



SUPREME COURT OF CANADA

CITATION: R. v. Basque, 2023
SCC 18

APPEAL HEARD: November 8,
2022

JUDGMENT RENDERED: June 30,
2023

DOCKET: 39997

BETWEEN:

Jennifer Basque
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Alberta
Intervener

OFFICIAL ENGLISH TRANSLATION

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

**REASONS FOR
JUDGMENT:**
(paras. 1 to 78)

Kasirer J. (Wagner C.J. and Karakatsanis, Côté, Rowe,
Martin, Jamal and O'Bonsawin JJ. concurring)

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* Brown J. did not participate in the final disposition of the judgment.

Jennifer Basque

Appellant

v.

His Majesty The King

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Indexed as: R. v. Basque

2023 SCC 18

File No.: 39997.

2022: November 8; 2023: June 30.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

* Brown J. did not participate in the final disposition of the judgment.

Criminal law — Sentencing — Mandatory minimums — Credit for pre-sentence driving prohibition — Offender charged with impaired driving released on undertaking not to operate motor vehicle while awaiting trial — Offence carrying mandatory prohibition against operating motor vehicle during period of not less than one year — Whether sentencing judge could grant credit for driving prohibition period already served by offender while awaiting trial — Criminal Code, R.S.C. 1985, c. C-46, ss. 259(1)(a), 719(1).

After being charged with a summary conviction impaired driving offence, the offender was released on an undertaking not to operate a motor vehicle while awaiting trial. She remained subject to that prohibition until she was sentenced 21 months later. At the time of the offence, s. 259(1)(a) of the *Criminal Code* (“*Cr. C.*”) required the court to make an order prohibiting an offender charged with a first impaired driving offence from operating a motor vehicle during a period of not less than one year. The sentencing judge imposed a one-year driving prohibition on the offender and chose to backdate the order to the first day of the pre-sentence prohibition, which meant that the period prescribed by law had been completed in full by the date of his decision.

The summary conviction appeal judge dismissed the Crown’s appeal. While noting that the sentencing judge had erred in backdating the prohibition, he found that the sentencing judge could nevertheless give credit for a pre-sentence driving prohibition as long as such a prohibition was a condition of release and also

part of the sentence later imposed. However, a majority of the Court of Appeal allowed the Crown's subsequent appeal, holding that there is no authority for giving credit so as to depart from a mandatory minimum provided for by statute.

Held: The appeal should be allowed.

It was open to the sentencing judge to take into account the period of 21 months already served by the offender, as this would not undermine Parliament's intent in enacting the mandatory minimum. No conflict arises from the concurrent application of s. 259(1)(a) *Cr. C.* and the common law rule that allows credit to be granted. At the time of sentencing, the court is required to impose the one-year mandatory minimum, but there is nothing in the statute that prevents it from then granting credit. Similarly, granting credit is not contrary to the rule set out in s. 719(1) *Cr. C.* requiring that a sentence commence when it is imposed. Only the sentence has to commence when it is imposed, not the one-year mandatory minimum served under s. 259(1)(a). These statutory provisions therefore do not displace the common law discretion of sentencing judges, recognized in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, to grant credit for a pre-sentence driving prohibition.

Canadian criminal law is made up of both statute law and common law principles. This coexistence of statute and common law is a feature of the law of sentencing. While the *Criminal Code* codifies the fundamental principles of sentencing, courts can also take account of other principles and factors arising from the common law. Although legislation may prevail over the common law, the latter remains

applicable insofar as it has not been displaced expressly or by necessary implication, a principle justified by the importance of stability in the law. The two-step framework used to analyze the interaction between legislation and the common law is well settled. The first step is analyzing, identifying and setting out the applicable common law; and then, at the second step, the statute law's effect on the common law must be specified.

With regard to the first step of the analysis, the common law allows courts to grant credit for a pre-sentence driving prohibition imposed on an offender. This common law discretion is a natural extension of an analogous principle that applies in the context of pre-sentence custody. Courts have long recognized that they can take into consideration, in imposing a sentence, any period of incarceration that the offender has already undergone between the date of arrest and the date of sentencing. Giving credit for the time an offender is subject to pre-sentence custody is part of the central principles of sentencing, although it is not statutorily expressed. The principle that credit can be granted for pre-sentence custody serves to mitigate certain injustices arising from the application of the principle that a sentence may not be backdated, now codified in s. 719(1). While Canadian law does not permit courts to backdate a sentence in order to reduce it, they may nevertheless consider the time spent in pre-sentence custody in determining the period that must be served prospectively by an offender. The application of this common law rule allowing credit to be granted is therefore not equivalent to backdating a sentence.

Furthermore, the absence of a statutory provision for pre-sentence driving prohibitions that is equivalent to s. 719(3) *Cr. C.*, which codifies the granting of credit in the case of pre-sentence custody, does not have the effect of displacing or limiting the common law rule allowing credit to be granted. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law. Section 719(3) was enacted in the specific context of pre-sentence custody, and the legislative debates suggest that Parliament’s intention was to ensure that credit could still be granted when a mandatory minimum term of imprisonment was imposed. There is no indication that Parliament considered whether credit could be given for a pre-sentence driving prohibition. There is also nothing in the legislative debates to support the position that Parliament sought to displace, whether expressly or by necessary implication, the common law rule applicable to such prohibitions. This is not a situation in which Parliament made clear its intention to displace or limit the applicable common law.

With regard to the second step in the analysis, s. 259(1)(a) does not limit the scope of the common law rule that allows credit to be granted for a pre-sentence driving prohibition. The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of “punishment”, understood as a deprivation, and of “sentence”, understood as a judicial decision (in French, the distinction between “*punition*” and “*sentence*”, where the term “*peine*” can also be used to convey both meanings). While the French term

“*peine*” used in the sense of “punishment” refers to the total punishment imposed on an offender, the same word when used to mean “sentence” refers to the decision rendered by the court, which is always prospective in order to prevent the judicial practice of backdating sentences.

In accordance with the modern approach to statutory interpretation, the reach of s. 259(1)(a) *Cr. C.* must be determined by considering its text, context and purpose. Properly interpreted, s. 259(1)(a) provides for a minimum punishment, not a minimum sentence. Interpreting s. 259(1)(a) *Cr. C.* as providing for the imposition of a one-year global punishment is perfectly in keeping with the objectives of deterrence and punishment that underlie the provision. 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. Though silent with respect to credit, the provision is not ambiguous: it can be read in only one way, that is, as providing for the imposition of a mandatory minimum punishment. If s. 259(1)(a) *Cr. C.* required that a minimum sentence be handed down, the appropriate difference between the punishments imposed on the most dangerous offenders and those imposed on the least dangerous offenders could be unduly eroded, and the precise gradation of minimum prohibition periods established by Parliament in s. 259(1) would be undermined. Absent a clear intention to this effect, it must be presumed that Parliament did not intend to produce such absurd results. In addition to leaving room for the exercise of the court’s discretion to grant credit, this interpretation of s. 259(1)(a) *Cr. C.* is

consistent with general principles of sentencing and does not offend the integrity of the criminal justice system.

In this case, the imposition of an additional one-year punishment would amount to a kind of double punishment, contrary to the most fundamental requirements of justice and fairness. By the time the sentencing decision was rendered, it had been 21 months since the offender had essentially begun serving her sentence. Conscious of this fact, the sentencing judge ordered a one-year driving prohibition but found that the offender had already satisfied this condition. However, he backdated the offender's sentence to achieve this result, which was an error. He could quite properly have imposed the one-year mandatory minimum punishment required by s. 259(1)(a) *Cr. C.*, stated that a sentence commences when it is imposed under s. 719(1) *Cr. C.*, and then granted credit for the pre-sentence driving prohibition period by exercising his common law discretion, which has not been displaced by the *Criminal Code*.

