



SUPREME COURT OF CANADA

CITATION: R. v. Wolfe, 2024
SCC 34

APPEAL HEARD: March 26, 2024
JUDGMENT RENDERED: October
18, 2024
DOCKET: 40558

BETWEEN:

Braydon Wolfe
Appellant

and

His Majesty The King
Respondent

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:** Martin J. (Wagner C.J. and Karakatsanis, Rowe and
(paras. 1 to 92) O'Bonsawin JJ. concurring)

**DISSENTING
REASONS:** Moreau J. (Côté, Kasirer and Jamal JJ. concurring)
(paras. 93 to 144)

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Braydon Wolfe

Appellant

v.

His Majesty The King

Respondent

Indexed as: R. v. Wolfe

2024 SCC 34

File No.: 40558.

2024: March 26; 2024: October 18.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Sentencing — Criminal negligence — Driving prohibition — Criminal Code permitting discretionary driving prohibition to be imposed as sentence for several enumerated offences — Enumerated offences including dangerous operation of conveyance but not criminal negligence causing death or criminal negligence causing bodily harm — Accused convicted of criminal negligence causing death and causing bodily harm for role in head-on collision — Trial judge imposing

driving prohibition — Whether driving prohibition may be imposed upon conviction for criminal negligence causing death or bodily harm in operation of conveyance — Criminal Code, R.S.C. 1985, c. C-46, s. 320.24(4).

The accused drove on the wrong side of a divided highway and caused a head-on collision, killing two people and seriously injuring another. He was found guilty of two counts of criminal negligence causing death contrary to s. 220 of the *Criminal Code* and one count of criminal negligence causing bodily harm contrary to s. 221. In his reasons, the trial judge alternatively held that, if his analysis of the criminal negligence counts set out in the indictment was faulty, then he would convict the accused of two counts of dangerous driving causing death contrary to s. 320.13(3) and one count of dangerous driving causing bodily injury contrary to s. 320.13(4). In addition to sentencing the accused to terms of imprisonment, the trial judge issued a driving prohibition order imposing concurrent 10-year driving prohibitions for each criminal negligence causing death count and a concurrent 7-year prohibition for the criminal negligence causing bodily harm count.

The Court of Appeal dismissed the accused's sentence appeal. With respect to the availability of the driving prohibition order, the court interpreted s. 320.24(4) of the *Criminal Code*, which permits sentencing judges to impose a discretionary driving prohibition where an offender has been "found guilty" of one of the provision's enumerated offences, as authorizing that order, even though the offences in ss. 220 and 221 are not enumerated offences. It held that the criminal negligence convictions under

ss. 220 and 221 necessarily included a finding of guilt for the lesser and included offence of dangerous driving under s. 320.13, which is enumerated.

Held (Côté, Kasirer, Jamal and Moreau JJ. dissenting): The appeal should be allowed and the driving prohibition order set aside.

Per Wagner C.J. and Karakatsanis, Rowe, **Martin** and O'Bonsawin JJ.: The driving prohibitions imposed on the accused were unlawful. The accused was convicted of criminal negligence causing death and criminal negligence causing bodily harm, which are not enumerated offences under s. 320.24(4) of the *Criminal Code*. He was not “found guilty” of an enumerated offence within the meaning of that provision. Accordingly, discretionary driving prohibitions were not available as a sentencing option.

Bill C-46, which introduced s. 320.24 into the *Criminal Code* in 2018, contained a complete overhaul of the *Criminal Code*'s driving provisions. All of the former driving-related offences were repealed and re-enacted under Part VIII.1 of the *Criminal Code* to ensure a clear, coherent structure in an area that had become complex and difficult to understand. Bill C-46 made two noteworthy changes to discretionary driving prohibition orders. First, the new s. 320.24 enumerates fewer offences that are eligible for that punishment. Removed from the list previously found in the former s. 259(2) are the general offences of criminal negligence causing death, criminal negligence causing bodily harm and manslaughter. Second, the description of the event that triggers the provision's operation has been modified, in English, from “convicted

or discharged” of an enumerated offence to “found guilty”, and in French from “*déclaré coupable ou absous*” to “*déclaré coupable*”.

Determining whether s. 320.24(4) of the *Criminal Code* now permits a discretionary driving prohibition upon a conviction for criminal negligence causing death or bodily harm requires the Court to interpret s. 320.24(4) by employing longstanding principles of statutory interpretation. Words of a statute are to be read 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.

With respect to the text, s. 320.24(4) expressly enumerates 12 offences for which a discretionary driving prohibition is available and authorized; on its face a closed list that does not include s. 220 or s. 221. Where express reference is expected, the court can infer that the failure to mention something is a deliberate decision to exclude it. Furthermore, Parliament’s usual practice is to specify available punishments expressly. If Parliament wished to enable driving prohibitions for criminal negligence convictions, it would have expressly listed ss. 220 and 221 in s. 320.24(4). As well, Parliament chose to remove ss. 220 and 221 from the list of enumerated provisions when it enacted s. 320.24(4). It is well established that prior enactments may throw some light on the intention of Parliament in repealing and replacing a statute. This textual evolution is consistent with legislative intention to exclude the general offences of criminal negligence and manslaughter from the ambit of s. 320.24(4).

The availability of a discretionary driving prohibition for a criminal negligence conviction is not implied through Parliament's use of the term "found guilty" in s. 320.24(4). Findings of guilt and convictions are conceptually distinct. A finding of guilt is a verdict following trial that occurs when the essential elements of the offence have been proven. A conviction is a final judgment of the court by which a finding of guilt is entered. A finding of guilt can lead to several different outcomes, including a conviction and sentence or a stay of proceedings or an absolute or conditional discharge. This distinction however offers little assistance because s. 320.24(4) plainly indicates that a discretionary driving prohibition is available when an offender has been "found guilty" of an enumerated offence. What must be considered is whether an offender is "found guilty" of an enumerated offence under s. 320.24(4) when convicted of an unenumerated offence for which an enumerated offence is included.

The included offence machinery in s. 662 of the *Criminal Code* does not facilitate the imposition of punishment by implication. Section 662 signals that the function of the included offence provisions is limited to situations where a charged offence is not proved. It makes clear that only where the evidence does not prove criminal negligence or manslaughter does it become possible to convict the accused of the included dangerous operation offence. This provides fair notice of an alternate pathway to a guilty verdict but it is not at all clear this gives notice of liability for punishments attached uniquely to included offences if convicted of the charged offence. Accused persons must be informed in advance and in a non-ambiguous manner

of the punishments they are liable to if convicted of a particular offence. The included offence machinery should not be extended beyond situations where the charged offence is not proved absent a clear legislative signal.

An additional signal of Parliament's intent is that, when an offender is found guilty of an offence enumerated in s. 320.24(4), a driving prohibition can be imposed in addition to any other punishment "for that offence". Criminal negligence is not enumerated; it cannot qualify as "that offence". As well, the French version of s. 320.24(4) is equally authoritative and must be considered. With Bill C-46, there was no change to the "*déclaré coupable*" language akin to the switch in English from "convicted or discharged" to "found guilty". This renders unpersuasive the argument that Parliament employed the distinction between concepts of conviction and guilt to create a new approach for imposing driving prohibitions. The text of s. 320.24(4) as a whole is clear and does not reveal any ambiguity. Criminal negligence offences are no longer listed as offences that can attract a discretionary driving prohibition and the use of "found guilty" strongly points to the need for an express judicial determination of guilt on an offence stipulated in the charging document or an included offence where the charged offence is not proved.

Statutory interpretation also requires considering context, purpose, and relevant legal norms. Several considerations stemming from surrounding statutory context and criminal law principles shed light on s. 320.24(4), such as s. 320.24(1) and s. 320.25, as well as the *Kienapple* principle. Statutory interpretations that are

consistent with or promote legislative purpose should be adopted. Bill C-46 raised certain maximum penalties and it is significant that penalties for the dangerous operation offences are now greater than or equal to those available for the criminal negligence offences. These changes further Parliament's objectives of developing a simplified, coherent, and efficient driving offence scheme under a single part of the *Criminal Code*. They signal that dangerous driving is best addressed by resorting to the dangerous operation offences under s. 320.13, which have been made more versatile and consistent with other driving offences resulting in similar harm. The exclusion of the criminal negligence offences from the ambit of s. 320.24(4) is therefore neither inconsistent with legislative purpose nor an absurdity.

Per Côté, Kasirer, Jamal and **Moreau JJ.** (dissenting): The appeal should be dismissed. Section 320.24(4) of the *Criminal Code*, properly interpreted, authorizes a driving prohibition order where an offender is convicted under ss. 220 or 221 of the *Criminal Code*. A finding of guilt for a principal offence necessarily entails findings of guilt for any lesser included offences. Under s. 662(5) of the *Criminal Code*, dangerous operation of a conveyance contrary to s. 320.13 is a lesser included offence of criminal negligence through the operation of a conveyance under ss. 220 and 221. Therefore, a finding of guilt in respect of criminal negligence through the operation of a conveyance necessarily entails a finding of guilt in respect of dangerous operation of a conveyance.

The modern approach to statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical

and ordinary sense, in harmony with the statute's scheme and objects. The plain meaning of the text is not in itself determinative. To ascertain legislative intent, the text of a provision must be placed in context and tested against other indicators of legislative meaning, including legislative objectives. The consequences of adopting a particular interpretation serve as an important interpretive aid. Consequences consistent with the purpose and scheme of the legislation are presumed to have been intended whereas consequences that are absurd or otherwise unacceptable are presumed not to have been intended.

There is a meaningful distinction between a finding of guilt and a conviction or discharge for the purpose of s. 320.24(4) — they are distinct concepts and are not interchangeable. The change from “convicted or discharged” in the former s. 259(2) to “found guilty” in s. 320.24(4) indicates that, for a valid driving prohibition order to be imposed, only a finding of guilt for a listed offence is required and a driving prohibition order may be imposed prior to the entry of a conviction. Several examples in the *Criminal Code* and the *Youth Criminal Justice Act* demonstrate that a conviction does not necessarily flow from a finding of guilt. However, when a conviction for an offence is recorded, it will always mean that the offender has been found guilty of that offence. Further, a conviction or discharge is not always necessary for a penalty to be imposed. Section 320.23 permits delaying sentencing for an offence in the operation of a conveyance to allow opportunity to attend a treatment program and apply for a medical discharge.

The use of “*déclaré coupable*” in the French version of 320.24(4) and its predecessor does not assist in determining whether Parliament intended to create a new approach. A “*déclaration de culpabilité*” can refer either to a finding of guilt or a conviction. The change in the English wording from “convicted or discharged” to “found guilty” informs the interpretation of “*déclaré coupable*” and suggests that it now refers to a finding of guilt in the context of s. 320.24(4).

A finding of guilt for a principal offence necessitates, by operation of law, findings of guilt for all lesser included offences. By definition, all elements of the lesser included offence are contained in the elements of the principal offence. As well, an indictment charging an offence also charges all lesser included offences, because they are necessarily committed in the commission of the principal offence. It is appropriate therefore for a penalty for a lesser included offence to formally attach to the principal offence. Section 662(5) explicitly makes dangerous operation of a conveyance under s. 320.13 a lesser included offence to criminal negligence where the offence involves the operation of a conveyance. This necessitates that if an individual is convicted under ss. 220 or 221, they are by operation of law found guilty of the offence under s. 320.13. It is impossible to act in a criminally negligent manner through the operation of a conveyance without dangerously operating a conveyance.

Parliament’s choice not to expressly list ss. 220 and 221 in s. 320.24(4) signals an intention to include criminal negligence through the inclusion of dangerous operation under 320.13 in the listed offences. Parliament has determined that only a

finding of guilt for one of the listed offences is required for a driving prohibition order to be imposed. This is consistent with criminal law principles including the requirement of fair notice, recognition of lesser included offences, and the rule against multiple convictions set out in *Kienapple*. The text of s. 662(5) and an indictment charging s. 220 or 221 offences provide adequate notice that a court may impose a driving prohibition order following a conviction for criminal negligence causing death or bodily harm where it arises out of the operation of a conveyance. Where an offender is “found guilty” through the operation of s. 662(5) of the lesser included offence, a driving prohibition order is required by the text of s. 320.24(4) as a punishment for “that offence” because it is one of the listed offences in s. 320.24(4). The driving prohibition order attaches to the conviction for criminal negligence.

An interpretation of s. 320.24(4) that does not authorize driving prohibition orders as a penalty for criminal negligence through the operation of a conveyance produces an absurd consequence. It creates an irrational distinction by authorizing a sanction for a lesser included offence, but not the more serious principal offence. It is inconsistent with Parliament’s stated purposes for enacting Part VIII.1 of the *Criminal Code* of reducing the significant number of deaths and injuries caused by impaired driving. Nor is it sufficiently clear that Parliament intended to signal through Bill C-46 that the Crown should resort to charging dangerous operation in preference to criminal negligence. Finally, the absence of the ss. 220 and 221 offences among the listed offences in s. 320.24(4) is not indicative of a drafting error that creates a legislative gap because no gap exists if s. 320.24(4) is properly read with s. 662(5).

