# Top 10 Supreme Court of Canada (and Manitoba Court of Appeal Cases) of 2023/24

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## *R. v. Breault,* 2023 SCC 9

Early in the afternoon of April 2, 2017, in Val-Bélair near Quebec City, police were looking for someone reported by trail patrollers to be driving an all-terrain vehicle (ATV) while drunk. They stopped Pascal Breault, who was walking away from a parked ATV at a campsite. The officers wanted to take a breath sample from Mr. Breault, but they did not have an approved screening device (ASD) to do so. They radioed nearby officers to obtain a device.

While still waiting for the device, the officers demanded that Mr. Breault provide a breath sample. Mr. Breault refused three times to provide the required sample, even after he was told that refusing without a reasonable excuse to comply with the demand was a criminal offence. Given the repeated refusals of Mr. Breault, who said he had not driven the , and given that the device had not yet arrived, the officers eventually cancelled their request. Mr. Breault was then charged with refusing to comply with a demand by police to provide a breath sample.

Under section 254(2)(b) of the *Criminal Code* (now section 320.27(1)(b)), police can demand that a person "provide forthwith" a breath sample if the person is suspected of drinking and driving within the last three hours. The test must be done using an . When a person blows into the device, it provides officers with a reading that determines if there is sufficient alcohol in the person's body to warrant a full breathalyzer test. Anyone who refuses to take the test without a reasonable excuse commits a criminal offence.

A municipal court in Quebec found Mr. Breault guilty of refusing to comply with a demand to provide a breath sample, and Quebec's Superior Court dismissed his appeal. He then turned to the Quebec Court of Appeal, which allowed his appeal and acquitted him. The Crown appealed to the Supreme Court of Canada.

The Supreme Court has dismissed the appeal.

**The demand by police to provide a breath sample was invalid because they did not have immediate access to an when making the demand.**

Writing for a unanimous Court, Justice Suzanne Côté ruled that the validity of a demand to provide a breath sample requires that police have immediate access to an at the time the demand is made. According to Justice Côté, the word "forthwith" in section 254(2)(b) must, as a general rule, be given a strict interpretation that reflects its ordinary meaning, namely "immediately" or "without delay". At this step of the detection procedure, a detained driver does not have a right to counsel as guaranteed by section 10(b) of the *Canadian Charter of Rights and Freedoms*, since the driver must provide a breath sample immediately. The limit

on this right is justified because the detention is very brief. It is therefore essential to the constitutional validity of this provision that the interpretation given to the word “forthwith” be consistent with its ordinary meaning. As she noted, “[t]he more flexibly the word ‘forthwith’ is interpreted, the less the recognized justification for limiting the right to counsel holds up”.

Justice Côté stated that, exceptionally, unusual circumstances may justify a flexible interpretation of the word “forthwith” if they are related to the use of the device or the reliability of the result. However, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency, such as the supplying of s to police forces or the time needed to train officers to use them. The absence of a device at the scene at the time the demand is made is not in itself an unusual circumstance.

The Crown did not show that there were unusual circumstances that would account for the absence of an at the scene and thus justify a flexible interpretation of the immediacy requirement. Justice Côté therefore found that the demand made by police was invalid. For these reasons, Mr. Breault’s refusal to provide a breath sample was not a criminal offence.

### ***R. v. Basque*, 2023 SCC 18**

On the night of October 7, 2017, Ms. Basque was stopped in downtown Moncton, New Brunswick, for driving her vehicle erratically. She was charged with impaired driving and released on November 30 of the same year on the condition that she not drive a motor vehicle while awaiting trial. She eventually pleaded guilty. It was her first offence in 10 years, so it was treated as a first offence. Between her initial appearance and the date she was sentenced, 21 months passed.

Under section 259(1)(a) of the *Criminal Code* (now section 320.24(2)(a)), a first offence is punishable by an order prohibiting the offender from driving a motor vehicle for a minimum of one year. Furthermore, section 719(1) of the *Code* states that, except where otherwise provided, a sentence commences when it is imposed. However, there is also a rule under the common law — the body of law that is not written down as legislation but is instead based on precedent — that gives judges a discretion to grant credit for the time an offender has spent subject to a driving prohibition before being sentenced, that is, a “pre-sentence prohibition”. The interaction between these *Code* provisions and the common law rule is at the heart of this appeal.