Cases Cited

Applied: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; **considered:** *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; **referred to:** *R. v. McDonald* (1998), 40 O.R. (3d) 641; *R. v. Sharma*, [1992] 1 S.C.R. 814; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521; *R. v. Bland*, 2016 YKSC 61, 3 M.V.R. (7th) 112; *R. v. Edwards* (2016), 382 Nfld. & P.E.I.R. 225; *R. v. Hilbach*, 2023 SCC 3; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Tim*, 2022 SCC 12; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Gladue*,

[1999] 1 S.C.R. 688; *R. v. Skolnick*, [1982] 2 S.C.R. 47; *R. v. Pham*, 2013 ONCJ 635, 296 C.R.R. (2d) 178; 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Urban Mechanical Contracting Ltd. v. Zurich Insurance Co.*, 2022 ONCA 589, 163 O.R. (3d) 652; *R. v. Goulding* (1987), 81 N.S.R. (2d) 158; *R. v. Pellicore*, [1997] O.J. No. 226 (QL), 1997 CarswellOnt 246 (WL); *R. v. Williams*, 2009 NBPC 16, 346 N.B.R. (2d) 164; *Bilodeau v. R.*, 2013 QCCA 980; *R. v. Sloan* (1947), 87 C.C.C. 198; *R. v. Patterson* (1946), 87 C.C.C. 86; *R. v. Wells* (1969), 4 C.C.C. 25; *McClurg v. Canada*, [1990] 3 S.C.R. 1020; *Turgeon v. Dominion Bank*, [1930] S.C.R. 67; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723; *R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742; *R. v. Walker*, 2017 ONCA 39, 345 C.C.C. (3d) 497; *R. v. Severight*, 2014 ABCA 25, 566 A.R. 344; *R. v. LeBlanc*, 2005 NBCA 6, 279 N.B.R. (2d) 121; *R. v. Hills*, 2023 SCC 2; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *R. v. Sohal*, 2019 ABCA 293, 91 Alta. L.R. (6th) 48; *R. v. Fox*, 2022 ABQB 132, 89 M.V.R. (7th) 23; *R. v. Froese*, 2020 MBQB 11, 461 C.R.R. (2d) 1; *R. v. Osnach*, 2019 MBPC 1, 38 M.V.R. (7th) 257; *R. v. Bryden*, 2007 NBQB 316, 323 N.B.R. (2d) 119; *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Richard C.J. and Baird and French JJ.A.), 2021 NBCA 50, 410 C.C.C. (3d) 228, 84 M.V.R. (7th) 1, [2021] N.B.J. No. 288 (QL), 2021 CarswellNB 564 (WL), setting aside a decision of Dysart J., 2020 NBQB 130, 65 M.V.R. (7th) 208, [2020] N.B.J. No. 194 (QL), 2020 CarswellNB 385 (WL), affirming the sentence imposed on the offender by McCarroll Prov. Ct. J. Appeal allowed.

Robert K. McKee, for the appellant.

Patrick McGuinty and *Pierre Gionet*, for the respondent.

Elisa Frank, for the intervener.

English version of the judgment of the Court delivered by

KASIRER J. —

I. Overview

[1] After being charged with a summary conviction impaired driving offence in 2017, the appellant, Jennifer Basque, was released on an undertaking not to operate a motor vehicle while awaiting trial. She remained subject to that prohibition until she was sentenced 21 months later. At the time of the offence, s. 259(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), required the court to make an “order prohibiting the offender from operating a motor vehicle . . . during a period of . . . not less than one year”.¹

[2] Could the sentencing judge credit Ms. Basque for the driving prohibition period already served, notwithstanding the combined effect of that one-year mandatory minimum prohibition and the direction — codified in s. 719(1) *Cr. C.* — that except where otherwise provided, a sentence commences when it is imposed?

[3] If not for the requirement in s. 259(1)(a), granting credit would undoubtedly be possible. Indeed, in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 — a case that did not concern a mandatory minimum prohibition — this Court

¹ This provision was repealed and replaced by s. 320.24(2)(a) *Cr. C.* (S.C. 2018, c. 21), which is “almost identical” to s. 259(1)(a), as the majority of the Court of Appeal noted (2021 NBCA 50, 84 M.V.R. (7th) 1, at para. 13).

confirmed that there is a common law judicial discretion to grant credit for a pre-sentence driving prohibition. This discretion is a natural extension of the longstanding practice of crediting offenders for periods of pre-sentence custody.

[4] Provided that Parliament respects the relevant constitutional constraints, it can, of course, enact legislation that displaces the common law rule allowing credit to be granted for a pre-sentence driving prohibition. Ms. Basque does not challenge the constitutionality of s. 259(1)(a) but argues that her request for credit is not limited in any way by the imposition of the mandatory minimum prohibition. The respondent Crown, relying on the majority reasons of the Court of Appeal, argues instead that granting credit in this case would conflict with the application of the one-year minimum prohibition, even though the relevant statutory provision is silent on crediting.

[5] Respectfully, I believe that the respondent is mistaken. In my view, granting credit based on the common law discretion recognized in *Lacasse* is perfectly consistent with the application of the minimum prohibition in s. 259(1)(a) *Cr. C.* and with the rule requiring that a sentence commence when it is imposed in s. 719(1) *Cr. C.* It was therefore open to the sentencing judge to take into account the period of 21 months already served by Ms. Basque, as this would not undermine Parliament's intent.

[6] The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of

“punishment”, understood as a deprivation, and of “sentence”, understood as a judicial decision (in French, the distinction between “*punition*” and “*sentence*”, where the term “*peine*” can also be used to convey both meanings). This distinction, considered by Rosenberg J.A. in the context of credit for pre-sentence custody in *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), was taken up by Arbour J. of this Court in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at paras. 35-37, with particular attention to the multiple meanings of the French term “*peine*”. From this perspective, Arbour J. explained that while the term “*peine*” used in the sense of “punishment” refers to the total punishment imposed on an offender, the same word when used to mean “sentence” refers to the decision rendered by the court. It bears noting that a sentence is always prospective in order to prevent the judicial practice of backdating sentences (see s. 719(1) *Cr. C.*).

[7] As a general rule, the purpose of a mandatory minimum is to impose on an offender an effective *punishment* of a specified minimum length. This is so because the objectives underlying a minimum punishment are achieved equally well whether the punishment is served before or after the offender is sentenced. In the instant case, the mandatory minimum provided for in s. 259(1)(a) is no exception to this rule.

[8] Properly interpreted, s. 259(1)(a) requires the court to impose a total *punishment* of one year to be served by the offender, not to hand down a *sentence* imposing a one-year prohibition that must necessarily be served prospectively. As Rosenberg J.A. noted in *McDonald*, 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. Interpreted in this way, s. 259(1)(a) did not prohibit the sentencing judge from “reducing” the *sentence* by granting credit for the pre-sentence driving prohibition period, as long as the total *punishment* remained consistent with the minimum prescribed by Parliament.

[9] By the time the trial judgment was rendered in this case, it had been 21 months since Ms. Basque had essentially “begun serving [her] sentence” (see *R. v. Sharma*, [1992] 1 S.C.R. 814, at p. 818, cited with approval by Wagner J., as he then was, in *Lacasse*, at para. 113). When considered from this perspective, the objectives of the minimum punishment set out in s. 259(1)(a) had already been met — and even surpassed. In such a context, granting credit to “reduce” the length of the prohibition imposed on Ms. Basque does not conflict with s. 259(1)(a) because she has already served a driving prohibition period exceeding the one-year minimum required by that provision. Crediting also addresses the considerations of fairness and justice touched on in *Wust*, including what Paciocco J.A. usefully described in an academic paper as “the aversion to double punishment” (D. M. Paciocco, “The Law of Minimum Sentences: Judicial Responses and Responsibility” (2015), 19 *Can. Crim. L.R.* 173, at p. 211).