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By Martin J.

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46, [2014] 2 S.C.R. 390; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *R. v. Prince*, [1986] 2 S.C.R. 480; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Doliente*, [1997] 2 S.C.R. 11, rev'g (1996), 108 C.C.C. (3d) 137; *R. v. Lights*, 2017 ONSC 5153, 18 M.V.R. (7th) 110, aff'd 2020 ONCA 102, 60 M.V.R. (7th) 47; *R. v. Bhangal*, 2016 ONCA 857, 100 M.V.R. (6th) 173; *R. v. Mowlai*, 2017 ONSC 4815, 15 M.V.R. (7th) 38; *R. v. K. (R.)* (2005), 198 C.C.C. (3d) 232.

By Moreau J. (dissenting)

R. v. Alex, 2017 SCC 37, [2017] 1 S.C.R. 967; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763; *La Presse inc. v. Quebec*, 2023 SCC 22; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101, 480 D.L.R. (4th) 1; *R. v. Francisco*, 2023 BCCA 450, 433 C.C.C. (3d) 1; *R. v. Boily*, 2022 ONCA 611, 163 O.R. (3d) 161; *R. v. Pearson*, [1998] 3 S.C.R. 620; *R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Basque*, 2023 SCC 18; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371; *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17; *R. v. Al-Kassem*, 2015 ONCA 320, 78 M.V.R. (6th) 183; *R. v. Abau-Jabeen*, 2019 ONSC 5399, 58 M.V.R. (7th) 304; *R. v. Gardner and Fraser*, 2021 NSCA 52, 406 C.C.C. (3d) 156; *Kienapple v. The Queen*,

[1975] 1 S.C.R. 729; *R. v. Heaney*, 2013 BCCA 177, 337 B.C.A.C. 43; *Sarazin v. R.*, 2018 QCCA 1065; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Javanmardi*, 2019 SCC 54, [2019] 4 S.C.R. 3; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60.

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Criminal Law Amendment Act, 1985, R.S.C. 1985, c. 27 (1st Supp.), s. 36.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Kalmakoff, Schwann and McCreary JJ.A.), 2022 SKCA 132, 420 C.C.C. (3d) 290, [2023] 3 W.W.R. 574, [2022] S.J. No. 405 (Lexis), 2022 CarswellSask 531 (WL), affirming a decision of Danyliuk J., 2021 SKQB 141, 84 M.V.R. (7th) 257, [2021] S.J. No. 247 (Lexis), 2021 CarswellSask 314 (WL). Appeal allowed and order of driving prohibition set aside, Côté, Kasirer, Jamal and Moreau JJ. dissenting.

Brent D. Little and Katherine Pocha, for the appellant.

Pouria Tabrizi-Reardigan, for the respondent.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin and O'Bonsawin JJ. was delivered by

MARTIN J. —

I. Overview

[1] The Court is called upon to decide between competing interpretations of s. 320.24(4) of the *Criminal Code*, R.S.C. 1985, c. C-46. This provision, which came into force in 2018 following the adoption of Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21, permits sentencing judges to impose a discretionary driving prohibition where an offender has been “found guilty” of one of the provision’s

enumerated offences, an express list of driving-specific offences which includes dangerous operation of a conveyance contrary to s. 320.13. The former s. 259(2) provided for the ability to impose a prohibition where an offender had been “convicted or discharged” of a broader list of enumerated offences. Three general offences that apply beyond driving cases are no longer included in the list of offences that can attract a driving prohibition under the new s. 320.24(4): criminal negligence causing death (s. 220), criminal negligence causing bodily harm (s. 221), and manslaughter (s. 236).

[2] The appellant, Braydon Wolfe, was convicted of general criminal negligence-based offences, which are no longer expressly listed as giving rise to a discretionary driving prohibition under the new *Criminal Code* provision. The issue before this Court is whether, in addition to his term of imprisonment, it remains lawful to impose the further punishment of a driving prohibition upon him.

[3] The Court of Appeal for Saskatchewan’s interpretation of s. 320.24(4) of the *Criminal Code* preserves the ability of sentencing judges to impose a driving prohibition on an offender convicted of driving-related criminal negligence. The Court of Appeal upheld the prohibition imposed on the appellant on the basis that his criminal negligence convictions in this context necessarily included findings of guilt for the included offence of dangerous operation, which is enumerated under s. 320.24(4) of the *Criminal Code*.

[4] Conversely, in other cases, the Court of Appeal for Ontario and Court of Appeal for British Columbia have rejected the result and the reasoning adopted by the

Saskatchewan court (*R. v. Boily*, 2022 ONCA 611, 163 O.R. (3d) 161; *R. v. Francisco*, 2023 BCCA 450, 433 C.C.C. (3d) 1).

[5] I conclude that the driving prohibitions imposed on the appellant were unlawful. Criminal negligence offences are no longer listed under s. 320.24(4) as offences that can attract a driving prohibition. The Crown’s proposed interpretation depends on the proposition that, following the enactment of Bill C-46, Parliament’s use of the term “found guilty” permits punishment to be imposed by implication and indirectly, rather than expressly and directly. This interpretation is implausible; it conflicts with the text of s. 320.24(4), sits in tension with the surrounding statutory context and purpose, and fails to fully accord with criminal law principles.

[6] With Bill C-46, Parliament endeavoured to create a clear, coherent, and self-contained scheme for driving offences. Driving-specific offences were reorganized into a new part of the *Criminal Code*, they were made more versatile through hybridization, and their maximum penalties were increased. It is neither absurd nor inconsistent with legislative purpose to exclude criminal negligence and manslaughter — general offences that are not limited to driving cases — from the ambit of s. 320.24(4). Nor has it been shown that Parliament made a mistake in drafting the provision by somehow inadvertently omitting the previously enumerated offences from the new section’s express list of captured offences. Rather, Parliament has broadly signalled through Bill C-46 that resorting to specific driving-related offences is preferable to general criminal negligence offences in driving cases. The changes to the

availability of discretionary driving prohibitions reflect a logical and deliberate choice to limit driving-specific punishments to driving-specific offences. This is a choice Parliament was free to make.

[7] For the reasons that follow, I would allow the appeal.

II. Background

A. *The Relevant Legislation at Issue on This Appeal*

[8] The *Criminal Code*'s driving-related provisions, which lie at the heart of this appeal, developed gradually and intermittently over a century. The *Criminal Code*, 1892, S.C. 1892, c. 29, contained one of the first driving offences: causing bodily harm “by wanton or furious driving, or racing or other wilful misconduct” while “having the charge of any carriage or vehicle”, which carried a maximum sentence of two years’ imprisonment (s. 253). Impaired driving was addressed for the first time in 1921 with the enactment of a prohibition on driving while intoxicated (S.C. 1921, c. 25, s. 3). In 1938, Parliament criminalized dangerous driving — defined as driving a motor vehicle “recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case” — regardless of whether death or injury ensued (S.C. 1938, c. 44, s. 16). Offenders were liable to up to two years’ imprisonment, a fine of up to \$1,000, and a driving prohibition of up to three years.

[9] Both prior to and following the introduction of the first dangerous driving and impaired driving offences, the Crown could prosecute serious driving-related misconduct that caused death or bodily harm by resorting to the manslaughter and criminal negligence offences (see K. Jokinen and P. Keen, *Impaired Driving and Other Criminal Code Driving Offences* (2nd ed. 2023), at p. 7). These offences carried significant maximum penalties of imprisonment, including life sentences (in cases where the driver caused death).

[10] Over time, there were gradual legislative reforms to the dangerous driving and impaired driving offences to account for developing consensus on what constitutes impairment, scientific advancements in breath testing, and a greater understanding of the harms caused by driving-related misconduct (see Jokinen and Keen, at pp. 8-12; Department of Justice Canada, *Legislative Background: reforms to the Transportation Provisions of the Criminal Code (Bill C-46)* (2017), at pp. 4-5). Maximum penalties were increased. The furious driving and dangerous driving offences were consolidated in 1954 into the offence of criminal negligence in the operation of a motor vehicle, increasing the maximum term of imprisonment to five years (*Criminal Code*, S.C. 1953-54, c. 51, s. 221(1)). The enactment of the *Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27 (1st Supp.), s. 36, further increased penalties and trifurcated the offence into three separate dangerous operation offences: dangerous operation *simpliciter* (a hybrid offence that, when prosecuted by indictment, attracted a maximum penalty of 5 years' imprisonment), dangerous operation causing bodily harm (10-year maximum), and dangerous operation causing death (14-year maximum) (s. 249).

[11] Over 30 years later, the government proposed Bill C-46 — a comprehensive revision to the *Criminal Code*'s driving-related provisions. The legislation proposed major changes (1) concerning the detection and prosecution of drug-impaired driving to coincide with the coming into force of the *Cannabis Act*, S.C. 2018, c. 16; and (2) authorizing mandatory roadside alcohol screening. These two proposals were largely the focus of the legislative debates.

[12] However, Bill C-46 also contained a complete overhaul of the *Criminal Code*'s driving provisions. All of the former driving-related offences were to be repealed and re-enacted under the new Part VIII.1 of the *Criminal Code* ("Offences Relating to Conveyances"). The Minister of Justice explained that this part of the bill's purpose was to ensure a "clear, coherent structure" in an area that has "become too complex and difficult to understand" (*House of Commons Debates*, vol. 148, No. 181, 1st Sess., 42nd Parl., May 19, 2017, at p. 11459 (Hon. J. Wilson-Raybould)). Speaking about the impaired driving regime in particular, the Minister noted:

This area of the criminal law perplexes even the most seasoned criminal professionals. It has developed in a piecemeal fashion since the first offence was enacted in 1921. It has never been comprehensively reformed, and according to a 1991 report by the former Law Reform Commission, its provisions are "virtually unreadable".

This state of affairs cannot be permitted to continue, especially in the area of criminal law that is among the most litigated. Bill C-46 proposes to create a clear, simplified, and modernized legislative framework to ensure that the public can better understand the law and also ensure that the police can effectively enforce it.

(*House of Commons Debates*, vol. 148, No. 224, 1st Sess., 42nd Parl., October 27, 2017, at p. 14638 (Hon. J. Wilson-Raybould); see also Law

Reform Commission of Canada, *Report on Recodifying Criminal Procedure*, vol. 1, *Police Powers* (1991), at p. 84; *Legislative Background: reforms to the Transportation Provisions of the Criminal Code (Bill C-46)*, at p. 11.)

[13] Bill C-46 was adopted by Parliament, and the new Part VIII.1 of the *Criminal Code* came into force on December 18, 2018. Various maximum and minimum penalties were increased by the legislation. For example, the maximum punishment for the indictable offence of dangerous operation causing death (contrary to s. 320.13(3)) was increased from 14 years' imprisonment to life imprisonment — consistent with the maximum penalties available for impaired operation causing death (s. 320.14(3)) and criminal negligence causing death (s. 220). The offence of dangerous operation causing bodily harm (contrary to s. 320.13(2)) was transformed into a hybrid offence, and its maximum penalty, when prosecuted by indictment, was increased to 14 years' imprisonment (from the previous 10-year maximum). This 14-year maximum is now equal to the potential punishment for impaired operation causing bodily harm (s. 320.14(2)) and exceeds that of criminal negligence causing bodily harm (s. 221).

[14] Bill C-46 also made changes to driving prohibition orders. The new s. 320.24 governs the availability of such orders. Offenders found guilty of impaired operation *simpliciter* (s. 320.14(1)) or failing to comply with a breath demand *simpliciter* (s. 320.15(1)) are subject to a mandatory prohibition order under s. 320.24(1). For other driving-related offences, a sentencing judge has the discretion to impose an order under s. 320.24(4), which reads:

(4) If an offender is found guilty of an offence under section 320.13, subsection 320.14(2) or (3), 320.15(2) or (3) or under any of sections 320.16 to 320.18, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).

(4) Le tribunal qui inflige une peine au contrevenant déclaré coupable d'une infraction prévue à l'article 320.13, aux paragraphes 320.14(2) ou (3) ou 320.15(2) ou (3), ou à l'un des articles 320.16 à 320.18 peut rendre, en plus de toute autre peine applicable à cette infraction, une ordonnance lui interdisant de conduire le moyen de transport en cause durant la période établie conformément au paragraphe (5).

Prior to Bill C-46, discretionary driving prohibitions were an available sentencing tool under s. 259(2):

(2) If an offender is convicted or discharged under section 730 of an offence under section 220, 221, 236, 249, 249.1, 250, 251 or 252 or any of subsections 255(2) to (3.2) committed by means of a motor vehicle, a vessel, an aircraft or railway equipment, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel, an aircraft or railway equipment, as the case may be

(2) Lorsqu'un contrevenant est déclaré coupable ou absous sous le régime de l'article 730 d'une infraction prévue aux articles 220, 221, 236, 249, 249.1, 250, 251 ou 252 ou à l'un des paragraphes 255(2) à (3.2) commise au moyen d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, le tribunal qui lui inflige une peine peut, en plus de toute autre peine applicable en l'espèce, rendre une ordonnance lui interdisant de conduire un véhicule à moteur dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public, un bateau, un aéronef ou du matériel ferroviaire

Parliament repealed the former s. 259(2) when it enacted Bill C-46 (s. 14).