The Provincial Court judge imposed a $1,000 fine and a one-year driving prohibition on Ms. Basque, in accordance with section 259(1)(a). He then considered the 21 months she had already been prohibited from driving and credited them against her sentence. He also backdated the order to November 30, 2017, the first day of the pre-sentence prohibition, which meant that Ms. Basque had already served the entire sentence by the date of the judge’s decision and was not subject to any further driving prohibition. The Crown appealed that judgment. The Court of Queen’s Bench appeal judge sided with the first judge.

On appeal to the New Brunswick Court of Appeal, a majority of the judges allowed the appeal, stating that the law does not allow such credit to be granted if this results in a prohibition being imposed for less than the minimum period required. It varied the appeal judge's decision to include a new one-year driving prohibition.

Ms. Basque then appealed that decision to the Supreme Court. The Court has allowed the appeal.

**Ms. Basque could be credited for the driving prohibition period she had already served, notwithstanding the one-year mandatory minimum provided for in the *Criminal Code*.**

Writing for a unanimous Court, Justice Kasirer stated that granting credit based on the common law discretion is perfectly consistent with the application of sections 259(1)(a) and 719(1). He explained that this coexistence rests on the well-known distinction between the concepts of "punishment", which refers to the total punishment imposed on an offender, and "sentence", which refers to the decision rendered by the court and which commences the day it is handed down by that court.

Justice Kasirer determined that section 259(1)(a) requires the court to impose a total punishment of one year to be served, not to hand down a sentence imposing a one-year prohibition that must be served prospectively. This interpretation is in keeping with the objectives of deterrence and punishment that underlie the provision. As he explained, "Parliament's intention is respected whether the punishment is served before or after the offender is sentenced, because the effect on the offender is the same in either case".

The sentencing judge was therefore correct in granting credit for the pre-sentence prohibition, but his decision to backdate the sentence was an error. According to Justice Kasirer, the judge could have imposed the one-year mandatory minimum driving prohibition on Ms. Basque, stated that a sentence commences when it is imposed, and then granted credit for the pre-sentence prohibition period she had already served. In her case, because that period exceeded the one-year minimum, the objectives of the minimum punishment were already met, and even surpassed. For these reasons, Justice Kasirer concluded that no further prohibition was required.

***R. v. D.F.*, 2024 SCC 14**

This appeal dealt with the question of whether a judge in a criminal trial made a mistake in understanding and treating key parts of the complainant's evidence in a manner that led him to unfairly convict the accused. In legal terms, this is called "misapprehending" the evidence.

D.F., whose name cannot be disclosed due to a publication ban protecting the complainant, was accused of sexual assault, sexual interference (meaning touching someone under the age of 16 for a sexual purpose), and of making sexually explicit material available to a child.

The complainant was eight years old at the time of the alleged offences. The offences allegedly took place while the accused was spending the day and evening at the house of the complainant's mother. The mother testified that she had been at the house all day and evening except when she briefly stepped out to a nearby store after dinner. D.F. stayed behind during that time with the complainant and her two younger siblings.

At trial, there were some inconsistencies in the complainant's testimony under cross-examination regarding whether or not her mother was home when the alleged sexual touching happened. However, the trial judge held that any minor inconsistencies in her testimony were a result of the complainant's immaturity and confusion, and that she was otherwise credible and reliable. The trial judge also found the other witnesses credible and reliable, including the complainant's mother, who testified that except for her trip to the store, she had been around the children all evening and did not observe any wrongdoing. Based on the evidence as a whole, including the testimonies, the trial judge was satisfied beyond a reasonable doubt of D.F.'s guilt and convicted him.

D.F. appealed his convictions. A majority of the Ontario Court of Appeal dismissed his appeal from the conviction on the count of making sexually explicit material available to a child, but allowed the appeal from his other two convictions. In the majority's view, the trial judge misapprehended the complainant's evidence on whether or not the complainant's mother was home at the time of the alleged sexual touching. That mistake was related to an important issue at trial, and played an essential role in the trial judge's reasoning process leading to convicting D.F. Moreover, the majority said that the trial judge did not sufficiently address the inconsistencies between the complainant's evidence and that of her mother in his decision to convict. For these reasons, the majority ordered that the convictions for sexual assault and sexual interference be set aside and that a new trial be held on those counts.