[10] In short, no conflict arises from the concurrent application of s. 259(1)(a) and the common law rule that allows credit to be granted. At the time of sentencing, the court is required to impose the one-year mandatory minimum punishment, but there

is nothing in the statute that prevents it from then granting credit. Similarly, granting credit is not contrary to the requirement set out in s. 719(1) *Cr. C.* because only the sentence has to commence when it is imposed, not the one-year minimum punishment served under s. 259(1)(a). These statutory provisions therefore do not displace the discretion of sentencing judges that was recognized in *Lacasse*. Of course, Parliament remains free, within the constraints imposed by the Constitution, to limit this discretion, but it must do so through a “clear provision to that effect” (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, at para. 56). There is no such provision here, as s. 259(1)(a) is silent regarding the granting of credit.

[11] Furthermore, the codification of the discretion to give credit for pre-sentence custody in s. 719(3) *Cr. C.* has no impact on this appeal. Like s. 259(1)(a), s. 719(3) is unambiguous, and it is also silent with respect to driving prohibitions. Here, the absence of an analogous provision for driving prohibitions does not signify a positive intention by Parliament to eliminate the discretion recognized in *Lacasse*, a case which, I should add, was decided after s. 719(3) was enacted.

[12] In light of the foregoing, and given that Ms. Basque has already been prohibited from driving for 21 months, the imposition of an additional one-year prohibition period would amount to a kind of double punishment, contrary to the most fundamental requirements of justice and fairness. Conscious of this fact, the sentencing judge ordered a one-year driving prohibition but found that Ms. Basque had already satisfied this condition. However, he backdated Ms. Basque’s sentence to achieve this

result. With respect, this was an error. He could quite properly have imposed the one-year mandatory minimum punishment required by s. 259(1)(a) *Cr. C.*, stated that a sentence commences when it is imposed under s. 719(1) *Cr. C.*, and then granted credit for the pre-sentence driving prohibition period by exercising his common law discretion, which has not been displaced by the *Criminal Code*.

[13] For the reasons that follow, I would allow the appeal and set aside the judgment of the New Brunswick Court of Appeal. I would restore the judgment of the summary conviction appeal court and reinstate the sentencing judge's conclusions in part, for different reasons. I would specify that the appellant has already served the mandatory minimum prohibition provided for in s. 259(1)(a) *Cr. C.*

II. Facts

[14] On the night of October 7, 2017, the appellant was driving her vehicle in downtown Moncton, New Brunswick. Constable Richard, who was patrolling the area, noticed that the vehicle was being driven erratically and stopped it. The interaction between the appellant and the police officer took place in French in keeping with the preference expressed by Ms. Basque. The constable had her take a breathalyzer test, which showed a blood alcohol level above the legal limit. Ms. Basque was then arrested for operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood.

[15] On November 30, Ms. Basque was released on an undertaking not to operate a motor vehicle. She was later charged with impaired driving under the former s. 253(1)(b) *Cr. C.*

[16] Ms. Basque initially pleaded not guilty to the charge brought against her. The trial was scheduled for June 2018 but was later adjourned at her request. In October of that year, Ms. Basque pleaded guilty and stated that she intended to apply for a conditional discharge under s. 255(5) *Cr. C.* (now repealed).

[17] At the sentencing hearing in the Provincial Court — delayed by adjournments — Ms. Basque waived her right to proceed in French and abandoned her application for a conditional discharge. Following discussion of her criminal history, it was determined that a prohibition applicable to a first offence was to be imposed on her under s. 259(1)(a). The Crown did not seek a term of imprisonment, and the parties reached an agreement on the amount of the fine to be set in her case.

[18] Between her initial appearance and the date she was sentenced, Ms. Basque was subject to a driving prohibition for 21 months.

III. Judicial History

A. *New Brunswick Provincial Court (McCarroll Prov. Ct. J.)*

[19] The sentencing judge acknowledged Ms. Basque’s difficult past, which included a very abusive childhood. He also noted that driving her vehicle was important to her. She had to travel to Fredericton to take part in hearings concerning the custody of her children, and the use of public transportation for that purpose placed her in a financially precarious position. Mindful of this reality, and taking account of the fact that Ms. Basque had been subject to a pre-sentence driving prohibition for 21 months, the judge granted her uncontested request that he not impose any further prohibition.

[20] At the hearing, the judge commented as follows on the possible terms of the order he had to make: “. . . I’m not sure of whether to word it, driving prohibition one year which has been completed because of her two years of – of prohibited driving [as a result of the pre-sentence prohibition], or simply say, no driving prohibition. I’m inclined to take the first approach because the law obliges me to – to order [the prohibition] – but I think it might be safer to back – to order it and then back-date it and say, you know, she’s already been without the licence by a court order for – for over two years” (A.R., vol. I, at p. 16). In the end, the judge chose to backdate the order prohibiting Ms. Basque from operating a vehicle to November 30, 2017 — the first day of the pre-sentence prohibition — which meant that the prohibition had been completed in full by the date of the decision. He also imposed the minimum fine of \$1,000.

B. *New Brunswick Court of Queen’s Bench, 2020 NBQB 130, 65 M.V.R. (7th) 208 (Dysart J.)*

[21] The summary conviction appeal judge heard an appeal by the Crown, which argued that the sentencing judge had erred in law in backdating the sentence. Relying on the principles laid down by this Court in *Lacasse* and *Wust*, the appeal judge dismissed the appeal, finding that the sentencing judge could give credit for a pre-sentence driving prohibition as long as such a prohibition was a condition of release and also part of the sentence later imposed (para. 28).

[22] Illustrating his point using two decisions that relied on *Lacasse* — *R. v. Bland*, 2016 YKSC 61, 3 M.V.R. (7th) 112, and *R. v. Edwards* (2016), 382 Nfld. & P.E.I.R. 225 (N.L. Prov. Ct.) — the appeal judge noted that the sentencing judge had not imposed a prohibition period that was less than the minimum provided for in the *Criminal Code*. Through his decision, the sentencing judge had imposed a driving prohibition on Ms. Basque for a total of one year, in accordance with s. 259(1)(a) *Cr. C.*, and then credited her for the pre-sentence prohibition to which she had been subject (para. 29). It was not an error of law to do so. Finally, the appeal judge noted that the error of backdating the sentence had not affected the decision rendered, as no further driving prohibition was indicated in this case (para. 30).

C. *New Brunswick Court of Appeal*, 2021 NBCA 50, 84 M.V.R. (7th) 1 (*Richard C.J., Baird J.A. concurring; French J.A., dissenting*)

[23] The issue before the Court of Appeal was framed as follows: “Did the summary appeal court judge err by affirming the Provincial Court Judge’s jurisdiction to reduce the s. 259(1)(a) [now s. 320.24(2)(a)] mandatory driving prohibition below

its one year minimum by giving credit for the time during which a pre-sentence prohibition was served by the Respondent ('Basque') as a release undertaking?" (para. 10). Richard C.J. stated that the question was not whether the pre-sentence prohibition period could reduce the post-trial prohibition period, "but rather whether it may *reduce this period below the one-year minimum*" (para. 12 (emphasis in original)).