[15] It is apparent by comparing the versions of the provision that Bill C-46 made two noteworthy changes to discretionary driving prohibition orders. First, the new provision enumerates fewer offences that are eligible for the punishment. Sentencing judges may impose a discretionary driving prohibition for the driving-specific offences of dangerous operation (s. 320.13, formerly s. 249), impaired operation causing bodily harm or death (s. 320.14(2) and (3), formerly s. 255(2), (2.1), (3) and (3.1)), failure/refusal to comply with a demand while knowing or being reckless to whether they were involved in an accident causing bodily harm or death (s. 320.15(2) and (3), formerly s. 255(2.2) and (3.2)), failure to stop after accident (s. 320.16, formerly s. 252), flight (s. 320.17, formerly s. 249.1), and operation while prohibited (s. 320.18, formerly s. 259(4)). Removed from the list and no longer enumerated are the general offences of criminal negligence causing death (s. 220), criminal negligence causing bodily harm (s. 221), and manslaughter (s. 236), along with the now-repealed offences of failure to keep watch on person towed (former s. 250) and unseaworthy vessel/unsafe aircraft (former s. 251).

[16] Second, the description of the event that triggers the provision's operation has been modified. In the English version of the provision, a driving prohibition could previously be imposed when the offender was "convicted or discharged under section 730" of an enumerated offence. Bill C-46 has changed the trigger to "found guilty". However, Bill C-46 brought about a more minor change to the French version of the text. The former s. 259(2) permitted driving prohibitions when the offender was "*déclaré coupable ou absous sous le régime de l'article 730*" of an enumerated offence.

Following Bill C-46, a prohibition is available when the offender has been “*déclaré coupable*”.

B. *The Underlying Offences and Proceedings*

(1) Circumstances of the Offences

[17] On August 21, 2017, the appellant drove on the wrong side of a divided highway near Langham, Saskatchewan. He caused a head-on collision, killing two people and seriously injuring another.

[18] The indictment alleged that the appellant committed two counts of criminal negligence causing death (contrary to s. 220 of the *Criminal Code*) and one count of criminal negligence causing bodily harm (contrary to s. 221 of the *Criminal Code*).

(2) Saskatchewan Court of Queen’s Bench (Danyliuk J.)

[19] In the Court of Queen’s Bench, the appellant was found guilty of the three criminal negligence charges set out in the indictment. Near the end of his reasons for judgment, the trial judge stated:

The findings of guilt on the criminal negligence counts effectively end my inquiry. However, I have gone on. Alternatively, in case I am in error in my analysis of criminal negligence, I have gone on to consider whether the evidence amounts to proof beyond a reasonable doubt of dangerous driving.

(2020 SKQB 324, 73 M.V.R. (7th) 242 (“trial reasons”), at para. 171)

The trial judge then considered the facts of the case in relation to the elements of the dangerous operation offences (also referred to as “dangerous driving”). He concluded that, in the alternative, he was “fully satisfied the Crown has met all the requirements to prove dangerous driving beyond a reasonable doubt” and therefore “[i]n the event [that the] analysis of the three criminal negligence counts is faulty, then [he] would convict the accused of three counts involving dangerous driving causing death and injury” (para. 180).

[20] The trial judge later sentenced the appellant to six years’ imprisonment on each of the criminal negligence causing death counts and three years’ imprisonment on the criminal negligence causing bodily harm count, all to run concurrently (2021 SKQB 141, 84 M.V.R. (7th) 257). The trial judge further imposed 10-year driving prohibitions on the criminal negligence causing death counts and a 7-year prohibition on the criminal negligence causing bodily harm count, all to run concurrently. He did not advert in his reasons to any issue regarding the availability of this sanction.

[21] The formal record of conviction, dated May 13, 2021, and prepared under s. 570 of the *Criminal Code*, indicates that the appellant was convicted of two counts of criminal negligence causing death (contrary to s. 220) and one count of criminal negligence causing bodily harm (contrary to s. 221) and further indicates the punishment imposed for those offences. The formal driving prohibition order, dated the same day, recites that the appellant was convicted of the criminal negligence counts

and prohibits the appellant from operating a motor vehicle in relation to those convictions.

- (3) Saskatchewan Court of Appeal, 2022 SKCA 132, [2023] 3 W.W.R. 574 (Kalmakoff J.A., Schwann and McCreary JJ.A. Concurring)

[22] The Court of Appeal dismissed the appellant's sentence appeal, having considered the length of the carceral sentence and the availability of the driving prohibition order. Only the latter is contested at this Court. Writing for a unanimous panel, Kalmakoff J.A. observed that Bill C-46 was driven by two key themes: "... (i) coherence, efficiency, simplification, and modernization of the *Criminal Code* provisions relating to driving offences; and (ii) increased punishments, with a focus on deterring people from dangerous and impaired driving" (para. 57). In Kalmakoff J.A.'s view, Parliament intended for Bill C-46 to "increase or, at the very least, maintain the penalties previously available for all criminal driving offences" (para. 58). On its face, the removal of a driving prohibition from the roster of available sanctions for criminally negligent driving that causes death or bodily harm is inconsistent with such an intention.

[23] Kalmakoff J.A. then examined a number of *Criminal Code* and *Youth Criminal Justice Act*, S.C. 2002, c. 1, provisions, as well as common law rules, demonstrating the legal distinction between findings of guilt and convictions. Section 662(5) of the *Criminal Code* provides that the offence of dangerous operation is an included offence for criminal negligence under ss. 220 and 221. By operation of

s. 662(5), it is not possible to be convicted of driving-related criminal negligence without also being guilty of the lesser included offence of dangerous operation. A conviction for criminal negligence necessarily includes a finding of guilt for dangerous operation. Moreover, while he was not obliged to, the trial judge also made an explicit finding that the Crown had proven all of the elements of the dangerous operation offences.

[24] Thus, Kalmakoff J.A. reasoned, just as Parliament must be taken to have understood the difference between a finding of guilt and a conviction, it must also be taken, in drafting s. 320.24(4) of the *Criminal Code*, as having been aware that dangerous operation is a lesser included offence of criminal negligence arising out of the operation of a conveyance. Interpreting s. 320.24(4) as authorizing a sentencing judge to impose a driving prohibition order following a criminal negligence conviction is the only interpretation that is consistent with the stated purpose of Bill C-46. An absurdity would result from the contrary interpretation; an offender would be subject to less serious consequences upon conviction of the more serious criminal negligence offence, compared to the lesser included dangerous operation offence.

[25] Accordingly, the Court of Appeal held that the driving prohibition orders against the appellant were lawful.

III. Issue on Appeal

[26] The sole issue on appeal to this Court is whether s. 320.24(4) of the *Criminal Code* permits the imposition of a driving prohibition upon conviction for the offence of criminal negligence causing death or bodily harm committed by means of a motor vehicle.

IV. Parties' Positions

A. *Appellant (Mr. Wolfe)*

[27] The appellant submits that the driving prohibitions were unlawful given that s. 320.24(4) does not list the offences of criminal negligence causing death (s. 220) and criminal negligence causing bodily harm (s. 221) as offences that can attract that punishment. With respect to the Court of Appeal's interpretation, the appellant points to examples where "findings of guilt" and "convictions" are used interchangeably in various contexts throughout the *Criminal Code*. He argues that the Court should therefore not assume that Parliament acted purposefully in drafting s. 320.24(4) of the *Criminal Code* and used the term "found guilty" to preserve the ability of a sentencing judge to impose a driving prohibition for an included offence. In effect, the Court of Appeal's interpretation creates a situation where punishment can be imposed by implication rather than by express terms.

B. *Respondent (His Majesty The King)*

[28] Under the former legislation, a driving prohibition could be imposed where a person was convicted of an enumerated offence. Consistent with the public protection objectives of the amendments, the new approach casts a wider net: a driving prohibition is available so long as a conviction for the more serious offence entails a finding of guilt for one of the basic enumerated offences.

[29] The Crown submits that the difference between a finding of guilt and a conviction is deeply entrenched in law, and Parliament must be taken to have understood the distinction. A finding of guilt is the proof of the essential elements of the offence and is a precondition to both a conviction and a discharge. At their highest, the appellant's examples of *Criminal Code* provisions using the two terms only show that "conviction" can sometimes stand for its constituent element of guilt, which the Crown does not take issue with. But, the appellant fails to show that the *Criminal Code* uses the narrow concept of guilt in place of the end-result concept of conviction.

[30] Dangerous driving is an included offence for criminal negligence causing death or bodily harm arising out of the operation of a motor vehicle. Thus, the Crown argues, the criminal negligence conviction proved the appellant guilty of one of the enumerated "basic driving offences" listed under s. 320.24(4). The driving prohibition orders were therefore lawful.

V. Analysis

A. *Governing Principles of Statutory Interpretation*

[31] Determining whether the *Criminal Code* permits a discretionary driving prohibition when there has been a conviction for criminal negligence causing death or bodily harm requires the Court to interpret s. 320.24(4) by employing longstanding principles of statutory interpretation.

[32] Words of a statute are to be read “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” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). While it is a proper starting point, the ordinary meaning of text is not determinative (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 3.01[3]). Statutory interpretation is incomplete without considering context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *R. v. Downes*, 2023 SCC 6, at paras. 24-25; Sullivan, at § 2.01[4]).

[33] In the analysis that follows, text, context, and legislative purpose will each be considered in a separate section, but they are not intended to be watertight compartments. Statutory interpretation factors are “closely related and interdependent” (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at

para. 31). Other principles of statutory interpretation also apply and will be referenced where applicable.

B. *Interpretation of Section 320.24(4)*

(1) Text

[34] For convenience, I reproduce s. 320.24(4) below:

(4) If an offender is found guilty of an offence under section 320.13, subsection 320.14(2) or (3), 320.15(2) or (3) or under any of sections 320.16 to 320.18, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).

(4) Le tribunal qui inflige une peine au contrevenant déclaré coupable d'une infraction prévue à l'article 320.13, aux paragraphes 320.14(2) ou (3) ou 320.15(2) ou (3), ou à l'un des articles 320.16 à 320.18 peut rendre, en plus de toute autre peine applicable à cette infraction, une ordonnance lui interdisant de conduire le moyen de transport en cause durant la période établie conformément au paragraphe (5).

(a) *The Criminal Negligence Offences Are Not Enumerated in Section 320.24(4)*

[35] Section 320.24(4) expressly enumerates 12 offences for which a discretionary driving prohibition is available and authorized. On its face, it establishes a closed list. In interpreting s. 320.24(4) to determine whether a driving prohibition can be imposed where there has been a conviction for a criminal negligence offence, it is very significant that neither s. 220 (criminal negligence causing death) nor s. 221

(criminal negligence causing bodily harm) are expressly included on the list of offences that can attract that punishment. In my view, the maxim *expressio unius est exclusio alterius* (“to express one thing is to exclude another”) is of interpretive significance here. Sullivan explains that an “implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly” (§ 8.09[1]; see also *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, at para. 59; *Cadieux (Litigation Guardian of) v. Cloutier*, 2018 ONCA 903, 143 O.R. (3d) 545, at para. 114). Where express reference is expected, the court can infer that the failure to mention something is the result of a deliberate decision to exclude it.

[36] A driving prohibition is a punishment (see *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 38). Parliament’s usual practice is to specify available punishments expressly. Within Part VIII.1 of the *Criminal Code*, provisions authorizing punishment — whether fines, imprisonment, or driving prohibitions — expressly list the offences to which those punishments directly apply (see ss. 320.19, 320.2, 320.21 and 320.24). The same is true in other parts of the *Criminal Code*, where the usual drafting practice is to either specify the punishment to which an offender is liable in the provision creating the offence or to enumerate the offences to which a particular punishment can attach.

[37] There is, therefore, strong reason to believe that if Parliament wished to enable driving prohibitions for criminal negligence convictions, it would have

expressly listed ss. 220 and 221 in s. 320.24(4). The fact it did not do so signals that the intention of Parliament was to exclude criminal negligence from the ambit of s. 320.24(4).

[38] Not only are the criminal negligence offences absent from the list of offences that can attract a discretionary driving prohibition, they were listed under the former s. 259(2), and Parliament chose to remove them when it repealed the former provision and re-enacted a different provision as s. 320.24(4).

[39] It is well established that “[p]rior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute” (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33; see also *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 60; Sullivan, at § 23.02[2]). Courts must presume that “amendments to the wording of a legislative provision are made for some intelligible purpose” (Sullivan, at § 23.02[3]). This remains so where the amendment takes the form of repeal and re-enactment, which is “generally viewed as the amendment of the former law” from a substantive perspective (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 111). Here, Parliament deliberately chose to repeal the former provision that listed the criminal negligence offences and replace it with a new one that does not. The textual evolution of the discretionary driving prohibition provision is consistent with legislative intention to limit the availability of

that sanction to the driving-specific offences in Part VIII.1 of the *Criminal Code*, excluding the general offences of criminal negligence and manslaughter.

