize that the accused in the case at bar was represented by counsel. This Court is therefore not required to determine whether the trial judge's duty to a self-represented accused would be different. Allow me nonetheless to digress by making a few comments, although without ruling definitively on this issue. In the case of a self-represented accused, the court has a duty to ensure that the accused can have a fair trial that is respectful of his or her fundamental rights. The judge is at that time [TRANSLATION] “charged with a particular responsibility” to

ensure that the trial is fair (*R. v. Leblanc*, 2010 QCCA 1891, 78 C.R. (6th) 359, at para. 47). The judge has, in this sense, a duty to assist the accused (*Guenette v. R.*, 2002 CanLII 7883 (Que. C.A.), at para. 20; *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 110). This duty to assist is [TRANSLATION] “variable”, however, as it differs according to the circumstances and is limited to what is reasonable (*M.R. v. R.*, 2018 QCCA 1983, 53 C.R. (7th) 182, at para. 25, citing *Jarrah v. R.*, 2017 QCCA 1869, and *R. v. Breton*, 2018 ONCA 753, 366 C.C.C. (3d) 281, at para. 13; see also *Richards*, at paras. 110-11). Although the court is not required to give advice to the accused, it must be reasonably certain that the accused is aware of his or her procedural rights. It could be necessary in such circumstances to inquire further into the consent of the accused. I will now return to the matter at hand.

[35] In sum, s. 669.2(3) does not bar a transcript of testimony given at a first trial from being filed as evidence on the merits in a second trial, nor does it require an inquiry by the judge in this regard. Nevertheless, s. 669.2 does not eliminate the judge’s power not to allow a transcript to be filed if he or she finds that the prejudicial effect of filing it would undermine the fairness of the trial. A judge who finds that trial fairness is undermined must intervene.

[36] Let us now turn to the situation in this case.

## B. *Application*

[37] The trial did in fact commence again before Judge Chevalier. He did not unilaterally require the parties to file the transcripts from the first trial. As I mentioned above, for the transcript of C.D.'s testimony to be admitted in evidence, all that was needed was that the transcript be duly filed and that the parties consent to its being filed. Both these conditions were met in this case. The respondent's second trial was fair.

[38] First, I note that it was the prosecution, not the defence, that decided — despite the weaknesses of C.D.'s testimony — not to enhance its evidence and not to call her to testify again. If the prosecution had decided to call C.D. again, the accused could not have objected to that, as she was a witness for the prosecution.

[39] Second, the accused was in no way obligated to consent to the filing of the transcript of C.D.'s testimony. Consenting to the filing of the transcript was a tactical decision, and I would add that this tactic seems to have worked, given that the accused was acquitted on six of the eight counts with respect to C.D.

[40] If the accused had refused to consent to the filing of the transcript of C.D.'s testimony, the prosecution would have had no choice but to have C.D. testify again (there is nothing in the evidence to suggest that the prosecution could not have called her again) or to abandon that evidence. As well, Judge Chevalier could not himself have forced the accused to consent to the filing of the transcript as evidence on the merits, especially given that no exception to the hearsay rule had been raised. What is

more, the accused could have withdrawn his consent either before Judge Chevalier or on appeal by claiming, for example, ineffective assistance of his counsel.

[41] But that did not happen. In all likelihood, the accused, on his counsel's advice, considered that it was to his advantage to consent to the filing of the transcript. I would add that at no time did the accused cast any doubt on his consent to proceeding in this way. It was not even included among his grounds of appeal in the Court of Appeal. Before being invited by the Court of Appeal to make submissions on this point, the accused never suggested that his consent to the filing of the transcript of C.D.'s testimony was vitiated or, at the very least, that he had changed his mind.

[42] Contrary to the situation in *Gauthier*, there were no indications in the instant case that might have led Judge Chevalier to question the consent of the accused. When he received the parties' consent, he was satisfied that the fairness of the trial was assured. The fact that Judge Chevalier presumed that the consent of the accused was valid does not constitute procedural unfairness. On the contrary, it is consistent with the guiding principles of criminal procedure.

[43] Furthermore, the Court of Appeal erred in concluding that, because the transcript of C.D.'s testimony was [TRANSLATION] "important evidence in a case in which credibility was key", Judge Chevalier should not have admitted it without ensuring that the respondent's consent was voluntary, informed and unequivocal and that its filing would not undermine the fairness of the trial (para. 37). Conducting a defence necessarily involves making tactical decisions in which the judge need not



intervene, especially when the accused is duly represented by counsel. The fact that credibility is in issue changes nothing in this case.

[44] As the appellant explains, [TRANSLATION] “[t]he effect of the Court of Appeal’s decision is that it is hard, if not impossible, to imagine a case in which the judge before whom a trial commences again can admit in evidence a transcript of testimony of a victim of a crime whose credibility is in issue. Only ancillary testimony would be compatible with the stated conditions. The Court of Appeal is practically prohibiting an accused from consenting to the filing of such evidence upon the resumption of the trial” (A.F., at para. 48).

[45] As to the counts with respect to S.D., I find that the Court of Appeal also erred in ordering a new trial solely on the basis that C.D.’s testimony was a relevant factor in the assessment of the acts committed against S.D.

[46] C.D.’s testimony was not necessary in order to find the accused guilty on the counts involving S.D. In assessing the evidence with respect to S.D., Judge Chevalier used the transcript of C.D.’s testimony to only a limited extent. And that limited use did not have the effect of vitiating all of the findings of fact (independent of C.D.’s testimony) Judge Chevalier reached.

[47] It is clear from Judge Chevalier’s reasons that he was satisfied, independently of C.D.’s corroboration — which, as I said, was not necessary — that the assaults alleged by S.D. actually took place. Judge Chevalier stated that he believed

S.D. [TRANSLATION] “because of the consistency between what he said and the accounts he had given previously, because of the lack of any sort of collusion with his sister, whom he even contradicted at times, and because of the objectivity he displayed in testifying, despite the contradictions by the accused and Ms. G., regarding the photos in particular” (para. 115 (CanLII)). Judge Chevalier then added that he “believes [S.D.]’s testimony and is satisfied beyond a reasonable doubt that the other types of sexual assault he experienced . . . the descriptions of which are very detailed, took place” (para. 118). As a result, [TRANSLATION] “[t]his limited corroboration could not cast doubt on the conclusion concerning S.D.’s credibility” (A.F., at para. 104).

[48] In sum, because the parties had agreed to proceed with the filing of the transcript of C.D.’s testimony, Judge Chevalier had only to determine the weight to be given to it. The absence of C.D. at trial goes to the weight of her testimony, not to its admissibility (*R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 79). The Court of Appeal should not have questioned the valid consent of the accused, which resulted from the exercise of reasonable professional judgment. That tactical decision by his counsel “[fell] within the wide latitude afforded counsel in the conduct of the case” (I.F., at para. 13).

[49] In conclusion, I must specify that it would not be appropriate to remand the appeal to the Court of Appeal. The accused has appealed to this Court on only a single issue and has neither reiterated nor stressed the other grounds he raised in the Court of

Appeal. To return the case to that court would not be an efficient use of judicial resources.

VI. Conclusion

[50] I would allow the appeal. The convictions and the sentences on counts 1, 2 and 9 to 13 are restored.

*Appeal allowed.*

*Solicitor for the appellant: Director of Criminal and Penal Prosecutions,  
Gatineau.*

*Solicitors for the respondent: Noël et Associés, Gatineau.*

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