[24] The Court of Appeal was divided on this question. The majority, in reasons written by the Chief Justice, granted the Crown's application for leave to appeal and allowed the appeal. While it is indeed possible to give credit for a pre-sentence driving prohibition in certain circumstances, the majority wrote, there is no authority for giving such credit so as to depart from a mandatory minimum provided for by statute. The majority stated that *Lacasse* could not offer guidance in this case because it dealt with a "discretionary" driving prohibition that was not subject to a mandatory minimum (paras. 18-19). The purpose of a mandatory minimum is precisely to limit judicial discretion. The appeal before the Court of Appeal was also fundamentally different from *Wust*, which concerned the possibility of granting credit for pre-sentence custody under s. 719(3). However, there is no equivalent to s. 719(3) for driving prohibitions.

[25] Section 259(1)(a) is not ambiguous when interpreted in accordance with the modern approach to statutory interpretation, the majority stated, and no credit can be granted to make the prohibition imposed less than the minimum period provided for by that provision. Moreover, the interpretation proposed by Ms. Basque would render s. 719(3) meaningless because the exception it creates would then apply to all

mandatory minimums and no longer solely to custodial sanctions as stated in the provision (para. 27). The majority rejected the argument that the unavailability of credit would lead to absurd results, noting that “[w]hile mandatory minimums are sometimes unfair, it is not for this Court to call them absurd” (para. 31). Since a sentence begins on the day it is imposed, such credit cannot be granted “[b]arring a successful constitutional challenge or clear direction from the Supreme Court” (para. 39). In the circumstances, the summary conviction appeal judge had erred in crediting Ms. Basque for the length of her pre-sentence driving prohibition, thereby failing to impose the mandatory minimum.

[26] French J.A., dissenting, wrote that there is no doubt that the law requires a driving prohibition to be imposed for not less than the applicable minimum period. However, he was of the view that the prohibition may be reduced “to less than the applicable minimum” by granting credit for a pre-sentence prohibition period, as long as the total driving prohibition still exceeds the mandatory minimum (para. 58).

[27] The dissenting judge found that while the language of s. 259(1)(a) is generally clear, it is ambiguous with respect to the possibility of granting credit. Quoting *McDonald*, and drawing an analogy with *Wust*, he noted that absurd results would flow from interpreting s. 259(1)(a) as preventing credit from being granted. Moreover, the absence of a provision equivalent to s. 719(3) *Cr. C.* for driving prohibitions does not mean that Parliament intended to prohibit the granting of such credit. In fact, this Court in *Lacasse* expressly recognized that it is possible to grant

such credit in the context of a pre-sentence driving prohibition and that this principle “applies generally” (para. 121).

[28] Finally, both the majority and the dissenting judge agreed that the execution of the order pertaining to Ms. Basque should be stayed. The release conditions in this case were unreasonable, even if she had not initially challenged them. The result of the pre-sentence prohibition was that Ms. Basque had actually been treated more harshly before being sentenced than after. In the particular circumstances of this case, and in order to avoid committing an injustice and “disproportionately punish[ing]” Ms. Basque, the Court of Appeal held that the execution of any further prohibition should be stayed (majority reasons, at para. 54; see also the dissenting judge’s reasons, at para. 132).

IV. Issue

[29] Ms. Basque raises a number of issues in this Court. They can be summarized in the following manner: Can the appellant be granted credit for the time she spent subject to a pre-sentence driving prohibition notwithstanding the one-year mandatory minimum prohibition period set forth in s. 259(1)(a) *Cr. C.*?

V. Analysis

A. *Key Statutory Provisions*

[30] At the time of the events, the former s. 259(1) *Cr. C.* made a driving prohibition order mandatory for certain impaired driving offences, including the summary conviction offence relevant to this case (similarly, see the current s. 320.24(2) *Cr. C.*, enacted by S.C. 2018, c. 21). Paragraphs (a), (b) and (c) of s. 259(1) established a gradation of mandatory minimum prohibition periods that took into account the offender's previous convictions for such offences:

Mandatory order of prohibition

259 (1) When an offender is convicted of an offence committed under section 253 or 254 . . . , 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 a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be,

(a) for a first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year;

(b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and

Ordonnance d'interdiction obligatoire

259 (1) Lorsqu'un contrevenant est déclaré coupable d'une infraction prévue aux articles 253 ou 254 . . . , le tribunal qui lui inflige une peine doit, en plus de toute autre peine applicable à cette infraction, 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 :

a) pour une première infraction, durant une période minimale d'un an et maximale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné;

b) pour une deuxième infraction, durant une période minimale de deux ans et maximale de cinq ans, en plus de la période d'emprisonnement à laquelle il est condamné;

(c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.

c) pour chaque infraction subséquente, durant une période minimale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné.

[31] Section 718.3(2), which is in the division of the *Criminal Code* dealing with “Punishment Generally”, provides that the punishment to be imposed (“*peine à infliger*” in French) is in the court’s discretion, subject to the limitations set out in the enactment prescribing the punishment in question:

Discretion respecting punishment

[718.3](2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Appréciation du tribunal

[718.3](2) Lorsqu’une disposition prescrit une peine à l’égard d’une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, laissée à l’appréciation du tribunal qui condamne l’auteur de l’infraction, mais nulle peine n’est une peine minimale à moins qu’elle ne soit déclarée telle.

[32] The parties also focused attention on s. 719. Its first subsection is entitled “Commencement of sentence” (in French, the word “*peine*” is used as the parallel term to “sentence” in this context). Section 719(3) is entitled “Determination of sentence” (“*Infliction de la peine*” in French). These provisions read as follows:

Commencement of sentence

719 (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

...

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Début de la peine

719 (1) La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.

...

Infliction de la peine

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.

[33] It is appropriate at the outset to recognize that linguistic usage in this area of sentencing is often uneven, be it in legislation, jurisprudence or scholarship. In the title for s. 259(1) *Cr. C.*, Parliament spoke of a “mandatory order of prohibition” / “*ordonnance d’interdiction obligatoire*”. In the English-language reasons of the Court of Appeal in this case, the terms “mandatory minimum”, “mandatory minimum sentence” and “mandatory driving prohibition” are used. In the French-language version of the reasons, “*peine minimale obligatoire*” and “*période minimale d’interdiction*” predominate. In the *Criminal Code* more broadly, the terms “minimum punishment” / “*peine minimale*” are frequently used as equivalents (see, e.g., *R. v. Hilbach*, 2023 SCC 3, at paras. 2 and 12, interpreting s. 344(1) *Cr. C.* and using both “mandatory minimum sentence” / “*peine minimale obligatoire*” and “mandatory

minimum punishment” / “*peine minimale obligatoire*”). That said, as Arbour J. wrote in *Wust*, “[w]hat is fundamental is less the words chosen, in the French or English version, but the concepts that they carry” (para. 36).

B. *Grounds of Appeal*

[34] In this Court, the appellant concedes that the sentencing judge erred in backdating her sentence; she acknowledges that he should have made the sentence commence when it was imposed in accordance with s. 719(1) *Cr. C.* She also acknowledges that s. 259(1)(a) provides that a driving prohibition must be imposed for a period of not less than one year. However, she submits — essentially adopting the summary conviction appeal judge’s position — that the prohibition imposed by the sentencing judge was not below the mandatory minimum. Based on the principles laid down by this Court in *Lacasse*, the appellant takes the view that credit for the prohibition period served prior to sentencing could be granted in this case.

[35] The appellant’s main argument is one of statutory interpretation. She submits that s. 259(1)(a) is silent about the possibility of granting credit for a pre-sentence driving prohibition period. Further, the common law judicial discretion to apply such credit has not been displaced by the relevant statutory provisions. Moreover, she says, the interpretation espoused by the majority of the Court of Appeal produces absurd results, including the imposition of prohibition periods that do not take account of the gradation established in s. 259(1), which could not be what Parliament had intended.