[40] In short, criminal negligence offences are not listed as offences that can attract a discretionary driving prohibition. They used to be listed, but are no longer. Parliament has expressed a strong legislative signal by repealing the provision that listed such criminal negligence offences and enacting another section that excludes them. This situation is a significant obstacle to the Crown's submission that a driving prohibition remains an available punishment where an offender has been convicted of a criminal negligence offence.

(b) *The Distinction Between Findings of Guilt and Convictions*

[41] To get around the lack of express reference to the criminal negligence offences in s. 320.24(4), the Crown argues that the continued availability of a discretionary driving prohibition for a criminal negligence conviction is implied through Parliament's use of the term "found guilty" in the provision. As noted above, compared to the previous English version of the legislation, Bill C-46 changed the event that triggers the availability of a discretionary driving prohibition from situations where an offender is "convicted or discharged under section 730" of an enumerated offence to situations where the offender is "found guilty".

[42] I proceed to consider whether the term “found guilty” in s. 320.24(4) can perform the function argued by the Crown and reflects Parliament’s introduction of a new circular drafting technique into the *Criminal Code*.

[43] Findings of guilt and convictions are conceptually distinct in the criminal trial context. A finding of guilt is a verdict of the court following trial. It occurs when there has been a finding that the essential elements of the offence have been proven beyond a reasonable doubt (see *Quigley’s Criminal Procedure in Canada* (loose-leaf), by D. Rose, ed., at § 22:7; *Boily*, at para. 55; see also, regarding the related concept of a plea of guilt, *Criminal Code*, s. 606(1.1)(b); *Ontario Courtroom Procedure* (5th ed. 2020), by M. Fuerst, M. A. Sanderson and S. Firestone, eds., with the assistance of R. N. Beaudoin et al., at p. 586). A conviction, on the other hand, is “a final judgment of the court by which a finding of guilt is entered” (*R. v. Bérubé*, 2012 BCCA 345, 326 B.C.A.C. 241, at paras. 44 and 49; see also *Boily*, at para. 55; *R. v. Senior* (1996), 181 A.R. 1 (C.A.), at para. 19). There is some authority to the effect that the meaning of the term “conviction” can vary based on the context (see *Morris v. The Queen*, [1979] 1 S.C.R. 405, at p. 429; *R. v. McInnis* (1973), 1 O.R. (2d) 1 (C.A.)). There is no doubt, however, that a finding of guilt is a distinct and earlier step in the trial process than the recording of a conviction (see R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at § 6:88; Fuerst, Sanderson and Firestone, at p. 586). Section 570 of the *Criminal Code* describes the process by which a trial for an indictable offence concludes and the judgment of the court is recorded:

570 (1) If an accused who is tried under this Part is determined by a judge or provincial court judge to be guilty of an offence on acceptance of a plea of guilty or on a finding of guilt, the judge or provincial court judge, as the case may be, shall endorse the information accordingly and shall sentence the accused or otherwise deal with the accused in the manner authorized by law and, on request by the accused, the prosecutor, a peace officer or any other person, a conviction in Form 35 and a certified copy of it, or an order in Form 36 and a certified copy of it, shall be drawn up and the certified copy shall be delivered to the person making the request.

[44] A finding of guilt can lead to several different outcomes, including a conviction and the passing of sentence. Some issues that arise in criminal trials — such as whether to stay proceedings based on the entrapment defence or the rule against multiple convictions — are considered by the trial judge after a finding of guilt has been made but before a conviction is recorded (see *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 972; *R. v. Pearson*, [1998] 3 S.C.R. 620, at paras. 10, 13 and 16; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Provo*, [1989] 2 S.C.R. 3; see also Salhany, at § 6:88). Courts must, “as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed” (s. 720(1)). For some offences, where an accused “pleads guilty . . . or is found guilty”, the court may direct that the accused be absolutely or conditionally discharged “instead of convicting the accused” (s. 730(1)).

[45] In short, a finding of guilt is not synonymous with a conviction. Indeed, the former is a precondition to the latter.

[46] The parties’ written submissions (see A.F., at paras. 46-87; R.F., at paras. 31-53), and much of the discussion from the Court of Appeal (see C.A. reasons,

at paras. 59-74), focus on whether findings of guilt and convictions are used interchangeably throughout the *Criminal Code* and the common law and whether this heightens or lessens the significance of Parliament's choice (in the English version of the text) to change the event triggering s. 320.24(4)'s operation from "convicted or discharged" to "found guilty". Kalmakoff J.A. stated that Parliament must "be taken to have acted intentionally when it changed the description of the event that triggers the operation of the section . . . and to have done so with the difference between those concepts in mind" (para. 74 (emphasis deleted)).

[47] However, it is my view that, despite the emphasis in the parties' submissions on this issue, this appeal does not turn on whether the concepts of a finding of guilt and conviction are used interchangeably at various parts of the *Criminal Code*. Throughout the *Criminal Code*, it is possible to identify provisions that signal that Parliament was alive to the conceptual distinction between findings of guilt and convictions (such as ss. 570(1), 570(4) and 730(1), noted above), and other provisions where the distinction is not so clear. This exercise offers little assistance in resolving this appeal. The issue in this case is not whether a conviction or a finding of guilt is the gateway to a driving prohibition under s. 320.24(4); the text plainly indicates that this sentencing option is available when an offender has been "found guilty" of an enumerated offence. Rather, this Court must consider whether, as the Crown submits and the Court of Appeal accepted, an offender is "found guilty" of an enumerated offence under s. 320.24(4) — triggering the availability of a discretionary driving prohibition — when they are convicted of an unenumerated offence for which an

enumerated offence is included. The Crown's incorporation by implication argument depends in part on the proper meaning of "found guilty" in the context of the provision.

(c) *Included Offences*

[48] The Crown argues that the appellant's convictions on the criminal negligence counts "proved him guilty" of dangerous operation. Further, they point to the fact that the trial judge conducted a separate analysis of the dangerous operation offence in the reasons and "explicitly found him guilty of that included offence" (R.F., at paras. 54 and 86-87).

[49] Section 662 of the *Criminal Code* governs included offences. It provides, in part:

662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or

(b) of an attempt to commit an offence so included.

...

(5) For greater certainty, when a count charges an offence under section 220, 221 or 236 arising out of the operation of a conveyance, and the evidence does not prove that offence but proves an offence under section 320.13, the accused may be convicted of an offence under that section.

Stated briefly, an “offence is ‘included’ if its elements are embraced in the offence charged (as described in the enactment creating it or as charged in the count) or if it is expressly stated to be an included offence in the *Criminal Code* itself” (*R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371, at para. 25).

[50] The terms of the included offence provisions signal that their function is limited to situations where the charged offence is not proved. The provisions provide fair notice of an alternate pathway to a guilty verdict. Section 662(5) makes clear that the dangerous operation offence (contrary to s. 320.13) is an included offence for criminal negligence offences arising out of the operation of a conveyance (ss. 220 and 221). But, s. 662(5) also makes clear that only where the evidence does *not* prove the charged offence does it become *possible* the accused could be convicted of the included dangerous operation offence (as demonstrated by Parliament’s use of the phrases “does not prove that offence” and “may be convicted”). The trial judge in this case recognized this when he stated that he was satisfied that the appellant was guilty of dangerous operation “in the alternative” and “in case [he was] in error in [his] analysis of criminal negligence” (paras. 171 and 183). Similarly, in jury trials, the trial judge should not instruct a jury on potential liability for an included offence when there is no realistic possibility of an acquittal on the charged offence and a conviction on the included offence (see *R. v. Ronald*, 2019 ONCA 971, at para. 42; *R. v. Wong* (2006), 209 C.C.C. (3d) 520 (Ont. C.A.), at para. 12; *R. v. Savage*, 2023 ONCA 240, at para. 42). This reflects the role of included offences as being an *alternative* basis for a finding of guilt.

[51] The Crown's argument jumps from the uncontroversial principle that the accused may, in the alternative, be convicted (or discharged) of an included offence, to the novel principle that the accused may be liable for a punishment available for an included offence even if not convicted or discharged of that offence. The words used in s. 662 speak clearly to the former idea but not the latter. The Crown's position stretches the included offence rules beyond their current understanding in law and amounts to a novel method of statutory interpretation of criminal offences and penalties.

[52] The jurisprudence on included offences typically centers on the idea of fair notice (see, e.g., *G.R.*, at paras. 11-12). In *R. v. Pawluk*, 2017 ONCA 863, 357 C.C.C. (3d) 86, Paciocco J.A. explained that "the very concept of an included offence is predicated on the fact that it is not unfair to try the accused on an included offence since the charge laid alerts the accused person that they are alleged to have satisfied all of the elements of the included offence, as well as the charged offence" (para. 28; see also *G.R.*, at para. 30). In *G.R.*, Binnie J. outlined three categories of included offences: (1) offences included by statute; (2) offences included in the enactment creating the offence charged; and (3) offences which become included by the addition of apt words of description to the principal charge (paras. 29-33). Each of these categories meets the test for fair notice; the accused is notified of the extent of their possible jeopardy by either the terms of the *Criminal Code* or by the words of the indictment (see also Rose, at § 22:8).

[53] Accordingly, an accused has no complaint if, in the alternative, they are found guilty by the court of an included offence, even if that offence is not stipulated on the charging document. It is not at all clear, however, that an accused has been fairly put on notice of their liability for punishments attached uniquely to included offences in situations where they are convicted of the charged offence. Accused persons must be informed in advance and in a non-ambiguous manner of the punishments they are liable to if convicted of a particular offence. This imperative is particularly consequential where an accused pleads guilty to an offence, given the requirement that they be aware of the criminal consequences of their plea (see *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at para. 4). I do not think that offenders who have pleaded guilty to criminal negligence causing death — as in *Boily* — would reasonably have understood based on the legislation that they may be liable to a driving prohibition for that offence at the time of their plea.

[54] I understand the logic of the Crown’s argument, but I am not persuaded that the relevance of the included offence machinery, which provides fair notice of an alternative basis upon which an accused could be found guilty and subsequently convicted, should be extended beyond situations where the charged offence is not proved. It is well established that “[a]bsent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law” (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21; see also *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 59; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at paras. 55-56; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 763-64; *R. v. Basque*, 2023 SCC 18, at para. 49;

Interpretation Act, R.S.C. 1985, c. I-21, s. 45(2)). In my view, Parliament's use of the term "found guilty" in s. 320.24(4) does not amount to a clear legislative signal that the included offence machinery should take on a new role and facilitate the imposition of punishment by implication rather than express reference. This would be a subtle and peculiar expression of legislative intent.

[55] I add that it is of no moment in this case that the trial judge chose to conduct a separate analysis of the included dangerous operation offences (paras. 171-80). It was not improper for the trial judge to conduct an alternative analysis on the included offences. But the availability of a driving prohibition should not depend on whether a trial judge chose to analyze the elements of an included offence in circumstances where they were not required to do so.

[56] In my view, the use of the wording "found guilty" in s. 320.24(4) is suggestive of an express judicial determination, whether by a jury in announcing its verdict or a judge. McGuinness defines a "finding" as a "determination made by an adjudicator during the course of a proceeding on some question of fact" (K. P. McGuinness, *The Encyclopedic Dictionary of Canadian Law* (2021)). *Black's Law Dictionary* (11th ed. 2019) defines to "find" as "[t]o determine a fact in dispute by verdict or decision" and offers the phrase "find guilty" as an illustration. I agree with Skolrood J.A. that the natural and ordinary meaning conveyed by "found guilty" is that there has been a *specific* finding of guilt (*Francisco*, at para. 42). Given the usual function of included offences that I have described above, I cannot accept that a finding

of guilt within the meaning of s. 320.24(4) can be the *implied* result of some other judicial determination (i.e., a conviction for an offence not enumerated in s. 320.24(4)).

(d) *An Additional Signal in the Text of Section 320.24(4)*

[57] Another obstacle to the Crown’s proposed interpretation lies in the fact that s. 320.24(4) provides that when an offender is “found guilty” of an enumerated offence, a driving prohibition can be imposed “in addition to any other punishment that may be imposed for that offence”. In other words, the provision contemplates the imposition of punishment — including a driving prohibition and “other punishment” such as imprisonment — for the commission of an enumerated offence (see *Francisco*, at para. 43). Criminal negligence is not enumerated; it cannot qualify as “that offence”. The Crown’s proposed interpretation contemplates a form of bifurcation that conflicts with this limitation: a driving prohibition would be imposed for the enumerated dangerous operation offence, and “other punishment” (in the appellant’s case, imprisonment) would be imposed for the unenumerated criminal negligence offence. Put differently, the second half of the text of s. 320.24(4) signals that a driving prohibition can be ordered in addition to other punishment imposed for an enumerated offence — not in addition to punishment imposed for another offence.