One judge disagreed and would have dismissed D.F.'s appeal in its entirety. In his view, the trial judge did not make any errors in assessing the evidence. The trial judge recognized that the complainant's evidence regarding the location of her mother at the time of the offences was inconsistent but he had not relied on it to convict D.F. Rather, the trial judge had correctly applied a common sense approach to assessing evidence of child witnesses to determine she was a credible and reliable witness overall. Finally, the dissenting judge determined that the trial judge's reasons sufficiently explained why he was satisfied beyond a reasonable doubt that the accused had committed the offences.

The Crown appealed to the Supreme Court of Canada.

**The Supreme Court has allowed the appeal.**

As such, D.F.'s convictions for sexual assault and sexual interference are restored.

***R. v. Kruk*, 2024 SCC 7**

These appeals dealt with the question of how credibility and reliability assessments by judges in criminal trials should be reviewed on appeal. They also addressed the role of common sense when assessing the evidence of witnesses.

Christopher James Kruk and Edwin Tsang were convicted of sexual assault in British Columbia in separate and unrelated cases. In both cases, the British Columbia Court of Appeal overturned their convictions because of alleged errors in the way the trial judges assessed the credibility and reliability of the complainants and the accused. The Court of Appeal found that the trial judges had made assumptions about human behaviour that were not supported by the evidence, which led the trial judges to believe the complainants and reject Mr. Kruk's and Mr. Tsang's testimonies for lack of credibility.

According to the Court of Appeal, the trial judges' assumptions were contrary to a new "rule against ungrounded common-sense assumptions", which would prevent judges from making speculations based on generalizations and common sense that are not grounded in the evidence before them. The Court of Appeal concluded that the trial judges had made errors of law by making assumptions about human behaviour not grounded in the evidence and that these errors had had an impact on finding Mr. Kruk and Mr. Tsang guilty, which justified setting aside their convictions and ordering new trials.

The Crown appealed the decisions to the Supreme Court of Canada. It argued that in both cases, the Court of Appeal should have deferred to the trial judges' conclusions on credibility. It also argued that their conclusions could only be overturned if they had made "palpable and overriding errors" in their assumptions. A "palpable" error is one that is obvious, and in this context could include where the assumption in question is obviously untrue, or where it is untrue or inapplicable in light of the other accepted evidence or findings of fact in the case. If such an error has been identified, the appeal court must also conclude that the trial judge's reliance on the assumption was "overriding", meaning it affected the result or went to the core of the outcome of the case. In the Crown's opinion, the Court of Appeal incorrectly relied on the rule against ungrounded common-sense assumptions, as opposed to looking for palpable and overriding errors in the assumptions made by the trial judges to justify overturning their credibility findings.

In response, Mr. Kruk and Mr. Tsang said the trial judges were wrong to rely on ungrounded common-sense assumptions to find them less credible. In their view, the Court of Appeal correctly used the rule against ungrounded common-sense assumptions overturn the trial judges' credibility findings and set aside their convictions.

The Supreme Court has allowed the appeals.

**The rule against ungrounded common-sense assumptions should not be recognized as a new basis for appellate courts to review credibility and reliability findings by trial judges.**

Writing for a majority, Justice Martin said that adopting a rule against ungrounded common-sense assumptions would represent a radical departure from how appellate courts have typically approached credibility and reliability assessments, especially in the context of sexual assault. She said the faulty use of common-sense assumptions in criminal trials should continue to be controlled by existing standards of review and rules of evidence. In some cases, a trial judge's use of common sense will be vulnerable to appellate review because it discloses recognized errors of law. Otherwise, like with other factual findings, she said credibility and reliability assessments – and any reliance on the common-sense assumptions inherent within them – will be reviewable only for palpable and overriding error.

In the instance cases, Justice Martin assessed the trial judges' credibility and reliability findings using the standard of palpable and overriding error and concluded that no such errors were made. For these reasons, she allowed the appeals and restored Mr. Kruk's and Mr. Tsang's convictions.