[36] The respondent Crown, relying in particular on *R. v. McIntosh*, [1995] 1 S.C.R. 686, argues that courts must carry out the clear intent of Parliament even if this leads to “uncomfortable or absurd result[s]” (respondent’s condensed book, at p. 1). In its view, there is no ambiguity in ss. 259(1)(a) and 719(1): Parliament has told judges that they must impose a one-year minimum prohibition period that must commence when the offender is sentenced. Absent a constitutional challenge to the applicable provisions, courts must give effect to Parliament’s intent.

[37] The respondent also points out that Parliament is presumed to know the necessary context for the implementation of its legislation. Here, it should be presumed that Parliament was aware that some accused persons are subject to pre-sentence driving prohibitions. According to the respondent, there is every indication that Parliament, in enacting s. 259(1)(a), chose not to adopt a provision equivalent to s. 719(3) for driving prohibitions. In this context, the respondent adds, the argument that Parliament’s silence implies that the common law discretion remains intact should be rejected. It is clear from reading ss. 259(1)(a), 718.3(2), 719(1) and 719(3) that this common law discretion has been displaced through the combined effect of the mandatory minimum and the rule that a sentence commences when it is imposed.

[38] Without taking a position on the outcome of the appeal, the Attorney General of Alberta intervenes in support of the interpretation advanced by the respondent. The intervener submits that Parliament’s silence with respect to the possibility of granting credit cannot negate its clear intent to impose a mandatory

minimum commencing on the day the offender is sentenced. The Attorney General says that *Lacasse* is of no assistance in this case because it did not concern a mandatory minimum.

C. *Analytical Framework: Coexistence of the Common Law and Legislation in Matters of Sentencing*

[39] Both parties agree that sentencing judges have a discretion to grant credit for a pre-sentence driving prohibition period. However, contrary to the appellant, the Crown argues that Parliament limited or displaced this common law discretion when it enacted the mandatory minimum set out in s. 259(1)(a) *Cr. C.* This appeal therefore raises the question of whether, as the appellant maintains, the common law rule can coexist in harmony with the mandatory minimum laid down by the *Criminal Code*.

[40] This question requires the Court to consider the sometimes complex interactions that characterize the relationship between the common law and legislation. While legislation may prevail over the common law, the latter remains applicable insofar as it has not been displaced expressly or by necessary implication, a principle often justified by the importance of “stability in the law” (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21, per Cromwell J.). In *Lizotte*, Gascon J., writing for a unanimous Court, reiterated the general principle that applies to legislative departures from common law rules: “This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect . . .” (para. 56). Professor Ruth Sullivan has written that this presumption

“permits courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from unclear or inadvertent legislative encroachment” (*The Construction of Statutes* (7th ed. 2022), at § 17.01.Pt1[2]; see also P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at Nos. 180-92).

[41] Canadian criminal law is made up of both statute law and common law principles (M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales 2022* (29th ed. 2022), at Nos. 1.17-1.24, citing, among others, *D.L.W.*, at paras. 3, 15 and 57-59). The enactment of a criminal code in this country in 1892 did not have the effect of systematically displacing the common law as a source of law (D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989), at p. 126; G. H. Crouse, “A Critique of Canadian Criminal Legislation: Part One” (1934), 12 *Can. Bar Rev.* 545, at p. 565: “One fundamental principle of the Canadian Codification is that the common law is not superseded.”). Today, the *Criminal Code* provides that, as a general rule, the common law is no longer a source of offences in Canada (s. 9(a)). It states, however, that common law defences continue in force except insofar as they are altered by statute (s. 8(3); *R. v. Tim*, 2022 SCC 12, at para. 27; see also J. Fortin and L. Viau, *Traité de droit pénal général* (1982), at p. 18). As Vauclair and Desjardins explain, reference may be made to the common law to interpret a criminal provision codifying a common law offence (No. 3.20, citing *R. v. Jobidon*, [1991] 2 S.C.R. 714).

[42] This coexistence of statute and common law is a feature of the law of sentencing (see Canadian Sentencing Commission, *Sentencing Structure in Canada: Historical Perspectives* (1988), at p. 35). While Part XXIII of the *Criminal Code* codifies “the fundamental . . . principles of sentencing” (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 1), courts can also take account of “other principles and factors arising from the common law” (D. Rose, *Quigley’s Criminal Procedure in Canada* (loose-leaf), at § 23:6). Legislation also prevails over the common law in this area if Parliament displaces it expressly or by necessary implication (see, e.g., *R. v. Skolnick*, [1982] 2 S.C.R. 47, at p. 58).

[43] In *Lacasse*, this Court reiterated that courts must take account of a pre-sentence driving prohibition period in exercising their discretion to give credit (paras. 111-14, per Wagner J.; see also paras. 176-78, per Gascon J., dissenting, but not on this point). It is true that *Lacasse* did not concern a mandatory minimum and that, under s. 259(2)(a.1) *Cr. C.*, the sentence had begun at the end of the offender’s incarceration. However, the judgment can guide us in this case, with the necessary modifications.

[44] The granting of such credit is anchored in the common law; it is one example, in the context of a driving prohibition, of what Arbour J. called the “well-established practice of sentencing judges [giving] credit for time served” (*Wust*, at para. 31). In the words of Paciocco J., as he then was, this rule is part of the “central principles of sentencing not statutorily expressed but still vibrant as ‘general principles

of sentencing” (R. v. Pham, 2013 ONCJ 635, 296 C.R.R. (2d) 178, at para. 18). As Wagner J. later noted in *Lacasse*, this principle has not been codified. Although s. 719(3) *Cr. C.* does codify the principle that credit can be granted in the case of pre-sentence custody, that provision has no statutory equivalent relating to pre-sentence driving prohibitions. The respondent takes the position here that the principle to which the Court referred in *Lacasse* was displaced by Parliament’s enactment of the mandatory minimum, a consideration that did not arise on the facts of that case.

[45] The interaction between legislation and the common law in matters of sentencing and punishment is therefore at the heart of this appeal. The two-step framework used to analyze this interaction is well settled. The first step is “analysing, identifying and setting out the applicable common law”; and then, at the second step, “the statute law’s effect on the common law must be specified” (2747-3174 *Québec Inc. v. Quebec (Régie des permis d’alcool)*, [1996] 3 S.C.R. 919, at para. 97, per L’Heureux-Dubé J., citing *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593, and *Frame v. Smith*, [1987] 2 S.C.R. 99; see also *Urban Mechanical Contracting Ltd. v. Zurich Insurance Co.*, 2022 ONCA 589, 163 O.R. (3d) 652, at para. 45). I therefore begin by determining the content of the common law rule that allows credit to be granted for a pre-sentence driving prohibition. I then turn to interpreting s. 259(1)(a) *Cr. C.*, taking s. 719(3) into account, in order to determine whether s. 259(1)(a) either expressly or by necessary implication has the effect of limiting or displacing the common law rule.