(e) *Comparison of the English and French Changes to Section 320.24(4)*

[58] The English and French versions of s. 320.24(4) are equally authoritative and both must be considered (see *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390,

at para. 53; Sullivan, at §§ 5.02[3]-[5]). As explained, the gateway to a discretionary driving prohibition as a sentencing option in s. 320.24(4) is where an offender has been “found guilty” (in the English version) or “*déclaré coupable*” (in the French version) of an enumerated offence. With Bill C-46, while the “convicted” language in the former s. 259(2) was dropped from the English version and replaced with “found guilty”, the French version of former s. 259(2) permitted driving prohibitions when the offender was “*déclaré coupable ou absous sous le régime de l’article 730*”. There was no change to the “*déclaré coupable*” language in the French version akin to the switch in English from “convicted or discharged” to “found guilty”.

[59] For this reason, the Crown’s submission that Parliament “employed the long-recognized distinction between concepts of conviction and guilt to create a new approach for imposing driving prohibitions” is unpersuasive (R.F., at para. 3 (emphasis added)). While there is no doubt that there is a distinction between convictions and findings of guilt, the force of the Crown’s submission is derived from the change in English from the deletion of the word “convicted” and the introduction of the “found guilty” language — a change which did not occur in the equally authoritative French version.

(f) *Conclusion on the Text of Section 320.24(4)*

[60] In my view, the text of s. 320.24(4) as a whole is clear and does not reveal any ambiguity. Criminal negligence offences are no longer listed as offences that can attract a discretionary driving prohibition. Moreover, Parliament’s use of the phrase

“found guilty” strongly points to the need for an express judicial determination of guilt on an offence stipulated in the charging document or included in one that is (in situations where the charged offence is not proved). The Crown fails to persuade me that a *finding* of guilt on an included offence — sufficient to attract punishment under s. 320.24(4) — necessarily flows from conviction on the charged offence. This a very weak basis on which to argue that the text implies the inclusion of something that was repealed and not carried forward in a fundamentally altered scheme for driving offences.

[61] In such circumstances, the text of the provision usually dominates the interpretive exercise, but the relevant jurisprudence directs that the Court must still go on to consider context and legislative purpose (see *Canada Trustco Mortgage Co.*, at para. 10; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48).

(2) Statutory and Broader Criminal Law Context

[62] There are several considerations stemming from the surrounding statutory context and broader criminal law principles that shed light on s. 320.24(4).

(a) *Other Provisions in Part VIII.1 of the Criminal Code*

[63] The upshot of the Crown’s position is that when one is convicted of an offence, there is, by necessary implication, a finding of guilt on any included offence.

And they attach legal consequences to that implied finding of guilt. The Court must assess the implications of this position.

[64] It is instructive to consider *Criminal Code* provisions that are closely proximate to s. 320.24(4). Section 320.24(1) provides for a mandatory driving prohibition order in certain situations and contains similar wording to that in s. 320.24(4):

320.24 (1) If an offender is found guilty of an offence under subsection 320.14(1) or 320.15(1), the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (2).

By its terms, the provision mandates a driving prohibition where an offender has been found guilty of impaired operation *simpliciter* (contrary to s. 320.14(1)) or failure/refusal to comply with a demand *simpliciter* (s. 320.15(1)). On a first offence, the duration of the prohibition order is to be “not less than one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment” (s. 320.24(2)).

[65] The Crown’s proposed interpretation of s. 320.24(4) sits uneasily with the mandatory driving prohibition provision. I note that the more serious offences of impaired operation causing bodily harm (s. 320.14(2)) and impaired operation causing death (s. 320.14(3)), and their equivalents in s. 320.15, fall under the discretionary

driving prohibition provision in s. 320.24(4). Suppose a first-time offender were to be convicted of impaired operation causing death, which provides that: “Everyone commits an offence who commits an offence under subsection (1) and who, while operating the conveyance, causes the death of another person” (s. 320.14(3)). As this offence fully embraces the impaired operation *simpliciter* offence as one of its components, the effect of the Crown’s position in this case would be that there would be a conviction on the s. 320.14(3) offence and a finding of guilt on the included s. 320.14(1) offence. Could the offender be subject to both a discretionary driving prohibition of “any duration that the court considers appropriate” with respect to the former and a mandatory prohibition of “not less than one year and not more than three years” (in addition to the duration of any prison term) with respect to the latter (s. 320.24(2) and (5))? Would any discretionary driving prohibition imposed for impaired operation causing death have to comply with the minimum and maximum temporal parameters of s. 320.24(2) — ostensibly mandatory upon a finding of guilt for impaired operation *simpliciter*? That the implications of the Crown’s position are unclear in relation to its application to a closely proximate statutory provision detracts from its plausibility in relation to s. 320.24(4).

[66] I consider also s. 320.25, which governs stays of driving prohibition orders pending appeal:

320.25 (1) Subject to subsection (2), if an appeal is taken against a conviction or sentence for an offence under any of sections 320.13 to 320.18, a judge of the court to which the appeal is taken may direct that the prohibition order under section 320.24 arising out of the conviction shall,

on any conditions that the judge imposes, be stayed pending the final disposition of the appeal or until otherwise ordered by that court.

This section contemplates stays of driving prohibition orders when an appeal is brought against a conviction or sentence for an offence under ss. 320.13 to 320.18. The “conviction” language in English was retained with the enactment of Bill C-46 compared to the former s. 261(1) of the *Criminal Code*. In French, Parliament replaced “*déclaration de culpabilité*” (“finding of guilt”) with “*condamnation*” (“conviction”). Although the criminal negligence offences were listed under the former s. 261(1), they have been dropped from the stay pending appeal provision following Bill C-46.

[67] It is not clear that s. 320.25(1) could operate to stay the appellant’s driving prohibitions pending appeal if the Crown’s interpretation is accepted, as the appellant was not *convicted* of any of the offences listed under that subsection. Though it perhaps could be argued that the effect of the Crown’s proposed interpretation would be that the appellant was *sentenced* to a driving prohibition for the included s. 320.13 offence, Crown counsel clarified during the oral hearing that, in his submission, punishment attaches to the offence for which an offender is convicted — not the finding of guilt (transcript, at pp. 60-61). In any event, s. 320.25(1) refers to a driving prohibition order “arising out of the conviction” — referring to the conviction specified in the opening words of the provision that is limited to those falling between ss. 320.13 and 320.18. The argument that s. 320.24(4) operates to allow for driving prohibitions to be imposed for criminal negligence convictions (under ss. 220 and 221) sits uncomfortably with s. 320.25(1), whose text appears not to contemplate stays pending appeal for this

situation. Further, Bill C-46's deletion of any reference to the criminal negligence offences from what is now s. 320.25(1) also supports the conclusion that driving prohibitions are no longer contemplated for criminal negligence convictions.

[68] Finally, the Crown relies on the new s. 320.23 to illustrate how Parliament was attuned to the “liminal space between ‘a finding of guilt’ and ‘conviction or discharge’ to create a unique post-guilt but pre-sentence treatment option” (R.F., at para. 68). Section 320.23 also uses the “found guilty” language and provides:

320.23 (1) The court may, with the consent of the prosecutor and the offender, and after considering the interests of justice, delay sentencing of an offender who has been found guilty of an offence under subsection 320.14(1) or 320.15(1) to allow the offender to attend a treatment program approved by the province in which the offender resides. If the court delays sentencing, it shall make an order prohibiting the offender from operating, before sentencing, the type of conveyance in question, in which case subsections 320.24(6) to (9) apply.

(2) If the offender successfully completes the treatment program, the court is not required to impose the minimum punishment under section 320.19 or to make a prohibition order under section 320.24, but it shall not direct a discharge under section 730.

This mechanism only applies to those found guilty of the *simpliciter* impaired driving and failure/refusal to comply offences in ss. 320.14(1) and 320.15(1). Ordinarily, these offenders would be sentenced to a mandatory driving prohibition under s. 320.24(1), but s. 320.23(2) permits an exception where the offender successfully completes a treatment program. Where sentencing is delayed for the purpose of allowing the offender to attend such a treatment program, the court is required to make a temporary driving prohibition order under this section (and not under s. 320.24).

[69] The pre-sentencing context of this section differs from s. 320.24(4), which authorizes a particular punishment on sentencing. Delaying sentencing to allow the offender to attend a treatment program is conditional upon the consent of the Crown and the offender, which distinguishes the interim driving prohibitions authorized by s. 320.23(1) from the punishments that s. 320.24 authorizes in the sentencing context. The most that can be said of s. 320.23 in support of the Crown's position on this appeal is that it demonstrates that a finding of guilt is not synonymous with a conviction, which I accept.

(b) *Rule Against Multiple Convictions*

[70] The Crown's proposed interpretation of s. 320.24(4) would permit the appellant to be sentenced to custody as a result of his convictions for criminal negligence causing death and bodily harm and sentenced to driving prohibitions as a result of having been "found guilty" of dangerous operation causing death and bodily harm. In *Boily*, Fairburn A.C.J.O. raised the concern that "if charged with the included offence, the [Crown's] interpretation has the effect of creating a punishment for a crime that, through the operation of the principles in *Kienapple*, would necessarily attract a conditional stay because a person cannot be punished twice for the same offence" (para. 57; see also para. 58).

[71] The *Kienapple* principle prevents an accused from being convicted of multiple offences when there is a factual and legal nexus connecting the offences (*Kienapple*; *R. v. Prince*, [1986] 2 S.C.R. 480). There is a factual nexus where the same

act grounds both charges (*Prince*, at pp. 492-93). A legal nexus exists where “there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle” (pp. 498-99; see also S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶14.33). In short, the rule precludes more than one conviction arising out of the same delict (*Kienapple*, at p. 748; *Prince*, at pp. 488-90).

[72] In situations where there have been multiple findings of guilt and *Kienapple* is found to apply, the offender should be convicted and sentenced on the more serious offence, and a conditional stay should be ordered on the less serious offence (*Provo*, at p. 16; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at paras. 13 and 15).

[73] The rule can apply to bar multiple convictions for two charges arising out of the same delict where one charge is included in the other (see, e.g., *R. v. Doliente*, [1997] 2 S.C.R. 11). This could certainly be the case where an offender has been found guilty of both a criminal negligence offence and a separately charged dangerous operation offence (see, e.g., *R. v. Lights*, 2017 ONSC 5153, 18 M.V.R. (7th) 110, at para. 1, aff’d 2020 ONCA 102, 60 M.V.R. (7th) 47; *R. v. Bhangal*, 2016 ONCA 857, 100 M.V.R. (6th) 173, at para. 3; *R. v. Mowlai*, 2017 ONSC 4815, 15 M.V.R. (7th) 38). Whether barring multiple convictions in the case of included offences is properly described as an application of the *Kienapple* principle or some other similar rule that specifically pertains to included offences (see *R. v. Doliente* (1996), 108 C.C.C. (3d)

137 (Alta. C.A.), at pp. 152-54, per Harradence J.A., dissenting, rev'd [1997] 2 S.C.R. 11; *R. v. K. (R.)* (2005), 198 C.C.C. (3d) 232 (Ont. C.A.), at para. 35), it is not in doubt that multiple convictions in this context are precluded.

[74] In this case, there is no suggestion that the rule from *Kienapple* is directly engaged as the appellant was not convicted of multiple offences arising out of the same delict. He was only convicted of the criminal negligence offences. But had there been separate counts on the indictment alleging dangerous operation, the appellant could not have been convicted of all of the counts. The trial judge would have been required to determine which counts would be stayed under the *Kienapple* rule. As I see it, accepting the Crown's argument on s. 320.24(4) would nonetheless have the effect of permitting punishment for the stayed offences.

[75] I appreciate the clarification offered by Crown counsel during the oral hearing to the effect that, on the Crown's argument, the driving prohibitions would formally attach to the criminal negligence convictions and not the implied findings of guilt on the included dangerous operation offences (transcript, at pp. 60-61). This clarification may serve to address Fairburn A.C.J.O.'s practical concern about "how [one would] reflect a punishment for a stayed offence on someone's criminal record" (*Boily*, at para. 58). But s. 320.24(4) nonetheless provides for punishment — a discretionary driving prohibition — in relation to dangerous operation, not criminal negligence.

[76] In my view, the well-established rule against multiple convictions is a relevant legal principle that bears on the interpretation of s. 320.24(4). The notion that a conviction for an offence opens the door to punishments not expressly provided for that offence, but by implication based on those available for an included offence, sits in tension with the rule against multiple convictions. This is because the rule would operate to prevent punishment in relation to the included offence had it been charged separately on the indictment.

(3) Legislative Purpose

[77] Sullivan explains that “[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided” (§ 9.01[1]; see also Côté, Beaulac and Devinat, at pp. 421-22).