***R. v. Dowd*, 2024 MBCA 43**

***R. v. Buboire*, 2024 MBCA 7**

***R. v. Bykovets*, 2024 SCC 6**

This appeal dealt with the question of whether an internet protocol (IP) address attracts a reasonable expectation of privacy, such that a request by the police to obtain it constitutes a search under section 8 of the *Charter*. An IP address is a unique identification number and is necessary to access the Internet. It identifies Internet-connected activity and enables the transfer of information from one source to another. Companies that provide access to the Internet, referred to as Internet service providers, keep track of the user information that attaches to each IP address.

In 2017, the Calgary Police Services began an investigation into fraudulent online purchases from a liquor store and learned that the store's online sales were managed by Moneris, a third-party payment processing company. The police contacted Moneris to obtain the IP addresses used for the transactions, and Moneris identified two. The police then obtained an order from the court compelling the addresses' Internet service provider to disclose the name and residential address of the customer for each IP address. One was registered to Mr. Bykovets, and the other to his father. The police used this information to obtain and execute search warrants at their residences. Mr. Bykovets was arrested and charged with offences relating to, among others, the possession and the use of third parties' credit cards and personal identification documents.

Before his trial began, Mr. Bykovets challenged the police's request to obtain the IP addresses from Moneris, alleging it violated his right against unreasonable search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms*. The object of section 8 is to protect privacy, including informational privacy. To establish a violation of his section 8 right, Mr. Bykovets first needed to show that there had been a "search". A search occurs where the state invades a reasonable expectation of privacy. Mr. Bykovets argued he had such an expectation with respect to his IP address.

The trial judge found that the police's request to Moneris did not amount to a search because there was no reasonable expectation of privacy in an Internet user's IP address. She reasoned that on their own, IP addresses do not provide a link to, or any other information about, an Internet user. As such, Mr. Bykovets did not have a reasonable expectation of privacy in his IP address and there was no violation of his section 8 right. He was ultimately convicted of 14 offences.

A majority of the Alberta Court of Appeal agreed with the trial judge and dismissed Mr. Bykovet's appeal. In dissent, one judge would have allowed his appeal, on the basis that a reasonable expectation of privacy did attach to the IP addresses. Mr. Bykovets appealed to the Supreme Court of Canada.

The Supreme Court of Canada has allowed the appeal.

***An IP address attracts a reasonable expectation of privacy*.**

Writing for the majority, Justice Karakatsanis explained that if section 8 of the *Charter* was to meaningfully protect the online privacy of Canadians in today's overwhelmingly digital world, it must protect their IP addresses. An IP address is the crucial link between an Internet user and their online activity. She said "it is the key to unlocking a user's Internet activity and, ultimately, their identity, such that it attracts a reasonable expectation of privacy". Accordingly, a request by the state – in this case, the police – for an IP address is a search under section 8 of the *Charter*.

On this basis, Justice Karakatsanis allowed Mr. Bykovet's appeal, set aside his convictions and ordered a new trial.

***R. v. R.D.W.*, 2023 MBCA 62**

Application by accused for leave to appeal his sentence, if granted, judicial interim release pending determination of his sentence appeal. The accused pleaded guilty to sexual interference, prosecuted by way of indictment. He was sentenced to one year's imprisonment, followed by three years' supervised probation. The victim was the accused's granddaughter. She was developmentally delayed. The offence when victim was age 15 and was in the accused's care. According to her victim impact statement, she was fearful of the accused, was embarrassed by what occurred, was distrustful of the police because of the accused's manipulation, suffered from anxiety and depression, and had behavioural and performance

issues at school. Accused was 73 years old and in declining health. He had been married for 52 years, had three children and eight grand/great-grandchildren. He and his wife owned and operated a campground. He had been actively involved in his community in a positive way. He has no prior criminal record. He was on judicial interim release for about four years without incident. The Crown requested a sentence of two years', less one day, imprisonment, followed by three years' supervised probation. The accused asked for a conditional sentence of imprisonment of an unspecified length.

HELD: Application denied.