(1) The Common Law Allows Credit To Be Granted for a Pre-sentence Driving Prohibition

[46] It is well settled that the common law allows courts to grant credit for a pre-sentence driving prohibition imposed on an offender (see, e.g., *R. v. Goulding* (1987), 81 N.S.R. (2d) 158 (S.C. (App. Div.)); *R. v. Pellicore*, [1997] O.J. No. 226 (QL), 1997 CarswellOnt 246 (WL) (C.A.); *R. v. Williams*, 2009 NBPC 16, 346 N.B.R. (2d) 164; *Bilodeau v. R.*, 2013 QCCA 980; *Lacasse*). This common law discretion is a natural extension of an analogous principle that applies in the context of pre-sentence custody. Courts have long recognized that they can “take into consideration, in imposing sentence, any period of incarceration which the accused has already undergone between the date of his arrest and the date of the sentence” (*R. v. Sloan* (1947), 87 C.C.C. 198 (Ont. C.A.), at pp. 198-99, citing *R. v. Patterson* (1946), 87 C.C.C. 86 (Ont. C.A.)).

[47] The principle that credit can be granted for pre-sentence custody serves to mitigate certain injustices arising from the application of the principle that a sentence may not be backdated, now codified in s. 719(1). While Canadian law does not permit courts to backdate a sentence in order to reduce it, courts may nevertheless consider the time spent in pre-sentence custody in determining the period that must be served prospectively by an offender (*Sloan*, at pp. 198-99; see also *Patterson*; *R. v. Wells* (1969), 4 C.C.C. 25 (B.C.C.A.), at pp. 36-37, per Bull J.A., dissenting; A. Manson, “Pre-Sentence Custody and the Determination of a Sentence (Or How to Make a Mole

Hill out of a Mountain)” (2004), 49 *C.L.Q.* 292). The application of this common law rule allowing credit to be granted is therefore not equivalent to backdating a sentence.

[48] While it is true that the rule allowing credit for pre-sentence custody has now been codified, there is no statutory provision equivalent to s. 719(3) for pre-sentence driving prohibitions. The respondent argues that the fact that Parliament did not enact a provision equivalent to s. 719(3) for pre-sentence driving prohibitions was deliberate and reflects its intention to displace the common law rule allowing for credit in this context. Specifically, the respondent submits that Parliament “turned [its] mind” to the possibility of recognizing an analogous exception for driving and implicitly rejected it (transcript, at p. 28). With respect, I do not share the respondent’s view. The absence of a statutory provision equivalent to s. 719(3) for pre-sentence prohibitions does not have the effect of displacing or limiting the common law rule allowing credit to be granted in such a context.

[49] The view that Parliament may codify one common law rule in order to implicitly exclude another calls to mind the maxim of interpretation *expressio unius est exclusio alterius*, that is, “to express one thing is to exclude another” (Sullivan (2022), at § 8.09; see also A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 170; *McClurg v. Canada*, [1990] 3 S.C.R. 1020). However, courts are cautious about accepting such arguments based on Parliament’s intention to implicitly exclude a common law rule since the context does not always permit assumptions to be made about a legislature’s unexpressed thinking (Sullivan (2022), at

§ 17.01.Pt1[2]). In *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, Newcombe J. warned that if this rule is considered to be a principle of general application, it may be “a dangerous master to follow” because its usefulness depends on the context and it “is not always in the mind of a draughtsman” (p. 71). Accordingly, Cromwell J. wrote that “[a]bsent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law” (*D.L.W.*, at para. 21). This recalls the principle stated by Professor C. K. Allen: “. . . the Courts will not, if they can help it, allow any enactment to overrule existing Common Law *by inference merely*”, but “[i]t is quite otherwise when the provision of the statute is express, or when there is a general clear intention to change the law” (*Law in the Making* (1992), at pp. 258-59 (emphasis in original)).

[50] Here, s. 719(3) was enacted in the specific context of pre-sentence custody. The legislative debates suggest that Parliament’s intention in enacting this provision was to ensure that credit could still be granted when a mandatory minimum term of imprisonment was imposed (*Wust*, at para. 31, quoting *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3118). There is no indication that Parliament considered whether credit could be given for a pre-sentence driving prohibition. There is also nothing in the legislative debates to support the position that Parliament sought to displace, whether expressly or by necessary implication, the common law rule applicable to such prohibitions. In short, this is not a situation in which Parliament made clear its intention to displace or limit the applicable common law.

[51] In light of the foregoing, I am of the view that the enactment of s. 719(3) *Cr. C.* did not have the effect of limiting the common law rule that allows credit to be granted for a pre-sentence driving prohibition. This rule thus continues to be part of the positive law of sentencing. This being so, what remains to be determined is whether the rule has been displaced or limited by s. 259(1) *Cr. C.*, which, as the respondent points out, establishes mandatory maximum and minimum prohibition periods.

(2) Section 259(1)(a) *Cr. C.* Does Not Limit the Scope of the Common Law Rule That Allows Credit To Be Granted for a Pre-sentence Driving Prohibition

[52] Once the common law rule has been identified, the second step in the analysis is to consider the effect of the relevant statutory provision on that rule (2747-3174 *Québec Inc.*, at para. 97). For this purpose, the reach of s. 259(1)(a) *Cr. C.* must be understood using the modern approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559). Then it must be determined whether this provision has the effect of limiting or displacing the common law rule.

[53] Before undertaking this analysis, it is important to have a clear understanding of the distinction, first accepted by this Court in *Wust*, between the concepts of punishment and sentence. This distinction, which is at the heart of this appeal, is essential to a proper interpretation of the reach of s. 259(1)(a).

(a) *Distinction Between the Concepts of Punishment and Sentence*

[54] The question before the Court in *Wust* was whether an offender could be credited for pre-sentence custody if doing so meant that the sentence imposed would be shorter in length than the mandatory minimum provided for in the former s. 344(a) (now s. 344(1)(a)). Writing for a unanimous Court, Arbour J. answered that question in the affirmative. She noted at the outset that s. 719(3) had been enacted for the specific purpose of authorizing such credit in the context of a mandatory minimum. In addition, and importantly, she stated that no conflict resulted from the concurrent application of ss. 719(3) and 344(a). She explained that this absence of conflict flowed from the conceptual distinction between a punishment and a sentence.

[55] This distinction was considered from the perspective of the English-language terms “punishment” and “sentence” in *McDonald* by Rosenberg J.A., who relied on the work of the Canadian Sentencing Commission. The Commission clarified that the term “punishment” refers to “the imposition of severe deprivation on a person guilty of wrongdoing” (*Sentencing Reform: A Canadian Approach* (1987), at p. 109). It then stated that the word “sentence” — which comes from the Latin *sententia*, meaning “opinion or the expression of an opinion” — refers to a judicial statement ordering the imposition of a sanction and determining what it should be (p. 111).

[56] It can therefore be said that the concept of punishment is fundamentally different from that of sentence, since the former reflects the global punishment imposed on an offender whereas the latter concerns only the portion of the punishment that the

offender must serve after judgment is rendered. Nothing in the jurisprudence precludes this distinction from being applied in this case. I note that in *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723, a case concerning parole eligibility following time spent in pre-sentence custody, the Court held that only the period after sentencing is to be considered in determining such eligibility, although it acknowledged that it had dealt with the question differently in *Wust* (para. 7). For the purposes of a conditional sentence, on the other hand, what must be considered is the global punishment imposed on the offender, including the pre-sentence period (*R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742). Similarly, where courts have had to determine the effect of a period of pre-sentence custody in cases involving a statutory maximum term of imprisonment, some provincial appellate courts have found, like this Court in *Wust* and *Fice*, that the relevant consideration is the global punishment, not the sentence imposed (*R. v. Walker*, 2017 ONCA 39, 345 C.C.C. (3d) 497, at paras. 20-26; *R. v. Severight*, 2014 ABCA 25, 566 A.R. 344, at para. 32; *R. v. LeBlanc*, 2005 NBCA 6, 279 N.B.R. (2d) 121, at para. 63).