[78] I agree with the Court of Appeal that Bill C-46 furthered objectives of “coherence, efficiency, simplification, and modernization of the *Criminal Code* provisions relating to driving offences” (para. 57; see also *Boily*, at para. 11). With this legislation, Parliament repealed the *Criminal Code*’s driving-related provisions and re-enacted them in a new, self-contained Part VIII.1 (“Offences Relating to Conveyances”). This new part contains the declaration of principles, driving offences, punishments, other sentencing provisions, investigative provisions, and evidentiary rules. Several offences were transformed from straight indictable to hybrid offences, affording greater flexibility to prosecutors in less serious cases (ss. 320.13(2),

320.14(2), 320.15(2) and 320.16(2)). Hansard records reveal that parliamentarians were attuned to this change (*House of Commons Debates*, May 19, 2017, at pp. 11491-92 (P. Damoff); *Debates of the Senate*, vol. 150, No. 156, 1st Sess., 42nd Parl., November 7, 2017, at p. 4103 (Hon. G. Boniface)).

[79] Bill C-46 also raised certain maximum penalties, which the Court of Appeal noted was another key theme of the legislation (para. 57). In my view, while these changes no doubt promote the statutory goal of “detering persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug” (s. 320.12(b)), they mainly serve to further Bill C-46’s aims of simplification, coherence, and efficiency. The new maximum penalty of 14 years’ imprisonment for dangerous driving causing bodily harm (s. 320.13(2)), when prosecuted by indictment, aligns with the punishment provided for the other driving-related offences in situations where bodily harm ensues (ss. 320.14(2), 320.15(2) and 320.16(2)). The same goes for dangerous driving causing death (s. 320.13(3)), whose maximum penalty was increased to life imprisonment — like other driving-related offences resulting in death. Again, parliamentarians recognized that Bill C-46 brought about consistency to the penalty scheme (*House of Commons Debates*, May 19, 2017, at p. 11492 (P. Damoff); *Debates of the Senate*, November 7, 2017, at p. 4103 (Hon. G. Boniface)).

[80] It is significant that the increased penalties expressly enacted by Bill C-46 for the dangerous operation offences are greater than or equal to those available for the

criminal negligence offences. The maximum penalty for dangerous operation causing death (s. 320.13(3)) is now equal to criminal negligence causing death (s. 220): life imprisonment, the highest prison term available in the *Criminal Code*. The maximum penalty of 14 years for dangerous operation causing bodily harm (s. 320.13(2)) now exceeds the 10-year maximum available for criminal negligence causing bodily harm (s. 221).

[81] In my view, these changes further Parliament’s objectives of developing a simplified, coherent, and efficient driving offence scheme under a single part of the *Criminal Code*. They signal that dangerous driving is best addressed by resorting to the dangerous operation offences under s. 320.13, which have been made more versatile (with respect to hybridization) and consistent with other driving offences resulting in similar harm (with respect to penalties). As one parliamentarian noted during the debates: “With the increase of the dangerous driving causing death maximum penalty, there would no longer be a need for the prosecution to pursue separate offences in order to allow for a maximum penalty of life imprisonment” (*House of Commons Debates*, May 19, 2017, at p. 11492 (P. Damoff) (emphasis added)).

[82] I note that practitioners and courts have recognized the prosecutorial advantages following Bill C-46 of resorting to dangerous operation as opposed to criminal negligence. In their book *Impaired Driving and Other Criminal Code Driving Offences*, Jokinen and Keen write that they “predict that criminal negligence will fall into disuse in driving cases, as it is a harder offence to prove and other available

offences, such as dangerous driving, now bear harsher penalties” (p. 531). They list several advantages, from the Crown’s perspective, of proceeding under the dangerous operation offences: the increased maximum penalties, the hybrid nature of the dangerous operation causing bodily harm offence, and the minimum fines and jail sentences that do not apply to criminal negligence (p. 157). In *Boily*, Fairburn A.C.J.O. made a similar observation related to the equal maximum penalties of life imprisonment for dangerous operation causing death and criminal negligence causing death (para. 73).

[83] The Court of Appeal below reasoned that it would be absurd if s. 320.24(4) did not allow for a driving prohibition for criminal negligence convictions given that the result would be that “being convicted of the more serious offence — criminal negligence — would leave the offender subject to less serious consequences than being convicted of a lesser included offence” (para. 79; see also *Boily*, at para. 50). The Crown argues that the effect of the appellant’s interpretation of s. 320.24(4) is that there would be an “inversion of the relationship between punishment and seriousness of the offence” (R.F., at para. 81; see also para. 93).

[84] Given the objectives advanced by Bill C-46, I do not accept that the exclusion of the criminal negligence offences from the ambit of s. 320.24(4) would be inconsistent with legislative purpose or represent an absurdity. Rather, this interpretation is perfectly consistent with Bill C-46’s stated purpose and what Parliament has actually enacted. Over time, Parliament has increasingly underscored

the seriousness of dangerous driving by gradually raising the penalties attached to the dangerous operation offence. Bill C-46 marked the point where those penalties matched or exceeded those available for criminal negligence — a more general offence that is not unique to the driving context. Jokinen and Keen have observed, as a result, that “criminal negligence is no longer the most serious penal offence” in driving cases (*Impaired Driving and Other Criminal Code Driving Offences: A Practitioner’s Handbook* (2019), at p. 137). I recognize that dangerous operation is nonetheless an included offence for criminal negligence under s. 662(5). But, the legislative changes to the penalty scheme significantly detract from the Crown’s absurdity argument. The assumption that criminal negligence is relatively more serious than dangerous operation may need to be revisited following the enactment of Bill C-46.

[85] My colleague states that although “lengthier penalties are available for the offence of dangerous operation of a conveyance, the offence of criminal negligence is at least as serious as dangerous [operation]” (Moreau J.’s reasons, at para. 140 (emphasis added)). In my view, for the absurdity argument to have any purchase, the criminal negligence offences must be shown to be more serious than dangerous operation. The existence of countervailing considerations pointing in different directions with respect to the comparative seriousness of these offences forecloses the absurdity argument being raised by the Crown. Parliament was entitled to modify the sentencing regime for driving offences; the exclusion of the criminal negligence offences from the ambit of s. 320.24(4) is only absurd if one applies old law to changed law and ignores what Parliament did by overhauling the penalty scheme in Bill C-46.

[86] I conclude that the exclusion of the criminal negligence offences from the list of enumerated offences that can attract a discretionary driving prohibition under s. 320.24(4) is not absurd or inconsistent with legislative purpose. There is therefore no need to give the phrase “found guilty” in that provision the meaning argued by the Crown in order to avoid such a result.

[87] Moreover, changing the event that triggers the operation of s. 320.24(4) from “convicted or discharged under section 730” language to “found guilty” in the English version and from “*déclaré coupable ou absous sous le régime de l’article 730*” to “*déclaré coupable*” in the French version makes sense in light of the legislative objectives of simplicity, coherence, and efficiency. As I have explained, a finding of guilt on a particular charge can lead to several different outcomes, including a conviction, discharge, and stay of proceedings. However, s. 320.24(4) pertains to the sentencing context (given its reference to the “court that sentences the offender”). As the Crown notes, “[o]nly two options are available at this point: a conviction and sentence, or a discharge” (R.F., at para. 49). Using the term “found guilty” promotes simplicity and economy of language, as the term would capture both situations of conviction and discharge (see *Boily*, at para. 61). The change also suggests an attempt to harmonize the English and French versions of the provision, given that the French versions of both the former s. 259(2) and the new s. 320.24(4) have used “*déclaré coupable*”. Such harmonization would be entirely consistent with the objective of Bill C-46, as expressed by the Minister of Justice, to re-enact the driving offence scheme in a manner that is “more clearly drafted and organized” (*Proceedings of the Standing*

Senate Committee on Legal and Constitutional Affairs, No. 34, 1st Sess., 42nd Parl., January 31, 2018, at p. 34:10 (Hon. J. Wilson-Raybould)).

(4) Conclusion on Interpretation of Section 320.24(4)

[88] A driving prohibition can be imposed under s. 320.24(4) when the offender has been found guilty of an offence enumerated under that subsection. This requires an express judicial pronouncement on an offence stipulated in the charging document or included in one that is (where the charged offence is not proved). This interpretation is supported by the plain and clear text of s. 320.24(4), the surrounding statutory context and purpose, and criminal law principles — which Parliament should not be taken to have departed from lightly.

[89] The Crown argues that where an offender is convicted of a criminal negligence offence, they are necessarily “found guilty” within the meaning of the provision of the included offence of dangerous operation. It acknowledges this would be a “new approach for imposing driving prohibitions” (R.F., at para. 3). However, I agree with Fairburn A.C.J.O. in *Boily* that if “Parliament had intended to navigate such a novel . . . course in criminal law, one would think that clarity would have been the order of the day” (para. 59). That Parliament employed a new drafting technique, as the Crown argues, is anything but evident. The machinery of included offences, which provides fair notice of an alternative path to a guilty verdict, does not provide persuasive support for the notion that a finding of guilt (that opens the door to punishment) can be implied. The Crown’s proposed interpretation sits in tension with

statutory provisions contained in the new Part VIII.1 of the *Criminal Code* as well as the rule against multiple convictions.

[90] Finally, I am not persuaded that accepting the Crown's proposed interpretation of s. 320.24(4) is necessary to avoid an absurdity or inconsistency with legislative purpose. With Bill C-46, Parliament chose to group driving-specific offences together in a self-contained part of the *Criminal Code*, make them more versatile, increase their penalties, and provide for unique driving-specific sentencing options. Parliament's logic in excluding the general offences of criminal negligence and manslaughter — which are not specific to the driving context — from the ambit of s. 320.24(4) is apparent given the emphasis on promoting the utility of the driving-specific *Criminal Code* provisions. The reforms are consistent with the purposes of Bill C-46 and the Minister of Justice's stated goals of clarifying and simplifying the criminal driving provisions.

VI. Conclusion

[91] The appellant was convicted of criminal negligence causing death and criminal negligence causing bodily harm, which are not enumerated offences under s. 320.24(4). He was not "found guilty" of an enumerated offence within the meaning of that provision. Accordingly, discretionary driving prohibitions were not available as a sentencing option.

[92] I would therefore allow the appeal and set aside the order of driving prohibition imposed on Mr. Wolfe.

The reasons of Côté, Kasirer, Jamal and Moreau JJ. were delivered by

MOREAU J. —

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I. Overview

[93] The issue in this appeal is whether s. 320.24(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorizes a court to impose a driving prohibition order following convictions for criminal negligence causing death or criminal negligence causing bodily harm under ss. 220(b) and 221 of the *Criminal Code*, respectively. Section 320.24(4) came into force on December 18, 2018, through the adoption of Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21.

[94] Bill C-46 contained amendments related to driving-related offences in the *Criminal Code*. Section 15 of Bill C-46 became Part VIII.1, “Offences Relating to Conveyances”, in the *Criminal Code*, and replaced many of the former provisions of Part VIII that pertained to driving offences. The amendments in Bill C-46 included the replacement of s. 259(2) with s. 320.24(4). There are two noteworthy differences between s. 320.24(4) and the former s. 259(2). First, the former s. 259(2) authorized a driving prohibition order where an offender was “convicted or discharged” of a listed offence. That is, a driving prohibition order could only be imposed upon a conviction or a discharge under s. 730 of the *Criminal Code* for an offence listed in former s. 259(2). The current s. 320.24(4) applies where an offender is “found guilty” of a listed offence. Second, the former s. 259(2) expressly included the offences of criminal

negligence causing death (s. 220) and bodily harm (s. 221). Section 320.24(4), however, has omitted any mention of those sections and, among the listed offences, only includes specified driving offences, including dangerous operation causing death or bodily harm (s. 320.13).

[95] Section 320.24(4) states:

(4) If an offender is found guilty of an offence under section 320.13, subsection 320.14(2) or (3), 320.15(2) or (3) or under any of sections 320.16 to 320.18, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).

(4) Le tribunal qui inflige une peine au contrevenant déclaré coupable d'une infraction prévue à l'article 320.13, aux paragraphes 320.14(2) ou (3) ou 320.15(2) ou (3), ou à l'un des articles 320.16 à 320.18 peut rendre, en plus de toute autre peine applicable à cette infraction, une ordonnance lui interdisant de conduire le moyen de transport en cause durant la période établie conformément au paragraphe (5).