When the judge's reasons were read as a whole and in context, she simply stated that there was no explanation for the offence grounded in the evidence that could reduce the accused's moral culpability. That was an accurate statement. Failure by the judge to ask the accused if he had anything to say before determining the sentence was not reason by itself to vary a sentence on appeal. It must also be shown that the failure to follow the correct procedure had a real effect on the sentence imposed. The accused was represented by experienced defence counsel who made comprehensive submissions. It was highly speculative to say that asking the accused if he had anything to say before determining the sentence would have made a difference to the sentence imposed. The judge's error appears to be nothing more than a harmless and trivial inadvertence. The judge gave extensive and balanced reasons in light of the relevant circumstances and the sentencing objectives and principles, and the guidance in Friesen as to the proper method of sentencing offenders committing sexual offences against children. There was no reasonable chance of success as to the grounds of appeal.

***R. v. Romaniuk*, 2024 MBCA 20**

***R. v. Parker*, 2023 MBCA 51**

***R. v. Daniels*, 2023 MBCA 86**

***R. v. Mohiadin*, 2024 MBCA 34**

***R. v. Kahsai*, 2023 SCC 20**

This is a case about determining the proper role of *amicus curiae* in a criminal trial. “*Amicus curiae*” (the plural form is “*amici*”) is a Latin term meaning “friend of the court.” The *amicus* is an independent lawyer asked by a judge to take part in a case. They do not represent a party to the case. The precise role of the *amicus* is case-specific and will depend on the particular needs identified by the judge. When the accused does not have a lawyer, the judge may appoint an *amicus* to assist the court, for example by challenging the prosecution’s case and

cross-examining witnesses. The goal is to make sure the judge or jury hears an “adversarial perspective” – an alternative to the prosecution’s version of the case – to come to a fair outcome.

Two *amici* were appointed at different times in the trial of Mr. Emanuel Kahsai, who was convicted by a jury for murdering two women in Calgary in 2015. The accused did not hire a lawyer to represent him at trial – he insisted on representing himself for the entire proceedings. The first *amicus* was appointed before trial to help Mr. Kahsai with the jury selection process. At trial, Mr. Kahsai was repeatedly disruptive. He did not question witnesses or present a defence. Partway through the trial, the judge decided to name a second *amicus* to cross-examine the Crown’s witnesses and ensure the proceedings were fair and appropriate. He was clear that the *amicus* would not act as the accused’s defense lawyer, to respect Mr. Kahsai’s right to represent himself. Despite the lawyer’s limited mandate, Mr. Kahsai resisted the appointment and mostly refused to cooperate with him throughout the proceedings.

At the end of the trial, the judge cut short Mr. Kahsai’s closing argument because he was not saying anything relevant to his defence. The judge did not ask the *amicus* to make closing arguments on behalf of Mr. Kahsai. The *amicus* did not ask permission to do so either because he thought the scope of his role prevented him from arguing on behalf of the defence.

Mr. Kahsai appealed his murder convictions to the Court of Appeal of Alberta. He argued the trial judge’s failure to appoint the *amicus* earlier in the trial and with a more adversarial role created the appearance of unfairness, which justified a new trial. Two of the three judges dismissed the appeal. They said that appointing the *amicus* with adversarial functions would have violated Mr. Kahsai’s right to represent himself. The third judge disagreed and wrote that imposing a lawyer on the accused when the case was complex and the accused was incompetent to self-represent did not infringe their right to control their own defence – rather, it preserved their right to a fair trial. Mr. Kahsai appealed to this Court.

The Supreme Court has dismissed the appeal.

**The amicus’ delayed appointment and limited role did not justify ordering a new trial.**

Writing for a unanimous Court, Justice Karakatsanis said the trial appeared fair to a reasonable observer, such that a new trial was not necessary. She said that while the *amicus* can never fully assume the role of the accused’s lawyer, they can take on “defence-like functions” when an adversarial perspective is necessary to ensure trial fairness.

In this case, Justice Karakatsanis said the appointment of an *amicus* with a broader mandate was at the trial judge’s discretion but that he was under no obligation to do so. She acknowledged the striking imbalance at trial due to Mr. Kahsai’s lack of representation and meaningful defence. However, “it is not clear that appointing *amicus* earlier or with a broader mandate would have provided much value for Mr. Kahsai, who forcefully resisted the appointment of *amicus* and sustained his objection to their participation throughout the trial”.

In her view, the trial judge had sufficiently addressed trial fairness concerns in the circumstances. For these reasons, Justice Karakatsanis dismissed the appeal.