[57] The distinction between “*peine*” in the sense of punishment and “*peine*” in the sense of a sentence is recognized in the French lexicon of Canadian law, taking into account the polysemy of the term “*peine*” (Canadian Sentencing Commission (1987), at pp. 108 and 111). Indeed, depending on the context, this term may refer either to the global punishment imposed on an offender or to the sentence handed down to an offender (see the Quebec Court of Appeal’s *Lexique en droit pénal* (online)). This prompted the Commission to observe the fundamental difference between “*peine*”, in

the sense of punishment, and sentence. The *Juridictionnaire*, a Canadian jurilinguistic study published by the Centre de traduction et de terminologie juridiques of the Université de Moncton, also draws this distinction, noting that [TRANSLATION] “[t]he *peine* [in the sense of “punishment”] is the sanction *incurred*, whereas the *sentence* is the judicial decision *imposing a punishment*” (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique*, October 15, 2018 (online), at p. 2035, para. 24 (emphasis in original)). In other words, whereas a sentence commences when it is handed down by a court, punishment encompasses [TRANSLATION] “[a]ny sanction imposed by a judicial authority in the application of a criminal statute” (H. Dumont, *Pénologie: Le droit canadien relatif aux peines et aux sentences* (1993), at p. 47).

[58] The double meaning of the French term “*peine*” is illustrated in several places in the *Criminal Code*. For example, s. 718.3(2), which limits judicial discretion where a mandatory minimum punishment exists, uses the term “*peine*” as the equivalent of the English “punishment”. In contrast, s. 719(1), which states that “[a] sentence commences when it is imposed”, also uses the term “*peine*” in French, but this time as the parallel to the English term “sentence”. The identification of the exact English equivalent of the term “*peine*” (be it “punishment” or “sentence”) depends on the context; this doublet may therefore give rise to interpretative difficulties in Canadian criminal law, where the rules for interpreting the bilingual legislative lexicon give each language version of an enactment an equal role in stating the law. Of course, this is not to say that the English word “sentence” is exclusively used to refer to the

judicial decision imposing a punishment. By way of example, the phrase “fit sentence” (often stated in French as “*peine juste*”) typically refers to the idea of an appropriate global punishment (see, e.g., *R. v. Hills*, 2023 SCC 2, at para. 45).

[59] In light of this reality, and beyond the terminology used, particular attention should be paid to the purpose and context of the relevant provisions (*Wust*, at para. 36). It is true that, as a general rule, Parliament can be expected to exercise [TRANSLATION] “discipline” in legislative expression by not giving the same word different meanings in the same statute (G. Cornu, *Linguistique juridique* (3rd ed. 2005), at p. 105). In this vein, Professors Côté and Devinat refer to the [TRANSLATION] “principle of uniformity of expression” with which Parliament strives to comply and which, in statutory interpretation, justifies a presumption that “a word has the same meaning throughout” a statute (Nos. 1142-43). They recognize, however, that this presumption [TRANSLATION] “must give way when circumstances demonstrate that such was not the intention pursued by Parliament” (No. 1146, quoting *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 61). In my view, this is such a case. The word “*peine*” is used in different ways in the *Criminal Code*, sometimes to refer to a sentence, that is, a judicial decision, and sometimes to refer to a punishment. I note that most cases not involving pre-sentence prohibition orders or custody do not hinge on the conceptual distinction between “sentence” and “punishment”.

[60] With this distinction in mind, I observe that the appellant’s position as set out in her factum could be a source of confusion. She suggests that granting credit

results in the imposition of a prohibition period that is less than the statutory minimum. This approach reflects a line of cases, exemplified by *R. v. Sohal*, 2019 ABCA 293, 91 Alta. L.R. (6th) 48, in which courts appear not to distinguish between the concepts of punishment and sentence. This approach suggests, mistakenly in my respectful view, that the enactment of a mandatory minimum by Parliament requires a court to hand down a minimum *sentence* (see also *R. v. Fox*, 2022 ABQB 132, 89 M.V.R. (7th) 23; *R. v. Froese*, 2020 MBQB 11, 461 C.R.R. (2d) 1; *R. v. Osnach*, 2019 MBPC 1, 38 M.V.R. (7th) 257; *R. v. Bryden*, 2007 NBQB 316, 323 N.B.R. (2d) 119). According to this approach, there is no legal basis for reducing a mandatory minimum sentence because “[t]he inherent discretion of the court must yield to statutory language” (*Sohal*, at para. 15).

[61] However, when the appellant clarified her position at the hearing, she rightly recognized — as did the dissenting judge in this case — that a court has no choice but to impose the mandatory minimum prohibition expressly provided for in s. 259(1)(a). But the imposition of that minimum does not prevent the court, under the common law rule, from taking into account the pre-sentence prohibition period. Depending on the circumstances and at the sentencing judge’s discretion, this period may form part of the punishment if the effect of the prohibition is “the same” before and after the offender is sentenced (*Lacasse*, at para. 113). Otherwise, if the effect is not the same, the court may consider it only as a mitigating factor, not as a period that can be credited pursuant to the common law discretion (see MacPherson J.A.’s

reasoning on this point in *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1, at paras. 32-35).

[62] In this appeal, in light of the distinction reiterated by Arbour J. in *Wust*, it is therefore important to determine whether s. 259(1)(a) requires that a minimum *punishment* be imposed or that a minimum *sentence* be handed down. This interpretative exercise is what will decide the outcome of the appeal. If the minimum driving prohibition in s. 259(1)(a) is a minimum punishment, this section will not affect the applicability of the common law rule. Ms. Basque’s pre-sentence driving prohibition can then “reduce” the ultimate length of her sentence in a manner consistent with Parliament’s direction that the minimum punishment must be for one year. Conversely, if s. 259(1)(a) provides for a one-year minimum sentence, Ms. Basque will have to serve an additional one-year driving prohibition since this mandatory sentence will necessarily be prospective (s. 719(1) *Cr. C.*).

(b) *Section 259(1)(a) Provides for a Minimum Punishment, Not a Minimum Sentence*

[63] In accordance with the modern approach to statutory interpretation, the meaning of s. 259(1)(a) *Cr. C.* must be determined by considering its text, context and purpose (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26; Côté and Devinat, at Nos. 165-70; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). I propose to proceed as the Court did in *Bell ExpressVu*, that is, by looking first at the

grammatical and ordinary meaning of the words used in s. 259(1)(a) and then considering the provision's context and purpose.

[64] First of all, the text of s. 259(1)(a) is silent about whether a pre-sentence driving prohibition period can be taken into account (*Bland*, at para. 22). It also does not clearly indicate whether the minimum driving prohibition it provides for is a punishment or a sentence. In this regard, I note that the word “order” used in s. 259(1) is defined as a “decision of a court or judge” (*Oxford English Dictionary* (online)). *A priori*, this distinction may seem to link the word “order” to the concept of “sentence” (*Pham*, at para. 9).

[65] However, I would point out that the word “punishment” appears in s. 259(1), which provides that “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 a motor vehicle”. It may be noted that the French version uses the word “*peine*” as the parallel term for “punishment” in this context. The wording of the provision in both languages thus suggests the view that the order to be made under s. 259(1)(a) is a punishment and not a sentence.

[66] In any event, the modern approach to interpretation cannot be focused solely on the words of the provision (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26). As Professors Côté and Devinat say, the text [TRANSLATION] “must be construed in the light of the other indicia relevant to interpretation” (No. 167). I now turn to an analysis of the context and purpose of s. 259(1)(a).