[96] The introduction of the term “found guilty” in the English version is a clear change from the former s. 259(2), which previously stated:

(2) If an offender is convicted or discharged under section 730 of an offence under section 220, 221, 236, 249, 249.1, 250, 251 or 252 or any of subsections 255(2) to (3.2) committed by means of a motor vehicle, a vessel, an aircraft or railway equipment, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel, an aircraft or railway equipment, as the case may be

(2) Lorsqu'un contrevenant est déclaré coupable ou absous sous le régime de l'article 730 d'une infraction prévue aux articles 220, 221, 236, 249, 249.1, 250, 251 ou 252 ou à l'un des paragraphes 255(2) à (3.2) commise au moyen d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, le tribunal qui lui inflige une peine peut, en plus de toute autre peine applicable en l'espèce, rendre une ordonnance lui interdisant de conduire un véhicule à moteur dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public, un bateau, un aéronef ou du matériel ferroviaire

[97] I conclude that s. 320.24(4), properly interpreted, does authorize sentencing judges to impose a driving prohibition order where an offender is convicted of an offence under ss. 220 or 221 of the *Criminal Code*. I depart with the majority on two main points. First, a finding of guilt for a principal offence necessarily entails findings of guilt for any lesser included offences. Under s. 662(5) of the *Criminal Code*, where criminal negligence under ss. 220 and 221 arises through the operation of a conveyance, dangerous operation of a conveyance contrary to s. 320.13 is a lesser included offence of criminal negligence. Therefore, where criminal negligence arises through the operation of a conveyance, a finding of guilt in respect of criminal negligence necessarily entails a finding of guilt in respect of dangerous operation of a conveyance.

[98] Second, the majority's interpretation of s. 320.24(4) produces the absurd consequence that a driving prohibition order can be imposed for a lesser included offence, but not the principal offence, which has a higher *mens rea* requirement. It is inconsistent with the purposes of Part VIII.1 of the *Criminal Code* ("Offences Relating to Conveyances"), including coherence, public safety, and deterrence of driving-related

offence. Given the seriousness of criminal negligence and Parliament's policy concerns with respect to public safety, it would be absurd to suggest that Parliament intended for driving prohibition orders to be unavailable following a conviction for criminal negligence.

[99] For the reasons that follow, I would dismiss the appeal.

II. Background

[100] The appellant, Braydon Wolfe, drove his vehicle into oncoming traffic and crashed head-on into a family vehicle. The collision seriously injured a woman and killed her husband and child. Following trial, the appellant was convicted on December 8, 2020, of two counts of criminal negligence causing death and one count of criminal negligence causing bodily harm contrary to ss. 220(b) and 221 of the *Criminal Code*, respectively. In his reasons, the trial judge indicated that if he was mistaken on the elements of the offence of criminal negligence, the Crown had proven all the elements of the offences of dangerous operation of a conveyance causing death and dangerous operation of a conveyance causing bodily harm contrary to s. 320.13 of the *Criminal Code* (2020 SKQB 324, 73 M.V.R. (7th) 242).

[101] The trial judge sentenced the appellant to a global period of imprisonment of 6 years and imposed driving prohibition orders of 10 years on each count of criminal negligence causing death and 7 years on the count of criminal negligence causing bodily harm, along with a DNA order (2021 SKQB 141, 84 M.V.R. (7th) 257).

[102] The appellant appealed the length of his term of incarceration to the Saskatchewan Court of Appeal. The Court of Appeal raised the issue of whether the driving prohibition orders were authorized by law and invited further submissions from the parties. The Court of Appeal ultimately dismissed the appeal and maintained the driving prohibition orders (2022 SKCA 132, [2023] 3 W.W.R. 574).

[103] The appellant now appeals the driving prohibition orders to this Court. He argues that the sentencing judge had no authority to make the driving prohibition orders pursuant to s. 320.24(4) of the *Criminal Code* because s. 320.24(4) does not include ss. 220 and 221 of the *Criminal Code* among the listed offences for which a driving prohibition order may be imposed.

III. Issue

[104] The issue in this appeal is whether s. 320.24(4) of the *Criminal Code* permits sentencing judges to impose driving prohibition orders following convictions for criminal negligence causing death and criminal negligence causing bodily harm under ss. 220(b) and 221 of the *Criminal Code*, respectively, when those offences arise out of the operation of a conveyance.

IV. Analysis

A. *The Modern Approach to Statutory Interpretation*

[105] Section 320.24(4) must be interpreted according to the modern approach to statutory interpretation. The modern approach requires that the words of a statutory provision are read “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” (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 24, citing *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Statutory interpretation entails “discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute’s scheme and objects” (*Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 21; see also *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 27). The plain meaning of the text is not in itself determinative. To ascertain legislative intent, the text of a provision must be placed in context and tested against other indicators of legislative meaning, including legislative objectives (*La Presse*, at para. 23; *Alex*, at para. 31).

[106] The consequences of adopting a particular interpretation serve as an important interpretive aid within the modern approach to statutory interpretation. Consequences that are consistent with the purpose and scheme of the legislation are presumed to have been intended. Conversely, consequences that are absurd or otherwise unacceptable are presumed not to have been intended (*Rizzo*, at para. 27; *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101, 480 D.L.R. (4th) 1, at paras. 42-43, cited in *R. v. Francisco*, 2023 BCCA 450, 433 C.C.C. (3d) 1, at para.

34; R. Sullivan, “Statutory Interpretation in a New Nutshell” (2003), 82 *Can. Bar Rev.* 51, at p. 63). The greater the absurdity that flows from a particular interpretation, the more justified an interpreter is in rejecting it, provided that the words of the provision can reasonably bear the interpretation ultimately adopted (*Wang*, at paras. 42-43; Sullivan, at p. 64).

[107] This case largely turns on the interpretation of the words “found guilty” in s. 320.24(4). In interpreting s. 320.24(4), I first consider the operation of findings of guilt for lesser included offences and then the consequences of the available competing interpretations of s. 320.24(4).

B. *A Finding of Guilt for the Principal Offence Necessarily Entails a Finding of Guilt for Lesser Included Offences*

[108] There is agreement with the majority that there is a meaningful distinction between a finding of guilt and a conviction or discharge for the purpose of s. 320.24(4). However, as I am of the view that a finding of guilt necessarily entails findings of guilt for lesser included offences, a finding of guilt for criminal negligence, where it arises through the operation of a conveyance, is also a finding of guilt for dangerous operation.

- (1) A Finding of Guilt Is Distinct From a Conviction or Discharge in Section 320.24(4)

[109] A finding of guilt and a conviction or discharge are distinct concepts and are not interchangeable. The change from “convicted or discharged” to “found guilty” indicates that a conviction or discharge for one of the listed offences in s. 320.24(4) is not essential for a valid driving prohibition order to be imposed. Rather, only a finding of guilt for one of the listed offences is required. The language of “found guilty” instead of “convicted or discharged” permits a driving prohibition order to be imposed prior to the entry of a conviction (*R. v. Boily*, 2022 ONCA 611, 163 O.R. (3d) 161, at para. 62).

[110] The Saskatchewan Court of Appeal referred to several examples in the *Criminal Code* and the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”), that demonstrate the distinction between a finding of guilt and a conviction. For example, the provisions relating to the granting of a discharge pursuant to ss. 730(1) and 667(1) of the *Criminal Code* clearly demonstrate that there are alternatives to conviction following a finding of guilt. Similarly, ss. 42 and 82 of the *YCJA* make it clear that young offenders are found guilty but not convicted.

[111] Another example is the defence of entrapment, which can only be considered after a finding of guilt but before the entry of a conviction (*R. v. Pearson*, [1998] 3 S.C.R. 620, at para. 5; *R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577). While entrapment offers a defence for those who have been found guilty of a particular offence, it operates differently than other defences in the *Criminal Code* in three respects. First, a finding of entrapment does not negate the elements of the offence. In other words, where a court determines that the police entrapped an individual into

committing an offence, the court recognizes that each of the essential elements of the offence has been proven (see *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 972; *Ahmad*, at para. 17). Second, when entrapment is established on a balance of probabilities, a stay of proceedings is entered, and unlike other defences, the accused is not acquitted of the associated charge or charges. Third, the defence of entrapment, unlike most other defences, must be considered after a finding of guilt but before the entry of a formal conviction in order to retain the availability of a stay of proceedings (see *Pearson*, at para. 5).

[112] The difference in the wording of ss. 259(2) and 320.24(4), considered along with examples of provisions in the *Criminal Code* and *YCJA* described above, support the conclusion that a conviction and a finding of guilt are not interchangeable. As these examples illustrate, it is not the case that a conviction necessarily flows from a finding of guilt. However, when a conviction for an offence is recorded, it will always mean that the offender has been found guilty of that offence.

[113] A conviction or discharge is not always necessary for a penalty to be imposed. Section 320.23, which was also an amendment introduced by Bill C-46, permits a court to delay sentencing of someone found guilty of an offence in the operation of a conveyance to allow them the opportunity to attend a treatment program and apply for a medical discharge. In those circumstances, the offender having been “found guilty”, a driving prohibition order may be imposed under s. 320.24(4), thereby curtailing the offender’s driving privileges prior to a conviction being entered.

[114] My colleague rightly notes that there was no change to the wording of the French version of former s. 259(2) — “*déclaré coupable*” — while the English version of s. 320.24(4) was changed from “convicted” to “found guilty”, and that the French and English versions of the *Criminal Code* are equally authoritative. However, a “*déclaration de culpabilité*” can refer either to a finding of guilt or a conviction, though there remains an important distinction between them (see, e.g., *R. v. Basque*, 2023 SCC 18, at paras. 57-58). “*Déclaré coupable*” is used elsewhere in the *Criminal Code*, regardless of whether the English version uses “convicted” or “found guilty” (see, e.g., ss. 2.2(2), 9, 15 and 284). Therefore, in this case, the use of “*déclaré coupable*” in the French versions of both ss. 259(2) and 320.24(4) does not assist in determining whether Parliament intended to create a new approach to imposing driving prohibition orders by distinguishing between a finding of guilt and a conviction or discharge.

[115] The legislative evolution of a provision is relevant to determining its intended meaning (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 43-44; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 23.02[2]). If the concepts of a finding of guilt and a conviction or discharge were intended to be interchangeable, there would have been no reason for the change in the English version of s. 320.24(4). The French and English versions of s. 320.24(4) must be read together. The change in the English wording from “convicted or discharged” in s. 259(2) to “found guilty” in s. 320.24(4)

informs the interpretation of “*déclaré coupable*” in the French version and suggests that it now refers to a finding of guilt in the context of s. 320.24(4).

[116] As noted in the Court of Appeal decision, at para. 74:

. . . just as Parliament must be taken to have *acted intentionally* when it removed the explicit reference to ss. 220 and 221 in s. 320.24(4), it must also be taken to have *acted intentionally* when it changed the description of the event that triggers the operation of the section from being “convicted or discharged under section 730” of an enumerated offence to being “found guilty” of an enumerated offence, and to have done so with the difference between those concepts in mind. [Emphasis in original.]

[117] In order to resolve this appeal, however, we must determine the further issue of whether a finding of guilt for a principal offence is also a finding of guilt for each lesser included offence.

(2) A Finding of Guilt for a Principal Offence Necessarily Entails Findings of Guilt for Lesser Included Offences in the *Criminal Code*

[118] A finding of guilt for a principal offence necessitates, by operation of law, findings of guilt for all lesser included offences.

[119] I respectfully disagree with my colleague that the use of the wording “found guilty” in s. 320.24(4) is suggestive of an express judicial determination, whether by a jury in announcing its verdict or a judge (majority reasons, at para. 56). An express ruling or verdict of guilt is unnecessary, as a finding of guilt is constituted by each of the elements of the offence being proven beyond a reasonable doubt and the

negation of any applicable defences (*Quigley's Criminal Procedure in Canada* (loose-leaf), by D. Rose, ed., at § 22:7). This can be expressed either by a single finding of guilt of the offence, or individual findings that each of the elements have been proven.

[120] A finding of guilt for a lesser included offence is established by a finding of guilt for the principal offence because, by definition, all elements of the lesser included offence are contained in the elements of the principal offence (R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at § 6:89). A finding of guilt signifies that the Crown has proved its case beyond a reasonable doubt. Further, as previously held by this Court, “an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence” (*R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371, at para. 30 (emphasis in original), quoting *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17 (Ont. C.A.), at p. 19). Because an indictment charging a principal offence entails all lesser included offences, it is appropriate for a penalty for a lesser included offence to formally attach to the principal offence.

- (3) A Finding of Guilt for Criminal Negligence Under Sections 220 or 221, Where It Arises From the Operation of a Conveyance, Contains Findings of Guilt for the Lesser Included Offence of Dangerous Operation Under Section 320.13

[121] The text of s. 662(5), read in combination with s. 320.24(4), is sufficient for a conviction for criminal negligence arising out of the operation of a conveyance to authorize a driving prohibition order. Section 662(5) explicitly makes dangerous

operation of a conveyance under s. 320.13 a lesser included offence to criminal negligence where the offence involves the operation of a conveyance:

(5) For greater certainty, when a count charges an offence under section 220, 221 or 236 arising out of the operation of a conveyance, and the evidence does not prove that offence but proves an offence under section 320.13, the accused may be convicted of an offence under that section.

(5) Il est entendu que lorsqu'un chef d'accusation vise une infraction prévue aux articles 220, 221 ou 236 et découle de la conduite d'un moyen de transport, et que la preuve n'établit pas la commission de cette infraction, mais plutôt celle d'une infraction prévue à l'article 320.13, l'accusé peut être déclaré coupable de cette dernière.

[122] The operation of s. 662(5) necessitates that if an individual is convicted under ss. 220 or 221 for criminal negligence arising out of the operation of a conveyance, they are, by operation of law, found guilty of the offence under s. 320.13. The elements of dangerous operation of a conveyance under s. 320.13 are imbedded within the elements of criminal negligence under ss. 220, 221 or 236, where it arises through the operation of a conveyance (see *R. v. Al-Kassem*, 2015 ONCA 320, 78 M.V.R. (6th) 183, at para. 8 (judgment rendered prior to Bill C-46 coming into force); *R. v. Abau-Jabeen*, 2019 ONSC 5399, 58 M.V.R. (7th) 304, at paras. 60-61; *R. v. Gardner and Fraser*, 2021 NSCA 52, 406 C.C.C. (3d) 156, at para. 20). Therefore, it is impossible to act in a criminally negligent manner through the operation of a conveyance contrary to ss. 220 or 221 without dangerously operating a conveyance contrary to s. 320.13.

(4) The Availability of a Driving Prohibition Order as a Penalty for Criminal Negligence Is Consistent With Criminal Law Principles

[123] Parliament's choice not to expressly list ss. 220 and 221 in s. 320.24(4), in light of the relationship between principal and lesser included offences and the purposes of the scheme for driving-related offences, signals an intention to include criminal negligence through the inclusion of dangerous operation under s. 320.13 in the listed offences in s. 320.24(4).

[124] It is a matter for Parliament to determine what is procedurally required for a punishment to be imposed, provided it is constitutionally permissible. With respect to s. 320.24(4), Parliament has determined that only a finding of guilt for one of the listed offences in s. 320.24(4) is required for a driving prohibition order to be imposed, rather than any additional procedural steps that typically follow a finding of guilt (Salhany, at § 6:88). This approach to the imposition of driving prohibition orders is consistent with existing criminal law principles, including the requirement of fair notice to accused and the public, the recognition of lesser included offences, and the rule against multiple convictions.

[125] The text of s. 662(5) serves to provide adequate notice to an accused and the public that a court may impose a driving prohibition order following a conviction for criminal negligence causing death or bodily harm where it arises out of the operation of a conveyance. Both accused and the public as a whole have adequate notice that lesser included offences are included within principal offences. Moreover, an indictment charging an accused with one offence gives fair notice to the accused

regarding their legal jeopardy in relation to offences that are included within the charged offence (*G.R.*, at para. 30).

[126] Having been found guilty of at least one of the s. 220 or s. 221 offences, an offender is also “found guilty” through the operation of s. 662(5) of the lesser included offence under s. 320.13. Therefore, a driving prohibition order is, as required by the text of s. 320.24(4), a punishment for “that offence” — “that offence” being one of the listed offences in s. 320.24(4). The driving prohibition order attaches to the conviction for criminal negligence. However, for the driving prohibition order to be imposed, it is only necessary that an accused is “found guilty” of “that offence”, which occurs when an accused is necessarily found guilty of the lesser included offence of dangerous operation upon being found guilty of criminal negligence.

[127] This interpretation of s. 320.24(4) — which authorizes judges to impose driving prohibition orders provided one of the listed offences is a lesser included offence of one for which the offender was convicted — is also consistent with this Court’s decision in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. The “*Kienapple* principle” applies to avoid multiple convictions for offences where the offences “do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong” (see *R. v. Heaney*, 2013 BCCA 177, 337 B.C.A.C. 43, at para. 25, per Bennett J.A.; see also *Sarazin v. R.*, 2018 QCCA 1065, at para. 28 (CanLII), per Healy J.A.).

[128] In *Kienapple*, this Court held that a stay of proceedings must be entered to avoid multiple *convictions* for the same underlying criminal conduct. However, the rule against multiple convictions is not violated by s. 320.24(4), as no conviction is necessary for a driving prohibition order to be imposed. As noted in *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at para. 14: “The rule against multiple convictions applies, of course, only to *multiple convictions* — which is not our case” (emphasis in original). Accordingly, duplicate punishments do not result from our conclusion that a driving prohibition order can be granted where there is a conviction under ss. 220 and 221.

[129] My colleague questions whether an offender could be subject to both a discretionary driving prohibition order plus the entire prison term for one offence as well as a mandatory driving prohibition order plus the entire prison term for another offence (majority reasons, at para. 65). However, the *Kienapple* principle ensures that the offender is not punished twice for essentially the same criminal conduct.

[130] In summary, a finding of guilt for a lesser included offence is necessitated by a finding of guilt for its principal offence. Given that s. 662(5) makes dangerous operation under s. 320.13 a lesser included offence of criminal negligence under ss. 220 and 221, s. 320.24(4) is sufficient for a conviction for criminal negligence arising out of the operation of a conveyance to authorize an order under s. 320.24(4). Parliament’s approach of indirectly incorporating principal offences of criminal negligence by reference to the lesser offence of dangerous operation under s. 320.13 is both consistent

with how lesser included offences operate in our legal system and Parliament's objective of achieving simplicity in its approach to driving-related offences.

C. *Consequences of Competing Interpretations of Section 320.24(4)*

[131] An interpretation of s. 320.24(4) that does not authorize driving prohibition orders as a penalty for criminal negligence under ss. 220 and 221 where the negligence arose through the operation of a conveyance produces an absurd consequence. An interpretation may be considered absurd if it, for example, creates irrational distinctions, defeats the purpose of the legislation, leads to incoherence, undermines the efficient administration of justice, or violates important norms of justice or fairness (Sullivan (2003), at p. 64; *La Presse*, at para. 54).

[132] The appellant's interpretation creates an irrational distinction by making a sanction for a lesser included offence, but not the more serious principal offence, and is inconsistent with Parliament's stated purposes for enacting Part VIII.1 of the *Criminal Code*. The appellant's interpretation produces an absurd consequence because it authorizes the imposition of driving prohibition orders for the lesser included offence of dangerous operation, but not for the more serious principal offence of criminal negligence, and subverts Parliament's policy aim to reduce the significant number of deaths and injuries caused by impaired driving.

[133] The interpretation that permits driving prohibition orders to be imposed in such circumstances should be preferred because it avoids the absurdity raised by the

majority's interpretation (see Sullivan (2022), at § 10.01). The interpretation that permits driving prohibition orders where an offender has been convicted under ss. 220 or 221 for an offence arising from the operation of a conveyance should be preferred in part because it is consistent with the purpose of s. 320.24(4) and the scheme in which it operates. I reiterate that this interpretation is supported by the text of s. 320.24(4), in light of the text of s. 662(5) and the distinction between a finding of guilt and a conviction or discharge.

- (1) The Availability of a Driving Prohibition Order as a Punishment for Criminal Negligence Is Consistent With the Stated Purposes of Section 320.24(4)

[134] The availability of driving prohibition orders for criminal negligence where it arose through the operation of a conveyance is consistent with the purposes of Bill C-46. The purpose and object of the 2018 amendments, as described by the Honourable Jody Wilson-Raybould, then Minister of Justice, as she introduced Bill C-46 in Parliament, was to “reduc[e] the significant number of deaths and injuries caused by impaired driving” (*House of Commons Debates*, vol. 148, No. 181, 1st Sess., 42nd Parl., May 19, 2017, at p. 11459). She further stated that the “proposed legislation was drafted with all victims of impaired driving in mind” and that the “hope and expectation [of the amendments was] that the combined effects of the many reforms proposed in Bill C-46 [would] be enormously effective in deterring drug and alcohol impaired driving” (pp. 11459 and 11461).

[135] The preamble to Bill C-46 sets out nine considerations and objectives underlying the amendments, including: “dangerous driving and impaired driving injure or kill thousands of people in Canada every year”; “dangerous driving and impaired driving are unacceptable at all times and in all circumstances”; and “the Parliament of Canada is committed to . . . deterring the commission of offences relating to the operation of conveyances, particularly dangerous driving and impaired driving”.

[136] The Court of Appeal noted that the legislative intent behind Bill C-46 reflected two key themes: “. . . (i) coherence, efficiency, simplification, and modernization of the *Criminal Code* provisions relating to driving offences; and (ii) increased punishments, with a focus on deterring people from dangerous and impaired driving” (para. 57). The preamble of Bill C-46 is consistent with s. 320.12 of the *Criminal Code*, which states:

320.12 It is recognized and declared that

- (a) operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
- (b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
- (c) the analysis of a sample of a person’s breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration; and
- (d) an evaluation conducted by an evaluating officer is a reliable method of determining whether a person’s ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

[137] Preserving the authority of sentencing judges to impose a driving prohibition order where an offender has been convicted, and therefore found guilty, of criminal negligence arising out of the operation of a conveyance is consistent with these objectives of protecting society and achieving coherence of *Criminal Code* provisions relating to driving-related offences. This includes the recognition in s. 320.12(b) that “the protection of society is well served by deterring persons from operating conveyances dangerously”.

[138] I cannot accept that Parliament intended to exclude criminal negligence from the scheme for driving-related offences. My colleague notes that Parliament “has broadly signalled through Bill C-46 that resorting to specific driving-related offences is preferable to general criminal negligence offences in driving cases” (majority reasons, at para. 6). However, Parliament clearly intended to include criminal negligence within the scope of driving-related offences, having expressly contemplated criminal negligence arising from the operation of a conveyance in s. 662(5). Parliament, in making sweeping amendments to the scheme for driving-related offences in the *Criminal Code*, kept s. 662(5) intact, rather than repealing or qualifying this provision.

[139] With respect, it does not appear sufficiently clear to me that Parliament intended to signal through Bill C-46 that the Crown should resort to charging dangerous operation in preference to criminal negligence. One would have expected that if the intent of Parliament was to alter the statutory scheme in this way, it would have done

so explicitly and would not have made s. 320.13 a lesser included offence of ss. 220 and 221.

(2) Criminal Negligence Is at Least as Serious an Offence as Dangerous Operation of a Conveyance

[140] The availability of a driving prohibition order for the lesser included offence of dangerous operation, but not for the principal offence of criminal negligence, creates an irrational situation. While lengthier penalties are available for the offence of dangerous operation of a conveyance, the offence of criminal negligence is at least as serious as dangerous conveyance. This is for two reasons. First, s. 662(5) expressly makes dangerous operation a lesser included offence of criminal negligence. Second, as the Crown argued during the hearing, the higher *mens rea* requirement for criminal negligence makes it a normatively more serious offence. Sections 220 and 221 have a heightened *mens rea* element in the form of a “*marked and substantial* departure” from the standard of care of the reasonable person (*R. v. Javanmardi*, 2019 SCC 54, [2019] 4 S.C.R. 3, at para. 23 (emphasis added)). This is in contrast to the *mens rea* for dangerous operation, which is met through only a *marked* departure in the standard of care that a reasonable person would observe (*R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49 (applying the former s. 249(4) of the *Criminal Code*); see also *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at paras. 33-36).

[141] In summary, an interpretation of s. 320.24(4) that does not authorize sentencing judges to impose driving prohibition orders where an offender is convicted

of criminal negligence under ss. 220 or 221 is absurd because it irrationally bars a punishment for the offence with the heightened *mens rea* requirement when that punishment is clearly available for the offence with a less onerous *mens rea* element. As noted by Kalmakoff J.A., being convicted of criminal negligence “would leave the offender subject to less serious consequences than being convicted of a lesser included offence. That cannot be what Parliament intended” (C.A. decision, at para. 79). Furthermore, it stands in opposition to the purposes of the scheme, including “coherence” and “increased punishments”.

[142] Finally, I am not persuaded that the absence of the ss. 220 and 221 offences among the listed offences results from a drafting error that creates a legislative gap as found by the Ontario Court of Appeal in *Boily*, as this conclusion fails to account for the operation of s. 662(5). I agree with Kalmakoff J.A. that when s. 320.24(4) is properly interpreted, no such gap exists (C.A. decision, at para. 58). Read with s. 662(5), s. 320.24(4) vests sentencing judges with the authority to impose driving prohibition orders upon those found guilty of criminal negligence causing death or bodily harm in the operation of a conveyance.

D. *Conclusion*

[143] The omission of criminal negligence from s. 320.24(4) was coupled with the amendment of “convicted or discharged” to “found guilty”, dispensing with a requirement for a conviction or discharge for the imposition of a driving prohibition. Section 662(5) makes the offence under s. 320.13 a lesser included offence of criminal

negligence causing death or bodily harm under ss. 220 or 221. A conviction under ss. 220 or 221 (where that conviction arises from criminal conduct involving the operation of a conveyance) necessarily entails a finding of guilt for dangerous operation causing death or bodily harm by operation of s. 662(5), which provides the basis for the imposition of a driving prohibition order under s. 320.24(4). This interpretation is most consistent with a harmonious reading of the text of s. 320.24(4), its broader context, and the objects of the law within the legislative scheme as a whole, and avoids absurd consequences that are presumed not to have been intended by Parliament.

V. Disposition

[144] For these reasons, I would dismiss the appeal.

Appeal allowed, CÔTÉ, KASIRER, JAMAL and MOREAU JJ. dissenting.

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