[67] With regard to the context of this provision, I note that Parliament used different language in s. 109(2)(a) *Cr. C.*, which deals with a prohibition against the possession of firearms. This latter provision states that “[a]n order made under subsection (1) shall . . . prohibit the person from possessing . . . any firearm . . . during the period that (i) begins on the day on which the order is made, and (ii) ends not earlier than ten years after the person’s release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person’s conviction for or discharge from the offence” (emphasis added). In enacting s. 109(2)(a), Parliament chose to specify the date on which the order ends in the plainest of terms, thereby limiting the court’s discretion to “reduce” the prohibition period going forward to less than the minimum period referred to in s. 109(2)(a). Moreover, the underlined passage shows that when Parliament wishes to impose a prospective prohibition for a specific length of time, it expresses this intention in clear language. However, there is nothing of the sort in s. 259(1)(a), which sets out neither a start date nor an end date for the one-year minimum driving prohibition.

[68] The purpose of s. 259(1)(a) *Cr. C.* also reinforces the idea that this provision establishes a minimum *punishment* and not a minimum *sentence*. Generally speaking, Parliament enacts mandatory minimums principally in order to deter and punish (see H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (3rd ed. 2020), at pp. 507-8; see also Paciocco, at p. 177). After setting out a detailed typology of punishments in Canadian criminal law, Professor Dumont states that [TRANSLATION] “any coercive measure that affects a person’s life, integrity, security,

liberty or reputation or that interferes with the person’s property and rights . . . is capable of being [a punishment] in the criminal law system” (p. 489). As was stated in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, for a coercive measure to constitute punishment, it must, among other things, have “a significant impact on an offender’s liberty or security interests” and be “a consequence of conviction” (para. 41). This typology includes measures such as [TRANSLATION] “victim compensation for certain crimes, a prohibition against driving or possessing a firearm [and] an inability to hold office or enter into a contract with the state” (Dumont, at p. 489 (emphasis added)). I agree with the view expressed by Paciocco J. in this regard in *Pham*: a driving prohibition is a form of punishment because it “is one of the arsenal of sanctions to which the accused may be liable upon conviction for a particular offence” (para. 22, referring to *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 62-63).

[69] While pre-sentence custody or a pre-sentence driving prohibition may initially be based on a desire to protect the public, post-conviction, this sanction can nevertheless ultimately have a punitive and deterrent effect on the offender and thus form part of the offender’s punishment. On this point, Arbour J. wrote in *Wust* that “[t]o maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody” (para. 41 (emphasis in original)). She found that “while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender’s conviction” (para. 41).

[70] These observations echo what Lamer C.J. said in *Sharma*, namely that the pre-sentence driving prohibition imposed on the offender had interfered with his liberty, such that he had essentially already begun serving his sentence (pp. 817-18; see also *Lacasse*, at para. 113). In reality, in Ms. Basque’s case, the pre-sentence driving prohibition had the same punitive and deterrent effects as if it had been served after she was sentenced. Accordingly, viewing s. 259(1)(a) *Cr. C.* as requiring the imposition of a one-year punishment — that is, a global punishment, including the pre-sentence period — is perfectly in keeping with the objectives of deterrence and punishment that underlie this provision (on this point, see *Pham*, at paras. 10 and 28). I note, moreover, that Parliament uses the word “punishment” in s. 718.3(2) *Cr. C.* in delineating the court’s discretion.

[71] If s. 259(1)(a) *Cr. C.* required that a minimum sentence be handed down, the results could well be counterintuitive, if not absurd. For example, the imposition of an additional driving prohibition for a minimum of one year would amount to double punishment for an offender who had already served all or part of the minimum driving prohibition period while awaiting trial. Such a result would be contrary to the most fundamental interests of justice, raising the spectre of double punishment “without the clearest of evidence to show that Parliament wanted to achieve such an outcome” (*Pham*, at para. 10).

[72] In addition, by analogy to what Arbour J. said in *Wust*, the appropriate difference between the punishments imposed on the most dangerous offenders and

those imposed on the least dangerous offenders could be unduly eroded. A hardened offender “whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention” (para. 42). Drawing on Arbour J.’s comments, I am of the view that any interpretation “that would reward the worst offender and penalize the least offender” (para. 42) must be avoided in this case. Finally, if s. 259(1)(a) *Cr. C.* required a minimum *sentence* to be handed down, it would undermine the precise gradation of minimum prohibition periods established by Parliament in s. 259(1)(a), (b) and (c), which French J.A., dissenting, noted (see C.A. reasons, at paras. 93-94 and 129). Indeed, an offender who merited only the one-year minimum punishment imposed for a first offence could, like Ms. Basque, be subject to the same deprivation of liberty as a chronic offender who was not prohibited from driving while awaiting trial.

[73] In keeping with the principles established by this Court, absent a clear intention to this effect, it must be presumed that Parliament did not intend to produce such absurd results (*Rizzo*, at para. 27, citing R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 88; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418, at para. 96, per Côté and Brown JJ., concurring).

- (c) *Section 259(1)(a) Does Not Limit the Common Law Rule That Allows Credit To Be Granted for a Pre-Sentence Driving Prohibition*

[74] There is every indication that s. 259(1)(a) provides for a minimum punishment, not a minimum sentence. There is no ambiguity in this provision, which is silent with respect to credit. In *Bell ExpressVu*, this Court reiterated that an ambiguity must be “real”, in the sense that the provision must be reasonably capable of more than one meaning (para. 29, quoting *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115). Reaching this conclusion requires a consideration of the entire context of the provision to ascertain whether there are “two or more plausible readings, each equally in accordance with the intentions of the statute” (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14). In this case, s. 259(1)(a) can be read in only one way: it provides for the imposition of a mandatory minimum *punishment* (in French “*peine*”, used in this latter sense).

[75] Not only does this interpretation of s. 259(1)(a) *Cr. C.* leave room for the exercise of the court’s discretion to grant credit, but it is also in line with the recommendation made by Arbour J. in *Wust* that “it is important to interpret legislation which deals . . . with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system” (para. 22).

[76] Because s. 259(1)(a) requires that an order be made prohibiting the offender from driving during a period of not less than one year, the sentencing judge was able to satisfy this requirement by making an order imposing a punishment for a total of one year. Granting credit does not negate the imposition of the minimum

punishment required by this provision. In this case, since the punishment had already been served in its entirety at the time of sentencing, no further prohibition was required.

D. *Court of Appeal's Stay of Execution of the Sentence*

[77] While not necessary in order to decide this appeal, I take note of the Crown's concession that it was inappropriate to ask that Ms. Basque's release be accompanied by a driving prohibition. The Court of Appeal was correct in its unanimous view that the release conditions imposed on Ms. Basque were unreasonable. She was ultimately prohibited from driving for 21 months and was thus treated more harshly than another offender not subject to a pre-sentence driving prohibition in otherwise similar, or more serious, circumstances. It is therefore understandable that the Court of Appeal was concerned about justice and fairness when it stayed the execution of the sentence imposed on Ms. Basque. The same preoccupation finds expression in the lower courts' judgments, even though they decided the case differently. The unanimous concern of the Court of Appeal aligns, in substance if not in law, with the solution proposed here. But with all due respect for the contrary view, reaching this solution does not require staying the execution of Ms. Basque's sentence. From a legal standpoint, she has served the mandatory minimum punishment provided for in s. 259(1)(a).

VI. Disposition

[78] I would allow the appeal and set aside the judgment of the Court of Appeal. I would restore the judgment of the summary conviction appeal court and reinstate the Provincial Court's conclusions in part, while specifying that Ms. Basque's sentence should not be backdated. By the time she was sentenced, she had already served, on a pre-sentence basis, the minimum driving prohibition set out in s. 259(1)(a). As a result, no further prohibition is needed in this case.

Appeal allowed.

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